Gender kaleidoscope: Diffracting legal approaches to reform gender binary

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Abstract

This article explores the import of current gender legal reforms. Through analysis of legal processes of self-determination and inclusion of non-binary gender labels, it critiques the hypostatizing tendency that marks our current understanding of gender and limits the scope of legal reforms. My insight is that reforms of legal gender status are bound to reproduce a conservative system of recognition because they rely on a substantialised conception of gender, one that frames gender as a given entity (or a given set of entities) along which our identities organise. In the conclusion, I discuss alternative forms of conceiving legal gender, gesturing toward a more relational and multifarious legal approach.

Keywords

Deleuze; Legal theory; Gender; Identity Politics; Recognition.

Biography

Valeria Venditti is IRC Postdoctoral Fellow at University College Cork. Her research focuses on LGBT rights and alternative political practices. Alongside this, she is interested in non-traditional kinship formations, in particular the impact of adoption, surrogacy and Assisted Reproductive Technology on the institution of family. In 2019 Routledge published her first monograph, entitled *The Law and Politics of Inclusion. From identity right to practices of disidentification*. This article was supported by the Irish Research Council, Post-doctoral Fellowship Project-ID GOIPD/2018/360.

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Introduction

The word penis is probably the most misattributed word in
English, I think. Because almost nobody has a real one.
The standards are made in Japanese or German factories.
Womb/vagina sets are unusual too if genuine.
Standards are from China; they are recycled sheepskin wallets.
I was shocked too when I heard this.
No Promissory Notes, Ish Klein (2011)

The call to reform legal gender status to encompass gender variant and non-binary identities in the law is becoming increasingly pressing at a national and international level. While many countries have already adopted new legal measures, reforms to gender regulation still represent a thorny issue. In Europe, different countries have implemented a range of alternative resolutions, ranging from the modification of parameters to introduce non-binary gender labels to the simplification of procedures for gender transitioning. In this scenario, scholars and activists are called upon to analyse and assess the impact of different political strategies, to determine outcomes of specific legal measures and propose alternative pathways to new legal accommodations. In this sense, while specialised discussions hold sway with regard to technical aspects of gender legal reform, a more theoretical approach to this issue proves valuable since it can home in on the conflation of several different disciplines and "provid[e] a way of thinking about how to change statutory law, engaging with current options but from a different place" (Cooper 2018b). What can be thought of as a speculative reading of gender reform might support and enrich the route toward developing alternative ways to account for gender in the law, offering legal experts and policy-makers unforeseen tools to think the scope of legal reforms and assess the symbolical weight of institutionalised conceptions. Speculative readings have the advantage of gathering knowledge and data from different fields to present a broader view of the tangle of needs, hopes and demands at stake when it comes to imagining the future of legal gender status.

In this article, I claim that legal gender reform is haunted by a hypostatizing tendency that marks our current understanding of gender and limits the scope of any

reform. My insight is that reforms to legal gender status are bound to reproduce a conservative system of recognition because they rely on a substantialised conception of gender, within which gender is framed as a given entity (or a given set of entities) that structures our identities. Gender appears as a pervasive feature. It is the main line along which subjects constitute themselves and step into the social field, as if they were carrying their own stable and unproblematic gendered self. When transposed onto the legal body, this substantialised account of gender comes to be reinforced by a Western system of laws that places at its centre single individuals and their rights.[2] In this account, political agency[3] becomes contingent on the legal articulation of identity categories that can be taken up by individuals to access rights and entitlements, carving out the import of relationships and contexts in the *functionality* of gender – that is, in the way in which gender unfolds in relational dynamics and also structures them.

Current legal accounts of gender tend to conceal its power as a productive concept and produce the luring illusion of gender as a stable mark that *belongs* to the subject's identity. Gender tends to be regarded as something "deeply rooted in an individual's personality", to the extent that it is possible to draw an analogy between a subject's gender and her "capacity to be the holder of rights and duties" (Van den Brink, Reuβ and Tigchelaar 2015, p. 289). As a result, while legal subjects are characterised as gendered atoms who become the main recipients of the law, legal measures are mainly oriented toward encompassing identity categories, rather than regulating practices linked to gender.[4] This specific modality of portraying gender not only curbs the social impact of legal transformations; it also reinforces the rhetoric of gender as a self-standing entity, a fixed concept, an individual feature, key to allotting

[2] In the last decades, Western laws have been marked by the rise of the jargon of individual rights. This tendency is particularly glaring when we analyse how LGBT issues have been politically discussed and legally addressed in the global North: progress in the law has been achieved in the form of rights concerning single subjects. In this framework, sexual and affective relationships are politically and legally framed as contracts between single gendered individuals. In much the same way, many entitlements and rights have been articulated as directly related to the gendered identity of legal subjects, rather than to the relational sides of the practices in which they take part. On this topic, see Venditti 2019.

