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A third legal gender in Sweden?

Recognition, alternatives, and the question of human rights for non-binary
and intersex individuals in Sweden

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Abstract

In recent years, the trans rights movement has gained a lot of traction and publicity both inside the queer movement and in western society and media at large. Debates on implementing a third legal gender for people who wish to not be registered as male or female, and for people born with ambiguous sex characteristics, have increased and new policies are being implemented in different countries and states across the world.

This paper analyses the debates and motions on implementing a third legal gender in the Swedish Parliament and the existing laws in a couple of European and Asian countries. Using human rights theory, queer theory, and discourse analysis the material is used to see if a third legal gender can be framed as a way to guarantee human rights for transgender and intersex people. It also tries to answer the question; can access to a third legal gender be described as a human right? What effect can it have on the access to human rights for those currently excluded from legal gender recognition?

Key words: *human rights, gender, sex, binary, liberal inclusion, queer, non-binary, intersex, third legal gender, Sweden*

Abstrakt

Ett tredje juridiskt kön i Sverige? Erkännande, alternativ, och frågan om mänskliga rättigheter för ickebinära och intersexpersoner i Sverige

Under de senaste åren har transrättighetsrörelsen fått ökad spridning och uppmärksamhet både inom den queera rörelsen och i västvärlden och i media överlag. Debatter om att implementera ett tredje juridiskt kön för de personer som inte vill vara registrerade som man eller kvinna, och för personer födda med tvetydiga primära eller sekundära könsorgan, har ökat och nya policys implementeras i olika länder och stater runt om i världen.

Den här uppsatsen analyserar debatterna och motionerna i Sveriges riksdag om att implementera ett tredje juridiskt kön och existerande lagar i en par europeiska och asiatiska länder. Genom att använda mänsklig rättighetsteori, queerteori, och diskursanalys med materialet undersöks huruvida tillgång till ett tredje juridiskt kön kan motiveras som ett sätt att garantera mänskliga rättigheter för transpersoner och personer som är intersex. Uppsatsen försöker även besvara frågan; kan tillgång till ett tredje juridiskt kön beskrivas som en mänsklig rättighet? Vilka effekter kan det ha på tillgängligheten av mänskliga rättigheter för dem som för nuvarande exkluderas från juridiskt erkännande av sina kön?

Nyckelord: *mänskliga rättigheter, könsidentitet, kön, binär, liberal inkludering, queer, icke-binär, tredje juridiskt kön, Sverige*

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1 Introduction

1.1 Background

In recent years, the transgender rights movement has gained a lot of traction and publicity both inside the queer movement and in western society and media at large. Debates on implementing a third legal gender that can be used by people who wish to not be registered as male or female, and for people born with ambiguous sex characteristics have increased and new policies are being implemented in different countries and states across the world. More transgender people are represented in media creating debate on the importance of representation and at the same time, the movement has also sparked backlash debates.

There are many ideas around gender and sex in our society, in political contexts, and in history. The constructionist view of gender and sex as categories and performances¹ rather than essential parts of human nature has gained an increasing amount of scientific weight. Seeing both sex and gender as social and politically motivated constructs is described in detail in (among others) the works of Judith Butler², Candace West and Don Zimmerman³, and Thomas Laqueur⁴.

In 2006 human rights groups from around the globe met in Yogyakarta, Indonesia and the outcome was the Yogyakarta principles. They are a set of ideas and suggestions for how to apply human rights law to ensure human rights protection for LGBTI people. It has not been adopted by the United Nations (UN) or any other regional human rights IGO. Principle 3 concerns the right to recognition before the law and calls on states to, among other things, provide their citizens with identification documents that reflect their identity.

“[States shall] Take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person’s gender/sex — including birth certificates, passports, electoral records and other documents — reflect the person’s profound self-defined gender identity;”⁵

¹ Candace West & Don Zimmerman, 1987, “Doing Gender”, *Gender & Society*, vol. 1, no. 2, p. 129

² Judith Butler, 1990, “From interiority to gender performances”, *Gender Trouble*, Routledge: New York

³ West & Zimmerman, 1987

⁴ Thomas Laqueur, 1992, “Of language and the flesh”, *Making sex, body and gender from the Greeks to Freud*, Cambridge: Harvard University Press

⁵ International Commission of Jurists (ICJ), 2007, “Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity”, p. 12

Several countries have implemented a third option for legal genders, to go beyond the male and female binary. The common traits are the gender marker being X, and that it serves as recognition of gender variant people. The rest varies quite a bit. Some laws are based on biology, such as the German and Bangladeshi law, while the Nepali and Belgian laws are rooted in self-identification. There are also several countries that have heard cases concerning being granted an X gender marker in one's passport where the courts denied the plaintiff.

The transgender rights movement and debate has also appeared in the Swedish Parliament in several ways. The Swedish Gender Recognition Act from 1972 was implemented to give transgender people the right to change their legal gender marker as long as they fit the binary gender it described. It was motivated as a way to lessen the stigmatisation and vulnerable situation of transgender people. The law is based on changing between the two legal genders male or female.⁶ In recent years, one of the issues discussed and debated is the question of implementing a third legal gender (and with that a new system for neutral personal numbers, as the current one has a gender specific number).

1.2 Research question and purpose

This paper will analyse the debates and motions on implementing a third legal gender in Sweden's parliament and compare the contents to the discourse in articles covering other countries that have already implemented similar policies. It will use human rights theory, queer theory, and discourse analysis to see if a third legal gender can be framed as a way to guarantee human rights for transgender and intersex people. The research questions are:

- Can access to a third legal gender be described as a human right?
- What effect can it have on the access to human rights for those currently excluded from legal gender recognition?

The field of transgender studies is still a small field with many gaps to fill, and by relating this to the field of human rights, this paper should both inspire further research and contribute to both the fields of transgender studies and human rights studies. The topic of a third legal gender falls within this field (as well as intersex studies) and has few contributions as of yet. The goal is for this paper to use human rights studies and transgender studies to create an interdisciplinary understanding of how a third legal gender can be situated in terms of fulfilling human rights and providing a minority with recognition on a national level.

⁶ Erika Alm, 2021, "A State Affair?: Notions of the State in Discourses on Trans Rights in Sweden" in Alm et al (red.), *Pluralistic Struggles in Gender, Sexuality and Coloniality: Challenging Swedish Exceptionalism*, Basingstoke: Palgrave Macmillan, p. 218-221

1.3 Material and limitations

This paper analyses documents from the Swedish parliament. The documents used are the motions, the proposals by the committee that treated the motions (The Committee on the Constitution), and the debate in parliament regarding the implementation of a third legal gender between 2011 and 2022. As the state carries most of the responsibility for human rights, and parliament holds a lot of political power, these documents were chosen rather than public debate or media coverage of the issue.

Included is also the governmental investigation of trans people's living conditions in Sweden; SOU 2017:92 *Transpersoner i Sverige: Förslag för stärkt ställning och bättre levnadsvillkor* (Trans people in Sweden: Suggestions for a strengthened position and better living conditions, authors translation), further explained in chapter 2.

The articles on other countries' implementation of a third legal gender were chosen on their relevance to the topic of implementing a third legal gender and to cover both other European countries and non-western countries. The laws differ from each other and have cultural components that make for a dynamic picture of third legal gender laws but must be understood in context of the country that implemented it.

The theories and studies presented in this paper are about western ideas of sex and gender and how they are positioned, both in society and in the current debate. The topic of my question is based on the grounds of western gendered and sexed society, and as Sweden is a western country the scope was limited to not include a broader array of theories in this paper. It does limit how well the examples from non-western countries are applied, but they still can be understood in their own context.

