

## Belonging beyond the binary

Gonzalez Salzberg, Damian; Perisanidi, Maroula

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## **Belonging Beyond the Binary:**

### **From Byzantine Eunuchs and Indian Hijras to Gender-fluid and Non-binary Identities**

**DAMIAN A. GONZALEZ-SALZBERG\* AND MAROULA PERISANIDI\*\***

While the majority of Western legal systems continue to insist on the existence of only two genders, a demand for the recognition of non-binary gender identities has become increasingly visible. Numerous individuals have gone to court demanding recognition of their identities beyond the binary, and have been faced with mixed outcomes. This article provides a novel lens through which to consider these contemporary legal claims. Through an exploration of historical and cultural alternatives of gender beyond the binary, more specifically those of the Byzantine eunuchs and the Indian hijras, this article analyses the regulatory forces that permit and promote the existence of non-binary genders. A better understanding of societies that have carved a space for genders beyond the binary can offer important insights into both the benefits and the dangers of the recognition of a third legal gender.

### **INTRODUCTION**

The vast majority of contemporary Western legal systems continue to insist on the existence of only two genders. Almost automatically after birth newborns are gendered as either girls or boys. This binary system is not even questioned in cases of intersex newborns, where the adopted medical practice consists of performing so-called ‘normalising’ surgery to make

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\* *Birmingham Law School, Edgbaston, Birmingham B15 2TT, UK*

[d.a.gonzalezsalzberg@bham.ac.uk](mailto:d.a.gonzalezsalzberg@bham.ac.uk)

\*\* *Leeds School of History, Parkinson Building, Leeds LS2 9JT, UK*

[m.perisanidi@leeds.ac.uk](mailto:m.perisanidi@leeds.ac.uk)

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external genitalia conform to the male/female paradigm.<sup>1</sup> Paradoxically, bodies that do not adjust to the cultural expectation of the gender binary need to be corrected to confirm the existence of the only two possible (opposite) genders. At the time of writing this article only a handful of States in the world allow for registration of newborns as neither male nor female.<sup>2</sup> Nevertheless, within the last decade, individuals have been increasingly bringing the gender binary to court, in legal attempts at challenging law's conception of gender.

Although this struggle for the recognition of genders beyond the binary might seem like a novel one, there are societies in which the concept has been well established. This led us to wonder whether an examination of historical and cultural alternatives of gender beyond the binary can provide useful insights into current claims for the legal recognition of non-binary identities. In agreement with Kessler and McKenna, we believe that the study of how gender is conceived in different cultures helps to de-naturalise this concept.<sup>3</sup> The two examples that we selected are those of the Byzantine eunuchs and the Indian hijras, the first a historical case and the second a contemporary community with deep-rooted history. Exploring their different expressions of genders beyond the binary can draw attention to the historically and culturally specific regulatory forces that underpin the construction of gender – and of the available gender categories – in different contexts.<sup>4</sup> We propose that a better

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<sup>1</sup> A. Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* (2000) 45; M. Cabral (ed.), *Interdicciones: Escrituras de la Intersexualidad en Castellano* (2009) 9; D.C. Ghattas, 'Human Rights between the Sexes: A Preliminary Study on the Life Situations of Inter\* Individuals' (2013) 7 and 10; P. De Bruyn, 'Promoting the Human Rights of and Eliminating Discrimination against Intersex People' (25 September 2017), Council of Europe, Doc.144404, para. 14.

<sup>2</sup> These include Germany, Iceland, Malta and the Netherlands. See M. Van den Brink, P. Reufs and J. Tigchelaar, 'Out of the Box – Domestic and Private International Law Aspects of Gender Registration' (2015) 17 *European Journal of Law Reform* 282; F. Garland and M. Travis, 'Legislating Intersex Equality: Building the Resilience of Intersex People through Law' (2018) 38 *Legal Studies* 587; J. Theilen, 'Subversion Subverted: Developments in German Civil Status Law on the Recognition of Intersex and Non-Binary Persons' in *Protecting Trans Rights in the Age of Gender Self-Determination*, eds. E. Brems, P. Cannoot and T. Moonen (2020).

<sup>3</sup> S. Kessler and W. McKenna, *Gender: An Ethnomethodological Approach* (1978) 22.

<sup>4</sup> id.; E. Towle and L.M. Morgan, 'Romancing the Transgender Native: Rethinking the Use of the "Third Gender" Concept' (2002) 48 *GLQ: A Journal of Lesbian and Gay Studies* 469, at 492.

understanding of these identities can shed light upon how non-binary genders are conceived in our day.

However, we embark on this exploration aware of the potential pitfall of ‘romanticising’ the third gender figure, as warned by Towle and Morgan.<sup>5</sup> We set to analyse the allure of these non-binary figures with the aim of examining the regulatory forces that both allow and promote the existence of non-binary genders in these societies. We dismiss both the idea that the existence of gender categories beyond the binary necessarily indicates a more progressive and tolerant society, as well as the illusion that the categories themselves are spaces of gender freedom.<sup>6</sup> The examples under study would certainly support the rejection of such stances. At the same time, we acknowledge that the selection of only two case-studies – especially two case-studies concerning non-binary identities of individuals imposed a male designation at birth – would limit the extent of any conclusions to be drawn. Nonetheless, it is not our expectation to exhaust the exploration of non-binary identities, and certainly hope that our reflections would entice further research into the realities of those embracing different non-binary identities, such as fa’afatama/fa’afafine, transpinoy/transpinay, or two-spirit, to name but a few.

It is also important to disclose the understanding of ‘gender’ and gender categories we adopt in this article. Our interpretation is grounded in queer theory, by which we mean a postmodern view on identities that contests the stability of identity categories such as sex, gender and sexuality.<sup>7</sup> Queer theory embraces the rejection of the traditional feminist distinction of the notions of *sex* and *gender*, conceiving both concepts as cultural constructions, and proposing that the distinction drawn between them might be no distinction

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<sup>5</sup> Towle and Morgan, op. cit., n. 4, p. 477.

<sup>6</sup> id. p. 488; A. Agrawal, ‘Gendered Bodies: The Case of the ‘Third Gender’ in India’ (1997) 31 *Contributions to Indian Sociology* 273, at 294.

<sup>7</sup> A. Jagose, *Queer Theory: An Introduction* (1996) 3.

at all.<sup>8</sup> That is why many queer writings, such as this article, make use of the terms sex and gender interchangeably. Queer theory proposes that gender is an identity category that is *performatively* constructed through the reiteration of acts, opposing the idea of the existence of an internal essence of the body.<sup>9</sup> Yet, it is crucial to understand that the performative construction of gender is not believed to be freely done by the individual. On the contrary, gender performance should be understood as an effect of regulatory systems.<sup>10</sup> Queer theory heavily relies on the work of Michel Foucault that questions the technologies of knowledge and power deployed by a normalising society that discursively produces and regulates identities.<sup>11</sup> Queer theory problematises the many disciplinary regimes that subject the body to systems of surveillance, classifications and control.<sup>12</sup>

In line with a queer standpoint that questions the cultural norms that impose and reinforce a regulatory gender model that is binary, mandatory, and involuntary,<sup>13</sup> this article proposes to examine our two case-studies to reflect on gender as a context-specific system whose effects should not be taken as universal truths. Through an exploration of the regulation of gender in the cases of Byzantine eunuchs and Indian hijras, the article sheds light on how some non-Western cultures have dealt with gender beyond the binary and provides a novel lens through which to consider current Western claims. Doing so emphasises the unreliability of Westernisation narratives which posit Western jurisdictions as origin sites for recognition and protection, with the rest of the world following suit.<sup>14</sup> Instead, non-Western jurisdictions and ways of life more broadly can be shown to have generated

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<sup>8</sup> J. Butler, *Gender Trouble: Feminism and the Subversion of Identity* (1990) 10-11 and 43-44.

<sup>9</sup> N. Sullivan, *A Critical Introduction to Queer Theory* (2006) 89-90; Jagose, op. cit., n. 7, pp. 90-91.

<sup>10</sup> J. Butler, 'Critically Queer' in *Playing with Fire: Queer Politics, Queer Theories*, ed. S. Phelan (1997) 16.

<sup>11</sup> M. Foucault, *The History of Sexuality: An Introduction* (1978) 53-57 and 139-145.

<sup>12</sup> D. Gonzalez-Salzberg, 'An Improved Protection for the (Mentally Ill) Trans Parent' (2018) 81 *Modern Law Review* 526, at 528-529.

<sup>13</sup> D. Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights: A Queer Reading of Human Rights Law* (2019) 18.

<sup>14</sup> H. Lau, 'Sexual Orientation and Gender Identity Discrimination' (2018) 2 *Comparative Discrimination Law* 1, at 34-35.

perspectives worthy of study in their own right, in addition to their potential to unsettle Western received assumptions. The following two Sections explore, in turn, each of our case-studies, while the subsequent one focuses on contemporary claims, allowing us to draw Conclusions applicable to current gender struggles.

