Do we need a legal gender?

Anne Phillips[1]

In many circles today, any talk of gender *de*certification will immediately start a conversation on gender *self*-certification. More specifically, it will evoke views about how easy or hard it should be made for people legally to transition from one gender to the other and the merits and dangers of this. There are multiple jurisdictions where that transition is simply impossible, where one can attempt to live – at some risk – in an acquired gender, but cannot change the legal sex status assigned to one at birth. In others, including the UK, it is now possible for those who have transitioned from male to female or female to male to be issued with a gender recognition certificate in their new identity, but this has typically been subject to a medical diagnosis of gender dysphoria and prolonged period of living in the acquired identity. In the UK's *Gender Recognition Act* (2004) there is also what became known as the 'spousal veto': if your marriage partner is unwilling to remain married to you after transition, you may only apply for an interim certificate, with the full certificate available only if and when the marriage is later annulled.

The delays and medicalisation and requirement to present oneself as suffering a form of mental illness have been much criticised, but a recent two-year consultation on reforms to ease the process produced much heat and little change. The initiative has stalled in England and Wales, with the dominant view in the Conservvative Party now firmly against reform. The Labour Party remains committed to modifying the current 'intrusive, outdated and humiliating' arrangements, but rejects self-certification and asserts a firm distinction between biological sex and social gender.[1] In Scotland, by contrast, the Parliament has passed legislation providing for a form of self-certification, reducing, among other things, the requirement to live in the acquired gender from two years to three months, and - perhaps most controversially - reducing the age at which one can certify one's gender to 16. (One can see why the legislation included this: the voting age for the Scottish Parliament is 16, and it seems odd to say that sixteen-year-olds are mature enough to vote but not to know their own gender identity; but worries about young people making life-changing decisions at too early an age have figured large in the objections to self-certification.) At the time of writing, the UK government has invoked previously unused powers to block this legislation, arguing that it conflicts with equality protections applying across Great Britain. The Scottish Parliament has petitioned for a judicial review of this; and the Advocate General for Scotland (acting for the UK Government) has refused that petition.[2]

As anyone who has dipped a toe in the debates about self-certification will know, they have generated highly polarised and often distressingly angry counter-positions, particularly, if somewhat surprisingly, among feminists. One side conjures up scenarios of multiple men declaring themselves female in order to prey on vulnerable girls and women, edging towards the view that biology is indeed destiny, and that only those declared female at birth can ever claim the name woman. The other side responds with accusations of transphobia. In this context, it comes as a great relief to read Davina Cooper's article on 'Decertification' and the

---

Anne Phillips is Professor Emerita at the London School of Economics, where she was previously Graham Wallas Professor of Political Science. Her most recent book, *Unconditional Equals*, was published by Princeton University Press in 2021.

associated report from the *Future of Legal Gender* project that she has worked with in recent years.[3]

Relief, because while *de*certification is an even more radical proposal, the larger focus on what it might mean to dismantle the entire machinery of legal sex and gender helps one think beyond the currently over-heated debate. For myself, I confess that when I first heard about the research project, I thought it interesting but somewhat wacky: asking us to think so far out of the box as regards the current legal framework that it was hard to connect to any of the pressing issues of sex and gender. In the event, I have found the work enormously thought-provoking, both on the specific issue of whether we should continue to have sex marked on our passports and birth certificates, and the wider question of why and in what circumstances we need legally specified identities. The work also provides some compelling thoughts about the challenges of moving from a long established legal tradition in which we take it for granted that we are assigned a sex at birth, to something that may better approximate the ways we currently live or would prefer to be living.

Among the many points Cooper makes in exploring the possibilities of decertification, the one that most stopped me in my tracks is the contrasting treatments of sex, race, and religion. Why do we consider it so obvious and uncontroversial to be labelled male or female at birth, when we would repudiate any suggestion that the state should assign us a specific racial, cultural or religious identity and expect us to remain in that for life? There *are* states that do this—there used to be significantly more—but most of us would find it abhorrent to be assigned a legally-policed racial identity, based on judgments made (by someone else) about the precise colour of our skin. Most of us would also object to any proposal for stamping us at birth with a particular cultural or religious identity, for while many willingly embrace the cultural traditions or religious beliefs of their parents, many others do not, and even those who do so would mostly resist the idea of an identity assigned by others. Sex is not, as Cooper notes, an 'unequivocally stable and binary foundation' (2022, 134), but something that can change in intended and unintended ways over the course of one's life. So what, if anything, makes it the exception?

