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Towards Categorical Visibility? The Political Making of a Third Sex in Germany and the Netherlands

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Abstract

Although international proclamations increasingly recognize legal sex beyond binary categories, domestic legislation is lagging behind. Germany and the Netherlands are the first countries in Western Europe where courts have ruled in favour of a third option. While the German constitution was amended to guarantee a third option, the Dutch government has refrained from implementing comparable legislation. What explains this difference? This article draws on parliamentary debates, newspapers and statements from activists to follow the trajectory of the third option. Building on literature on intersex rights legislation and the diffusion of LGBT rights norms, we find that an established progressive reputation can lead states like the Netherlands to take a back seat, while mobilization by activists was crucial in establishing the self-determination of legal sex on the German political agenda. Our study contributes to unravelling the complex ways in which new norms shape – or fail to shape – domestic political outcomes.

Keywords: intersex; norm diffusion; Germany; the Netherlands

Introduction

Male or female? From choosing a bathroom to filling out a form, sex is a defining factor engrained in daily life. States ‘give sex’ through registration (Davis *et al.*, 2016). While the registration of sex is key to policies, laws and rights that regulate which bodies can appear in public and how they are seen, citizens can only exercise these rights if they fit into established binary categories. This makes people with intersex characteristics ‘categorically invisible’ – and thus unequal (see Massey, 2007) – as they are born with physical sex characteristics that do not fit medical norms for female or male bodies.¹ Most states do not legally recognize intersex but prioritize medical interventions to ‘normalize’ intersex bodies (Garland and Travis, 2018).

Germany and the Netherlands are the first countries in Western Europe in which courts recently ruled in favour of a ‘third’ option besides binary sex categories.² But despite their similarities, these court rulings have led to different political outcomes. Germany amended its constitution to include the right to register legal sex as ‘diverse’ but the Dutch government took no such steps. What mechanisms shaped these outcomes? We build on scholarship that analyses the diffusion of lesbian, gay, bisexual and transgender (LGBT) rights. Historically, intersex activists have framed their demands similarly to the gay and

¹‘Intersex’ is an umbrella term, not a homogeneous classification. It includes anyone with a congenital condition whose reproductive anatomy does not clearly fit into the binary male/female norm (Davis, 2015).

²‘Third’ sex is not universally accepted. Activists argue that this generic sex classification neglects the many variations of intersex characteristics (Horowitz, 2017) and perpetuates harmful practices (for example pressure on parents to ‘choose’ a binary sex for their child).

lesbian movement. Furthermore, both in Germany and the Netherlands, LGBT and intersex activism partly overlaps. Finally, norms on sexuality and gender identity are both heavily influenced by binary sex norms. Challenging these deeply-rooted norms are part and parcel of normative change.

Scholars of LGBT-rights have analysed cross-national differences in their adoption and identified factors that impede or facilitate the acceptance of new norms (Kollman, 2013; Ayoub, 2016). Norms can diffuse when governments grow convinced that they are appropriate, for example, as expressed in international treaties and conventions. To be accepted, new norms also need to resonate with existing domestic ideas or beliefs, placing a premium on the process of 'norm brokerage' in which actors with local knowledge mediate between new international norms and domestic discourses (Ayoub, 2016). Although international norms have received attention, domestic studies that go beyond binary sex categories remain scarce. An 'implementation gap' (Bauer *et al.*, 2019) exists between international human rights proclamations and national legislation. Focusing on domestic contexts, we argue, allows us to study the role of pioneering states as teachers of new norms and the efforts of norm brokers in securing change.

Building on scholarship on the diffusion LGBT rights, we qualitatively analyse the introduction of the third option in Germany and the Netherlands. We examined the data with regard to three mechanisms of LGBT rights diffusion: (1) references to international and European standards on registration beyond binary categories; (2) references to domestic discourse; and (3) the ability of activists to operate as norm brokers. We follow the trajectory from previous changes in the law in the Netherlands in 2007 and in Germany in 2013 until 2019, combining data sources including parliamentary debates, court transcripts and press releases by activists.

Our findings reveal that although these mechanism matter for intersex rights, they do not translate directly to the trajectory of the third option in Germany and the Netherlands. Whereas scholarship on the diffusion of LGBT rights has pointed to the desire of states to live up to their international reputations, we find that the Netherlands did not fulfil its role as a 'norm-shaper' (Kollman, 2014). While the self-determination of legal sex secured a place on the German political agenda, the Dutch government refrained from implementing the third option. This lack of political action suggests that appeals to international reputation are not always an effective strategy, especially in a case as disruptive as non-binary sex registration. German activists were able to act as norm brokers, framing self-determination of sex as a fundamental human right. This frame resonates strongly in the German political context and connects German activists with a transnational advocacy network (Keck and Sikkink, 1998) of intersex activists. The three mechanisms do not operate in isolation but are interdependent: their interplay offers an explanation of why Germany moved first. Our findings contribute to the thus-far-understudied field of intersex rights and activism and sheds new light on how sex norms beyond the binary may diffuse.

Next, we outline a theoretical framework, followed by the case selection and methodology. The empirical body of the paper provides an overview of the development of international norms, maps the domestic contexts of the right to register in Germany and the Netherlands, and examines the role of intersex activists as norm brokers.

I. LGBT Rights: The Diffusion of a Norm

The (lack of) implementation of the third option in Germany and the Netherlands shows that a new norm can play out differently in two similar national contexts. How can we understand these differences, and what can they tell us about the possibilities of norm change? Numerous studies have addressed how norms about LGBT rights diffuse internationally and catalyse the domestic adoption of these rights (Swiebel, 2009; Paternotte and Kollman, 2013; Ayoub, 2016). Building on constructivist theories of norm dynamics within international relations, this body of work examines (resistance to) changing norms about LGBT rights.

Many states today support the norm that sexual orientation and gender identity should be the subject of human rights protection – a norm that has been increasingly visible in Europe since the 1980s. The gradual introduction of new norms can lead to ‘social learning’ among national policymakers (Finnemore and Sikkink, 1998) until a tipping-point is reached – a decisive stage in the ‘norm life cycle model’ (Keck and Sikkink, 1998). When enough critical states embrace a new norm as befitting their identities, a tipping-point is reached and the norm diffuses. A new norm can thus cascade (Finnemore and Sikkink, 1998) or spiral down through international society (Risse *et al.*, 1999).

Governments are most susceptible to this kind of pressure when they ‘aspire to belong to a normative community of nations’ (Keck and Sikkink, 1998, p. 29). Kollman (2017) finds that an important part of what persuaded the Dutch government to take the controversial step to introduce marriage equality was its ambition to be recognized internationally as a ‘policy pioneer’. This same desire may motivate states to implement intersex legislation. But here, both Germany and the Netherlands can rely on their established international reputations as progressive countries, which may allow them to take a back seat on the issue. Denmark was a pioneer on registered partnership in 1989, but approved marriage equality only in 2012. But due to its progressive reputation, Denmark received no international criticism (Ayoub, 2016).