## BYZANTINE EUNUCHS

Eunuchs were present in the Byzantine Empire from its beginning in the fourth century to its end in the fifteenth.<sup>15</sup> Throughout this period, they were well integrated and highly visible.<sup>16</sup> In our sources, the term ‘eunuch’ most often referred to those who were castrated before puberty, but could also apply to men who underwent castration as adults, as well as to some intersex individuals.<sup>17</sup> The Byzantines often divided eunuchs into three categories based on the way in which they had been deprived of their procreative capacities. The twelfth-century canon lawyer Theodore Balsamon described these as follows: (1) the *thlibiai*, whose parents had disposed of their generative body-parts when they were infants by squeezing them; (2) the *spadones*, who were born without testicles; and (3) the *castrati*, who had been mutilated by knife.<sup>18</sup>

Over the thousand years of the Byzantine Empire, views on eunuchs varied, but officially the Church remained against castration, and those who underwent the procedure were only reluctantly accommodated within the existing religious framework. The Bible itself

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<sup>15</sup> A. Cameron, *The Byzantines* (2006); C. Messis, *Les eunuques à Byzance, entre réalité et imaginaire* (2014); S. Tougher, *The Eunuch in Byzantine History and Society* (2008); K. Ringrose, *The Perfect Servant: Eunuch and the Social Construction of Gender in Byzantium* (2003); M. Kuefler, *The Manly Eunuch: Masculinity, Gender Ambiguity and Christian Ideology in Late Antiquity* (2001).

<sup>16</sup> This visibility has its ups and downs. See for example N. Gaul, ‘Eunuchs in the Late Byzantine Empire, c. 1250-1400’ in *Eunuchs in Antiquity and Beyond*, ed. S. Tougher (2002) 199-219.

<sup>17</sup> As mentioned above, our Byzantine material focuses exclusively on individuals assigned male at birth, as much less is known about non-binary Byzantines who were assigned female at birth. The sources that provide perhaps the best snapshot of this describe such people as ‘women’ who ‘pretended’ to be castrated males to enter male monasteries. See R. Betancourt, *Byzantine Intersectionality* (2020) 104-135.

<sup>18</sup> G.A. Rhalles and M. Potles (ed.), *Σύνταγμα τῶν θεῶν καὶ ἱερῶν κανόνων*, vol. 2 (1852) 30. See also Messis, *op. cit.*, n. 15, pp. 31–40.

contained an ambiguous message: eunuchs, both castrated and natural, were mentioned in positive ways (Matthew 19:12 and Isaiah 56:3-7), but according to the Old Testament having ‘damaged genitals’ limited one’s access to religious rituals (Leviticus 21:16-23; Deuteronomy 23:1). Self-castration was condemned at the first ecumenical council of Nicaea (325) and those who had castrated themselves were barred from ordination.<sup>19</sup> The same council also allowed castration for those who needed the procedure for health reasons. This was justified through the high death rate associated with such interventions: they should only be undertaken to save a person’s life. Castrations undertaken willingly, without medical reasons, were seen by the Church as a form of suicide and a slander towards God’s creation.<sup>20</sup> Although this continued being the official view of the Church as expressed in canon law, in the early twelfth century Theophylact archbishop of Ohrid suggested that, in his time, an abuse of the system was in place: there was too little scrutiny, and too many children who were castrated for it to be believable that all the operations were taking place for health reasons.<sup>21</sup> Being a eunuch had become useful for one’s social mobility and life prospects, as well as a necessary part of the imperial court, where eunuchs could act as trustworthy imperial servants, symbols of imperial status and magnifiers of imperial masculinity.<sup>22</sup> As such, medical views could be twisted and religion placated to make room for this third gender.<sup>23</sup>

From early on in Byzantine history eunuchs had been acknowledged as a third type of person that fell outside the gender binary. Several authors of the fourth century explicitly

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<sup>19</sup> Rhalles and Potles, id., pp. 114–16.

<sup>20</sup> id. p. 31.

<sup>21</sup> P. Gautier (ed. and trans.) *Théophylacte d’Achrída : Discours, traités, poésies*, vol. 1 (1980) 310–11.

<sup>22</sup> Tougher, op. cit., n. 15, pp. 42-53.

<sup>23</sup> Note however that some within the Church remained particularly reluctant especially when it came to castration during adulthood. See Rhalles and Potles, op. cit., n. 18, p. 116.

stated that eunuchs belonged to neither sex; that they were neither men nor women.<sup>24</sup> Yet, there was no unified conception of what this meant. As is the case today, in the Byzantine period different ideas about what constitutes sex/gender co-existed.<sup>25</sup> Some Byzantines closely associated the lack of testicles to the eunuchs' perceived gender. They believed, for example, that castration made eunuchs physically distinctive from men and women, emphasising their lack of beard, as well as their different facial appearance, skin texture, musculature, stature, and voice range.<sup>26</sup> They also claimed that castration gave eunuchs a compliant nature: 'they are always well-disposed towards their master, following the etymology of their name'.<sup>27</sup> This compliance had a particularly gendered significance in Byzantium, as being servile was considered to be unmanly. This assumption was also reflected in the type of work that eunuchs were expected to perform: they were thought to make perfect servants, whether to the emperor or to the Church, as clerics or monks. Although we can find them in more 'masculine' positions, for example as military leaders, their successes and failures in such roles are most often explained through recourse to their gender; their performance could, for example, be considered good 'for a eunuch'.<sup>28</sup>

Other Byzantines, however, postulated little connection between the eunuch's anatomy and their gender, emphasising the impact of acculturation. One of the arguments claimed that the eunuchs' gendered attributes depended on the different groups that they

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<sup>24</sup> Tougher, op. cit., n. 15, p. 98; G. Sidéris, 'The Rise and Fall of the High Chamberlain Eutropius: Eunuch Identity, the Third Sex and Power in Fourth-Century Byzantium' in *The Palgrave Handbook of Masculinity and Political Culture in Europe*, ed. C. Fletcher et al. (2018) 63-84.

<sup>25</sup> Messis, op. cit., n. 15, pp. 53-59; Ringrose, op. cit., n. 15, pp. 18-23, 51-60.

<sup>26</sup> Ringrose, op. cit., n. 15, pp. 54, 56, 59. The distinctive physical appearance of those castrated before puberty allowed their association with angels. It also meant that those assigned female at birth had a better chance of passing as eunuchs later in life. See Messis, op. cit., n. 15, pp. 57, 186-92, 198-202; Tougher, op. cit., n. 15, 106-7. For eunuchs as singers, see N. Moran, 'Byzantine castrati' (2002) 11:2 *Plainsong and Medieval Music* 99.

<sup>27</sup> Gautier, op. cit., n. 21, p. 308.

<sup>28</sup> Ringrose, op. cit., n. 15, p. 131.

frequented, as they modelled themselves on the people who surrounded them.<sup>29</sup> Importantly, being in the service of women was thought to make them more effeminate, because their mistresses' female behaviours were believed to rub off on them.<sup>30</sup> To describe this process of gendering Theophylact of Ohrid used the proverb 'grape ripens against grape' ('βότρυς πρὸς βότρυον πεπαίνεται'), which implies a process of imitation and performance.<sup>31</sup> Yet it should be noted that Theophylact was himself a man, as were most known Byzantine authors, and hardly any sources produced by eunuchs themselves have survived.<sup>32</sup> As such, the views on gender that we can garner from our historical sources come from a heavily male perspective and it is not possible to tell how individual eunuchs would have self-identified.

It is, nonetheless, clear that Byzantine society set eunuchs apart in terms of their characteristics and attributed to them gendered roles and expectations that differentiated them from men and women. In the context of law in particular, eunuchs were rarely explicitly addressed in civil or ecclesiastical legislation, but when they were the main topic of law it was because different rules applied to them than to men and/or women.<sup>33</sup> An example where such a differentiation was clearly spelled out involved the eunuchs' monetary value as slaves. A decree included both in the sixth-century Justinianic Codex and the tenth-century *Basilika* stated that male and female slaves who were 10 years old or less were valued at 10 *solidi*, while eunuchs of the same age bracket were worth up to 30 *solidi*. Similarly, eunuchs who were older than 10 and had no trade were valued at 50 *solidi*, while the equivalent value for a

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<sup>29</sup> This argument is made in a text written by Theophylact, archbishop of Ohrid (b. c.1050/60; d. after 1125) and commissioned by his brother Demetrios, who was a eunuch. See Gautier, op. cit., n. 21, p. 330; M. Mullett, 'Theophylact of Ochrid's *In Defence of Eunuchs*' in *Eunuchs in Antiquity and Beyond*, ed. S. Tougher (2002) 177-98.

<sup>30</sup> Gautier, op. cit., n. 21, p. 293.

<sup>31</sup> id. pp. 295, 318.

<sup>32</sup> Ringrose, op. cit., n. 15, p. 35; C. Messis, 'Les voix littéraires des eunuques: Genre et identité du soi à Byzance' (2016) 70 *Dumbarton Oaks Papers* 191.

<sup>33</sup> This was similar, however, to the situation of women, who also appear at first sight to be neglected by the law. Byzantine laws often used the masculine plural to refer to people, whether they referred only to men, or to a group of men, women, and eunuchs. On eunuchs and the law, see also Messis, op. cit., n. 15, pp. 97-110.

male or female slave of the same age and no trade was 20 *solidi*.<sup>34</sup> In that example, ‘man’, ‘woman’, and ‘eunuch’ are clearly contrasted, making it easier to see eunuchs as a gender category before the law. All other things being equal, eunuchs were more expensive to buy than men or women.

