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# Nonbinary people and the law

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## Abstract

*Introduced with an account of how the work of academic trans theorists opened up many gender possibilities for trans people, this chapter looks at how the law has failed to keep step with these new gendered ways of being. Though there has been a progressive awareness of the need to remove gendered elements from law, what the law has not done is recognize that there are now many individuals who cannot easily be placed on one side of the M/F divide when the law requires it. By exploring and explaining how the law interacts with the new non-binary and non-gendered trans community, one can see how they might use the law to best protect their personal rights.*

## 1. Introduction

This chapter<sup>1</sup> discusses the interface between people with non-binary gender identities (including genderqueer, gender-fluid, gender non-conforming, and gender variant identities) and law. The focus here is predominantly on the law of England and Wales, with references to other jurisdictions and international developments as a comparison. Of significance to current English and Welsh law, and to any jurisdiction contemplating reform of gender identities, is an examination of the recent Inquiry of the UK Parliament's Women and Equalities' Committee into Transgender Equality, discussed further below. This chapter evaluates how the law comprehends, recognises, and provides protection (or not) for people with identities outside the male/female binary; and highlights the significant

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<sup>1</sup> With grateful thanks to Nathan Gale and Tony Ward for their comments and suggestions in an unreasonably short timeframe.

mismatch between the actuality of these identities and their acknowledgement in the practical interactions of daily life.

## 2. Non-Binary?

The term *non-binary* is used as an all-encompassing name for those people whose gender identities fall outside the dominant societal gender binary<sup>2</sup>. It is impossible to discuss non-binary gender identities in the singular; they are a complex series of identities both within and outside of the understanding of gender being binary i.e. boy and man, girl and woman.

Some argue that the phrase *non-binary* excludes trans identities that are binary-oriented, such as *trans man* and *trans woman*. However, to do so, is short sighted:

To encounter the transsexual body, to apprehend a transgendered consciousness articulating itself, is to risk a revelation of the constructedness of the natural order. Confronting the implications of this constructedness can summon up all the violation, loss, and separation inflicted by the gendering process that sustains the illusion of naturalness (Stryker, 1994: 93).

Purging structural systems of that illusion of gender naturalness has been at the core of trans activism, as articulated by trans academics as they created the field of Trans theory. The 1990's saw transsexual<sup>3</sup> and transgender<sup>4</sup> (trans) scholars and activists lead the discussion in which the constructed nature of gender difference and the limits of its mental spaces were acknowledged and challenged, effectively asking whether there is anything at all natural about having two genders:

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<sup>2</sup> There are political connotations to some of these terms, especially 'genderqueer' that 'non-binary' may obscure (Nonbinary.org, 2016a).

<sup>3</sup> Transsexual is a medical category used to refer to people who seek out gender reassignment treatments and/or surgery to enable them to live in a preferred gender role different to that ascribed at birth.

<sup>4</sup> Transgender is becoming the term of choice amongst Governmental bodies, as it is an inclusive term, which includes those people referred to as transsexual and those people who live in a preferred gender role that is different to that ascribed at birth with limited or without medical intervention.

One answer to the question "Who is a transsexual?" might well be "Anyone who admits it." A more political answer might be; "Anyone whose performance of gender calls into question the construct of gender itself" (Bornstein, 1994).

The idea of a third (or fourth, or fifth, ....) gender may have been rejected by many courts<sup>5</sup> as the judiciary dismissed the claims that trans people brought for recognition of their particular gender identity, yet the very fact that trans people brought those claims before the courts has proliferated the visibility of their transgressive gender performances. It was the activism of trans people and their willingness to demonstrate the reality of transgressing gender boundaries; by challenging the limitations of law, and exploring their experiences through the media, that created an awareness of the fluidity of socially constructed gender boundaries. They made vulnerable the model of binary genders using new methods of social and political change, effectively ensuring death by Internet. The result:

A trans identity is now accessible almost anywhere, to anyone who does not feel comfortable in the gender role they were attributed to at birth, or has a gender identity at odds with the labels *man* or *woman* credited to them by formal authorities, (Whittle, Foreword, in Stryker & Whittle, 2006)

Bornstein (1994) referred to those who cannot comprehend a world in which there are a plurality of genders as the 'Gender Defenders'. Amongst these, 1970s Radical feminists were the loudest protesters at the gender transgressions of trans people (Raymond 1979). They claimed they were the one's promoting true gender transgressions, but their insistence on the uniqueness of the biological category of woman would undermine their arguments. Their voices still exist, but have sounded increasingly isolated and shrill. Some wrote to the recent Inquiry of the UK Parliament's Women and Equalities' Committee into Transgender Equality, to oppose access to women's facilities for trans women. They brought forward

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<sup>5</sup> See the 'transsexual cases' at the European Court of Human Rights such as *Rees v United Kingdom* [1987] 9 EHRR 56., *Cossey v United Kingdom* [1991] 13 EHRR 622., and *Sheffield and Horsham v United Kingdom* [1999] 27 EHRR 163.

reactionary arguments which refuse to recognise any sense of gender fluidities as embodied by the trans community, instead still claiming that trans lives cause oppression by upholding gender stereotypes (Jeffreys, 2015, para 3.iii).

