

Law Beyond the Binary: Gaps in Legal Recognition of Non-Binary People in the UK and Indonesia

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An estimated 80 million people globally are non-binary,¹ an umbrella term encompassing individuals whose gender identity² lies either outside of or between those of women and men. The term also includes individuals who do not experience a gender identity at all or identify their gender as fluid.³ Conversely, a gender-binary system is one that dichotomously classifies gender into two distinct forms and is therefore predicated on clear, fixed distinctions between the two.⁴ Despite the growing socio-cultural acknowledgment⁵ that an understanding of “gender” as simply a binary alternative of “female” and “male” does not correspond to documented lived experiences, legal recognition has lagged behind. In most countries, including Indonesia and England and Wales, on which this blog post focuses, non-binary people remain invisible in the law.

This blog post highlights the current absence of legal recognition for non-binary people in Indonesia and England and Wales.⁶ Specifically, we focus on the consequences of these legal omissions on access to adequate legal identity documents, while also proposing possible avenues for reform. We begin by providing a brief sketch of the legal frameworks in each jurisdiction, before outlining a typology of modes of recognition adopted in other jurisdictions to date. We conclude with a discussion on the broader significance of challenging the legal enforcement of the gender binary for advancing gender equality. Indonesia and England and Wales represent two profoundly different—but equally instructive—legal landscapes: Indonesia, a pluralistic civil-law system shaped by Dutch codification, rich customary law (*adat*) traditions, and regional Sharia influences, contrasts sharply with England and Wales’ precedent-driven common-law framework.

The absence of recognition, including having to identify oneself with documents that do not bear one’s real experienced gender, can have significant psychological and practical consequences for people who find themselves outside the categories of ‘female’ and ‘male.’ Placing legal and social restrictions on gender expression can lead to gender dysphoria, a recognized condition often accompanied by long-term emotional distress, for which an incongruence between an externally “assigned” gender label and the individual’s internal experience is a key diagnostic criterion.⁷ Where non-binary individuals are restricted from accessing identity documents that adequately reflect them, they are consistently put at risk of harm through seemingly

¹ Based on a finding of 1% global average from Ipsos, *LGBT+ Pride 2021 Global Survey* (2021), p. 5 and

² Unlike “sex”, which refers to a set of biological physical characteristics, such as chromosomes, hormones, and reproductive processes, “gender” refers to practices, expectations, and roles culturally ascribed to individuals based on their sex, which are socially constructed and can vary across contexts and time: Lips, H. M. (2020). *Sex and gender: An introduction*. Waveland Press, p.7.

³ Monro, S. (2019). Non-binary and genderqueer: An overview of the field. *International Journal of Transgenderism*, 20(2-3), p. 1.

⁴ *Ibid.*

⁵ As one manifestation, in the 2021 Ipsos survey, the percentage of respondents identifying as non-binary rises to 3% (1% average) for respondents aged 18-25): Ipsos, *LGBT+ Pride 2021 Global Survey* (2021), p. 5-6.

⁶ We focus on the jurisdiction of England and Wales, rather than the country of the UK. The UK has three jurisdictions within it.

⁷ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed., text rev.)

innocuous everyday interactions—from routine dealings with State institutions to grocery store visits or travelling. While data-collection efforts to date have been limited, in a 2022 UK survey, 65.3% (n = 126) of non-binary respondents agreed or strongly agreed with the statement ‘my legal gender affects my everyday experiences’.⁸ Thus affirming our urgent call for the legal recognition of non-binary people in Indonesia and England and Wales.

Legal Framework in England and Wales

In England and Wales, identity documents are defined under Article 7 of the Identity Documents Act 2010. The term encompasses immigration documents, a UK or non-UK passport, a document that can be used in place of a passport, and a UK or non-UK-issued motor vehicle licence.⁹ Available gender markers are limited to male or female.¹⁰

The non-recognition of non-binary individuals can, perhaps, be seen as surprising against the backdrop of modest advancement in transgender rights in the jurisdiction. Historically, the UK did not legally recognise transgender or non-binary individuals, rendering both communities legally invisible. This changed following a 2002 court decision that found that the UK violated the European Convention of Human Rights (ECHR) by failing to legally recognise transgender people in their acquired gender.¹¹ Notably, the European Court of Human Rights (ECtHR) emphasised the international shift towards legal recognition for, specifically, post-operative transsexuals.¹² This judgement marked a change towards the legal recognition of transgender people who fall within the binary of ‘male’ or ‘female’. However, it placed legal emphasis on the medicalisation of gender transitions (as “sex changes”) at the cost of a broader undoing of binary and fixed understandings of gender. The judgement was important for providing access to care and recognition for transsexual persons in the UK, yet the decision created a conditional model of legal and medical acceptance that stays within the legal gender binary.

