

**SEXUALLY DIMORPHIC BODIES:  
A PRODUCTION OF BIRTH CERTIFICATES**

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## 1. Introduction

The ubiquitous registration of a newborn's gender/sex in birth certificates is based on the idea that humans are born with sexually dimorphic bodies that can be easily classified into female and male. Marking an F or M on a form is considered a mere formality that reflects a natural state of affairs and is thought to follow an objective assessment of newborn's genitals. However, as shown in this article, the binary identification of sex or gender as part of civil registration processes does something else than document a state of affairs. It actually produces and shapes bodies in order to conform to understandings of sexual dimorphism and reinforces the idea that humans come in two clearly and objectively different genders/sexes with diverging body appearances. Not only does the registration of legal gender/sex reinforce social norms that lead to the erasure of intersex<sup>2</sup> bodies, but it also disciplines the development of bodies of endosex<sup>3</sup> cis<sup>4</sup> and trans<sup>5</sup> persons, leading to distinctively male and female appearances. This is also true for legal registration systems that provide 'third' or more gender/sex categories. Thus, this article aims to show how legal gender/sex registration procedures are productive of sexed body appearances and demonstrate that sexed bodies are neither static nor pre-existing, but constantly in the process of *becoming*, influenced by socio-legal procedures, including gender/sex registration.

The theoretical framework underpinning my analysis draws on a Foucauldian view of power as both constraining and productive. It further builds upon feminist, poststructuralist and new materialist perspectives on the production of sex and gender, and biological research on social influences on sexed bodies, notably by Anne Fausto-Sterling. In order to show how gender/sex registration is 'a cultural norm which governs the materialization of bodies'<sup>6</sup>, I will discuss a variety of domestic case law, in particular examples from Australian jurisdictions. The reason why Australian jurisdictions take centre stage in this article is that the gender/sex registration procedures in this part of the world are reflective of developments and discussions, such as concerning 'non-binary' gender/sex categories, which are prevalent also in other legal systems. Analysing Australian laws concerning gender markers on birth certificates can therefore reveal *general* patterns of how laws are productive of body appearances. Since the norms regulating

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<sup>2</sup> Intersex persons 'mean people who are born with physical sex characteristics that do not fit medical norms for female or male bodies'. See: Morgan Carpenter and Intersex Human Rights Australia, *Identification Documents* (online) 4 January 2019 <<https://ihra.org.au/identities/>> (last accessed 26 March 2019).

<sup>3</sup> Endosex is a new term to denote persons with sex characteristics that fit medical norms for female and male bodies.

<sup>4</sup> Cis persons identify with the gender that was assigned to them at birth.

<sup>5</sup> Trans persons identify with a gender different from the one that was assigned to them at birth.

<sup>6</sup> Judith Butler, *Bodies That Matter: On the Discursive Limits of 'Sex'* (Psychology Press 1993) xii.

legal gender/sex registration on official documents are many, especially in countries like Australia where respective laws are highly fragmented,<sup>7</sup> the article focuses only on the registration of legal gender/sex on birth certificates and the change of gender markers thereof.

The article continues in section II with an introduction into feminist and socio-biological theories on the materialisation of bodies. Section III discusses the practice of registering gender/sex at birth, by addressing its harmful effects on the bodies of intersex newborns' and its impacts on the body development of children and adults in general. Section IV analyses the reproduction of sexually dimorphic bodies through laws on changing the gender marker on birth certificates, by focusing on requirements often demanded for this purpose, such as body alterations and medical and/or psychological treatment. It also examines the consequences of introducing 'third' legal gender categories for the bodies of intersex and trans persons. The conclusion builds upon the previous analysis to propose considering the progressive elimination of the legal gender/sex registration and briefly discuss the legal developments in Tasmania.

## 2. The Materialisation of Bodies

Almost simultaneously as replacing the term *gender* with *sex* on US government websites and starting to push for the same in UN documents in 2018,<sup>8</sup> the Trump administration issued a draft policy document holding that 'sex means a person's status as male or female based on immutable biological traits identifiable by or before birth'<sup>9</sup>. The use of the term *sex* instead of *gender* and the reference to 'immutable biological traits' in the document is intended to support the claim that the division of society into two genders is fixed and relies on objective biological

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<sup>7</sup> As opposed to most civil law countries, Australia does not have a central registry that records all personal status information and serves public institutions with data. Instead, different registries have their own records unconnected from each other. The federalist nature of Australia adds another level of complexity to the change of gender markers on official documents, since regulations and laws vary among the different states and territories. See: Marjolein van den Brink, Philipp Reuß and Jet Tigchelaar, 'Out of the Box? Domestic and Private International Law Aspects of Gender Registration: A Comparative Analysis of Germany and the Netherlands' (2015) 17 *European Journal of Law Reform* 282, 284; Mary Keyes, 'Country Report for Australia' in Marjolein van den Brink and Jet Tigchelaar (eds), *M/V en verder: Seksregistratie door de overheid en de juridische positie van transgenders* (Ministerie van Veiligheid & Justitie 2014) 126.

<sup>8</sup> Lilly Dancyger, 'For Trans People Seeking Passports, State Department Abruptly Changes Language' *Rolling Stone* (online) 13 September 2018 <<https://www.rollingstone.com/culture/culture-news/transgender-passport-sex-gender-state-department-723984/>> (last accessed 29 March 2019); Julian Borger, 'Trump Administration Wants to Remove "gender" from UN Human Rights Documents' *The Guardian* (online) 25 October 2018 <<https://www.theguardian.com/world/2018/oct/24/trump-administration-gender-transgender-united-nations>> (last accessed 29 March 2019).

<sup>9</sup> Erica L Green, Katie Benner and Robert Pear, "'Transgender' Could Be Defined Out of Existence Under Trump Administration' *The New York Times* (online) 10 December 2018 <<https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>> (last accessed 18 March 2019).

differences between women and men. This is possible since many people, including gender experts, would argue that sex and gender are two different concepts, with the former referring to biological differences in sex characteristics of women and men and the latter denoting socially constructed roles, norms and identities.<sup>10</sup> Hence, shifting the discussion back to sex, instead of gender, allows conservative governments to revive old arguments on biological determinism, which find the reasons for gender divisions in *nature* instead of societal structures and discourses.

Establishing distinct meanings of sex and gender was a successful tool of second-wave feminisms to argue against any naturalness of gender roles and women's systematic oppression.<sup>11</sup> At the same time, the focus on gender left the assumption that sex is a static, immutable and dimorphic physical characteristic unchallenged. The binary *sex vs. gender* generated other dichotomies, such as *nature vs. nurture* and *body vs. mind*, which framed the binary's first element as an immutable state and the second one as subject to societal influences. This conceptual dualism has not remained without contestation by feminists. For example, Moira Gatens criticized the sex/gender distinction in its early days for assuming that the body is a neutral and passive object on which social norms are inscribed.<sup>12</sup> In her eyes, separating sex and gender and focusing merely on the latter as political tool left out a critique of corporeality and the importance of bodies for establishing gender relations.<sup>13</sup> Instead, she argues for a theory of sexual differences, which recognizes that the 'imaginary body is developed, learnt, connected to the body-image of others and is not static'<sup>14</sup> but becomes lived,

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<sup>10</sup> For example, see the definitions on sex and gender given by the UN Women Gender Equality Glossary, which defines sex (biological sex) as "[t]he physical and biological characteristics that distinguish males and females" and gender as referring "to the roles, behaviors, activities, and attributes that a given society at a given time considers appropriate for men and women". See: UN Women Trainings Centre, *Gender Equality Glossary* (online) <<https://trainingcentre.unwomen.org/mod/glossary/view.php?id=36>> (last accessed 29 March 2019).