Norms about LGBT rights do not diffuse to domestic contexts at a similar pace. Countries with strong conservative Catholic backgrounds, like Malta, have become pioneers while other more progressive democracies have lagged behind (Ayoub, 2016). Where sexual minorities become visible, contestation as well as resistance and backlash are common (Ayoub, 2014; Symons and Altman, 2015). LGBT rights activists have nevertheless continued to mobilize even when access to national political arenas is blocked. In Europe, a transnational network of activists and actors such as the Council of Europe, the European Court of Justice and the European Court of Human Rights have empowered domestic movements. Court rulings have empowered LGBT activists vis-à-vis their governments, at times facilitating breakthroughs (Van der Vleuten, 2014; Helfer and Voeten, 2018). Von Wahl (2017) finds that the 2013 reform of German civil status law, which allowed for the assignment of unspecified sex, did not follow traditional patterns of advocacy. It resulted from a ‘boomerang pattern’ (Keck and Sikkink, 1998) that pressured the government from above.

States are more likely to implement LGBT rights legislation when their national movements have strong ties to European networks (Paternotte and Kollman, 2013; Kollman, 2017). However, examples of leading countries are scarce because legislation on intersex is almost completely absent and an international trend towards recognition

remains in its infancy (Garland and Travis, 2018). Norm diffusion scholars emphasize that the creation of new standards of appropriate behaviour for states does not necessarily lead to political change in domestic contexts. How activists frame their claims and through what channels they do so can determine which norms succeed in bringing about change. To get their message across, activists must translate norms (Zwingel, 2012) and connect their issues to dominant frames in specific domestic contexts. Ayoub (2016) refers to this process as ‘norm brokerage’ whereby actors with local knowledge mediate between new international norms and domestic discourse. Norm brokers frame an international norm in domestically familiar discourse and connect actors across contexts to draw external attention to the state of LGBT rights in their country.

Framing the LGBT norm as a European standard of human rights has proven to be an especially successful strategy (Swiebel, 2009; Holzacker, 2012; Kollman, 2014). In the case of same-sex marriage, a pattern can be distilled: LGBT rights activists were able to use the growing recognition of LGBT rights in European law, along with the example of pioneering states, to create and disseminate a European norm that frames the recognition of same-sex relationships as a human right (Kollman, 2013). Since the 1990s, intersex activists have used human rights principles to frame their claims as well (Bauer *et al.*, 2019; Monro *et al.*, 2019), but with varying success. Scholars of LGBT rights diffusion have further argued that international pressure does not provide a complete picture of norm change. While there is an implicit assumption that the discourses that introduce new norms into national settings are relatively uniform across states, this is not so: despite international standards, domestic intersex legislation is lacking almost everywhere. To understand the expansion of the binary sex norm, we need to examine domestic contexts more closely to unpack ‘the role that pioneering states play as teachers of *new* norms’ [emphasis added] (Kollman, 2017, p. 23).

Scholarship shows that LGBT rights diffuse under the following conditions: 1) when states fear the costs of international censure and become convinced of the international norm’s appropriateness; and 2) when pre-existing domestic norms resonate with international norms through 3) the mediating efforts of local activists acting as norm-brokers. These mechanisms do not operate in isolation. Instead, the interplay between them creates a playing field in which norms on LGBT rights can diffuse. We expect these mechanisms to matter for the expansion of the binary sex norm too. However, this interplay may take shape slightly differently. Intersex rights – alongside the recognition of sex beyond binary categories – are possible even more contentious than LGBT rights, as we discuss in the next section.

II. The Diffusion of Intersex Rights

LGBT rights remain contentious in most societies. Intersex rights and the recognition of sex beyond binary categories are possibly even more contentious and require challenging deeply-rooted normative ideals, but to date have received little scholarly attention.

While many intersex activists argue that LGBT activism has opened the door for intersex rights, the conflation of intersex with LGBT has led to appropriation and issue deflection (Bauer *et al.*, 2019). Intersex is not a sexual orientation or a singular gender identity, but refers to many different *biological* possibilities (Dreger and Herndon, 2009). Most scholarship on intersex rights has addressed the experiences of people with intersex

characteristics in relation to medicine (Horowicz, 2017; Carpenter, 2018; Davis and Evans, 2018), where intersex characteristics have long been seen as ‘disorders’ or ‘diseases’. Although almost all intersex conditions pose no physical risk and require no medical intervention, infants with intersex traits have been subject to surgeries so that their bodies conform to a binary sex norm. Such medical interventions can have lifelong consequences, including sterilization and genital mutilation, and have been condemned by advocacy groups, human rights organizations and supranational bodies. Since the late 1990s, intersex activists have challenged the medicalization of intersex and framed intersex medical treatment as human rights abuses (Chase, 1998; Preves, 2005).³ In 2015, the Council of Europe’s Human Rights Commissioner recognized the right of intersex people to not undergo sex assignment treatment, while the Council of Europe and the European Union’s Fundamental Rights Agency called for reassessing medical approaches that pathologize intersex traits.

A shift from medical to legal approaches towards intersex is taking place globally, although the two often remain linked. The legal requirement for children with intersex characteristics to be identified as either male or female leaves them vulnerable to surgical intervention (Horowicz, 2017). The medical narrative has historically relegated intersex to the private sphere, outside of public concern and state responsibility. Garland and Travis conclude that ‘legal silence effectively legitimizes the medical account of intersex as a purely material concern, permits attempts to “normalize” these bodies and enables their social or cultural erasure’ (2018, p. 589). Still, expanding binary categories for legal sex registration is not an uncontested goal of the intersex movement. Advocating for a ‘third’ option is considered to divert from the human rights violations resulting from unnecessary medical interventions. Criminalization of these mutilating interventions is prioritised over anti-discrimination legislation or sex registration (Bauer *et al.*, 2019).

While a number of studies have examined the experiences of people with intersex characteristics in relation to medicine (see for example Karkazis 2008; Davis, 2015), our focus lies with the legal erasure of intersex which has only recently attracted scholarly attention. Von Wahl (2017) has detailed how activists mobilized transnationally to pressure the German government in 2013 to reform civil status law to allow leaving legal sex unspecified. This reform has been widely criticized by intersex activists who argue that ‘non-registration’ provides new grounds for, and does nothing to address, the medicalizing and pathologizing of intersex, pressuring parents of children with intersex characteristics to choose surgery rather than assign no sex. In the United Kingdom, Monro *et al.* (2017) find that the Gender Recognition Act’s privileging of the psychological aspects of sex and gender requires specific reform to facilitate those with intersex characteristics to obtain legal recognition. Likewise, Monro *et al.* (2019) show in their study of unnecessary medical interventions a regulatory gap between international treaties and conventions and national legislation in the UK, Switzerland and Italy.