From the 1950s to early 1990s, Gender Identity Clinics were the only places to provide any support to people uncomfortable in their assigned gender. Some clinicians working in the field had narrow views of men's and women's social and sexual roles and undoubtedly promoted, and in some cases insisted on, stereotypical gender role behaviour by their trans patients. Many will have felt obliged to conform to what was at the time seen as common sense knowledge. However, when trans man Lou Sullivan came out as gay in the late 1980s, he effectively gave many trans people permission to re-evaluate their sexuality and the identity their 'gender' gave them (Zagria, 2013). Since the publication of Sandy Stone's 'The Empire Strikes Back' (1992), trans activists and scholars responding to her call to reclaim our histories, have become auto-ethnographers, engaging with and challenging the view that gender is only binary. They have created their own academic events and conferences, and worked within organisations like the World Professional Association for Transgender Health (WPATH) (Fraser, 2015: 32) and the APA (2015) insisting upon modernisation within the clinical frameworks that provide medical support for trans people. The recognition of gender pluralities are written large now within the International Standards of Care for the health of Transsexual, Transgender, and Gender-Nonconforming people (Coleman et al., 2012).

All this has meant that paradoxically, on one hand transgender and transsexual people are increasingly now seen as having ordinary, if moderately rare, aspects of gender identity development – yet, at the same time more of them are declaring a more complex, non-binary gender identity. Undoubtedly, some trans people do see themselves as having a gender which sits on one or the other side of a gender divide, but many working with the trans community would say that this is an increasingly rare presentation of personal gender knowledge, as can be seen in the written evidence sent to the recent UK Inquiry into Transgender Equality (Women and Equalities Committee, 2015, discussed further below). A significant number of submissions came from people who had 'commenced permanently

living in their preferred gender role', but only in the sense that their 'preferred gender role' is one understood by cisgender people, not by the person themselves. They might appear as trans, but their personal understanding of their gender identity is far more complex. More than 50% of submissions came from people referring to themselves as having a non-binary gender identity. This group was not necessarily a younger group, but crossed the age range, reflecting the development of complex gender understandings that many older trans people have already arrived at, through discussion, study, activism and life experience:

If somebody asked me for an easy answer I would say I was born a boy it was just that nobody could see it [...] It is obviously much more complex than that. [...] you have a positioning which sort of shifts just slightly on one side of the scale. In other words [...] you're not a feminine woman, [...] but you're not actually a man at that point [...] then you sort of step over that line , [...] but you don't quite make it into full manhood, ever (Stephen Whittle speaking in Self and Gamble, 2000)

And yet, this is not a complete story. A plurality of gender identities still excludes some.

Christie Elan-Cane says

I really wish that people would not refer of [sic] my non-gendered identity as my "gender identity". I am non-gendered. I have a core identity that is as real and valid as the core identity of any gendered person but it is not a gender identity. It is an identity (Elan-Cane, 2011)

Elan-Cane's position is that to talk of per<sup>6</sup> as having a non-binary gender misses the point completely. Elan-Cane is a person who does not equate their personal sense of being as having any sort of gender. Referring to per as having a non-binary, or non-gendered identity equates per's sense of selfhood still within the context of gender, yet per lives outside of, and without gender (For anthropological perspectives on gender pluralities, see Waldemar Bogoras in Williams, 1988: 252).

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<sup>6</sup> Elan-Cane requests use of the terms per and perself rather than gendered pronouns.

For many people with non-binary identities, or identities outside of any genders - whether trans or not - this is the real problem. Our social and legal structures insist that gender is binary. Many trans and non-trans people frequently, and for very good reasons, opt for safety over activism in their lives; meaning conformity to a pretence. Having spent their childhood pretending to be of their assigned gender, in adulthood pretending to be of another gender is not that hard if it ensures employment, housing, and healthcare. However, that does not mean to say they are content, as was clearly seen in the many submissions to the recent UK Parliamentary Inquiry (Women and Equalities' Committee, 2015).

In the last twelve years, the UK has seen the implementation of the Gender Recognition Act 2004, The Civil Partnership Act 2004, the Equality Act 2010, and the Marriage (Same Sex Couples) Act 2013, and increasingly lesbian, gay and trans people are aware of their legal rights. So many people with non-binary gender identities submitted evidence to the Parliamentary Inquiry because, trans or not, they want not to merely have rights, but also to have their rights afforded recognition in law. There is many an equivocation that can be made to survive, but equivocations will ultimately produce problems – it may come, as recently has happened, when at the birth registration of a child, the birth mother finds himself referred to as the father, or partner, as on paper, only the legally recognisable 'woman' in a relationship can be the child's mother, even though she was not the person to give birth. It seems the only way round is for the birth mother to become a surrogate mother, then he can give the child to be jointly adopted by his partner and himself as if step parents. The tangled web of inadequate law is never conducive to happy families!