<sup>11</sup> Even though the term *gender* is often associated with second-wave feminism, its origins can be traced back to John Money, a psychologist responsible for promoting the undertaking of "cosmetic" genital surgeries on intersex infants. Money argued that a child's gender identity is completely malleable and develops in concordance with the assigned gender role as long as the environment does not have any doubt about the child's sex. To erase any doubts, intersex genital surgeries should be performed on children. Thus, the separation of sex and gender served as a rationale for institutionalising medical practices leading to violations of bodily integrity. See: Morgan Carpenter, 'The "Normalisation" of Intersex Bodies and "Othering" of Intersex Identities' in Jens Scherpe, Anatol Dutta and Tobias Helms (eds), *The Legal Status of Intersex Persons* (Intersentia 2018) 445 at 482–484.

<sup>12</sup> Moira Gatens, 'A Critique of the Sex/Gender Distinctions' in Judith Allen and Paul Patton (eds) *Beyond Marxism? Interventions After Marx* (Intervention Publications 1983) 143.

<sup>13</sup> Mary Walsh, 'Twenty Years since "a Critique of the Sex/Gender Distinction": A Conversation with Moira Gatens' (2004) 19 *Australian Feminist Studies* 213 at 213.

<sup>14</sup> Gatens above note 12 at 151.

situated and materialized through historical practices.<sup>15</sup> By borrowing from Michel Foucault and Baruch Spinoza, she contends that ‘the sexed body is not a product of nature but is rather constituted as dichotomously sexed through elaborate and pervasive practices that act on and through the body’<sup>16</sup>. Thus, there is no such thing as a ‘true’ nature of the body, since the body is constituted through a continuous process and varies according to time and space.<sup>17</sup>

The nature of sex and bodies has also been debated among poststructuralist and queer scholars. Notably, Judith Butler destabilised the view that sex and gender can be separated within feminist circles by stating that “‘sex’ is as culturally constructed as gender; indeed perhaps it was always already gender”<sup>18</sup>. She rejected the assumption that sex is solely determined by biological static factors by arguing that cultural and social meanings are constantly inscribed onto bodies. In addition, Butler describes the compulsory integration into the gender/sex binary through discourses of heterosexuality as intrinsically violent, a perspective that helps in the following analysis to reveal some of the violence inflicted on bodies by legally classifying them into (binary) gender/sex categories.<sup>19</sup>

Partly as a reaction to the poststructuralist focus on discourses and language as constituents of the social world, *New Materialism* emerged in the 1990s taking materiality, such as bodies, as the starting point for ontological elaborations.<sup>20</sup> New Materialists reject the Cartesian-Newtonian dichotomy of separating matter/body/object from mind/identity/subject, but perceive bodies as lively matter that exhibits agency; in other words, the material world emerges from ‘processes of materialization of which embodied humans are an integral part’<sup>21</sup>. They borrow the basic premises of modern particle physics, which had radically changed the Cartesian or Newtonian understanding of matter as stable and solid towards an idea of matter as being embedded in a complex and dynamic process of transformation influenced by various forces.<sup>22</sup> In this sense, even though New Materialists and Poststructuralists differ significantly

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<sup>15</sup> Elizabeth Grosz argues similarly that ‘the body, as much as the psyche or the subject, can be regarded as a cultural and historical product’. See: Elizabeth Grosz, *Volatile Bodies: Toward a Corporeal Feminism* (Indiana University Press 1994) 87.

<sup>16</sup> Moira Gatens, ‘Towards a Feminist Philosophy of the Body’, *Imaginary Bodies* (Routledge 1995) 52.

<sup>17</sup> As above at 57.

<sup>18</sup> Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990) 7.

<sup>19</sup> As above at 111–127; Judith Butler, *Undoing Gender* (Routledge 2004) 67, 207.

<sup>20</sup> Diana H Coole and Samantha Frost, ‘Introducing the New Materialisms’ in Diana H Coole and Samantha Frost (eds), *New materialisms: ontology, agency, and politics* (Duke University Press 2010) 1 at 2–3.

<sup>21</sup> As above at 9.

<sup>22</sup> As above at 10–13; Karen Barad, ‘Posthumanist Performativity: Toward an Understanding of How Matter Comes to Matter’ (2003) 28 *Signs: Journal of Women in Culture and Society* 801; Diana H Coole, ‘The Inertia Of Matter and the Generativity of Flesh’ in Diana H Coole and Samantha Frost (eds), *New materialisms: ontology, agency, and politics* (Duke University Press 2010) 92.

in their understanding of *how* bodies become constituted, they share the idea that sex and gender, thus matter and human action, constitute *one* dynamic process of continuous re-enactment and production. Bodies are thus not static or ahistorical but continuously *becoming*.

The (in)separability of sex and gender is not only discussed in sometimes quite abstract social theories but also reflected in empirical research in the fields of biology.<sup>23</sup> Fausto-Sterling was one of the first biologists who challenged the idea that sex characteristics are static and solely determined by genes.<sup>24</sup> She instead argues that ‘living bodies are dynamic systems that develop and change in response to their social and historical context’<sup>25</sup>. In order to constitute a middle ground between biological determinists and cultural determinists, Fausto-Sterling uses the term *gender/sex* to refer to the inseparability of materiality and the social world.<sup>26</sup> Legal documents commonly use the words sex and gender interchangeably, and it often remains unclear whether states register a person’s body appearance (sex) or role/identity (gender), or whether they assume that the two always correlate. Due to this uncertainty, and in light of the theories on the inseparability of the two, I follow Fausto-Sterling’s approach in using predominantly the term *gender/sex* in this article.

While conservative forces continue to use the term *sex* for referring to stable and immutable body characteristics, feminists such as Gatens, poststructuralists, new materialists and biologists have rejected this simplified view on biology. Bodies might indeed be biological and natural, but they are not static or immutable. Equating biology and nature with determinism and staticity ignores that humans are constantly moulding and shaping their bodies, such as through cultural and religious practices, including body art (e.g. piercings, tattoos), physical activity and medico-technical interventions. All of these practices are influenced by gender norms. For example, arm muscle training is recommended for masculinising the body, but one should do diets and specific exercises for hips and bottoms for making the body more feminine. Intersex, female or male genital mutilations also exist due to gendered societal, religious and medical

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<sup>23</sup> Most recently, also researchers in neurosciences have refuted the idea that girls and boys are born with differences in brains, but argue that sex differences in brains are also due to different socialisation. See, for example, Rebecca M Jordan-Young, *Brain Storm: The Flaws in the Science of Sex Differences* (Reprint edition, Harvard University Press 2011); Gina Rippon, *The Gendered Brain: The New Neuroscience That Shatters the Myth of the Female Brain* (Bodley Head 2019).

<sup>24</sup> Anne Fausto-Sterling, *Myths Of Gender: Biological Theories About Women And Men, Revised Edition* (Basic Books 1992); Anne Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* (Basic Books 2000); Anne Fausto-Sterling, *Sex/Gender: Biology in a Social World* (Routledge 2012).

<sup>25</sup>As above 2012 at XIII.

<sup>26</sup> Anne Fausto-Sterling, *Sexe, Genre, Sexualités - Nos Corps, Entre Nature et Culture* (online video) UNIGE, Geneva, 7 March 2019 <[https://mediaserver.unige.ch/play/116747?fbclid=IwAR0qCEdW9TxwNCpi69rg\\_XZPBfXOo\\_zz6RW0cejI\\_gjxxSVZaArliAk9BPg](https://mediaserver.unige.ch/play/116747?fbclid=IwAR0qCEdW9TxwNCpi69rg_XZPBfXOo_zz6RW0cejI_gjxxSVZaArliAk9BPg)> (last accessed 15 March 2019).

norms on how genitals should like and which functions they should perform. Thus, (sexed) bodies are constantly being moulded by social norms, biopolitics and laws, instead of being pre-discursive and static objects. Legal gender/sex registration procedures are examples of practices shaping bodies into what they are expected to be: sexually dimorphic.

