The recognition of the nonbinary gender

A socio-legal analysis of the third gender legislation in Malta and Germany

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Magister Thesis in Gender Studies

Spring 2019

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Abstract

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The binary conception of gender as solely male or female has had a great impact to nonbinary and intersex people in the societal and legal field. Their ability to enjoy human rights is impacted by the current normative confines of sex and gender. The aim of the following paper is to investigate how Malta and Germany have included intersex people and/or nonbinary identities in their legislation and through a socio-legal analysis examine whether their legislations achieved to provide non-discrimination policies. The paper concludes that the third legal recognition in Malta and Germany is based on different perspectives in order to include populations that do not conform to the binary dichotomy and that seek legal recognition.

*Keywords: nonbinary, intersex, third gender legislation*
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1. A note on terminology

The following paper will predominantly use nonbinary as a general term to refer to all gender identities that differ from the notions of women and men. Another essential element that needs to be mentioned is the fact that nonbinary and genderqueer identities are regarded as synonymous and are used interchangeably.

Furthermore, in the scholarship sphere the term third gender and nonbinary gender are also used interchangeably as they refer to intersex people or nonbinary identities who reject the binary at a conceptual level or avoid gender presentations altogether. Even though the term third gender seems to be more popular in legal terms, it implies that only three gender identities exist, which is not the case. Instead, referring to these people as nonbinary indicates an indefinite number of gender identities.

2. Introduction

The binary classification of female and male in our society demonstrates people’s limited understanding of sex and gender, given the rigid line with which people are separated into two mutually exclusive sexes (Agius, 2015). Even though dissatisfaction with the strict binary gender system does not constitute a new phenomenon, the widespread and legitimized conversations surrounding intersex people and nonbinary identities have grown significantly in recent years (Dembroff, 2018).

The term genderqueer was coined in the 1990’s as an attempt to describe those people who came together to oppose the resistance to the construct of gender as fixed, biologically determined, natural binary as male and female (McGuire et al, 2018). Until then, scholarship was solely focused on transgender individuals who identified with a gender that differed from their sex assigned at birth and were seeking medical or social transition (McGuire et al, 2018).

Gender-related measurement that extends beyond binary representations of masculinity and femininity has grown out of a need for accurate representation of nonbinary identities in the legal, societal, political and scholarship field (McGuire et al, 2018). Still, our societies do not recognize people without a reference to their sex, and as a result the ability of nonbinary and intersex people to enjoy their human rights is impacted by the current normative confines of sex and gender (Agius, 2015).
Gendered symbols indicate which sex-segregated facilities are available to that person and which are not. Furthermore, various documents throughout people’s lives will oblige them to tick F or M as a part of personal data required before the provision of the service, creating difficulties for those who do not fit within the female and male dichotomy (Agius, 2015).

According to McGuire et al, (2018) gender identity development trajectories vary widely within the nonbinary population, as according to a research conducted in 2011, it was stated by the 13.3% of the trans participants that their gender was not listed among the given options of female, male or transgender, as most of them identified as genderqueer, third gender or hybrid (McGuire et al, 2018). Furthermore, according to a UK survey on nonbinary people mentioned in ILGA Europe in 2018, 73% of the participants would favor the introduction of the third gender category (Holzer, 2018). Regarding the intersex situation, according to a study conducted by the Netherlands Institute for Social research in 2014, it was found that virtually all intersex people interviewed encountered problems in social situations, as they talked about being different, feeling lonely and experiencing shame and embarrassment (FRA, 2015).

Making space for nonbinary and intersex people is a way to make personal identity political and embody gender (McGuire et al, 2018). A recognition model that would provide a third option to better reflect the lived experiences of people who do not check the F and M boxes, would assert to nonbinary and intersex people not to be forced to adopt a binary sex category that is a lie (Clarke, 2019).

**3. Aim, methodology and research questions**

The aim of the paper is to investigate how Malta and Germany included intersex people and/or nonbinary identities in their legislation that extend beyond binary representations of femininity and masculinity. The methodology of socio-legal analysis will be applied in order to determine whether the Gender Identity Gender Expression and Sex Characteristics Act (GIGESC) of Malta and the Third Gender in Civil Status law of Germany have achieved legal and societal change, provided non-discrimination safeguards that cause a break in the static registration of gender as binary and gave access to nonbinary people access in social discourses such as culture, medicine and law.
Through the comparative analysis of the two legislations, it will be portrayed the different tactics each country has used, as well as analyse their similarities and differences, shortcomings and anti-discrimination policies.

Thus, the research questions of the following paper will be the following:

1. How and when was the Third gender legislation introduced in Malta and Germany?
2. How did each country argue for its legislation?
3. How did the LGBTG+ community react to each legislation?

4. Gender assumptions

Commonly held beliefs about sex and gender are embedded in biologically based conceptualizations of physical sex as binary, meaning solely female and male. The idea that physical sexes come only in two forms is accompanied by a correlative set of assumptions to the effect that genders are binary and biologically rooted in the physical sexes (Devor, 2016). From this standpoint, when a child is born with an anatomy that does not conform to normative expectations about sexed embodiment (intersex), the child’s prospective identity and status as a coherently gendered subject is thrown into question (Rubin, 2017).

