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Non-Binary Gender Markers: Mobility, Migration, and Media Reception in Europe and Beyond

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Abstract

Although EU legal frameworks tend to conceive of sex and gender in binary terms, a growing number of countries in Europe and around the world have been increasingly allowing for third gender and non-binary possibilities in IDs, passports, and public registries, of which the X marker in the sex/gender field has become the most common. However, initiatives like the X, which may initially signal trans-friendliness, must be considered alongside heightened border surveillance. As more and more European countries begin to follow this trend of expanding possibilities for registering (non-binary) gender (e.g., Malta, Denmark, Germany, the Netherlands), we look here to some illustrative examples (e.g., Nepal, Canada, Pakistan) that have been at the forefront of non-binary legal recognition to interrogate the complications and conundrums that these developments may provoke in European contexts.

Keywords

Non-Binary, Transgender, Identity Documents, Europe, Mobility

In recent years, attention to transgender rights has given rise to a number of international legislative and policy reforms to sex and gender registration. Academic scholarship has also begun to delve into the critical questions that these developments have provoked (Aboim, 2020; Cooper, Grabham, and Renz, 2020; Quinan and Bresser, 2020; Quinan, Molitor, van den Brink, and Zimenkova, 2020; Van den Brink, Reuss, and Tigchelaar, 2015; Verloo and van der Vleuten, 2020). One significant aspect of such attempts to address gender diversity and equality has involved the re-evaluation of how binary sex/gender markers and other identity documentation practices disproportionately impact trans and non-binary people's lives (Spade, 2011). In Europe, this re-evaluation has taken on increased urgency, with three significant reports on developments in the realm of trans, non-binary, and intersex rights having recently appeared: ILGA Europe's *Non-Binary Gender Registration Models in Europe: Report on Third Gender Marker or No Gender Marker Options* (Holzer, 2018), the European Commission's *Trans and Intersex Equality Rights in Europe – A Comparative Analysis* (van den Brink and Dunne, 2018), and the European Commission's *Legal Gender Recognition in the EU: The Journeys of Trans People Towards Full Equality* (European Commission, 2020).¹ Despite the fact that these three reports uncover a Europe-wide political interest in addressing trans rights, their findings largely indicate that legal protection for people identifying as non-binary is particularly weak across EU member states (van den Brink and Dunne, 2018: 14). In addition to suggesting that member states take all measures to ensure that each individual's self-defined gender identity is legally recognized, the European Commission recommends offering 'the option of a neutral gender marker in identity documents for those who may desire them, such as non-binary and genderqueer people' (European Commission, 2020: 16). This recommendation also falls in line with Principle 31 of the Yogyakarta Principles + 10 (2017), which encourages states to 'make available a multiplicity of gender marker options' and to 'ensure a quick, transparent, and accessible mechanism that legally recognises and affirms each person's self-defined gender identity' (cf. Holzer, 2020).

Indeed, countries around the world (e.g., Australia, New Zealand, Pakistan, Nepal, Bangladesh, India, Canada) have increasingly been introducing third-gender and non-binary possibilities, of which the 'X' marker in passports and public registries has become the most common legal instrument for accommodating gender minorities.² With the relatively rapid pace

¹ At the global level, this has been followed up by ILGA World's report *Trans Legal Mapping Report 2019: Recognition Before the Law* (Chiam et al., 2020).

² While in Canada and New Zealand the unspecified X marker is purely optional and obtained via self-declaration, in other nations (e.g., Pakistan, Nepal) unspecified sex markers are mandatory for all transgender people seeking to update their documents. Such policies could arguably affect individuals

at which trans and non-binary rights are evolving, it is likely that non-binary legal recognition will expand in the coming years. In the European context, despite a growing recognition that binary gender registration contradicts the principles of self-determination and non-discrimination, there has been a limited (albeit expanding) uptake of non-binary recognition (Holzer, 2018: 63). At present, a small number of European countries allow their citizens to elect an X in passports or other identity documents: in Malta and Denmark, citizens may choose the X by self-determination, while in Germany this option (also called ‘divers’) is limited to specific cases (e.g., intersex diagnosis) and in the Netherlands it is permitted following a legal judgement that can only be obtained by suing the municipality in which one was born. Other European countries – including Iceland, Austria, Belgium, and Greece – have also begun to take steps to allow for gender markers other than male and female.³ Nonetheless, this data remains limited and fragmented; hence, the majority of examples we draw on here come from non-EU contexts. We use these case studies to think through, not only the possibilities, but also the challenges that the expansion of the X and other non-binary markers could provoke for trans and non-binary individuals, including the implications it might have for cross-border travel and migration, particularly in light of increased securitization of national borders.