### 3. Birth Registration as a Constitutive Act of Sexual Dimorphism

Almost all countries worldwide require that a newborn's gender/sex is registered as part of the birth registration procedure.<sup>27</sup> While states are quite concerned with defining the conditions under which people are allowed to change their gender marker on birth certificates, if they are allowed at all, they usually do not provide a definition of what makes a newborn a girl or a boy in the first place. Depending on the specific birth registration procedures in a jurisdiction, assigning a gender/sex to an infant is usually delegated to the medical profession or parents. For example, in Australian states and territories, the medical personnel involved in childbirth is obliged to notify the registry about the birth of the child.<sup>28</sup> The information provided by the medical staff, such as concerning a child's gender/sex, is checked against the information supplied by the parents once they register the child officially.<sup>29</sup> Thus, in Australia, the assignment to a legal gender/sex category is based on the assessment of a child's primary sex characteristics, notably external genitalia, by doctors and midwives. Genitalia are assumed to speak for themselves. The assessment thus becomes a matter of 'common sense' as much as of 'objective' medical knowledge. However, as shown in this section, the assignment of gender/sex at birth does not reflect a pre-existing state of affairs, but is based on subjective assumptions of normality and the idea that the appearance of external genitals defines legal identity and gender identity.<sup>30</sup> This renders intersex bodies either invisible or an illegitimate

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<sup>27</sup> A few countries, such as Austria, Germany and the Netherlands, make exceptions for intersex newborns (see section 3.2). Malta became in 2015 the first country worldwide that allows any parents to postpone the gender/sex registration of their newborn until the child's 18<sup>th</sup> birthday, no matter whether the child is intersex or endosex. In addition, as briefly discussed in the conclusions, Tasmanian legislative bodies adopted on 10 April 2019 a new bill which generally eliminates references to gender/sex on birth certificates, unless parents explicitly request a gender marker on their newborn's birth certificate or individuals above the age of 16 request this for themselves. See: Gender Identity, Gender Expression and Sex Characteristics Act, Pub. L. No. XI (2015), para. 7(4); Justice and Related Legislation (Marriage and Gender Amendments) Act 2019 (TAS), Pub. L. No. 7 (2019), para. 22.

<sup>28</sup> Keyes above note 7 at 128.

<sup>29</sup> As above.

<sup>30</sup> Interestingly the Inter-American Court of Human Rights (IACtHR) has become sensitive to the constructed nature of sex. It defined in its advisory opinion on Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples, published in 2018, the concept of "sex assigned at birth" as recognising sex as a social construct and holding that "[s]ex assignment is not an innate biological fact; rather, sex is assigned at birth based on the perception others have of the genitalia". See: *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples* (2017) Inter-American Court of Human Rights Advisory Opinion OC-24/17, Series A No. 24 para 32(b).

‘exception’, and ignores that gender-specific laws, such as those concerning physical activity, (re)produce sexual difference.

### 3.1. The Alignment of Body and Legal Identity

Most legal systems provide only F or M as options for gender markers on official documents, such as birth certificates, assuming that everybody can be classified into these categories. Following the logic of Butler that the compulsory integration in the gender binary is a violent act, all children experience some form of violence when being assigned to one of these two categories. However, due to the belief that the body must correlate with the (legal) identity in an endosexnormative and cisnormative way, gender/sex registration at birth can have especially detrimental consequences for the right to bodily integrity of intersex children. Intersex children are regularly subjected to medical interventions that do not serve any health needs, but are only conducted for cosmetic goals, in order to make their bodies fit normative understandings of female and male sex. These interventions include genital surgeries, also called *genital mutilations*, which regularly result in loss of sexual function and sensation, demand follow-up surgeries, cause infertility, bring about the need for lifelong hormone replacement therapies, create trauma and generate many other problems, such as low self-esteem caused by social stigma.<sup>31</sup> The idea behind these interventions is that the body, the legal identity and the gender identity/role must always correlate. Mauro Cabral Grinspan and Morgan Carpenter state that ‘[i]ntersex infants interrupt a naturalized association between external genitalia and “true” sex, gender identity, gender expression, and sexual orientation’<sup>32</sup>. By deciding who should be assigned as a girl or a boy, doctors thus create the violent alignment of body and legal identity, which, in the words of Nancy Ehrenreich and Mark Barr, ‘creates males and females out of bodies that are, in fact, either/or, neither/both’<sup>33</sup>.

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<sup>31</sup> Morgan Carpenter, ‘The “Normalization” of Intersex Bodies and “Othering” of Intersex Identities in Australia’ (2018) *Journal of Bioethical Inquiry*; Dan Christian Ghattas, ‘Standing Up for the Human Rights of Intersex People’ in Jens Scherpe, Anatol Dutta and Tobias Helms (eds), *The Legal Status of Intersex Persons* (Intersentia 2018) 429 at 432.

<sup>32</sup> Mauro Cabral Grinspan and Morgan Carpenter, ‘Gendering the Lens: Critical Reflections on Gender, Hospitality and Torture’, in *Gender Perspectives on Torture: Law and Practice* (Centre for Human Rights and Humanitarian Law Anti-Torture Initiative American University Washington College of Law 2017) 183 at 187.

<sup>33</sup> Nancy Ehrenreich and Mark Barr, ‘Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of “Cultural Practices”’ (2005) 40 *Harvard Civil Rights-Civil Liberties Law Review* 71, 121.

Intersex rights activists have strongly denounced these ‘normalising’ medical interventions on intersex children as violations of their right to bodily integrity and self-determination.<sup>34</sup> As a result, international human rights bodies, such as the UN Committee on the Rights of the Child and the one against Torture, increasingly condemn intersex genital surgeries as human rights violations.<sup>35</sup> Nevertheless, research shows that genital surgeries conducted on non-consenting intersex children continue to be performed.<sup>36</sup> To my knowledge, only two jurisdictions worldwide, Malta and Portugal, have so far prohibited the practice.<sup>37</sup> The way the laws in these two countries are implemented and whether they contain adequate legal safeguards for protecting the rights of intersex children are yet to be explored.<sup>38</sup>

As intersex rights organisations have pointed out, it would be naive to think that if the legal registration of gender/sex was abolished, intersex children would no longer be subjected to genital surgeries.<sup>39</sup> For this, the prohibition of these medical practices and awareness raising to increase acceptance of *all* bodies would be needed. Nevertheless, legal gender/sex registration is one *cultural practice*, as Fausto-Sterling calls it, which institutionalises and normalises the binary gender/sex division in society and strengthens the assumption that body, gender identity/role and legal identity must correlate in a cisnormative and endosexnormative logic in order to be legally valid. This can have direct effects on bodies, exemplified by cases in

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<sup>34</sup> See, for example, Third International Intersex Forum, *Malta Declaration* (online) 2013 <<https://oieurope.org/malta-declaration/>> (last accessed 28 May 2018).

<sup>35</sup> See, for example, ‘Concluding Observation on Switzerland’ (Committee on the Rights of the Child 2015) CRC/C/CHE/CO/2-4 paras 42(b), 43(b); ‘Concluding Observations on the Second Periodic Report of South Africa’ (Committee on the Rights of the Child 2016) CRC/C/ZAF/CO/2 paras 39, 40(d); CAT Committee, ‘Concluding Observation on Germany’ (2011) CAT/C/DEU/CO/5 para 20; ‘Concluding Observations on the Seventh Periodic Report of France’ (Committee against Torture 2016) CAT/C/FRA/CO/7 paras 34, 35; ‘European Parliament Resolution on the Rights of Intersex People (2018/2878(RSP))’.

<sup>36</sup> Ulrike Klöppel, *Zur Aktualität Kosmetischer Operationen „uneindeutiger“ Genitalien Im Kindesalter* (Geschäftsstelle des Zentrums für transdisziplinäre Geschlechterstudien der Humboldt-Universität zu Berlin 2016); Josch Hoenes, Eugen Januschke and Ulrike Klöppel, *Häufigkeit Normangleichender Operationen „uneindeutiger“ Genitalien Im Kindesalter. Follow Up-Studie* (Prodekanin der Fakultät für Sozialwissenschaft Professur für Gender Studies Ruhr-Universität Bochum 2019); Morgan Carpenter and Intersex Human Rights Australia *Bodily Integrity* (online) 4 January 2019 <<https://ihra.org.au/bodily-integrity/>> (last accessed 27 March 2019).

