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SEX AND GENDER IN LAW

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This chapter considers the concepts of sex and gender in relation to law and particularly in relation to claims for self-identification of legal sex and the replacement of 'sex' as a protected characteristic under equality law by the concept of 'gender identity'. To date, discussions about self-identification of legal sex have taken place amongst a relatively small group of mainly global North states (e.g. in Europe, North America and Australasia), often with very different legal approaches to the overarching topic and to the individual legal issues within their jurisdictions. Those debates often centre on human rights, referencing human rights mechanisms in the international arena but with limited understanding or discussion of how those mechanisms work, the powers they hold, or how their jurisprudence influences the creation and interpretation of domestic law. At the national level in the United Kingdom, there has been misinterpretation, misunderstanding and misrepresentation of the law by lobbying groups and other bodies that is only now beginning to be addressed and corrected by legal authorities. This chapter sets out the current position and history of sex and gender in English and international law to demonstrate not only that, in both jurisdictions, 'sex' and 'gender' have been treated as two distinct concepts, but also that they should remain so. In doing so, we aim to contribute to greater knowledge and understanding of what the law is and how it should be applied.

Our sexed heritage

That men and women enjoy a largely equal status in law today is due to the efforts of feminist campaigners who sought to separate the inevitability of the sexed body from the socially-imposed gender norms that had been built upon it (Levine 1987; Smith 1990; Caine 1997; Rackley and Auchmuty 2019). By identifying and peeling back the layers of gendered norms and socialisation into those norms from their

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association with particular sexed bodies, feminists tried to remove the restrictions on women's access to rights enjoyed by men as well as the mechanisms which gave men rights and power *over* women.

Much of first-wave (nineteenth-century) feminist energy was devoted to showing that women's supposedly 'natural' predisposition to domestic life and their 'natural' inability to compete intellectually, creatively or physically with men were not due to an innate nature at all but the product of a sustained process of socialisation that began with the arrival of a female baby (e.g. Cobbe [1881] 2010). Only by challenging the assumption that women's biological make-up meant that their role should be confined to marriage, homemaking and rearing children – an argument developed in response to the separation of work and home after the Industrial Revolution – could feminists hope to change the legal customs that barred women from public life and disqualified them from participating in lawmaking as voters, Members of Parliament and lawyers. They realised they had to show that possession of a female body did not mean that a woman could not function in what were seen to be masculine fields of activity. It is the great achievement of first-wave feminism that they succeeded. Having managed to gain admission to an academic education, they quickly showed themselves intellectually the equal of men; and from there, they made their way into the professions. With the achievement of the vote for some women in the Representation of the People Act 1918 and the removal of the barrier of sex from the ability to work in any profession (except the church) in the Sex Disqualification (Removal) Act 1919, they achieved a measure of formal equality that went a long way towards breaking the link between sex and appropriate social roles for women.

The other goal of first-wave feminism was to expose and dismantle coverture, the doctrine that denied married women legal independence and failed to protect them (although it purported to do so) from their husbands. Through their research and writings, feminists demonstrated how coverture facilitated men's exploitation and abuse of their wives at every level – financial, physical, sexual and psychological (Norton 1854; Bodichon [1854] 1987; Cobbe [1868] 1995; Cobbe [1878] 1995). Feminist campaigning led to reforms granting married women control over their property (Married Women's Property Acts 1870 and 1882), rights to their children (Custody of Infants Acts 1839 and 1873) and some relief from male violence (Matrimonial Causes Act 1878). The clearest example of legal injustice being justified by 'nature' and biology was the sexual double standard that made every allowance for men's sexual 'needs' and desires while punishing female exercise of an independent sexuality and even the victims of men's licentiousness. Men's abuse was tolerated, even expected, because of men's physical make-up; women, being innately moral, were not supposed to be sexual at all. Here, too, first-wave feminists were active: in a rare example of cross-class protest against the sex bias in the law, first-wave feminists achieved the repeal of the Contagious Diseases Acts, which exposed prostitutes to forced medical examinations and imprisonment while their male clients were left unmolested (Butler [1870] 1984).