This separation into man, woman, eunuch was accompanied by gendered assumptions which could become enshrined in law. One of the most obvious examples involves the eunuchs’ sexual behaviour. Societal views on this topic could be quite contradictory: some Byzantines assumed eunuchs to be asexual, while others criticised them for engaging in sex with men and/or women. Eunuchs could be presented as both lacking all sexual desire and as particularly lustful.<sup>35</sup> In the late ninth century, a law promulgated by Emperor Leo VI (r. 886–912) reinforced the former assumption and prohibited eunuchs from marrying.<sup>36</sup> The core of the emperor’s argumentation was taken up by a definition of marriage which could only take place between ‘a man and a woman’, having at least the potentiality of resulting in offspring. This definition already excluded eunuchs from marriage, both by virtue of their belonging beyond the man/woman binary, as well as due to their established sterility. Nevertheless, Emperor Leo further reinforced this exclusion by arguing that marriage also provides a space for the expression of sexual desire, which should be closed off to eunuchs because they were meant to be asexual. More specifically, he referred to I Corinthians 7:9 ‘it is better to marry than to burn with passion’, and explicitly excluded the possibility that desire – even when experienced by eunuchs or their partners – could be a valid reason for them to marry. In the case of eunuchs, there was no context in which sexual relations could be sanctioned.<sup>37</sup> One of the stated reasons for this prohibition was that, by marrying, eunuchs went against the very

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<sup>34</sup> Justinian CJ.7.7.1.5/b in B.W. Frier (ed.), *The Codex of Justinian. A New Annotated Translation, with Parallel Latin and Greek Text*, vol. 2 (2016) 1799-801; *Basilika* Book 48 title 14 chapter 4 in H.J. Scheltema et N. van der Wal (ed.), *Basilicorum libri LX*. Series A, 8 vols. (1955-1988).

<sup>35</sup> Tougher, *op. cit.*, n. 15, pp. 77–79; Ringrose, *op. cit.*, n. 15, pp. 21–25.

<sup>36</sup> Novel 98 in P. Noailles and A. Dain (ed.), *Les nouvelles de Léon VI le Sage* (1944) 320–7.

<sup>37</sup> *id.* pp. 324–325.

reason for which they were ‘created’. The act of castration was expected to ‘diminish their passion for the female sex and turn them into trustworthy guardians of the marital bed’, a role that Leo associated with the etymology of the word ‘eunuch’ (literally ‘bedroom guard’).<sup>38</sup> By wanting to marry, eunuchs defied society’s expectations and contradicted their allotted gender role. This way they ended up ‘existing as a strange sex (ξένον τι γένος), accommodated neither to the nature which initially sent them forth nor to the evil artifice which later refashioned them’.<sup>39</sup> In this example, the eunuch’s asexuality, as well as their submissive nature, are taken for granted as basic characteristics of their gender, and are inscribed in law.

As the previous discussion confirms, non-binary genders are far from being a recent Western phenomenon. The Byzantine Empire not only allowed, but even promoted the existence of a third gender. However, the existence of a gender category beyond the binary was certainly not a space of greater freedom from regulatory gender norms, nor did it drastically change existing expectations about binary gender roles. The opposite might as well be closer to the truth. In Byzantium, the accommodation of a third gender category came about despite the fact that male and female gender roles continued to be rigidly defined, in many ways more firmly than in the contemporary West.<sup>40</sup> Men and women were expected to have quite distinctive roles and spheres of influence. Women, for example, were not allowed to teach in Church, and public speaking more generally was thought to be the preserve of

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<sup>38</sup> id. pp. 324–7.

<sup>39</sup> id. pp. 326–7.

<sup>40</sup> In the case of hijras too their subversive potential has often been put to the service of existing discourses about masculinity, being tamed in the process. See, for example: J. Hinchy, ‘Obscenity, Moral Contagion and Masculinity: Hijras in Public Space in Colonial North India’ (2015) 38:2 *Asian Studies Review* 274; G. Reddy, ‘“Men” who would be kings: Celibacy, emasculation and the re-production of hijra in contemporary Indian politics’ (2003) 70:1 *Social Research* 162.

men.<sup>41</sup> Similarly, hunting and warfare were thought to be manly affairs, while a pampered life at home and a concern for one's hairstyle and dress were considered proper to women.<sup>42</sup>

In the case of eunuchs, various matrices of power worked to enforce a coherent gender role, including: religious discourses on asexuality and bodily integrity; medical ideas about the dangers of castration; and the social need for the creation of loyal and trustworthy imperial subjects. An idealisation of virginity and chastity by the Church, especially through the promotion of celibacy within monasticism and to a lesser extent through the encouragement of chastity and abstinence within marriage, allowed for the creation of a positive narrative surrounding the asexual potential of eunuchs.<sup>43</sup> At the same time, a rejection of a strict reading of the Old Testament concerning bodily integrity enabled certain types of eunuchs to assume even sacred functions, despite their castration.<sup>44</sup> Medical and religious discourses operated together to set the grounds for both allowing and restricting the creation of eunuchs, without this creation becoming an insult towards God.<sup>45</sup> Perhaps the strongest incentives behind the creation and acceptance of eunuchs were of a social nature: there was a perceived need for a different type of person who could be trusted to help govern without fear of usurping power.<sup>46</sup> Medical discourses and social norms intersected, as there was an understanding among some that castration itself would 'naturally' lead to the forging of loyal and trustworthy servants, in parallel to what was observed with animal castration.<sup>47</sup> These regulatory forces, with variable strength at different periods, not only made castrations

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<sup>41</sup> Rhalles and Potles, op. cit., n. 18, pp. 467-9.

<sup>42</sup> See for example H.J. Magoulias (trans.), *O city of Byzantium: Annals of Niketas Choniates* (1984) 388-9, 441-2, 508-9, 529-30, 540-1; P. Magdalino, 'Enlightenment and Repression in Twelfth-Century Byzantium: The Evidence of the Canonists' in *Byzantium in the 12th Century: Canon Law, State and Society*, ed. N. Oikonomides (1991) 361.

<sup>43</sup> Tougher, op. cit., n. 15, pp. 77-78; Ringrose, op. cit., n. 15, p. 116.

<sup>44</sup> For eunuchs in the Church, see Tougher, id., pp. 69-74; Messis, op. cit., n. 15, pp. 119-78. On the more relaxed attitude in Byzantium towards physical impairment compared to the Old Testamentary rules, see Zonaras' comment in Rhalles and Potles, op. cit., n. 18, p. 100.

<sup>45</sup> Rhalles and Potles, id., p. 30; Gautier, op. cit., n. 21, pp. 310-1. More generally on medical discourses on eunuchs, see Ringrose, op. cit., n. 15, pp. 51-66.

<sup>46</sup> Tougher, op. cit., n. 15, pp. 42-53; Messis, op. cit., n. 15, pp. 24-27.

<sup>47</sup> Ringrose, op. cit., n. 15, pp. 59-60.

possible and profitable, but also created a framework within which those who were castrated were to understand themselves. As such, they produced the subjects they came to regulate. And we have seen here one of the most obvious examples of this circular mechanism in the case of marriage: despite the fact that there was great recorded variety in terms of the sexual behaviour of eunuchs, their ideal asexuality was cited in law as a reason behind their exclusion from marriage; this legal prohibition reinforced in turn their ideal asexuality.

## INDIAN HIJRAS

The case of the Indian hijras is another interesting example of gender beyond the binary.<sup>48</sup> The hijra community has a long tradition in South Asian societies, tracing its roots to ancient Indian mythology and history.<sup>49</sup> Many hijras historicise their identity invoking a narrative of decline, starting with their respected position in mythological stories such as the ancient Indian epic, Ramayana; continuing with their favourable treatment under Muslim rulers of the Mughal Empire (1526-1857) and the Muslim princely states (1765-1947), but sharply deteriorating in the areas under British colonial rule (1858-1947).<sup>50</sup> The persecution of hijras under colonial domination is well-documented, taking place through recourse to the 1871 Criminal Tribes Act – which categorised hijras (‘eunuchs’) as a criminal tribe – and Section 377 of the 1860 Indian Penal Code – which criminalised ‘carnal intercourse against the order

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<sup>48</sup> Similarly to the Byzantine case, in the Indian context the experience of those assigned female at birth has rarely been the focus. Importantly for our purposes, they are hardly acknowledged in the *NALSA* ruling, which will be discussed in this section. This is not to say that a fruitful study of their experiences cannot be undertaken, especially following recent efforts to document it. See LABIA, ‘Breaking the Binary: Understanding Concerns and Realities of Queer Persons Assigned Gender Female at Birth across a Spectrum of Lived Gender Realities’ (2013).

<sup>49</sup> G. Reddy, *With Respect to Sex: Negotiating Hijra Identity in South India* (2005) 18-30.