<sup>37</sup> *Gender Identity, Gender Expression and Sex Characteristics Act* above note 27 at para 14; *Votação na Reunião Plenária n.º 72, Texto de substituição apresentado pela Comissão de Assuntos Constitucionais, Direitos, Liberdades e Garantias relativo à Proposta de Lei n.º 75/XIII/2.ª (GOV), Projetos de Lei n.ºs 242/XIII/1.ª (BE) e 317/XIII/2.ª (PAN) 2018.*

<sup>38</sup> Some intersex rights organisations have criticised these laws for not going far enough in the protection of intersex children, since the sanction mechanisms are weak, they do not address specific obstacles to access justice for intersex persons (e.g. statutes of limitations) nor do they create extraterritorial obligations. See: Stop IGM, *Portugal > New Law Fails to Protect Intersex Children from IGM* (online) 13 April 2018 <<http://stop.genitalmutilation.org/post/Portugal-New-law-fails-to-protect-intersex-children>> (last accessed 29 March 2019).

<sup>39</sup> IVIM / OII Deutschland, *Kennzeichen Divers - eine verpasste Chance für eine offenere und freundlichere Gesellschaft für alle* (online) 17 December 2018 <<https://oiiGermany.org/kennzeichen-divers/>> (last accessed 28 March 2019).

Argentina where parents could not receive any identification documents for their intersex newborn before subjecting the child to genital surgeries.<sup>40</sup> Thus, (binary) legal gender/sex registration supports the idea that a person's legal identity and gender identity depend on the appearance of sex characteristics, which can encourage the erasure of visible intersex variations through 'normalising' genital surgeries.

### 3.2. 'Othering' through Intersex-Specific Registration Procedures

While international human rights bodies have been rather responsive to claims made by intersex persons on the harmfulness of intersex genital surgeries,<sup>41</sup> domestic law-makers have often reacted by proposing a reform of gender/sex registration procedures, instead of outlawing the medical practices.<sup>42</sup> Some jurisdictions have introduced specific ways of registering the legal gender/sex of intersex newborns, based on the idea that these will 'reduce the risk that parents force their child to conform to a particular gender or subject them to gender assignment surgery'<sup>43</sup>. However, intersex community organisations strongly oppose specific ways of registering the gender/sex of intersex newborns, since there is no evidence that this protects the children concerned from 'normalising' medical procedures.<sup>44</sup> Instead, registering intersex children differently from endosex children can constitute a forced outing that enhances their stigmatisation.<sup>45</sup> It frames them as 'exception to the rule', which reinforces the assumption that sexual dimorphism is the norm and intersex persons a 'mistake' of nature. Gina Wilson argued once that 'a third sex category can be seen as a way of purifying the existing two sexes by

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<sup>40</sup> Cabral Grinspan and Carpenter above note 32 at 188; Justicia Intersex and StopIGM.org / Zwischengeschlecht.org, *Intersex Genital Mutilations Human Rights Violations Of Persons With Variations Of Sex Anatomy. NGO Report to the 6th and 7th Periodic Report of Argentina on the Convention against Torture (CAT) 2017* at 22.

<sup>41</sup> Above note 35.

<sup>42</sup> Germany changed the Personal Status Law as result of a recommendation received by the German Ethics Council, but has not yet legally regulated intersex genital mutilations, even though this was also recommended by the Ethics Council and was promised by the current German government in its coalition agreement. See: German Ethics Council, *Intersexuality. Opinion* (2013) at 163–167; 'Ein neuer Aufbruch für Europa. Eine neue Dynamik für Deutschland. Ein neuer Zusammenhalt für unser Land. Koalitionsvertrag zwischen CDU, CSU und SPD. 19. Legislaturperiode' 793–799.

<sup>43</sup> Letter by K. Gallagher, dated 15.04.2014, cited in Carpenter above note 11 at 485. See also: Van den Brink, Reuß and Tigchelaar above note 7 at 286.

<sup>44</sup> Carpenter above note 31.

<sup>45</sup> Gina Wilson and OII Australia, *Third Sex Redux* (online) 14 June 2013 <<https://oii.org.au/22663/third-sex-redux/>> (last accessed 8 February 2019); Dritte Option, *Stellungnahme Zur Änderung Des §22 PStG* (online) <<http://dritte-option.de/stellungnahme-zur-pstg-aenderung/>> (last accessed 8 February 2019); ISNA, *Does ISNA Think Children with Intersex Should Be Raised without a Gender, or in a Third Gender?* (online) <<http://www.isna.org/faq/third-gender>> (last accessed 8 February 2019); Carpenter above note 31.

allowing people who are anatomically “impure” to be assigned otherwise’<sup>46</sup>. This ‘othering’ process can lead to even more medical interventions being performed on intersex children, since parents and doctors might feel pressured to make the children’s bodies fit normative understandings of body appearance in order to be able to register a binary gender/sex.<sup>47</sup>

In addition, the majority of intersex persons identify with a binary gender/sex, mostly with the one assigned at birth, and only a minority identifies with a category other than female or male.<sup>48</sup> The assumption that all intersex persons identify with a non-binary<sup>49</sup> gender identity is based on biological determinism. Therefore, as long as gender/sex continues to be legally registered, intersex community organisations support the assignment of a binary category to intersex newborns, while keeping in mind that, like endosex children, intersex children develop diverse gender identities that do not always correspond to the one assigned at birth.<sup>50</sup>

The Netherlands, Austria and Germany, for instance, provide exceptional procedures for registering the legal gender/sex of intersex children. In all three countries, intersex newborns can initially be registered without any legal gender/sex or, in the latter two countries, permanently registered with the category *divers*.<sup>51</sup> This is similar to the situation in the Australian Capital Territory (ACT), where a child’s gender/sex must only be recorded ‘if the sex of the child is known’<sup>52</sup> and parents can choose among the categories *female*, *male*, *unspecified*, *indeterminate* and *intersex*.<sup>53</sup>

The introduction of a specific gender/sex registration for intersex newborns in Germany in 2013 was met with strong criticism from intersex community organisations, since it was understood

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<sup>46</sup> Gina Wilson and *OII Australia*, *On Norrie v NSW Registrar of Births, Deaths and Marriages* (online) 22 June 2013 <<https://oii.org.au/22681/norrie-v-nsw-registrar-of-births-deaths-and-marriages/>> (last accessed 9 April 2017).

<sup>47</sup> Dritte Option above note 45; Carpenter above note 2.

<sup>48</sup> Carpenter above note 2; Tiffany Jones, ‘Intersex and Families: Supporting Family Members with Intersex Variations’ (2017) 17 *Journal of Family Strengths* 1 at 37.

<sup>49</sup> Non-binary is often used as umbrella term to refer to gender identities that differ from common notions of women and men.

<sup>50</sup> Third International Intersex Forum above note 34; *Darlington Statement* (online) para 8(c) <<https://oii.org.au/darlington-statement/>> (last accessed 14 September 2017).

<sup>51</sup> The exact procedures concerning the blank gender/sex registration for intersex children differ in the three countries. See: Personenstandsgesetz 2007 paras 22(3), 45(b); Bundesministerium Inneres, ‘BMI-VA1300/0528-III/4/b/2018. Verwaltungsangelegenheiten - Sonstige; Personenstandswesen Erkenntnis Des VfGH Vom 15. Juni 2018, G 77/2017-9, Zu § 2 Abs. 2 Z 3 PStG 2013 - Umsetzung Zu Varianten Der Geschlechtsentwicklung (“3. Geschlecht”); Dutch Civil Code Art 1:19d.

<sup>52</sup> ACT Government, *Birth Registration Statement* (online) <[https://www.accesscanberra.act.gov.au/app/answers/detail/a\\_id/3573](https://www.accesscanberra.act.gov.au/app/answers/detail/a_id/3573)> (last accessed 6 February 2019).