People whose gender identities or expressions differ from social norms have lived in all societies throughout history. Even though gender has been used as a central social organizing principle, the understanding of gender (non)conformity has varied. For instance, in some cultures gender nonconforming people have been well integrated, whereas in others there has been little or no tolerance whatsoever (Devor, 2016). Historical and present day examples include Indian Hijra, Thai Kathoey, Indonesian Waria, various Two-Spirit identities of First Nations tribes and South American Machi identities, each with a distinct meaning not reducible to man or woman. Sadly, as Clarke (2019) puts it, these examples have been overlooked due to “ethno-centric Western interpretations of gender that have dominated the natural and social sciences.”

Definitions of male and female anatomy are not predetermined neither universal. Instead, they are culturally specific and in various degrees arbitrary. Even though
many people are used to conceptualize the male and female distinction as scientific and as a natural division of humankind, labeling someone male, female, trans, cisgender or intersex is a social decision. Furthermore, our beliefs about gender affect what kinds of knowledge scientists produce about sex in the first place (Rubin, 2017).

5. **Nonbinary gender identities**

According to McGuire et al (2018), genderqueer or nonbinary individuals are often subsumed under lesbian, gay, bisexual, queer, and transgender umbrellas (LGBTQ). Genderqueer or non-binary identities represent individuals that are uniting in resistance to the construct of gender as fixed, biologically determined and binary. These people do not subscribe to the conventional gender binary and instead identify as both masculine and feminine, between masculine or feminine, gender neutral or outside of the gender binary (McGuire et al, 2018). More specifically, a person is genderqueer if they are reliably perceived as attempting to not exclusively adopt either feminized or masculinized gender expression, or their body cannot be reliably coded in the context of either male or female (Dembroff, 2018).

According to Richards et al (2016), nonbinary people constitute a relatively recent and under-researched phenomenon. Hence, it is likely that that some people who previously would have identified as trans within the gender binary, may have identified outside of the binary if that discourse had been available to them. Hence, nonbinary people pose a challenge to all modes of sex segregation, unlike transgender people seeking recognition as men or women (Clarke, 2019).

Nonbinary people do not reject femininity and masculinity, but they rather reject their concepts that always taken into consideration for interpreting an individual’s behavior or aesthetic. Hence, it involves rejecting the idea that their way of being in the world should be understood via the binary concepts of feminine and masculine. However, due to binary divisions, nonbinary people out of necessity frequently maintain binary coded norms relevant for them where there is no alternative in spaces like restrooms or legal institutions (Dembroff, 2018).

Nonbinary identities are diverse and have any number of relationships to gender such as hybridity, rejection, dynamism or all of these. More specifically:
1. Gender hybridity: it combines gender roles into nontraditional configurations and might include bigender, pangender and androgynous identities.
2. Gender rejection: the refusal to adopt traditional gender categories may be about avoiding stereotyped expectations and might include agender, genderless, gender neutral or unisex identities.
3. Gender dynamism: gender identities do not remain static overtime but are fluid. Thus, a gender fluid person might experience their gender differently at different times. For instance, a gender fluid person might feel more male in some occasions and more female in others (Clarke, 2019).

Nonbinary gender identities are at a high risk for discrimination and violence. Due to ignorance society argues that science and religion demonstrate that everyone is either a man or a woman and nonbinary identities undermine traditional gender roles. Another common reason for bias is that nonbinary identities are a developmental phase, a result of confusion or a form of experimentation and the idea of a third gender is “ridiculous,” “insane” or the result of brainwashing. As a result nonbinary people hide their identities in order not to disrupt gendered segregated places or let strangers assume that they are either men or women, rather than spend their time trying to explain nonbinary gender identities. This leads policymakers to assume that nonbinary people are a very small number of people, leading to their legal discrimination (Clarke, 2019).

6. Intersex people

Intersex is used as an umbrella term to indicate a number of variations in an individual’s bodily characteristics that do not match the strict medical definitions of male and female (FRA, 2015, Clarke, 2019). These characteristics may be chromosomal, hormonal or anatomical and may be present to differing degrees. Differences can include XXXY or XO sex patterns, different tissues responses to sex hormones such as having one ovary and one testis, different hormone balance or the genitalia may not be clearly identifiable as male or female. For others, the detection of intersexuality might happen during puberty or later in life, due to the absence of menstruation or physical development that is not in line with the assigned sex (Agius, 2015). Medically, intersex individuals are grouped under “disorders of
sexual development or DSD\(^1\). However, this term is rejected by activists and intersex people themselves, who do not wish to identify as such, as they consider it stigmatizing and pathologising (FRA, 2015).

Intersex embodiment disrupts binary schemas of sex and gender and has not been accepted as part of the order of things. It is regarded as a problem since it disrupts the traditional gender order. The prevailing medical opinion is that ambiguous sex can and should be fixed. Our societies place a great deal of importance on normative genital appearance as a prerequisite for naturalized gender role ascription and acquisition and doctors perform normalizing genital surgeries to humanize intersex infants in order to allow them to fit in (Rubin, 2017). In fact, genital surgeries on intersex babies have become a routine, despite the fact that they are rarely medically necessary. Emphasis is placed on the newborn’s ability to pass for one sex or the other, thus meeting social expectations, rather than on the child’s best interests and welfare. However, the gender of the intersex child is an educated guess and entails a great risk of error (Agius, 2015).

This “involuntary genital normalizing surgery” constitutes a form of torture, as they cause more physical and psychological trauma than does growing up with atypical genitalia. One justification for these surgeries has been that binary sexual anatomy is essential for parents to raise a child within the binary gender identity to avoid stigmatization and ensure that the child appears “normal” (Clarke, 2019). According to Agius (2015), male infants with penises smaller than 2cm are considered too small and are assigned the female gender and reconstructed to look female, while clitorises larger than 0.9 cm are considered too big and are reduced in size. Furthermore, a great percentage of intersex children are transitioned to a female sex due to the fact that “a functional vagina can be constructed in virtually everyone, while a functional penis is a much more difficult goal” (Agius, 2015). Intersex people are denied their right to physical integrity and the ability to develop their own gender identity (Agius, 2015).

