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OSCAR DAVIES

Language as a Cage and a Tool:
Drafting Non-Binary into UK Legislation

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Summary

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Abstract

Questo articolo considera come la legge e la legislazione del Regno Unito possano essere riconcettualizzate in una maniera più inclusiva che aiuti tutte le identità di genere, non solo alcune. L'articolo esplora percorsi per incorporare protezioni per identità non binarie come l'aggiunta di un terzo genere, la "decertificazione", o una graduale riforma legale tramite "legge lenta" per garantire un trattamento equo e la non discriminazione per tutte le identità di genere all'interno del sistema legale britannico. L'articolo fornisce alcune idee di stesura su come la legislazione attuale possa essere modificata per essere più inclusiva di tutte le identità di genere. Nell'articolo si discute la necessità per l'immediato inserimento delle protezioni per persone di identità non binaria nella legislazione del Regno Unito. Non è sufficiente infatti che le persone di identità non binaria siano protette dalla giurisprudenza, poiché anche in una giurisdizione di common law, tale protezione è fragile. La mancanza di riconoscimento dell'esistenza di molteplici identità di genere rende il sistema legale del Regno Unito intrinsecamente prevenuto nei confronti di qualsiasi persona che esista al di fuori del tradizionale binario di genere.

This article considers how UK law and legislation could be reconceptualised in a more inclusive way that helps all genders, not just some. The article explores pathways to incorporating non-binary protections such as adding a third gender, 'decertification', or gradual legal reform via 'slow law', to ensure equitable treatment and non-discrimination for all genders within the British legal system. Drafting ideas are provided for policy makers in terms of how the current legislation can be amended to better include people of all genders. It is argued here that non-binary protections must be written into UK legislation, now. It is not enough for them to be protected in case law, as even in a common law jurisdiction, such protection is fragile. This lack of recognition makes the UK's legal system inherently prejudiced against any person who exists outside of the traditional gender binary.

* Barrister of England and Wales, BA (Hons), GDL, BPTC LLM, first publicly recognised non-binary barrister in the UK. This paper passed a double blind peer review.

1. Introduction and definitions

Putting an identity into words presents challenges. But how can the law, being defined by language, exact meaning and strict application, understand and explain something as multifaceted as non-binary identity?

Non-binary is a gender identity that refers to people whose gender cannot be defined within the margins of the gender binary. Whilst Cambridge Dictionary calls it ‘having a gender identity that is not simply male or female’¹ and Oxford English Dictionary states ‘choosing not to be identified as either male or female’², I would argue that is not quite right, as it conflates sex (male/female) with gender (man/woman) which is not necessarily helpful.

The term ‘non-binary’ is used both as an umbrella term and a gender identity label to refer to people whose gender does not fall within the binary categories of man and woman³. It is important to acknowledge that being non-binary is not a new phenomenon as non-binary people have been recognised throughout history in many cultures, albeit in different names⁴. There are several different identity labels and experiences that fall under the non-binary umbrella, such as genderfluid, agender, neutrois, genderless, and non-gendered. Non-binary is also generally understood as a subset of the broad ‘trans’⁵ umbrella.

‘Trans’ or ‘transgender’ is a broad term which covers different situations, including people who reject traditional gender categories and identify as neither women nor men (non-binary, “*NB*” or “*enby*”) and people whose gender identity differs from their sex assigned at birth, but who are not outside the male/female gender binary (i.e. binary trans men and trans women). In a recent US study⁶, non-binary people made up approximately one third of the broader trans community. Yet most research on trans populations focuses on the experiences of binary trans people (i.e. trans men and trans women)⁷.

Some non-binary people do not consider themselves trans, as they may consider that trans is more likely to refer to e.g. a binary trans man or a trans woman. Individuals who are non-binary will have different experiences of their gender identity depending on their gender expression⁸. Some may

¹ Cambridge Dictionary, ‘non-binary’, <https://dictionary.cambridge.org/dictionary/english/non-binary>.

² Oxford English Dictionary, ‘non-binary’, https://www.oed.com/dictionary/non-binary_adj?tl=true.

³ E. Matsuno, A. Webb, H. Hashtpari, S. Budge, M. Krishnan, & K. Balsam. *Nonbinary fact sheet*, American Psychological Association, 2021, <https://www.apadivisions.org/division-44/resources/nonbinary-fact-sheet.pdf>.

⁴ N. Thorne, AK-T. Yip, W.P. Bouman, E. Marshall, J. Arcelus, *The terminology of identities between, outside and beyond the gender binary – a systematic review*, International Journal of Transgenderism, 2019, n. 20, pp. 138-154.

⁵ Oxford English Dictionary, “Originally: designating a transsexual or transvestite person. Now usually: designating a transgender person. See also trans man n., trans person n., trans woman n. Although still sometimes intended to be understood as an abbreviation of transsexual, transgender, etc., later use of trans now often implies a desire to include any or all non-conventional gender identities while avoiding more specific categorizations (cf. trans* adj. and note at transgender adj. A.1).”, https://www.oed.com/dictionary/trans_adj.

⁶ E. Matsuno, N. L. Bricker, E. N., Collazo, R. Mohr Jr., & K. F. Balsam, *The default is just going to be getting misgendered: Minority stress experiences among nonbinary adults*, Psychology of Sexual Orientation and Gender Diversity, 2024, 11(2), 202–214. <https://doi.org/10.1037/sgd0000607>.

⁷ *Ibid.*, p.202

⁸ Cambridge Dictionary, ‘the way in which people show their gender identity, especially in the way they dress and behave: Gender expression is the way we show our gender to the world around us. Residents of all gender identities and gender expressions deserve to feel safe in our community.’, <https://dictionary.cambridge.org/dictionary/english/gender-expression>.

draw less attention when walking down the street, adopting more normative modes of dress. Others may be harder to miss. Each is as non-binary as the other, though those presenting in a more gender non-conforming way are likely to face higher levels of harassment⁹. Typically, due to socio-linguistic factors such as expanded vocabularies for gender identity/expression, a higher proportion of young people now identify as non-binary¹⁰.

'Gender critical' is defined by the Cambridge dictionary as "*believing that sex is a fact of biology that cannot be changed, and doubting the idea of gender identity (= a person's feeling of being male, female, or another identity, especially when this is different from the sex they were said to have at birth)*". However, the term denotes, less a critical approach to gender, and more an emphasis on claiming 'biologically defined' notions of femaleness and womanhood over gender identity and social concepts of gender¹¹.

In addition to attacking trans people's right to access public toilets in line with their sex/gender presentation, 'gender critical' feminists have criticised social developments such as LGBTIQ-inclusive school education and positive media representations of trans people¹². Increasingly, they argue that such developments result from what they call 'gender ideology', a term originating in anti-feminist and anti-trans discourses among right-wing Christians, with the Catholic Church acting as a major nucleating agent¹³. The Council of Europe has recently condemned the use of the term 'gender ideology' as a mischaracterisation, falsely relegating transgender identity to a belief system, and falsely portraying trans rights as conflicting with women's and children's rights¹⁴.

'Gender critical' beliefs have been the subject of much litigation in the UK¹⁵, which I argue elsewhere is slowly but surely eroding the rights of trans and non-binary people.¹⁶ 'Gender critical' beliefs tend to invalidate non-binary identities either directly or as a corollary of their strict understanding of sex or gender as binary¹⁷.

⁹ Human Rights Campaign Foundation, *The Epidemic of Violence Against the Transgender and Gender Non-Conforming Community in the United States*, November 2023, <https://reports.hrc.org/an-epidemic-of-violence-2023>; A.R. Gordon, I.H. Meyer, *Gender nonconformity as a target of prejudice, discrimination, and violence against LGB individuals*, *J LGBT Health Res.* 2007;3(3):55-71.

¹⁰ S. Monro, *Non-binary and genderqueer: An overview of the field*, *Int J Transgend*, 2019 Jan 21; 20(2-3), p.126.

¹¹ R. Pearce, S. Erikainen, & B. Vincent, *TERF Wars: An Introduction*, *The Sociological Review Monographs*, 2020, 68(4), pp. 677–698.

¹² *Ibid.*, p.681

¹³ *Ibid.*, p.681

¹⁴ Council of Europe, Resolution 2417 (2022), "5. The Assembly condemns the highly prejudicial anti-gender, gender-critical and anti-trans narratives which reduce the struggle for the equality of LGBTI people to what these movements deliberately mis-characterise as "gender ideology" or "LGBTI ideology". Such narratives deny the very existence of LGBTI people, dehumanise them and often falsely portray their rights as being in conflict with women's and children's rights, or societal and family values in general. All of these are deeply damaging to LGBTI people, while also harming women's and children's rights and social cohesion.", see further <https://pace.coe.int/en/files/29712/html>.