### **3. Non-binary gendered lives and the legal interface**

By discussing the law as it relates to England and Wales, with occasional reference to other jurisdictions to highlight significant differences, these inadequacies are clarified. By discussing international and domestic developments it is possible to see how there is now at least an inkling in some law that gender identities are much more complex than previously imagined.

Looking at a range of examples of the law-related interactions non-binary people face on a regular basis, these are essentially instances where non-binary identities or behaviours disrupt the assumptions society makes about gender assignment – how many genders there are, and what qualifies a person as a particular gender. These interactions are jarring, disruptive, and potentially threatening to the person with a non-binary gender identity. Their negotiation of everyday life brings them, repeatedly, into conflict with society's preconceptions and prescriptions.

### **3.1. Name**

At birth, parents register a chosen first (middle) and last name for their child. Most people will continue to use this name for all purposes, however some will change their name for a variety of reasons. Women often now choose to use their natal last name for professional purposes, and their spouse or partner's last name for family matters. The name given at birth will be shown on a person's birth certificate, naturalisation certificate, etc., and this will not usually change. Exceptions are when a child's name is changed on an adoption certificate, or when a child's 'sex' has been incorrectly determined at birth, or when a trans person is issued a new birth certificate after obtaining legal recognition of their acquired (preferred) gender role.

#### **3.1.a. Change of Name in the UK**

In the UK, unlike many other European states, a person may change the name assigned at birth as often as they wish, though it will remain on their birth certificate unless they apply for legal gender recognition. There are very few restrictions on what a formal change of name may be, so long as a new name is not for the purposes of passing-off or deception. The Registrar General will only refuse names, at birth registration, which cannot exist (because they cannot be said) or which are obscene. The Registrar cannot refuse (though they may so advise) to register the name, for example, of a child given all of the surnames of the Manchester United football team. This means that gender-neutral names are easily achieved in the UK.



The law allows a change of first, middle and last (sur)names simply through custom and practice (i.e. without undergoing any legal process), unless the person is under the age of 16, in which case, a declaration of consent from all those with parental responsibility is required, or a court order. In reality though, many institutions including government departments, frequently, but incorrectly, insist upon evidence of a formal process to record a change of name. Most people will use a self-typed statutory declaration of name change, or if trans, a declaration of name and gender change. The declaration requires notarisation - a five minute solicitor's appointment which currently costs £7 (2015). Deed polls are often accepted as proof of name change, at least in some areas of the UK, but may also require notarisation. Furthermore, the details on a deed poll including former names alongside new names have to be published in the London Gazette. As such these are inappropriate for trans people who wish to retain control over their privacy.

Formal name change documents can be used to change most personal paperwork, including a passport, driving licence, bank account, etc., and thus provide everyday evidence of a person's new name, without indicating that this name is not the name originally given. The only document that cannot be changed this way is the person's birth certificate.

Many other European states insist that names come from a list of government approved, clearly gendered, names. A Registrar or administrative judge can refuse any name if they feel it does not 'match' the person making the application, or is not a recognised name. This is clearly problematic for non-binary persons as they will be compelled to have a formal name that is gendered. Also, trans people in general may be refused a 'non-matching' name (determined to be so by someone else) which is nonetheless the most appropriate from a self-identification point of view.

### **3.1.b. Social Title and Pronouns**

In the laws of the UK states (England and Wales; Scotland and Northern Ireland) there is no governance of pronouns; he, him, she, her - or personal titles; Mr, Ms, Mrs, Miss (or Sir or Madam). Only titles obtained through qualification e.g. Dr, Professor, Lord, Dame, etc., are governed by law. Yet, pronouns and titles pervade our daily lives through social and

employment practices, and interactions with law enforcement bodies or the courts. As Genderqueer in the UK puts it: ‘The trouble is, when someone is asking *us* for a title, they’re basically asking if we’re a guy or a girl. The answer is almost always neither’ (2011).

The other complication is that whilst there is no legal governance of most titles, there is also no legal governance of potential gender-neutral titles, and thus institutional forms and computer programmes which require a title to be submitted, rarely offer a gender-neutral option. Cassian, blogging in 2011 about one company’s acknowledgement of the gender-neutral title ‘Mx’, enthused:

This is amazing because: [...] People who are or may be genderqueer but don’t know about the title may see it when applying for deed poll documents, and feel accepted and recognised.

The latter is a BIG DEAL. Non-binary people are basically invisible (Cassian, 2011).