[3] With 'political agency', I refer to the negotiating potential of social actors. Legal tools become instruments in the hands of subjects to enforce their political will or modify their political and social stance. On the issue of political agency and recognition, see McNay 2008, in particular pp. 163-167 and 195-197.

[4] In the preamble to the Yogyakarta Principles, "gender identities" are understood as referring "to each person's deeply felt internal and individual experience of gender […] including the personal sense of the body […] and other expressions of gender, including dress, speech, and mannerisms". See https://yogyakartaprinciples.org/, viewed 29 August 2019.

entitlements, protections and rights. To put it another way, the current mainstream conception of gender as a given, stable entity that fashions bodies before and beyond their social embodiment, informs legal accounts of gender and clogs alternative readings of gender, both at a legal and at a social level.

In the following pages, my aim is to revise this monolithic account of gender as a self-standing feature to prefigure a kaleidoscopic idea of gender that might pave the way for more effective legal reform. This new perspective is rooted in a conception of gender as a relational, fluctuating, everchanging *space* that we inhabit, instead of an essential and unchanging feature that establishes our identities. In the first section, I briefly present some examples of legal reform and the predicaments that have come with them. From the harmonisation of national schemes of gender recognition at an international level to the potential drawbacks of non-binary regulations on gender violence/gender equality, up to the effects of legal reforms on the everyday lives of single individuals and the social perception of non-binary genders, I deem these problems as originating in the essentialisation and naturalisation of gender – even when not considered as a reflection of sex – and in a legal position that neglects the structural power of legal gender labels. In the second part of this article, I turn my attention to the impact that these substantialising processes have on legal reforms and their scope. To do so, I tackle the connection between the mainstream understanding of gender, its main legal "expression" – individual rights – and its specific legal value – identity recognition. In today's global North, legal gender labels impose, in Deleuzian terms, "a series of models on our bodies, even in their involuntary structures, and offer our intelligence a sort of knowledge, a possibility of foresight as project" (Deleuze 2004, p. 21). In this scenario, the legal articulation of what Gilles Deleuze defines as a foreseeable project leaves little leeway for the articulation of alternative regulations. The conclusion gestures toward the advantages of understanding gender as a productive material practice, something that exists only in the contingency of its manifestations, that is constantly made within interactions, that exceeds categories and can only be known in the flickering of single occurrences. In addition, I hint at alternative routes to gender legal reforms based on a more nuanced reading of gender, one that goes beyond the fixed narration of gender that legal reforms and the jargon of rights keep supporting.

This article will focus on two ways of "doing" gender legal reforms: self-determination and the creation of a third gender label. However, many things will be left out. First, it will not deal with data drawn from quantitative or qualitative studies, nor will it carry out an in-depth analysis of case studies or practical examples, as this

would exceed its purpose and methods. Instead, this article engages with legal practices from a critical point of view and sets up a speculative approach to gender deregulation and legal reform. Its main aim is to look at these topics in a way that takes into consideration first and foremost life practices and the rhetoric that shape discourses around them.[5]

It is worth noting that legal and social recognition is a crucial element for those people whose gender identity does not fit into binary or conventional standards. Legal legitimation and social intelligibility become a shield against discrimination and violence. Reports of discriminatory behaviours on the basis of gender show that the validation of one's own identity makes a difference when it comes to living a 'livable' life (see e.g. O'Flaherty 2015). However, this article will deliberately eschew any direct references to the emotional, practical and symbolical weight of recognition. In fact, in what follows, I aim to work with our conceptual understanding of gender in order to explore the potentialities of using it in a different way, *as if* we might do without gender even in the social positioning of our identities (see Cooper 2018b). Nevertheless, I acknowledge the pain and the struggles of transgender, genderfluid and agender people, and recognize the *need* for a strategic politics of gender (see, among others, Butler 2004), one that uses socially accepted labels and aims to conquer new spaces for those whose social, legal and lived experience of gender diverge from the standard.

In this article, then, I will speak "from a different place" (Cooper 2017, p. 335) to juggle some concepts and articulate my argument with a view on "denaturalis[ing] prevailing ways of doing things while simultaneously inspiring, crafting and developing alternatives" (Cooper 2017, p. 335). This is a creative and affirmative response to the political challenges that the institutionalisation of gender binarism imposes (Monro and Van der Ros 2018).

Finally, let me point out that I am not advocating for the complete abandonment of the grid of meanings that allow us to classify gendered relations and grasp how sedimented concepts work. Rather, a speculative reading[6] starts with

[5] For a general perspective on non-binary gender, citizenship and legal reforms, see Monro 2019; Monro and Van Der Ros 2018; Rellis 2008; Spade 2015.