Although international actors such as the Council of Europe and the United Nations have started to recognize intersex rights legislation, such laws are almost completely absent in domestic contexts. This ‘implementation gap’ (Bauer *et al.*, 2019) between international human rights proclamations and national legislation requires a more detailed

³For a comprehensive review of activism within the intersex movement, see Dreger and Herndon (2009) and Bauer *et al.* (2019).

understanding of the strategies of norm-brokers in domestic settings – for which the legal introduction of sex beyond binary categories in Germany and the Netherlands presents a valuable opportunity. The playing field of international norms, domestic contexts and norm-brokers mediating between them shapes our analysis of the third option in Germany and the Netherlands.

III. Case Selection and Methods

Germany and the Netherlands are the first countries in Western Europe where courts have ruled in favour of a third option to register legal sex. With regard to the mechanisms of diffusion identified earlier, the Netherlands and Germany are similar cases. Both are members of international organizations that support LGBTI rights and international norms generally enjoy legitimacy. And although each has a different history, both countries have strong LGBT movements integrated into European advocacy networks. Dutch and German laws for registering legal sex are similar with regard to record-keeping and sex registration and are characterized by the use of a central source for records that informs all other registers (Van den Brink *et al.*, 2015). In German and Dutch law, entry of sex in the civil status registry is mandatory. Before the court rulings of 2017 and 2018, the available options were binary, with the exception in Germany since 2013 of leaving the registration undetermined when a child cannot be assigned the female or male sex. Despite these similarities, the role of the German Constitutional Court is unique and unparalleled in the Netherlands. The Constitutional Court has historically chipped away at LGBT and intersex inequalities (Von Wahl, 2017; Davidson-Schmich, 2018), pressuring the German government to implement progressive change. Additionally, frames of human rights violations may resonate more strongly in Germany given its historical sensitivities (von Wahl, 2019). Yet, the European norm of LGBT rights is similarly respected in Germany and the Netherlands. In both countries, activists in their fight for marriage equality held up other European countries and European institutions as benchmarks for national human rights practices. The ambition to maintain an image as a progressive European and international leader is clearly present in both countries.

The other European exception is Malta, which introduced a third option as part of a sweeping reform of gender legislation in 2015, abruptly propelling the island-nation to the status of trailblazer. The new legislation breaks away from previous legislation. The changes were the result of a sweeping victory of the Labour Party, after conservative governments had blocked such reforms for two decades. The law change has been explained as resulting from elite socialization, as policy-makers closely engaged with activists, most prominently at the third International Intersex Forum in Malta. Several critical actors such as the Minister of Social Dialogue, Consumer Affairs and Civil Liberties and the Human Rights Policy Coordinator have personal ties to the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe) (see for example Harwood, 2015; Ayoub, 2016; Garland and Travis, 2018).

This study offers one of the first explorations of the introduction of a ‘third’ option in only two cases, limiting the possibilities to identify causal mechanisms of norm diffusion. However, the expansion of binary sex norms does not occur in a vacuum, but is the result of a complex process of political and social contestation, we aim to unpack. As the international trend towards self-determination of legal sex develops and new cases occur, more

systematic comparisons between countries need to be made to accompany our findings. Malta's gender reform – and those of other leading cases such as Uruguay and Argentina - warrants further comparative research but this lies outside of the scope of this study.

To examine the trajectory of the third option in Germany and the Netherlands, we combined different data sources. We first established a timeline. For Germany, it begins in 2013, when civil status law was amended to include the option to leave legal sex undetermined. For the Netherlands it goes back to 2007, when the Supreme Court denied the appeal of a person with intersex characteristics to remove the registration of their sex from their official documentation. We followed the legal and political trajectory to the German and Dutch court rulings introducing the third option in 2017 and 2018, respectively. Our strategy to identify all actors and organizations that made claims on the right to register legal sex during this timeframe included two steps. We first searched for news articles and parliamentary documents reporting on the right to register through LexisNexis and online databases of the Dutch and German parliaments.⁴ We then mapped all actors and organizations mentioned in these documents until we reached saturation. This resulted in a dataset containing legal proceedings, parliamentary questions, motions and debates, research reports, assessments from legal and medical experts, newsletters and publications from intersex associations and newspaper articles. This combination of data provides a cross section of the different levels on which the three mechanisms of norm diffusion interact.

To study the strategies of norm brokers, we compiled an overview of all activist organizations speaking out on the right to register in Germany and the Netherlands and included their online communications, both on their websites and on social media. Building on the mechanisms identified by scholars studying the diffusion of norms regarding LGBT rights, we deductively coded our data under three headings: (1) references to international and European standards; (2) references to domestic identity such as societal developments and statements describing 'the way we do things'; and (3) norm-brokers' activities. Across these themes, we focused on how sex and gender are defined and the consequences for the inclusion and protection of persons with intersex characteristics (see Appendix II for the codebook).

IV. International Norms of Legal Sex Registration

On which international standards can Dutch and German norm-brokers base their claims? Although binary conceptions of sex are increasingly challenged internationally, domestic policies vary and most states lack legislation that specifically mentions intersex (see Table 1). International standards of appropriate state behaviour have been a focal point in explaining norm change. With intersex rights increasingly considered in international declarations and treaties, the aspiration to belong to a normative international community of nations (Keck and Sikkink, 1998) has been shown to contribute to socialization and norm change within domestic contexts.

⁴For the Netherlands, see: <https://www.tweedekamer.nl/kamerstukken>. For Germany, see: <https://www.bundestag.de/dokumente> (accessed 24 April 2020).

