

Questions of a “third sex“ in the international and European arena

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www.invote.de

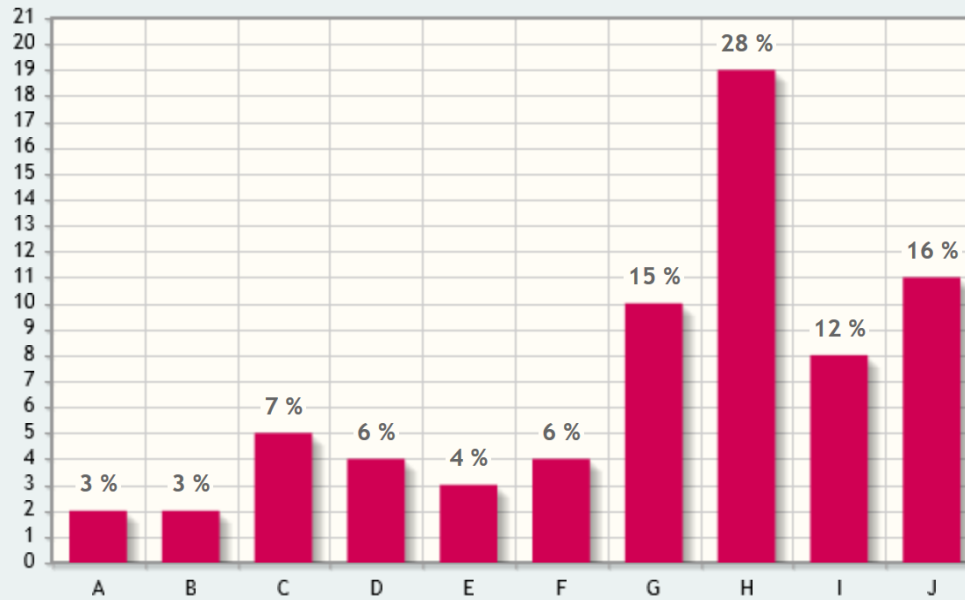
4 4 7 7 8

Please rate yourself on from 1 to 10 as
"male" or "female"
(1 = very male, 10 = very female)

very male 1 ●—————● 10 very female

Please estimate how "male" or "female" you would rate yourself on a scale from 1 to 10 (1 = "very male", 10 = "very female").

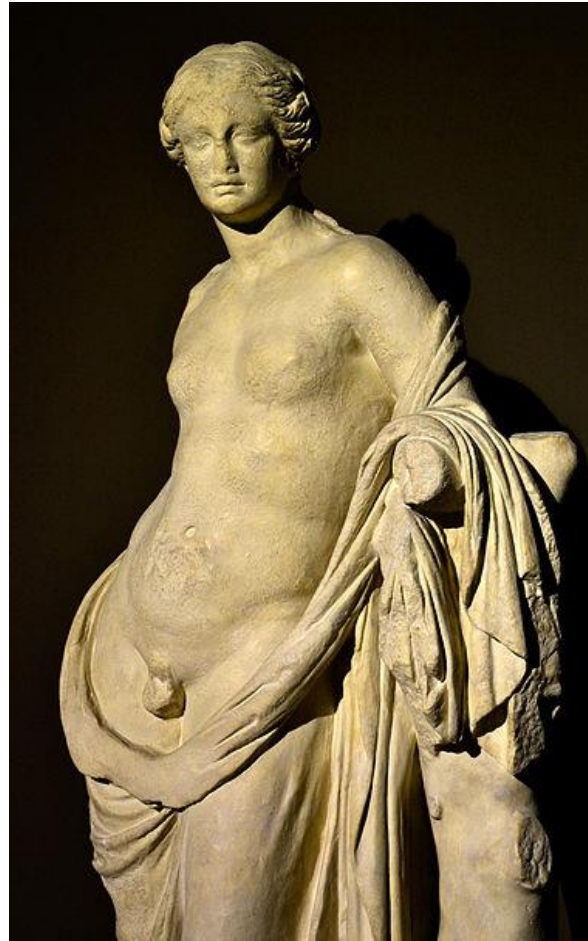
Histogramm Textuell Export Teilen



- A 1
- B 2
- C 3
- D 4
- E 5
- F 6
- G 7
- H 8
- I 9
- J 10

N = 68

The binary (?) gender system



Intersexual Person: Person with gender defining or gender differentiating features neither exclusively male nor exclusively female