Although such legislative developments have begun to redress inequalities, they have not been immune to critique. Policies that claim to address diversity and inclusion by adding new categories may run the risks of reifying sex classification and gender norms by grouping all those who fall outside stereotypical notions of masculinity and femininity into a separate category (Mak, 2012; Wipfler, 2016). This conundrum is encapsulated in Grietje Baars’ provocative question: ‘Does a “third gender” category, a third box to tick, liberate us from the binary, or does it incorporate our difference in a reconstituted, fine-tuned “ternary” compulsory gendering system, and box us in?’ (Baars, 2019: 21). In such a framework, capitalism and neoliberalism, which emphasize individuality yet simultaneously subsume difference into hierarchical systems of categorization, have managed ‘to accommodate resistant political movements organized around identity by co-opting the rhetoric of equality’ (Morris, 2012: 106).

Applying a postcolonial theoretical lens allows us to see how the social and legal integration of (gender) minorities is historically linked to practices of population registration, regulation, and classification – often exemplified by identity documents, which have long served as colonial tools of surveillance (McClintock, 1995; Pérez, 1999; Sandoval, 2000). María

with unspecified sex markers even more strongly given the ways in which those possessing non-Western passports are already often subject to increased policing and surveillance at border checkpoints.

³ See <https://www.ilga-europe.org/blog/mfxother-6-countries-pushing-non-binary-registration-europe>

Lugones (2007), for instance, makes clear that binary systems themselves are thoroughly colonial and their imposition has resulted in both physical and epistemic violence, particularly for indigenous populations.⁴ In the introduction to a special issue of *Transgender Studies Quarterly* on decolonizing transgender, the editors summarize how colonial resonances continue to shape discourses on trans issues: 'European colonial expansion deployed gender and sexuality as technologies to categorize colonized bodies into distinct kinds, while sexual and gender diversity in non-European contexts was used as a rationale to support the removal, "re-education," or wholesale genocide of colonized others. The traces of those histories of removal and dispossession remain, as do their imbrication in global sexual and gender politics' (Aizura et al., 2014: 308). In this respect, initiatives like the X, which may initially signal trans-friendliness, must be considered alongside heightened border surveillance that targets gender non-normativity (Beauchamp, 2019; Clarkson, 2019; Fischer, 2019; Quinan and Bresser, 2020). Likewise, it is in this broader context that state-level changes to sex/gender markers in passports, ID cards, and public registries must also be considered as biopolitical instruments of regulation.

Although the X marker in passports has been possible since 1996 thanks to guidelines established by the International Civil Aviation Organization (ICAO) for machine-readable travel documents (ICAO, 1996) and could, in theory, be adopted by any of the 193 ICAO member states, there is little evidence that instruments like the X option have undergone any extensive review.⁵ Media outlets have, however, often heralded these changes as improving mobility and migratory opportunities for trans, intersex, and non-binary populations. As some European countries begin to follow this trend of expanding possibilities for registering (non-binary) gender, we now turn to some recent examples that have gained attention to illustrate the complications and conundrums that these developments have provoked in other geopolitical contexts. These examples also speak to the ways in which a transnational circulation of ideas, concepts, laws, and policies might allow for a better understanding of how the category of transgender has been

⁴ For more on how the category of 'transgender' has been critiqued as being imperial, see Billard and Nesfield, 2020; Pyle, 2018; Spade and Willse, 2015; Towle and Morgan, 2006.

⁵ The ICAO guidelines that have allowed for the non-binary X marker have sparked a larger call in the media and in activist circles for genderless identification documents. Ironically, however, the ICAO remains an impediment to this goal, for they state (on rather tenuous grounds) that the sex/gender field in documentation remains necessary because 'knowing a person's gender significantly narrows the results of a search in systems that hold information about a large number of people' (ICAO, 2012: 7). As if acknowledging this collective desire, Canada includes the following disclaimer at the top of its passport application page: 'you must have a sex designation on your passport or travel document to comply with International Civil Aviation Organization (ICAO) standards. **It can't be removed or left blank**' (emphasis in the original).

formulated and regulated in the EU and beyond, as well as what openings might exist for subverting systems that appear entrenched in binary gender norms.