In 2004, the Gender Recognition Act was introduced in the UK, creating the framework for the legal change of gender from ‘male’ to ‘female’ or ‘female’ to ‘male’.¹³ Persons of either gender may apply for a Gender Recognition Certificate provided they meet various requirements, including medical reports on gender dysphoria and treatments.¹⁴ If successful, the applicant is permitted to use their acquired gender on all legal identity documents.¹⁵ The 2004 Act made significant strides for the legal recognition of transgender people who identify within the gender binary, enabling the

⁸ Hannah J. H. Newman and Elizabeth Peel, “An impossible dream? Non-binary people’s perceptions of legal gender status and reform in the UK” (2022) 13 *Psychology & Sexuality* p 138.

⁹ *Identity Documents Act 2010* Article 7(1).

¹⁰ House of Commons Library, Research Briefing: Non-binary gender recognition: law and policy (31 March 2022) p 12.

¹¹ *Christine Goodwin v The United Kingdom* [2002] 35 E.H.R.R. 18 paragraph 93.

¹² *ibid* para 84.

¹³ Gender Recognition Act 2004.

¹⁴ *ibid* Section 3, Schedule 1.

¹⁵ *ibid* Section 9, Schedule 1.

changing of sex on birth certificates from female to male and *vice versa*. Yet, this structure is based on binary understandings of sex. As such, the act still excludes legal recognition of non-binary people.

The Gender Recognition Act 2004 has been subject to scrutiny, with activists, the public, and academics proposing a system of self-identification of gender in place of a largely medical model.¹⁶ Public discontent with the UK system was illustrated by a 2021 petition, which called for non-binary gender identity to be recognisable under Gender Recognition Certificates. Despite 140,768 signatures, the government reiterated its stance, stating there are no plans to change the Gender Recognition Act 2004. This statement marked the UK Parliament's continued rejection of legal non-binary recognition.¹⁷ Such attitudes are further affirmed in the 2021 case, *R (on the application of Elan-Cane) v Secretary of State for the Home Department*, which sought judicial review of Her Majesty's Passport Office policy to exclude "X" identification markers on UK passports.¹⁸ Interpreting ECHR Articles 8 (Right to respect for private and family life) in conjunction with Article 14 (Prohibition of discrimination), the Supreme Court found there was no positive obligation on the state to provide an "X" marker. The Court based its decision on the wide margin of appreciation afforded to States which have ratified the ECHR.¹⁹

By contrast to the position in England and Wales, the Scottish Government has pursued more progressive reform towards legal gender recognition. By introducing the Gender Recognition Reform (Scotland) Bill 2022 and establishing a Non-Binary Working Group,²⁰ the government has taken tangible steps to address the systemic problems and oppression faced by non-binary people in Scotland. Recommendations 24-26 of the Gender Recognition Reform Bill 2022 notably urged [the government to commission] expert research towards non-binary legal recognition, to move away from unnecessary gendered terminology in future legislation, and to revise and remove unnecessary gender markers on identity documents.²¹ Contrary to the UK Parliament, the Scottish government has approached the legal recognition of non-binary people explicitly and as a matter of non-discrimination and human rights, acknowledging the gaps in previous legislation and proposing reform to secure the legal identity rights of this population. At the time of writing, this progressive approach has been halted by strategic litigation applicable to both Scotland and the rest of the UK.²²

¹⁶ C Fairbairn, M Gheera, D Pyper and P Loft, *Gender recognition and the rights of transgender people* (House of Commons Library Briefing Paper, Number 08969, 22 July 2020), p 3.

¹⁷ Make non-binary a legally recognised gender identity in the UK' (UK Government and Parliament Petitions, 26 October 2021) <https://petition.parliament.uk/petitions/104639> accessed 25 February 2025.

¹⁸ *R (on the application of Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56 paragraph 1.

¹⁹ *ibid* para 26 - 27.

²⁰ Fairbairn, Gheera, Pyper and Loft (no 15) p 5.

²¹ *Non-Binary Working Group Report and Recommendations* (Scottish Government, March 2022), p 36, 38, 40.