<sup>53</sup> As above.

as creating the *obligation* to postpone the gender/sex registration of intersex newborns.<sup>54</sup> Only in 2018, was it clarified that keeping the gender/sex registration blank or choosing ‘divers’ are *options* for parents with intersex children in Germany, not an obligation.<sup>55</sup> Even though local organisations welcomed this clarification, they argued that legal gender/sex registration should be eliminated for *all* children, since this would avoid the ‘othering’ and outing of intersex children.<sup>56</sup> Moreover, they argued that no reform of the personal status law could effectively protect intersex children from genital mutilations, which is why these practices must be prohibited.<sup>57</sup> Thus, the idea that sexual dimorphism is the (medical) norm is not challenged by specific gender/sex registration procedures, since they reinforce the children’s risk of being subjected to genital surgeries by ‘othering’ them, especially in light of an absence of a prohibition of these practices.

### 3.3. Shaping Bodies through Gender-Specific Legal Rights

So far, I have analysed how legal gender/sex registration produces sexual dimorphism by rendering intersex bodies either invisible or an illegitimate ‘exception to the rule’. This section discusses the effects of legal gender/sex registration on the body development of *all* people, including intersex and endosex persons. Fausto-Sterling stressed in a lecture at the University of Geneva in 2019 that, contrary to the common belief, gender/sex is not binary, but a continuum.<sup>58</sup> According to her, the binary is imposed and naturalised through a variety of cultural practices, most notably birth certificates.<sup>59</sup> In this sense, the F or M markers on birth certificates do not (merely) reflect differences in babies’ sexed bodies, but also signal the direction in which they should develop. Various studies have shown how girls and boys develop differences in their use of bodies, such as in games and sports, due to their different ways of being socialised.<sup>60</sup> Women’s bodies are in particular often influenced by cultural beauty

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<sup>54</sup> OII Germany, *PM: Mogelpackung Für Inter\*: Offener Geschlechtseintrag Keine Option. Pressemitteilung Der Internationalen Vereinigung Intergeschlechtlicher Menschen (IVIM) / Organisation Intersex International* (online) 7 February 2013 <<http://www.intersexualite.de/index.php/pm-mogelpackung-fur-inter-offener-geschlechtseintrag-keine-option/>> (last accessed 10 April 2019); Dritte Option above at 39.

<sup>55</sup> IVIM / OII Deutschland above note 39.

<sup>56</sup> As above.

<sup>57</sup> As above.

<sup>58</sup> Fausto-Sterling above note 26.

<sup>59</sup> As above.

<sup>60</sup> See, for example, Anne Fausto-Sterling and others, ‘Multimodal Sex-Related Differences in Infant and in Infant-Directed Maternal Behaviors during Months Three through Twelve of Development.’ (2015) 51 *Developmental Psychology* 1351; Rohan M Telford and others, ‘Why Are Girls Less Physically Active than Boys? Findings from the LOOK Longitudinal Study’ (2016) 11 *PLOS ONE* e0150041; Iris Marion Young, ‘Throwing Like a Girl: A Phenomenology of Feminine Body Comportment Motility and Spatiality’ (1980) 3 *Human Studies* 137.

standards, which, for instance, result in the undertaking of cosmetic surgeries and diets. As shown in this section, in addition to social norms that affect girls and boys differently, legal norms help to realize sexually dimorphic bodies by subjecting people registered as ‘women’ or ‘men’ to different regimes of laws on physical activity, such as in sports and employment law. Being declared a *boy* or *girl* after birth does not only lead to the imposition of a social role but can also generate specific rights and duties. Some laws that continue to treat women and men differently in certain countries have direct effects on the development of distinctively masculine and feminine traits, such as laws regulating sports and manual labour. For example, women and girls often face legal barriers in their exercise of sports, such as in Saudi Arabia, where physical education for girls in public schools was banned until 2017.<sup>61</sup> The systematic prevention of women and girls from doing physical exercise, not only in schools but also in external facilities, has been identified as one reason for the high level of obesity among Saudi women, showing how laws can shape bodies.<sup>62</sup> Moreover, many sport disciplines bear gender-specific restrictions and rules. For instance, there is no professional American Football league for women in the United States, apart from the highly sexualised Lingerie Football League, and, until now, men cannot compete in two traditionally ‘feminine’ disciplines that necessitate gracile body appearances and movements, synchronised swimming and rhythmic gymnastics, at the Olympic Games.<sup>63</sup>

Apart from gender-specific regulations in the field of sports, many countries continue to impede women from working in certain employment sectors involving manual work, such as mining, construction and agriculture.<sup>64</sup> This can influence the development of differences in women’s

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<sup>61</sup> Human Rights Watch, *Saudi Arabia: State Schools to Allow Girls’ Sports. Key Reforms to Male Guardianship System Still Needed* (online) 13 July 2017) <<https://www.hrw.org/news/2017/07/13/saudi-arabia-state-schools-allow-girls-sports>> (last accessed 21 March 2019).

<sup>62</sup> Human Rights Watch, “*Steps of the Devil*”. *Denial of Women’s and Girls’ Rights to Sport in Saudi Arabia* (online) 2012 <<https://www.hrw.org/report/2012/02/15/steps-devil/denial-womens-and-girls-rights-sport-saudi-arabia>> (last accessed 21 March 2019).

<sup>63</sup> The Tokyo Organising Committee of the Olympic and Paralympic Games, *Event Programme for the Tokyo 2020 Games Finalised!* (online) <<https://tokyo2020.org/en/news/notice/20170610-01.html>> (last accessed 3 April 2019). Interestingly, gender markers on birth certificates are not always the decisive element for the classification of athletes into gender categories in international sports law. For example, the Court of Arbitration for Sport decided recently in the *Caster Semenya* case that naturally produced testosterone can be lawfully used as criterion to exclude certain women from women’s sport events in specific athletic disciplines. This problematic definition of ‘sportswoman’ also produces sexually dimorphic bodies, since some women must ‘feminise’ their bodies by artificially reducing their natural testosterone production in order to be able to compete in women’s sport events. See: [Mokgadi Caster Semenya v. International Association of Athletics Federations & CAS Athletics South Africa v. International Association of Athletics Federations, No. 2018/O/5794; 2018/O/5798 \(Court of Arbitration for Sport April 30, 2019\).](#)

<sup>64</sup> International Bank for Reconstruction and Development / The World Bank, *Women, Business and the Law* (2018) at 14.

and men's body appearance, since they are differently exposed to physical labour. The conscription to the military, which, if practised, is mostly mandatory only for men, is another example for how bodies of young women and men are put under different conditions influencing their appearances.<sup>65</sup> Thus, assigning people an F or M does not only influence the way how their bodies develop as a result of gender-specific social norms, but can also prompt the development of distinctively female/feminine or male/masculine body traits by subjecting them to different legal norms.

#### 4. Dimorphic Bodies through Changes of Gender/Sex Markers on Birth Certificates

Apart from registering gender/sex at the time of birth, also procedures to change gender markers on birth certificates later on in life influence the development of bodies towards sexually dimorphic appearances. Since some people do not identify with the gender/sex assigned at birth, certain jurisdictions have introduced procedures, often called *gender recognition procedures*, which enable adults and sometimes minors to modify their gender/sex on official documents. However, most countries with gender recognition procedures require the applicants to fulfil specific conditions, such as having undergone medical and psychological interventions, getting a divorce if the applicant was married and having lived in the self-identified gender role for a certain period, before being allowed to change the legal gender/sex.<sup>66</sup> Yet, more and more countries abolish all of these requirements and international human rights bodies are increasingly wary of their negative effects on the right to bodily integrity and self-determination.<sup>67</sup> The following sections discuss the bodily effects of selected requirements for gender recognition, such as medical and psychological treatment, which aim to generate distinctively female- and male-looking bodies and result in the 'othering' of all persons wanting to change their legal gender/sex. Moreover, I will show that 'third' legal gender categories do

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<sup>65</sup> Central Intelligence Agency, *Field Listing :: Military Service Age and Obligation — The World Factbook* (online) <<https://www.cia.gov/library/publications/the-world-factbook/fields/333.html>> (last accessed 6 April 2019).

<sup>66</sup> For an overview of gender recognition laws, see: Zhan Chiam, Sandra Duffy and Matilda González Gil, *Trans Legal Mapping Report: Recognition before the Law* (ILGA World 2017, 2<sup>nd</sup> edition).