History shows that there is always a backlash after feminist gains. The idea that women's 'natural' place was in the home was quickly restored after the upheavals of

the First World War (1914–18) and again after the Second (1939–45; Wilson 1980). While the pressure was largely social, remnants of coverture assured a legal basis for the ideology: husbands remained legal guardians of a couple's children until the Guardianship of Children Act 1975 and heads of the household for the purposes of the Census until 2001; couples were jointly taxed, in *his* name, until the Finance Act 1988; domestic violence was considered by police and courts alike to be a 'private' matter, not requiring legal intervention until 1976 (Domestic Violence and Matrimonial Proceedings Act); husbands could not be charged with rape of their wives until 1991 (*R v R* [1991] 3 WLR 767). Discrimination against women was freely permitted, allowing banks and building societies to refuse loans to women or require a male guarantor and lawyers to insist on conveying the marital home to the husband alone. Equal pay only existed in one or two professions, and there were still advertisements for 'Jobs for men and boys' and 'Jobs for women and girls'.

So, when the Women's Liberation Movement (second-wave feminism) emerged at the end of the 1960s, once again aided by an expanding economy that required the presence of married women in the workplace, it faced the task, yet again, of breaking down the association between women's reproductive role and their social role as wives and mothers (Todd, this volume). The Sex Discrimination Act 1975 outlawed discrimination against women (and also against men) in employment, education, goods, facilities, services and premises. Jobs could no longer be sex-specific unless sex was a 'genuine occupational requirement' for the post. While the Act was hugely important in shifting attitudes and opening opportunities for both women and men to work in fields from which they had formerly been excluded and for women to progress to levels hitherto sacred to men, feminists knew all too well that formal equality measures were not going to be enough to ensure women's *substantive* equality. What was also needed were sex-specific measures to *recognise women's sexed difference* from men and to *compensate for their historical disadvantage*. From this realisation came the hard-fought rulings on pregnancy and maternity rights (Atkins and Hoggett 1984, ch. 2; Horton 2018; Morris 2019), the campaigns around sexual harassment in the workplace and violence and abuse at home (Atkins and Hoggett 1984, ch. 7) and positive action policies in politics and at work (Atkins and Hoggett 1984, ch. 3).

As this brief history shows, women's current formal equality masks a legal heritage of inequality, discrimination and exploitation derived from, and justified by, our physical difference from men – our biology – against which feminists have always had to fight and which persists in both the public sphere (unequal pay, for example, usually being explained by reference to women's reproductive role) and the private (in the statistics of violence and abuse of women by men).

Definitions

Law starts from the proposition that male and female human beings are physically different. Sex is defined on the basis of reproductive function, and 'woman' has always been understood in English law by reference to female biology. So far as we

know, the word has never been defined in statute – not in itself an unusual feature of English law, which does not even have a written constitution – because it has been taken for granted that it meant 'adult human female'. (The word *man*, in contrast, has caused many problems, as the law sometimes includes women within it and sometimes not, leading to a century of litigation in what were known as the 'persons' cases – see Sachs and Hoff Wilson 1978.)

This understanding of law and biology was confirmed in the case of *Corbett v Corbett* [1970] 2 All ER 33 which concerned a well-known transsexual model, April Ashley. Born George Jamieson, Ashley had been a sailor as a young man before embarking on a course of hormone treatment and genital surgery and living as though she were a woman. She married Arthur Corbett, 3rd Baron Rowallen, who was well aware of her background. The case centred on their mutual desire to end their marriage. He said it should be annulled on the basis that April Ashley remained a man despite being transsexual. (Marriage was then defined in law as the union of one man and one woman.) She sought divorce on the ground of non-consummation. The court looked in great detail at what 'sex' is for the purposes of law. The judge, Mr Justice Ormerod, who had a medical background and demonstrated deep understanding of the issues, ruled that sex is about chromosomes, endogenous gonads and genitalia, and that the sex of a person is determined by at bare minimum two of those three markers. This meant that even when a person such as April Ashley altered their external genitalia, their sex remained that defined by their chromosomes and endogenous gonads. While deeply sympathetic to those who experienced gender dysphoria, Ormerod made it clear that sex is about biology. The case received much press attention at the time.

Although this case is more than 50 years old, it remains good law. The English doctrine of precedent ensures that, unless or until overturned by subsequent case law or statute, a decided case must be followed. None of the cases since that time have challenged the definition of sex as biology, nor have any statutes overturned the law set out by Ormerod in his judgment. So, we adopt that definition as the current law.