²² In *Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16, the UK Supreme Court allowed an appeal, finding that the Scottish Government's guidance regarding the interpretation of "Sex" in the Equality Act 2010 and its relationship to the Gender Recognition Act 2004 was unlawful and incorrect

Human rights laws provide a potential legal framework for the recognition of non-binary identity rights, but have thus far failed to secure rights for non-binary people in England and Wales. Addressed in the 2022 Thematic Report on Legal Gender Recognition in Europe, legal gender recognition is undeniably a human rights issue.²³ Gender identity falls within the scope of Article 14 of the ECHR, making it a protected characteristic that ensures the right to non-discrimination.²⁴ Moreover, Article 8 secures the right to respect for private and family life as it concerns gender self-determination.²⁵ The right to legal gender recognition and the corresponding obligation of the State to secure this right were established in *Goodwin v. The United Kingdom* (2002).²⁶ In implementing legal gender recognition procedure, the ECtHR refer to Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on the measures to combat discrimination on grounds of sexual orientation or gender identity.²⁷ Recommendation 21 outlines that the Member State should take the appropriate measures to secure full legal recognition of a person's gender reassignment in all areas of life, emphasising the need to secure accessible, transparent, and quick changes of gender in official documents.²⁸

UK residents are entitled to rights codified under the ECHR because the UK is a signatory to the ECHR and has incorporated its provisions under the Human Rights Act 1998. However, even the ECHR appears to follow a binary understanding of gender in its exclusive language of “men” and “women”, calling into question the rights and entitlements of non-binary persons. In addressing this gap, the Council of Europe acknowledges the choice of some Member States to recognise non-binary or gender-neutral registration, highlighting the role of courts in leading to legislative change.²⁹ In light of the UK rejecting legislative change, Employment Tribunal case, *Ms R Taylor v Jaguar Land Rover Ltd* [2020] ET 1304471/2018, held that a person who identifies as gender-fluid and non-binary has the protected characteristic of gender reassignment under Section 7(1) of the Equality Act 2010.³⁰ The Equality Act 2010 is a central piece of UK legislation that provides statutory protection against unlawful discrimination based on protected characteristics.³¹ It directly links to the fundamental aim of equality and non-discrimination as outlined in the Human Rights Act 1998. Though not binding in precedent, this judicial interpretation extended the Equality Act 2010 protections to a non-binary individual, illustrating the role of domestic tribunal interpretation. However, the 2025 Supreme Court ruling,

(p 23). This case is a piece of strategic litigation brought forward to halt the statutory guidance provided by Scottish Ministers.

²³ Council of Europe ‘Thematic Report on Legal Gender Recognition in Europe’ (Council of Europe 2022), p 14 para 21.

²⁴ *ibid.*

²⁵ *ibid* p 14 para 22.

²⁶ *ibid*

²⁷ *ibid* p 16 para 26.

²⁸ Committee of Ministers, *Recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity* (CM/Rec(2010)5, 31 March 2010) p 4/6.

²⁹ Council of Europe (no 22) p 35 para 58.

³⁰ *Ms R Taylor v Jaguar Land Rover Ltd* [2020] ET 1304471/2018 para 177.

³¹ Equality Act 2010 para 12.

mentioned above, on the meaning of ‘women’ under the Equality Act has halted this line of judicial reform.³²

The Council of Europe prioritises the margin of appreciation of Member States as it concerns the legal recognition of non-binary gender identities, honouring State discretion over the rights of non-binary people. The European agenda acknowledges the option of ‘X’ available in the Netherlands, Iceland, and various jurisdictions, shifting focus to an inclusive dialogue regarding the most appropriate measures for securing non-binary recognition and an ongoing review of the necessity of gender markers in official identity documents.³³ Here, ideas of non-binary rights progression are not rejected, recognising the dynamic evolution of human rights protections and the need for conceptualisations of human rights to evolve in accordance with scientific understandings, social norms, and the genuine protection of all (transgender and intersex) persons.³⁴ In Europe, although non-binary legal identity is considered a human rights issue, such rights have not been realised across Europe due to exclusionary language in the ECHR and the margin of state discretion concerning non-binary recognition. However, as human rights protections continue to evolve in Europe, this remains a possible approach for future reforms.