<sup>50</sup> S. Nanda, *Neither Man nor Woman: The Hijras of India* (1999, 2<sup>nd</sup> edn.) 13, 23, 42, 52; R. Lal, ‘Harem and eunuchs: liminality and networks of Mughal authority’ in *Celibate and Childless Men in Power: Ruling Eunuchs and Bishops in the Pre-Modern World*, eds. A. Höfert, M. Mesley, and S. Tolino (2018) 92-108; J. Hinchy, *Governing Gender and Sexuality in Colonial India: The Hijra c. 1850-1900* (2019). For an interview where the hijra activist Laxmi Narayan Tripathi outlines such a narrative of decline, see <<https://www.youtube.com/watch?v=Z4tuHJey1i4>>.

of nature'.<sup>51</sup> Aspects of this colonial influence remained in place until fairly recently, as the Criminal Tribes Act was only repealed after India gained its political independence and it was not until 2018 that the Indian Supreme Court would strike down Section 377.<sup>52</sup>

Nowadays, the hijras continue to occupy a marginal position in Indian society, but have attracted considerably more attention both because of numerous academic studies that have been written about them and because of recent legal developments. Here, we discuss them with particular focus on these legal changes, which include a 2014 judgment of the Indian Supreme Court in the case *National Legal Services Authority v Union of India and others* (hereinafter 'NALSA') and the 2019 legislation adopted in consequence of the ruling.<sup>53</sup>

In April 2014 a two-judge bench of the Supreme Court was called to rule on whether the members of the hijra community deserved to be recognised by the law as belonging to a third gender, beyond the legal categories of male and female. Within this judgment we find a discussion of the gender system of India for which the Court relies heavily on three referenced sources: a 2010 Issue Brief commissioned by UNDP;<sup>54</sup> the 2005 book *With Respect to Sex* by Gayatri Reddy;<sup>55</sup> and the 1999 edition of the book *Neither man nor woman* by Serena Nanda.<sup>56</sup> Both Nanda and Reddy describe that most hijras are assigned male at birth, but adopt 'female behaviour', wear traditionally female clothing, and refer to themselves through the use of female pronouns ('she/her').<sup>57</sup> Nonetheless, most of them do

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<sup>51</sup> J. Hinchy, op. cit., n. 50, esp. pp. 50-53, 165-169 and 257-264.

<sup>52</sup> Indian Supreme Court, *National Legal Services Authority v. Union of India and others* (2014) 5 SCC 438, paras. 16-18; Indian Supreme Court, *Navtej Singh Johar and others v. Union of India and others* (2018), Writ Petition (Criminal), No.76 of 2016.

<sup>53</sup> Indian Supreme Court, *National Legal Services Authority v. Union of India and others* (2014) 5 SCC 438; The Transgender Persons (Protection of Rights) Act 2019.

<sup>54</sup> V. Chakrapani, 'Hijras/Transgender Women in India: HIV, Human Rights and Social Exclusion' (2010) United Nations Development Programme (UNDP), India, Issue Brief (December 2010).

<sup>55</sup> Reddy, op. cit., n. 49.

<sup>56</sup> Although the title of Nanda's books is not indicated in the judgment, the referenced work is assumed to be Nanda, op. cit., n. 50. Reddy focused her fieldwork on the twin south Indian cities of Hyderabad and Secunderabad between 1995 and 2005 when her book was published. Serena Nanda's work took place between 1981 and 1986 in a South-central Indian city she called Bastipore and in a variety of places in Northern India, including Delhi, Chandigarh and the hijra temple in Gujarat.

<sup>57</sup> Reddy, op. cit., n. 49, p. 2; Nanda, op. cit., n. 50, pp. 15-18.

not identify as male or female, but as a third gender.<sup>58</sup> This was acknowledged in *NALSA*, as Justice Radhakrishnan – who wrote the main judgment – asserted that hijras ‘are neither men nor women and claim to be an institutional third gender’,<sup>59</sup> having already been recognised as such by the judiciary of neighbouring States, such as Nepal and Pakistan.<sup>60</sup>

Hijras are ideally meant to renounce sex and undergo a sacrificial emasculation (*nirvan*) which consists of an excision of their penis and testicles.<sup>61</sup> This is supposed to give them the power to perform blessings at weddings and births, providing them with the means to earn a living through the collection of alms (*badhai hijra*).<sup>62</sup> However, not all hijras undergo such a procedure. Within the group observed by Reddy, not all hijras had to undergo *nirvan* to belong to their community, but all hijras had to be circumcised.<sup>63</sup> This was part of the initiation ritual that physically inscribed hijra identity on their body. But the reason behind the circumcision was religious: it was an expression of their Muslim identity.<sup>64</sup> This was also acknowledged by Justice Radhakrishnan in *NALSA*: ‘Among Hijras, there are emasculated (castrated, nirvana) men, non-emasculated men (not castrated/akva/akka) and inter-sexed persons (hermaphrodites)’.<sup>65</sup> Similarly, for many hijras asexuality remains simply

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<sup>58</sup> Not all hijras identify as ‘neither men nor women’, but some think of themselves as women. See Nanda, *id.*, p. xix.

<sup>59</sup> Indian Supreme Court, *National Legal Services Authority v. Union of India and others* (2014) 5 SCC 438, paras. 11 and 70.

<sup>60</sup> The need for the adoption of third gender categories by law had been decided by the Supreme Courts of Nepal (2007) and Pakistan (2009), to allow for the recognition of the members of different groups that belong to neither the male or female gender. See Supreme Court Division Bench, Sunil Badu Pant & others v. Nepal Government & others, Writ No. 917 of the year 2064 BS (2007 AD) (translated into English in 2 *National Judicial Academy Law Journal* (2008) 261); Supreme Court of Pakistan, Dr Muhammad Aslam Khaki & another v. S.S.P. (Operation), Rawalpindi & others, Const. Petition No. 43/2009. See also: M. Bochenek and K. Knight, ‘Establishing a Third Gender Category in Nepal: Process and Prognosis’ (2012) 26 *Emory International Law Review* 11; F. Khan, ‘Khawaja Sira Activism: The Politics of Gender Ambiguity in Pakistan’ (2016) 3 *TSQ: Transgender Studies Quarterly* 158.

<sup>61</sup> Reddy, *op. cit.*, n. 49, pp. 56-7; Nanda, *op. cit.*, n. 50, pp. 26-9.

<sup>62</sup> Reddy, *id.*, p. 56. On this ritual aspect of the hijras, see Nanda, *id.*, pp. 4-6.

<sup>63</sup> Reddy, *id.*, p. 57.

<sup>64</sup> This is noted by Reddy and Nanda, but both the emphasis on emasculation and the association with Islam is contested in A. Hossain, ‘Beyond emasculation: Being Muslim and becoming hijra in South Asia’ (2012) 36:4 *Asian Studies Review* 495, which focusses on hijras in Bangladesh and shows the local differences between different hijra communities in South Asia.

<sup>65</sup> Indian Supreme Court, *National Legal Services Authority v. Union of India and others* (2014) 5 SCC 438, para. 11.

an ideal, as engaging in sex constitutes both an important aspect of their identity and their main source of income (*kandra hijra*).<sup>66</sup> According to Reddy, being penetrated in sexual intercourse along with the performance of ‘women’s work’ were the central axes of the sexual and gender identity of the group of hijras on which she focused her study.<sup>67</sup>

Most hijras live together in communities, relatively isolated from the rest of society, to the extent that for many middle- and upper-class Indians hijras exist only ‘at the periphery of their imaginaries’, being visible on certain ritual occasions.<sup>68</sup> These communities tend to be very hierarchical. They are subdivided into ‘lineages’ and households, and each household has a head, disciples of the head, and disciples of the disciples.<sup>69</sup> The importance of these communities has also been recognised in *NALSA*, as the judgment acknowledged that while hijras ‘can be considered as the western equivalent of transgender/transsexual (male-to-female) persons’, they have a long tradition and share ‘strong social ties formalized through a ritual called reet’, which makes them members of the hijra community.<sup>70</sup>

In addition to the hijras, the judgment recognised a number of other groups whose gender identity does not conform to the gender binary. It provided a description of different identities to be found within the transgender community of India,<sup>71</sup> which includes *hijras*, *eunuchs*, *aravanis*, *kothi*, *jogta/i*, and *shiv-shakthis*. However, it is worth mentioning that these are not the only categories that do not fit the gender binary in Indian society. In her book, Reddy further discusses *zenanas*, *kada-catla kotis*, *AC/DC*, and *berupias*.<sup>72</sup> To give an

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<sup>66</sup> Reddy, op. cit., n. 49, p. 48; Nanda, op. cit., n. 50, pp. 9-12, 53-5.

<sup>67</sup> Reddy, op. cit., n. 49, pp. 15, 44. Nanda, on the other hand, places a lot of emphasis on emasculation. See Nanda, op. cit., n. 50, p. 15.

<sup>68</sup> Reddy, id., pp. 3, 9. This was even more the case at the time of Nanda’s study. See Nanda, id., p. xvii.

<sup>69</sup> Reddy, id., pp. 58, 150-64; Nanda, id., pp. 38-47.

<sup>70</sup> Indian Supreme Court, *National Legal Services Authority v. Union of India and others* (2014) 5 SCC 438, para 44.

<sup>71</sup> id.