As for 'gender', in spite of efforts by second-wave feminists to use it to distinguish between the *biological* and the *social* characteristics associated with each sex (Oakley 1972), in the last decades of the twentieth century the word came to be used as a synonym for 'sex' in expressions such as 'gender pay gap'. We see it used in that sense in Parliamentary debates and case law, but it was not until 2004 that it entered the *legislative* discourse. The Gender Recognition Act 2004 (GRA) allows the law to treat a person as someone of the other sex if they have obtained a Gender Recognition Certificate (GRC). Possession of such a certificate enables the person to change their statement of sex on all official documentation, such as birth certificate, driving licence and passport. To obtain a GRC, a person must be at least 18, have lived as if a member of the opposite sex for two years, intend to remain permanently in that gender, and have a medical diagnosis of gender dysphoria. Surgical modification of the body is not required. The GRA creates a legal fiction whereby the person is thenceforth treated as a member of the opposite sex from their birth sex for many

but not all purposes. Legal fictions exist in areas where something known not to be true in reality is treated as truth for the purposes of law: for example, the personhood of companies (Schane 1986; Fagundes 2001).

Nevertheless, people in possession of a GRC retain characteristics of their birth sex that distinguish them from persons born into the acquired sex. One obvious distinction is biological so that a transgender woman's medical needs will not map on to the gynaecological or obstetrics provision in a hospital, while a trans man's might. The law also recognises some situations where the person with a GRC will not be encompassed within the new sex (see the next section). For example, the Equality Act 2010 (EA) allows for 'sex' as well as 'gender re-assignment' to be a protected characteristic in order to preserve some spaces, such as changing rooms and refuges, for those with female (or male) bodies alone. This is a balancing exercise, which also takes into account the intersection of sex with other protected characteristics such as religion. For example, an argument for sex-specific changing rooms is that several faiths do not permit women to undress in the presence of male bodies or vice versa. Separate spaces are also justified in the interests of the social goal of women's protection, for example to allow sex-specific refuges set up for women escaping male violence.

The rights of any particular group are not absolute and, as with all rights, courts may be called upon to decide whether the right of a member of one protected group should have precedence in a given situation over the right of a member of a different protected group. For example, in *Lee v McArthur and Ashers* ([2018] UKSC 49), the Supreme Court (the highest court in the UK) ruled that it was lawful for bakers to turn away the custom of a client because he had asked them to produce a cake with the message 'support gay marriage', something that was contrary to their religious beliefs. The court emphasised that the bakers had not discriminated against Mr Lee on the basis of his sexual orientation but rather that they could not be compelled to promote a message with which they profoundly disagreed because of their protected characteristic of freedom of religion or belief. The ruling was even supported by some prominent LGBT+ activists who pointed to the ruling as being important to protect the hypothetical gay baker who might in the future be asked to create a cake with a message against gay marriage. The issue of belief as a protected characteristic was further discussed in *Maya Forstater v CGD Europe*: UKEAT/0105/20/JOJ, in which the Employment Appeal Tribunal found that Forstater's comments and gender-critical beliefs were shared by others and 'statements of neutral fact', not expressions of antipathy towards trans persons or transphobic. Her views met the threshold of being a 'philosophical belief', that is that the belief is 'worthy of respect in a democratic society, not incompatible with human dignity and not in conflict with the fundamental rights of others'.

Unfortunately, courts and the government have so far avoided making a clear and unequivocal statement that, while for most purposes possession of a GRC allows a person to be treated as a member of the other sex, this does not mean that they *are* a person of the other sex or will be so treated in every situation. Further, they have

failed to define 'gender reassignment', still less 'gender identity', making it difficult for courts to interpret and apply current statutes. In the 2020 case of *Elan-Cane* [2020] EWCA Civ 36, where a person who self-defined as 'non-binary' lost an action against the Home Office for failing to allow an 'X' option as a third 'gender' option on a passport, a person's gender was described by the Court of Appeal (where appeals against first-instance judgments are heard) as 'a matter of self-perception'. If this is so, then definition becomes impossible and, with it, enforcement of any discrimination legislation, both because the courts cannot determine how a person perceives him- or herself and because any definition cannot deal with the long – and constantly increasing – list of gender categories set out by organisations such as Stonewall (Stonewall n.d.).