Currently (2016), there is a petition on the UK Government and Parliament ‘Petitions’ website seeking support for a requirement that government bodies should allow use of gender-neutral honorifics such as ‘Mx’ (“Petition,” 2016). Whilst the intention is clearly good, the result might be formal recognition of gendered titles, and that would be very unsatisfactory.

As with titles, pronoun use is habitual and (in English, at least), grammatically gendered. The neutral pronoun ‘they’ seems to have greater currency than *ze* or other neutral pronouns (see Nonbinary.org, 2016b), but its usage is far from universal<sup>7</sup>. However, this should not obscure the significant impact of repeated mis-gendering by pronoun or social title. A person with a non-binary gender identity cannot require a person to use appropriate pronouns, or titles, however organisations or persons serious about respecting others will endeavour to use that person’s preferred pronoun and title. For example, Christie Elan-Cane prefers the use of *per* and *perself* for *per*’s pronouns. The members of the UK Parliament’s Women and Equalities Committee managed to use the terms entirely successfully when

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<sup>7</sup> for a facetious take on everyday pronoun interactions, see *Beyondthebinary* (2016)

Elan-Cane appeared before the Inquiry into Transgender Equality (Women and Equalities Committee 2016).

### 3.2. Formal sex and gender designation

A person's legal sex is usually regarded as that designated on their birth certificate – it will refer to them as a boy or a girl. Essentially, it is a category resulting from a cursory examination by a midwife; their glance at the length of baby's primary sex organ will decide whether it is a penis, or a clitoris. A midwife will only examine to see if a baby has a vagina if the primary sex organ is 2.4cm, i.e. too long to be one thing, too short to be another.

Naturally occurring variations in biology are disregarded (Hines 2004; Roughgarden, 2004).

The law's view of gender and sex is evolving however, sex is still regarded as a physical 'fact', and gender as a psychological experience (see Hines, 2004, p. 4 for discussion of why it is unfeasible to make this distinction).

Many nation and federal states now allow a person to obtain legal recognition of a preferred ('opposite') gender identity as if their birth sex (e.g. the *Gender Recognition Act*, 2004), but few allow full legal recognition of a non-binary gender identity as a legal sex. The Australian federal government allows people with medical evidence of gender reassignment (which need not be medical or surgical), intersex or indeterminate sex, to have X as their gender marker on their passport, but as yet none of the Australian States allow that as a legal sex marker on birth registration documents.<sup>8</sup> New Zealand has allowed trans citizens, as well as those who are intersex, to obtain a passport with a preferred gender marker of X.<sup>9</sup> This is not, however, their legal sex, which is either that recorded at birth, or after application for a change of birth registration – and this can only be 'male' or 'female' (Dept.

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<sup>8</sup> See Sex and gender diverse passport applicants at

<https://www.passports.gov.au/passportsexplained/theapplicationprocess/eligibilityoverview/Pages/changeofsexdoborpop.aspx>

<sup>9</sup> See Information about Changing Sex / Gender Identity at <https://www.passports.govt.nz/Transgender-applicants>, and Denmark: X in Passports and New Trans Law Works at <http://tgeu.org/denmark-x-in-passports-and-new-trans-law-work/>

Internal Affairs, n.d.a) unless there is medical evidence that a person is of indeterminate sex or intersex (Dept. Internal Affairs, n.d.b). Nepal makes 'O' ('other') passports available (Knight, 2015) and Pakistan also recognises a third gender apart from male and female in some circumstances (Maqbool, 2011). The only state to date which allows a person to choose to have X as their legal gender marker in all circumstances is Denmark (TransGender Europe, 2014).

In the UK, following earlier support for recognition of non-binary gender identities, an Early Day Motion is tabled for debate in the House of Commons 2016-17 parliamentary session. Entitled 'Legal recognition for people who do not associate with a particular gender,' this aims to:

... address the issues faced by people whose identities are neither male nor female; [this House] believes that people are compromised and diminished as a result of inappropriate gender references on their personal identity information; [...] [and] notes that citizens of Australia and New Zealand are able to obtain a non-gender-specific X passport and that India, Nepal and Pakistan make provision for their citizens when neither M nor F are appropriate; further believes that similar provision is needed in the UK [...] and therefore urges that [...] non gender-specific X passports [are made] available [...] to people who do not identify with a particular gender (Lamb, 2016)

Very few Early Day Motions will result in actual debate or legislative change.

### **3.3. Public Toilet Access for Non-Binary People**

Most public toilets in the UK are separated into male and female facilities, though increasingly non-segregated toilets can be found in Universities, LGBT bars, and LGBT-friendly areas of cities (Ward, 2013) and at gender-inclusive events. However, as Kopas notes, echoing points made by Browne (2004), Cavanagh (2010), and Halberstam (1998):

Because gender-segregated public bathrooms allow for only two genders and hence set up the possibility of "failing" this gender test, public bathrooms are often sites of violence against gender non-conforming individuals, who may be the targets of

interpersonal gender policing regardless of which gendered choice they make (2012a, p. 9).