\(^1\)Intersex variations were classified under different categories such as congenital adrenal hyperplasia (CAH), androgen insensitivity syndrome (AIS), gonadal dysgenesis, hypospadias, and unusual chromosome compositions such as XXY (Klinefelter Syndrome) or XO (Turner Syndrome) (Agius, 2015).
These factors have led intersex people, their families, activists, scholars, legal and health care professionals to doubt the medicalization of intersex, as it tends to reproduce rather than resolve the vast array of inequalities. Surgical normalization reproduces the stigma and trauma associated with intersex that physicians claim to prevent via surgery, since the misapprehension of people born with atypical sexual anatomies as other, defective or less human, constitutes a social problem (Rubin, 2017). However, since intersex lives become mainstream, parents and the medical profession may have less to fear for children with ambiguous genitalia or other sex characteristics and these surgeries may decrease (Clarke, 2019).

7. The difference of nonbinary identities and intersex people with trans people

Nonbinary people are often being compared to transpeople, an umbrella term that refers to people whose gender identity or expression differs from their sex assigned at birth and make physical gender changes within the binary or decide to undergo surgical interventions to address the incongruence between their physical and mental gender. It also has to be noted that some nonbinary people might also choose to alter their bodily characteristics. For instance, some nonbinary people might choose to remove obvious markers of masculinity by wearing makeup, having long hair, removing their body hair or femininity by having breast surgery, breast binding, having a traditional male hairstyle, not shaving the body hair. Some nonbinary people like to destabilize conventional gender markers by dressing androgynously or combine men’s and women’s clothing (Richards et al, 2016, Clarke, 2019). Hence, not all nonbinary identify as trans and many trans people identify as men or women (Clarke, 2019).

Regarding intersex people, it is important to note that intersex people have a variety of gender identities, including binary or nonbinary and many people with nonbinary gender identities do not have intersex variations. Both nonbinary identities and intersex people share legal interests, although their interests may sometimes diverge. Individuals who are both intersex and nonbinary may be at the forefront of advocacy efforts, as they may seem more sympathetic to the public and judiciary, because intersex traits are regarded as somatic rather than psychological or elective (Clarke, 2019).
8. The importance of the third gender recognition

Today, nonbinary gender rights advocacy draws on feminist arguments that perpetually criticized the binary concept of gender, in order to open new legal possibilities (Clarke, 2019).

The legal recognition of the third sex/gender would grant legal dignity and protection and would respond to concerns regarding disbelief, disrespect and disregard of nonbinary people. Also, it would legitimize the nonbinary identity as a “civil status” and affirm a position within the legal system and equate nonbinary identities to the gender identities of women and men. Legal recognition would give nonbinary people authority to demand fair treatment in public and private spaces (Clarke, 2019).

Opponents of nonbinary gender recognition argue that it can reinforce stereotypes about the third category and authorities may end up policing who is and is not a legitimate member of the third category. Moreover, adding an X option to M and F does not confer dignity but rather expands the list of legal sex classifications to three. The X designation may be a poor fit for those people who regard their gender identities as hybrids of M and F or altogether absent (Clarke, 2019). However, it is of high importance to note that people must enjoy the human right of self-determination and have the possibility of not only choosing a specified male or female gender marker, as it prioritizes gendered self-autonomy and makes trans and intersex people the arbiters of their legal identity (European Commission, 2018).

Identity documents such as passports, driver’s licenses, birth certificates, have a major impact in a person’s conception of self. Thus, the recognition of a nonbinary gender could legitimize the individual’s claim to that status, as it would indicate that people with nonbinary gender identities deserve the same respect as women and men (Clarke, 2019).

Furthermore, the recognition of the nonbinary can facilitate data collection in order to identify problems and challenges nonbinary people face and entail a right to affirmative changes in policy to accommodate nonbinary gender identities. Taking nonbinary gender into consideration would entail protection from discrimination and harassment in housing, employment, education and public accommodations. The law
has no abiding interest in maintaining a universal scheme of binary sex or gender regulation that would exclude nonbinary people (Clarke, 2019).

Even though recognizing gender outside of the traditional male and female dichotomychallenges us to rethink the concepts of sex and gender in new ways, it is important to take into consideration what nonbinary people consider for themselves as the best option. It is estimated that a great amount of nonbinary people would favor the introduction of a third gender category\(^2\), even though there is a great diversity in nonbinary identities\(^3\). A third gender category provided for the people who seek it, would not only provide relief and pride in having their identity reflected in gender markers, but it also boost public awareness and support. Nonbinary people deserve the same basic rights as cisgender people and there is an urgent need to stop discriminating people regarding their legal and social status just because they identify outside of the gender binary. The proactive approach towards forms of inclusivity and the understanding nonbinary identities is a way to comprehend the social, legal and economic challenges these people face and begin to respect the right of their fundamental human rights.

9. Methodology

For the purpose of this paper, a socio-legal analysis of the current legal situation in Malta and Germany regarding the legal recognition of the nonbinary and intersex people will be analyzed. Through socio-legal analysis it will be portrayed how the Maltese and the German legal systems introduced a third gender option to achieve legal and societal change, recognize gender diverse people and reduce the stigma attached to oppressed sexual subjectivities and make them gain access and voice in social discourses such as culture, medicine and law.