[6] Speculative readings "demand of imagination to outrun direct observation, venturing towards the limits of the observable where thought becomes experimental and experiential of future" (Parisi 2012,

paying attention to those conventions in order to dis-organise our modes of understanding reality along a line that takes into account the inherent variability of gendered traits, patterns and systems. Mine is a plea for seeing gender reforms as a fertile site to rewrite and rewire the way in which we think about gender and how we experience its impact upon our daily life. A plea for treating gender labels and non-conformity as political tools and positionings from which to crack the grid of meanings and practices we have been imposed. A plea for trying to think that the legal tools with which we have been endowed might become the same tools that ensnare us again and again in the cage of the gender binary.

A monolithic idea of gender

Legal gender reforms have been mainly couched in terms of simplifying transitioning procedures and allowing for self-declarations.[7] This pathway toward legal reform facilitates processes of "formal identification" (Clarke 2015), allowing subjects to apply to change their legal gender or provide a non-binary classification of gender. Both in the case of laws concerning gender reassignment procedures through statutory declaration, and in those based on the proliferation of alternative gender boxes, the main tendency of these reforms has been to work on and with mechanisms of recognition. Here, the law becomes a field where formal identities can be articulated and negotiated through ascriptive procedures. Subjects start to hold the right to decide over their formal gendered identity, taking away from the state the task of allotting gender at birth. In this modality, it is possible to find echoes of the path that brought gender from being considered a fate to being seen as a cultural feature. No longer the mere expression of biological sex, gender ceases to be a trait that can be *verified* by the state (as happens with birth or death). In the legal settings that allow citizens to decide over their registered gender, the latter rather emerges as an *individual property*,[8] in the widest meaning of the term. It is a property, a feature, a trait since it constitutes

p. 237). A speculative method takes into account the open-endedness of any social event and engages with it by following potential paths and developments.

[7] This classification must be intended as one among many possible readings. Other elements or features can be emphasised to draw slightly different (more detailed or oriented towards a more specific goal) classifications of non-binary gender rights. On this, see e.g. Clarke 2019, pp. 993-944.

[8] It is interesting to observe that the concept of "property" lends itself to acquiring the twofold extension of 'ownership' and 'belonging'. For "[p]roperty involves relations of belonging" (Cooper and Renz 2016, p. 11). That is, property can be conceived both as a cluster of individual entitlements derived from ownership and as a "spatialised" relationship (Keenan 2010) that involves and affects both poles of the relation in a non-fixed way. I will emphasise a reading of identity as mainly related to possession. Yet, the idea of property as a "relationship of belonging" is still at work in the background of my analysis.

individual identities. But it is also a possession, something that belongs to social actors. In this second sense, legal gender takes the form of a civil status, a category or a position that can be the object of a transaction between the citizen and the state.[9] As with their civil status, citizens can choose to change their legal identification, exercising their political agency to be publicly recognised as belonging to a gender and claiming control over their legal identities. When this happens, though, social actors are required to exercise their agency under conditions encoded in the law. Gender becomes the object of a regulated negotiation between the social actor and the state – a property with rights attached to it. In changing their legal gender, citizens enter into a contract with the state, but it is the latter that holds the power to determine the terms of this exchange. It is the state that sets the standards to allot and endow recognition.[10] It is the state that presents citizens with a range of possible identities to adopt and that marks the boundaries and the limits of self-determination.

Before turning to an analysis of the specific outcomes of this arrangement, it is worth observing that the introduction of fixed, standardised and non-negotiable options of recognition on the part of the state paves the way for a relapse into a substantialised view of gender. Legal gender becomes a new fate, no longer given in nature, but enforced by the law. To craft one's own formal identity as legally recognisable, social actors buy into a system that *must* replicate the "traditional" one: legal systems built on a binary division will hardly be the field for a fertile articulation of alternative forms of division, for a creative re-fashioning of their basic terms. This

[9] The overlap between a *contract* and a *status* has been detailed by Carole Pateman in *The Sexual Contract*. Pateman (1988) describes marriage as a modification of a status, rather than a mere transaction limited to the performative utterance "I do". While the aftermath of a transaction usually affects the *object* of the exchange, marriage modifies the status of the parties involved. In Pateman's account, marriage has an impact and a duration in time that exceeds the scope of a binding agreement, since it ratifies a condition of subjection of one party (the woman) to the other (the man). In her terms, a marriage is not "concluded at the moment of the ceremony […] but rather at the moment of conjugality – the exercise of the patriarchal right" (Stichyn 2007, p. 78). The "moment of conjugality", however, lasts for the entire duration of the contract: the object of the contract is not a property or the mutual modification of the civil position of the parties. Rather, the object of the contract is the subjection of the weakest contractor to the strongest. Echoing Pateman, I deem the "recognition act" that sanctions the contract between the state and the citizen to present the same features as marriage. The differential of power that characterises the relation between the state and the citizen and the nature of gender reforms, as will become clear in due course, marks the contractual power that citizens hold, resulting in a subjection of the citizen to a subtler, but equally binding rule of the state. On this, see also the classic concept of *assujettisement* as articulated by Butler (1997).