Table 1: National legislation on intersex rights around the world, as of March 2020

| | |
|---|---|
| Third sex marker | Nepal 2007; Pakistan 2009; New Zealand 2012; Australia 2003, 2011*; Bangladesh 2011; India 2014; Germany 2014, 2017**; United States 2016***; Canada 2017, 2019; Malta 2017; Uruguay 2018; Argentina 2019; Iceland 2019; Austria 2019 |
| Sex characteristics protected within anti-discrimination law | South Africa 2005; Australia 2013; Greece 2015; Bosnia-Herzegovina 2016; Malta 2017; The Netherlands 2019 |
| Ban on surgical interventions | Malta 2015; Chile 2015 (repealed 2016); Uruguay 2018; Portugal 2018 |

Sources: Holzer (2018) ILGA-Europe; Transgender Europe (TGEU) (2017); OII International (2018); Intersex & Genderqueer Recognition Project (IGRP) (2018); Van den Brink and Dunne (2018, pp. 66–7). * The Australian passport with an 'X' marker was issued in 2003. Until 2014, passports with an 'X' marker were only issued to people born with intersex characteristics. In 2011, the Australian government broadened access to any person with a non-binary identity. ** In 2014, German civil status law was reformed to include an 'indeterminate' option for registering sex. In 2017, the Constitutional Court ruled in favour of adding a third option 'divers' or 'inter'. *** Different degrees of legislation offering an X marker for non-binary people on birth certificates, drivers licenses and/or other state identification documents have been passed in 17 states: Oregon (2016), California (2016), District of Columbia (2017), Maine (2019), Washington (2018), Minnesota (2018), Arkansas (2018), Colorado (2018), Maryland (2019), Massachusetts (2019), Pennsylvania (2019), New Mexico (2019), Illinois (2019), Vermont (2019), Nevada (2019), New Hampshire (2020) and Hawaii (2020).

In 2006, a group of human rights experts launched the Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity. The Council of Europe has endorsed the Yogyakarta Principles and made recommendations to member states for their implementation. Principle 31 of the Yogyakarta Principles +10 explicitly demands that sex markers are eliminated from identity documents (Yogyakarta Principles, 2017). Various Council of Europe institutions now acknowledge the position of people with intersex characteristics. Perhaps most prominently, the European Court of Human Rights (Helfer and Voeten, 2018) – although it has yet to rule on a case involving intersex characteristics or legal sex registration beyond binary categories – has found countries that restrict the rights of transgender people to be violating the European Convention.⁵ The Parliamentary Assembly of the Council of Europe has also spoken out on the rights of persons with intersex characteristics, while the UN Committee against Torture and the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW) have reprimanded the Netherlands and Germany for violating intersex rights, including the failure to ban surgical interventions and to expand legal sex registration categories.

We distinguish between three types of legislation that address intersex: a third sex marker, the inclusion of sex characteristics within anti-discrimination law, and a ban on surgical interventions. The varied ways in which states have implemented such legislation shows that international standards diffuse unevenly (see Table 1).

Following Nepal in 2007, several states have introduced some form of third sex marker, including India, Pakistan and Bangladesh which legally recognize genders other than male or female in parts of their legal systems. Many early adopters of a third option, including Australia, New Zealand and Canada, use case law rather than more rigid common law systems (Van den Brink *et al.*, 2015), which has allowed them to introduce a third option piecemeal. While most jurisdictions in Europe are based on common law,

⁵Garçon & Nicot v. France, 2017; S.V. v. Italy, 2018; Y.Y. v. Turkey, 2015; Parry v. the United Kingdom, 2006; Goodwin v. the United Kingdom, 2002.

the binary understanding of legal sex has been challenged. Alongside Germany, the Netherlands and Malta, Portugal and Austria have introduced legislative provisions to register legal sex beyond binary categories. South Africa has included sex characteristics in its anti-discrimination laws while Finland has added 'gender features of the body' within the protected characteristics of 'gender identity and gender expression'. The Netherlands, Greece and Bosnia-Herzegovina now prohibit discrimination and hate crimes on the basis of 'sex characteristics'. Uruguay, Portugal and Malta have gone further by banning surgical interventions on infants with intersex characteristics. As can be seen in Table 1, countries that have introduced the right to register legal sex beyond binary categories outnumber those that recognize intersex as a category for protection from discrimination or which prohibit medical interventions.

Sex registration is often restrictive as it incorporates conflating definitions of sex and gender. For example, while New Zealand allows 'X' in passports for those of 'indeterminate/unspecified' sex, the law does not explicitly mention intersex; applicants are labelled 'transgender', making it unclear whether persons with intersex characteristics can use this marker. Germany, Austria and the US state of California define the third option using biological characteristics to facilitate individuals with intersex characteristics to register as such. But in the overwhelming majority of states, intersex is conceived as gender identity in legislation on civil status.

Some states have implemented models of self-determination to change legal sex within binary categories. In 2014, the Netherlands amended its Transgender Law (*Transgender Wet*) to remove requirements of sterilization and reassignment surgery. In 2011, the German Constitutional Court declared the existing Transsexuals Act (*Transsexuellengesetz*) unconstitutional since it required sterilization, reassignment surgery and divorce in cases where a legal change in sex led to same-sex marriage. Although there is no requirement in the Netherlands for individuals to obtain a diagnosis, the legal sex recognition process is supervised by medical professionals. In Germany, changing legal sex within binary categories takes place before a local court and requires medical assessment. In five jurisdictions in the EU – Cyprus, Bulgaria, Latvia, Lithuania and Liechtenstein – there are no formal arrangements to change legal sex within or outside binary categories (Van den Brink and Dunne, 2018). Despite its supposed 'universality', we find medical authority takes contingent shape in national arenas or leads to different assessment practices of legal sex. This contingency shows that international developments are not always enough to prompt domestic change.

The increasing categorical visibility of intersex on the international agenda has also faced resistance. A proposal by the Norwegian Labour Party to reform civil status law to include a third option was rejected in parliament in 2017. In France, the *Cour de Cassation* ruled against the registration of 'neutral' as a legal sex in 2017, deeming the binary registration system essential for public order (Cour de Cassation, 2017). In June 2018 the British High Court ruled against a bid for passports to have an X marker.

V. Legal Sex Registration in Germany and the Netherlands

We now turn to the domestic contexts in which the third option was introduced in Germany and the Netherlands. In Germany it was the result of a series of court cases filed by a citizen with intersex characteristics which progressed through the entire justice

system – from the Regional Court to the Higher Regional Court to the Federal Court of Justice – between 2014 and 2017. The campaign group *Dritte Option* (Third Option) was founded in 2013 after the request to register sex as ‘inter’ or ‘divers’ was denied by the local registry office. After the District Court in Hannover declined the appeal against this decision, second and third appeals were filed and denied at the Higher Regional Court in 2015 and the Federal Court of Justice in 2016. *Dritte Option* finally filed a constitutional complaint against the ruling of the Federal Court of Justice with the German Constitutional Court.

In 2017, the Constitutional Court ruled that the existing legal framework for sex registration violated the German Constitution. The obligation to register legal sex as either male or female or to leave the entry empty were deemed to violate constitutional rights, especially the right to the protection of gender identity. The Court acknowledged that ‘gender’ (or ‘sex’; ‘Geschlecht’ in German does not distinguish between ‘sex’ and ‘gender’) in the Constitution encompasses more than ‘men and women’. The Court in its ruling referred to a 2015 statement by the German Medical Association, which underlined the scientific consensus that gender (‘Geschlecht’) cannot only be determined by genetic or anatomical characteristics, but is influenced by social and psychological factors; self-determination is thus the most relevant measure of gender identity. The Court provided the legislator with two choices to rectify the constitutional violation: to abolish the requirement to register legal sex or to create a third option. A year after the ruling, the German government adopted an amendment to civil status law and created the third category ‘diverse’.