A Global Turn Towards Third Gender Markers

The above-mentioned ILGA Europe report opens with a reference to Nepal – the first country to officially recognize non-binary identities in 2007 – as the initial inspiration for non-binary gender markers on official documentation in Europe and elsewhere (Holzer, 2018: 2). Similarly, we find Nepal, which has been labeled a 'best-practice' model even though it signals potential complications, a helpful illustration of the complexities of non-binary gender registration that should be considered in future developments with regard to non-binary gender markers in the European context. Just as it highlights the critical role Nepal played in catalysing change in Asia – and eventually Oceania and North America – the ILGA Europe report also notes Malta, which we briefly discuss below, as another model for the Eurozone. However, given the paucity of data in both Malta and Nepal, using such specific national contexts and legislation as a model of best practice to replicate could, we argue, lead to unintended consequences.

To assuage any initial concerns trans people may have had about changes to gender markers in passports, particularly problems related to travel and migration, *Human Rights Watch* reported that Nepali transgender rights activist Bhumika Shrestha had safely secured visas and travelled to Taiwan using her passport with an O ('other') marker (Knight, 2015). (The O marker, which is not currently sanctioned by the ICAO, can be considered an antecedent to the now more prevalent X marker.) The *Human Rights Watch* report claimed that the 'successful issuance of Shrestha's passport and her Taiwanese visa shreds one common argument against issuing passports in three genders: that foreign governments will not acknowledge them, imperilling those who possess them' (Knight, 2015). The perceived *success* of this process has contributed to a regional domino effect in South Asia; Bangladesh, India, and Pakistan have all followed Nepal's lead and issued similar third gender options for documentation.

Notwithstanding the *Human Rights Watch* report cited above, Nepal represents a complicated example. In a 2018 interview, Parsu Ram Rai of the Blue Diamond Society, an LGBTQ rights organization in Nepal, stated that as of August 2017, only 22 people had made use of the new gender markers in passports.⁶ While there are many structural issues that might

⁶ P. Ram Rai, personal communication, February 22, 2018.

explain such low numbers, this limited demographic data points to the need for caution when singling out certain national efforts to implement policy change as exemplary. Ram Rai also indicated that there was antipathy towards the new gender markers, as many gender-nonconforming individuals were wary of changing their documentation for fear of persecution.⁷ Here, it should also be noted that Nepal mandates that this third gender marker be used for *all* transgender and gender-diverse individuals seeking to amend their sex/gender on identification papers. This might explain the caution exercised in choosing the new marker. Indeed, the speed at which Nepal's example was subsequently followed throughout the broader region should give pause, as it remains an unresolved policy change that has singled out and rendered hyper visible the populations it seemingly intends to benefit.

Another issue with third gender markers is their potential for reification of binary gender markers. In some jurisdictions (e.g., Canada), X markers are accessible through self-determination, while amendments to traditional M and F are not. In other words, binary sex marker amendments (e.g., from M to F or F to M) are still withheld by medical and legal gatekeepers and are, thus, much more difficult to change. In this sense, the differential processes surrounding non-binary markers make them a site of potential othering – even if self-determination is an approach that should be extended to all sex and gender markers whether binary or non-binary. This is, again, exemplified by the case of Nepal, with the O option standing for 'other,' and is further compounded by the fact that this 'other' marker was created specifically for indigenous third-gender categories.⁸ And while some people also identify with non-indigenous categories like 'transgender', in Nepal all third-gender, gender-nonconforming, transgender, and non-binary categories are corralled into the O marker. Similarly, transgender individuals who identify within the gender binary must opt into this third gender category (Kapali, 2018), thereby reinscribing binary sex as innate and static and potentially entrenching essentialist views of gender.

Thus, despite Nepal having garnered positive attention in Europe and elsewhere as 'trail blazing' for its early adoption of third gender markers, this model is not without unforeseeable negative consequences. While Nepal is a specific context, it helps us identify potential tensions in other national schemes that adopt unspecified or non-binary gender markers, even if those markers are not connected to local third gender identities. Thus, Nepal's policies in this regard highlight the potential hazards of implementing new gender options without considering how

⁷ P. Ram Rai, personal communication, February 22, 2018.