<sup>72</sup> The spelling used in the book for some of these terms is different from the spelling found in the judgment. We have used throughout the spelling followed by the judgment. For a detailed description of all these categories, see Reddy, op. cit., n. 49, pp. 52-74. Reddy further proposed that the Indian gender system can be interpreted as

idea of this variation we can look at *zenanas*. Unlike hijras, *zenanas* do not openly present themselves as visibly ‘othered’ to the general population, but their gender expression tend to be that of men. Nonetheless, this masculine performance is often restricted to particular social contexts. When they get together, their speech patterns and hand gestures appear to undergo a marked change,<sup>73</sup> and as a group they do not hesitate to be identified as not-men. Unlike hijras, *zenanas* do not live together. They have their own families and physical dwellings, and only get together for special occasions.<sup>74</sup> *Zenanas* have a ‘reet’ in a hijra house, becoming the disciple of one of the hijras in that house.<sup>75</sup> They also have their own structural community, complete with hierarchical positions, initiation rituals, rules of comportment, and specific kin alignments.<sup>76</sup> They do not undergo *nirvan* and most of them are married to women and have children.<sup>77</sup>

Another gender category that was discussed by the judgment was that of the *shiv-shakthis*, defined as ‘males who are possessed by or particularly close to a goddess and who have feminine gender expression’.<sup>78</sup> The mentioned 2010 Issue Brief explains that: ‘Usually, Shiv-Shakthis are inducted into the Shiv-Shakti community by senior gurus, who teach them the norms, customs, and rituals to be observed by them. In a ceremony, Shiv-Shakthis are married to a sword that represents male power or Shiva (deity). Shiv-Shakthis thus become the bride of the sword’.<sup>79</sup> Further to this, Reddy narrates that the religious affiliation of *shiv-shakthis* as Hindu is important for their identity and they are often found offering their blessing at Hindu temples. Like hijras, they wear female clothing and makeup, and can

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divided into three broad categories: (1) behavioural and biological ‘men’, called *pantis*, (2) effeminate men or behavioural ‘not-men’, called *kotis*, and (3) all women or *narans*. id. p. 15.

<sup>73</sup> id. p. 60.

<sup>74</sup> id. p. 61.

<sup>75</sup> id. p. 62.

<sup>76</sup> id. p. 63.

<sup>77</sup> id. p. 66.

<sup>78</sup> Indian Supreme Court, *National Legal Services Authority v. Union of India and others* (2014) 5 SCC 438, para. 44.

<sup>79</sup> id.

engage in sexual acts with men, but they can also be married to women, have children, and live with their families.<sup>80</sup>

As quickly becomes obvious, there is great gender diversity within Indian society, going far beyond the gender binary. What is more, these gender roles can be fluid, with the same individual adopting very different identities within their lifetime. Both Reddy and Nanda report such examples (e.g. a *zenana*, a *shiv-shakti*, and a *kada-catla koti* who became hijras), with Nanda emphasising that, contrary to what is suggested by Western social science, ‘gender identity/role may be subject to transformations later in life’.<sup>81</sup> This shift could be quite important, given that, as we have seen, *zenanas* could have wives and children and could spend large parts of their life performing a ‘male identity’.<sup>82</sup>

Even though the *NALSA* ruling referred to at least some of these identities, its engagement with people’s lived experience of gender non-conformance has somewhat flattened them. This is an unsurprising, and perhaps even unavoidable, consequence of legal institutions’ attempts to comprehend the radicalness of non-conforming genders through the language of rights and norms.<sup>83</sup> Indeed, the concurrently appealing and dangerous character of legal rights remains a constant matter of concern for queer writing more broadly.<sup>84</sup> Moreover, the judgment reads untidy, confusing, and does not seem to offer the strongest possible arguments and reasoning for reaching a decision that, conversely, presents aspects deserving of (queer) celebration. With variable accuracy, in its attempt to engage with gender diversity the ruling made use of a multiplicity of international and comparative norms and judgments; most of them concerned the gender recognition of ‘transsexual’ individuals who had undergone a gender transition process. Nevertheless, when it came to defining gender

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<sup>80</sup> Reddy, *op. cit.*, n. 49, pp. 70-71.

<sup>81</sup> *id.* pp. 207-8; Nanda, *op. cit.*, n. 50, pp. 115-6.

<sup>82</sup> Reddy, *op. cit.*, n. 49, pp. 60-6.

<sup>83</sup> D. Sharma, ‘The State and the Construction of Non-Normative Citizen’ (2018) 9 *Journal of Indian Law and Society* 18, at 37-38; R. Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (2018) 246-247.

<sup>84</sup> Kapur, *op. cit.*, n. 83; Gonzalez-Salzberg, *op. cit.*, n. 13.

identity, Justice Radhakrishnan stated that it refers to each person's 'self-identification as a man, woman, transgender or other identified category'.<sup>85</sup> The conclusion he reached was that, despite the lack of domestic legislation in India concerning the recognition of trans individuals' gender identity, the State should follow existing rules of international law, so long as they do not oppose domestic law. Justice Radhakrishnan's opinion was that not only did the gender recognition of transgender individuals not oppose Indian law, but the legal recognition of gender identity was comprised by the right to dignity and freedom guaranteed by the Constitution.<sup>86</sup>

The second judge of the two-judge bench – Justice Sikri – expressed his agreement with the opinion that preceded him, but clarified that there were two different facets of the topic of gender identity; the first, concerning individuals who desire recognition of their gender as the one on the opposite side of the binary and, the second, regarding those who are neither man nor woman and want to be identified as belonging to a third gender.<sup>87</sup> Concerning the latter, Justice Sikri affirmed that transgender individuals have a right to be identified as a third legal gender. He clarified, nonetheless, that for the purpose of his argument this was only applicable to: 'Hijaras (sic), enunch (sic), Kothis, Aravanis, Jogappas, Shiv-Shakthis etc'.<sup>88</sup> These were the identities that, he believed, should be allowed recognition as a third gender without the need to follow any further requirements. Conversely, Justice Sikri adopted a more restrictive approach with regards to trans individuals who seek recognition within the gender binary. He argued that the legal acknowledgment of their identity could be made dependant on the need to undergo sex-

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<sup>85</sup> Indian Supreme Court, *National Legal Services Authority v. Union of India and others* (2014) 5 SCC 438, para. 19.

<sup>86</sup> *id.*, paras. 49, 53 and 68.

<sup>87</sup> *id.*, para. 79.

<sup>88</sup> *id.*, para. 108.

reassignment surgery.<sup>89</sup> Justice Sikri supported this opinion with passages from a magazine (Eye of the Sunday Indian Express), where a trans woman expressed her happiness about her life after gender transition.<sup>90</sup> He matter-of-factly argued that the process of transition involved evaluation by at least two psychiatrists to rule out schizophrenia, depression and transvestism; which would pave the way for hormone therapy, to be followed by surgery.

While undoubtedly well-intended, Justice Sikri's reasoning was problematic for at least two main reasons. First, the story one person narrates to a magazine – regardless of how appealing and emotional it might be – does not amount to solid grounds for constructing a grand narrative of trans lives to support a Supreme Court's ruling, especially given the nuances and complexities of gender diversity that exist within Indian society. Equally problematic, if not more, was the explanation of the gender transition process, provided as if there could only exist one possible way to transition gender, which necessarily entails psychiatric tests, hormonal therapy and surgical procedures. Moreover, a reasoning such as that one, which provided the (authoritative) 'true story' of trans lives appeared at odds with the claims made throughout Justice Radhakrishnan's opinion as to the gender identity of individuals to be 'based on self identification, not on surgical or medical procedure'.<sup>91</sup>

In the end, the Supreme Court's judgment declared, first, that hijras should be treated as a third legal gender (beyond male and female); and, secondly, that transgender individuals in general have a right to the legal recognition of their self-perceived gender, being it male, female or third gender.<sup>92</sup> However, the apparent contradiction between the opinions of the two judges concerning self-determination and the recognition of binary gender subsisted. This left serious doubts as to whether transgender people's right to self-identify their gender

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<sup>89</sup> id, para. 105.

<sup>90</sup> id, paras. 102-104.

<sup>91</sup> id, para. 76.

<sup>92</sup> id, para. 129 (1)-(2).

could be subject to specific requirements, such as having to undergo the transition process described by Justice Sikri, before some of the gender options were made available to them.

In 2019, following the Court's decision, India adopted the 'Transgender Persons (Protection of Rights) Act'. This piece of legislation relies on the principle of self-determination for the legal recognition of individuals as 'transgender',<sup>93</sup> a legal gender category beyond the man/woman binary, which is available to individuals with different identities, including trans-men,<sup>94</sup> trans-women, those who identify as 'genderqueer', as well as those having 'socio-cultural identities as kinner, hijra, aravani and jogta'.<sup>95</sup> The new legislation also ended the apparent contradiction in the ruling by restricting gender self-determination to those belonging to a third gender category, while for trans individuals who desire recognition within the gender binary surgery and medical certification appear as requirements.<sup>96</sup>

As can be seen from the above discussion, India has been home to a long history of non-binary genders, but also to regulatory forces which allowed and promoted their existence, including religion, the ideal of asexuality, and the importance of social hierarchies and kinship structures. For instance, the main compulsory bodily alterations expected of hijras came from religious imperatives, namely their circumcision as part of their Muslim identity. According to Reddy's account, this was not a secondary characteristic, but an integral feature of being part of the hijra community,<sup>97</sup> leading to a fusion of gender and religious categories. Hierarchical relations and, especially, kinship structures appear as a major driving force behind this third gender category, as becoming the disciple (*cela*) of

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<sup>93</sup> The Transgender Persons (Protection of Rights) Act 2019, article 4.

<sup>94</sup> The acknowledgment of transmen within the legislation came to partly redress their almost complete erasure within the discussion of the NALSA judgment. See A. Dutta, 'Contradictory Tendencies: The Supreme Court's NALSA Judgment on Transgender Recognition and Rights' (2014) 5 *Journal of Indian Law & Society* 225, 226-227 (2014).

<sup>95</sup> *id.*, article 2.(k).