The question suggests a larger one: why do we need any of our identities to be recognised in law? We all have identities—national, cultural, gendered, racial, sexual, political—some of which we take for granted, some we care about deeply, some we try to disown, but why and in what circumstances should any of them be *legal* identities? One answer is that in being given the status of law, they provide us with rights and protections. This is part of what citizenship does: if you are legally the citizen of a specific country, you are free to live there, can claim the protection of its legal system, and access more of its facilities than those who are simply travelling through. We might dream of a world without borders and countries, and then indeed we would not need this particular legal identity, but that really is beyond what most of us can currently imagine.

Marriage, too, provides rights and protections. If you are legally married in the UK, or have a civil partnership, you will benefit from certain inheritance tax advantages over those who are simply cohabiting; you will be better protected in the division of joint property in the event of later separation; if a father, you will have more secure access to your children than if unmarried; and so on. (It is because of the added protections associated with marriage that there is concern about the situation of Muslim women in the UK, many of whom marry only

in a religious ceremony, and do not then qualify for all the legal protections if they later divorce.) But *should* marriage carry this extra weight? Many people, including Clare Chambers in *Against Marriage* (2017), argue that there should be no such discrimination between the married and the unmarried, between those who sign the register and assume the legal identity and those who simply live together; that while we do indeed need ways of legally ensuring parental rights and responsibilities, or an equitable division of resources between people who have previously shared their lives, these rights and protections should not depend on being legally married. Many people now refuse the legal status of married, which is not to say that they refuse to fall in love or live with those they love or have children with them. Abolishing the status of married is clearly not such a wacky idea. So why exactly do we need the legal status of 'male' and 'female'?

Cooper identifies a number of ways in which our lives could go better if we did not have this legally regulated status, the most general being that it could help further to reduce the tendency to think that who we are and what we can become is determined by the nature of our genitals, and could free us from some of the weight of gender expectations and norms. The most specific—which is where the proposal overlaps with self-certification—is that it would make procedures for formal gender transitioning redundant, and remove the pressure on those who identify as non-binary to make their choice between either female or male. But what of the rights and protections that might be lost in the process? Much of the critical opposition (to either de- or self-certification) has centred on issues of safety, and particularly the safety of women and girls. As summarised by Cooper, the claim is that 'in conditions of bodily exposure, women and girls relied on knowing that others present were female, and on being able to track the location of "men" and "boys"' (2022, 138-9). Having clearly defined sex identities is thought to provide important protections: against boys intruding on girls' spaces in school toilets; against men representing themselves as women in order to infiltrate women-only spaces in changing-rooms, prisons, and most troubling of all, women's refuges.

It is a bit disingenuous to suggest that ending clearly defined sex identities would remove important protections for girls in school, when much of the sexual harassment in schools, of boys as well as girls, takes place in currently segregated school toilets. The more substantial concern about self-certification is that equality law might require organisations to accept as a woman anyone who has legally certified herself as such, making it an act of illegal discrimination to refuse access to possibly dubious applicants. Cooper suggests that *de*certification could provide a more nuanced solution to this. Instead of it becoming a legally enforceable right for those bearing the relevant certificate to access a sex-specific facility, the management of access would depend (as in many instances it already does) on more contextual judgments. Those running women's refuges, for example, would not (do not) ask to see a birth certificate in order to determine who gets access, but make their decisions based on what the woman in question recounts of her experiences. This of course has its own disadvantages, possibly substituting, as Cooper acknowledges, substantive scrutiny for formal membership. In the context of stereotyped views of 'women' and 'men', this might be less helpful to those who have transitioned than being able to produce a certificate. It is one of the really useful features of Cooper's contribution that it requires us to weigh up in more open-ended manner the possibilities and risks of all three scenarios: decertification, self-certification, or continuing as we are. What comes out clearly is that many of the scenarios conjured up in defence of continuing as we are are overstated. The real challenge is to

develop ways of managing access and securing protection that continue to secure the safety of the vulnerable, while including in that category also the vulnerabilities of those who have transitioned.