≈ 0.1% of the population

Transsexual Person: Person belonging physically to one sex (m or f) but feels belonging to the other one

≈ 0.2% of the population

Characteristics for gender-differentiation and classification

- phenotype, esp. the external genitals
- internal genitals
- chromosome set
- certain hormones

"sex"

- personal self-understanding / self-determination
- social reception / perception
- ...

"gender"

Legal Importance?

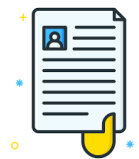
- Personal status



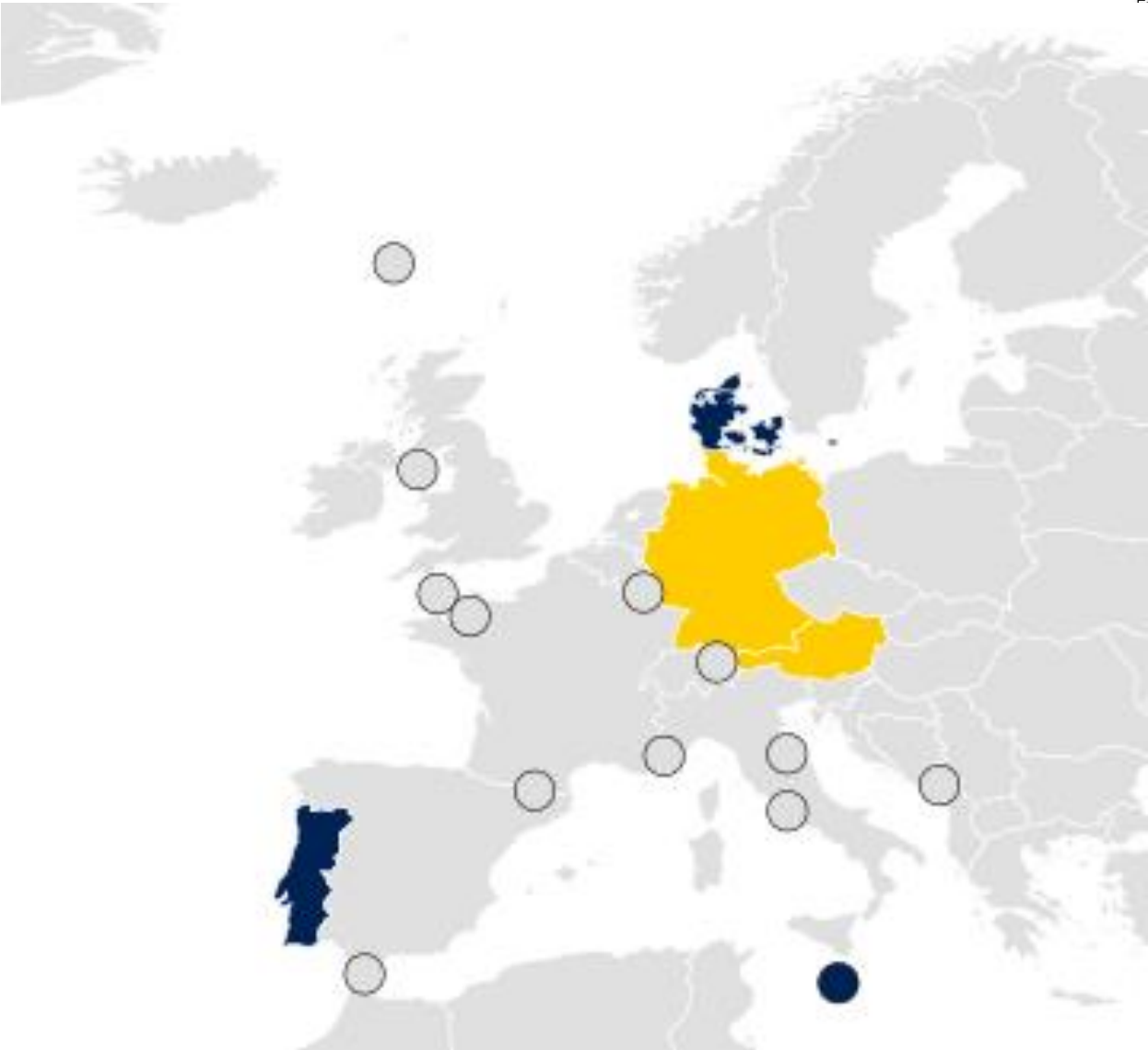
- Family law



- Other areas of law (passport, social security, police arrest ...)



European View



https://en.wikipedia.org/wiki/Legal_recognition_of_non-binary_gender

European View (I)

Germany:

- since 2013: birth registration can be left open
- since 2019: + birth registration as « divers »



Malta:

- since 2015: recognition of foreign non-binary status
- since 2017: general registration possible

Austria:

- since 2018 entry as « open » or « divers »



European View (II)

Netherlands?


- Rechtbank Limburg, 28.5.2018 (C/03/232248 / FA RK 17-687), ECLI:NL:RBLIM:2018:4931: *Geslacht is niet kunnen vworden vastgesteld + passport with “X”*

Portugal?


- Lei n.º 38/2018 de 7 de agosto Direito à autodeterminação da identidade de género e expressão de género e à proteção das características sexuais de cada pessoa, Diário da República, 1.ª série, n.º 151, 7.8.2018, 3922

European View (III)

France?

- Cour de Cassation 1ère civ., 5.4.2017 (16-17.189)
ECLI:FR:CCASS:2017:C100531: „neutre“ cannot be registered, binary system as part of public policy 
- pending at the ECtHR

UK (England & Wales)?