[10] Again, in those legal settings that implement self-ascriptive procedures, gender becomes the object of a contract as it starts to be treated as a property that belongs to the citizen, that is, as it becomes something that the citizen can dispose of on the basis of their free will – as happens with marriage. Indeed, in this latter type of contract, the state is the other contractor.

way of conceiving gender legal reforms stands out as extremely controversial: while it supports personal agency, it maintains conservative hierarchies; while it reclaims gender as a cultural product, it rearticulates it as a stable, non-negotiable identity feature; while it aims at including, it backs up social hierarchies and worsens marginalisation. In placing at their core the concept of *recognition*, gender legal reforms keep perpetuating the system they want to dismantle.

As for now, it is possible to distinguish two main ways in which gender legal reforms have been articulated: (1) self-declaratory processes and (2) the extension of recognised genders beyond male and female. The first type of legal reforms are directed at easing the procedures for gender reassignment through self-declaratory practices.[11] In legal systems that adopt self-declaration, people who are transitioning are allowed to have their legal gender modified without the validation of specific panels or boards (e.g. Gender Recognition Panels), or upon institutional declarations (e.g. the attestation of having lived in one's preferred gender for a given period or a diagnosis of gender dysphoria).[12] In these cases, gender acts as a civil status, in that it is the sovereign, autonomous choice of the actor that brings about a change in their legal gender. No longer dependent on an external legitimation, it is the subject that chooses the main line along which they want to be recognised. This practice is carried out through the presentation of official documents or statutory declarations.

Notwithstanding the great freedom bestowed by these reforms, most jurisdictions call on people to confirm the "solemn intention of living in the preferred gender for the rest of his or her life".[13] The arrival of what has been dubbed the "principle of irreversibility" places a great limit on self-determination and stands out as one cornerstone of these reforms. Whether or not the possibility of reinstalling the "original" sex under exceptional circumstances, according to strict judicial procedures is contemplated, the principle of irreversibility aims at discouraging any fraudulent behaviours and excludes strategic transitions aimed at achieving legal benefits or entitlements.[14] Gender fluidity is banned from these reforms for legal and administrative reasons, which can go from "benefits-raiding" (Cooper 2018b) to

[11] The scope of the processes and what they entail vary from country to country.
[12] E.g. in Belgium, Norway, Ireland and Portugal. In 2018 the World Health Organization rejected the classification of "gender incongruence" as a mental disorder, see https://tgeu.org/world-health-organisation-moves-to-end-classifying-trans-identities-as-mental-illness/, last viewed 28 August 2019.
[13] See , e.g. the Irish Gender Recognition Act, available at: http://www.irishstatutebook.ie/eli/2015/act/25/enacted/en/print.html, last viewed 28 August 2019.
[14] See http://www.ejustice.just.fgov.be/eli/loi/2017/06/25/2017012964/justel, last viewed 28 August 2019.

complications related to kinship laws, paternal rights or gender fairness. The binding nature of irreversible self-declaration precludes the possibility of "recurring transitions" based on the state's need to track subjects' social positioning. Stability, in these cases, fulfils the normative expectations of state law, allowing the legislator to leave untouched the tangle of different norms and rights contingent on gender ascription. Nonetheless, while it is rare to find the formal reasons tied to the necessity of securing gender labels explicitly articulated in the debate on gender transitioning, politicians and policy makers often refer to the "harm that gender fluidity would pose to society or [to the possibility] that gender fluidity would regularly occur" (Cannoot 2018).[15] Practices of self-determination reveal the twofold side of current legal reforms based on the principle of recognition. Reforms endow people with agency, on the condition that agency, to be "properly" exercised, fits the boxes and legal terms of clarity and steadiness. The limit imposed by the principle of irreversibility holds back the progressive drives of self-determination. The agency conferred by legal reforms collides with the implications that transitioning to another fixed gender brings with it. The transition is toward a new nature. It does not negate the need to *be a gender*, to engrave a gender on our political bodies, on our formal identities. This hampers the possibility of reconceiving gender as an unstable entity, a condition that might change, rather than a fixed characteristic (see Renz 2019). Such reforms leave little leeway for the development of any alternative account of gender: they expand, stretch the traditional idea of how gender shapes and informs our identity. Although gender might no longer be sanctioned at birth, it still encroaches on our identities, it is *the mark* that saturates our social presence, our political body.