The other major concern about decertification is whether it would reduce our capacity to pursue initiatives for equality between women and men. If being male or female became entirely a matter of self-identification, with no formal regulation of the categories, this would surely blur the sharpness of data differences, making it harder to identify gender pay gaps, for example, or establish levels of violence specifically against women. It could also make it harder to implement programmes of positive action, all of which depend on knowing who falls into the currently under-represented category. The use of gender quotas, for example, as a (now common) way of addressing the under-representation of women in politics, depends on a binary distinction between women and men, though there is often a further set of more informal criteria to ensure that the women selected are ethnically diverse, and come from a range of class and occupational locations. Without a legal sex identity, how would one know who qualifies as a woman in the operation of any such quota? Cooper's response, as with her response to the issue of managing access to safe spaces, is that there are many possible ways of managing access beyond checking birth certificates. Opportunistic applicants for a gender-based selection process would almost certainly be ruled out if they were unable to demonstrate how their experiences as women qualified them to represent women as a marginalised category.

The parallel with race is clearly pertinent here, for we do not employ legally controlled membership for most categories of inequality, and this has not prevented us from either collecting data—relying inevitably on self-description—or pursuing anti-inequality policies. There is, perhaps, a bigger difference here than Cooper allows. The data on other protected characteristics named in the UK's *Equality Act* is less robust than that dealing with the legally certified categories of sex and age, and the reliance on self-description as regards ethnicity—which always means a certain proportion of respondents will refuse to say—can be a stumbling block in identifying disproportionality or discrimination. It is not, I think, an accident that employers have been more diligent in producing details of the gender composition of their work forces than in producing details of ethnic composition, for whatever they might claim about the difficulties of collecting data on the second, they can hardly make the same excuse as regards the first. More needs to be said about the knowledge-generation risks of moving to self-description, yet the general point Cooper makes surely remains valid. The fact that we have no system of legal certification for sexual orientation or ethnicity or social class has not of itself prevented initiatives to address inequality.

I am left with two main concerns. The first is less about the proposal and more about the way Cooper frames it as a form of prefigurative politics. She describes her approach as a deliberate departure from 'interest group politics and its account of women as a group with assumed-to-be-stable interests that need representation'; and endorses instead a feminist politics 'concerned with subordination, exclusion and exploitation, more generally, as exercises of power produced through differently constituted (and co-constituted) social relations' (2022, 134-5).This arguably slips into the kind of binary thinking she otherwise rejects, for thinking of women as a group that needs representation is *not* incompatible with a more general concern with subordination, exclusion and exploitation, nor with an analysis of differently constituted and co-constituted power relations. Challenging the stability and unity

of ‘women’s interests’ has been a staple of feminist literature on representation for decades, to the point where scepticism about women as an interest group has been almost coterminous with arguments for their better representation. The category of women is far too large and internally stratified for us to be able to attribute a clearly defined set of shared interests, and the dangers of attaching to the group ‘women’ the concerns and interests of a more privileged subset are by now well-rehearsed. It is widely accepted among feminists that the particular ways in which women experience subordination, exclusion, or exploitation vary: that they vary through time but also according to location in structures of caste, class and race; and that hierarchical stratifications between women can mean that many will not even recognise themselves in talk of exploitation or exclusion. It is also widely accepted that any representation of ‘women’ must attempt to capture something of the diversity of experience, and not adopt some women as a proxy for all.

This is perhaps just a minor nuancing of Cooper’s points. The larger objection is that prefiguration, understood as ‘acting as if’ things were already otherwise, is not always available as an option. Cooper calls on us to ditch the ‘static’ image of women as a group with interests that need representation, and to act as if gender and sex were already what they most definitely are not: that is, ‘elective, plural and unfixed’(2022, 145).I warm, as many will, to the suggestion of a world beyond fixed gender identities. I also agree with the general direction of prefigurative politics, which seeks to embed the character of the ultimate objectives in the ways in which we organise for these. But where women and the interests coded as female are so systemically under-represented—as they are in politics, policing, higher education, and the higher echelons of virtually every centre of power—I would strongly resist any premature abandonment of either ‘women’ or ‘women’s interests’. In some cases, that under-representation is actively maintained by what one can plausibly call institutionalised misogyny. Recent evidence about behaviour and attitudes in (the still heavily male) police or fire services points in this direction. In all cases, it is associated with an under-prioritisation of concerns coded as female, as in the persistent failure in the UK to provide well-resourced and affordable child-care, and the shocking failure to secure convictions for rape. This is not something one can challenge effectively through policies that act ‘as if’ gender were already elective and unfixed.