¹⁵ See for example *Forstater v CGD Europe and Others* [2021] UKEAT/0105/20/JOJ: Maya Forstater, a researcher, was not offered a renewal of her consultancy contract due to her gender-critical beliefs. The Employment Appeal Tribunal ruled that her beliefs were protected under the Equality Act, though it clarified that this did not permit harassment or misgendering. *Bailey v Stonewall Equality Ltd, Garden Court Chambers and Others* [2022] ET Case No 2202172/2020: Allison Bailey, a barrister, claimed that her chambers had discriminated against her due to her gender-critical beliefs, influenced by Stonewall's actions. The tribunal upheld some of her claims against her chambers but rejected those against Stonewall.

¹⁶ See O. Davies, *Gender critical cases: making bad law?*, *New Law Journal*, 26 April 2024.

¹⁷ See for example *Mackereth v Department of Work and Pensions (DWP)* [2022] EAT 99: Dr. David Mackereth, a doctor, had beliefs that "God made humans "male and female". That leaves no scope for any other sex or gender. This is completely inconsistent with the theory of 'gender fluidity'. c. God's creation was perfect or "very good" (Genesis 1:31). When God made

Whilst non-binary identity may seem ungraspable to some, it has a material reality to many. Indeed, the 2021 census recorded more than 30,000 non-binary people in the UK¹⁸. The figure is likely to be greater given that a 2018 survey showed that 76% of non-binary people in the UK avoided expressing their gender identity due to fear of negative reactions (Government Equalities Office, 2018)¹⁹.

At present in the UK, non-binary people are not recognised by legislation. In this article, I suggest ways that the current law could be redrafted to make it more inclusive for non-binary people and that this must be written into UK legislation now. I consider too how we might reconceptualise the law in a more inclusive way that helps *all* genders, not just some. Not only does the gender binary bind us all in different ways, but it also frames the law as we know it. The UK should look to other countries that already have non-binary recognition in some format: there has been no constitutional crisis or a collapse of systems in those countries, which amounts to 18 at the time of writing²⁰ (these now include the US, New Zealand, Canada, Mexico, Argentina).

Non-binary discrimination is not illusory. In 2021, Galop's Hate Crime Report revealed that 64% of trans and non-binary people have experienced verbal abuse in public, with many also reporting incidents of physical violence²¹. The absence of legal recognition for non-binary identities further entrenches discrimination. Current UK laws do not allow non-binary people to have their gender accurately represented on official documents, forcing them to conform to binary categories that do not reflect their identities. This lack of recognition extends to organisational policies, which frequently exclude non-binary options, leaving individuals to navigate systems that erase their existence²².

In a recent important qualitative US study "*The Default Is Just Going to Be Getting Misgendered*": *Minority Stress Experiences Among Nonbinary Adults*²³, stressors specific to non-binary people were identified. Participants discussed both severe stressors that were typically infrequent as well as daily stressors that were more subtle. The more severe stressors identified were discrimination, rejection, and harassment/violence and the daily stressors identified were binary normativity, interpersonal invalidation, misgendering, and burdening ('burdening' being when others put the emotional/mental labour onto a non-binary person to explain their identity).²⁴ Meanwhile, internal stressors included internalised stigma, anticipated rejection, and concealment, which in turn contribute to negative mental health outcomes among cisgender sexual minorities.²⁵ Whereas there is societal pressure for binary trans individuals to prove to others that they are the gender they identify as (man or woman), non-binary individuals face additional pressure to also prove that their gender identity is

mankind perfect, he made them male and female." (para. 13). He refused to use preferred pronouns of transgender individuals based on his Christian beliefs. While his beliefs were found to be protected, the tribunal ruled that his refusal to comply with workplace policies was not.

¹⁸ Office for National Statistics, *First census estimates on gender identity and sexual orientation*, 1 October 2024, <https://www.ons.gov.uk/news/news/firstcensusestimateongenderidentityandsexualorientation>; see also on self-identity and stigma related to misclassification: K.A. McLemore, *Experiences with Misgendering: Identity Misclassification of Transgender Spectrum Individuals*, in *Self and Identity*, 2015, n. 14, vol. 1, pp. 51-74.

¹⁹ Government Equalities Office, *National LGBT survey: Research report*, 2018, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721704/LGBT-survey-research-report.pdf.

²⁰ Equaldex, *Legal recognition of non-binary gender' map*, 3 October 2024, <https://www.equaldex.com/issue/non-binary-gender-recognition>.

²¹ Galop, *Hate Crime Report*, 2021, <https://galop.org.uk/resource/hate-crime-report-2021/>, p.7.

²² See further B. Vincent, *Non-Binary Lives: An Anthology of Intersecting Identities*, Jessica Kingsley Publishers, 2020.

²³ E. Matsuno, N. L. Bricker, E. N., Collazo, R. Mohr Jr., K. F. Balsam, *ivi*.

²⁴ *Ibid.* p.201, p. 206.

²⁵ *Ibid.* p.203.

real²⁶.

Non-binary participants described experiencing discrimination in several settings including medical settings, public accommodations (e.g., bathrooms), employment settings, and with security and police. Within the context of receiving gender-affirming medical care, participants reported their non-binary identity was sometimes a barrier to receiving letters of support from mental health providers and receiving insurance coverage for gender-affirming procedures²⁷.

Some participants reported extreme forms of harassment, such as experiencing sexual harassment and physical violence. Many of the participants who reported such experiences were trans feminine and/or BIPOC²⁸. Experiences of sexual and physical assault were extremely distressing and appeared to have long-term impacts on participants²⁹. Participants also discussed harassment experiences, such as when others intentionally misgendered them as a method of invalidating their gender or trying to cause harm. An earlier study found that identity invalidation was a prominent theme in a qualitative study about stressful experiences among non-binary youth³⁰. Non-binary students face significant challenges in educational settings, where bullying and erasure are commonplace. Non-binary people are frequently disbelieved by their trans and cis peers, and unsurprisingly frequently question whether they are or look 'non-binary enough'³¹.

Policy makers in the UK must interrogate the language of drafting and legislation such that it includes all genders, and allowing us to move forward in a more equitable fashion. New protections must be put in place for people existing outside of the gender binary. Why? Non-binary people cannot attain justice when we face violence because of our gender identity³²; we cannot travel using our correct gender³³; and cannot marry without effectively being forced to lie on paper³⁴.

I look at the ways we can implement recognition, whether it is adding a third gender, 'decertification', or change through 'slow law', or even removal of sex and gender altogether. There must be a way through that permits anyone outside of the gender binary to have access to the same basic human rights as others.

I provide drafting ideas that will hopefully be taken on board by legislators and policy makers who so far seem apathetic to the idea of non-binary people being legally recognised in the UK.

1.1. Gendered terminology in law

In many English-speaking countries, legal language has historically used gendered terminology, often referring to individuals using gender-specific pronouns (he/him for males, she/her for females) and other gendered terms (e.g., 'chairman' instead of 'chairperson' or simply 'chair'). This gendered lan-

²⁶ *Ibid*, p.203.

²⁷ *Ibid*. p.206.

²⁸ 'Black, Indigenous, and People of Colour'.

²⁹ E. Matsuno, N. L. Bricker, E. N., Collazo, R. Mohr Jr., & K. F. Balsam, *ivi*, p.207.

³⁰ K.C. Johnson, A.J. LeBlanc, J. Deardorff, & W.O. Bockting, *Invalidation experiences among nonbinary adolescents*, *Journal of Sex Research*, 2020, 57(2), 222–233. <https://doi.org/10.1080/00224499.2019.1608422>.

³¹ E. Matsuno, N. L. Bricker, E. N., Collazo, R. Mohr Jr., & K. F. Balsam, 2024, *ivi*, p.211.

³² Human Rights Campaign, *Honouring Nex Benedict*, 2 October 2024, <https://www.hrc.org/news/honoring-nex-benedict-16-year-old-non-binary-high-school-student-who-tragically-died-after-school-beating>.

³³ *R (on the application of Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2021] All ER (D) 53 (Dec).

³⁴ The Marriage (Same Sex Couples) Act 2013 legalised same-sex marriage in England and Wales but maintains a binary understanding of gender.

guage reflects societal norms and conventions at the time the legislation was drafted. For a long time, English statute has used 'he' as default. Whilst legislation often refers to 'he' as replaceable with 'she', this still uses the male pronoun as the default, which favours male as the norm, and excludes all other genders.