If toilets are marked male or female, it is unsurprising that non-binary people with non-conforming gender expression are accused of using the 'wrong' bathroom (Cavanagh, 2010). Beliefs about segregation are clearly deep-rooted. Kopas notes that 'The participants in my research were for the most part attached to the norm of gender separation', and even when participants' arguments were challenged on the grounds of being illogical or inconsistent, a strong resistance to removing gender segregation remained (Kopas, 2012b).

UK law provides different rules regarding toilet provision; for employers and service providers, depending upon the building they occupy and what can reasonably be provided. A large office block or factory can clearly provide more toilet space than a small sandwich shop. Whatever the business, employers must always provide toilet facilities or allow reasonable access to other toilets outside of the workplace, for employees.

Local byelaws may require places where people eat - such as restaurants - to provide toilets for patrons. For other services, the minimum is one toilet, which is also accessible to people with disabilities. After that, if it is feasible, provision should be made for a separate toilet for women from that used by men. However, there is no legal requirement for total separation. So long as one toilet is separate for women to use (and where possible, a separate one for men) all other toilets can be shared toilets. If there are toilets distinguished as men's and women's there is no legal requirement that people only use one of the designated toilets.

The Equality Act 2010 requires that everyone, including trans people, are provided with the same access to facilities as any other person. If a person is presenting in their preferred gender identity, they must have the same access as others presenting in that gender identity - including access to changing rooms and the toilets. Managers and licensees of private premises have the right to decide who may enter the premises; though it is doubtful that they, rather than the provisions of the Equality Act, can determine who can access which toilet (Bishop, n.d.). The only time a person can be lawfully prevented access to a toilet is if a police officer (called by a manager, possibly) observes a person behaving in a way like to cause a breach of the peace.

Recent years have seen a significant decline in the number of public toilets and therefore an increase in the use of toilet facilities in shopping centres, pubs, and cafes (Department of Communities and Local Government, 2008). People with non-binary gender identities are invisible in government and policy documents on this issue. The decline of public toilets has had a disproportionate effect on women; older, disabled people, and carers of young children (Department of Communities and Local Government, 2008).

Prior to the Equality Act 2010, anti-discrimination law only concerned race, disabilities and sex. Sex was about men and women, but there was recognition even then that the relative lack of women's public toilets was of real concern (Communities and Local Government Committee, 2008). The Equality Act 2010 advice provided for businesses who sell goods and services, gives the following example:

Can a man just put on some lipstick and try to get into the ladies' toilet?

No. [...] a man who just puts on lipstick but does not wish to change his sex is not a transsexual person who is undergoing the process of changing his gender, nor is he likely to be thought to be transsexual, so he cannot rely on this protection (British Chambers of Commerce and Government Equalities Office, 2010, p. 6).

A petition for gender neutral public toilets exists in the archives for the 2010–2015 Conservative – Liberal Democrat UK coalition government ("Archived Petition," 2010); it obtained just six signatures.

### **3.4. Relationship recognition**

Legal relationship recognition, comprising marriage and civil partnership, retains a binary-gendered framework.

In 1866, a decision at the common law, held that

marriage as understood in Christendom is the voluntary union for life of one man and one woman, to the exclusion of all others. <sup>10</sup>

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<sup>10</sup> Penzance, LJ, in *Hyde v. Hyde and Woodmansee*. [L.R.] 1 P. & D. 130

In the requirements for marriage, most elements of that decision have long gone, with only 'one man and one woman' continuing to exist until the enactment of the Marriage (Same Sex Couples) Act 2013.

Legislative advances were made in the Gender Recognition Act 2004, which allowed trans people who obtained legal recognition to marry a person of the 'opposite' gender, rather than to marry in their assigned gender. However, those who had married in the former gender role were unable to get recognition of their preferred gender unless they ended their marriage. It was recognised that this could cause grave injustices especially for older couples, where employment related survival pension benefits were often dependent upon the couple retaining a married status. This situation was ameliorated by the enactment of Civil Partnership Act in December 2004, which allowed same-sex couples to register a relationship akin to marriage, albeit not marriage in some small aspects. Combined with the provisions of the Gender Recognition Act 2004, and some clever footwork in the Rules of Court, this allowed married trans people to end their marriage by annulment. The trans spouse would then receive a Gender Recognition Certificate, which enabled the couple to immediately contract a Civil Partnership, so protecting the survivor pension benefits of the (mostly non-trans) partner (former spouse).

In 2013, the UK government passed the Marriage (Same Sex Couples) Act 2013. The Act allowed for equal marriage for same sex couples (albeit without the religious elements, and not in Northern Ireland) but it did not at the same time allow 'opposite' sex couples to contract a civil partnership. The Act allows those couples in a Civil Partnership to convert the partnership to a marriage without having to go through a further ceremony. Importantly, for trans people seeking gender recognition, the Act allows for already-married trans people to obtain gender recognition without ending their marriage.