There is indeed a problem in organising as women in order to challenge the power of gender in our lives, but this is better understood as what historian Joan Scott calls the ‘constitutive paradox of feminism’: that in campaigning against the ways in which women are excluded, exploited, or regulated by gender, we almost inevitably call back into existence the very gender differences we reject. Scott puts it thus: ‘Feminism was a protest against women’s political exclusion: its goal was to eliminate “sexual difference” in politics, but it had to make its claims on behalf of “women” (who were discursively produced through “sexual difference”). To the extent that it acted for “women”, feminism produced the “sexual difference” it sought to eliminate’ (1997, 3-4). [4] My point (I think also Scott’s) is that we cannot easily evade this paradox. The solution is not to act ‘as if’ it did not exist, but to keep that simultaneity between both affirming and refusing gender always firmly in mind. So long as the binary women/men remains so central to the organisation of gender relations, we have to simultaneously work within and against it.

My second query is about the gap between the proposal, which is in essence about whether we have an accredited sex on our birth certificates and passports, and the hoped-for

transformations in our gender regimes. However much people may worry about who is a woman and who is a man, and the supposed difficulties of knowing which one is dealing with, the reality is that we rarely brandish our birth certificates around as a way of settling the question. As Cooper's own arguments indicate, we are not often asked for proof of our sex, and it is still unusual for people in the UK to carry identity cards around. Recognising how rarely certification is invoked helps calm some of the more exaggerated worries about the effects of decertification. But in reminding us how seldom we have recourse to a legal sex or gender identity, it also reminds us what a small part is played by legal status in the maintenance of gender identity.

It is society in its multifarious ways that polices us into particular ways of being male and female, not the fact that the state has given us a specific label. To return to the case for abolishing the legal status of marriage, it is not so much state-regulated marriage that sets women and men off onto such different paths as regards their employment possibilities, their earnings, security, or overall status in the world. Far more important is the experience of having children in a society that still deems the care of those children almost exclusively the responsibility of the mother. So while I agree with Clare Chambers that the legal status of marriage, along with the specific rights, protections and privileges currently accorded to the married, should be abolished, I do not think this will make much difference to the existing patterns of gender inequality. And while I welcome Davina Cooper's questioning of the presumed importance of a legal label for our sex/gender identity, and the presumed biological basis for knowing what is a woman and what is a mean, her own calming evidence and arguments leave me agnostic as to how much difference the legal change would make. What is clear, however, is that in proposing *de*certification, Cooper offers a wider vision and more fruitful direction than the more specific *self*-certification, and potentially cuts across the overheated polarities of the current 'culture wars'.

NOTES

[1] Labour vows to 'modernise, simplify and reform' Gender Recognition Act | Labour | The Guardian

[2] Answers and Note of Argument for Judicial Review of the Gender Recognition Reform (Scotland) Bill - GOV.UK (www.gov.uk)

[3] *Legalities* 2.2 (2022) included a contribution by Davina Cooper, 'Decertification: Researching a Prefigurative Legal Reform Proposal' (133-149) in which she outlined the project resulting in the publication: *Abolishing Legal Sex Status: The challenge and consequences of gender-related law reform*. Future of Legal Gender Project, Final Report future-of-legal-gender-abolishing-legal-sex-status-full-report.pdf (kcl.ac.uk).

REFERENCES

Chambers, Clare (2017). *Against Marriage* (Oxford University Press).

Cooper, Davina (2022) ‘Decertification: Researching a Prefigurative Legal Reform Proposal’ *Legalities* 2.2.

Scott, Joan Wallach (1997). *Only Paradoxes to Offer: French Feminists and the Rights of Man* (Harvard: Harvard University Press).