Legal Framework in Indonesia

Notwithstanding Western assumptions that gender is strictly binary, fixed, and defined corresponded to an individual’s sex,³⁵ many cultures³⁶ have traditionally recognized three or more genders. In Indonesia, the Bugis people in Southern Sulawesi recognise three genders other than female (*makkunrai*) and male (*oroanne*): *bissu*, *calabai*, and *calalai*. *Calabai* are born with female bodies, but traditionally take on male gender roles. *Calalai* are born with male bodies, but take on female gender roles. Non-binary in early Bugis cosmology, *bissu* are traditionally considered powerful holy people with the ability to shift between genders and to embody capacities associated with multiple genders.³⁷ A lesser-known people in Central Sulawesi, the Toraja, also

³² *Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16 addressed the interpretation of the Equality Act 2010 in conjunction with Section 9 of the GRA, which affirms that a “person’s gender becomes for all purposes the[ir] acquired gender” after attaining a Gender Recognition Certificate. The Supreme Court found that “sex”, “man”, and “woman” in the Equality Act refer to biological sex. Consequently, transgender women are not legally recognized as women under the Act and do not have entitlements under this category of protected characteristic. See *Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16 para 266.

³³ Council of Europe (no 22) p 40 para 74.

³⁴ *ibid* p 18 para 31.

³⁵ Peter H., et.al, *Nonbinary Gender Identities. Gender, Sex, and Sexualities: Psychological Perspectives* (OUP 2018), p. 60; The White House, ‘Defending Women from Gender Ideology Extremism and Restoring Biological Truth to The Federal Government’ <<https://www.whitehouse.gov/presidential-actions/2025/01/defending-women-from-gender-ideology-extremism-and-restoring-biological-truth-to-the-federal-government/>> accessed 15 May 2025.

³⁶ For example, First Nation communities; Chuckchi in Siberia, Bakla in the Philippines, Hijra in India, and Quariwarmi in Peru, see further in Robinson M. ‘Two-spirit and bisexual people: different umbrella, same rain’ (2017), *Journal of Bisexuality* 17(1), p. 7–29.

³⁷ Peter, H. (n. 3, p. 69).

recognise a third gender called *to baruke*.³⁸ While we acknowledge that using ethnographically Euro-centric terms for these identities, such as ‘non-binary’, is problematic,³⁹ their histories are instructive in highlighting the legal gender binary as historically and geographically specific, rather than “natural” or inevitable.

Perhaps surprisingly, however, given its culture and history, the legal position on access to identity documents reflecting non-binary gender identities in Indonesia is largely the same as it is in England and Wales. Under Dutch colonial rule, the colonial government classified indigenous belief systems outside Christianity and Islam as “*geen goddienst*” (non-religion).⁴⁰ By doing so, the colonial government enforced conversions and simultaneously imposed Western gender binaries, targeting non-cis identities like the Bugis *bissu* by labelling them “amoral” and subjecting them to forced assimilation.⁴¹ Concurrently, the rise of reformist Islamic education also contributed to narrowing permissible gender expression in *pesantren*.⁴² These dual forces – colonial (Christian) religious policies and conservative (Islamic) religious interpretations – established and entrenched cisgender expectations, which persisted into what Julia Suryakusuma coined as the New Order era’s⁴³ “state motherhood” – an ideology under Soeharto, which continues to shape Indonesian gender norms

³⁸ Anthropologist Hetty Nooy-Palm says Torajans believe the most important religious leader in their culture is a woman (*burake tattiku*) and a man dressed as a woman (*burake tambolang*), see Nooy-Palm, H., *The Sa’dan-Toraja* (Brill, 1979), p. 282.

³⁹ In the late 1800s, European and American anthropologists took a keen interest in gender diversity within Indigenous communities in North America, producing extensive—yet deeply problematic—writings on individuals they labeled as “*berdache*”. This term, along with the scholarship surrounding it, reflects ethnocentric and harmful perspectives. Not only is “*berdache*” a derogatory and misleading label (originating from an Arabic term associated with sex work), but the colonial framework imposed by these scholars also misrepresented Indigenous gender systems. By interpreting them through Western concepts of gender and sexuality, they reinforced a distorted, outsider view of Indigenous cultures. Moreover, this academic curiosity existed alongside brutal colonial policies, including the forced removal of Indigenous children to residential schools, coerced sterilizations, violent suppression of cultural practices, and systemic genocide. Thus, the anthropological discourse on gender variance was not merely biased but complicit in broader structures of oppression. See, e.g., Epple C., Coming to terms with Navajo Nádleehí: a critique of Berdache, “gay,” “alternate gender,” and “two-spirit”. *Am Ethnol* 25(2) (1998), pp. 267–290. The contemporary umbrella term “Two-Spirit” represents the preferred nomenclature among many First Nations and Native American communities, having originated from these cultural contexts. It is important to note, however, that numerous Indigenous nations maintain their own specific terms for gender-diverse identities. Furthermore, cultures beyond North America possess distinct terminology and conceptual frameworks for what might be considered analogous to two-spirit identities within their respective societies. The linguistic and cultural expressions of gender diversity thus vary significantly across different Indigenous groups and global cultures. (e.g., *nádleehí*—Navajo; *niizh manidoowag*—Ojibwe; *Bote/Bate/Bade*—Apsáalooke). See, e.g., McNabb, C., *Nonbinary gender identities: History, culture, resources* (Rowman & Littlefield 2017), pp. 8-9; Robinson M. (n. 4).