Domestic Law and Human Rights

The main cause of the conflict in England and Wales over sex and gender in law is the tension between two key pieces of legislation: the GRA and the EA. Both Acts protect the human rights of minority groups, but the fact that they were created for very different reasons, seemingly without due consideration as to how they might interact with one another, has caused significant problems in theory and in practice, leading to competing interpretations as to how they ought to be applied.

The background to the GRA is as follows. In 1998, Parliament passed the Human Rights Act, which brought into domestic law the European Convention on Human Rights to which the UK had been a signatory for almost half a century. (In a dualist state, domestic legislation is required in order to give effect to international laws.) Article 8 of the Convention assures the right to a private and family life and Article 12 the right to marry. A case was soon taken through the domestic courts and then on appeal to the European Court of Human Rights about whether the right to a private and family life of a transsexual named Christine Goodwin had been violated by the law's failure to recognise her as a transsexual *woman* (*Goodwin v. United Kingdom*, Application no. 28957/95, Council of Europe: European Court of Human Rights, 11 July 2002). Goodwin argued that by not being able to change her birth certificate, her employer knew of her transsexual status (which she would have preferred to keep private) and also that she was not able to marry a man because same-sex marriage was not allowed at that time. She also objected to having to wait until she was 65 to receive her pension, rather than 60, which, as a woman, she was then entitled to (at that time there were different retirement ages for men and women). The European Court of Human Rights ruled that this violated her Article 8 and 12 rights.

This ruling obliged the state to bring domestic law into line with the Convention, so in 2004 the UK Parliament enacted the GRA. The Act states that for a person to change their *legal sex* they must have a medical diagnosis and have lived meaningfully as though they were a person of the other sex for two consecutive years. And while this provision does not change the fact of someone's *biological*

sex – chromosomes, gonads and genitalia – it provides a mechanism that allows the law to treat a person as though they were the other sex. It is important to note, however, that it *allows*, rather than *mandates*, the law to do so and that there are some exceptions where the law treats such individuals as members of their biological sex. Where a person meets the legal test, s/he receives a Gender Recognition Certificate that allows her/him to change their birth certificate and be treated in law as a person of their preferred sex.

The EA replaced and brought together all the earlier equalities legislation, including that related to sex, race, disability and sexuality, into one piece of law (Hepple 2010). Under the Act, discrimination is unlawful on the basis of nine protected characteristics, among them 'sex' and 'gender reassignment'. 'Gender reassignment' was included because of the Gender Recognition Act 2004 while 'sex' was there both to carry forward the protections enacted under the Equal Pay Act 1970 and the Sex Discrimination Act 1975 and also to recognise the need for sex-segregated services set up specifically for women's protection, such as separate accommodation in prisons, medical facilities and youth hostels, or introduced after feminist campaigning, such as refuges and rape crisis centres (Kaganas 2019; Diduck 2019). Inclusion of 'sex' as a protected characteristic also provided a mechanism for redressing the historical imbalance of power between men and women in the public arena, permitting the provision of separate women's sports and all-women shortlists for political parties or prizes in business (Atkins 2019; Devine, this volume).

Sex is defined in law by s.212(1) EA to mean that a woman is a female, while a man is a male. 'Male' and 'female' in this context relate to biological sex classifications. Section 9(1) of the GRA, however, allows a biological male to be legally considered female on acquisition of a GRC. There are therefore two ways to be a man or woman in law: biologically by birth or legally by acquisition of a GRC.

The EA introduced exemptions to protect single-sex services. There are nine specific provisions allowing direct sex discrimination: Separate- and single-sex services (Schedule 3 ss. 26, 27 and 28), Occupational requirement (Schedule 9), Communal accommodation (Schedule 23), Charities (Section 193), Associations (Schedule 16) and Single sex schools (Schedule 11). These exemptions can be used to exclude from female-only services men and also, in some circumstances, males with the protected characteristic of gender reassignment. As the Equality and Human Rights Commission (EHRC, 2021) – the country's national human rights institution – explained:

> If you are accessing a service provided for men-only or women-only, the organisation providing it should treat you according to your gender identity. In very restricted circumstances it is lawful for an organisation to provide a different service or to refuse the service to someone who is undergoing, intends to undergo or has undergone gender reassignment.