The draft bill on the third option passed in the *Bundestag* in 2018 with a majority of votes from the Christian Democrats (CDU/CSU) and Social Democrats (SPD). The right-wing Alternatives for Germany (AfD) voted against the bill, warning against the spread of ‘gender ideology’ and underlining the need for objective criteria to establish legal sex. AfD MP Beatrix von Storch stated: ‘(they) tell us that one can freely choose sex: a man in the morning, a woman by night, and with a full moon, perhaps even something completely different’ (Deutscher Bundestag, 2018, p. 5989). The Greens (*Bündnis 90/Die Grünen*), who had wanted more thorough reforms including removing the requirement of medical certification, abstained, as did the liberal Free Democratic Party (FDP). The Left Party (*Die Linke*) voted against the bill due to the lack of reforms. Despite heated debate over the bill, the *Bundesrat* did not incorporate proposals from opponents to amend the civil status law. Medical certification remains necessary for citizens wanting to register as diverse, in stark contrast with the right to self-determination activists plead for.

In the spring of 2018 the Dutch District Court of the province of Limburg ruled in a case of a person with intersex characteristics that the entry of sex in their birth certificate could be changed from ‘female’ to ‘sex could not be determined’. Although *Transgender Netwerk Nederland* (TNN), the Dutch Association for the Integration of Homosexuality (COC) and the Dutch Organization for Sexual Diversity (NNID) had been advocating for self-determination of legal sex for several years, they were not actively involved in the court proceedings. The claimant represented themselves for two years, without direct support from advocacy groups.

In considering the case, the Court relied on the opinion of a medical professional to establish whether the claimant was indeed ‘intersexed’. It asked the claimant to provide

documentation prior to the hearing, appointing an expert to conduct chromosomal research. The latter testified during the hearing that ‘the question whether the claimant is ‘intersexual’ is not a question of medical diagnosis, but of gender identity’ (District Court Limburg, 2018, §1.6). The Court ruled that the fact the claimant was born with ‘indeterminable sex’ had no bearing on the personal experience of the claimant’s gender identity. Although many intersex activists emphasize that intersex characteristics should not be conflated with gender identity, the Court’s position reflects a broader shift from a medical discourse to a self-determined identity requiring legal protection (Dreger and Herndon, 2009).

On the national level, no jurisprudence on the recognition of a third option existed before a ruling by the Dutch Supreme Court in 2007, which denied the request of the claimant for their sex to be removed from their birth certificate. Nevertheless, the District Court of Limburg argued that ‘there is a societal recognition and – at least a trend towards – judicial recognition of a neutral gender identity’ (District Court Limburg, 2018, §2.5). Its ruling framed the Netherlands as a frontrunner in the recognition of sex beyond binary categories, pointing to the practices of the Municipality of Amsterdam and the Dutch railway operator addressing its customers in a gender-neutral manner, and the department store HEMA shifting to sell only gender-neutral children’s clothing. The Court, which concluded that a third option is appropriate and consistent with this *Zeitgeist*, recognized the claimant’s right to change the registration of their sex in their birth certificate to ‘sex cannot be determined’. But making the undetermined registration of sex available to all citizens would require an amendment to civil status law, which is beyond the Court’s authority. It therefore implored the Dutch government to pass legislation to align with its ruling.

The government’s response to the Court’s ruling did not reflect the ambition to be a ‘policy pioneer’. The response of the State Secretary for the Interior and Kingdom Relations to limit the unnecessary registration of sex was initially positive. But after the court ruling was submitted for consideration to an internal advisory committee, the State Secretary and Minister for Legal Protection issued a statement that implementation of a third option would be ‘premature’ and that the Netherlands should bide international developments on legal sex registration (Tweede Kamer der Staten Generaal, 2019). Contrastingly, the District Court ruling provides a list of international developments, such as examples of countries implementing a non-binary option, ECtHR-rulings and the Yogyakarta Principles, but these did not convince the Dutch government into action.

In contrast to the German ruling, the Dutch court understood intersex as gender identity. This definition has since allowed several individuals without intersex characteristics to win the right to register their legal sex as undetermined in court. Defining intersex as gender identity has bolstered the argument for self-determination as the most relevant measure of legal sex in the Netherlands.

VI. Norm Brokers

Norms regarding LGBT rights are more likely to diffuse when international norms, mediated by local activists acting as norm-brokers, resonate with existing domestic discourses (Ayoub, 2016). In both Germany and the Netherlands, norm-brokers played a crucial role in the introduction of the third option.

Research has shown that activists are more successful when they are embedded in transnational advocacy networks (Keck and Sikkink, 1998; Kollman and Waites, 2009). German organizations that advocate for intersex rights are numerous and have been fostering transnational alliances for over a decade (see Table 2). Many local groups are embedded in Organization Intersex International Europe, the umbrella organization for European human rights-based intersex activism. Two German organizations – *Intersexuelle Menschen e.V.* and *XY-Frauen* – submitted their shadow report to CEDAW on the situation of intersex people in 2008, which set the ‘boomerang pattern’ in motion. The German government was reprimanded in CEDAW’s official response and requested to improve the rights of intersex individuals (Von Wahl, 2017). Since then, organisations have strategically been reporting to UN committees such as CEDAW and the Committee against Torture (CAT). Activists in Germany rallied behind the de-medicalization of intersex, banning of unnecessary medical interventions and legal sex registration based on self-determination. During the legal proceedings that led to the introduction of the third option, *Dritte Option* ran a public campaign to raise awareness for intersex people in Germany and the repressive effects of the binary. Other groups joined after the draft 2017 bill proposed a narrow implementation of the third option requiring medical certification of intersex. A nationwide alliance of transgender, intersex and queer groups and individuals launched the campaign *Aktion Standesamt 2018* to encourage citizens who do not identify as either male or female to apply for self-determined sex registration. They organized demonstrations in major cities around the country to pressure the government