⁴⁰ Yulianti, *The Birth of Buddhist Organizations in Modern Indonesia, 1900–1959* (2022) 13 *Religions* 217, p. 3.

⁴¹ Frances Gouda, *Dutch Cultures Overseas: Praktik Kolonial di Hindia Belanda, 1900–1942* (Jugiarie Soegiarto & Suma Riella Rusdiarti trans, Serambi Ilmu Semesta 2007), p. 277.

⁴² Islamic boarding schools.

⁴³ New Order Era or *Era Orde Baru* refers to the period in Indonesian history from 1966 to 1998, when General Suharto seized power after the tumultuous events of 1965 and established an authoritarian regime.

today.⁴⁴ This is why, despite the long-standing cultural traditions of non-binary identities in some of its communities, the jurisdiction as a whole lacks legal recognition of non-binary genders.

On all legal documents in Indonesia, including the *Kartu Keluarga* (KK, or family card),⁴⁵ *Kartu Tanda Penduduk* (KTP, or Indonesian citizen identity card),⁴⁶ *Akta Kelahiran* (birth certificate),⁴⁷ *Akta Perkawinan* (marriage certificate),⁴⁸ *Surat Izin Mengemudi* (SIM, or driver's license),⁴⁹ and *Paspor* (passport),⁵⁰ only two gender markers are available: female and male. To date, public debate in Indonesia has focused on sexual orientation, with no focus on the rights of non-binary people. However, issues concerning non-binary people arose when a non-binary student at Hasanuddin University went viral on social media for his confession of being non-binary in 2022. In response, the student was expelled and subjected to online bullying. Gender activist Tunggal Pawestri criticized the educator's actions and highlighted the need for universities to embrace gender diversity.⁵¹ The Deputy Chairman of Commission X of the Indonesian House of Representatives (DPR RI), Dede Yusuf, also responded to the incident, criticizing the incident and stating that the student should not have been expelled.⁵²

⁴⁴ Afkar Aristoteles Mukhaer, 'Kolonialitas Gender: Interpretasi Agama dan Warisan yang Dirawat' (CRCS UGM, 20 January 2025) <[://cracs.ugm.ac.id/kolonialitas-gender-interpretasi-agama-dan-warisan-yang-dirawat/](https://cracs.ugm.ac.id/kolonialitas-gender-interpretasi-agama-dan-warisan-yang-dirawat/)> accessed 16 June 2025.

⁴⁵ Art. 1(13) Act No. 23/2006 about Civil Administration that amended by Act No. 24/2013 (*Pasal 1 Ayat 13 Undang-Undang (UU) Nomor 23 Tahun 2006 tentang Administrasi Kependudukan, yang telah diubah dengan Undang-Undang Nomor 24 Tahun 2013*) mentioned that KK contains the structure of the family and their identity—noting it always change when there are something change in the family.

⁴⁶ Art. 64 of Act concerning Civil Administration mentioned that there are only 2 options for the KTP—whether male or female.

⁴⁷ Art. 27(1) of Act concerning Civil Administration ruled that every birth must be reported by the Resident to the nearest (Instansi Pelaksana) no later than 60 (sixty) days after the birth. They decide the sex right after the labor by looking the biological characteristic—whether female or male.

⁴⁸ Art. 1 Act No. 1/1974 about marriage that has been updated by Act No. 16/2019 (*Pasal 1 UU No. 1 Tahun 1974 tentang Perkawinan, yang telah diperbaharui menjadi UU No. 16 Tahun 2019*), marriage is a physical and mental bond between a man as husband and a woman as wife.