Socio-legal research challenges the traditional limitations of legal knowledge and moves beyond the black letter approach to law, is it reaches new insights into the social dimension. Society is ordered by multiple normative systems of culture and

\(^2\)According to a UK survey on nonbinary people mentioned in ILGA Europe in 2018, 73% of the participants would favor the introduction of the third gender category (Holzer, 2018), as mentioned in the introduction.

\(^3\) Most common being agender, bigender, genderfluid, genderqueer, polygender (Holzer, 2018).
social values. Hence, law formulation is supposed to be influenced by social and discursive environments, in order to regulate society fairly and meet contemporary social demands (Banakar, 2009). Socio-legal research establishes alternative ways of thinking and argues that the law must be more pluralistic in order for marginalized groups to be able to be identified with it. Furthermore, it investigates how the application of the law affects the creation, maintenance and change of the social order (Ashford, 2010).

Public spaces are heavily gendered according to the binary, leaving no choice for nonbinary people to conform to the male or female option (Dembroff, 2018). The fluidity of the socio-legal research contributes to new insights regarding LGBTQ+ spaces, as it puts emphasis on the fluidity of gender identities in relation to the cisgender space. Across the EU, legal gender recognition remains anchored to a highly binary framework, meaning that there is an absence of a formal acknowledgement and protection for nonbinary identities. Intersex people and nonbinary identities are posited as “other” to dominant understandings of sex and gender. Thus, they fear stigmatization and social exclusion because society remains largely ignorant about their existence (Agius, 2015). Due to this ignorance, nonbinary gender identities may unleash moral panic because they call into question accepted social norms about gender identity and people may fear that those who are willing to transgress social norms with respect to binary gender may also be willing to transgress other social boundaries, posing threats to safety (Clarke, 2019).

Practices such as issuing birth certificates and medical treatments in the gender binary, can have an impact on the fundamental rights of nonbinary identities. Legislation needs to establish the applicability of human rights protections to nonbinary identities and promote the right to bodily diversity, physical and psychological integrity, as well as the right to be free from discrimination.

From a socio-legal perspective, human rights are a social institution expressed through legal structures. The social environment in which human rights norms, values, and standards exist relates to societies’ expectations of how people are supposed to behave, guide the actions of individuals, institutions and society through discursive relations of power, knowledge and normalization, as well as protection of vulnerable subjects (Eijkman, 2007, Rubin, 2017).
Malta based its legislation on the right of gender identity and the right to bodily integrity and physical autonomy and Germany on the right to sexual identity and the development of personality in a self-determined way. Thus, both of the legislations will be analyzed from a socio-legal perspective on human rights, in order to investigate whether the protection of the diversity of physical sex development, gender identities and gender expression in relation to fundamental human rights is being implemented. Malta and Germany have adopted this legislation based on different tactics. Hence, it will be examined how each country argue for the legislation and whether the law is adequate to intersex or/and nonbinary people.

Even though multiple European countries\(^4\) legally recognize third gender classifications, Germany and Malta were chosen to be analyzed, due to the discrepancies in legislation these countries have among each other. Even though Germany is considered to be a LGBTQ+ friendly country, its legislation is considered controversial since it applies only on intersex people that need a medical certification and denies the right to nonbinary identities. The recognition of the third gender in Germany is interesting to be analyzed, as the initiative of such legislation was followed by an intersex adult, whom chromosome analysis found to be neither male nor female, and after a four year battle the government concluded that a new gender category must be passed by the end of 2018. Hence, the initiative of an individual made Germany the first European country to recognize intersex people (Sirin, 2018). Despite the fact that Germany’s highest court stated that binary designations are discriminatory and undermine the free development of gender identity, the third option “diverse” is not based on the self-determined decision, accessible to all. Hence, it will be examined what Germany could alter in its legislation in order to be improved.

From the other hand, a conservative Catholic nation such as Malta is the only country in the European Union whose jurisdiction permits individuals to obtain legal acknowledgment of a nonbinary preferred gender, without the requirement for surgical, medical, psychological, hormonal or any other treatment. Malta’s third gender recognition was implemented from a totally different perspective, as the legislation was implemented after the Minister of Malta had the personal opportunity

\(^4\)such as Austria, Denmark, The Netherlands and the UK
to connect with intersex people during a convention regarding intersex people, and helped her comprehend the legal burdens these people face. Malta adopted an easier procedure to changing one’s gender identity on legal documents and improved public awareness regarding nonbinary identities and it is being supported by the LGBTQ+ community.

The socio-legal analysis of Malta’s Gender Identity, Gender Expression and Sex Characteristics (GIGESC) Act and Germany’s Civil Status Law, is based on the analysis of the applicable law in each country, meaning the GIGESC ACT No. XI of 2015 and the German Law Archive for the Third Gender in Civil Status Law. For the analysis of each legislation, EU documents, press releases, interviews and media articles from NGOs, activists and the LGBTQ+ community were accumulated in order to portray their reactions for each legislation. More specifically, a great assistance was the feedback from ILGA\(^5\) and TGEU\(^6\). All the documents were published between the years 2015-2019 and accumulated from an internet search. The time frame of the research regarding the GIGESC Act and the Third gender in Civil Status Law was carried during April 2019. The presentation of these two legislations is intended to portray what is being done in respect of those people who do not conform to the sex binary and wish to seek legal recognition.