Table 2: Bodies advancing public claims about the need for a third option and protection of intersex during our timeframe (2007–19 for the Netherlands and 2013–19 for Germany)

| <i>Germany</i> | <i>Founded</i> |
|---|----------------|
| <i>pro familia Deutsche Gesellschaft für Familienplanung, Sexualpädagogik und Sexualberatung</i> (German Society for Family Planning, Sexual Education and Counselling) | 1952 |
| <i>Deutscher Kinderschutzbund Bundesverband</i> (German Federal Association for the Protection of Children) | 1953 |
| Lesbian and Gay Federation (LSVB) | 1990 |
| <i>XY-Frauen</i> (XY-Women) | 1997 |
| <i>Deutsche Gesellschaft für Transidentität und Intersexualität</i> (dgti) (German Society for Transidentity and Intersexuality) | 1998 |
| <i>Intersexuelle Menschen</i> (Intersexual People) | 2004 |
| TransInterQueer | 2006 |
| <i>Zwischengeschlecht.org</i> (Betweensexes.org) | 2007 |
| <i>Aktion Transsexualität und Menschenrecht</i> (Atme) (Campaign Transsexuality and Human Rights) | 2008 |
| Organization Intersex International (OII Germany) | 2008 |
| <i>Dritte Option</i> (Third Option) | 2013 |
| <i>Bundesverband Trans*</i> (Federal Association Trans*) | 2015 |
| <i>AktionStandesamt2018</i> (Campaign Registry Office 2018) | 2018 |
| <i>#SelbstbestimmungJetzt</i> (#Self-determinationNow) | 2019 |
| The Netherlands | |
| Dutch Association for the Integration of Homosexuality (COC) | 1946 |
| Transgender Network Netherlands (TNN) | 2008 |
| Dutch Organization for Sexual Diversity (NNID) | 2013 |

Note: not all organisations focused exclusively on intersex rights during their years of operation.

and to demand comprehensive reform of civil status law. *Bundesverband Trans** – an alliance of 30 regional and national interest groups advocating for sexual diversity and self-determination – presented the *Bundestag* committee, tasked with designing the draft bill, a petition for a self-determined third option signed by over 40,000 people.

Before the parliamentary debate, an alliance of six organizations penned an open letter to the *Bundestag* expressing concern about the proposed bill.⁶ The letter criticised the prerequisite of medical certification of intersex and demanded that no external report should be necessary to change legal sex. The letter additionally called for the repeal of the Transsexuals Act (*Transsexuellengesetz*), the expansion of counselling and the prohibition of unnecessary medical interventions in intersex infants. At the time of writing, a legislative proposal to ban such interventions is pending. Most intersex activist organizations in Germany do not favour a ‘third’ option to register legal sex. They see such interventions as stalling tactics that divert or dismiss the experiences of persons with intersex characteristics and advocate abolishing the state’s registration of legal sex altogether. In the words of *Trans** activist group *Atme e.V* (2018): ‘A state that takes its citizens seriously ensures that the stereotypical division of people into social genders – that only has the purpose of upholding inequality – is erased. It does not create *new* gender-borders’ [emphasis ours].

Although Dutch LGBT and intersex activists such as Transgender Network Netherlands (TNN), the Dutch Association for the Integration of Homosexuality (COC) and the Dutch Organization for Sexual Diversity (NNID) have been advocating for the self-determination of legal sex for several years, they were not actively involved in the court proceedings on the third option. The emergence of intersex activism in the Netherlands is more recent but has been gaining momentum and has started to forge national and international alliances. The NNID (established in 2013) is the first non-governmental organization in the Netherlands championing the human rights of individuals with intersex traits. It entered an alliance with COC and TNN in 2017, which qualified it for government subsidies. This alliance also connects the NNID transnationally within the umbrella organization OII Europe and the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA). NNID provided recommendations to UN consultations for the CEDAW report in 2016 and the Committee on Economic, Social and Cultural Rights’ report in 2017, calling on the Dutch government to protect the rights of intersex citizens and to ban unnecessary medical interventions.

Dutch activists have appealed to the common perception of the Netherlands as a progressive pioneer on LGBT rights. Building on publications by the Council of Europe and the EU Agency for Fundamental Rights on the human rights of people with intersex characteristics in 2015, COC and NNID demanded a response from the government, setting the stage for a ‘boomerang’ pattern (Keck and Sikkink, 1998). Liberal party Democrats 66 took up these demands and submitted parliamentary questions and a motion. Although the Minister for Safety and Justice commissioned research on the possibility of changing or abolishing how legal sex is registered in the Netherlands, no further steps were taken. Dutch advocacy groups criticized the government after it retracted its commitment to the introduction of a third legal option in 2019 by arguing that the country was not living up

⁶Alliance of Deutsche Paritätische Wohlfahrtsverband, Lesben- und Schwulverband in Deutschland (LSVD), Deutscher Kinderschutzbund Bundesverband, pro familia (Deutsche Gesellschaft für Familienplanung, Sexualpädagogik und Sexualberatung), Bundesvereinigung *Trans**, and Intersexuelle Menschen.

to its reputation as a policy-pioneer: ‘Had we bided international developments when it came to same-sex marriage, it may never even have happened’ (TNN, COC and NNID, 2019).

Research on the diffusion of LGBT rights in Europe shows that international reputation can be a powerful motivator for states to embrace new norms (Kollman, 2017). Being a policy pioneer can also lead to the ‘curse of the first’. States that can rely on their established human rights stature can afford to wait longer to make advances without facing international criticism (Ayoub, 2016). The lack of political action in the Netherlands following the court ruling shows that emphasizing international standards is not always an effective strategy for activists in states that can rest on their already-established reputations. The Dutch government denied the existence of an international trend towards non-binary sex registration. In Germany, norm-brokers were able to make a difference. Outspoken German intersex activists had a head-start compared to their Dutch counterparts and have been actively nurturing (transnational) alliances for over a decade. The combination of a strong message for full self-determination of legal sex with public visibility for human rights claims were essential ingredients for legal change. In both countries, the struggle by activists to change a deeply entrenched norm is only beginning. In Germany the third option remains subject to external medical evaluation. As Elisabeth Kaiser, MP for the Social Democratic Party (SPD) stated: ‘Intersex people do not need someone to tell them they are intersex, they *know* they are’ (Deutscher Bundestag, 2018, p. 5990).

Conclusion

The right to register legal sex has profound implications for gaining the categorical visibility that determines access to basic human rights. While the positive third option ‘diverse’ has become available in Germany, the Dutch government has not heeded the recommendations of its courts and the right to leave legal sex undetermined must be won in court on an individual basis. This requires closer examination of how leading states can play the role of the teacher of new norms, especially one as contentious as sex beyond traditional binary categories. What mechanisms shaped these outcomes?

Tracing the trajectories of the third option in Germany and the Netherlands deepens our understanding of the mechanisms identified in the study of the diffusion of norms about LGBT rights. This scholarship shows that legislation can diffuse to states when states fear the costs of international censure and become convinced of the appropriateness of the international norm. Paths are smoother when pre-existing domestic norms resonate with new international norms, especially when local activists are able to ‘broker’ between them. These mechanisms do not operate in isolation, but are interdependent. It is their interplay that offers explanations for norm change. We find that these mechanisms matter for intersex rights, though they translate slightly differently. Binary sex is deeply rooted in societal norms. Combined with the medicalization of intersex, this creates a unique challenge for activists working to expand sex categories beyond binary sex.