The statute provides at s.28 to Schedule 3 that

> [a] person does not contravene section 29, so far as relating to gender reassignment discrimination, only because of anything done in relation to a matter within sub-paragraph (2) if the conduct in question is a proportionate means of achieving a legitimate aim.
>
> The matters are:
>
> (a) the provision of separate services for persons of each sex;
> (b) the provision of separate services differently for persons of each sex;
> (c) the provision of a service only to persons of one sex.

What happens then when someone holds a GRC and wants to access single-sex services that fall under the EA exemptions? The EHRC had previously stated that it was unlawful to exclude trans women with a GRC from single-sex services. Following the consultations on self-identification for the purposes of obtaining a GRC in the autumn of 2018, that guidance was changed to '[a] business may have a policy about providing its service to transsexual users, but this policy must still be applied on a case-by-case basis' and that a birth certificate proves legal sex. That approach appears to leave each situation to the discretion of the service-provider, with limited guidance on how to apply the law to each individual case. This approach of a 'case-by-case basis' was adopted in *R v AEA and EHRC* [2021] EWHC 1623 (Admin) in which the court ruled that the EHRC's approach was lawful. In that same case, the EHRC acknowledged that some service providers had misinterpreted the EA and had adopted unlawful policies that did not uphold single sex exemptions and therefore called on the government for clearer guidance to be provided in this area.

The government's 2018 consultation on proposed reforms to the GRA was expected to be relatively non-controversial, with an estimate of 700 expected responses. But more than 100,000 responses were submitted, thanks to information sharing and campaigning from grassroots organisations concerned about women's and/or trans rights and the resulting significant media attention. The most contested proposal was one that would allow individuals to obtain a GRC simply by self-identifying their legal sex, without any further requirements. Discussions about self-identification brought to the fore the conflict of rights between the GRA and the EA and the failure of courts and policymakers to clarify the exemptions for single-sex spaces under the EA. The public became more aware that trans rights activists and organisations such as Stonewall had been advising organisations that maintained single-sex spaces – such as the National Health Service, schools, the Girl Guides, prisons and sports teams – that they must include any person who self-identified as women or men whether or not they held a GRC. This is legally incorrect. The EA specifically allows for these exceptions to the terms of the GRA, and self-identification is not yet recognised in law. There had also been legally incorrect advice given that a GRC *always* allows a holder to access single-sex spaces. The threat to natal women has been starkly exposed by revelations of male sexual offenders without GRCs asserting that they are trans women in order to serve their time in the female prison

estate, some of whom have gone on to assault female prisoners (Phoenix, this volume). It has been argued that we should not judge the motives of trans activists by the actions of this small group. But laws exist to protect us against the small minority who offend.

Discussions about law reform and self-identification in England and Wales did not take place in a vacuum. Other countries had or have been grappling with similar issues, each with its own context for such discussions, and different approaches have been adopted (Burt, this volume). In England and Wales, the government decided to shelve the reform proposals after the consultations but failed to provide any clarity on the issues that had arisen regarding the conflicts between the different GRA and EA provisions and the exemptions in the EA.

Human rights issues relating to sex and gender identity have been raised in other domestic legal contexts over recent years. Three particularly high-profile cases are worth noting. In 2020, the Court of Appeal refused to allow Freddy McConnell, a trans man, to be registered as the father on his child's birth certificate (*R v McConnell* [2020] EWCA Civ 559). The Supreme Court refused an application to hear a final appeal in the UK, and McDonnell is seeking leave to appeal to the European Court of Human Rights, claiming that his human rights have been violated by the UK government's insistence that he be registered as the mother on the birth certificate of the child he gestated and gave birth to. In 2021, the UK Supreme Court ruled, in the case of *Elan-Cane* [2021] UKSC 56, that there is no obligation for a state to provide a third ('X') gender marker on passports. The Court examined the UK's human rights obligations and found that there is no requirement under international human rights law to provide a neutral sex/gender category. In the same year, Keira Bell applied for leave to appeal to the Supreme Court to overturn a Court of Appeal ruling [2021] EWCA Civ 1363 that children under the age of 16 are able to consent to taking puberty blockers to prevent puberty until such time as they are old enough to consent to cross-sex hormones.