⁸ Nepal's 2011 Sexual and Gender Minority Survey illustrates this diversity; respondents could select from categories like *metis*, *kothis*, *panthis*, *ta*, and *hijaras* (Knight et al., 2015).

they may affect the people they seek to benefit, or without considering how these new categories might further favour binary gender markers, which are already seen as static and essential.⁹

In Canada, one of the most recent countries to allow for non-binary legal recognition, media outlets have largely attributed the option to choose the X marker to the Trudeau administration's promise to 'better reflect the gender diversity of Canadians' (Kilpatrick, 2017). Given the government's self-branding as feminist in its approach – both domestically and internationally – and an advocate for human rights, this latest step seems to fall in line with Canada's support for LGBTQ rights more generally.¹⁰ However, it is critical to note that instead of broad acceptance of gender diversity, individual complaints of human rights violations related to gender identity levelled at the Canadian government have, in fact, been the primary vehicle for such policy changes. For instance, in May 2018 Luna Ferguson won a human rights complaint in the province of Ontario, which opened the door for birth certificates to include X. We surmise that this decision will have broader implications that will not be confined only to Ontario or to birth certificates. Indeed, other provinces and territories in Canada have begun to follow suit by offering amendments to birth certificates, driver's licenses, and health cards (Kappler, 2018; McKenzie-Sutter, 2019; Raymer, 2021). Ferguson's victory in Ontario also contributed to the federal change to include the non-binary X marker on passports.

While the media has generally portrayed these changes as a 'step forward' for gender-identity recognition, some have shown a bit more scepticism about these developments, noting that 'although the gender-neutral passport is welcomed by many, people choosing to travel with an X under their name might face difficulty' (Young, 2017). Despite its best efforts to portray an LGBT-friendly stance on gender diversity, the Canadian government ironically seems to reflect this uncertainty, noting on their website that 'the Government of Canada cannot guarantee entry or transit by border control authorities of another country. Choose the sex that you feel would make it easier to travel' (Government of Canada, 2018). Similarly, in Australia, where the X option has been available on a wide scale since 2011, the Department of Foreign Affairs and Trade similarly warns: 'those travelling on a passport showing "X" in the sex field may encounter difficulties when crossing international borders due to their infrequent use' (Government of

⁹ Activist Rukshana Kapali stated in an interview quoted in *Pahichan* (a Nepalese LGBTI+ organization) that she has requested that media coverage does not address her as third gender, but instead as female (Pahichan, 2019). This form of mandatory gender recategorization under a third gender option is not only misgendering in this case, but is potentially dangerous, as it indicates someone's transgender status.

¹⁰ For more on the Canadian government's promotion of feminist values through 'international assistance', see Global Affairs Canada (2017).

Australia, 2018). Moreover, one of the most significant obstacles to using non-binary gender markers is with flight purchasing systems and airline check-in processes, which are almost exclusively based on binary gender classifications, thereby leading to incongruencies between gender markers on passports and on airline tickets, which may trigger heightened interrogation or being barred from boarding a plane.¹¹ Furthermore, while the government of Canada disavows any responsibility for protecting travellers and leaves it up to the individual to ‘choose the sex that you feel would make it easier to travel,’ traveling while trans remains a calculated balancing act involving cost-benefit analyses wherein no option may be truly safe or guarantee freedom of movement, mobility, or migration.

Indeed, there is growing concern from trans activists worldwide that possessing a travel document with an X marker could arguably make someone more vulnerable to further scrutiny or suspicion. Pakistani English-language newspaper *The Express Tribune*, for instance, reported that Shakeel Ahmed was barred from entering Saudi Arabia to complete the Umrah (Islamic pilgrimage) due to the possession of a passport with an X marker. Because the Hajj and Umrah government application forms do not allow for non-binary markers, many have been discouraged from updating their documents (Wasif, 2017). Farzana Jan – the first Pakistani transgender person to receive the new X passport marker in 2017 – echoes this sentiment: ‘I can travel around the world while having a passport with an “X” in the gender column but I cannot perform Hajj or Umrah... this is sad’ (Wasif, 2017).