In recent years, however, there has been a growing recognition of the importance of using inclusive and non-discriminatory language in legislation and other official documents. Efforts have been made to update legal language to be gender-neutral and inclusive. From 2008 to 2018 a quantitative study showed a dramatic decrease in the use of 'he' in new legislation³⁵.

The Drafting Guidance 2018 issued by the UK Office of the Parliamentary Counsel states that "*It is government policy that primary legislation should be drafted in a way that avoids reinforcing gender stereotypes*"³⁶. It states that in practice, that means avoiding 'he' as default, and avoiding nouns such as 'chairman'. The Drafting Guidance suggests three techniques to avoid sex-specific pronouns. First, the noun can be repeated, using 'P' or 'person'³⁷. This is a simple workaround that is gender-neutral but allows the legislation to work effectively, excluding no-one. Second, change the pronoun to 'they': "*In common parlance, "they" is often used in relation to a singular antecedent which could refer to a person of either sex.*"³⁸ It also notes that whilst 'he or she' has sometimes been used in legislation to refer to individuals, "*it is best avoided*"³⁹. The third technique is to rephrase to avoid the need for a pronoun or noun, for example using the passive, or 'who' instead of 'if he'⁴⁰.

Gender-neutral legislative drafting has contributed to a reduction in the direct legal consequences associated with being categorised as either a man or a woman, suggesting an ostensibly progressive step towards equality. The removal of certain legal barriers and disadvantages historically faced by women is an advancement that promotes fairness for all. However, there is a risk that gender-neutral laws may inadvertently obscure persistent social inequalities and the specific harms faced by marginalised groups, particularly concerning issues such as poverty, workplace discrimination, violence, exclusion, and entrenched gender stereotypes.

Despite gender-neutral reforms, certain laws continue to hinge on distinctions between sex and gender. For example, provisions governing same-sex versus different-sex marriage still reflect binary gender assumptions. The Gender Recognition Act allows a trans person to change their legal sex with a Gender Recognition Certificate. More frequently, the law's support for gender-based distinctions is subtle yet pervasive. Employers, for instance, may maintain gendered dress codes, and the structure of the school day implicitly relies on the availability of a caregiver – often presumed to be a woman – to collect and care for children. In certain cases, the law overtly endorses gender-based measures aimed at addressing historical inequalities, such as political parties' ability to implement all-women

³⁵ G.A. Pennisi, *Stability and change in legislative drafting techniques in the UK legislation: a recent debate on gender-neutral language*, in K. Ackerley et al., eds., *Thinking out of the Box in English Linguistics, Language Teaching, Translation and Terminology*, 2023, Padova University Press, p.196.

³⁶ UK Office of the Parliamentary Counsel, *Drafting Guidance 2018*, <https://www.gov.uk/government/publications/drafting-bills-for-parliament>.

³⁷ See for example section 4(2) Public Order Act 2023, "Without prejudice to the generality of subsection (2), a person ("P") is to be treated as having a reasonable excuse for the purposes of that subsection if P's presence in the tunnel was authorised by a person with an interest in land which entitled them to authorise P's presence there."

³⁸ *Ibid.*, p.9, para. 2.1.12. See also commentary on singular use of they: "Whether this popular usage is correct or not is perhaps a matter of dispute. OED (2nd ed, 1989) records the usage without comment; SOED (5th ed, 2002) notes "considered erroneous by some". It is certainly well-precedented in respectable literature over several centuries. In a House of Lords debate in 2013 a number of peers expressed concern about the use of "they" as a singular pronoun." *Ibid.*, p.2.1.3.

³⁹ *Ibid.*, p.9 para. 2.1.18.

⁴⁰ *Ibid.*, p.9 para. 2.1.19.

shortlists for parliamentary candidates, as permitted under section 104 of the Equality Act 2010.

2. Language as a cage and a tool⁴¹

Language is slippery and imperfect. To communicate clearly, however, we must be as precise in our speech as possible. In law, everything is categorised. But putting an identity into words presents challenges. I argue that language can be a cage that reinforces the gender binary if it is used without reflection, but it can also be a tool to deconstruct the binary, if used conscientiously.

What is 'non-binary' and why does it matter? For many, being non-binary represents a wholesale rejection of gender as we are taught to see it and of binaristic thinking. I set out some matters of linguistic importance here, though note they are constantly evolving as society changes over time⁴². I use non-binary as an adjective but also as a noun as a shorthand for non-binary identity or non-binary people.

Whilst in some circumstances it is common parlance to say someone 'identifies as' non-binary or trans, I challenge such usage and indeed throughout this article and in the proposed drafting, I use the better phrasing of someone 'is non-binary/trans or they 'are non-binary/trans'. This is because 'identify as' does not need to be explicit – it is implicit as so far as it is an identifier. Further, 'identify as' is often used by those who want to ridicule or undercut non-binary/trans people, saying 'well if you identify as non-binary, then I identify as a dishwasher'. In this common straw-man fallacy, the use of 'identify as' is distorted and exaggerated, turning the point into something absurd and easier to dismiss. The response does not engage with the real substance of the original statement but creates a weaker, distorted version (the 'straw man', a gendered term itself) to mock or refute, rather than addressing the actual point. This type of argument is common in debates where one side tries to undermine a position by making it appear extreme or ridiculous, rather than engaging with the real issues.

There are similar reasons for not using the phrase 'preferred pronouns', given that 'preferred' implies that pronouns are simply a matter of personal preference or optional choice, rather than a reflection of someone's gender identity. By framing pronouns as 'preferred', it can imply that someone's gender identity is negotiable or subjective, which can be invalidating. For some non-binary people, they do not care which pronouns are used (they might be genderfluid for example), and therefore this invalidation may not apply. Yet for other non-binary individuals, pronouns are an important aspect of affirming their gender identity, not just a matter of personal preference. Using 'preferred pronouns' can subtly place the burden on the individual to explain or justify their pronouns, as if it's a personal quirk rather than a legitimate aspect of their identity. This might make it harder for some people to assert their pronouns confidently. The qualifier 'preferred' therefore should be dropped when referring to pronouns⁴³.

British law now uses both terms 'sex' and 'gender'. Confusingly, however, sometimes sex and gender are used interchangeably⁴⁴, sometimes to mean different things. For example, the conflation of

⁴¹ Theory from: K. Gümüşay, *Speaking and Being: How Language Binds and Frees Us*, Profile Books, 5 May 2022.

⁴² For a useful commentary on the history of 'non-binary' terminology, see N. Thorne, AK-T. Yip, W.P. Bouman, E. Marshall, J. Arcelus, *ivi*, pp. 138-154.

⁴³ See A.C. Fowlkes, *Why You Should Not Say 'Preferred Gender Pronouns'*, Forbes, 10 December 2021, <https://www.forbes.com/sites/ashleefowlkes/2020/02/27/why-you-should-not-say-preferred-gender-pronouns/>.

⁴⁴ See L. Tolland and J Evans, *What is the difference between sex and gender?*, Office for National Statistics, 21 February 2019, "It is important to note that the law in the UK treats the terms sex and gender as interchangeable. This is shown by the Gender Recognition Act allowing someone who is changing their gender to change the sex marker on their birth certificate".

sex and gender is shown by the Gender Recognition Act allowing someone who is changing their gender to change the sex marker on their birth certificate. The social assumptions made about people's bodies, capabilities, and life choices, and their treatment as a result, make it sometimes unhelpful to separate sex from gender in equality law and to treat them as two separate grounds.

Many now think the gender binary to be a colonial export to many parts of the world⁴⁵. Some go further and consider the gender binary a tool of white supremacy⁴⁶. For example, when England colonised India, the perhaps revered third gender 'hijra' quickly became vilified and shunned, institutionally and personally, as a result of English treatment⁴⁷.

Whilst gender as a social construct is well-trodden path, originating from feminist thinkers such as Simone de Beauvoir ("*One is not born, but rather becomes, a woman*"⁴⁸) and Judith Butler⁴⁹, and gender as a social structure has been well explored⁵⁰, going one step further, I think of the gender binary as a sort of social *contract*. Does looking beyond the binary only work when all of us, or at least the majority, agree that this is possible? And as with many social contracts, once society is conscious of the inequalities produced as a cost of maintaining it, we must work to reimagine or redefine an amended or new social contract that better protects those who have lost out or been marginalised as a result of the prior social contract.