1.4 Terminology

On the topic of terminology. This paper is about gender and sex and will use terms that are well known within gender studies but can be complex. Hopefully this section will clear up the definitions used and meanings. The abbreviation LGBTQI, meaning lesbian, gay, bi, trans, queer, and intersex, as well as the word queer, to refer to the larger community of people identifying and living outside the heterosexual and cisgender norm. It is a predominantly western term and when speaking of gender variance in a cultural context, the appropriate words will be adopted and explained.

In this paper, the term sex will refer to the categories based on biological difference, and sexual acts or sexuality will be used when relevant to refer to the act of reproduction and/or pleasure and the identities tied to them. Gender will be used to refer to the social interpretation and identity tied to sex. To differentiate between

genders and sexes I will use the words male and female to refer to the binary sexes, and the words man and woman to refer to their traditionally respective genders.

The terms non-binary and intersex are umbrella terms for a wide spectrum of realities. Non-binary refers to genders that are not 100% man or woman but can be anything outside of these two absolute categories. These include, but are not limited to, identifying partially with one or both binary genders, identifying as another gender altogether, no gender, several genders, regarding one's gender as fluid or non-static, or as queer. Some non-binary people also use the term transgender as it refers to not identifying with your sex/gender assigned at birth. The antonym of transgender is cisgender, this could for example be someone who identifies as a woman and was born with a female body.

Intersex is a medical term describing “ambiguous sex characteristics” where assigning a sex at birth is not straightforward and a simple matter of matching up sex chromosomes, reproductive organs, and hormones. Intersex conditions vary as well and can be difference in sex chromosomes or having reproductive organs that do not fit in the parts of the biological spectrums that has been designated male and female.⁷

Human rights is a broad term that usually refers to the fundamental rights found in the UN Declaration of Human Rights or the international conventions that make them legally binding. Since the conception of human rights as they are known today, it has also been used broadly as a normative discursive tool and many theories on how to motivate and derive rights have been published. In Chapter 3, human rights and non-ideal theory is described to motivate why the term human rights is used in the broader sense in this paper.

1.5 Ethical assessment

The topic of this paper is a complicated one and concerns heterogenous groups. It cannot analyse every aspect or take all opinions into consideration. But the science should be sound, based on the use of the method and theories, clearly communicated results and done with as little bias as possible. The positionality of the author as a non-binary trans person was considered as well. As much as that might influence personal opinions and the interest in the topic, it also lends a good understanding and pre-existing knowledge of the issues presented. By questioning assumptions and interpretations, and explaining the train of thought, their validity and reasonability was made more secure. Societal context is unavoidable, as is one's own view of reality, and discourse analysis uses an understanding of social structures and realities,

⁷ Alkeline van Lenning, 2004, “The Body As Crowbar: Transcending Or Stretching Sex?”, *Feminist theory*, vol. 5, no. 1, p. 31

but in this paper, measures have been made to critically view the findings and analysis.

Since the motions and opinions used as material is public documents under the principle of public access to information and the motions are seldom discussed as individual motions but rather overarching themes, the risk of exposing individual parliament members unnecessarily has been deemed small. They are also elected officials that work with a certain amount of publicity. The older motions that are used are not from long ago and the later motions often represent the authors' updated views and opinions. Knowing this, the ethical assessment of the study is that all measures that could reasonably be taken have been, and the paper should not cause unjustified trouble for the motion authors.

2 Literature and previous research

2.1 Gender and sex outside the binary

The idea of biological sex and its meaning has not been static through history, and the current understanding of it is not purely based off biology but is influenced by the understanding of the science as well as politically motivated framing.⁸ The two-sex model, or sex binary, that is most prevalent today is a more recent development from the previous notion that there was only one sex, and the difference between male and female was that females were inverted males. Only with the two-sex model were the dichotomous “opposite sexes” created.⁹

One of the main issues the intersex movement is tackling is coercive medical intervention to make intersex people fit one of two sexes. This became standard practice around the turn of the last century when surgery became significantly safer, and more people started giving birth at hospitals rather than at home.¹⁰ Because of the medical advances there was an increase in surgery in all medical areas, but with the added layer of very strict heteronormativity (and by extension homophobia) the surgery on intersex bodies was important mainly as a way to prevent homosexuality.¹¹ Compared to today, the motivation for surgery and other medical intervention (such as hormone replacement therapy) has gone from protecting the ways of society and heterosexual norms¹² to making life easier for the intersex person by helping them fit in with a “normal body”.¹³

2.2 The situation for trans people in Sweden

In 2016, a big survey was undertaken on direction from the government to explore what could be done to improve the living conditions of trans people in Sweden.¹⁴ The report is based on trans people’s lived experience and stories, as well as cooperation with medical professionals and queer groups and associations. The results of the investigation were presented as a report named *Transpersoner i Sverige: Förslag för stärkt ställning och bättre levnadsvillkor* (Trans people in Sweden: Suggestions for a strengthened position and better living conditions, authors translation) in 2017. Among other things the report suggested that the government start an inquiry as to

⁸ Laqueur, 1992, p. 10-11

⁹ Laqueur, 1992, p. 4-5

¹⁰ Sharon E. Preves, 2002, “Sexing the Intersexed: An Analysis of Sociocultural Responses to Intersexuality”, *Journal of Women in Culture and Society*, vol. 27, no. 2, p. 533-534

¹¹ Geertje A. Mak, 2015, “Conflicting heterosexualities: hermaphroditism and the emergence of surgery around 1900”, *Journal of the History of Sexuality*, vol. 24, no. 3, p. 402-408

¹² Mak, 2015, p. 420

¹³ Preves, 2002, p. 525

¹⁴ SOU 2017:92. Utredningen om stärkt ställning och bättre levnadsvillkor för transpersoner. *Transpersoner i Sverige: Förslag för stärkt ställning och bättre levnadsvillkor*

how a third legal gender as well as gender neutral personal numbers could be implemented.¹⁵

The report discusses the problems facing trans people and intersex people due to not having a legal gender that matches their physical appearance, or having identified themselves as a gender that does not match the one on their ID or passport. Especially hard is travelling by flight and going abroad. The respondents tell stories of avoiding travelling, being stopped for questioning at passport control, changing their appearance to try and pass as the gender on the passport while travelling, and travelling with a note from their doctor.¹⁶

The report's focus on living conditions for trans people covers both a mapping over the current situation and suggestions for improvement. It makes clear that legal recognition as your identified gender is an important part of trans people's lives. As a non-binary person, it can be a way to receive recognition and legitimacy when the rest of society doesn't provide it. A survey made by Transgender Europe (TGEU) showed that of the respondents, only 6% of the 41% that had changed or were changing their legal gender were non-binary. A significant number of people answered that they did not want to change their legal gender as there was no option that suited them available.¹⁷ They also cite the report *Overdiagnosed but Under Served. Trans Health Care in Georgia, Poland, Serbia, Spain and Sweden Trans Health Survey*, also made by TGEU in 2017, that recommends Sweden to change the personal number system to make all personal numbers gender neutral and implement a third legal gender or remove a legal gender divide altogether.¹⁸

Since Swedish citizens legal genders are recorded in their personal number, it makes it easy to use those numbers when making statistics that is divided by gender, to get age and gender in one question. The issue is that the data collected then does not always match the way trans and/or intersex people identify or present their gender. This makes the statistics misleading and inaccurate. It also hides the disparity of how people identifying and/or living outside the gender and sex binary are much more vulnerable.¹⁹

2.3 Legal genders and international human rights

On the topic of human rights and international obligations, the report discusses how the UN Human Rights Council's independent expert presented six crucial actions for counteracting violence and discrimination against LGBTIQI people. One of the

¹⁵ SOU 2017:92, p. 488-490

¹⁶ SOU 2017:92, p. 187-189

¹⁷ SOU 2017:92, p. 173

¹⁸ SOU 2017:92, p. 173-174

¹⁹ SOU 2017:92, p. 461-466 and 470-473

actions was legal recognition of one's gender identity, without demands of forced psychological or medical intervention or undue bureaucratic difficulties.²⁰

The Council of Europe's Commissioner for Human Rights made a similar report in 2015, where they recommended states to make it possible changing your legal gender based on self-identification for intersex people. The recommendation included making it possible to not choose a male or female marker.²¹ The Parliament Assembly of the Council of Europe have made resolutions regarding inclusive legal genders, recommending and calling on member states to consider a third legal gender.²²

The report also references principle 3 of the Yogyakarta Principles²³, which concerns the right to legal recognition as the gender one identifies with, mentioned in the first chapter. While the Principles are not legally binding as no states, or the UN have ratified or accepted them, they are however a good insight to what Human Rights might mean for LGBTQI people based on expert knowledge of the topic, and the report mentions that they have influenced the development of LGBTQI people's rights. The Swedish government has even had the principles translated to Swedish.