While these non-binary possibilities seem to be proliferating across the globe, in some European countries there has also been resistance to introducing the X. In 2018 the UK’s High Court backed the government’s refusal to issue non-binary passports. *The Guardian* quotes Sir James Eadie speaking for the Home Secretary that ‘if the policy constituted an interference with article 8 [of the European Convention on Human Rights] – the right to respect for private life – it was justified by the need to “maintain an administratively coherent system for the recognition of gender,” in order to maintain security and to combat identity theft and fraud, and “to ensure security at national borders”’ (Bowcott, 2018b). The UK government also argued that such changes to the system would be too expensive, even though *The Guardian* reported earlier in the year that ‘[t]he cost of issuing a third category of passport would be as little as £2m, a rather modest sum’ (Bowcott, 2018a). Further, Sir Eadie’s belief that a ‘coherent system for the

¹¹ This issue has increasingly been receiving attention. *The Daily Beast* reported that the U.S.-based airline industry trade group Airlines for America would add new non-binary gender options to accommodate for passengers who have an X in their identity documents (Allen 2019). These changes went into force on June 1, 2019. U.S.-based Delta Airlines has also recently begun allowing for non-binary gender options and gender-neutral forms of address (e.g., Mx.).

recognition of gender' must be maintained in order to avoid compromising border security is negated by the fact that British border control is able to read and process passports issued with X from other countries without any problems (Bowcott, 2018a; Holzer, 2018: 21). This issue is ongoing in the UK, for permission was recently granted to non-gendered activist Christie Elan-Cane to appeal an earlier ruling handed down by the Court of Appeal. In *Christie Elan-Cane v Secretary of State for the Home Department*, the UK Supreme Court will decide on the lawfulness of the Passport Office's policy on X passports in July 2021, potentially opening up possibilities for non-binary legal recognition in the UK.

Although legal protections remain uneven across Europe, Malta has – as indicated above – been leading by example, and other EU countries are looking to the Maltese model as a best-practice for the implementation of non-binary markers (Holzer, 2018: 52). As ILGA Europe's report notes, difficulty in crossing borders with X markers is largely dependent on travel destinations (Holzer 2018: 21); to this end, Malta offers the option to possess two passports: one with a non-binary X passport *and* one with M or F (determined by self-declaration). In addition to not requiring medical documentation to obtain an X marker, Malta also allows for 'undetermined' (or 'X') to be listed on birth certificates (Holzer, 2018: 19). As of yet, however, the Maltese model does not provide sufficient data for assessing its impacts on travel and border-crossing possibilities in Europe and beyond.

Conclusion

The above examples highlight that even as non-binary markers may open up opportunities for some travellers and migrants, it is critical to further interrogate how they also impact well-being and freedom of movement, including scrutiny at the border or inability to undertake religious- and/or economic-based travel or migration. Furthermore, such developments could paradoxically be a way to avoid or side-step human-rights claims, while simultaneously allowing a nation to proclaim its trans-friendliness (as the case of Canada suggests). In the context of broader mainstream LGBTQ rights and movements, we argue that these developments could be seen as a form of pink-washing in that 'progressive' or 'trans-friendly' changes and policies are promoted in ways that distract from harmful actions, which disproportionately impact trans and non-binary populations. Indeed, even as nations like Canada and Australia claim to support gender diversity and LGBTQ rights, the scepticism evidenced by the aforementioned passport warnings point to a potential governmental lack of confidence in these non-binary markers. This scepticism is potentially confirmed by cases like the Umrah example cited above, highlighting

how trans and non-binary individuals may be discouraged from changing their documentation due to inability to travel to or through certain countries or out of fear of detention at the border. Issues and obstacles related to border-crossing are also racialized and framed in relation to citizenship. For example, a white Canadian, gender-nonconforming citizen with an X in their passport entering Europe may well be read and treated differently from, for example, an Indigenous or Black Canadian, or a Muslim gender-nonconforming person of color attempting to gain entry at that same checkpoint.

Returning to the European context, there is little uniformity in how Eurozone countries are considering adopting the X marker. While Malta is highlighted as an example to follow, other countries, such as Germany, are limiting the use of the X marker exclusively for intersex people. This policy disunity potentially reflects other issues related to mobility and migration that have recently tarnished the reputation of the Schengen Area's ethos of free movement. While the ILGA Europe and European Commission reports emphasize progressive human rights-based frameworks in order to promote the benefits of non-binary gender markers, the haphazard implementation of these policy changes further complicates an already complex network of border crossings into and across the EU. While we fully support alternative options in documentation, including – and especially – the removal of sex/gender from documentation altogether, here we have signalled some possible issues that should be considered so that future developments in Europe are implemented in ways that support trans, non-binary, and gender-nonconforming people, rather than only targeting those who fall outside normative categories, thereby reinforcing the borders of Fortress Europe 2.0.

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