Nonetheless, the rift toward a re-substantialisation of gender – sanctioned with the principle of irreversibility – does not dismantle the value of these reforms as a specific tool to respect and sustain individual choices. In this sense, legal reforms centred on self-determination fulfil their inclusive purpose in supporting the autonomy of citizens as *owners* of their gender. When considered as a legal tool that the citizen can work with, self-declaratory procedures appear as precious political conquests. Endowing individuals with the power of self-determining their positioning, taking away the boundary of a paternalistic recognition on the part of medical professionals or boards, is extremely important; yet, it comes at a price, for

[15] While I am referring here to the Belgian debate, the need to state the irreversible nature of gender registration has marked many other debates on gender recognition. See e.g. the English debate on the Gender Recognition Act: for example, https://www.theguardian.com/commentisfree/2018/oct/17/the-guardian-view-on-the-gender-recognition-act-where-rights-collide, last viewed 28 August 2019. This tendency might find its roots in what Monro and Van der Ros (2018) define as the "highly institutionalized" gender binary.

the legal practice of self-declaration cannot be detached from social recognition and requires broader support. Medical intervention, for instance, can be key to finding recognition in everyday contexts or, even more, when gender serves an evidentiary function. While gender is re-substantialised in the legal text through the principle of irreversibility, there is no requirement for matching body appearances and legal gender. The discrepancy between formal gender and bodily features downplays the benefits of self-declaration, exposing those who have chosen to change or correct their gender to a recursive request for (social) recognition. Whether in institutional contexts (where documents or other identification records are requested, e.g. airports or courts) or in social ones (e.g. the use of restrooms), this discrepancy eventuates in a lack of protection,[16] for self-determination in this context takes the form of mere formal operations. It not only provokes a mismatch between formal gender and social identity, but it also produces a gap between the legal-political and the medical sides of the transitioning. In many cases, such a disjunction results in the dismissal of a whole set of practices (which might include regular psychological therapies, body modification technologies, and hormonal treatments), as they cease to be essential for a *legal* transition. The disentanglement of the legal-political side of transitioning has the merit of pushing toward a de-pathologisation of gender modification, but at the same time it tends to place the hurdles connected with transitioning processes on the actor's shoulders. To revoke the connection between the civic and the medical side of transitioning mainly affects those people who are unable to afford medical treatments, creating the condition for a further, yet more subtle, disadvantage.[17] As Chris Dietz (2018) points out, this separation brings about a clash between the letter of the law and issues that can be "designated as purely medical", creating the conditions for "situation[s] where medical profession[als] may be resistant to political development" (p. 193). Under this regime, transgender people can incur more subtle forms of marginalisation, exposure to unfair treatments or endless, more burdensome, efforts to *conciliate* legal and biological transitioning.[18]

[16] The debate on sex-segregated washrooms or changing facilities emerges from time to time as an urgent question, as it makes explicit and tangible the demand for consistency between bodily features and public behaviours. On the use of self-segregated toilets and non-binary sex, see e.g. *Johnson vs Fresh Marks*, where the plaintiff's "non-clinical" and "ambiguous" response about her sex authorises her employers to rely on the "unequivocal information provided by her driver license" as a proof of her sex for official recognition (in Clarke 2015, p. 821). On this, see also Dunne and Hewitt, 2018 and Nisar 2018.

[17] When transitioning ceases to be contingent on medical assessment or surgical/hormonal treatments, access to health care, public welfare and insurance for those who want to undertake these paths might be restricted or fall entirely on their shoulders, both economically and emotionally.

[18] A similar gap between the legal text and the conduct of medical professionals has emerged in cases where the law admits the right to refuse to perform medical treatments on the basis of moral or

Similar tensions between legal legitimation and social recognition arise in the case of those legal reforms that opt for a multiplication of legal labels. Recognition is here guaranteed through the provision of a third gender. While part of these arrangements considers the right of individuals to declare their non-conformity with traditional gender labels (choosing another gender, or correcting the one to which they belong),[19] I am more concerned with those arrangements aimed at supporting the right of children born with an intersex condition not to be "forced" under a binary scheme of gender.[20] While the former kind of legal measures shares some problems with self-declaratory practices, the ascription of a child to a non-binary gender has a different import. Once again, recognition is issued on the premise of very narrow clauses. In Germany, for example, a child might be ascribed to a "third gender" only until the sex *is clearly determined*. The legal gender must be modified as soon as the sex can be identified (see Van den Brink, Reuβ and Tigchelaar 2015). The "third-gender" label turns into a legal tool to safeguard children from invasive surgical operations before the development of secondary gender traits. However, these reforms displace only temporarily and contingently the centrality of the binary distinction male/female. In opposition to the steadiness required of people who are transitioning from one sex to the other, the third-gender label is issued as a transitory condition. The temporality of the intersex condition re-affirms the binary system of gender and the centrality of the clear categories male and female.

As in the case of self-declaration, the single subject (the self, the individual, *that* individual) becomes the main target of the law. Once again, then, these arrangements prove substantial for redeeming specific situations and easing individual lives, yet, they leave untouched the symbolic import of gender, reinforcing its importance as an identity marker. However, contrary to self-determination, the decision process is necessarily linked to the autonomous choice to *change* or *correct* one's legal gender, in the case of newborns that present intersexual conditions, the decision must be made by their caregivers. The uncanniness of the choice is worsened by the confusion on "whether the parents, doctors, or hospital officials are to decide on that initial category" (Clarke 2015, p. 793). Reports suggest that parents – often supported by medical experts – prefer to assign their babies to a gender because gender uncertainty

religious reasons. See e.g. the case of abortion rights in Italy and the difficulties that women face to have access to termination procedures.