2.4 Implementations of third legal genders in other countries

A range of countries around the globe have debated and either rejected or implemented the idea of a third legal gender. Stefano Osella discusses cases and laws on third legal genders in Belgium, Germany, France and Italy with his anthropological analysis of comparative law. He discusses how the "lack of recognition" has many effects on people's lives, from putting them in vulnerable positions of poverty, mental unhealth, and being discriminated, to creating bureaucratic issues. Most states that have some sort of legal gender recognition for trans people require medical intervention before granting the change.²⁴

Osella identifies three paths taken by states regarding implementing a third legal gender, exemplifying them with four different countries. Belgium shows how a law can be based on self-determination, Germany's law only grants limited recognition, whereas both France and Italy have denied court cases concerning a third legal gender. Germany's law makes the option for a third legal gender and X gender marker available to only intersex people who also identify as non-binary ("permanently"). While Belgium's law sounds more liberal, it is complex and

²⁰ SOU 2017:92, p. 96-97

²¹ SOU 2017:92, p. 108-109 and 174

²² SOU 2017:92, p. 174

²³ SOU 2017:92, p. 92

²⁴ Stefano Osella, 2022, "When Comparative Law Walks the Path of Anthropology: The Third Gender in Europe", *German Law Journal*, vol. 23, no. 7, pp. 925

regarded as a “half-win” by local activists. France’s denial of the court case is based on an argument that the binary is too ingrained and important to society to be changed. While France has explicitly denied a third legal gender, Italy has gone another route to prevent their laws from allowing space for a third legal gender. When making laws to ensure binary trans people (that is, trans women and trans men) can access care and legal recognition, those laws were written to ensure the upholding of the gender binary. Osella remarks how despite the Italian court calling the gender binary “a centuries-old tradition”, there has been anthropological research on the transfeminine non-binary people found in Naples called the *femminielli*, going back centuries.²⁵

In the article “Establishing a Third Legal Gender Category in Nepal: Process and Prognosis” Micheal Bochenek and Kyle Knight describe how the Nepalese court ruled in favour of the LGBTQI NGOs case and both did away with discriminatory laws and made a new law, legally recognising a third gender category.²⁶ This category is broadly inclusive, as the court has defined it as being both for binary trans people, intersex people and third gender (equivalent or similar to non-binary) people. It is also based on self-determination.²⁷ Ultimately though, it seems the access to the third gender is not so easily accessible after all. There is still a large administrative burden placed on the person wanting to access the third gender, and they can face discrimination by census workers.²⁸ While this article focuses on Nepal, the author compares the law on third legal genders in other countries. For example, Pakistan, where there is a law guaranteeing *hijra* (eunuchs) recognition before the law but that is not practiced fully. India has a similar law which allows people to register themselves as eunuchs and get an E gender marker in their passport and other ID based solely on self-identification.²⁹ In Australia one needs a letter from one’s doctor stating one is intersex or undergoing a medical gender transition. Surgery is not required but other medical intervention is. New Zealand require going through the court to change one’s legal gender and confirming one’s gender identity and offers the option of a X gender marker.³⁰

A more complicated case of legal gender recognition is presented in Adnan Hossain’s article about Bangladesh’s law that recognises the cultural third gender *hijra*, described as neither male nor female or as third gender.³¹ While it seemed to be a big step in the right direction for acceptance and recognition, reality has shown that

²⁵ Osella, 2022, s. 929-941

²⁶ Michael Bochenek & Kyle Knight, 2012, “Establishing A Third Gender Category In Nepal: Process And Prognosis”, *Emory International Law Review*, vol. 26, no. 1, p. 12

²⁷ Bochenek & Knight, 2012, p. 16-19

²⁸ Bochenek & Knight, 2012, p. 30-33

²⁹ Bochenek & Knight, 2012, p. 29-30

³⁰ Bochenek & Knight, 2012, p. 28-29

³¹ Adnan Hossain, 2017, “The paradox of recognition: hijra, third gender and sexual rights in Bangladesh”, *Culture, Health and Sexuality*, vol. 19, no. 12, p. 1420

there is still a lot of prejudice, lack of education and understanding.³² Despite the law meaning to give recognition and more societal space to the long misunderstood group, bigger issues of discrimination and class divide are working against it. Because of the misconception that hijras are born with genital “genetic defects” (potentially meaning intersex variations, author’s note), the third legal gender category is used more as a disability category.³³

³² Hossain, 2017, p. 1418-1419

³³ Hossain, 2017, p. 1424-1425

3 Theory and method

3.1 Theory

3.1.1 Gender theory and Sex

The idea of gender and sex as separate things is common in transgender activism to explain transgender existences, but that fails to account for the inherent ties between the way they are constructed. Often gender is seen as the more progressive way of thinking and speaking about man and woman, and male and female as the sexes, but Butler challenges the idea that gender comes from sex and argues instead that the ideas of sex are informed by the constructed ideas of gender.³⁴ In the case of non-binary genders and intersex conditions this adds another layer – how do the constructed binaries react when more options are introduced?

The female sex has traditionally been framed as a light or lesser than version of the male sex and this is prevalent in how judgements on sex are made in intersex people. For example, often the “easiest fix” is to assign a new-born the sex female and to reduce the size of their phallus to fall inside the spectrum of the more common sizes of clitorises.³⁵ In a critical framing this can be seen as if the body is not enough to be male, it will be made female regardless of natural state. It calls in to question how natural the binary sexes are and should also be analysed through the lens of devaluing female (including those made female by surgery) sexuality as performing surgery on a phallus removes part of or all its capacity for pleasure.

3.1.2 Sexuality and Heteronormativity

Gender, sex, and sexualities are often discussed together and are intrinsically tied to each other because of how sexing and gendering are connected to heteronormativity. Heteronormativity, and heterosexuality itself, are reliant on people being either a female woman or a male man, and any deviation from that creates tension.³⁶ Gender roles and gendering in everyday life is rarely tied directly to one’s sex or perceived sex through genitals but does include performing one’s half of the heterosexual contract.³⁷

The intersex and non-binary position in relation to heteronormativity adds another layer of complexity. With the progress of the queer movement making people change to fit a heterosexual matrix may not be as popular as it once was, but challenging it

³⁴ Butler, 1990, p. 176-180

³⁵ Preves, 2002, p. 530-531

³⁶ Stevi Jackson, 2006, “Gender, sexuality and heterosexuality: The complexity (and limits) of heteronormativity”, *Feminist Theory*, vol. 7, no. 1, p. 105-117

³⁷ West & Zimmerman, 1987, p. 129-132

by embracing ambiguity still faces opposition and discrimination.³⁸ The justification of performing surgery to discover a new-born's true sex (and through that gender) is to secure their future bodily confidence and physical relationships.³⁹ This logic is inherently tied to the premiering of normative bodies within a heteronormative society. Bodies and people who are queer, meaning those who are structurally othered and differentiated from the norm as part of the LGBTQIA+ community, create a threat against the social structures based on heterosexual hegemony.