- *R (on the application of Christie Elan-Cane) vs. Secretary of State for the Home Department*, [2018] EWHC 1530 (ADMIN), 22.6.2018 (CO/2704/2017): no passport with „X“ 

... and a lot of discussion

- Belgian case pending 
- Evaluations by ethic commissions / legislative attempts
 - **Switzerland:** Reform project 2019
 - **Luxemburg:** Commission Nationale d'Éthique, Avis relatif à la diversité des genres: Avis 27 (2017)
 - **Netherlands:** Marjolein van den Brink, Recht doen aan genderidentiteit evaluatie drie jaar transgenderwet in Nederland 2014-2017, 15.12.2017 (<https://www.wodc.nl/onderzoeksdatabase/2897-evaluatie-transgenderwet.aspx>)
 - **France:** Hérault Laurence & et al., Etat civil de demain et transidentité (2018), (<http://www.gip-recherche-justice.fr/publication/etat-civil-de-demain-et-transidentite/>)
 - **UK – Scotland:** Consultation + pending evaluation (<http://www.gov.scot/Publications/2017/11/5459> and <https://consult.gov.scot/family-law/review-of-the-gender-recognition-act-2004/>)
 - **UK – England & Wales:** Consultation + pending evaluation (<https://consult.education.gov.uk/government-equalities-office/reform-of-the-gender-recognition-act/>)

What about fundamental rights?

Article 8 ECHR

(1) Everyone has the right to respect for his private and family life [...].

Cossey v UK (case 10843/84)

B. v France (case 13343/87)

Goodwin v UK (case 28957/95)

van Kück v Germany (case 35968/97)

→ Protection of sexual privacy and gender identity (self-determination)

→ maybe a growing international consensus

What about fundamental rights?

Article 14 ECHR

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, [...], birth or other status.