⁴⁹ SIM aligns with KTP since the administrative requirements for driver's license is KTP, issuance provided in Art. 9(1)(a)(2) National Police Chief Regulation Number 5 of 2021 concerning the Issuance and Marking of Driver's License (*Pasal 9 Ayat 1 poin a(2) Peraturan Kapolri Nomor 5 Tahun 2021 tentang Penerbitan dan Penandaan SIM*).

⁵⁰ Paspor aligns with KTP and Akta Kelahiran mentioned in Art. 4(1) Regulation of the Minister of Law and Human Rights Number 8 of 2014 concerning Ordinary Passports and Travel Letters as Passports (*Pasal 4 Ayat 1 Peraturan Menteri Hukum dan HAM Nomor 8 Tahun 2014 tentang Paspor Biasa dan Surat Perjalanan Laksana Paspor*).

⁵¹ 'Mahasiswa Unhas Dirisak Karena Mengaku Non-Biner, "Para Pendidik Seharusnya Perbarui Ilmu Tentang Gender"' (BBC News Indonesia) <<https://www.bbc.com/indonesia/indonesia-62661710>> accessed 3 March 2025.

⁵² Santoso B and Ardiansyah N, 'DPR Respons Soal Insiden Pengusiran Mahasiswa Yang Ngaku Non Biner Di Universitas Hasanudin' (suara.com, 21 August 2022) <<https://www.suara.com/news/2022/08/21/122712/dpr-respons-soal-insiden-pengusiran-mahasiswa-yang-ngaku-non-biner-di-universitas-hasanudin>> accessed 3 March 2025.

Non-binary people in international law

The right of non-binary persons to legal recognition is not expressly recognised in any existing multilateral treaty. The most authoritative statement articulating such a right is found in the Yogyakarta Principles, non-binding standards on the application of international human rights law to sexual orientation and gender identity and expression.⁵³ Under Principle 3, persons of diverse gender identities are entitled to recognition before the law as an integral aspect of their self-determination, dignity, and freedom.⁵⁴ States are urged to take legislative, administrative, and other measures to legally recognise each individual's self-defined gender identity and ensure procedures support State-issued identity papers that accurately indicate the person's gender/sex.⁵⁵ While the limitations of this soft-law document are evident, the principles chart a direction for legal reform towards the realisation of non-binary rights to legal gender recognition, including access to adequate identity documents.

Moving Forward

As of February 2025, 20 countries and 19 sub-national regions have adopted some form of legal recognition of non-binary individuals.⁵⁶ Experiences from these jurisdictions can provide both directions for change and lessons learned. The forms and scope of recognition adopted vary widely. Notably, many of the jurisdictions—including Belgium, Colombia, Denmark, and Malta—offer a gender-neutral marker on documents but not full legal recognition of “non-binary” gender operationalised across all areas of the law. In doing so, the gender-neutral marker means that the gender or sex is merely “undeclared” on the document. Only a few jurisdictions—including Chile, Iceland, India, and the U.S. state of Oregon—fully recognise non-binary individuals as a distinct legal gender. This distinction is crucial, if often overlooked, as it highlights the limitations of solely introducing an “X” option on documents. There are further jurisdictional differences as it pertains to requirements for recognition, such as Argentina and Iceland requiring self-declaration, and the Netherlands and the majority of Canada requiring medical evidence.⁵⁷ Jurisdictions must also consider whether the gender-neutral marker is available at birth or only through a change later in life, and the designations available—for instance, “Diverse” in Germany or “Not specified” in Australia.⁵⁸

Four distinct models of recognition can thus be identified: two extend merely to providing options for gender-neutral identification in identity documents, and two propose a more meaningful reform to the binary understanding and operationalisation of legal gender:

⁵³ ‘The Yogyakarta Principles plus 10 (YP+10)’ (Yogyakarta Principles.org) <www.yogyakartaprinciples.org> accessed 20 November 2024.

⁵⁴ Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity (adopted 9 November 2006) (Yogyakarta Principles), p. 11-12.

⁵⁵ *ibid.*

⁵⁶ Equaldex, ‘Legal recognition of non-binary gender’ (*Equaldex.com*, n.d.) <<https://www.equaldex.com/issue/non-binary-gender-recognition>> accessed 1 March 2025.

⁵⁷ *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 (AUS).