The German case shows that the medicalization of intersex – which limits the ability to self-determine legal sex and requires medical certification of an intersex ‘condition’ – remains prominent. Because the Dutch court understood intersex as gender identity, several non-binary people have been able to use the third option. Although this expands access, conflating intersex with gender identity makes individuals with intersex traits

vulnerable to discrimination since the frame of gender identity removes the need for explicit legal protection on the basis of sex characteristics. Although intersex activists have argued that the implementation of a 'third' option diverts attention from criminalization of mutilating medical interventions, the scope of our study is limited to the expansion of binary sex categories. Malta, Uruguay and Portugal have recently instated bans on surgical interventions and provide valuable cases for future research into the diffusion of intersex rights. As an international trend beyond the binary develops, a more systematic comparison of cases – which is beyond the scope of this study – is needed.

Despite the fact that international standards increasingly recognize intersex rights, we show that domestic legislation varies greatly. Notwithstanding its reputation as a pioneer, the Dutch government did not heed activists' calls for international leadership. Dutch intersex activism has started to gain momentum, to forge national and international alliances and has relied on international standards to legitimize its claims. However, the lack of political action in the Netherlands following the court ruling suggests that claims based on international standards are not always an effective strategy for activists in states that already enjoy established reputations of protecting LGBT-rights. This 'curse of the first' may lead states like the Netherlands to take a back seat, especially in a case as controversial and disruptive as non-binary sex registration. The German Constitutional Court is able to coerce the government to implement change; a force that is unparalleled in the Netherlands. However, the story of the 'third' option remains a political one as the German government chose to only minimally follow the Court's recommendations, fuelling intersex activism for self-determination. German intersex organizations have worked to position themselves as 'norm-brokers' and reframed the right to register from a medical perspective on intersex to a fundamental human right. This frame resonates strongly in the German context, given its historical sensitivities and commitment to the protection of human rights principles. Compared to the Netherlands, German intersex activism is mature and embedded in powerful transnational alliances and international organizations. The public visibility generated by these organizations has placed the right to self-determine legal sex and the necessity of recognizing intersex rights firmly on the political agenda.

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Appendix I: Overview of Sources

| <i>Type of document</i> | <i>Source</i> |
|---|--|
| UN-level documents | |
| Committee on the Elimination of Discrimination against Women – Concluding observations on the sixth periodic report of Germany (2009) CEDAW/C/DEU/CO/6 | Available at: https://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-DEU-CO6.pdf (last accessed 18-03-2020) |
| Committee on the Elimination of Discrimination against Women – Concluding observations on the combined seventh and eighth periodic reports of Germany (2017) CEDAW/C/DEU/CO/7–8 | Available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/DEU/CO/7-8&Lang=En (last accessed 18-03-2020) |
| Convention against Torture and Other Cruel, Inhuman or Degrading Treatment | Available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/DEU/CO/5&Lang=En (last accessed 18-03-2020) |
| or Punishment (2011) CAT/C/DEU/CO/5 | |
| Committee on the Elimination of Discrimination against Women – Concluding observations on the sixth periodic report of the Netherlands (2016) CEDAW/C/NLD/CO/6 | Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/402/93/PDF/N1640293.pdf?OpenElement (last accessed 18-03-2020) |
| Committee on the Elimination of Discrimination against Women – Concluding observations on the fifth periodic report of the Netherlands (2010) CEDAW/C/NLD/CO/5 | Available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fNLD%2fCO%2f5&Lang=en (last accessed 18-03-2020) |
| Convention against Torture and Other Cruel, Inhuman or Degrading Treatment | Available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fNLD%2fCO%2f7&Lang=en (last accessed 18-03-2020) |
| or Punishment – Concluding observations on the seventh periodic report of | |
| the Netherlands (2018) CAT/C/NLD/CO/7 | |
| Universal Periodic Review of the Kingdom of the Netherlands – National report submitted in accordance | Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/046/55/PDF/G1704655.pdf?OpenElement (last accessed 18-03-2020) |

| (Continued) | <i>Type of document</i> | <i>Source</i> |
|--|--|--|
| Council of Europe, Parliamentary Assembly, Resolution 2048: Discrimination against transgender people in Europe (2015) | Resolution 2048: Discrimination against transgender people in Europe (2015) | (last accessed 18-03-2020) |
| Council of Europe, Parliamentary Assembly, Resolution 2,239: Private and family life: achieving equality regardless of sexual orientation (2018) | Resolution 2,239: Private and family life: achieving equality regardless of sexual orientation (2018) | Available at: http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fze2VtYmx5LmNvZS5pbmQvbnveG1sL1hSZWYyWDJlURXLWV4dHluYXNwP2ZpbGVpZD0yNTE2NiZsYW5nPUV0&xsl=aHR0cDovL3NiZWVudGJjcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRClBVC1YUWyUERGlnhzbA=&xslparams=ZmlsZWlkPTI0MTY2 (last accessed 18-03-2020) |
| Council of Europe, Parliamentary Assembly, Resolution 2,191: Promoting the human rights of and eliminating discrimination against intersex people (2014) | Council of Europe, Parliamentary Assembly, Resolution 2,191: Promoting the human rights of and eliminating discrimination against intersex people (2014) | Available at: http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fze2VtYmx5LmNvZS5pbmQvbnveG1sL1hSZWYyWDJlURXLWV4dHluYXNwP2ZpbGVpZD0yNDIzMiZsYW5nPUV0&xsl=aHR0cDovL3NiZWVudGJjcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRClBVC1YUWyUERGlnhzbA=&xslparams=ZmlsZWlkPTI0MTY2 (last accessed 18-03-2020) |
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Appendix II: Codebook

Research objective: Study the mechanisms norm diffusion during the political trajectories of the ‘third’ option for legal sex registration in Germany and the Netherlands

Version: 3

Date: September 22, 2020

Summary of the Research

Germany and the Netherlands are the first countries in Western Europe in which courts recently ruled in favour of a ‘third’ option besides binary sex categories.⁷ But despite their similarities, these court rulings have led to different political outcomes. Germany amended its constitution to include the right to register legal sex as ‘diverse’ but the Dutch government took no such steps. What mechanisms shaped these outcomes? We build on scholarship that analyses the diffusion of lesbian, gay, bisexual and transgender (LGBT) rights. Historically, intersex activists have framed their demands similarly to the gay and lesbian movement. Furthermore, both in Germany and the Netherlands, LGBT and intersex activism partly overlaps. Finally, norms on sexuality and gender identity are both heavily influenced by binary sex norms. Challenging these deeply-rooted norms are part and parcel of normative change.