The theory of liberal inclusion described by Cathy J. Cohen is important to understanding how more acceptance in society and discourse impacts a rights movement and by extension how it affects the perception of what science and what truth is.⁴⁰ When movements try to affect social change, is it on the establishment's terms? The example is the queer movement's success in being accepted as a part of civil society but through that becoming more commercialized and "made more palatable" for a conservative audience. In the Swedish context, an open and tolerant attitude towards diversity is part of the national identity. And the binary gender system is ingrained in the way the state interacts with its citizens, which is more apparent for the transgender citizen than the cisgender citizen.⁴¹

While the visibility and proven existence of natural otherness to some extent is subverting gendered and sexed social structures, Alkeline van Lenning raises the important point of how people's bodies are politicised matter. There is diversity within any community and while some intersex people may use their bodies as political tools in activism there also are those who do not wish to do so. The active subversion of both sex and gender binaries are demonstrated by trans people, and their bodies as well, choosing what amount of transitioning is right for them regarding surgery, hormones, and social change.⁴² Changing your legal gender can be part of socially transitioning, and a binary system makes that change complicated for those living outside the binary.

3.1.3. Theoretical frameworks of gender and human rights

The theories presented below are a constructivist, feminist theory on gender and sex, as well as a human rights theory. They represent the position of this paper and provide tools to critically analyse the position of non-binary and intersex identities in a gender binary, as well as the way the issue of a third legal gender is presented,

³⁸ Preves, 2002, p. 538

³⁹ Turner, Stephanie S., 1999, "Intersex Identities: Locating New Intersections of Sex and Gender", *Gender & Society*, vol. 13, no. 4, p. 467

⁴⁰ Cathy J. Cohen, 1999, "What is this movement doing to my politics?", *Social Text*, no. 61, p. 111-118

⁴¹ Alm, 2021, p. 210-11

⁴² Van Lenning, 2004, p. 34-36

treated, and debated in the Swedish Parliament. They will also be used to compare the findings of earlier research on other countries with a third legal gender.

Gayle Rubin's model of sex[ual acts or sexuality] hierarchies and domino theory of sexual peril propose that there is what is accepted as "good sex", what is rejected as "bad sex", and the rest is in an "area of contestation". The sex[ual acts, or sexualities] in "the area of contestation" can be accepted if it ticks enough of the boxes of what is accepted as good, and through that establishing itself as accepted deviance. The domino theory is an expression of moral panic, saying that if some deviance is accepted the rest of "the bad sex[ual acts, or sexualities]" will make its way into the area of contestation and then to the accepted and good side as well.⁴³ It is the theory behind the "slippery slope" argument. The model of sex[ual act] hierarchies is applicable to other hierarchies as well, and in this paper will be applied to gender and sex hierarchies.

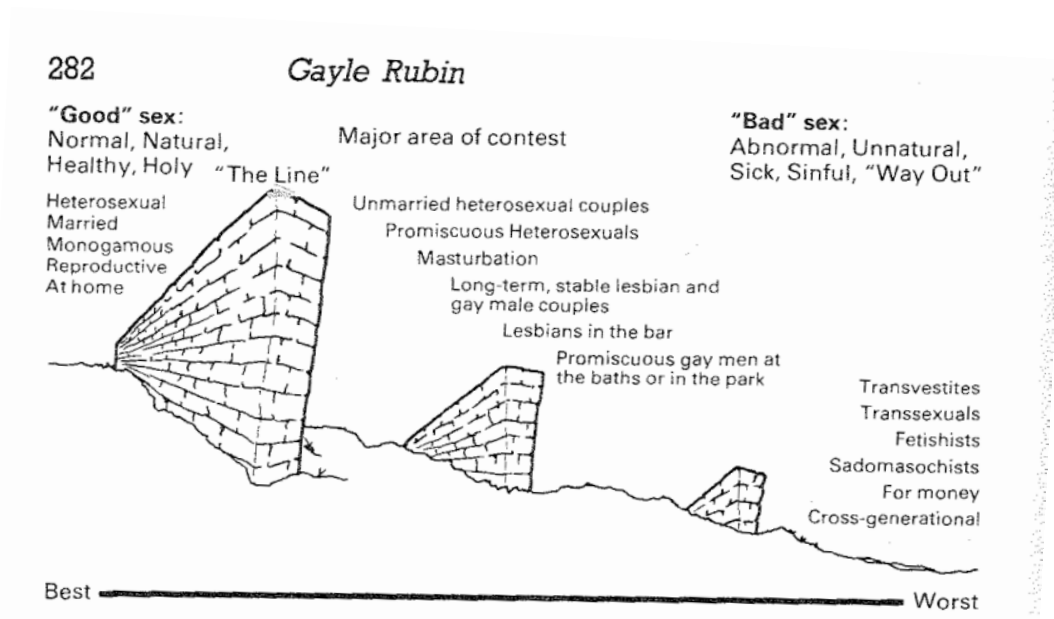


Figure 2 The sex hierarchy: the struggle over where to draw the line

Figure 1. Gayle Rubin's model of sex[ual act] hierarchies.⁴⁴

This theory is adapted to the topic of gender and sex, imagining a gender/sex hierarchy where the good gender and sex is cisgender, gender-role fulfilling and unambiguous, and the bad gender and sex is non-conforming, ambiguous, especially visibly so, fluid, transgender and/or non-binary. Gender-role fulfilling, transitioned

⁴³ Gayle Rubin, 1984, "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality", in Carole S Vance (editor), *Pleasure and Danger: Exploring Female Sexuality*, Boston: Routledge, p. 279-282

⁴⁴ Rubin, 1984, p. 282

and passing, binary transgender people, and non-binary people who can be assumed to be binary based on appearance and presentation lands in the grey zone.

Political theorist Martha Nussbaum has formulated a theory on human rights to act as a counterweight to BNP focused research and that focuses on the opportunity and capability of humans.⁴⁵ While there is a distinction made between capabilities and human rights, they are closely related. Unlike in human rights conventions, the capabilities approach does not differentiate between political and civil rights, and economic and social rights, but rather argue that they are intrinsically tied to each other and the individual human's good capabilities.⁴⁶ Nussbaum uses Capabilities to answer the question "what is this person able to do and be?" and defines internal capabilities as what someone is personally able to do and be. Combined capabilities are made up in part of internal capabilities, but also takes into account the conditions of society. An example would be the ability to express oneself being tied to the laws on free speech to give a full view of the capability of free speech.⁴⁷ The Capabilities theory ties together human rights and duties, and states that the primary duty belongs to the state political system. The state has a duty to ensure human rights and capabilities to its citizens.⁴⁸

Lena Halldenius describe how ideal theory and non-ideal theory can be used within the field of human rights. Ideal theory refers to how rights movements and advocates work from an idea of their ideal world and try to create the steps to get there without considering the actual conditions of society. Within this theory, attempts to define and derive "pure human rights" are made. Non-ideal theory, on the other hand, is a form of social criticism that can form human rights into a tool against injustice, inequality, and oppression.⁴⁹ In this paper, non-ideal theory will be used to analyse how the term human rights can be used as a tool to create normative change and right claims.