The legislative focus has so far been on relationship equality understood through a binary gender model. Nonbinary persons at present must identify as either male or female in order to marry, a situation which is clearly unsatisfactory (O'Toole, 2016).

There is some prospect for change. *Ferguson and Others v United Kingdom*, an application to the European Court of Human Rights case borne from the Equal Love Campaign (n.d.),

was originally concerned with obtaining same-sex marriage (made redundant by the Marriage (Same Sex Couples) Act) and different sex civil partnership. The application was declared inadmissible in 2015, but still has life in the domestic courts as *Steinfeld and Keidan* (Bowcott, 2016). Human rights cases such as these aim to broaden the application of Article 8 of the European Convention on Human Rights, which guarantees the right to respect for private and family life. If successful, either in the UK or the European Court of Human Rights, this would make gender neutral formal relationships effective (cf (King, 2016)).

### Equality Act 2010

The Equality Act, s.4 (*Equality Act, 2010*) provides protection to people who have a *Protected Characteristic* being: age; disability; gender reassignment; marriage or civil partnership; pregnancy or maternity; race and ethnicity; religion or belief; sex; and sexual orientation. A person who has (or who is perceived to have) a protected characteristic is afforded protection from discrimination and harassment. This includes association with, or victimisation for supporting, a protected person. Public bodies are required to give due regard to eliminating discrimination, harassment, victimisation [...]; advancing equality of opportunity; and fostering good relations, between persons with a protected characteristic and those who do not share it' (*Equality Act, 2010, section 149*).

In recent years, there has been a move towards making legislation sex or gender neutral (e.g. The Sexual Offences Act 2003). However, the Equality Act 2010 retained the specification of sex, and the gender/sex binary in various *protected characteristics*. Sex is 'a reference to a man or a woman' (*Equality Act, 2010, section 11(a)*), though the aim of the Act is to neutralise the impact of sex or gender. Sexual orientation is also binary: a person's sexual orientation towards persons of the same sex, persons of the 'opposite' sex, or of 'either' sex (section 12(1)). The characteristic of gender reassignment recognises people who are intending to undergo, are undergoing or have undergone 'a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex' (section 7(1)), and according to the Act, this makes them a transsexual person.



There is no doubt that the Act was poorly conceived as regards gender identity concerns. The government used the language originally used by the Advocate General of the European Court of Justice, in the 1997 case of *P v S & Cornwall County Council*<sup>11</sup>. In 2010, a consortium of trans support groups argued for the replacement of the narrow characteristic ‘gender reassignment’ with ‘gender identity’ in the proposed Equality Act, so providing protection to people with various gender identities which are different. This would include

transsexual, transgender, or [other] gender variant identities, [...] would also protect children or adolescents without requiring them to choose to have gender reassignment [...] when their identities are still flexible and forming, be in line with the international human rights, equality and diversity statements, recommendations etc. of the UN, the Yogyakarta Principles, the Council of Europe, the EU, and others.  
[Press For Change, 2009, p.2)

Their recommendation, which includes non-binary people in the reference to ‘gender variant identities’ was turned down, but just seven years later, the recommendations of the recent Inquiry of the House of Commons Women and Equalities Committee, mirrored those words:

the use of the terms “gender reassignment” and “transsexual” in the Act is outdated and misleading; and may not cover wider members of the trans community. The protected characteristic in respect of trans people under the Equality Act should be amended to that of “gender identity” [...] bringing the language in the Act up to date, making it compliant with Council of Europe Resolution 2048; and make it significantly clearer that protection is afforded to anyone who might experience discrimination because of their gender identity (Women and Equality Committee, 2016, paras 107-108).

‘Gender identities’ need to be construed as including non-gendered identities to afford protection to people such as Christie Elan-Cane.

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<sup>11</sup> P v. S and Cornwall County Council, Case C-13/94, [1996] IRLR 347

The explanatory notes to the Equality Act 2010 make it quite clear that 'gender reassignment' is to be considered a social process and not a medical process. As such, the Act protects anyone who is intending to, is undergoing, or has undergone gender reassignment even if they have not had or do not intend to have any medical gender reassignment treatments (Government Equalities Office, 2010, s.7, paras 41-43). However, what matters is that a person, at the very least, intends to permanently live in their preferred gender role. It also clear, that the Act is intended to exclude those who 'cross-dress' for reasons other than moving to live permanently in a gender role different to that assigned at birth.

Similarly, In relation to the protected characteristic of sex—

a reference to a person who has a particular protected characteristic is a reference to a man or to a woman (*Equality Act, 2010, section 11*).