<sup>67</sup> Started by Argentina in 2012, about a dozen of jurisdictions worldwide have eliminated all requirements for gender recognition, allowing a change of legal gender/sex now unconditionally. This has, for example, been endorsed by the IACtHR Advisory Opinion on the issue in 2018, which held that gender recognition procedures 'should be based solely on the free and informed consent of the applicant without requirements such as medical and/or psychological or other certifications that could be unreasonable or pathologizing'. See: *English translation of Argentina's Gender Identity Law 2012 [Ley 26.743]; Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples* (2017) Inter-American Court of Human Rights Advisory Opinion OC-24/17, Series A No. 24 at 56.

not necessarily stop the reproduction of sexually dimorphic bodies, but if body appearance is a precondition for accessing these categories, they continue to frame sexual dimorphism as the *norm* and everything else an exception confirming the rule.

#### 4.1. Gender Affirmation Treatment Reproducing Sexual Dimorphism

Many countries that provide the possibility to change the legal gender/sex demand gender affirmation treatment as precondition.<sup>68</sup> Gender affirmation treatment usually entails irreversible body alterations in form of genital surgeries, hormone treatment, mastectomies and/or sterilising measures and serves the rationale of making a body appearance conform to normative and stereotypical understandings that relate to the person's gender identity. While gender affirmation treatment constitutes vital health care for many trans persons, some trans persons do not want to change their body, want to change only parts of it or have health conditions that prevent them from medically transitioning. Laws that demand gender affirmation treatment as precondition for changing the legal gender/sex seem to presuppose that body alterations are always part of a transition process and therefore prove that a person is 'really' trans. Gender affirmation treatment becomes in this sense a requisite for being legally recognized with one's gender identity, instead of being considered as a health care service that people can access based on their free choice. This reproduces standards of sexually dimorphic body appearances by forcing people to have bodies, in particular external genitalia, which look either female or male before they are allowed to change the legal gender/sex.

In April 2019, shortly before the publication of this article, Tasmania followed as first Australian state or territory the example of Argentina, which introduced in 2012 gender recognition procedures that do not demand any preconditions for changing the legal gender/sex.<sup>69</sup> Indeed, most Australian jurisdictions continue to demand the undertaking of body

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<sup>68</sup> For an overview of requirements that countries demand for the purpose of gender recognition, see, for example, Transrespect, *Legal Gender Recognition: Change of Gender. Sterilisation/SRS/GRS Requirement* <<http://transrespect.org/en/map/pathologization-requirement/>> (last accessed 17 November 2018).

<sup>69</sup> English translation of Argentina's Gender Identity Law above note 67. Since the amendment of the Births, Deaths and Marriages Registration Act 1999 (TAS) on 10 April 2019, applicants in Tasmania must not anymore divorce and undergo any medical or psychological 'treatment' before they can change the legal gender/sex. See: Justice and Related Legislation (Marriage and Gender Amendments) Act above note 27 at para. 21. Some more Australian jurisdictions, such as Queensland and Victoria, are currently in the process of reviewing their laws for changing the legal gender/sex. See: The State of Queensland (Department of Justice and Attorney-General), "Registering Life Events: Recognising Sex and Gender Diversity and Same-Sex Families. Review of the Births, Deaths and Marriages Registration Act 2003 (Qld). Discussion Paper 1." March 2018; "Bill To Allow Gender Change On Birth Certificates Without Surgery Introduced in Victoria." June 26, 2019, <http://localhost:8080/news/2018/AT04905-article.html>.

alterations for changing the legal gender/sex on birth certificates.<sup>70</sup> For example, the Birth, Deaths and Marriage Registration Act (1995) of New South Wales (NSW) demands a *sex affirmation procedure*, which is ‘a surgical procedure involving the alteration of a person’s reproductive organs’<sup>71</sup>. This procedure follows the aim ‘to be considered to be a member of the opposite sex’<sup>72</sup> or ‘to correct or eliminate ambiguities relating to the sex of the person’<sup>73</sup>. In practice this means that intersex and endosex trans persons wanting to change their gender maker on birth certificates are forced to get sterilized and to change their bodies for making them conform to normative understandings of sexual dimorphism that correlate with their gender identity. This reflects the underlying rationale for conducting intersex genital surgeries on infants, namely the idea that a person’s gender, either legal gender or gender identity, depends on the person’s body appearance, notably the appearance of external genitals.

#### 4.2. Definitions of Sexually Dimorphic Normality through the Pathologisation of Intersex and Trans persons

An increasing number of states eliminate mandatory gender affirmation treatment, including sterilization, for the purpose of gender recognition. This is in line with developments by international human rights bodies, which have started to condemn forced body alterations, in particular those resulting in sterilization, as violating human rights.<sup>74</sup> However, many of the jurisdictions that do not require body alterations for the purpose of gender recognition still demand that applicants undergo some form of other medical and/or psychological ‘treatment’. As shown in the following, this continues to frame persons wanting to change their legal gender/sex as medically ‘atypical’ and in need of treatment. The pathologisation and ‘othering’ reinforces the idea that persons who pursue a change of legal gender/sex are an exception and need to be ‘fixed’ through ‘normalising’ medical procedures. This again disciplines bodies

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<sup>70</sup> The Gender Reassignment Board of Western Australia, “Information on Applying for a Gender Reassignment Certificate,” 2019, 2, [https://courts.justice.wa.gov.au/\\_files/Gender-Reassignment-Brochure.pdf](https://courts.justice.wa.gov.au/_files/Gender-Reassignment-Brochure.pdf); Northern Territory Government, “Register a Change of Sex or Gender on a Birth Certificate,” December 20, 2018, <https://nt.gov.au/law/bdm/register-a-change-of-sex-or-gender-on-a-birth-certificate>; Department of Justice and Regulation Births Deaths and Marriages Victoria, “Change Your Recorded Sex,” Births, Deaths and Marriages Victoria, accessed April 6, 2019, [/changes-and-corrections/change-your-recorded-sex](https://www.bdm.vic.gov.au/changes-and-corrections/change-your-recorded-sex); “Birth, Deaths and Marriages Registration Act, Queensland” (2003), para. 23(4)(b)(i); “Birth, Deaths and Marriages Registration Act, New South Wales,” Pub. L. No. 62 (1995), para. 32C(a).

<sup>71</sup> Birth, Deaths and Marriages Registration Act 1995 above at para 32A.

<sup>72</sup> At 32A(a).

<sup>73</sup> At 32A(b).

<sup>74</sup> See for example *A.P., Garçon and Nicot v France* (2017) European Court of Human Rights No. Applications 79885/12, 52471/13, 52596/13; *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples* (2017) Inter-American Court of Human Rights Advisory Opinion OC-24/17, Series A No. 24 at 9.

towards developing in a way consistent with societal and medical expectations of normality, hence, sexual dimorphism.

All Australian jurisdictions, except for Tasmania, require some form of medical and/or psychological certificates as precondition for changing the gender marker on birth certificates. For example, Southern Australia requires *appropriate clinical treatment*, but has clarified that this treatment does not necessarily involve invasive medical interventions but can be comprised of counselling.<sup>75</sup> ACT's legislation on the issue is similar, but it differs from the law in Southern Australia by noting that intersex persons are exempted from providing a proof of having undertaken appropriate clinical treatment. However, intersex persons wanting to change their legal gender/sex on birth certificates still need a medical or psychological statement certifying that they are intersex.<sup>76</sup> In this way, both jurisdictions pathologise persons that pursue a change of gender marker on birth certificates and medicalise the procedure to do so. This labels persons concerned as *abnormalities* to persons whose bodies correlate with the gender identity and legal identity in a cisnormative and endosexnormative manner. A cis person whose body fits normative and stereotypical understandings of sexual dimorphism is therefore reproduced as the *normal* human.

### **4.3. Bodies that Matter for Non-Binary Legal Gender/Sex Categories**

In 2007, Nepal was reportedly the first country worldwide that legally recognized persons who identify with a gender/sex different from the conventional notions of *woman* or *man*, often called *metis* in local languages.<sup>77</sup> Since then, less than ten jurisdictions worldwide have followed Nepal and introduced so-called 'non-binary' legal gender/sex categories that provide an alternative to the labels F or M.<sup>78</sup> While these non-binary categories seemingly challenge

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<sup>75</sup> *Birth, Deaths and Marriages Registration Act 1999*, Southern Australia paras 29H(1), 29K(a).