<sup>96</sup> *id.*, article 7. This appears in stark contrast to the legislation adopted by neighbouring Pakistan in 2018. See Transgender Persons (Protection of Rights) Act 2018.

<sup>97</sup> Reddy, *op. cit.*, n. 49, p. 57.

another hijra in one of the established hijra households forms an essential part of hijra identity.<sup>98</sup> Life as part of these households determines to a large extent the type of work that hijras do (be it *badhai* or *kandra*) as well as the interactions that they have with others. In particular, the realities of earning a living often clashed with the ideal of chastity of hijras. The question of kinship structures is also important from a legal standpoint, as the Supreme Court seemed to have delegated the task of the definition of the ‘third gender’ to the groups themselves. The *NALSA* judgment affirmed that hijras are a socio-religious and cultural group that should be recognised as a third gender,<sup>99</sup> without providing any further requirement for such a recognition than the belonging to the group.<sup>100</sup>

This analysis provides further support to the perception of gender as a constructed system that relies on regulatory discourses which, far from being universal, vary across different cultures. In Byzantium, the legislative existence of a gender beyond the binary was to a large extent the product of an imperial political and economic system that had use for such a role, which could be supported by contemporary ideas about religion, medicine, and sexuality. In India, the hijras remain a socio-religious and cultural reality with deep-rooted history, whose existence has been supported by specific ideas about religion, sexuality, and kinship. It is certainly interesting to see that both examples of non-binary genders shared a belief in their asexuality, presenting a clear connection between anatomy – and an assumed idea of the absence of male genitalia –, gender, and sexuality.

## **BRINGING THE GENDER BINARY TO COURT**

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<sup>98</sup> ‘Without a guru, a hijra’s very identity is called into question.’ See Reddy, *id.*, pp. 162, 9-10.

<sup>99</sup> Indian Supreme Court, *National Legal Services Authority v. Union of India and others* (2014) 5 SCC 438, para. 70.

<sup>100</sup> Dutta has also emphasised the importance of such kinship structures, noting how lineage-based hijras have associated themselves with NGOs and the media in order to define ‘real’ hijras as a minority. See A. Dutta, ‘An Epistemology of Collusion: Hijras, Kothis and the Historical (Dis)continuity of Gender/Sexual Identities in Eastern India’ (2012) 24:3 *Gender & History* 825.

As discussed at the outset, carving a gender space beyond the compulsory binary is an increasing demand faced by contemporary Western societies. While our case-studies helped to confirm the existence of third gender alternatives in very different cultures, they also allow us to see how such a gender option does not come into being through the suppression of the regulatory forces that dictate gender norms. On the contrary, the existence of a third gender category is the outcome of gender discourses that are functional to and validated by the particular culture. The third gender identity is a heavily regulated space.

Over the last ten years individuals who wished to challenge an undesired binary gender categorisation have brought an array of legal claims to court. One of the earlier cases that reached international notoriety was that of Mx Norrie, a Scottish-Australian national who requested the New South Wales (Australia) Registrar of Births, Deaths and Marriages to recognise *her* gender as ‘non-specific’.<sup>101</sup> The decision reached by the High Court was that Mx Norrie’s gender should be registered as non-specific as requested, grounding its ruling on the fact that she had undergone a sex-affirming process, but that such ‘procedure had not eliminated the ambiguities relating to Norrie’s sex.’<sup>102</sup> Therefore, the reasons for acknowledging a gender existence beyond the binary were to be found on an alleged anatomical fact, that of Mx Norrie’s sex fitting neither the male nor the female gender model.<sup>103</sup> The success achieved by Mx Norrie was certainly not a predictable outcome. This is a field of litigation in which, so far, legal victories can be juxtaposed with defeats. Among the former, we can count cases brought to court in the United States,<sup>104</sup> Austria,<sup>105</sup> and

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<sup>101</sup> Norrie used ‘she/her’ as preferred pronouns throughout the case. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11.

<sup>102</sup> *id.*, para 39.

<sup>103</sup> A.J. Neuman Wipfler, ‘Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents’ (2016) 39 *Harvard Journal of Law and Gender* 491, at 513-514; J. Theilen, ‘Beyond the Gender Binary: Rethinking the Right to Legal Gender Recognition’ (2018) *European Human Rights Law Review* 249, at 250-251.

<sup>104</sup> *In re Sex Change of Jamie Shupe*, 16CV13991 (Or. Cir. 2016) (order granting general judgment of sex change).

<sup>105</sup> Verfassungsgerichtshof, G 77/2018-9, 15/06/2018

Canada;<sup>106</sup> while the latter includes claims decided in France,<sup>107</sup> Argentina,<sup>108</sup> and the United Kingdom.<sup>109</sup>

Perhaps the two most important cases to date concerning legal challenges to a State's binary-only gender policies have been the ones decided by the Constitutional Courts of Germany and Belgium (in 2017 and 2019, respectively), as these rulings were not only about the specific situation of an individual, but directly aimed at challenging the States' whole gender recognition system. In October 2017, the German Federal Constitutional Court favourably ruled on a case dealing with gender identification beyond the binary. The claim was brought by a person who had been assigned a female gender at birth, but who had an atypical set of chromosomes and permanently identified as neither female nor male. The claimant had previously attempted to have their birth registration amended to replace the female entry with one stating 'inter/diverse' or 'diverse', but such a request had been unsuccessful. While German legislation had already been amended in 2013 to allow for not imposing a gender to newborns who could not be assigned either male or female at birth,<sup>110</sup> the Court considered this amendment to be insufficient. It stated that, given the importance society attributes to gender, the lack of an affirmative gender designation to individuals who did not fit the male/female binary, rendered them unable to develop their personality in equal conditions to those individuals who were assigned a gender.<sup>111</sup> The Court asserted that the lack of gender designation does not alter the exclusively binary pattern of legal gender, which in turn fails to offer due recognition to the identity of individuals who do not fit the gender

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<sup>106</sup> Center for Gender Advocacy and Samuel Singer, Sarah Blumel, Elizabeth Heller, and Jenna Michelle Jacobs v. The Attorney General of Quebec (No.500-17-082257-141), Judgment, 28/01/2021.

<sup>107</sup> Cour de Cassation (Chambre Civile 1), 04/05/2017, 16-17.189.

<sup>108</sup> Cámara Civil (Sala G), 'Bertolini, Lara María c/ En-M Interior Op y V s/Información Sumaria' (Expte.48756/2018/CA1). Reversing a decision of the first tribunal that had ordered the legal recognition of the claimant's identity as 'transvestite femininity'.

<sup>109</sup> *R (on the application of Christie Elan-Cane) v. Secretary of State for the Home Department and Human Rights Watch (intervener)* [2018] EWHC 1530 (Admin).

<sup>110</sup> German Civil Status Act (Personenstandsgesetz), s 22 para 3 (amended on 7 May 2013).

<sup>111</sup> German Federal Constitutional Court, Decision of 10 October 2017, Application no 1 BvR 2019/16, paras. 40 and 47-48.

binary.<sup>112</sup> Consequently, the Court ordered the German Parliament to amend the legislation to allow for an ‘affirmative designation’,<sup>113</sup> different to male and female, for ‘persons whose gender development deviates from female or male gender development and who permanently identify as neither male nor female’,<sup>114</sup> unless it opted for completely dispensing with gender as a category for civil status.<sup>115</sup>

As argued by Theilen, the Court could have been clearer as to whether belonging to this affirmative third gender designation needed to be based on biological or anatomical grounds, or if self-determination should suffice;<sup>116</sup> but it was left instead up to the legislator to provide an answer to such a question. The legislation finally adopted by Parliament at the end of 2018 established that the designation ‘divers’ was to be restricted in its use as an affirmative designation for persons with a ‘variance of sex development’;<sup>117</sup> hence, grounding this gender category in biology.

On the other hand, the 2019 judgment of the Belgian Constitutional Court is certainly one of the most interesting rulings on non-binary gender rendered thus far. The case was filed by three NGOs (‘Çavaria’, ‘Maison Arc-en-Ciel’, and ‘Genres Pluriels’), challenging the constitutional validity of the Gender Recognition Act on two different grounds. The first was that the law continued to regulate gender as a binary category and, therefore, excluded non-binary individuals. The second ground was the assumed irreversibility of gender, which restricted the possibility of multiple changes of registered gender, hence preventing the

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<sup>112</sup> *id.*, para. 43.

<sup>113</sup> Theilen, *op. cit.*, n. 102, pp. 252-253.

<sup>114</sup> German Federal Constitutional Court, Decision of 10 October 2017, Application no 1 BvR 2019/16, *op. cit.* para. 3.

<sup>115</sup> *id.*, para. 51.

<sup>116</sup> Theilen, *op. cit.*, n. 102, p. 255.

<sup>117</sup> Theilen, *op. cit.*, n. 2.

recognition of gender-fluid people.<sup>118</sup> The Constitutional Court decided in favour of the claimants on both grounds.