Whilst the law is supposed to be objective, it is necessarily skewed to favour those who have made it over centuries: predominantly cisgender white heterosexual men⁵¹. As law is based on precedent, histories and narratives are seen through this prism⁵². The purported neutrality of law as standardised approaches "*reduce everyone, irrespective of race, sex, gender or class to one supposedly neutral entity*"⁵³. Centuries of marginalised voices have been lost because of this myopic bias. My analysis tries to remove that gaze and reimagines a legal system through a feminist lens that is equitable, transcends binaristic thinking, and does not merely pay lip service to minorities' rights as is so often the case today.

Language can be both a cage and a tool, depending on how it is used. Over time, different categories of people have gradually been considered 'human enough' to warrant basic human rights. Over the last fifty years alone, our language on racial justice, disability rights and gender equality has changed dramatically as we rethink who the people are that deserve rights and recognition in a democracy. In the next fifty years with the rise of AI, language is likely to evolve further and the lines between what is/is not human (and what deserves basic respect/dignity/rights) will become increas-

⁴⁵ O'Sullivan, *The Colonial Project of Gender (and Everything Else)*, *Genealogy*, 2021; 5(3):67. <https://doi.org/10.3390/genealogy5030067>.

⁴⁶ See for example K. Marshall, *The Gender Binary Is a Tool of White Supremacy*, 14 July 2020, <https://aninjusticemag.com/the-gender-binary-is-a-tool-of-white-supremacy-db89d0bc9044>.

⁴⁷ See for useful discussion on this A. Hossain, *The paradox of recognition: hijra, third gender and sexual rights in Bangladesh*, *Culture, Health & Sexuality*, 2017, 19(12), 1418–1431. <https://doi.org/10.1080/13691058.2017.1317831>.

⁴⁸ S. De Beauvoir, *The Second Sex* (C. Borde & S. Malovany-Chevallier, Trans.), 2011, Vintage Books. (Original work published 1949).

⁴⁹ J. Butler, *Gender Trouble: Feminism and the Subversion of Identity*, Routledge, New York, 1990.

⁵⁰ See B.J. Risman, C. Travers Fleming, *Category X: What does the Visibility of People who reject the Gender Binary Mean for the Gender Structure?*, *AG. About Gender*, 2022, n. 11, vol. 21, pp. 1-34, <https://riviste.unige.it/index.php/aboutgender/article/download/2005/2689>.

⁵¹ For interesting discussion on 'queering' the law, see G. Baars, *Queer Cases Unmake Gendered Law, Or, Fucking Law's Gendering Function*, *Australian Feminist Law Journal*, 2019, 45:1, 15-62, DOI: 10.1080/13200968.2019.1667777.

⁵² J. Conaghan, *Law and Gender*, OUP, 2014, 199.

⁵³ M. Aristodemou, *Law and Literature: Journeys from Her to Eternity*, Oxford University Press, 2000, 206.

ingly blurred⁵⁴.

But language can be a weapon and is often a means of discrimination, directly or indirectly. Misgendering can be a frequent source of trouble for non-binary people⁵⁵ (though not for all non-binary people) and could be termed discrimination or harassment under the Equality Act 2010. It is particularly difficult for non-binary people to be gendered correctly in a binary normative society, as exemplified by a non-binary participant in a recent US study:

“I think the biggest thing is that our society is so binary focused on male and female that it’s nigh impossible to be in a situation where you’re going to be gendered correctly without really putting yourself out there and being like, yo, I’m nonbinary, please use they/them pronouns for me. The default is just going to be getting misgendered, you know? So that feels really invalidating”⁵⁶.

Participants in that study discussed feeling more upset about being misgendered when their pronouns were publicly displayed or when in LGBTQ-oriented spaces, and when being misgendered at a trans health clinic: *“They were deadnaming me every time I was calling to renew my testosterone which is every month, like this is your job”⁵⁷.*

Language also has implications on how space is used. An obvious example would be bathrooms. For many non-binary people, using public bathrooms is a stressful experience due to feeling invalidated in addition to feeling anxious about being targeted based on their gender. Often there are only ‘men’s’ and ‘women’s’, and an accessible toilet⁵⁸ in most public buildings (such as in most UK court buildings). This means private companies are less likely to do anything if the government does not recognise that there are more than binary options.

Dog whistles (an expression or statement that has a secondary meaning intended to be understood only by a particular group of people) can be particularly nefarious, as their meaning is not self-evident. *“Adult human female”* is part of the anti-trans slogan *“woman = adult human female”*. Whilst on the surface it describes a person who, in biological terms, has female reproductive anatomy and characteristics typical of adult humans, the implication here is that everyone’s gender is immutably determined by the sex they are assigned at birth and therefore trans identities are not valid, and should be excluded from single-sex spaces. *“Trans-identified”* is a term that denies the existence of trans people by implying that people cannot determine their own gender and that gender is determined by the sex that someone is assigned at birth. It is used in discourse to misgender people — for example, calling a trans woman a *“trans-identified male”* (TIM) or a trans man a *“trans-identified female”* (TIF). A *“gender critical”* view is, I argue, a broad-spectrum dog whistle that allegedly tries to protect women from predatory trans/non-binary people, meanwhile often espousing and legitimising anti-trans views. Yet, what seems to be often misunderstood is that rights are not limited as percentages on a pie chart; marginalised groups can gain rights without taking away the hard-fought rights of others. Presenting rights as mutually exclusive misunderstands their very nature: rights can (and should) be reasonably extended for each group that faces adversity in society. This is crucial for society to become fairer for all.

In this context then, language can be a cage that reinforces the gender binary if it is used without reflection. But language can also be a tool to deconstruct the binary, if used conscientiously.

⁵⁴ See S. Alegre, *Human Rights, Robot Wrongs: Being Human in the Age of AI*, Atlantic Books, 2024.

⁵⁵ E. Matsuno, N. L. Bricker, E. N., Collazo, R. Mohr Jr., & K. F. Balsam, *ivi*, p.208.

⁵⁶ *Ibid.*, quote from Spidermx (they, 26, White/Latinx, non-binary, genderqueer, transmas).

⁵⁷ *Ibid.*, quote from participant Arno (they, 38, White, non-binary).

⁵⁸ Forcing or asking a non-binary person to use an accessible/disabled toilet could sound in a discrimination claim if non-binary identity is properly protected by law.

3. Gender binary as fallacy

It is my contention that we are socialised from birth and educated into believing that there is nothing *but* binary gender as an option. This false dichotomy manifests in reductive fallacies of ‘gender essentialism’ such as boys should wear blue and girls should wear pink; boys should play football, girls should play netball; teachers and nurses should be women, pilots and engineers should be men. Gender roles dictate that men should be assertive and dominant, women passive and submissive⁵⁹. The gender binary can even play out in affecting peoples’ academic and life paths to reproduce the same gender inequality that we have been speaking about for years. These gender biases are further compounded by racial bias, especially when notions of gender are defined through a white lens⁶⁰. It is not enough to merely challenge gender stereotypes, which only consider external perception. For many, gender is an internal identification that may (or may not) manifest externally or intentionally.

Much of the bias against non-binary people is rooted in paternalism: the beliefs of medical professionals, educators, family members and caregivers that non-binary people must be protected from themselves, lest they make choices they will come to regret, such as medical intervention, or that will expose them to tragic and irreversible social consequences such as bullying and harassment.⁶¹ This perpetuates people’s misconceptions of ‘trans’ being a mental health issue. Meanwhile, there has been movement in the medical world away from stigmatising transness. In 2019, ‘gender incongruence’⁶² was moved in the World Health Organisation’s classification from the ‘mental health’ section to the ‘sexual health’ section, no longer being recognised as a ‘disorder’⁶³.

The British government’s vilification of trans and non-binary people comes at the expense of those people’s physical and mental health. Stonewall’s School Report survey in 2017 showed that 92% of trans young people have thought about taking their own life; even more disturbingly, 45% of trans young people have *tried* to take their own life⁶⁴. Out of non-binary respondents in a 2015 US survey, 39% had attempted suicide, compared with 4.6% of the general population⁶⁵. Rather than the problem being the internal self-destructiveness, the problem in fact lies in how trans and non-binary people are treated by society – how they are othered by institutions where they are told they cannot fit in. It often takes a lot for a trans and non-binary people to accept themselves, but it feels increasingly undeniable that it takes a lot more for society to accept them for who they are.

The very existence of gender allows for discrimination based on gender. But we should not think

⁵⁹ D. Best, and Angelica R. Puzio, ‘Gender and Culture’, in D. Matsumoto, and H.C. Hwang (eds), *The Handbook of Culture and Psychology*, New York, 2019; online edn, Oxford Academic, 18 July 2019.

⁶⁰ See K. Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, Stanford Law Review, 1991, 43(6), pp. 1241–1299; P.H. Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment*, Routledge, 2000.