A type of secondary protection from discrimination might be available to a person who has a non-binary gender identity in instances where:

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others (*Equality Act, 2010, section 13(1)*).

This section does not *require* that (B) actually has the protected characteristic. So, if a person is wrongly perceived to be intending to undergo gender reassignment, or to be gay or lesbian or bisexual, and treated less favourably because of that, this would constitute unlawful discrimination on the grounds of gender reassignment or sexual orientation under the Act 2010.

Similarly, harassment occurs where a person engages in unwanted conduct 'related to a relevant protected characteristic' (*Equality Act, 2010, section 26*). The Code of Practice makes it clear that harassment is possible where there is any connection with a protected characteristic, whether or not the person themselves has that characteristic. If a person with a non-binary gender identity is harassed because they are wrongly assumed to have a protected characteristic such as gender reassignment or being gay or lesbian or bisexual,

they can obtain protection under the Act (see Great Britain and Equality and Human Rights Commission, 2011, paragraphs 7.10 and 7.11 for further discussion).

Aileen McColgan of Matrix Chambers suggests, when discussing cross dressing, that there may be cases in which discrimination because of a person's wearing 'inappropriate clothing' for their recorded birth sex could constitute sex discrimination. However, "the domestic courts have remained very reluctant to interfere with employers' rights to impose 'gender appropriate' clothing and appearance rules" (McColgan, 2014, paragraph 4).

### 3.5. Gender Recognition

In addition to this gender binary focus, UK law has an emphasis on official recognition or approval before a change in gender becomes recognised in law. The Gender Recognition Act requires evidence of a person having been diagnosed with Gender Dysphoria. (*Gender Recognition Act, 2004, section 1*). The diagnosis of gender identity disorder has now been superseded by a diagnosis of gender dysphoria, which is far wider in its conception

A marked incongruence between one's experienced/expressed gender and assigned gender (APA, para 302.85)

The likely forthcoming version of the ICD-11 also looks set to 'declassify' Gender Dysphoria, rename it Gender Incongruence, and position Gender Incongruence in a non-mental health chapter (currently a chapter entitled 'conditions related to sexual health') (World Health Organization, 2016).

Ireland, on the other hand, has followed the example of Argentina and Denmark, and the intended direction of other European countries (O'Toole, 2015) in allowing citizens to apply for a Gender Recognition based on self-declaration (*Gender Recognition Act, 2015*; Transgender Equality Network Ireland, n.d.). Although the Irish Gender Recognition Act does not have a provision for self-definition as having a third gender or no gender, self-definition is likely to lead to these options having to be considered. If the defining characteristic of gender is self-perception, then there is no logical reason for self-perception to be restricted to the male/female binary. In contrast, however, a system in which authority rests outside

the hands of the persons requiring recognition of their gender seems more likely to be conservative when faced with new gender possibilities.

### 3.6. Gender Identity Protection in Scottish Law

UK law is binary-focussed when it addresses questions of gender identity. There is one exception; the Offences (Aggravation by Prejudice) (Scotland) Act 2009, which provides a statutory aggravation for offences where the accused has evinced malice or ill will relating to sexual orientation or transgender identity. Transgender identity is defined as:

(a) transvestism, transsexualism, intersexuality, or having, by virtue of the Gender Recognition Act 2004 (c.7), changed gender, or;

(b) any other gender identity that is not standard male or female gender identity.

(*Offences (Aggravation by Prejudice) (Scotland) Act, 2009 section 2(8)(a) and (b)*).

### 3.7. The Yogyakarta Principles

*The Yogyakarta Principles* (International Commission of Jurists and International Service for Human Rights, 2007), whilst not having been adopted as law by any national, federal or supra-national body; and having no binding effect in international human rights law; has however been acknowledged as influential. Unsurprisingly, given the pedigree of the human rights experts who authorised the principles, the definition of gender identity in the *Principles* is exemplary. Gender Identity is:

to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms (International Commission of Jurists and International Service for Human Rights, 2007, Preamble).

Given the non-binding status of the *Principles*, it might be thought that they are richer in potential than effectiveness, and reservations have been expressed by Dreyfus (2012) and Waites (2009). However, O'Flaherty and Fisher (2008) argue that the *Principles*, read in

conjunction with General Comments of the United Nations human rights treaties bodies on States' obligations to undertake effective programmes of education and public awareness about human rights, and general duty to enable people to benefit from their entitlements, ought to have significant impact.

Following the Yogyakarta Principles, it is generally considered clear that international human rights law now contains the general principle that that all persons, regardless of sexual orientation or gender identity, are entitled to the full enjoyment of all human rights. Following the *Recommendation CM/Rec(2010)5 of the European Council Committee of Ministers on measures to combat discrimination on grounds of sexual orientation or gender identity*, in 2011, the European Union amended the Qualification Directive 2004/83/EC<sup>12</sup> to include explicit reference to gender identity; Article 10(1)(d) of the Directive now reads:

Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group.