⁵⁸ *ibid.*

Changes to documents only

1. Allowing for an “X” option on documents;
2. Removing gender markers from documents;

Changes to the legal recognition of gender

3. Recognition of a third legal gender, “non-binary”, or more;
4. Removing the State’s role in certifying legal gender altogether.

Conspicuously absent from the debate has been attention to what non-binary individuals themselves identify as best protecting their rights. While there has been only limited effort to collect such data, in the UK, a 2022 survey found that 86.5% (n = 167) of non-binary respondents believed gender need not be specified on official documents, 85.5% (n = 165) were against the current system of compulsory assignation female or male at birth, and 57% (n = 110) were in favour of abolishing legal gender altogether, albeit in follow-up interviews this was construed as an ‘impossible dream’.⁵⁹ Concerning mere document markers, a different 2016 study on the experiences of non-binary people in the UK found that 78% (n = 598) of respondents would like to have their legal gender/sex recorded as something other than ‘female’ or ‘male’ on at least some identification documents.⁶⁰ Respondents described that recognition in documents would be significantly validating, affirming their experience, evoking feelings of legitimacy, and preventing feelings of gender dysphoria in their daily life.⁶¹

We suggest that states utilize these proposals from the non-binary community, either to operationalise a non-binary understanding of gender throughout legal systems or to abolish the official certification of gender altogether. These changes could chart a progressive model for rethinking the role of gender in our legal systems more broadly. This, we argue, would better reflect the global history of gender as a social identity more complex than current legal regimes maintain. While abolition of official certification of gender has not been adopted in any jurisdiction to date, the role of the State in certifying gender has also been amply questioned in some branches of feminist legal scholarship. The Future of Legal Gender Project’s final report, for instance, proposed nine practical principles on which decertification could be based, while retaining the benefits of gender identification for data collection and a legal right to organise gender-specific provisions for specific purposes.⁶² Authors have further explored the implications of decertification in areas including equal pay law⁶³ and

⁵⁹ Hannah J. H. Newman and Elizabeth Peel, ‘“An impossible dream”? Non-binary people’s perceptions of legal gender status and reform in the UK’ (2022) 13 *Psychology & Sexuality* 138. Comparable data could not be identified for Indonesia.

⁶⁰ Vic Valentine, ‘Non-binary people’s experiences in the UK’ (Scottish Trans Alliance, 2015) <<https://www.scottishtrans.org/wp-content/uploads/2016/11/Non-binary-report.pdf>> accessed 21 February 2024, p. 68.

⁶¹ *ibid* p. 73.

⁶² Cooper, D et al., *Abolishing legal sex status: The challenge and consequences of gender-related law reform* (Future of Legal Gender Project, 2022) <<https://www.kcl.ac.uk/law/research/future-of-legal-gender-abolishing-legal-sex-status-full-report.pdf>> accessed 7 March 2025, p. 37-39.

⁶³ Grabham, E., ‘Decertifying Gender: The Challenge of Equal Pay’ (2023) 31 *Fem Leg Stud* 67.

provision of single-sex services, such as gender violence shelters.⁶⁴ A key argument for decertification is that compulsory registration of legal gender at birth plays an important role in legitimising a wide array of gendered stereotypical expectations and norms in the course of any individual's life; as such, its abolition would have benefits for gender equality more broadly.⁶⁵ Indeed, dispensing with gender as an element of legal personhood might better recognise the lived realities of gender as a complex identity diversely experienced and expressed, including by individuals who would readily identify as 'female' or 'male.'

In response to both proposals, there are two primary arguments: first, that departing from a binary legal gender system would be administratively complicated, due to the pervasiveness of the marker across legislation and government administration⁶⁶; second, that it would adversely affect the State's ability to counter gender-based discrimination against women.⁶⁷ In particular, the UK government has highlighted the potential impacts on sex- or gender-specific provisions including pensionable age, criminal offences defined as only committable against persons of a particular sex, and provisions within family law related to maternity.⁶⁸ We suggest that these concerns are unwarranted. With regards to pensionable age, the sex differentiation has already been phased out and only applies to individuals who reached State Pension age before 6 April 2016⁶⁹—these entitlements could simply be retained based on the individual's legal sex at attainment.⁷⁰ As it concerns criminal offences that reference the female sex, such as female genital mutilation,⁷¹ the only change required would be to remove the reference to women and girls, and retain the existing specification of the genitalia concerned, as is already the case with the offence of rape under the Sexual Offences Act 2003.⁷² Accordingly, to the extent that "mother"

⁶⁴ Renz, F., 'Gender-Based Violence Without a Legal Gender: Imagining Single-Sex Services in Conditions of Decertification' (2023) 31 *Fem Leg Stud* 43.