- discrimination based on sex should include a non-binary sex
- if not: “other status”

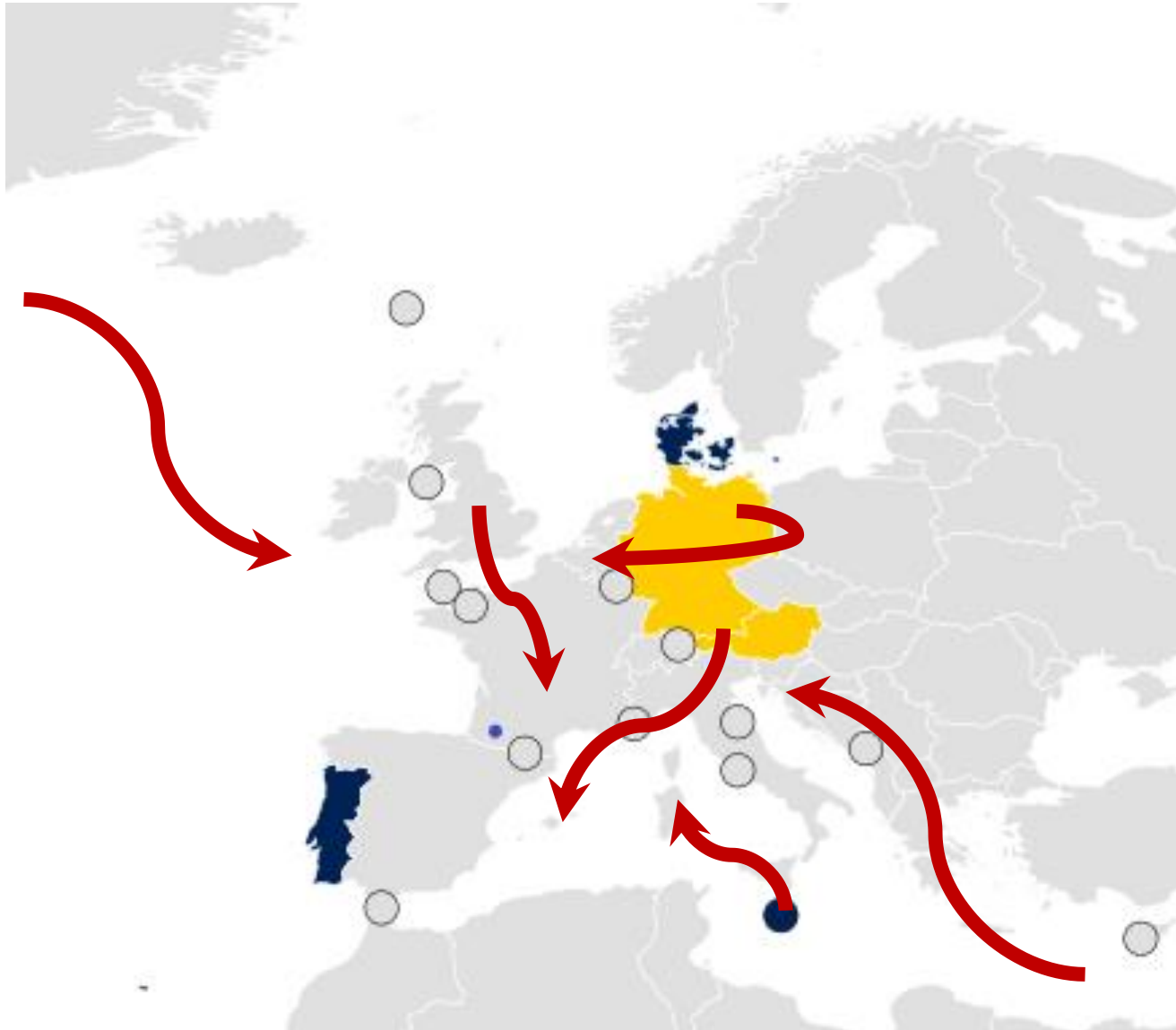
Justified reasons to deny?