[19] Note that in the second case the law recognises the possibility of transitioning to a third gender, which does not entail nor is directly related to self-determination procedures (where transitioning occurs between two genders).

[20] For a general perspective on "further genders", see Barker and Richards 2015.

might be "unsettling and stressful for families" (Clarke 2015, p. 793; see also Van den Brink, Reuβ and Tigchelaar 2015, p. 286).

The disquieting aura of choosing to register a baby as neither male nor female is strongly contingent on the value that gender still retains as the main line along which identities are organised. This resonates also in other problematic outcomes of self-declaratory schemes and legal systems that allow non-binary registrations. In most civil law systems, legal gender is "a personal record that informs all other registers" (Van den Brink, Reuβ and Tigchelaar 2015, p. 284). The ascription to a third gender or the correction of one's birth certificate might be a hurdle both in international and national contexts where recognition is required. In addition to the difficulties related to a mismatch between legal gender and an individual's appearance, the modification of one's own gender can bar access to specific public services, from "sex-specific" medical examinations to kinship arrangements (such as marriage or adoption rights). Many legislations tie (whether overtly or covertly) legal gender to the possibility of previously legitimised affective or parental relationships (see e.g. Clarke 2015, pp. 798-799; O'Flaherty 2015, p. 291-292). Legal reforms concerning gender and sex have not pushed for a broader change "regarding marriage and regarding legal parentage. […] Similarly, a provision regarding parental status of a person of unknown or 'third' gender is lacking" (Van den Brink, Reuβ & Tigchelaar 2015, pp. 286-287). This also applies to cases where the subject is transitioning from one sex to the other. For instance, the Irish Gender Recognition Act explicitly requests "a statutory declaration declaring that the person transitioning "is not married or [has] a civil partner" (GRA 10.f.i.).[21] Whether the legislator aims at relieving pressure on transitioning processes or at avoiding compulsory treatments and prejudices against intersex people, the "dominant theme" in these legislations is "their focus on a kind of polarity between male and female: one can be one or the other, or perhaps cross over successfully […], but never rest between the two or challenge the poles altogether" (Katyal 2017, p. 430).

Diffracting legal accounts of gender

Although legal reforms based on self-determination and non-binary labels have the merit of supporting single individuals in owning and operating through their legal

[21] Note that civil partnerships were introduced in Ireland in 2011 and same-sex marriage became effective in 2015, while the Gender Recognition Act only came into effect in 2016.

gender identity, these reforms tend to replicate an exclusionary matrix typical of liberal legal systems. Reforms based on identity keep working on categories that even when "cut up, planified, machined differently" do not defy dualism, since "what defines dualism is not the number of terms (x 2). You only escape dualism effectively by shifting [terms] like a load, and when you find between the terms […] a narrow gorge like a border or a frontier which will turn *the set into a multiplicity*" (Deleuze and Parnet 2012, p. 132, emphasis added). In this sense, these categories are not able to diffract legal gender, that is, to provide a cluster of alternative modes to interact with and account for gender in a non-binary way.

Moreover, this kind of legal reform frames gender as a *personal property* and overlooks the dynamic, inter-relational, social value of gender. These legal labels shape clear-cut identities organised along the axis of gender, which serves the legal need to individuate who falls under certain rules and who can enjoy specific rights.[22] As Jessica Clarke observes, gender labels are "[f]ormal definitions" that "may be appropriate where the evidentiary, and channeling functions of formality serve the substantive ends of the law" (2015, p. 747). Categories are encompassed in the law to determine who can enjoy a right. Thus, individuals are induced "to sort themselves into channels based on sex, race, family status and citizenship" (Clarke 2015, p. 747). This arrangement attributes to the individual a status or an identity that is "generally considered fundamental characteristic[c] of human beings, contributing to a 'sense of self and place in the world'" (Clarke 2015, p. 747).