⁶¹ See F. Ashley, *Gatekeeping Hormone Replacement Therapy for Transgender Patients Is Dehumanising*, Journal of Medical Ethics, 2019, 45(7), pp. 480–482; S. Hines, *The Feminist Frontier: On Trans and Feminism*, Journal of Gender Studies, 2020, 29(5), pp. 572–584.

⁶² Defined as ‘a person’s marked and persistent experience of an incompatibility between their gender identity and the gender expected of them’, *MSD Manuals Professional Version*, June 2023, <https://www.msmanuals.com/professional/psychiatric-disorders/gender-incongruence-and-gender-dysphoria/gender-incongruence-and-gender-dysphoria?ruleredirectid=742>.

⁶³ BBC News, *Transgender no longer recognised as ‘disorder’ by WHO*, 29 May 2019, <https://www.bbc.co.uk/news/health-48448804>.

⁶⁴ Written evidence submitted by Mermaids (CYP0097), February 2021, <https://committees.parliament.uk/writtenevidence/23299/pdf/>.

⁶⁵ S.E. James, J.L. Herman, S. Rankin, M. Keisling, L. Mottet, & M. Anafi, *The Report of the 2015 U.S. Transgender Survey*, Washington DC, 2016.

of gender as a linear concept with masculinity and femininity at opposing poles. Instead, it could be considered a galaxy⁶⁶ with no beginning and no end point. Non-binary-ness has, and must have, existed for as long as humans have, even if it had a different name⁶⁷.

Importantly, if non-binary people face violence and discrimination in relation to their gender – which is no doubt the case, Nex Benedict’s case being a prime example⁶⁸ – how can we get recourse to justice when the government does not even acknowledge or recognise our existence?

4. Law at present in the UK

At present, in the UK, non-binary people are not recognised by legislation. It is not currently possible to have a gender-neutral marker on passports or driving licences in the UK, and non-binary identity is not protected from discrimination in legislation at all. If we face discrimination at work, education or from public services because we are non-binary, we are unlikely to have recourse to justice via the courts. No gender-neutral recognition certificate exists. This means any non-binary identity is fundamentally invalidated by the British government.

In December 2021, the Women’s Select Committee Report on ‘Reform of the Gender Recognition Act’ highlighted some of the issues that non-binary people face because we are not recognised under the law. These range from issues accessing primary healthcare to the lack of specialist support services available if they are sexually or domestically abused. The report expressed disappointment that the Government had not accepted the case for legal recognition of non-binary people through the Gender Recognition Act 2004. The Government’s response, published on 24 March 2022, was that it still considered that no such changes to the Act were needed. By the time this report emerged, there had already been several petitions calling for us to be legally recognised, with one petition attaining over 140,000 signatures, and eventually being discussed before Parliament in May 2022. Yet still nothing has been done.

Nor are judges generally usually willing to break new ground in the world of trans and non-binary rights. When a judge makes a ruling, that judge creates a new legal reality, and that authority rests with them rather than with politicians. Such is the nature of a common-law system based on precedent and binding case law. In Christie Elan-Cane’s case, the Supreme Court was unwilling to recognise Elan-Cane’s non-gendered identity, rejecting an ‘X’ marker on passports. And in the case of Freddy McConnell, a trans man who became pregnant and gave birth, the Court of Appeal was unwilling to change his child’s birth certificate to have him registered as the father rather than the mother.

In these types of cases, where the law is forced to confront a person who does not neatly fit into the gender binary, judges prefer to defer such decisions to parliament, saying that it is not their role to make policy. Yet I contend that the government so far has been apathetic, at best, in its approach towards non-binary people – and with neither judges nor politicians engaged in improving non-binary people’s lives, those who live outside the gender binary find themselves in legal and existential limbo.

There are two exceptions to the above rule that stand out where judges have been willing to include recognition of non-binary identities in their judgments. In *Taylor v Jaguar Land Rover*, Rose Taylor worked at Jaguar Land Rover for over 20 years as an engineer. Taylor was non-binary/gender

⁶⁶ The idea of a ‘gender galaxy’ as discussed in M.-J. Barker, & A. Iantaffi, *Life Isn’t Binary: On Being Both, Beyond, and In-Between*, Jessica Kingsley Publishers, 2019.

⁶⁷ G.H. Herdt, *Third Sex, Third Gender: Beyond Sexual Dimorphism in Culture and History*, Zone Books, 1994.

⁶⁸ Human Rights Campaign, *Honouring Nex Benedict*, 2 October 2024, <https://www.hrc.org/news/honoring-nex-benedict-16-year-old-non-binary-high-school-student-who-tragically-died-after-school-beating>.

fluid (first announced in 2017) but soon faced discrimination at the hands of her colleagues. One colleague said, “I was checking out your dress, looked up, saw it was you and my jaw dropped”. Another said, “Is this for Halloween?” Another said “So what’s going on? Are you going to have your bits chopped off?” Another asked her why the “top half didn’t match the bottom half”. Taylor faced limited to no support from managerial teams regarding her transition in the workplace and the insults and abusive jokes she was experiencing.

Taylor brought a case in the employment tribunal and succeeded when it was decided for the first time that ‘non-binary’ or ‘gender fluid’ could be covered under the ‘gender reassignment’ part of the Equality Act 2010. This means that if non-binary people face discrimination at work, we may have recourse to justice. The Tribunal held that, having reviewed *Hansard* at paragraph 178:

“We thought it was very clear that Parliament intended gender reassignment to be a spectrum moving away from birth sex, and that a person could be at any point on that spectrum. That would be so, whether they described themselves as “non-binary” i.e. not at point A or point Z, “gender fluid” i.e. at different places between point A and point Z at different times, or “transitioning” i.e. moving from point A, but not necessarily ending at point Z, where A and Z are biological sex” .

In *R (AA) v NHS Commissioning Board* [2023] EWHC 43 (Admin), a case about NHS waiting times for trans people’s access to hormones and an initial consultation, Chamberlain J endorsed the approach in Taylor in supporting the breadth of how section 7 Equality Act 2010, ‘gender reassignment’, had been drafted (paragraphs 127 to 131 of that judgment).

This protection, however, is fragile and provisional as both judgments are only first-instance decisions. This means that if a higher tribunal/court makes a finding against it, then this decision would be overturned and the protection for non-binary people would vanish. In a common law system, where junior courts must follow the decisions of more senior courts, the law is constantly drawn and redrawn, such that protections set out in just one judgment can easily be removed by a more senior judge deciding on the issue.

Importantly, as in these two cases, recognising non-binary people under the law would not just benefit non-binary people. I contend that when (not if) non-binary people are recognised, legally and socially, it will help free everyone from the entrapment of binary thinking.

Deconstructing the gender binary would not only validate the experiences of trans and non-binary people but also transform the lives of cisgender individuals by dismantling restrictive norms, reducing inequalities, and enhancing societal wellbeing. For example, women would face fewer glass ceilings in professional settings, as the dismantling of gender norms would remove stereotypes that associate leadership and assertiveness with masculinity. This would lead to greater representation of women in senior roles, closing the gender pay gap and fostering more diverse workplaces.

In domestic spaces, breaking down the binary could reduce the prevalence of domestic violence. Rigid notions of masculinity often perpetuate toxic power dynamics that enable control and aggression; challenging these constructs could create healthier relationships built on mutual respect and shared responsibility. Men, too, would benefit by feeling less societal pressure to embody harmful traits associated with toxic masculinity, such as emotional suppression or dominance, which often harm their mental health and relationships.

Ultimately, challenging the gender binary would lead to a more inclusive, equitable, and flexible understanding of gender and identity. It would validate diverse experiences while liberating all individuals—regardless of their gender—from the constraints of stereotypes, fostering healthier relationships, increased economic opportunities, and a more compassionate society.

4.1. Moving forwards

There are three potential solutions moving forwards to make the law more equitable for those of *all* genders.

4.1.1. 'Third' Gender

The first is to add a 'third' gender for anyone considering themselves outside the gender binary. This would both give options for other genders on official documents and would validate non-binary and genderfluid people. A recent empirical study showed that 95% of non-binary people within the study would endorse this approach⁶⁹.

Yet the UK Courts are not willing to do so. In Ryan Castellucci's 2024 case were not willing to acknowledge a third gender on Gender Recognition Certificates⁷⁰. Castellucci is an American non-binary cyber security expert who had their gender recognised under law of the State of California as "*non-binary*". They were issued with an American passport which lists their sex as "X". When they moved to the UK, however, they applied for a Gender Recognition Certificate to have their non-binary gender identity recognised here, only to have it refused. There was no such equivalence under the Gender Recognition Act.