<sup>76</sup> *Birth, Deaths and Marriages Registration Act 1997*, Australian Capital Territory para 24(1)(c)(ii). Information provided by Intersex Human Rights Australia in 2014 cites a letter by Simon Corbell MLA and ACT Attorney-General stating that intersex persons also need to provide proof of clinical treatment before they are allowed to change their legal gender. See: Organisation Intersex International Australia, *Intersex People and Identification Documents* (online) <<https://ihra.org.au/24378/intersex-people-and-identification-documents/>> (last accessed 24 March 2019).

<sup>77</sup> *Pant v Nepal* (2007) Supreme Court Division Bench Nepal No. 917 of the Year 2064 BS.

<sup>78</sup> See, for example, *National Legal Services Authority v Union of India and others* (2014) Supreme Court of India No. writ petition (civil) No. 400 of 2012 and writ petition (civil) No. 604 of 2013; Senate Bill No. 179, Chapter 853 2017 Legislative Council California; Gesetz Zur Änderung Der in Das Geburtenregister Einzutragenden Angaben, Pub. L. No. Bundesgesetzblatt Teil I 2018 Nr. 48 21.12.2018 S. 2635 (2018); Bundesministerium Inneres, 'BMI-VA1300/0528-III/4/b/2018, Verwaltungsangelegenheiten - Sonstige; Personenstandswesen Erkenntnis Des VfGH Vom 15. Juni 2018, G 77/2017-9, Zu § 2 Abs. 2 Z 3 PStG 2013 - Umsetzung Zu Varianten Der Geschlechtsentwicklung ('3. Geschlecht')' 20 December 2018.

the division of humans into two distinct genders/sexes, a closer analysis reveals that not all of them disrupt the assumption that humans come *normally* in two differently-looking and separate genders/sexes. Indeed, those categories that take the appearance of bodies as condition for accessing the new categories reproduce the image of sexual dimorphism as the normal, natural condition.<sup>79</sup>

While closely related, the approaches discussed in this section differ from the intersex-specific gender registration procedures considered in section 3.2. The ones analysed in the following provide adults and consenting minors the *option* to change their legal gender/sex to a non-binary category, instead of being imposed on intersex children. They can broadly be separated into two types. One approach enables *all* persons identifying with a gender different from woman or man to change their legal gender/sex to a ‘third’ category. In some jurisdictions, an applicant’s body matters for accessing these non-binary legal gender/sex categories. The second approach creates a new category solely for non-binary intersex person, which means that persons with a non-binary gender identity can only adopt this category if they are intersex. The body always matters in this approach.

#### **4.3.1. First Approach: Legal Gender Categories for Non-Binary Persons generally**

Australia made international headlines in 2014 when the NSW High Court of Australia granted an individual, Norrie, the right to change the legal gender/sex to the category *non-specific*.<sup>80</sup> The High Court’s reasoning in this case was that, in order to ensure legal accuracy, the registrar was obliged to change Norrie’s gender marker on the birth certificate to *non-specific*, since Norrie fulfilled the NSW’s requirement for modifying the legal gender/sex and Norrie’s sex was *indeterminate* due to ‘failed’ gender affirmation treatment.<sup>81</sup> The right to change the legal gender/sex to non-specific derived therefore from the fact that Norrie’s body looked neither

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<sup>79</sup> Some activists and scholars doubt that new legal gender/sex categories disrupt the gender binary. For example, Dylan Amy Davis argues that ‘given the normalizing effects of appealing to the dominant culture for recognition, the third legal gender category may be interpreted as bolstering the very dichotomous system of gender it purports to undermine’. See [Dylan Amy Davis, ‘The Normativity of Recognition: Non-Binary Gender Markers in Australian Law and Policy’ in \*Gender Panic, Gender Policy\* \(Emerald Publishing Limited, 2017\) 227 at 242](#). See also: [Theodore Bennett, ‘No Man’s Land: Non-Binary Sex Identification in Australian Law and Policy’ \(2014\) 37 \*UNSW Law Journal\* 847 at 858-9](#).

<sup>80</sup> *NSW Registrar of Births, Deaths and Marriages v Norrie* (2014) High Court of Australia S273/2013.

<sup>81</sup> At 46.

completely female nor male.<sup>82</sup> As analysed by Mary Keyes, this argumentation could have implications for intersex newborns, since the Registrar would in theory be obliged to record their legal gender/sex as *non-specific* or *intersex* in order to ensure the accuracy of the law.<sup>83</sup> This reflects ideas of biological determinism and would be contrary to the demands of intersex community organisations, which oppose the automatic assignment of intersex newborns to a non-binary category. In addition, the Court relied on the idea that a person's legal identity derives from a person's body appearance, which is mostly distinctly female or male and only in exceptional cases *indeterminate*. As a consequence, sexual dimorphism is reproduced as the human norm.

Apart from the condition of having an *indeterminate* body appearance, Norrie needed to fulfil the requirements for gender recognition procedures in NSW in general. As discussed above, these include the obligation of having undergone sex affirmation procedure, thus a surgical procedure. Other Australian jurisdictions that provide non-binary gender/sex categories on birth certificates, such as ACT and the Northern Territory,<sup>84</sup> also demand applicants to satisfy certain eligibility criteria before they can adopt these categories. Since these criteria include mandatory body alterations and/or medical or psychological treatment, persons wanting to change their gender marker to a non-binary category are once again pathologised and framed as a medical *exception* to the rule.

With the legislative change in April 2019, Tasmania introduced non-binary legal gender categories next to eliminating restrictive requirements for gender recognition.<sup>85</sup> This follows the example of California, which abolished all requirements for gender recognition at the same time as introducing the category *nonbinary* in 2015.<sup>86</sup> Adults and qualifying minors in California and Tasmania can now change their legal gender/sex to a 'third' category irrespective of their body or any other condition. This means that legal status can in principle be independent

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<sup>82</sup> At 32. Norrie's legal team reinforced this reasoning by arguing that Norrie's true identity is *intersex*, which was aligned with Norrie's physical appearance through sex affirmation procedure. Intersex Human Rights Australia criticised this for conflating gender identity issues with those concerning sex characteristics, and risking of 'reinforcing perceptions that bodies and identities must match each other to be valid'. See: 'Respondent's Submissions to the High Court of Australia *NSW Registrar of Births, Deaths and Marriages v. Norrie* 16 January 2014 at paras 39–40; Organisation Intersex International Australia, *NSW Registrar of Births, Deaths and Marriages v. Norrie: Implications for Intersex People* (2014) 3.

<sup>83</sup> See: Keyes Mary, 'The Formal Recognition of Sex Identity' (2014) 28 *Australian Journal of Family Law* 266, 270–271.

<sup>84</sup> ACT allows changing the gender marker on birth certificates to *unspecified*, *indeterminate* or *intersex*, and the Northern Territory to *non-binary* and *unspecified*. See: Government of South Australia and Attorney-General's Department, *Record a Change of Sex or Gender Identity – Application*; Northern Territory Government above note 70.

<sup>85</sup> Justice and Related Legislation (Marriage and Gender Amendments) Act above note 27 at para. 21.

<sup>86</sup> Senate Bill No. 179 above note 7078.

of the body appearance and any medical certificate, which can halt the reproduction of sexual dimorphism for the purpose of gender recognition.