3.2 Method

First, the appropriate literature on gender and sex were selected for the basis of the paper. The articles forming the background and previous research on non-binary and intersex positions in society and law were chosen based on their use of the keywords: *intersex* (or the older term *hermaphrodite*), *non-binary*, *gender*, *sex*, *third legal gender*, *third legal gender germany*, and *transgender discrimination+legal gender*, as well as a screening of their

⁴⁵ Martha Nussbaum, 2011, *Creating Capabilities: The human development approach*, Cambridge, MA: Harvard University Press

⁴⁶ Nussbaum, 2011, p. 67

⁴⁷ Nussbaum, 2011, p. 20-23

⁴⁸ Nussbaum, 2011, p. 62-64

⁴⁹ Lena Halldenius, 2018, "Filosofiska teorier om Mänskliga Rättigheter" i Arvidsson, Halldenius & Sturfelt (red.), *Mänskliga rättigheter i samhället*, Lund: Bokbox, p. 43-44

abstracts presenting different approaches to the topic of intersex and (trans)gender studies. Given their similarities in advocacy work and positions in sex and gender hierarchies respectively, comparisons of non-binary genders and other genderqueer trans existences were also included. What connects the non-binary and the intersex is the ambiguity of gender and sex. Neither adhere to a dichotomous binary and by mere existence challenge binary perceptions of gender and sex.⁵⁰

The gender and sex theories used and presented in the third chapter are by well-established gender theorists whose works explain the basis of constructivist theories on gender and useful theories for the analysis of the research done in chapter four.

The primary material consists of parliament documents that were collected from the Swedish Parliament's official website (riksdagen.se) as public records. The documents used have been limited to motions that directly refer to implementing a third legal gender submitted between 2011 and the end of 2022, either by individual members of parliament or party groups, as well as the proposals of the Committee of the Constitution and the parliament protocols of the debates on the proposals. Motions and debates regarding other rights for transgender and intersex people, or other aspects of the legal gender system, have not been included to limit the scope and focus on the most relevant texts. Motions to completely remove legal genders were also not included, as there was an insignificant number (1) of them and did not address the idea of a third legal gender. The motions used in this paper were all sent to the Committee on the Constitution as a matter of constitutional liberties and rights. There are similar motions that have been sent on to the Committee on Taxation and dealt with in parliament as well, they were not included as this paper is concerned with exploring a third legal gender in the context of rights and liberties.

By using the search engine on the website and the search terms *third legal gender*, *legal gender*, *non-binary*, and *intersex* all motions suggesting the *utredning* (investigation) and/or implementation of a third legal gender by one or more members of parliament were located. The search was performed in Swedish. Some motions were broad and included a third legal gender as one of many suggested reforms, these were in some cases found by working backwards from the Committee proposals list of considered motions on the topic. The website links between motions and parliament protocols, the chain of handling instances can be navigated back and forth from the submission of motions to the Committee response and recommendation, to the debate and voting on the proposal in parliament. Through this, the correct corresponding documents were all located. In total 25 motions, eight *betänkanden* (documents of consideration), and eight parliament protocols were used.

⁵⁰ Preves, 2002, p. 539-540

After this, all documents were paired off in groups with the motions, considerations, and debates and voting results from the same period. While reading the motions, those not relevant, such as one motion suggesting getting rid of legal genders all together, were removed from the material.

Going through each group of documents, the motions were read carefully, and their content was identified and split into themes and mentions of the categories below. The categories were based on prevalence and occurrence in the texts as well as relevance to the topics being analysed. Other notable themes or phrases in the individual motions were noted as well, such as referencing *forceful assimilation*.⁵¹ The categories were chosen based on their impact on the framing of the problem that would be solved with a third legal gender, and how the author's motivated the importance of the problem.

- human rights
- rights and liberties
- transgender people and lives
- intersex people and lives
- openness/changing norms/social acceptance/discrimination
- other countries with third legal genders
- the Swedish personal number system
- trans health and wellbeing
- freedom of choice and self-determination
- calls for implementation
- calls for an investigation into how to implement a third legal gender
- gender-based statistics
- the trans investigation SOU 2017:92

After the motions in the group were categorised, the corresponding proposal was summarised with the proposal to approve or deny the motion, the motivation behind the proposal and the reservations from motion authors. It quickly became clear that the motivation used kept referring to earlier motivations, and thus the categorising became more of a genealogy of the motivations.

The debates and pleas to raise reservations were very similar to the original texts from the motions, and the same categories and phrases were used for categorising.

The different groups were compared to each other. Discourse and use of power in language was identified by close examination of the text and noting recurring and

⁵¹ Motion 2014/15: 509

important overarching themes.⁵² The theories from earlier chapters concerning non-binary and intersex positions in the binary gender system, and the marginalisation and similarities of the two groups were taken into account, as well as trying to identify where the authors and the Committee members place non-binary and intersex people and bodies in a gender and sex hierarchy. The theory of moral peril was used to identify any arguments or motivations that used that or similar logic. Any mention of rights, human rights, or related phrases and discourse was analysed with non-ideal theory to see if it was being used as a tool and if so, how?

The secondary material consists of three articles by Hossain⁵³, Bochenek and Knight⁵⁴, and Osella⁵⁵ discussing laws and systems of third legal genders in other countries in Europe and Asia. They were found using the same search terms as the background and previous research and were used to give an introduction to research made on the topic. After the categorising and analysis of the parliament documents, these articles were re-read, and the discourse and issues framed by the authors of the articles were compared to the findings on discourse and issue framing from the primary material.

While comparing the articles, special focus was placed on the authors' arguments and reasoning, the description of national discourse, and how the problem and solutions are described and implemented. Keywords and phrases are listed below.

- human rights
- Yogyakarta Principles
- discrimination
- self-determination and conditions for gender change
- education, understanding
- acceptance, recognition, and respect
- gender-based or divided statistics

Finally, in the discussion, the queer and gender theories were applied to the findings and analysis of them in chapter four to identify what can be concluded from both the Swedish situation in itself, and the comparison with other countries' law.

⁵² Göran Bergström & Lena Ekström, 2018, "Tre diskursanalytiska inriktningar" in Kristina Boréus & Göran Bergström (red.), *Textens mening och makt: Metodbok i samhällsvetenskaplig text- och diskursanalys*, 4th edition, Lund: Studentlitteratur, p. 297

⁵³ Hossain, 2017

⁵⁴ Bochenek and Knight, 2012

⁵⁵ Osella, 2022

4 The Swedish Parliament and the third legal gender debate

This research has been split into two main parts; the motions to implement a third legal gender, the proposals from the Committee on the Constitution after handling the motions, and finally the debate in parliament before voting on the proposals constitute the first part. The second part is an comparison of how the authors of three articles use and reports discourse and frame issues when talking about third legal gender categories.

4.1 Motions suggesting a third legal gender

The first notable finding in the materials is that many of the motions⁵⁶ are either full or partial copies of earlier motions by the same author. The partial copies have sometimes updated their language to be more respectful (eg. replacing “hermaphrodite” with “intersex”) or added arguments in favour of their suggestion. This is especially prevalent in the motions submitted after the survey *SOU 2017:92 Transpersoner i Sverige: Förslag för stärkt ställning och bättre levnadsvillkor* (Trans people in Sweden: Suggestions for a strengthened position and better living conditions, authors translation) was released, it is used to strengthen and put weight behind the arguments.