Castellucci challenged this by way of judicial review, but the High Court found that the government was entitled to keep the options as binary as this reflects how the British law sees sex and gender⁷¹. There is no third option. Even though it was acknowledged that Castellucci was being treated differently from someone whose gender is binary (whether -cis or -trans), the court considered that this treatment was justified and proportionate due to, *inter alia*, an absence of an international consensus on the issue. The Courts said that it was not for the judiciary to make such a drastic change, but for the legislature to imagine a new statute that accommodates all genders (paragraph 130).

But adding a third gender would bring UK law into step with other jurisdictions where a third gender is already recognised (as in the state of California in Castellucci's case). Would this be so bad? This could, practically speaking, be the most efficient option, though Gender Recognition Certificates and equality law will have to be amended to permit a third gender option. While third gender markers could be an option for interested adults, some consider having mandatory third gender markers as potentially harmful, for example by further stigmatising intersex children and this would of course require careful consideration.

⁶⁹ M. Gascoigne, *Legal sex status: the attitudes of non-binary people towards reform in England and Wales*. *Legal Studies*. 2024;44(2):277-294. doi:10.1017/lst.2023.30, p.7.

⁷⁰ *R (Castellucci) v Gender Recognition Panel* [2024] EWHC 54 (Admin).

⁷¹ See *R (on the application of Christie Elan-Cane) v Secretary of State for the Home Department* [2018] EWHC 1530 (Admin), paragraph 52. Also, *Corbett v Corbett (otherwise Ashley)* [1971] P 83 (UK), an old case still relied on today by judges. This case in the UK dealt with the legal recognition of gender reassignment and the definition of binary sex for legal purposes. In the case, the court ruled that a person's sex is determined by biological factors (chromosomal, gonadal, and genital) at birth, which had significant implications for marriage law and gender identity.

4.1.2 Replace ‘Sex’ and ‘Gender Reassignment’ with ‘Gender’

The second option would be to replace ‘sex’ and ‘gender reassignment’, as defined in legislation, with a broader category of ‘gender’. The intent of this shift would be to create a more inclusive legal framework that transcends binary constructs and accommodates a wider spectrum of gender identities, as well as perceived gender. This approach advocates for a gender-neutral drafting process, wherein ‘gender’ is understood as encompassing sex and gender or perceived gender. Such an adjustment could resolve the often arbitrary and complex distinctions between sex and gender in legal contexts, distinctions that scholars have noted can be fraught with inconsistencies and philosophical debates⁷².

Under this model, gender would no longer be constrained to binary man and woman categories but would extend to recognise all gender identities, thereby fostering inclusivity and equity. However, this proposal presents significant logistical and socio-political challenges. Key among these are the implications for existing legal constructs such as single-sex shortlists, sex-based rights, and protections that have been foundational to advancing women’s rights. Reconceptualising these frameworks could potentially undermine hard-fought legal victories for women, particularly in contexts where the intersection of gender and other axes of identity is not adequately addressed⁷³.

Furthermore, such a reform would necessitate a comprehensive re-evaluation of the entire legislative corpus, requiring a shift in both institutional thinking and societal norms. This would likely be a protracted and contentious process, particularly under political leadership that has historically displayed ambivalence or opposition to expansive interpretations of human rights. The success of legal reforms aimed at promoting inclusivity often depends on the political will to champion equality and human dignity⁷⁴.

4.1.3. Decertification

The third option would be to completely remove sex and gender from official documents such as birth certificates. As proposed in 2022’s *Future of Legal Gender Project*⁷⁵ led by Davina Cooper, this can be defined as ‘decertifying’ sex and gender, i.e., removing legal sex and gender. This forward-looking project draws on extensive evidence, involving a survey eliciting over 3,000 responses and 200 interviews with government officials, trade unions, regulatory bodies, and lawyers. Many participants in favour of decertification reflected the inclusion of sex on the birth certificate as an ‘unconscious habit’ rather than serving a useful purpose. Some argued that gender is like religion in many ways—that it should not be mandatory as part of identification in the first place. The project concludes that, if done carefully and correctly, decertifying sex is, on balance, likely to do more good than harm. It is argued elsewhere that if we are ever to move forward to a more just world, we need a movement to overturn gender as a social structure itself⁷⁶.

But what would decertification look like in reality? In practical terms, official documents like

⁷² See for example S. Monro, *Bisexuality: Identities, Politics, and Theories*, Springer, 2020.

⁷³ R.W. Connell, *Gender in World Perspective*, Polity Press, 2012, pp.143-145.

⁷⁴ S. Fredman, *Discrimination Law*, Oxford University Press, 2018, p.211.

⁷⁵ D. Cooper, R. Emerton, E. Grabham, H.J.H. Newman, E. Peel., F. Renz, & J. Smith, *Abolishing legal sex status: The challenge and consequences of gender related law reform. Future of Legal Gender Project, Final Report*, King’s College London, 2022.

⁷⁶ B.J. Risman, C. Travers Fleming, *ivi*, p.24.

passports and driving licenses would undergo modifications, eliminating references to 'sex' or 'gender'. The state would stop registering sex at birth, and so stop pulling people into a formal, legally gendered edifice stretching across lifespans.

The recent Court of the European Union case of *Mousse v Commission nationale de l'informatique et des libertés (CNIL) and SNCF Connect*, Case C-394/23, EU:C:2025:2 involved a dispute over the processing of personal data, particularly titles (e.g., "Mr." or "Ms.") and gender information, in the context of purchasing French train tickets online. The Court ruled that SNCF Connect's mandatory collection of titles and gender information was a breach of the GDPR's principle of data minimisation (Article 5(1)(c)). This principle requires that personal data collected must be adequate, relevant, and limited to what is necessary for the purpose. Importantly, the Court addressed the issue of processing customers' civil titles and its potential implications for discrimination based on gender identity at paragraph 42:

*"The processing of personal data relating to civil titles, such as 'Mr.' or 'Ms.', can, in certain circumstances, pose a risk of discrimination on the grounds of gender identity, particularly for individuals who do not identify with the binary gender classifications"*⁷⁷.

This is potentially the first time that the Court of the European Union has evoked the fundamental EU law principle of non-discrimination to protect the ground of gender identity for trans and non-binary people. The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) argues that the judgement means that in fact all public and private organisations that are required to comply with GDPR in the EU will need to comply with this judgment and stop collecting gender markers when it is not strictly necessary in the light of the purposes for which this data is processed⁷⁸. This is a way in which the law could shape a movement towards decertification in some aspects of life (where the use of gender markers has become ultimately redundant).

Decertification aims to eliminate gender-based discrimination during border crossings, particularly benefiting non-binary individuals and those not conforming to traditional gender norms. However, it would not help someone like Castellucci who wants equivalent recognition that has already been attained abroad. Further, it would not necessarily permit someone like Christie Elan-Cane to have a non-gendered gender acknowledged on a passport⁷⁹.

As recognised in the *Future of Legal Gender Project*, decertification offers several advantages, including the deconstruction of a legal system that categorises individuals into unequal social classifications of male and female⁸⁰. This process facilitates greater freedom of gender expression by removing the constraints imposed by legal gender markers and alleviates the bureaucratic challenges faced by individuals seeking state recognition of their gender transitions. In contrast, the current practice of certifying individuals as either male or female reinforces restrictive social norms regarding sex and gender and how these should be expressed. By legally differentiating between women and men, this system perpetuates heteronormative laws, policies, and cultural assumptions. Decertification could also benefit those who do not conform to the binary gender framework, relieving the pressure to conform to a single category.

Concerns regarding the decertification of sex and gender have also been raised, particularly in relation to gender- and sex-specific services, data collection, issues of violence, and positive/affirmative action. Critics argue that abolishing sex as a legal status could jeopardise the availability of services and spaces designed for women and men, potentially disadvantaging women in particular. It is im-

⁷⁷ *Mousse v Commission nationale de l'informatique et des libertés (CNIL) and SNCF Connect*, Case C-394/23, EU:C:2025:2, para. 42.

⁷⁸ ILGA, *Joint statement welcoming CJEU judgment to halt unlawful gender title collection*, 9 January 2025, <https://www.ilga-europe.org/news/joint-statement-welcoming-cjeu-judgment-to-halt-unlawful-gender-title-collection/>.

⁷⁹ J. Castle, O. Davies, *Gender Identities: a Two-Tier System?*, *New Law Journal*, 4 February 2022.