As the discussion above shows, human rights law is frequently invoked in these cases and sometimes in competing ways. As things stand at present, the European Convention on Human Rights is incorporated into domestic law through the Human Rights Act 1998, but a right of appeal exists to the European Court of Human Rights (which is quite separate from the European Court of Justice, the court of the European Union). This means that it is crucial to understand the international human rights law frameworks on sex and gender (including other international conventions to which the UK is a signatory) when discussing human rights law at the domestic level. The next section explains the operation of international human rights law on issues of sex and gender.

International Human Rights Law

When the Universal Declaration of Human Rights (UDHR, 1948) was being drafted, there were discussions about whether to have specific protections for women

(Gaer 2009). The decision not to have separate provisions was made because the entire point of the Declaration was to enshrine in law that *every* individual has every right by virtue of being born human. It was decided that having specific protections for particular groups would undermine the universality of the human rights project. Ultimately, however, trying to mainstream women's rights into human rights left significant and problematic gaps in terms of women's rights. At that time, one third of United Nations member states did not grant political rights to women, and women remained subjugated in many ways, often in the name of 'religion' or 'culture'.

In 1967, the UN Commission on the Status of Women took the groundbreaking step of adopting the Declaration on the Elimination of Discrimination against Women, followed in 1979 by the Convention on the Elimination of All Forms of Discrimination against Women. Thus was created an accountability mechanism to review and implement that Convention in those States that signed up to it (Englehart and Miller 2014). There has certainly been progress in advancing women's rights but, despite much focus on ending discrimination and achieving equality for women, and despite increasing concern about violence against women and girls, women are still denied their fundamental rights in many parts of the world both in law and in practice. Some forms of human rights abuses and discrimination against women are based on their sex – for example denying access to reproductive rights, or permitting child brides. Others are based on gendered constructs, such as denying girls the right to education, or men's violence against women and girls (although this is enacted in sex-specific ways).

As in domestic law, in international human rights law the word *women* has always been defined as referring to biological sex. This definition was adopted in many international human rights treaties and discussions. For example, the 1998 Statute of Rome, which created the International Criminal Court, states that the word *gender* refers to the two biological sex classes of male and female. At the UN Committee on the Elimination of Discrimination Against Women, some states, including New Zealand, recently opted to report on trans women as part of their periodic reporting, but there is no requirement to do so. Scholars such as Sandra Duffy (2021) have documented the number of times that trans-inclusive language has been used at the Committee, but this practice is not adopted by most Committee members, most states party to the treaty or, indeed, most of global civil society. Rather, it generally comes from a small group of global North states. Elsewhere, other treaty-based bodies have rejected the conflation of sex and gender identity; the UN Committee Against Torture, for example, has considered these issues in relation to trans women in prisons and, in doing so, made it clear that sex is biological. And at the UN Human Rights Council, a political body based on proportionate geographic representation of UN members, these issues are not even discussed.

The fight for women to have specific protections paved the way for other vulnerable groups to do the same. Once the idea of having specific protections for groups who face particular risk was no longer viewed as undermining the nature of human rights, similar steps could be taken for children, persons with disabilities,

racial minorities, and migrant workers. There is now clear understanding that the risks faced by members of such groups means that they require specific protection in law and practice. Of course, just because such an understanding exists, and states formally accept obligations by ratifying treaties, changes on the ground do not necessarily follow. But these international law provisions have given those groups tools for lobbying for effective change, which is at the heart of human rights advocacy and work.

Yet while many vulnerable groups have now received specific protections from the UN human rights system, attempts to protect sexual orientation and gender identity (SOGI, the UN umbrella term for LGBT+) minorities have been less successful. Efforts to protect SOGI minorities are almost always done independently of the protection of women's rights, with members of those groups seen as suffering separate disadvantage. In the 1990s, a pivotal time for human rights with the end of the Cold War and a new commitment to advancing human rights in the international arena, there were moves to include SOGI minorities in the declarations and plans of action for human rights. These moves were blocked by the 75 countries that still criminalise, discriminate against, or oppress LGBT persons, with even the most basic attempts to protect SOGI individuals from being killed by their governments, as in the UN resolutions on extrajudicial killings in the early 2000s, being fiercely resisted by a sizeable minority of countries.