10. The third legal recognition in Malta

The Republic of Malta has a conservative background since the constitution recognizes Catholicism as the state religion where divorce was legalized in 2011. Even though the Church does not interfere in drafting legislations, it plays an essential role in teaching citizens the moral values of right and wrong. In recent years, Malta has been progressing in the sphere of gender and sexuality and the GIGESC Act that is going to be analyzed, was considered a revolutionary act as it was considered to undermine the concept that a family is made up of a man and a woman. Even though the views of several Maltese citizens might not be in favor of the Gender Identity Act


due to conservative values, the Act was not a matter of conflict between State and Church (Hay, 2015).

Malta had a unique situation to implement the GIGESC Act, since the Human Rights Policy Coordinator at the Maltese Ministry for Social Dialogue, Consumer Affairs and Civil Liberties (2013), Silvan Agius was an intersex ally and was previously working with the International Gay, Lesbian, Transsexual, Transgender, and Intersex Association. Silvan Agius, held international conventions on intersex issues and assisted in bringing together a global intersex community. During the third year of the Convention held in Malta, the Minister of Malta, Helena Dalli was invited and had the personal opportunity to connect with intersex people that helped her understand the need of such legislation (Hay, 2015).

10.1 The Gender Identity, Gender Expression and Sex Characteristics Act

In 2015, Malta explicitly provided protection against discrimination on the grounds of “sex characteristics” since the GIGESC Act recognized the registration of the gender, as well as the recognition and protection of the sex characteristics of a person (ACT No. XI of 2015). The formulation of the Act introduced two new universal rights in the Maltese legal system; the right to gender identity and the right to bodily integrity and physical autonomy.

The right to gender identity is a prerequisite for all individuals, cisgender or transgender as the law empowers all adults and minors to rectify the gender and name on official documents and does not have any negative repercussions to the individual in terms of marital status, family status or property (Dalli, 2015). Hence, all people being citizens in Malta have the right to (a) the recognition of their gender identity, (b) the free development of their person according to their gender identity, (c) be treated according to their gender identity and be identified accordingly in their official documents. The person shall not be required to provide proof of a surgical procedure for total or partial genital reassignment, hormonal therapies, psychiatric or medical treatment to make use of the right to gender identity (ACT No. XI of 2015). A declaration based on self-determination before a notary is sufficient.

7Which refers to the chromosomal, gondal and anatomical features of a person, which include primary characteristics such as reproductive organs and genitalia and/or in chromosomal structures and hormones; and secondary characteristics such as muscle mass, hair distribution, breasts and/or structure (ACT No. XI of 2015).
The right to bodily integrity and physical autonomy is a prerequisite for all people, regardless whether they are identified as male, female or intersex at birth (Dalli, 2015). Also, Malta outlawed conversion therapies, which includes the prohibition of sex normalizing surgeries on intersex babies. Hence, it is unlawful for medical professionals to conduct any sex assignment treatment or surgical interventions on the sex characteristics of a minor until the person to be treated can provide informed consent, unless in exceptional circumstances (ACT No. XI of 2015). An agreement between an interdisciplinary team, appointed by the equality minister and those with parental authority or the child’s tutor is also required (FRA, 2015). According to the amendment of the Act in 2016, the pathologization of any form of sexual orientation, gender identity and, or gender expression, shall be null and void in Malta. The nullity of such classification shall not impact negatively the provision of any healthcare service related to sex or gender.

Hence, parents have the choice to register or not register their newborn’s gender as part of the birth registration and protect children whose sex and gender is unclear. More specifically, children do not need to be assigned a legal gender at birth, but wait until the gender identity of the minor is determined. This allows time for the child to make an informed decision (LGBTI Intragroup, 2015).

Minors\(^8\) can apply for legal gender recognition, meaning establish or alter their legal gender in official documentation, with no need for professional or medical consent requirements, no time requirements such as living in the desired gender for a certain amount of time and no associated costs. The entire process lasts a maximum of 30 days and later on enables the individual to pursue their live without further interference (TGEU Press Release, 2015).

Nonbinary people who do not want their gender specified on identification documents can also amend or not to declare their gender/sex details with a neutral “X” marker option which stands for “undetermined”. Thus, it refers not to a “third” gender but to the nonregistration of a gender, next to “female” and “male” on official forms (Agius, 2015, Holzer, 2018). Although Malta still officially recognizes the existence of two genders, the introduction of the “X” marker allows trans and nonbinary people a third

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\(^8\) people under the age of legal responsibility which is 16 years old
option on their passports and legal documents, allowing them not to identify their

Furthermore, Malta recognizes nonbinary gender markers or the absence of gender
markers from competent foreign courts or responsible authorities acting in accordance
with that country’s laws (FRA, 2015).

The unforeseen loophole in the GIGESC Act established on April 2015 was addressed
by the amendment of the Act in July 2015, according to which adopted individuals
can have their gender changed followed by an annotation in the margin of the
respective individual’s registration in the Register of Adopted Persons (Debono, n.d).

Last but not least, the Maltese government introduced an educational policy focusing
on the needs of trans, gender variant and intersex people and promoted the learning of
human diversity, social awareness, acceptance and respect (Ministry for education and
employment, 2015). The educational policy highlighted key issues in order to make
schools inclusive for trans, gender variant and intersex students, such as protection of
privacy, adequate facilities, inclusive policies, regulations and language and access to
counselling and information. Furthermore, it addressed how schools should respond
when a trans, gender variant or intersex student comes out or transitions (Cassar,
2016).