Regarding non-binary identities, the Court ruled that the binary gender system enforced by the legislation amounted to a discriminatory breach of the right to self-determination for persons with non-binary gender identities, as it was forcing them to accept the legal imposition of a legal sex (man or woman) that does not correspond to their gender identity.<sup>119</sup> It affirmed that non-binary persons should have the possibility of amending the gender marker stated on their birth certificate to reflect their gender identity. The Court then left it to Parliament to amend the Gender Recognition Act, so as to make it compatible with the recognition and respect of the identities of non-binary individuals. It noted that there were several ways to achieve this outcome, such as the legal recognition of one or several supplementary gender categories, as well as the removal of gender designation as part of individuals' civil status.<sup>120</sup> As to the fluidity of gender, the Court ruled against the legal provisions that made amended sex registrations irrevocable and those that established that first names could be changed only once. It asserted that such provisions discriminated against persons with fluid genders, finding no reasonable justification for these individuals to be required to accept the recording of a sex which did not match their (fluid) identities.<sup>121</sup> Consequently, the Court annulled the legal provisions that established the irrevocable character of sex amendments on birth certificates and struck down those that only allowed for first names to be changed once.<sup>122</sup>

The ruling of the Belgian Constitutional Court is certainly a legal opinion deserving of (queer) celebration. This is (so far) the furthest that a State's highest court has dared to

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<sup>118</sup> Belgian Constitutional Court, Judgment number: 99/2019 (19 June 2019), para. B.1.5.

<sup>119</sup> *id.*, para. B.6.6.

<sup>120</sup> *id.*, para B.7.3.

<sup>121</sup> *id.*, para. B.8.8

<sup>122</sup> *id.*, para. B.8.10.

venture into an understanding of gender queer enough to uphold the existence and legal protection of fluid and non-binary identities. And yet, the Court still failed to detach its ruling from the traditional naturalised view of sex as a characteristic determined by biology/genetics/anatomy.<sup>123</sup>

As foreshadowed in the Introduction, the gender system of most contemporary societies continues to be largely based on the normative belief in the existence of only two possible genders, which are initially identified by an assumed anatomical compatibility. Genitalia are the first marker of gender, which is confirmed by the (still) accepted practice of coercive surgery in cases of intersex newborns. This reliance on anatomy can be seen, in turn, to be underpinned by the naturalisation of heterosexual desire. The surgical modification of genitalia in intersex individuals is usually not aimed at addressing any life-threatening conditions or even specific health complications, but its purpose is to allow the ‘normalised’ individual to perform in the future heterosexual penile-vaginal intercourse.<sup>124</sup>

As proposed by Judith Butler, the actual intelligibility of bodies is subject to their performance of stable genders, which are defined through the compulsory practice of heterosexuality.<sup>125</sup> Butler coined the notion of *heterosexual matrix*, to refer to the net of cultural intelligibility through which bodies are naturalised in asymmetrical gender opposition (men/women) to be capable of responding to the heterosexualisation of sexual desire. This heterosexual matrix can be found embedded into norms, institutions and practices that naturalise and enforce the requirement of asymmetric opposed genders and

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<sup>123</sup> *id.*, para. B.2.2. However, it is worth mentioning that this understanding of ‘sex’ as biological seemed to be supported by the applicants themselves, according to para. A.1 of the judgment.

<sup>124</sup> S. Kessler, ‘The Medical Construction of Gender: Case Management of Intersexed Infants’ (1990) 16 *Signs* 3, at 3 and 19-20; A.D. Dreger, *Hermaphrodites and the Medical Invention of Sex* (2003) epilogue; M. Carpenter, ‘The “Normalization” of Intersex Bodies and “Othering” of Intersex Identities in Australia’ (2018) 15 *Bioethical Inquiry* 487, at 488-489.

<sup>125</sup> J. Butler, *Gender Trouble: Feminism and the Subversion of Identity* (1999, 2<sup>nd</sup> edn.) 194.

heterosexuality, from medical discourses that reinforce the idea of only two possible genders to legislation that solely allows for registration of newborns as either girls or boys.<sup>126</sup>

Embracing sexual desire in terms of heterosexuality as norm entails the necessary production of homosexuality as deviation, since both sexualities are conceived as an (asymmetric) binary pair in which the meaning of one derives from the knowledge of the other.<sup>127</sup> This process also allows the conception of bisexuality as a potential alternative; narrowly understood as a by-product of the sexual model, a mere combination of both categories of the sexual binary. The sexual universe produced by the regulatory power of the heterosexual matrix precludes the possibility of intelligible genders beyond the man/woman binary, since the potential subject of desire needs to be coded in binary man/woman terms.<sup>128</sup> In other words, the normative character of heterosexuality spreads its regulatory effects onto the gender system, producing binary genders as norm;<sup>129</sup> a phenomenon that could be labelled *binanormativity*.<sup>130</sup>

And yet, non-binary people have existed in different times and cultures, as the Byzantine eunuchs and the Indian hijras exemplify. A possible explanation for the recognition of gender beyond the binary in those contexts could reside on the chaste character attributed to those belonging to the third gender. It does not seem coincidental that the recognition of third genders has been closely linked to the assumption of the sexuality of those in such a category as unable to jeopardise the system of compulsory heterosexuality. A

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<sup>126</sup> id. p. 96.

<sup>127</sup> J.W. Scott, 'Deconstructing Equality-Versus-Difference: Or, the Uses of Post-structuralist Theory for Feminism' (1988) 14 *Feminist Studies* 33, at 36-37; E. Kosofsky Sedgwick, *Epistemology of the Closet* (1990) 9-10; J. Katz, *The Invention of Heterosexuality* (1995) 12 and 187.

<sup>128</sup> D. Valente, 'I Went to Bed with My Own Kind Once: The Erasure of Desire in the Name of Identity' in S. Striker and S. Whittle (eds), *The Transgender Studies Reader* (2006) 407, 408; S. Striker, 'Transgender Studies: Queer Theory's Evil Twin' (2004) *GLQ: A Journal of Lesbian and Gay Studies* 212, 212.

<sup>129</sup> Valente, id., pp. 416-417; V.K. Namaste, 'Genderbashing: Sexuality, Gender, and the Regulation of Public Space' in S. Striker and S. Whittle (eds), *The Transgender Studies Reader* (2006) 584, 586.

<sup>130</sup> This can be added to the long list of normalising regimes underpinning the heterosexual matrix, including a *sexual imperative*, *mononormativity*, *repronormativity*, and *cisnormativity*. See Gonzalez-Salzburg, op. cit., n. 13, pp. 20-21.

sexual system coined in terms of the genitalia of sexual partners is not challenged by the recognition of those beyond a binary gender if their asexuality is assumed – as it was in our case-studies – or when the anatomy of those beyond the binary can be imagined as harmless, either because it has been surgically modified or because it places them in a space beyond desirability.<sup>131</sup>

However, we propose that it is the opposite that might be closer to the truth. It is the acknowledgment of the existence of a desire – including, but not limited to, an erotic desire – for those bodies that are located beyond the binary that acts as a driving force for the recognition of their genders. Naming and affirming the asexual character of these identities actually evokes their potential sexuality. Given that every binary pair (such as sexuality/asexuality) necessarily brings its opposite attached,<sup>132</sup> it is the mention of their asexuality that makes them intelligible as sexual subjects. This understanding can be supported by the sources that refer to the lustful character of the Byzantine eunuchs and by the fact that resorting to sexual work is not an unusual way in which Indian hijras earn a living. Even more apparent is the well-documented desire for bodies that defy the constraints of the gender binary in contemporary Western societies.<sup>133</sup> In particular, it is trans and non-binary women who appear overrepresented within the sex industry;<sup>134</sup> a clear reflection of societies that disavow gender non-conforming people, while simultaneously demanding their availability for satisfying an existing desire. This latent desire (whether avowed or repressed)

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<sup>131</sup> A. Sharpe, ‘Transgender Marriage and the Legal Obligation to Disclose Gender History’ (2012) 75 *Modern Law Review* 33, at 39; A. Sharpe, ‘The Ethicality of the Demand for (Trans)parency in Sexual Relations’ (2017) *Australian Feminist Law Journal* 169, at 177-180 and 183.

<sup>132</sup> J.M. Balkin, ‘Deconstructive Practice and Legal Theory’ (1987) 96 *Yale Law Journal* 743, 747-749.

<sup>133</sup> T. Fletcher, ‘Trans Sex Workers: Negotiating Sex, Gender, and Non-Normative Desire’ in E. van der Meulen, E.M. Durisin and V. Love (eds), *Selling Sex: Experience, Advocacy and Research on Sex Work in Canada* (2013) 65, 67-68 and 70.

<sup>134</sup> J. Van Schuylenbergh, J. Motmans and G. Coene (2018) ‘Transgender and Non-binary Persons and Sexual Risk: A Critical Review of 10 Years of Research from a Feminist Intersectional Perspective’ (2018) 38 *Critical Social Policy* 121, 131-132; J. Van Schuylenbergh, J. Motmans, J. Defreyne, A. Somers and G. T’Sjoen, ‘Sexual Health, Transition-related Risk Behavior and Need for Health Care among Transgender Sex Workers’ (2019) *International Journal of Transgenderism* 388, 389.

contributes to the intelligibility of those bodies,<sup>135</sup> and will certainly play an important role in making their forthcoming legal recognition an inevitable reality.<sup>136</sup>

The judgments from the German and Belgium Constitutional Courts undoubtedly represent a step forward in the recognition of non-binary identities. The decreasing influence of *heteronormativity*<sup>137</sup> as ideal within many contemporary Western societies – including the long-awaited weakening of Christian religious discourses in policy setting and the clear trend towards the de-medicalisation of gender non-conformance –<sup>138</sup> certainly provides a more nurturing space for re-conceiving gender beyond the binary. Nonetheless, the reach of these rulings in carving a valuable space for non-gender identities within the respective societies has been somehow limited. The shortcomings of the German ruling are perhaps more evident, as the rationale of the decision was grounded in ‘gender development’, which translated into recognition being granted due to a biological inability to fit within the gender binary. Even if a gender category beyond the binary can be achieved, when these are grounded on ‘biological facts’ or ‘anatomical truths’, they can be read as isolated exceptions from the norm(ality); departures from the gender binary that are permitted only in so far as the gender system as a whole remains unquestioned. Indeed, these allowed exceptions serve to reinforce the validity of the gender binary.<sup>139</sup> If the third category only appears as an alternative for individuals whose anatomy/biology fails to fit the binary norm, it fulfils the purpose of legitimising both sides of the binary as the safe spaces for normal genders.