⁸⁰ D. Cooper, R. Emerton, E. Grabham, H.J.H. Newman, E. Peel., F. Renz, J. Smith, *ivi*, p.6.

perative that any implementation of decertification does not worsen existing inequalities. According to the proposed decertification measures, existing legislation such as the Gender Recognition Act, which currently provides a framework for individuals to change their legal sex and gender status, would become obsolete. Although sex assigned at birth could still be documented in aggregate for the purposes of planning and statistical analysis, it would no longer constitute a component of an individual's legal identity.

But is the present political climate a safe one in which to question the architecture of equality law or to fundamentally alter gender and sex categories? Probably not. If making changes, we need to minimise damage as much as possible.

Rather than abolishing sex and gender entirely, decertification may therefore be better approached through the prism of 'slow law'⁸¹. This involves transitional legal reforms (for example, legally recognising a third gender, as per the first option) while also attending to far-reaching structural concerns of poverty, violence, exclusion, and exploitation⁸². An incremental approach based on updated language is safer in an environment where governments seem intent on rolling back certain domestic human rights and removing recourse to international safeguards such as the European Convention on Human Rights⁸³.

The next government Census, due to be held in 2031, could, instead of having 'M' and 'F' boxes, have an empty box for people to fill in themselves. This would allow greater particularity and usefulness in terms of recording these statistics. The right answer may be asking for someone's gender on some occasions – but not always – and whenever it is asked, to give the largest range of possibilities to people so that we can declare whatever we like. If the passport authorities say it is too complex to allow people to write in whatever we like, then in that case no gender box may well be the answer.

There is clearly scope to have better *law* if language is used more conscientiously. And there is also scope to have a more inclusive *society* if more efforts are made by everyone in public places, education and workplaces. And rather than lagging behind socio-economic and linguistic developments, it is, I suggest, time for the law to start leading by example

5. Drafting non-binary into UK legislation

Whilst the British government seems largely apathetic to non-binary identity being recognised, one of the reasons given for not implementing it is that legislation drafting will be too complicated. But would it be so complicated? Perhaps this writer is naïve and/or an optimist, but some amendments to existing legislation could be relatively simple. Others would take more thought. Though by no means exhaustive, below are some suggested amendments or redrafting of current legislation that could include non-binary or a third gender, thus providing better protections that the legislation is built for.

5.1. Equality Act 2010

The Equality Act 2010 in the UK currently protects individuals from discrimination based on various

⁸¹ D. Cooper, R. Emerton, E. Grabham, H.J.H. Newman, E. Peel., F. Renz, & J. Smith, *ivi*, p.35.

⁸² See A. Sharpe, *The Sexual Constitution of Political Authority: The 'Slow' Law of Judicial Change*, 2020 Routledge; and D. Rosenblum *Unsex CEDAW, or What's Wrong with Women's Rights*, 2011, *Columbia Journal of Gender and Law*, 20(2), 98-199.

⁸³ J. Elgot, *Tory MPs to push for UK exit from European convention on human rights*, BBC News, 5 February 2023.

characteristics, including “sex” and “gender reassignment”. However, it does not explicitly mention non-binary identity, which has led to a debate about whether the Act should be updated to provide explicit protection for non-binary people who are undergoing, have undergone, or are proposing to undergo gender reassignment.

Section 7(1), gender reassignment reads “*A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has 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*”.

This is often interpreted in a binary context (male to female or female to male). The law could be amended to explicitly include those who are transitioning to or identifying as non-binary. This would mean broadening the definition of gender reassignment to include individuals who do not consider themselves strictly male or female.

Proposed amendments:

- *“Gender reassignment means a person proposing to undergo, undergoing, or having undergone a process (or part of a process) of changing their sex or gender identity. This includes individuals who are non-binary, genderqueer, or any other identity outside the traditional binary framework of male and female”* or
- Redefine “gender reassignment” as *“the process of moving away from one gender identity to another or identifying outside of the male/female binary”* or
- Add a new protected characteristic of “gender identity” to the list of characteristics under the Act. This would clarify that all people, regardless of whether they are male, female, or non-binary, are protected under the law.
- Even without changing the primary legislation, statutory guidance accompanying the Equality Act could be updated to clarify that non-binary identities are covered under existing protections.

The final of these suggestions in particular runs contrary to the government’s position that this would be complicated and time-consuming.

5.2. Gender Recognition Act 2004

Updating the Gender Recognition Act 2004 to include non-binary people would involve specific amendments to sections of the Act that currently only recognise binary gender identities (male and female). Such changes would also necessitate interaction with the Equality Act 2010, particularly in how non-binary identities would be protected from discrimination. Below I analyse how these two Acts could be amended to better accommodate non-binary people.

5.2.1. Section 1: The Meaning of Gender Dysphoria⁸⁴

Currently, Section 1(1)(a) of the Gender Recognition Act 2004 requires individuals to experience gen-

⁸⁴ ‘Gender dysphoria’ is defined by the NHS as “a term that describes a sense of unease that a person may have because of a mismatch between their biological sex and their gender identity”, see ‘Gender Dysphoria’, 28 May 2020, NHS <https://www.nhs.uk/conditions/gender-dysphoria/#:~:text=Gender%20dysphoria%20is%20a%20term,harmful%20impact%20on%20daily%20life.>

der dysphoria to apply for a Gender Recognition Certificate. The language presumes a binary understanding of gender transition (from male to female, or vice versa). This section could be amended to broaden the definition of gender identities beyond the binary framework.

- Proposed Amendment: Amend Section 1 to include non-binary identities explicitly by expanding the definition of gender dysphoria and acknowledging that it may involve incongruence with a non-binary gender identity.
- Amended Text: "*For the purposes of this Act, gender dysphoria includes discomfort or distress caused by a mismatch between an individual's gender identity and their sex assigned at birth, which may include male, female, or non-binary identities*".

5.2.2. Section 2: Application for Gender Recognition Certificate

Section 2 sets out the requirements for obtaining a Gender Recognition Certificate, which currently include a diagnosis of gender dysphoria and living in the "*acquired gender*" for at least two years. This binary framework excludes non-binary individuals who do not transition from one gender to another in a traditional sense.

- Proposed Amendment: Update Section 2 to allow individuals who are non-binary to apply for a Gender Recognition Certificate, without requiring a transition to a binary "*acquired gender*".
- Amended Text: "*A person may apply for a Gender Recognition Certificate if they are living in accordance with their gender identity, which may include non-binary, for at least two years prior to the application*".

5.2.3. Section 3: Evidence Requirements for a Gender Recognition Certificate

Under Section 3, applicants are required to provide evidence from medical professionals to confirm their gender dysphoria and "*acquired gender*". This medicalisation of gender recognition creates barriers for non-binary people who may not seek medical transition.

- Proposed Amendment: Remove or relax the medical requirements, particularly for non-binary applicants, allowing for self-declaration of gender identity as sufficient evidence for a Gender Recognition Certificate.
- Amended Text: "*The application must include a statutory declaration that the applicant identifies as non-binary or another gender identity and intends to live permanently in accordance with that identity*".

5.3. Pensions

5.3.1. Pension Schemes Act 1993 & Pensions Act 2008

UK pension schemes, including state and occupational pensions, often base calculations on sex-related factors such as retirement age, life expectancy, and survivor benefits. These factors are traditionally framed within a binary model of male and female.

- Proposed Amendment: Amend the Pension Schemes Act 1993 and the Pensions Act 2008 to account for non-binary individuals. This could involve introducing a neutral or equitable system that does not rely on sex-based differentiation or introducing non-binary as a recognised category with equal treatment.
- Amended Text: *“Where reference is made to sex for the purposes of calculating pension contributions, entitlements, or benefits, those who are not male or female, including non-binary individuals, shall not be subject to differential treatment and shall be entitled to choose the sex-based calculation most favourable to them, or to a neutral calculation”*.

5.3.2. State Pension Age Act (Pension Act 1995 and Pensions Act 2014)

The state pension age in the UK has historically been different for men and women. These distinctions could be problematic for non-binary individuals who do not fit into the male/female binary.

- Proposed Amendment: Amend the legislation to provide non-binary individuals the right to choose which state pension age applies to them or create a neutral state pension age that applies equally to all genders, including non-binary individuals.
- Amended Text: *“Individuals who are not male or female, including non-binary individuals, shall be entitled to elect which state pension age applies to them or to opt for a neutral state pension age that is equitable across genders”*.

5.3.3. Occupational and Private Pension Schemes

Many occupational pension schemes have gendered rules around contributions, pay-outs, and survivor benefits. These rules often differ based on sex, particularly when it comes to life expectancy or annuity calculations.