10.2 Analysis of the GIGESC Act

The GIGESC Act promotes equality policies and represents an improvement in the
protection of nonbinary and intersex people (Anonymous, ILGA, 2015). It offers anti-
discrimination protections and based on the right of self-determination, it eases the
process of gender identity change and administrative recognition for transgender,
genderqueer and intersex minors and adults (Hay, 2015). Furthermore, it is regarded
as firmly build on trans and intersex people’s rights and creates the conditions for an
equal society.

Intersex people are depathologised, as involuntary surgical interventions driven by
social factors on the sex characteristics are outlawed and there is a separation between
legal recognition procedures and any medical or surgical interventions that individuals
may wish to undergo in order to align their body with their gender identity (Dalli,
2015). Furthermore, the Act exposed the vulnerability of intersex individuals in
medical settings, while affirming that this can be successfully addressed as a matter of law (Cabral & Eisfeld, 2015).

By adding the “X” marker on official documents, the GIGESC Act demonstrated that pathologization can no longer be justified using outdated legal imperatives (Cabral & Eisfeld, 2015) and eliminated the need to undergo gender reassignment surgery before attempting the process of amending credentials. This is one of the advantages of the Act, as gender reassignment surgery is within itself a financial burden, due to travel and professional costs and hormonal treatments.

Malta’s education policy for gender variant and intersex people constitutes further proof to the equality mainstreaming and makes Malta the first country in Europe to publish a comprehensive educational policy focusing specifically on trans, gender variant, and intersex children. According to ILGA Europe, Malta makes a history in advancing LGBTIQ rights globally, as the GIGESC Act “constitutes a great example when equality rights and dignity are at the forefront of political conversation”(Anonymous, ILGA, 2015).

Transgender Europe (TGEU) encourages other states to review and reform their legislation with the same aim (TGEU Press Release, 2015), as the GIGESC Act constitutes a historic breakthrough for the rights of nonbinary people in Malta and Europe. According to TGEU’s Press Release, the GIGESC Act fulfills the standards of “quick, transparent and accessible” gender recognition procedures and foresees pro-active equality measures (TGEU Press Release, 2015). Malta’s progress in gender equality has become an inspiration for other countries to follow, and a beacon of hope for nonbinary people across the continent (Caruana, 2017).

Even though the Act states that individuals have the right to make their own decisions about their body, there seems to be a shortcoming regarding surgical procedures. The terminology used in the Act implies that the medical procedures on intersex individuals will be applied when informed consent will be given, when the Act could have deemed these surgeries as completely unnecessary. In that way, the Act does not completely refute prejudiced perspectives against intersex traits and intersex people needing to be fixed in some way (Hay, 2015).
11. The third legal recognition in Germany

The German state has committed itself in its constitution to treat religions and worldviews neutrally and not identify with any religious or ideological denomination, even though most of the population is Christian (Deutschland.de). According to a study conducted by Expert Market (2017), Germany is ranked as the fourth best European country to work for LGBT people due to its non-discrimination legislation, workplace policies and fair housing measures (Anderson, 2017).

In 2012, the German Ethics Council published a comprehensive Opinion on intersex issues, providing a range of recommendations to safeguard the rights of intersex people. The Opinion argues that legal systems presume a strict sex binary that does not always occur in nature. Thus, intersex issues should concern legal professionals and policy makers, and not only health and healthcare professionals. Furthermore, the German Ethics Council has recommended allowing the ‘other’ sex category in certifications. Hence, since 2013, in Germany it is possible to issue birth certificates without a sex identifier or marker and there is no deadline to include such a marker (FRA, 2015).

In 2013, Germany allowed the issues of birth certificates without a sex category in certifications, as the court ruled that it was unconstitutional to force people to choose if they were either male or female. Even though media articles spoke about the legalization of a “third sex” category for nonbinary people, this was not the case. In reality, the law allowed babies born with intersex variance to leave the gender options of male and female blank. More specifically, in the Civil Status Law it is stated that newly born children can be registered without reference to their legal sex if “the child can neither be assigned male nor female sex” (Dunne & Mulder, 2018).

11.1 The Third Gender in Civil Status Law

Until November 2017, the gender boxes on birth certificates of intersex children were left blank until Germany’s constitutional court ruled that denying people a gender was a discriminatory practice, noting that sexual identity of an individual is protected as a basic right. Hence, the Court provided two possible scenarios: either the Government introduces a “third” non-binary legal gender category or it abolishes the registration of gender altogether (ILGA Europe, 2019). The Constitutional Court ruled that a third
gender option must be introduced in order to recognize intersex persons who identify outside the gender binary. This led to the new legislation being adopted in December according to which, the German introduced a third gender marker (TGEU, 2018).

Germany passed this law after an intersex adult argued that the state should not force intersex people to choose between male and female on official documents, as according to the German Law Archive on Third Gender in Civil Status Law, “one of the purposes of the general right of personality is to guarantee the development and protection of their individuality in a self-determined way. The gender identity of persons who can be assigned neither the male nor the female gender must be protected as well” (Bottcher, 2018).

The new law proposal introduced the “divers” gender marker entry, which is translated from German to English as “diverse” or “various” next to the “male” and “female” options on birth certificates. This law applied to infants born intersex, meaning that it encompasses individuals who have sex traits such as genitals or chromosomes that do not entirely fit with a typical binary notion of male and female (The local, 2018). Hence, the “divers” category is included on driving licenses, birth certificates and other official documents. This ruling applies only on intersex individuals. Regarding intersex infants, parents need a doctor’s certificate to mark their child under the new category and adults must also produce a doctor’s statement or other medical certification confirming their intersexuality in order to change their existing designation to the new option (Eddy, 2018). Furthermore, essential emphasis was put on the fact that intersex children and their parents should be given psychological counselling and support in order to protect the child’s integrity (FRA, 2015).