The motions have similarities that are recurring in a majority of the motions. The key motivation is that it would make non-binary and intersex people’s lives easier.⁵⁷ The motion authors use words such as *utsatt* (being in an exposed, vulnerable position in society) and refer to the comparatively worse mental health and social standing of people living outside the binary than both cisgender and binary transgender citizens. In the motions from the early 2010s the lack of research and knowledge of how transgender and intersex suffering and discrimination impacts their lives is problematised, and authors argue that giving non-binary and intersex people visibility through a third legal gender could help spread knowledge and awareness.⁵⁸ Both in the earlier motions as well as the ones written in recent years discrimination is mentioned as a big problem facing the communities.⁵⁹

⁵⁶ Motion 2012/13: K210, Motion 2013/14: So202, Motion 2017/18: 750, Motion 2018/19: 2597, Motion 2019/20: 3316, Motion 2020/21: 1998

⁵⁷ Motion 2011/12: K316, Motion 2012/13: K210, Motion 2013/14: So202, Motion 2015/16: 49, Motion 2017/18: 2857, Motion 2018/19: 289, Motion 2018/19: 2597, Motion 2019/20: 946, Motion 2019/20: 1998, Motion 2021/22: 466, Motion 2022/23: 379

⁵⁸ Motion 2011/12: K316, Motion 2012/13: K210, Motion 2013/14: So202

⁵⁹ Motion 2011/12: K316, Motion 2012/13: K210, Motion 2013/14: So202, Motion 2015/16: 49, Motion 2015/16: 2786, Motion 2017/18: 2857, Motion 2018/19: 2597, Motion 2019/20: 946, Motion

Using discrimination prevention as a way to motivate implementing a third legal gender positions the suggestion as a way to improve the life quality of two marginalised groups of people. By using discourse of vulnerability, discrimination, and being part of a marginalised group, sympathy can be cultivated for a cause. It could also be tied to Alm's article on how Sweden's legal system interacts with gender and trans people in an almost paternalistic fashion. After the trans, non-binary, and intersex people are framed as an especially vulnerable group, it is up to the state to step up and take care of them. It was used to motivate the legal gender reform in 1972 and with that as background, similar themes can be identified in these motions.⁶⁰

Some of the language used takes a more practical approach. Two motions mention that *Försäkeringskassan*⁶¹ (the Swedish Social Insurance Agency) have expressed a need for a third legal gender. It can be seen as a way to prove that it is a practical need not only for the people who would use it but for government agencies as well.

Some motions respond to the Committee's mention of how the gendered personal numbers are used to create statistics used for gender equality work. The authors generally agree that it is an important aspect to preserve, and that an investigation into how to implement a third legal gender should investigate how gendered statistics could continue to be produced with a three-gender system. Some motions put more weight behind the possibility to create statistics as they are produced today than others, saying it is very important that the statistics are important tools that must be maintained.⁶² Other motions point out that a third legal gender, as well as an easier process to change one's legal gender, would create statistics that were based on self-identification and create more true-to-reality statistics. The question of combining the implementation of a third legal gender with gender neutral personal numbers but continuing to be able to create gender specific statistics is proposed to be investigated further in the proposed investigations.⁶³

In a similar fashion, other countries that have implemented different versions of third legal genders are brought up in 14 of the motions.⁶⁴ Germany and other countries are referenced as being frontrunners. When the German third gender is

2019/20: 3316, Motion 2020/21: 1998, Motion 2021/22: 446, Motion 2021/22: 4004, Motion 2021/22: 4093

⁶⁰ Alm, 2021, p. 218-220

⁶¹ Motion 2015/16: 868, Motion 2017/18: 750

⁶² Motion 2015/16: 2786, Motion 2014/15: 509, Motion 2015/16: 49, Motion 2015/16: 2786, Motion 2018/19: 2597, Motion 2021/22: 466, Motion 2021/22: 4004, Motion 2022/23: 881

⁶³ Motion 2021/22: 466, p. 2

⁶⁴ Motion 2011/12: K316, Motion 2013/14: So202, Motion 2014/15: 509, Motion 2014/15: 1685, Motion 2015/16: 49, Motion 2015/16: 868, Motion 2016/17: 58, Motion 2017/18: 750, Motion 2018/19: 2297, Motion 2019/20: 946, Motion 2020/21: 1998, Motion 2021/22: 466, Motion 2021/22: 4093, Motion 22/23: 379

brought up, it is followed in almost every case by an explanation that the Swedish law should also be applicable to non-binary people and not only intersex people. The language suggests that their use of a three-gender system in their legal system is the first instances of a bigger trend, and that seeing other countries implement this change is proof that it can be done. In addition to this theme of a rising trend, one of the most recent motions mentions that the UN High Commissioner for Human Rights has called for all countries to implement a third legal gender.⁶⁵ While the call is not legally binding, it carries weight coming from the Office of the UN High Commissioner for Human Rights.

In nine of the motions a third legal gender is explicitly referred to as a *mänsklig rättighet* (human right) or *rättighet* (right).⁶⁶ It has also been described as something that would guarantee greater self-determination, freedom, and ability to be authentically represented according to one's identity. Framing something as a human right or right has great normative impact. A member of parliament declaring a third legal gender a human right gives the motion weight and importance. It is hard to oppose human rights reforms without reframing the reform as not relevant to human rights. Having identified that non-binary and intersex people experience inequality and injustice, declaring reforms such as a third legal gender as a human right is using the term human right as a tool to create normative and legal change according to non-ideal theory.

There are several themes that are recurring regardless of author of the motion, and their party allegiance, in how the problem is framed and why a third legal gender is a viable solution. There are differences in what the parties emphasise as important to consider in their suggested investigation of how to implement a third legal gender, but it's more a case of priorities than differing contents.

There is a lot of weight put to the personal number system, as it is a key tool of citizen registration and of creating valuable statistics that are, among other things, used in the work towards gender equality. Adding a third gender option into the existing system is discussed, as well as the fact that the system has previously been updated and will need to be again, as numbers are limited.⁶⁷

4.2 Proposals from the Committee on the Constitution

Every motion processed by the Committee on the Constitution about the implementation and/or investigation of a third legal gender has been recommended

⁶⁵ Motion 2021/22: 4093, p. 4

⁶⁶ Motion 2011/12: K316, Motion 2012/13: K210, Motion 2013/14: So202, Motion 2014/15: 509, Motion 2015/16: 49, Motion 2015/16: 868, Motion 2017/18: 750, Motion 2018/19: 2297, Motion 2021/22: 466

⁶⁷ Motion 2017/18: 2857

for denial by the committee.⁶⁸ The motions with several suggestions have had the third legal gender point recommended for rejection along the motions exclusively about a third legal gender.

Large parts of the texts from the Committee on the Constitution quote existing laws, rules, and procedures. They are presented to justify the position statement of the Committee which is that because of how deeply rooted the binary gender system is in the formation of Swedish law and how important gendered personal numbers are to statistics for furthering the work on gender equality, they are not ready to initiate any action suggested in the motions.⁶⁹ This position remains unchanged through all documents. Using gender equality work and statistics as justification puts women's rights against those of non-binary and intersex people. This discourse makes it out to be one or the other and places the needs of the larger group (women) before those of the minority. It uses a logic close to that of moral peril, and the "slippery slope". If a third legal gender is implemented, it could lead to no gender specific statistics, and that could in turn lead to increased inequality – the opposite of the aim for rights and liberties.

Comparing the language used in the oldest and most recent proposal documents, Betänkande 2011/12: KU14 and Betänkande 2021/22: KU29, shows that just like motions suggested, more visibility and debate spread awareness. When quoting existing laws from decades ago, it is unavoidable to use phrases that would not be used today, such as *missbildning av könsorganen* ("misshapen genitals"), this has however changed since 2012 and the legal text now use the phrase *medfödd avvikelse i könsutvecklingen* ("born with irregular genital development"). In the Committee's motivation and referral to newer documents a change in language can be identified as well. In Betänkande 2011/12: KU14, a report from the *socialstyrelsen* (National Board of Social Affairs and Health) is referred to and words like *könsidentitetsstörning* (gender identity disorder or disturbance, authors translation) and binary transsexual (a word which is today mostly replaced with transgender) people are described in three paragraphs while the last line says "there are also people who do not want a clearcut gender identity" (authors translation) as the only mention of non-binary existences.⁷⁰ Comparatively, in Betänkande 2021/22: KU29 the investigations mentioned are made by transgender organisations and experts in trans issues and questions, and use phrases to explain binary and non-binary like *könsöverskridande identitet eller uttryck* (authors translation: equivalent to "gender non-conforming identity or expression").