According to Tsourdi, this means the Directive

also entails an obligation for decision-makers to give consideration to gender-related aspects, including gender identity – reflected by the use of “shall” instead of “might”. Even with this strengthened wording, however, and the inclusion of gender identity, it does not unambiguously include intersex individuals, although the Directive does recognise in Article 9(2) that gender-specific acts and child-specific acts fall within the concept of persecution and both of these references can be relevant in cases of persecution of intersex people (2013).

### **3.8. Future directions**

The recently published Report on Transgender Equality by the Women and Equalities Committee (2016) makes a number of positive observations and significant

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<sup>12</sup> The Qualification Directive 2004/83/EC of 29 April 2004 sets up the Common European Asylum System (CEAS)

recommendations, including the following. These recommendations are striking, both individually and in their totality:

5. The Government must look into the need to create a legal category for those people with a gender identity outside that which is binary and the full implications of this.

7. Within the current Parliament, the Government must bring forward proposals to update the Gender Recognition Act, in line with the principles of gender self-declaration that have been developed in other jurisdictions. In place of the present medicalised, quasi-judicial application process, an administrative process must be developed, centred on the wishes of the individual applicant, rather than on intensive analysis by doctors and lawyers.

13. We recommend that provision should be made to allow 16- and 17-year-olds, with appropriate support, to apply for gender recognition, on the basis of self-declaration.

17. The inclusion of “gender reassignment” as a protected characteristic in the Equality Act 2010 was a huge step forward and has clearly improved the position of trans people. However, it is clear to us that the use of the terms “gender reassignment” and “transsexual” in the Act is outdated and misleading; and may not cover wider members of the trans community.

18. The protected characteristic in respect of trans people under the Equality Act should be amended to that of “gender identity”. This would improve the law by bringing the language in the Act up to date, making it compliant with Council of Europe Resolution 2048; and make it significantly clearer that protection is afforded to anyone who might experience discrimination because of their gender identity.

56. The UK must follow Australia’s lead in introducing an option to record gender as “X” on a passport. If Australia is able to implement such a policy there

is no reason why the UK cannot do the same. In the longer term, consideration should be given to the removal of gender from passports.

57. The Government should be moving towards “non-gendering” official records as a general principle and only recording gender where it is a relevant piece of information. Where information on gender is required for monitoring purposes, it should be recorded separately from individuals’ personal records and only subject to the consent of those concerned. (Women and Equalities Committee, 2015, pp. 79–87)

If even a fraction of the recommendations of the Committee are put into effect, these will make a significant improvement to the legal recognition of people with non-binary gender identities.

#### **4. Conclusions**

Law engages as much with the lives of people with non-binary gender identities, as it does with others, but being non-binary repeatedly highlights law’s patriarchal heteronormative history whilst frequently frustrating law’s purpose. Law cannot recognise a world containing a plurality of gender identities, because it was constructed to uphold the point of difference contained in a binary gendered system controlled by men.

However, the law is not static, and advances are being made through the work of theorists and activists. There is currently inadequate recognition of and protection for people with non-binary gender identities, but it is not without hope that change will appear soon. Those drafting the Equality Act 2010 (albeit within restricted concepts formed in mid-1990s employment law) intended the law to be far reaching in its protection of people who were gender diverse. As it stands however, people with non-binary gender identities are not bringing discrimination and/or equality cases to court – quite reasonably when legal aid is not available to most, and legal support which will be needed to bring a successful challenge is expensive and beyond the reach of people who have struggled to get and keep the job they have. The alternative is probably not to seek legislative change head on, but rather to seek regulatory change of minor parts of the Act. Simply changing gender reassignment to

gender identity in the Act will resolve the major part of the problem, and provide clear and extensive protection.

Legislation is best when it works by stealth - not through the courts. And just as minor changes to the Equality Act 2010 would bring huge advances, minor changes to the Gender Recognition Act 2004 would bring great change. By looking to the experience of other nations clearly the systems of self-identification favoured in other jurisdictions are working – and that the sky has not fallen down.

Understanding that gender is like race – nothing more than a system developed to give power to some, and to keep other powerless, would be a start. But that is not in itself enough. We also have to acknowledge that for most, having some sort of gender identity, or not having a gender identity at all, is a keenly felt essential part of their autonomous, independent self. To acknowledge that universality in law without being prescriptive would enhance the well-being of many - without damaging anyone else’s sense of self.

Comprehending the plurality of gender identities is not an especially novel idea, indeed the jurists, lawyers and activists behind the Yogyakarta Principles got to grips with it ten years ago (2007). This flourishing of a more inclusive conception of gender has borne fruit in the recognition of this plurality in the recent report of the Parliamentary Women and Equalities Committee whose recommendations, if given effect, should significantly impact the lives of people with non-binary gender identities for the better.

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