11.2 Analysis of the Third Gender in Civil Status Law

While activists described Germany’s new law as a “small revolution” as it creates more visibility outside the gender binary and serves as a first step towards the creation of space and more inclusive gender laws, it is claimed that the lawdoes not go far enough to protect people of nonbinary identities (Madhuri, 2019). The category “divers” must be open to all individuals who need and want it without requiring official medical statements, as it excludes people that feel sustainably not male or
female and have been waiting for a law to legally register their status as they define it (Darin, 2019, Eddy, 2019).

Even though the German law allows intersex people to be registered as a third gender, it is a measure that is not considered progressive, as it requires doctors to certify gender variations in order for a person to change their gender classification in the birth registry. This medical approval needs be removed as intersex people have already been subjected to unnecessary and traumatic medical interventions.

Currently, trans people can change their names and their gender marker from “male” to “female” or vice versa but there is no legal status for nonbinary people. Hence, binary trans people and nonbinary intersex people have the right to be recognized before the law, but nonbinary trans people have not such a right, as the current third sex option allows people to select a nonbinary sex classification rather than gender. Germany’s LGBTI community, the politicians from the Social Democratic Party and the Greens stated that the legislation was far from perfect, since requiring a doctor’s certificate to change their legal status, puts too much focus on physical attributes when gender cannot be determined solely by physical characteristics, but also from social and psychological factors (Derek, 2018). According to the Lesbian and Gay Association this signals that being intersex is seen as abnormality and demanded that these degrading assessments must be abolished (The Jakarta Post, 2018).

Even though TGEU welcomes the introduction of the “divers” gender marker as an alternative to female and male, it demands the change of the gender marker to be based on the standard of self-determination for nonbinary and intersex people rather than medicalization, as it shows a gross lack of understanding of the seriousness of the human rights violations these people face. According to TGEU “the law needs to protect against human rights violations and not invite new abuse. Gender identity is one of the most intimate parts of a person’s private life, an area that needs high standards of protection against any interference from the state” (TGEU, 2018). TGEU demands from German lawmakers to use the opportunity of reforming the Transsexual Law in 2019 and create one human rights compatible standard for anyone who needs a change in gender marker (TGEU, 2018).
12. Comparative analysis

Looking at the overall development of law relating to the recognition of the third gender in Malta and Germany discussed above, it is evident that some similarities and differences apply regarding the preface towards implementing the legislation, the focus on human rights, the surgical procedures, the nonbinary marker, the feedback by the LGBTQ+ community and the education policy.

The preface towards implementing the legislation: The implementation of each legislation was intrigued by different scenarios, as in Malta the third legal recognition happened when the Minister of Malta was invited in the international convention on intersex issues and had the chance to connect with intersex people and understand firsthand the need of such legislation. The Maltese Act was implemented to expose the vulnerability of intersex people, while affirming that this can be addressed as a matter of law. It ensured equality and respect towards nonbinary people altogether and safeguard the fundamental human rights and freedoms of all. Germany passed the legislation after an intersex adult argued for a change in the German constitution to offer a third gender option and make society comprehend that there are people living outside of the gender binary and accept intersex people for who they are. Thus, the German constitution altered their legislation and begun to protect intersex adults under the right of sexual identity only after intersex activists pushed the government for a change based on the violation of their personal rights. Even though there are a lot to be done in order for intersex people to be fully integrated into the society, the legislation was considered as an important step towards acceptance of intersexuality.

The focus on human rights: The GIGESC Act focused on the right to gender identity, as well as the right to bodily integrity and physical autonomy. It met current human rights standards as both nonbinary and intersex people were benefited from the legal protection. Despite the fact that The Civil Status Law focused on the right of sexual identity and the development of personality in a self-determined way, the legislation included solely intersex, leading to the discrimination of nonbinary identities.

Surgical procedures: In Malta, unconsented interventions on intersex infants were prohibited and intersexuality got depathologised, meaning that nonbinary people do not need proof of surgical procedures, hormonal therapies or psychiatric treatment to
officially be recognized as the third gender. This allowed nonbinary people to determine their gender without any invasive medical interventions or certification. In Germany, in order for intersex people to be legally recognized as a third gender, the requirement of a doctor’s certification is needed, putting more focus on physical attributes rather than social or psychological factors.

The nonbinary marker: The neutral “X” marker standing for “undetermined” was chosen by Malta as an option for nonbinary people, referring not to a “third” gender but to the nonregistration of gender whatsoever, allowing them not to identify their gender on official documents. Germany introduced the “diverse” gender marker as an alternative to female and male, as the general right to personality is to guarantee the protection of people who cannot be assigned as a female or male gender, develop their personality in a self-determined way and incorporate those people into society.

Education policy: The GIGESC Act became a prerequisite for all Maltese schools in order to promote the understanding, supporting and inclusion of nonbinary people into society. The structure that Germany followed did not allow parents to embrace the new law, as the medical advice is still conservative and advises to go within the binary system. Furthermore, Germany failed to provide all the essential guidelines for parents of intersex babies regarding the naming of the child, the right pronoun to use and how to educate intersex children.