As legal gender exceeds its political value, the attribution of an identity oversteps the limits of the legal field, thereby bringing about effects in the social world. The formalisation of gender in the law appears to be bound to replicate a "kind of polarity" typical of the gender binary. In the legal demand for stability and certainty lies the assumption of an ultimate duality of gender. This cannot be disrupted by the introduction of a third gender, for this term emerges as a combination of male and female (a site in between them, a temporary condition) or as a double, a replica, a gender in itself still contingent on the other two. Alluring and disquieting, the "X" that often stands for the third sex in legal texts indicates "sex which is not one" (Irigaray 1985), a neglected replica of the binary that finds no uniform recognition. In the social sphere a symbolic load is attached to it: "X" is the other of the norm and it lacks a substantive status. It is defined by negation. Neither male nor female, the "X" does

[22] In the legal context, this can be said also of the label "X", for "X" comes to constitute a specific category, with clear and specific characteristics, that are indicated in the law.

not challenge the binary of gender (see Deleuze 1987, p. 132-134), but rather confirms its exceeding value in the double bind of an impossible definition (a definition that says what X is not) and a precarious legal status. Not thoroughly recognised in all international settings, this label also poses issues at the level of national institutions. Not only can it limit access to public services and hamper the exercise of sex-specific rights, but it can also be framed as a site of passage, a momentary label when the real sex has yet to be discovered. The "X" of the law maintains its symbolic awkwardness (see Van den Brink, Reuβ and Tigchelaar 2015), it becomes the dark continent of legal gender identity, a recognition through subtraction. In this sense, its value wanes in the face of legal reforms that are still tied to a system of recognition and legitimation based on identity categories. Selecting, carving and defining a subject of law, a stable category to rely on, always means electing some attributes as meaningful, some statuses as relevant. This process is not only bound to exclude some categories from recognition. It also constitutes "human agents" as "individual units with a positive essence […] self-determining, ideally rational, consciously operating units" (Davies 2007, p. 153).

When it comes to gender, this representation "might also, ironically, reinstate (in a different form) the status categories which [reforms] fought so hard to eliminate" (Davies 2007, p. 153). The stigma of a misplaced identity re-emerges in the undetermined status of those whose gender is *the other* of binary genders, as well as in the re-integration of those who are transitioning in one of the two accepted categories. At the same time, gender identity sanctions the autarchy of the subject. The very concept of "self-determination" rules out of the legal sphere the relational aspects of gender. The sovereign rhetoric deployed in the law clashes with the hurdles that arise in the social unfolding of gender. Recognition is determined not by a labelling process, nor by the performative declaration of our desires concerning one's belonging to a gender category. The struggle of fitting the social grid of gender entails the *functionalities* of a body, the way in which it composes with the reality that surrounds it. However, a label is not a body; a formal identity does not ease the experience of a lack of social approval. The reforms presented above do not "fix the floating chain of signifieds in such a way as to counter the terror of uncertain signs" (Barthes in De Lauretis 2008, p. 117). To have the capacity of being ascribed to a different gender label, to choose, correct, amend one's own gender does not ease the social "terror of uncertainty" but at the same time defines the spectrum of possible recognition. The law offers a "narrative anchorage" that is "too weak or too dispersed" to evoke changes in the social import of gender, but strong enough to reinforce the traditional

understanding of gender as a substance, an inherent feature of the subject.[23] Formal gender identities do not make room for a proliferation of genders or a movement between them. They either frame the *other* of the norm or call for a re-normalising process to be done. Weakness and dispersedness reveal themselves in the request of finding out the *true* sex of a baby, in the elusiveness of sex-specific state services, in the possibility of having the last word on the gender *we are* – last and ultimate, because it appears irreversible.

These legal junctures cannot be fixed or amended until gender keeps being understood as a thing in itself (pre-relational) attached to an individual (pre-social). Indeed, in a system structured on the idea of subjective rights and identity groups, the categories offered in the law constitute the "resting point where meaning could temporarily congeal" (De Lauretis, p. 118). This is a crucial element of legal recognition and the only strategy to attribute individual rights. The problem arises when relationality kicks in. When the subject of law descends into everyday life, which is embroidered with "informal practices of identity formation reflective, playful, and flexible" (Clarke 2015, p. 814). In this realm, new burdens materialise and, often, originate from the idea that we must adopt a formal identity, even when self-determination does not provide a way out from narratives of the "wrong body", social prejudice and exclusion from legitimised affective bonds.

A way out can be to rewire legal reforms. To leave gender categories intact or get rid of them, to find a strategy to tackle the gender binary in order to offer relief and shelter to those *individuals* that need the law to define (re-define, self-define) their gender identity – possibly enjoying sex-specific services and public welfare to support their choices. But at the same time, to determine those sites where legal gender counts as a functional element. To operate on relationships and not on recognition. To stop "measur[ing] and limit[ing] the quality by relating it to something" (the identity related to gender), to avoid the interruption of what Gilles Deleuze (2001, p. 178) defines as "mad-becoming".