- Proposed Amendment: Update pension regulations to ensure that non-binary individuals are treated equitably. This could involve requiring pension providers to apply the more favourable of male or female benefit calculations or implementing a non-discriminatory model that does not rely on gender differentiation.
- Amended Text: *“Pension schemes must ensure that individuals who are non-binary or outside the traditional binary gender categories are not disadvantaged in the calculation of their benefits, and providers must offer the option to elect the most favourable terms available or provide gender-neutral calculations”*.

5.3.4. Civil Service and Public Sector Pension Schemes

Public sector pension schemes often have specific rules regarding retirement age, contributions, and benefits based on sex. These may not account for non-binary identities, potentially leading to unequal

treatment.

- Proposed Amendment: Require civil service and public sector pension schemes to treat non-binary individuals equitably by allowing them to choose between male or female criteria, or by introducing a non-gendered criterion.
- Amended Text: "*Civil service and public sector pension schemes shall ensure that non-binary individuals are provided with equitable treatment in relation to retirement age, contributions, and benefits, either by allowing a choice between male and female standards or by introducing neutral standards*".

5.4. Births and Deaths Registration Act 1953

The Births and Deaths Registration Act 1953 governs how births are registered in the UK. It currently only allows for the registration of male or female sex. This clearly stigmatises intersex and non-binary people who do not fall under either of those categories.

Section 1, 'Birth Registration', only allows for "*male*" or "*female*" to be recorded on birth certificates.

- Proposed Amendment: Allow for an option of "*non-binary*" or another gender marker in birth registration.
- Amended Text: "*In the case of a person whose gender is non-binary, the birth registration may reflect this gender as 'non-binary' or another suitable term*".

5.5. Marriage (Same Sex Couples) Act 2013

The Marriage (Same Sex Couples) Act 2013 provides for marriage between same-sex couples but does not account for non-binary individuals in its language.

Section 3, 'Marriage of Same-Sex Couples' only refers to marriage between "*male and female*" or "*same-sex*" couples, excluding non-binary individuals.

- Proposed Amendment: Include non-binary identities in the definition of marriage.
- Amended Text: "*Marriage may be contracted between two persons, regardless of whether they are male, female, or non-binary*".

5.6. The Civil Partnership Act 2004

The Civil Partnership Act 2004 governs civil partnerships but does not currently account for non-binary individuals.

Section 1, 'Civil Partnership' is currently limited to couples identified as "*same-sex*" or "*opposite-sex*".

- Proposed Amendment: Include non-binary individuals within the definition of civil partnership.
- Amended Text: "*A civil partnership may be formed between two individuals, regardless of whether they are male, female, or non-binary*".

Section 11 'Effect on Marriage and Civil Partnership', addresses how gender recognition affects existing marriages and civil partnerships, typically by placing conditions on continuing the relationship based on the binary gender framework.

- Proposed Amendment: Modify Section 11 to ensure that recognition of a non-binary gender identi-

ty does not affect the validity of marriages or civil partnerships. Additionally, introduce language that explicitly acknowledges non-binary individuals.

- Amended Text: "*Gender recognition as male, female, or non-binary shall have no impact on the validity of any existing marriage or civil partnership, provided both parties consent to the continued relationship*".

5.7. Parenthood

Freddy McConnell's case (referenced above) highlights the complexities non-binary or transgender individuals face in terms of legal recognition as parents, particularly in the context of birth certificates and gender recognition. McConnell, a transgender man who gave birth, fought to be listed as the "*father*" or simply "*parent*" on the birth certificate rather than being automatically listed as the "*mother*". The courts ruled against him, stating that the law requires the person who gives birth to be registered as the "*mother*", regardless of their gender identity.

To address such issues in UK law, the following pieces of legislation would need to be amended to allow non-binary and transgender individuals to be recognised as "*parents*" rather than being forced into binary categories of "*mother*" or "*father*". Below are specific laws that could be amended based on McConnell's case:

5.7.1. Human Fertilisation and Embryology Act 2008

5.7.1.1 Section 33: Status of the Mother

This section states that the person who carries and gives birth to a child is considered the "*mother*" for legal purposes, regardless of gender identity.

- Proposed Amendment: Modify this section to allow non-binary and transgender individuals who give birth to be recorded as "*parent*" or a gender-neutral term, rather than "*mother*".
- Amended Text: "*The person who gives birth to a child, regardless of their gender identity, shall be referred to as the 'parent' on the child's birth certificate, unless they request to be referred to as 'mother' or 'father'*".

5.7.1.2 Section 35: Status of the Father

This section presumes that the husband of a woman who gives birth is the child's father, without accounting for non-binary or transgender parents.

- Proposed Amendment: Allow for non-binary individuals to be recognized as "*parent*" rather than "*father*".
- Amended Text: "*In circumstances where a person gives birth, their partner, regardless of their gender identity, may be recorded as 'parent,' 'mother,' or 'father,' as requested*".

5.7.2 Section 12 Gender Recognition Act 2004: Effect on Parenthood

Section 12 of the Gender Recognition Act states that obtaining a Gender Recognition Certificate does not affect the status of the person as the mother or father of a child born before the certificate was issued. This section effectively means that even after legal gender recognition, an individual is still treated as the "mother" or "father" based on their biological role in reproduction.

- Proposed Amendment: This section could be amended to allow transgender and non-binary parents who give birth after obtaining a Gender Recognition Certificate to be recognised as "parent" instead of "mother" or "father".
- Amended Text: "*Where a person who has been issued a Gender Recognition Certificate gives birth to a child, they may be listed as 'parent' on the birth certificate rather than 'mother' or 'father,' as per their request*".

5.7.3 Section 10: Registration of Birth, Births and Deaths Registration Act 1953.

This section requires the registration of a child's mother and father on the birth certificate, using binary gendered terms that exclude non-binary or transgender individuals.

- Proposed Amendment: Modify the law to allow non-binary or transgender parents to be recorded as "parent" or under a gender-neutral title.
- Amended Text: "*Upon the registration of a birth, the parent or parents of the child may be listed as 'mother,' 'father,' or 'parent,' as per their gender identity and request*".

5.7.4 Section 66 Adoption and Children Act 2002: Meaning of "Adoption" and "Adoptive Parent"

The Act uses gendered terms like "adoptive mother" and "adoptive father", which do not accommodate non-binary identities.

- Proposed Amendment: Update the language to use "adoptive parent" instead of "adoptive mother" or "adoptive father" allowing for the recognition of non-binary individuals.
- Amended Text: "*An adoptive parent may be any individual, regardless of their gender identity, and shall be listed as 'parent,' 'mother,' or 'father' as they prefer*".

Amending each of these laws would provide non-binary people with explicit legal recognition and protection across a range of areas, including discrimination, marriage, pensions, and gender recognition. These amendments would ensure that UK law reflects the full diversity of gender identities and guarantees non-binary individuals the same rights and protections as those who are male or female.

It is hoped that the above drafting examples will give policy makers ideas in terms of how non-binary identity may be written into legislation in a way that is possible and necessary. The law can be reconceptualised in a more inclusive way that helps *all* genders, not just some, whether it be by 'slow law', adding a third gender, or even the removal of gender/sex categories in some circumstances.

6. Conclusions

The integration of non-binary identities into UK legislation is not only feasible but also necessary to foster a more inclusive legal system. Non-binary discrimination is not illusory. The current legal framework, which predominantly recognises binary gender categories, inherently marginalises those who identify outside of these traditional boundaries. The UK falls far behind other progressive countries by constantly rejecting the drafting of non-binary rights into law. By implementing legislative changes such as the addition of a third gender option, the expansion of the "*gender reassignment*" category, and the potential decertification of gender altogether, the law could better reflect the diversity of gender identities. This would ensure equitable protection and recognition for all individuals, regardless of gender identity.

The proposed legal reforms are not without challenges, particularly when considering the broader societal and political climate in the UK. While more far-reaching approaches such as decertification of gender might encounter resistance, incremental reforms, such as updating the Equality Act 2010 and the Gender Recognition Act 2004, provide practical pathways forward. These reforms would provide explicit legal recognition for non-binary individuals while preserving the existing rights framework. The introduction of gender-neutral terminology in key areas like pensions, marriage (not just civil partnership), and parenthood would further ensure that non-binary people are not disadvantaged in these key areas of life.

Ultimately, the law must evolve to accommodate the lived realities of individuals whose genders lie beyond the binary. Recognition under the law would not only improve access to justice, and equality but would also signal a broader cultural shift towards dismantling the constraints of a binary view of gender and the patriarchy. By adopting these proposed reforms, the UK could join other jurisdictions that have already made strides in recognising non-binary identities, promoting a legal system that is truly inclusive for all genders.