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<sup>135</sup> Fletcher *op. cit.*, n. 132, p. 68.

<sup>136</sup> J.A. Clarke, ‘They, Them, and Theirs’ (2019) 132 *Harvard Law Review* 894, 940.

<sup>137</sup> In the sense given to the term by Ingraham, as: ‘the view that institutionalized heterosexuality constitutes the standard for legitimate and prescriptive sociosexual arrangement’. C. Ingraham, ‘The Heterosexual Imaginary: Feminist Sociology and the Theories of Gender’ (1994) 12 *Sociological Theory* 203, 204.

<sup>138</sup> Gonzalez-Salzberg, *op. cit.*, n. 12, at 534.

<sup>139</sup> Towle and Morgan, *op. cit.*, n. 4, at 485; D. A. Davis, ‘The Normativity of Recognition: Non-binary Gender Markers in Australian Law and Policy’ (2017) 24 *Advances in Gender Research* 227, at 234 and 238; G. Baars, ‘Queer Cases Unmake Gendered Law, Or, Fucking Law’s Gendering Function’ (2019) 45 *Australian Feminist Law Journal* 15, at 60.

While the shortfalls of the Belgium judgment might be less apparent, they are not limited to the validation of the biological/genetic/anatomical truth of sex. A problem that can be highlighted is its (over)reliance on self-determination as the pinnacle of gender freedom. While the ideal of self-determining our own genders might sound idyllic, the understanding we have of gender, and of the availability of gender categories, is culturally dependent and necessarily embedded in our social context.<sup>140</sup> Therefore, it is possible to argue that the idea of gender self-determination is in itself a notion of culturally constrained autonomy, since it has already been contoured by the context in which we came into being.<sup>141</sup> This same context determines not only the availability of gender alternatives, but especially their desirability. The rulings of both courts provided recognition to a lesser or greater extent, but neither was able to disclose and engage with their societies' desire for non-binary people.

In 2021 the UK Supreme Court has an invaluable opportunity to ease some of the many components of the regulatory power that sustain in place the State's binary-only gender policy. While the Indian hijras have managed to break free from some of the *binanormative* legal legacies of the Empire,<sup>142</sup> these ideas continue to resonate within the British gender system. In March 2020, a Court of Appeal of England and Wales confirmed a 2018 High Court decision that rejected the claim of Christie Elan-Cane, who had requested to be issued with a 'gender X' passport, so as to obtain recognition to their 'non-gendered' identity.<sup>143</sup> The scope of this case is much more restricted than the aforementioned Belgian one, as it is limited to the issuance of a passport; a possibility contemplated by the International Civil

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<sup>140</sup> J. Butler, *Undoing Gender* (2004) 94.

<sup>141</sup> D. Gonzalez-Salzberg, 'A queer approach to the *Advisory Opinion 24/2017* on LGBT rights' in *Research Methods for International Human Rights Law: Beyond the Traditional Paradigm*, eds. D. Gonzalez-Salzberg and L. Hodson (2019) 111-112.

<sup>142</sup> Indian Supreme Court, *National Legal Services Authority v. Union of India and others* (2014) 5 SCC 438; Indian Supreme Court, *Navtej Singh Johar and others v. Union of India and others* (2018), Writ Petition (Criminal), No.76 of 2016.

<sup>143</sup> *R (on the application of Christie Elan-Cane) v. Secretary of State for the Home Department and Human Rights Watch (intervener)* [2018] EWHC 1530 (Admin); *The Queen (on the application of Elan-Cane) (Appellant) v Secretary of State for the Home Department (Respondent) and Human Rights Watch (Intervener)* [2020] EWCA Civ 363.

Aviation Organisation – the UN specialised agency that regulates civil aviation – and which has already been adopted by different countries.<sup>144</sup> While the lower courts have acknowledged, to a certain extent, the non-gendered identity of the claimant, as well as the existence of non-binary identities more broadly,<sup>145</sup> both courts agreed that the recognition of a gender beyond male and female was a topic that so far remained within the State’s ambit of discretion, which meant that the binary-only gender policy followed by Her Majesty’s Passport Office could not be seen as unlawful.

Nevertheless, since the rulings against Elan-Cane, other British courts have started to provide an incipient protection to non-binary individuals. This took place through the recognition of non-binary gender identities as a protected characteristic both from persecution, for the purpose of asylum claims,<sup>146</sup> as well as from discrimination more broadly, under the Equality Act 2010.<sup>147</sup> What is now at stake, before the Supreme Court, is merely the acknowledgement that the UK Government must join the existent legal trend towards recognition of non-binary identities. This is a progressive move that is unlikely to happen without a ruling from the Court, as illustrated by the Conservative Government’s refusal to seriously review its dated regulation on legal gender recognition.<sup>148</sup> If the Court dares to take this step, it would be ideal if it avoids the temptation of seeking an elusive truth of the claimant’s identity in essentialist grounds and, more importantly, acknowledges the desirability of re-thinking gender beyond the binary.

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<sup>144</sup> The list includes Australia, Canada, Denmark, Germany, India, Malta, Nepal, New Zealand and Pakistan.

<sup>145</sup> *R (on the application of Christie Elan-Cane) v. Secretary of State for the Home Department and Human Rights Watch (intervener)* [2018] EWHC 1530 (Admin), paras. 120 and 151; *The Queen (on the application of Elan-Cane) (Appellant) v Secretary of State for the Home Department (Respondent) and Human Rights Watch (Intervener)* [2020] EWCA Civ 363, paras. 46 and 58.

<sup>146</sup> Upper Tribunal (Immigration and Asylum Chamber), *Mx M (gender identity – HJ (Iran) - terminology) El Salvador* [2020] UKUT 00313 (IAC), 30/09/2020.

<sup>147</sup> Employment Tribunal, *Ms. Rose Taylor v. Jaguar Land Rover Limited* (Case No: 1304471/2018), 26/11/2020 (reasons).

<sup>148</sup> The Minister for Women and Equalities' Written Ministerial Statement to the House, on the Government’s response to the consultation on the Gender Recognition Act 2004 (22 September 2020).

## CONCLUSION

Contemporary claims for gender recognition beyond the binary have the potential to destabilise the gender system.<sup>149</sup> It is not surprising that reactionary forces continue to object to any manifestation of gender that dares to challenge the traditional man/woman divide.<sup>150</sup> However, as the discussion in this article evidences, the existence of gender categories beyond the binary neither secures, nor necessarily facilitates, a greater flexibility of gender norms.<sup>151</sup> A clear warning that should be rescued from our analysis is that third genders can be accommodated for in different historical and cultural settings with little impact on the gender binary as we know it.

The existence of a specific third gender identity can risk becoming an enticing trap that narrows the ability to imagine different ways in which gender can exist beyond the binary.<sup>152</sup> Even a plurality of non-binary gender options can lead to restrictive identities, if each requires conformity with narrower confines.<sup>153</sup> If we are willing to embrace a queer commitment to the continuous interrogation of the regulatory discourses that promote the construction of gender, we can make use of the lessons from this article and avoid reproducing third gender categories that limit the possibilities to (re)imagine gender and that favour the protection of heterosexuality as norm.

We should be willing to question the technologies of power/knowledge, the discourses, practices and institutions, that insist on the preservation of the gender system as it currently exists in the West. So far, the Belgian Constitutional Court seems to have been the only judicial authority open to (re)conceive gender as a fluid and non-binary construct. While

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<sup>149</sup> S. Monro, 'Towards a Sociology of Gender Diversity: The Indian and UK Cases' in *Transgender Identities*, eds. S. Hines and T. Sanger (2010) 252.

<sup>150</sup> The Vatican (Congregation for Catholic Education), 'Male and Female He Created Them: Towards a Path of Dialogue on the Question of Gender in Education' (2019).

<sup>151</sup> Agrawal, *op. cit.*, n. 6, at 294.

<sup>152</sup> Towle and Morgan, *op. cit.*, n. 4, at 484; Clarke *op. cit.*, n. 135, at 991.

<sup>153</sup> Agrawal, *op. cit.*, n. 6, at 294.

it still failed to avoid the pitfall of the naturalisation of 'sex', this misstep might have been due to the Court's acceptance of the claimant's own views, which reinforces the importance of being aware of our own beliefs.

A final lesson to extract from our exploration of the regulatory regimes present in our case-studies is that societal desire can be seen as a central element for carving up a space for a gender category beyond the traditional binary. While this desire for non-binary people is certainly latent in current Western societies, this has so far failed to transpire in the rulings of the courts. It is up to us to imagine and demand our own possible existence beyond the gender binary and for our societies to acknowledge and validate our own desires.