- national interest in strict civil status entry law
- morals of society

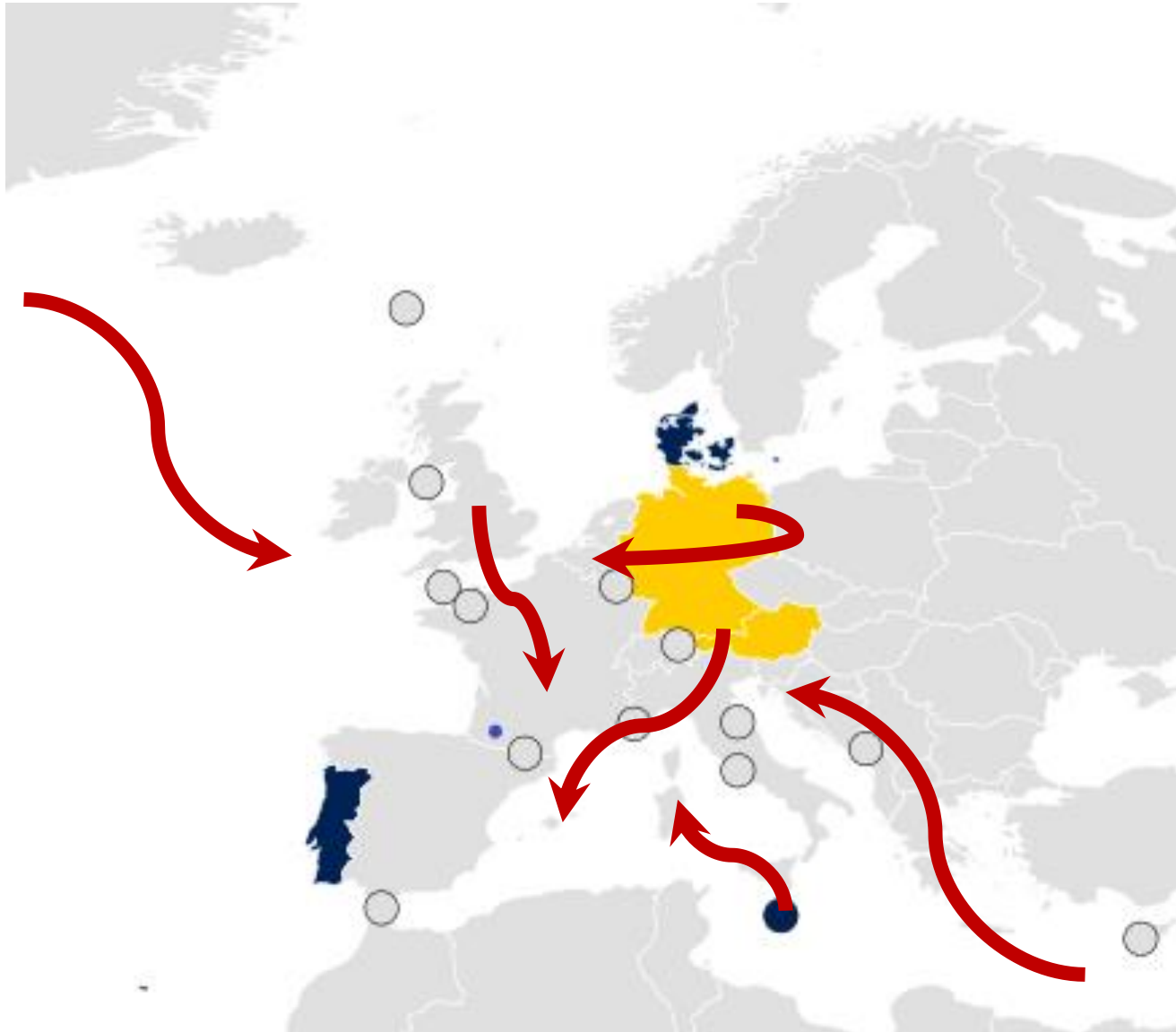
but “society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity”

Cross-border Issues

Cross-border Issues



Cross-border Issues



Cross-border Issues

Identity Registration



Parentage



Belgian Law



Wet tot regeling van een Rijksregister van de natuurlijke personen

Art. 3.[...] in het Rijksregister opgenomen en bewaard :

- 1° de naam en voornamen;
- 2° de geboorteplaats en -datum;
- 3° **het geslacht**;
- 4° de nationaliteit;
- 5° [...]