#### 4.3.2. Second Approach: Legal Gender Categories for Non-Binary Intersex Persons

While the above-mentioned models all concern non-binary legal gender/sex categories in general, some jurisdictions have introduced new categories that are restricted to intersex persons only. Even though most intersex persons identify with a binary gender/sex, many of the legal campaigns for the recognition of a ‘third’ gender/sex category have been led by intersex individuals, at least those that have been publicised.<sup>87</sup> The fact that intersex-led litigation and efforts directed at the legislative or executive have been often successful could indicate that law-makers still perceive the *body* as crucial determinant for one’s legal gender/sex assignment.<sup>88</sup> This reflects biological essentialism, underpinning the logic of intersex genital mutilations, namely the need to match a child’s body appearance with the child’s (legal) gender role/identity in a binary logic.<sup>89</sup> In addition, restricting non-binary gender/sex categories to intersex persons enhances their pathologisation, which reinforces once again the assumption that sexual dimorphism is the *status quo*. This disciplines bodies to fulfil expectations of sexual dimorphism.

Austria and Germany are examples for countries that have recently adopted ‘third’ legal gender/sex categories that are restricted to intersex persons. In both countries, the new category *divers* was introduced as a result of decisions by their Constitutional Courts in cases led by intersex individuals.<sup>90</sup> In the end of 2018, a German law and an executive degree in Austria clarified that only persons who can prove that they are intersex through medical attestations can

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<sup>87</sup> See, for example, Sam Levin, ‘First US Person to Have “intersex” on Birth Certificate: “There’s Power in Knowing Who You Are”’ *The Guardian* (online) 11 January 2017 <<https://www.theguardian.com/world/2017/jan/11/intersex-rights-gender-sara-kelly-keenan-birth-certificate>> (last accessed 27 January 2017); *1 BvR 2019/16* (Bundesverfassungsgericht); *G 77/2018-9* (Verfassungsgerichtshof); *C / 03/232248 / FA RK 17-687* (Rechtbank Limburg, Roermond).

<sup>88</sup> A telling example is the case of Sara Kelly Keenan, an intersex person, who received in 2017 a new birth certificate stating *intersex* issued by the state of New York, even though Keenan asked for the recognition of being *non-binary*. See: Carpenter, above note 11 at 487–488; Levin above note 86.

<sup>89</sup> Indeed, according to Intersex Human Rights Australia, new legal categories shall not be named *intersex*, since this misgenders most intersex persons by providing the perception that all intersex persons have a non-binary gender identity. For example, the Australian Government Guidelines on the Recognition of Sex and Gender propose that individuals shall be able to choose an X, standing for ‘indeterminate/intersex/unspecified’, next to F and M, when data on gender/sex is collected. This has led to the misconception that intersex is necessarily associated with a ‘third’ gender/sex. See Carpenter above note 2; Organisation Intersex International Australia above note 76.

<sup>90</sup> *1 BvR 2019/16* (Bundesverfassungsgericht); *G 77/2018-9* (Österreichischer Verfassungsgerichtshof).

change their legal gender/sex to divers in the two countries.<sup>91</sup> An exemption exists in Germany, where in exceptional cases intersex persons can substitute the medical attestation with an affidavit certifying that they are intersex.<sup>92</sup> This means that the procedures to adopt the new category divers are again medicalised and intersex bodies are framed as *medical deviation* of the norm. This can be seen as a continuation of the violence inflicted on intersex children, since intersex persons' exclusion from the definition of the *normal* can enhance the erasure of intersex bodies from society through medical interventions, stigma and taboo.

## 5. Conclusions

I have shown in this article that the registration or change of gender markers on birth certificates disciplines and regulates bodies towards adopting sexually dimorphic appearances. Saying it with the words of Butler, “sex” not only functions as a norm, but is part of a regulatory practice that produces the bodies it governs<sup>93</sup>. Intersex and endosex bodies, trans and cis bodies, are all subjected to regulatory legal practices that violently impose norms of human sexual dimorphism. Sexed bodies are therefore constantly in the process of *becoming*, instead of being pre-discursive objects. This becoming is not pre-ordained either, but some bodies do not perform according to expectations of ‘normal’ sexed appearances. These include women with bodies considered as ‘too’ masculine, intersex persons embracing their visible intersex variations and trans persons who do not alter their bodies as expected by the binary gender/sex model. Even though these bodies could make the performativity of sexual dimorphism apparent, they are often labelled as (medical) *deviation*, which reinforces the understanding that sexually dimorphic bodies are the ultimate norm.

Legal gender/sex registration at birth generates sexually dimorphic bodies by rendering intersex bodies either unintelligible, as it is assumed that body and (legal) identity must correlate in binary terms, or illegitimate, through intersex-specific gender/sex registration procedures. This supports social norms that generate the erasure of visible intersex variations through intersex genital surgeries, especially considering the absence of a legal prohibition of these practices in almost all countries. Legal gender/sex registration further constitutes the basis for subjecting

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<sup>91</sup> Gesetz Zur Änderung Der in Das Geburtenregister Einzutragenden Angaben, above note 78; Bundesministerium Inneres, above note 78.

<sup>92</sup> Personenstandsgesetz 2007 at 45(b)(3).

<sup>93</sup> Butler above note 6 at xi.

persons legally registered as female or male to different regimes of sports and employment law, which can bring about distinctly masculine and feminine physical traits.

Laws on changing the legal gender/sex on birth certificates also create sexual dimorphism by including eligibility requirements that demand the alterations of bodies. The pathologisation and medicalisation of intersex and trans persons through the condition of providing medical and/or psychological attestations certifying ‘treatment’ or an intersex variation further frames sexual dimorphism as the *norm* and everything else as a medical *exception to the rule*. This is also the case if gender/sex registration procedures that allow for a ‘third’ category on birth certificates restrict the access to these categories based on body appearance.

Gender recognition procedures that provide more than two gender/sex options and do not demand any preconditions for a change of legal gender/sex, such as in California and Tasmania, disconnect body appearance with legal gender. This can stop the disciplining of bodies for the purpose of gender recognition. However, in the case of California, children continue to be registered with a legal gender/sex at birth, which once again influences the body development and assumes that civil status *shall* and *can* objectively record a person’s sex (body) and not gender (identity). As the notification of gender/sex on official documents severely impacts the right to self-determination, intersex and trans rights organisations advocate for eliminating the public registration of gender/sex altogether, or at least for striving towards this in the future.<sup>94</sup>

These demands by intersex and trans rights activists have recently earned attention in Tasmania. On 10 April 2019, after this article was initially written, the Upper and Lower House of Tasmania passed a law making it optional for parents to request the mentioning of the legal gender/sex on newborns’ birth certificates.<sup>95</sup> This means that the new default position is that future birth certificates do not show any gender markers, unless parents request this for their newborns or individuals older than 16 years seek this for themselves.<sup>96</sup> The new law further allows a change of legal gender/sex to binary as well as non-binary categories for persons above the age of 16 without fulfilling any restrictive requirements.<sup>97</sup> While a profound analysis of

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<sup>94</sup> Third International Intersex Forum above note 34; ‘Darlington Statement’ above note 50 at para 8(c); TGEU, *TGEU Position Paper on Gender Markers* (online) 19 July 2018 <<https://tgeu.org/tgeu-position-paper-on-gender-markers/>> (last accessed 29 July 2018); ‘The Yogyakarta Principles plus 10. Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles’ Principle 31(A). Eliminating the public gender/sex registration would generate a variety of social and legal effects. An upcoming special issue of the *International Journal of Gender, Sexuality and Law* treats related questions more in detail.

<sup>95</sup> Justice and Related Legislation (Marriage and Gender Amendments) Act above note 27 at para. 22.

<sup>96</sup> As above; Tasmanian Law Reform Institute, *Legal Recognition of Sex and Gender*, Issue Paper No. 29, June 2019, para. 2.1.95.

<sup>97</sup> Justice and Related Legislation (Marriage and Gender Amendments) Act above note 27 at para. 21.

these significant legal developments, exceeding a few brief references added to this article shortly before publication, are left for another occasion, it is worth mentioning that the Tasmanian gender/sex registration model could indeed stop some of the discursive and material violence currently inflicted on human bodies. However, other measures would be certainly necessary to increase the acceptance of bodily and gender diversity, such as the prohibition of intersex genital surgeries, which the Tasmanian Law Reform Institute proposed in June 2019. Thus, Tasmania could become a pioneer in accepting that sexual dimorphism is not a state of nature which must be codified in law but rather a product of socio-legal processes.