LGBTQ+ feedback: Malta became a leader in LGBTQ rights and in 2018 it was placed in top position on the Rainbow Europe Map and Index (Collins, 2018). Malta’s GIGESC Act was considered as a victory by NGOs such as OII⁹ Europe and GATE¹⁰, as it made a significant contribution to intersex human rights by recognizing in law the pervasive role of social factors aimed to normalize intersex bodies. Furthermore, activists urged the governments of other nations and other law making entities to take the GIGESC Act as an example and adopt similar reform within their own countries and areas, ending decades of abusive reparative and gender confirming surgical intervention (Cabral & Eisfeld, 2015). Germany is the only country in the EU that recognizes intersex people officially. Although advocates have hailed Germany’s law

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⁹An umbrella organization of European human rights based intersex organisations  
¹⁰Global Action for Trans Equality
as progress, they are urging Germany to include in its legislation all gender fluid identities and not solely be based on biological factors.

13. Conclusions

The paper attempted to conceptualize nonbinary identities and intersex people. It presented the recognition of a third option for nonbinary and intersex people in Malta and a third option for intersex people in Germany. Based on the above comparative analysis, Malta and Germany implemented their legislation based on different tactics and from two different perspectives in order to include populations that do not conform to the binary dichotomy and that seek legal recognition.

The GIGESC Act of Malta has a strong foundation in established human rights standards towards nonbinary and intersex people. The sensitive nature of the matter was respected, as well as the fact that the legislation has an impact on the everyday lives of many individuals and their families. The requirements for surgical, medical, psychological, hormonal or any other treatment were abolished and an easier procedure of changing one’s gender was established. More specifically, non-medically necessary treatments on sex characteristics without an informed consent were regarded as unlawful. The Act regulated a fairly easy procedure on all official documents for the legal gender procedure both for minors and adults and introduced the right to gender identities for all individuals, irrespectively whether they are intersex or identify themselves as nonbinary. It provided parents the possibility to postpone the entry of a gender marker on their children’s birth certificate, which can be altered when the child’s gender identity is determined. Furthermore, it introduced an obligation to government agencies to ensure that their services meet the Act’s objectives and initiated an educational policy to raise awareness and promote equality to all people.

The implementation of the Third Gender in Civil Status Law, constitutes Germany as the first country in the EU to offer the option to intersex individuals to be recognized as a gender under the “diverse” category, instead of not specifying ones gender whatsoever. Germany put more emphasis on the protection and recognition of the diversity of physical sex development and the improvement of the human rights of intersex people. Hence, intersex people are able to alter their registered sex if the original one is proved to be incorrect, in order to be included in the legal and societal
field. Intersex infants can also be registered under the third option “diverse” on their birth certificates, giving parents the possibility not to randomly choose either the female or male option. Even though Germany made a step in protecting intersex people under the “diverse” option, in order to be fully aligned with the current human right standards, the doctor’s statement confirming intersexuality in order to alter or mark one’s third gender option needs to be revoked, since in this way too much focus is putted on physical attributes, when gender cannot be determined solely by physical characteristics, but also from social and psychological factors. Furthermore, Germany should introduce a nonbinary legal gender category open for all nonbinary people on the basis of self-determination, since for now nonbinary people are excluded from the legislation.

Malta and Germany included through different tactics, nonbinary people in their legislation that extend beyond binary representations of femininity and masculinity. Based on the above analysis, one can hypothesize that the differences regarding the implementation of the third gender in each legislation is based on two different incentives. In Malta, the third legal gender was implemented because the Human Rights Policy Coordinator was an intersex ally and was previously working with LGBTQ+ people, meaning that he already knew the difficulties these people face. Furthermore, the Minister of Malta had a personal opportunity to connect with intersex people during a convention, leading the Maltese Government to have a more humanitarian and societal perspective towards nonbinary populations and creating a wider law that contributes towards equal treatment and acceptance. Germany from the other hand, implemented the third gender recognition solely to intersex people, as during the last four years before the implementation, an intersex person wanted to be recognized as a legal third gender in the eyes of law after repetitious trials, as his chromosomes analysis were nor male neither female. Germany implemented a more medical perspective as the third legal recognition have to be based on evidence rather than self-assessments.

Still, European countries remain largely ignorant about the social and legal burdens intersex and nonbinary populations face, leading to their discrimination and inability to protect them. Member states should raise the importance of the third legal recognition and provide an equal treatment based on the right of self-determination. Flexible procedure should be implemented in (re)assigning gender markers in official
documents and boost the understanding of the social, legal and economic challenges these people face. Research should be conducted in order to investigate the needs of nonbinary populations and improve the services in the health and social field. New forms of inclusivity should be promoted so everybody can enjoy their human rights.

14. References
6. Anonymous. (2015). ILGA, the International Lesbian, Gay, Bisexual, Trans and Intersex Association applauds the unanimous approval of the Gender Identity, Gender Expression and Sex Characteristics (GIGESC) Act by the Maltese Parliament. The law, which is the outcome of a long collaborative effort between LGBTIQ activists, politicians and other stakeholders was approved on Wednesday April 1st. https://ilga.org/malta-gigesc (accessed 16/04/2019)

21. GIGESC ACT No. XI of 2015

22. GIGESC ACT No. LVI of 2016


https://www.thejakartapost.com/news/2018/12/14/german-law-allows-third-

34. The local (2018) Third gender option for birth certificates approved in 
Bundestag. https://www.thelocal.de/20181214/germany-approves-third-
gender-option-law (accessed 19/04/2019).

gender equality and non-discrimination. Trans and intersex rights in Europe- a 
comparative analysis. European Commission.