Belgian Law



Burgerlijke Wetboek

Art. 143. Een huwelijk kan worden aangegaan door twee personen van verschillend of van hetzelfde geslacht.

Art. 318. § 1. Tenzij het kind bezit van staat heeft ten aanzien van de echtgenoot, kan het vermoeden van vaderschap worden betwist [1 voor de familierechtbank]1 door de moeder, het kind, de man ten aanzien van wie de afstamming vaststaat [2 de man die het vaderschap van het kind opeist en de vrouw die het meemoederschap van het kind opeist]2.



Other countries

- “Marriage is a legally regulated community of a **man** and a **woman**.” (Croatian Family Act)
- “The mother of a child is the **woman** who gave birth to it.” (German Civil Code)
- “... after a person’s forename [...], shall stand the name of his or her father or mother, in the genitive case, with the suffix *son* in the case of a **man** or *dóttir* in the case of a **woman**.” (Icelandic Personal Names Act)

Law Applicable

- ❖ German documents as authentic instruments

 - ❖ Consequence: “recognition” by conflict of laws
 - General rule applicable on status questions
 - Connecting factor: nationality (here: German)

 - Consequence: “divers” or no entry
- (no violation of *ordre public*)

Application

Problem 1: no feasible entry, only male or female

Problem 2: marriage of person with “no entry”?

(Art. 143. Een huwelijk kan worden aangegaan door twee personen van verschillend of van hetzelfde geslacht.)

Problem 3: parentage?

Solutions

Consequence: Adaptation

- of the German law?
- of the *lex causae* (Belgian substantive law)?
- of the conflict of laws rule?

Option 1

Adaptation of the German law (to the needs of the Belgian law)

- Person will be treated as not being “divers” or “no entry”
 - Determination according to Belgian law as “male” or “female”
- No problem with the application of the Belgian law

Option 1

Problems:

- violation of Art. 8 ECHR (in conjunction with Art. 14)
- violation of Art. 21 TFEU (ex Art. 18 TEC)
 - (1) Every citizen of the Union shall have the right **to move and reside freely** within the territory of the Member States[...]
- Garcia Avello (C-148/02)
- Grunkin & Paul (C-353/06)
- Coman (C-673/16)

Option 1



Option 2

Adaptation of the Belgian law (to the needs of the foreign status)

1. Registration as “divers” or “no entry”
2. Reading the marriage rule as “everybody”
3. Reading the parentage rules as “person” not *vrouw* or *man*

Option 2

Problems:

- technical implementation
- violation of Art. 8 ECHR
 - Spouse, child, person themselves

Brüggemann & Scheuten v. Germany (case 959/75)

Smith & Grady v. UK (case 33985/96)

- violation of Art. 21 TFEU (ex Art. 18 TEC)
 - Garcia Avello (C-148/02) ... Coman (C-673/16)



https://www.maltatoday.com.mt/news/national/83920/malta_releases_first_passport_with_neutral_x_gender_marker

Document 9303 Standards ICAO (International Civil Aviation Organisation)

Leerstoei, Marcel Storme, 2018/2019

Option 2



Option 3

Adaptation of the conflict of laws rule

- Limited choice of law
- Connecting factors:
 - Nationality
 - Habitual residence
 - (formal residence)

Option 3

Person can decide between Belgian and German law

- if choice of Belgian law:
 - treated as option 1, but no conflicts with TFEU & ECHR
- if choice of German law:
 - adaptation as in option 2, but no conflicts

Option 3



No perfect solution, but ...

... continued improvement is better than
delayed perfection
(Mark Twain)

Hartelijk dank voor uw aandacht