⁶⁸ Betänkande 2011/12: KU14, Betänkande 2013/14: KU14, Betänkande 2015/16: KU15, Betänkande 2017/18: KU34, Betänkande 2018/19: KU27, Betänkande 2020/21: KU23, Betänkande 2021/22: KU29, Betänkande 2022/23: KU26

⁶⁹ Betänkande 2011/12: KU14, Betänkande 2013/14: KU14, Betänkande 2015/16: KU15, Betänkande 2017/18: KU34, Betänkande 2018/19: KU27, Betänkande 2020/21: KU23, Betänkande 2021/22: KU29, Betänkande 2022/23: KU26

⁷⁰ Betänkande 2011/12: KU14, p. 42-45

The language used in the earlier texts hold a lot of power in othering non-binary, transgender, and intersex people, and points out the divergence from the norm as wrong or a very unusual occurrence and that “the cause is unknown”. The shift to using words preferred by the concerned communities, that point out that the divergence is from a norm largely constructed by society, shows an increase in understanding and respect for identities and bodies existing outside the binary. Another way of framing the change would be that genders and sexes that do not adhere to the binary have moved further up towards the good side, but still residing in the area of contestation in the gender and sex hierarchy.

The language used to dismiss the motions has changed to be less othering and more respectful, but the result is the same. Despite broad support, with motions from five out of nine parties in parliament, and government investigations pointing out a third legal gender as a way to create positive visibility and recognition for a marginalised group, the motions are not getting support from the Committee or as a counter-suggestion in parliament.

Since the investigation *Trans people in Sweden: Suggestions for a strengthened position and better living conditions* was released, it’s been mentioned in every proposal document (excluding Betänkande 2020/21: KU23 in which the motions are dismissed with referral to earlier decisions) and with that a quote that says visibility and legal recognition is vital to improve the living standards of trans people and that is can be tied to the right to privacy established in the European Court of Justice.⁷¹

4.3 Debate in parliament on the proposals

The debate on the motions of implementing a third legal has been sparse during the parliamentary debates on the Committee on the Constitution’s proposals.

In the first debate, from the 12th of April 2012, the motion writer questions why the Committee has not suggested to change the law on legal gender to include a third option. A member of the Committee on the Constitution answers that because the binary gender system is entrenched in many parts of the legal system and that there is too little research the Committee is not ready to propose an investigation for such a major change.⁷²

In the other three instances⁷³ the motions were mentioned during the debate there were one or more parties who put in reservations against the Committee proposal and a handful of pleas to raise those as counter-suggestions. In these written

⁷¹ Betänkande 2021/22: KU29, p. 55

⁷² Protokoll 2011/12: 95, p. 16-19

⁷³ Protokoll 2015/16: 88, Protokoll 2018/19: 106, Protokoll 2021/22: 125

reservations and the speeches mentioning the reservations on the floor the motion authors again use the words rights and human rights, as well as a *frihet* (liberty).

In every instance of the Committee proposing to vote no on the motions, the parliament has followed suit and rejected the motions. Not always unanimously, but never with a close call result.

The declaration that it is a matter of rights is reoccurring throughout the political process. That these motions are given to the Committee on the Constitution and dealt with under the rubric of *Fri- och rättigheter m.m.* (“Liberties and Rights etc”) makes a statement outside of making sense procedurally. That many of the motion authors use human rights, rights, liberties, and invoking the UN High Commissioner for Human Rights states a clear tie between a third legal gender and transgender rights, and that transgender rights are human rights.

4.4 A third gender in Bangladesh, Belgium, France, Germany, Italy, and Nepal

The ideology of the authors shines through when the discourse is more closely examined. Hossain uses a language similar to that of the Swedish motion authors in talking about the hijras vulnerable position in society.⁷⁴ He presents cases of how hijras are subjected to loss of privacy and bodily autonomy⁷⁵, and the divide in how hijras identify and live, and their cultural role, compared to what the public think of when one mentions hijras.⁷⁶

The Nepali law uses language that resembles the Swedish motions when it speaks of providing legal recognition and rights.⁷⁷ Bochenek and Knight mirror this in their description of how important it is to have your gender recognised on government issues IDs and documents. They exemplify this with how third gender people face distrust, fraud accusations and other vulnerable situations when interacting with the state.⁷⁸ They also compare existing international human rights with the experiences of third gender people. They state a third legal can be described as part of the right to recognition before the law and for children to preserve their identity. In reference to the Yogyakarta Principles, they agree that it is part of the right of freedom and expression to have one’s gender recognised on documents and ID. By emphasising how a mismatched ID and gender expression can lead to harassment and violence, ensuring a matching ID and gender expression is framed as a way to protect third gender individuals from torture. Most notably, they conclude that having one’s

⁷⁴ Hossain, 2017, p. 1422 and 1428

⁷⁵ Hossain, 2017, p. 1419

⁷⁶ Hossain, 2017, p. 1420-21

⁷⁷ Bochenek and Knight, 2012, p. 19

⁷⁸ Bochenek and Knight, 2012, p. 23-25

gender legally recognised is a catalysator for greater enjoyment of other human rights.⁷⁹

In the case of the Bangladeshi law, it is clear that the lack of understanding of the marginalised group it claims to protect, the state has created their own category of gender which is actually treated as a disability.⁸⁰ Hossain describes the discourse used in Bangladesh as using the language of rights to add legitimacy and weight, much like the Swedish motion authors have done. The issue is described as a marginalised group that must be protected and helped. There is also a strong effort to create a clear definition of what and who is and is not hijra.⁸¹ The paternalism of the Swedish Gender Act of 1972 is somewhat echoed in the Bangladeshi attempt to conform something inherently non-conforming to fit their legal system.

In France and Italy, the control over the gender categories was a reason to deny a third legal gender. The gender binary as well as the heterosexual norm were too integral to the fabric of society to be challenged or changed.⁸² The ability to keep working towards gender equality and produce gendered statistics was raised as well as an argument for denying a third gender in France.⁸³

While Germany was often referred to as an example by Swedish lawmakers, it is unsurprising they called for a broader definition of who would have access to the third gender category. Intersex and non-binary activists alike have criticised the law for being too narrow.⁸⁴ It ties back to a similar reasoning to France and Italy, of not wanting to change the gendered status quo in the state organisation.⁸⁵

The law that best matches the ideologies of the article authors, as well as the suggestions in the Swedish motions, is the third gender law in Belgium. It was developed in cooperation with LGBTQI groups and is based on self-determination. A major difference from the other countries' laws is that the Belgian court decided that if the engrained binary gender system prevented legal recognition of non-binary people, the system was the problem, not a third gender category.⁸⁶ While the process of accessing the third legal gender is not the easiest, the article concludes that the law has managed to create a broad enough definition where the law can be applied to many different identities.