A relational approach to gender takes into account its social rootedness, as well as its variability and its connection with the context. In this sense, stepping away from a politics of identity does not imply a recrudescence of gender-blind policies that are

[23] This duality is contradictory only superficially, for the law is too weak to impose changes but can back up and adopt traditional views, conferring on them a stronger value.

unable to address issues of social injustice. An alternative approach must take as its starting point the idea of gender as a relational practice, as a feature that is constantly made within interactions, exceeds pre-given stable categories and can only be known in the reciprocal positioning of social agents. In this perspective, gender appears as "a real force throwing its weight around in the world and demanding to be taken seriously" (Harman 2005, p. 17). More than a property, gender can be read as an *existing* force, that is, as a combinatory, interactional practice that emerges from exchanges. This does not mean dismissing gender as an ephemeral feature that can be easily undone or deliberately modified.[24] Flora Renz proposes treating gender as a "temporal or fluctuating dimension and to focus on gender as fluid not in the sense that someone individually perceives their gender identity as such but rather as a category or social reality that can vary in intensity or that might have different effects in different moments" (Renz 2019, n.p.). The legislator would be called to "think about gender as something that may flare-up at a given time, and so carry more relevance, and go into remission at other times", this "allow[s] for a more nuanced analysis of gender-based oppression or discrimination, which is frequently impacted by the simultaneous working of other factors" (Renz 2019, n.p.). This approach does not overlook the challenges that gender brings with it, nor does it neglect gender-based violence; rather, it replaces the sop of recognition with the concession of a set of legal tools that can be used by social agents in a creative way.

In addition, such legal arrangements would favour an approach that engages with the dynamic chain of meaning that composes gender.[25] Far from replicating the gender binary as a fixed set of features that can be eluded but never escaped, an opening to creativity leaves spaces for alternative affirmative appropriations without incurring in the awkward proliferation of substantialised identities.[26] When treated as a "real force" that operates in the web of social connection, the law can embed an idea

[24] The idea of "undoing" gender has found in Judith Butler (2004) a great supporter. Her theories on performativity have exerted great influence on queer scholars and theorists interested in explaining the power of subversive practices. Yet, the limits of performativity as a political tool that is manageable by single individuals have been discussed and challenged by many. Butler herself, in her more recent works, adopts a position that pays more heed to the social dimension of performances, rather than to the actors who might carry them out by themselves.

[25] The twofold meaning of 'property' re-emerges here, since to account for what I define as "the chain of meanings" that composes gender, the acknowledgement of networks of belonging is required. Indeed, shifting from an identity-based legal system to one that regulates and protects networks of belonging and social positionings calls for a pluralisation of the law. For a further and deeper exploration of these topics, see Keenan (2010) and Cooper (2019b).

[26] The need to add elements to the "LGBT" category displays the predicament of recognition. To fall under the group, as bearers of an identity, social actors must be visible, linguistically encompassed through a label in the never complete list of possible sexual orientations and preferences.

of gender that crosses the "limits of this representation or reproduction" (Deleuze 2001, p. 80). In this way legal gender would acknowledge the "variable relations of resemblance and contiguity known as forms of association" (Deleuze 2001, p. 80), which allows legal reforms to focus on the exceeding value of gender instead of crystallising some features as typical of one or the other gender. In concentrating on the relational value of gender, legal reforms can regulate the functional value of gender and consider its import in everyday social junctures. At the same time, in not giving up gender labels, legal systems would still be able to provide solutions to single cases, such as transitioning processes and all those instances where a formalised gender identity is an essential element in the individual demand for recognition. Crucial in setting up an alternative and more effective way to treat legal gender is the idea of gender as a multiple legal concept that can take a different value according to its "context" and the "purpose". Davina Cooper (2019a, p. 4) clearly makes this point when she observes that we should let go of the idea that it is possible to "pre-emptively" figure out "which conception is the right or best one" and embrace a perspective that pushes toward a consideration of "different cuts and joins (material and interpretive)" that allows to gauge the "implications different conceptions have for how social life is understood and lived". Cooper goes on, emphasising that

> This also recognises that while different conceptions, for instance of gender, are tied to different political projects, conceptions can take on their own life as not-sensibly-to-be disputed "facts", particularly when they are taken up by powerful institutional bodies and processes. (p. 4)

In this sense, fragmenting our understanding of gender *in the law* can be crucial to avoid a hypostatisation of its value. Being able to promote a conceptual segmentation of gender in the law can expand the scope of legal measures so as to grasp new or unforeseen instances of marginalisation. Opposite to a strategy that frames the conundrum of legal gender in terms of individual rights (so as to provide an extemporary solution that paradoxically replicates the exclusionary system it is meant to challenge), taking an approach that accounts for the shimmering nature of gender, its embeddedness in the social field, its unstable, uncanny, unclear manifestation can allow us to avoid the predicament of neglecting gender-based violence while eschewing an articulation of the struggle around gender in terms of "recognition". Perhaps this paradigm shift in the law can be useful to understand "how derisory are the voluntary struggles for recognition" (Deleuze 2001, p. 80) because "[s]truggles occur only on the basis of a common sense and established values, for the attainment of current values (honours, wealth and power). A strange struggle among consciousnesses for the conquest of the trophy […] of pure recognition and

representation" (Deleuze 2001, p. 80). A kaleidoscope of gender is what might help us overcome the mark of "this indelible model of recognition" (Deleuze 2001, p. 80).

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