Scholars of LGBT-rights have analysed cross-national differences in their adoption and identified factors that impede or facilitate the acceptance of new norms (Kollman, 2013; Ayoub 2015). Norms can diffuse when governments grow convinced that they are appropriate, for example, as expressed in international treaties and conventions. To be accepted, new norms also need to resonate with existing domestic ideas or beliefs, placing a premium on the process of ‘norm brokerage’ in which actors with local knowledge mediate between new international norms and domestic discourses (Ayoub, 2016).

Building on scholarship on the diffusion LGBT rights, we qualitatively analyse the introduction of the third option in Germany and the Netherlands. We examined the data with regard to three mechanisms of LGBT rights diffusion: (1) references to international and European standards on registration beyond binary categories; (2) references to domestic discourse; and (3) the ability of activists to operate as norm brokers. We follow the trajectory from previous changes in the law in the Netherlands in 2007 and in Germany in 2013 until 2019, combining data sources including parliamentary debates, court transcripts and press releases by activists. Data were coded using the software program MAXQDA. The data was sorted in document folders for each case and for each level investigated: international norms, domestic resonance and norm-brokers.

⁷‘Third’ sex is not universally accepted. Activists argue that this generic sex classification neglects the many variations of intersex characteristics (Horowicz, 2017) and perpetuates harmful practices (for example pressure on parents to ‘choose’ a binary sex for their child).

Code System

International standards:

- **Description:** Numerous studies have addressed how norms about LGBT rights diffuse internationally and can catalyze the domestic adoption of these rights (Swiebel, 2009; Paternotte and Kollman, 2013; Ayoub, 2016).
- **Origin:** deductively coded based on literature on LGBT norm diffusion
- **Applied when terms referred to:** (a) examples of leading countries; (b) standards developed by the European Union (EU) (for example The European Union Agency for Fundamental Rights (FRA), the European Court of Human Rights (ECHR) or the Council of Europe); (c) standards developed by the United Nations (UN) (for example the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW) or the Committee Against Torture (CAT)); (d) other international treaties and conventions such as the Yogyakarta Principles or the International Intersex Forum.
- *Leading countries:* ‘(...) diverse Aziatische landen, zoals Nepal en India hebben het bestaan van een gerde gender erkend’.
- *EU-level:* ‘Het Europees Hof voor de Rechten van de Mens heeft bepaald dat het recht op persoonlijke autonomie deel uitmaakt van de persoonlijke vrijheid en menselijke waardigheid’.
- *UN-level:* ‘(...) die Bemerkungen des Ausschusses der Vereinten Nationen zu Beseitigung jeder Form der Diskriminierung der Frau, in denen der Ausschuss die Bundesrepublik Deutschland aufforderte, ... in einen Dialog mit Nichtregierungsorganisationen von intersexuellen und transsexuellen Menschen einzutreten, um ein besseres Verständnis für deren Anliegen zu erlangen und wirksame Maßnahmen zum Schutz ihrer Menschenrechte zu ergreifen’.
- *Other:* ‘Uit de Yogyakarta beginselen blijkt derhalve dat ieders zelf gedefinieerde seksuele oriëntatie en genderidentiteit gebaseerd is op de fundamentele mensenrechten van het recht op zelfbeschikking, het recht op privacy en het recht op menselijke waardigheid’.

Domestic resonance

- **Description:** Domestic norms predict the degree to which international norms resonate (Checkel, 1999). Studies have shown that this is most clearly the case for norms within international law, since the power of a normative claim in law is tied to the fit with existing framework in a country (Keck and Sikkink, 1998; Charlesworth, 2013). Within international relations theory, domestic identity refers to the reasons for organizing power and authority in specific ways. Because identities shape interests, they affect how states see the importance of norms and how they will respond to pressure invoking those norms (Gurowitz, 2006). The pre-existing ‘(...) domestic discourse provides the context within which the international norm takes on meaning’ (Cortell and Davis, 2000, p. 73).
- **Origin:** deductively coded based on literature on LGBT norm diffusion.
- **Applied when terms referred to:** domestic societal developments, trends or domestic identity.

- ‘In de Nederlandse samenleving wordt steeds meer gekozen voor genderneutraliteit’.
- ‘Deutschland hat im internationalen Vergleich eine Vorreiterstellung eingenommen’.
- ‘Die gesellschaftlichen Wertvorstellung sind nicht so geändert das sich auch in Deutschland eine politische Mehrheit für eines Dritte Option ergebe’.

Norm-brokers

- **Description:** Norms regarding LGBT rights are more likely to diffuse when international norms, mediated by local activists acting as norm-brokers, resonate with existing domestic discourses (Ayoub, 2016).
- **Origin:** deductively coded based on literature on LGBT norm diffusion.
- **Applied when terms referred to:** the activities or statements of LGBT and/or intersex activist groups.
- ‘Der Verein Intersexuelle Menschen hält die bisherige rechtliche Lösung für unzureichend’.
- ‘Volgens het Nederlands Netwerk Intersekse/DSD (NNID) vinden er in Nederland nog altijd

niet-noodzakelijke operaties plaats’.Definitions of intersex:

- **Description:** The way intersex is defined impacts on its political and legal categorization. Conflating intersex with gender identity makes individuals with intersex traits vulnerable to discrimination since the frame of gender identity removes the need for explicit legal protection on the basis of sex characteristics. Actors define intersex or intersexuality in a variety of ways: as a biological phenomenon, as gender identity or as a sexual orientation or identity.
- **Origin:** inductively coded from the data;
- **Applied when terms referred to:** explanations or definitions of intersex or intersexuality.
- ‘(...) Voor het zich hier voordoende geval van “interseksualiteit“ in de zin van een seksuele identiteit die noch tot het mannelijke noch tot het vrouwelijke geslacht behoort’
- ‘(...) dass sich das Geschlecht nicht allein nach genetisch-anatomisch-chromosomalen Merkmalen bestimmen oder gar herstellen lässt, sondern von sozialen und psychischen Faktoren mitbestimmt wird’
- ‘Intersex people are born with biological sex characteristics that do not fit societal norms’

Counter-examples:

- ‘Intersex’, ‘intersexual’ or ‘intersexuality’ are not coded when not defined but part of enumerations (for example lesben, schwulen, bissexuellen, transsexuellen und intersexuellen), titles (for example ‘interministeriellen Arbeitsgruppe Intersexualität/Transsexualität’) or mentioned without definition (for example ‘(...) implement mechanisms to protect intersex children against experimental medical treatments’).

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