⁷⁹ Bochenek and Knight, 2012, p. 34-40

⁸⁰ Hossain, 2017, p. 1419, 1421 and 1425

⁸¹ Hossain, 2017, p. 1424

⁸² Osella, 2022, p. 930 and 933

⁸³ Osella, 2022, p. 931

⁸⁴ Osella, 2022, p. 935

⁸⁵ Osella, 2022, p. 937-938

⁸⁶ Osella, 2022, p. 940-941

Bochenek and Knight discuss the difficulties of travelling as a trans person, and the examples of passport control and air travel are similar to those made in the Trans Survey SOU 2017:92. In the cases where border control reacts to someone's apparently mismatched appearance and gender marker on their ID, the person is often in a very exposed situation and can face discrimination and harassment.⁸⁷

⁸⁷ Bochenek and Knight, 2012, p. 26-27

5 Discussion

5.1 Discussion of the analysis

Non-ideal theory states that human rights should be used as tools to determine what change is needed in society and how to best achieve that change. The motion writers have identified a marginalised group with a need and tried finding a way to achieve that change. Non-binary and intersex people are not legally recognised in alignment with their identity because there are only two legal genders and that causes internal and social issues. The simplest solution seems to be to create a third legal gender for this group. That means a third legal gender has a tie to human rights. While the third legal gender in itself might not be a human right, the full realisation of a person's life, free from discrimination, and recognition of them by the state has been identified as one by the motion authors. A third legal gender is then their proposed best way to achieve the change. A third legal gender creates the condition for the capability for a life where the state acknowledges your existence and works towards a more equal social standing for your community.

Sweden has seen an increase in knowledge, awareness, and understanding of people existing outside of the binary genders and sexes. Non-binary identities and intersex bodies have moved up the ladder of Gayle Rubin's area of contestation. Which come first and after respectively is hard to divide, they are tied to each other.

Normalisation of something makes it less scary which creates more discourse (or debate) on the topic which leads to normalisation, and so it moves, with backlashes and times of great progress.

There is significant overlap between parts of the Swedish debate and the discourse and actual laws in the other countries. The Committee on the Constitution's insistence on preserving the gendered personal number system, arguing that it is needed to continue the work on gender equality, is similar to the argument made by the French court.

An argument missing from the topic of (non-)gendered personal numbers in Sweden and producing reliable statistics (as well as from the court debates in France) is that by giving actors such as SCB (*Statistiska Centralbyrån*, the Swedish Central Bureau of Statistics) access to the legal gender for statistics, more accurate statistics can be created. Currently statistics on non-binary lives and experiences are only produced on much smaller scale and requiring the survey taker to answer questions on their gender. Something that ensures more accuracy but also puts trans people, non-binary people, and intersex people in a position of vulnerability.

The avoidance of ambiguity in the German and Bangladeshi laws, and France's and Italy's absence of law is hard to reconcile with the concepts of gender and sex ambiguity and non-conformance. The inherent difference of the law and the lived reality of non-binary and intersex people call into question whether it is possible to create enough ambiguity and still have a functional law. Whereas Nepal's law seems to be hard to access, Belgium counters this question with a law that does have a broad definition and works for trans, non-binary, and intersex people alike.

5.2 Further discussion

The existence of non-binary and intersex people pull into question the truth of natural binaries. Those who believe in essential differences between the sexes and genders tend to oppose the validity of non-binary genders as they are grounded in one's self-definition and does not correlate to being intersex (though the two can coincide). Accepting intersex as natural conditions and separate from the established binary sexes means having to redefine what kind of sexes there are and the relevance of their social status.

A third legal gender in many ways seems to be and is presented as the obvious solution to people existing outside of a binary system, to create a category for all the "others". I argue that just like we moved from a one-sex model to a two-sex model, we now may be moving towards a three-sex model. Because of the plurality within the intersex community and the conditions, it seems like a way to keep the binary sex theory intact while allowing some room for the blatant proof that the theory is either incomplete or a socially constructed categorization method. There are similar things happening within the discourse on gender (identity) where the inclusion of a larger spectrum of seeing, experiencing, and presenting gender is reduced to a third gender category.

Considering Rubin's model of sex(ual acts and sexuality) hierarchies applied to gender and sex certain things can be derived from society. The "good body" is the one where genitals, chromosomes, and hormones all fall in the same category of sex, and that sex then matches the gender identity and expression of that person, and always has. The "bad body" is where one or more things of the previous definition are not true. This may be an intersex body without medical intervention, or a trans person. The act of transitioning to be able to fully pass as cisgender can move a binary trans person into the area of contestation, but by declining for example genital surgery or clothing norms a trans body will be positioned further down the hierarchy.

It brings into question if what is happening in the gender and sex debates in highlighting non-binary and intersex people's existence is actually breaking down the binaries that constrain ideas of what body structure and presentation means or if it is

simply expanding the binary to a sort of gender trinary, where non-binary and intersex become the third, “other” option. The fact that the option is repeatedly called a third legal gender, or a third gender, in debate, laws, and academia, support this thought.

While what is happening could be a move towards a gender trinary, it could be argued there will instead still be a binary with the two poles being the male man and others. Gender and sex hierarchies in western society has placed male men at the top, and the subjugation of females and women can be recognised in aspects of the subjugation of intersex and non-binary bodies, such as being made to fit certain boxes or being seen as imperfect versions of the normal. Will intersectional solidarity between queer movements and feminist movements result in what some feminists fear; the continuing of the male man while the female woman is deconstructed and grouped with the other “others”?

Combining the idea of a gender trinary and the theory of the domino effect of moral peril with the concept of liberal inclusion; I argue that the way intersex variations/sexes are being positioned as a third sex category and non-binary genders as a third gender category is an unspoken compromise of being inclusive and seen as progressive enough, while not causing moral panic by saying there is more variation or using the spectrum metaphor. To reach true acceptance and achieving human rights that guarantee liberation from the gender binary for intersex and non-binary people, a third legal gender may only be a steppingstone.

When it comes to intersex bodies, medical rights, and a third legal gender, the recognition of sex divergence may come with both positive and negative effects for the individual. Being part of a marginalised group can undeniably be dangerous and impact someone’s life in many ways. If intersex conditions are continued to be seen as abnormalities the surgeries can be continued to be framed as interventions to ensure a healthy body. But looking at the historical and current motivations it makes better sense to frame it as an issue of prejudice rather than health. The body has been political for longer than the non-binary and intersex movements have had space in the political spotlight. A third legal gender could create space to avoid unnecessary and unwanted surgical and medical intervention on intersex bodies.

What happens with the binary when intersex and non-binary realities are considered? Equal rights and treatment may not be right around the corner, but progress is being made. Can the gender and sex binaries and structures be dismantled and deconstructed simply by giving more space and visibility to those outside the norms?

More research is needed on norm-breaking bodies (by birth or by later choice) using queer theory and subjugated knowledges, including foremost the lived experiences of

non-binary and intersex people. It would also be useful to make further comparison with non-Western societies that have historical cases of trinary societies. Clearly the established ideas of what fits in the boxes of gender and sexuality in the Western world is not enough to understand the very real existence of other kinds of experiences and bodies.

6 Conclusion

In this paper, a third legal gender has been found to be seen as a tool to ensure the human rights of recognition, personal identity and private life, and equality within the legal system by the parliament members writing motions calling for its implementation, as well as many international activists, lawmakers and academics. Despite the possible consequences of the changing position of non-binary and intersex people as included in a gender trinary, or the possibility of a law that does more harm than good, a third legal gender can certainly be seen a matter of realising human rights within a gendered social system for non-binary, transgender, and intersex people who are not represented in the existing legal gender binary. In the case of Sweden, there seems to be enough political willingness to start implementing a third legal gender once the details of how to adjust the personal number system are established. This could be an important step towards stronger human rights for gender and sex minorities in Sweden.

Overall, more research is needed on existing laws that seek to accommodate gender non-conformance in the state, and more work is needed on both a local, national and international level, to ensure that the lives of marginalised genders and sexes are made easier and more equal.

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