In response to this refusal to recognise the need to protect SOGI minorities within the UN, in 2006 a group of international human rights law experts and SOGI activists devised the Yogyakarta Principles at a workshop. These Principles set out rights which the workshop participants advocated that gender identity minorities ought to have, although like many other similar texts from campaigning organisations they do not include adequate definitions of terms like '*gender identity* and *sex characteristics*. Some commentators mistakenly claim that these principles have international law status and even that they have overturned international law on sex. This is wrong: international law continues to define sex as biological. We must remember that the Yogyakarta Principles were aimed at kick-starting discussions to develop much-needed protections for SOGI minorities. But they are *not* law, and they were not promoted as anything other than a starting point. While they have occasionally been referred to by academics, or even (very rarely) by a court, they are not discussed even as 'soft law' (Chinkin 1989). And since they have hardly been discussed by UN member states, they have gained little traction.

A key reason why the Yogyakarta Principles were not taken forward was that in 2011 the UN Human Rights Council passed the UN's first resolution on protecting and promoting the human rights of SOGI minorities (UN Human Rights Council 2019). This marked a significant turning point after years of attempts to discuss SOGI rights had been blocked by coalitions of states that criminalise or oppress SOGI minorities. Since 2011, there have been significant steps taken within the UN human rights system to protect and promote rights of SOGI minorities, including the creation in 2016 of a Special Procedures mandate holder on violence and

discrimination against SOGI minorities. Attention from SOGI activists, including those who created the Yogyakarta Principles, turned to how to advance SOGI rights within the UN human rights system. As such, despite the claims of some proponents of those Principles, they do not represent international law but rather remain a representation of the views of the self-selecting group of academics and activists who created them. The issues that have been raised about the Principles, including lack of definitions and expansion of rights beyond the fundamental ones enshrined in the UDHR and codifying covenants, have not been addressed.

Unfortunately, at the UN level, steps taken to protect and promote the fundamental rights of SOGI minorities have also failed to define transgender or gender reassignment in a uniform manner. 'Gender identity' has been defined tautologically ('the gender with which someone identifies') or as an umbrella term in much the same way that Stonewall does (Stonewall n.d.). At the international level, therefore, the problem is similar to that at the domestic level: sex, being defined as biological, can be protected as a class in law, but the absence of a clear legal definition of gender identity makes it near-impossible for the law to be effective in this area.

Conclusion

This chapter has surveyed the history and current state of English and international laws on sex and gender. It has shown that, where laws relating to sex have been enacted, they have been intended to remedy the disadvantages suffered directly and indirectly by *women*. These disadvantages have always been based on women's biology as females and on the social constructs built upon their biology. In consequence, the law has defined women as *females* and has provided rights and protections to counter the historical and continuing restrictions imposed by these. Where once biology was invoked to justify the denial of rights to females, today it provides the rationale for the rights and protections the law offers. As this chapter has explained, without a clear definition of the class requiring protection, the law cannot protect it. If we erase sex as a legal category and replace it by gender identity, we not only end up with a category that has so far not been adequately defined in either national or international law, and so cannot be properly enforced, but we will also dilute – even sabotage – those efforts to protect women from the wrongs they suffer as biological females.

We note that much of the support for conflating sex and gender identity comes from those claiming to be allies of feminism and of females. This can only be understood if we assume that these people believe that the sexes are already equal and that women do not need special protections based on their biology any more. This is plainly not true. Attempts to restrict and control women's reproductive rights remain widespread; existing gender pay gaps are exacerbated by economic downturns around the world; the COVID-19 pandemic has demonstrated the disparities in healthcare provision and research between men and women, let alone women of colour or with disabilities; and more than two women a week are killed by their male partners or relatives in the UK alone.

Our conclusion is that there are just too many situations – those envisaged in the Equality Act exemptions being prime examples – where removal of the protected category of sex will reduce, and possibly remove, the very protections that were enacted to help natal women and redress their historical disadvantage. It is for this reason we argue that we need to retain the protected characteristic of sex in the EA, since its replacement by 'gender identity' would obliterate its historical and continuing basis in biology, cut women off from our heritage (women's lives matter, just as black lives do) and blur the distinction between people who have been discriminated against because of their bodies and those discriminated against because of their identities.

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