⁶⁵ Cooper, D. and Renz, F., 'If the State Decertified Gender, What Might Happen to its Meaning and Value?' (2016) 43 *Journal of Law and Society* 483, 487; Smith, J., et al., 'Roundtable on Deregistration and Gender Law Reform Internationally' (2023) 31 *Fem Leg Stud* 145, 152 (Pieter Cannoot); Cooper, D., Renz, F., 'Introduction to Special Issue: Decertifying Legal Sex—Prefigurative Law Reform and the Future of Legal Gender' (2023) 31 *Fem Leg Stud* 1, 6.

⁶⁶ In the UK context, this was the argument against a legal recognition of a non-binary gender identity advanced, among others by the Deputy Director of the Equality Hub in the Cabinet Office, in her witness statement in *R (Castellucci) v The Gender Recognition Panel and the Minister for Women and Equalities* [2024] EWHC 54 (Admin), para 34-55, and in the government's consultation document concerning a potential revision of the GRA: House of Commons Library, *Research Briefing: Non-binary gender recognition: law and policy* (31 March 2022) p. 12.

⁶⁷ Government Equalities Office, *Gender Recognition Act: analysis of consultation results* (22 September 2020), 23.2 Question 20.

⁶⁸ *R (Castellucci) v The Gender Recognition Panel and the Minister for Women and Equalities* [2024] EWHC 54 (Admin), para 34-55.

⁶⁹ House of Commons Library, *Research Briefing: Pensions in the UK* (13 November 2024).

⁷⁰ Save for binary reassignment cases provided for in s. 6A of Schedule 5 of the GRA.

⁷¹ Female Genital Mutilation Act 2003, s. 1.

⁷² The Sexual Offences Act 2003 introduces new provisions for sexual offences, aiming to define, prevent, and protect from harm from sexual acts. Section 1(1)(a) describes the offence of rape, stating that it is the intentional penetration of the vagina, anus, or mouth of another person(B) with his(A) penis. This section illustrates a legal reference to the genitalia of person B rather than a gender marker such as woman or girl, which removes reference to gender in addressing criminal offences where sex may be relevant.

is used in the context of pregnancy and birth, “birthing parent” could be adopted in its place. Importantly, information about the individual’s biological sex characteristics could and should remain available within a medical register to enable quality care. Within the realm of law, however, recognizing a non-binary understanding of gender, or abolishing legal gender altogether, would invite state administrative entities and courts into a more nuanced analysis of the causal link between the harm and the affected individual’s gender identity and expression,⁷³ arguably enhancing the efficacy of anti-discrimination law for everyone.

Conclusion

Far from being a marginal issue within the discussion on the role of law in addressing gender-based injustices, non-binary people’s demand for legal recognition has transformative potential – in the United Kingdom, Indonesia, and beyond. First, it highlights an urgent gap within the current international, regional, and domestic human rights regimes that leaves a vulnerable community without basic protections. Moreover, it invites a deeper rethinking of how gender is reflected and understood within the law, and whether our current, and in some cases ahistorical, approaches may, in fact, stand in the way of effectively dismantling gendered systems of oppression.

Undoing the legal reproduction of the binary understanding of gender is important for a further reason: it is central to the broader project of decolonisation. Numerous scholars have underscored that in much of the globe, the gender binary traces its history to policies imposed by European colonial powers and by subsequent decades of soft-power dependence, and they have documented the rich gender diversity that had thrived in pre-colonial societies around the globe.⁷⁴ Rather than an inevitable human universal, they posit, a binary notion of gender is a product of a historically specific idea from a small part of the world that became widely enforced through colonial coercion.⁷⁵ Grappling with these origins of prevailing ideas about gender, and exploring the alternatives they displaced, can and should be understood as an exercise in challenging Western-centric approaches to human rights law and to gender equality.

⁷³ Grabham explores this role of the causal link post-certification in the context of pay discrimination: Grabham, E., ‘Decertifying Gender: The Challenge of Equal Pay’ (2023) 31 *Fem Leg Stud* 67.

⁷⁴ For an overview, see for example: Ballestin, L., ‘Gender as Colonial Object’, (2018) Public Seminar <<https://publicseminar.org/2018/07/gender-as-colonial-object/>>.

⁷⁵ *Ibid.*