A Critique of the Model of Gender Recognition and the Limits of Self-Declaration for Non-Binary Trans Individuals

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Accepted: 30 January 2021 / Published online: 20 February 2021
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Abstract

This article considers the model of recognition in the Gender Recognition Act 2004 (GRA) and, through a critique of the value of stability pursued through this legislation, argues that recognition as a model is incompatible with the variety of experiences of non-binary trans-identified individuals. The article then moves on to analyse self-declaration, part of the proposed reform recently dismissed by the Government. While self-declaration contains provisions that would minimise the length of the process of recognition as well as the level of intrusiveness and stigma associated with it, this analysis highlights some fundamental theoretical concerns with its over-reliance on the strict dialectical logics on recognition and its structural inability to account for and respond to the challenges posed by non-binary trans individuals.

Keywords Feminism · Gender recognition · Self-declaration · Transgender

Introduction

This paper offers a theoretical critique of the model of recognition within the Gender Recognition Act (GRA) 2004. Despite plans to reform the GRA 2004 in England, Scotland and Wales which were officially abandoned by the Government in September 2020, this paper seeks to critically reconsider the system of self-declaration taken into consideration in the dismissed proposal and, through a critique of the ideal of *stability* pursued by this legislation, map out a temporality that is incompatible with the lived experiences of many non-binary trans-identified individuals. In suggesting that the numerous and significant gaps created, or left unresolved, by the GRA 2004 beg for a thorough reassessment of this legislation in a way that really takes into consideration

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the many challenges of non-binary subjectivities and the multiple ways of being trans, this paper proposes a novel theoretical framework that could support future reviews of the legislation, and open up a space that radically transforms the experience of those individuals who are left behind by a dichotomous law that relies on binarised understanding of gender which they cannot and will not fulfil.

I will start my analysis with an overview of the fundamental requirements in the GRA 2004 that are useful to highlight the rigid core structure of this legislation. From here, I will move on to consider self-declaration, and will suggest that while this may be a positive measure that would minimise the length of the process of recognition as well as the level of intrusiveness and trauma, it would not resolve the pressing issue of equality linked to the strict logic of recognition that is currently central to the GRA. I argue that this is due to two main reasons: first, self-declaration is a procedure that *still* fundamentally relies on recognition, that is, on a dialectical and close mechanism that is apt to protect and reproduce sameness (recognisable categories). The act's over-reliance on this model is, I suggest, structurally unable to account for the multiplicity of subjectivity, and does no justice to non-binary individuals who live at odds with institutional notions of gender. This is because the logic of that system—wherein the dialectical roles of subject and object are so separate, and therefore so unequivocally entwined—stops any lateral movements that divert from the credited path. While trans individuals whose journey is directed towards an engendered life would find this useful, those who reject the binary become irrelevant to this model. Second, the temporality of gender recognition as laid out by the GRA 2004 is not the same temporality as some trans lived-experiences: living and *being* gender is the result of cultural, social, individual variables and negotiations that inevitably respond to each individual's experience and cannot always meet the parameters set by an ideal version of that gender. This inevitably leads to tension, or worse rejection, and therefore lack of justice, when the two are forced to coexist. This is not a minor preoccupation, for the GRA 2004 effectively creates divisions between members of the same community: those who wish to embrace a clearly engendered lifestyle, and those who have a rather more fluid understanding of their gender; those who embody a widely recognisable idea of masculinity and femininity and those who retain or reject elements of both spheres; those who are *in for life* and those who are not; between the acceptable and the unacceptable; between conformity and deviance (Sandland 2005). Non-binary and non-gendered trans-identified individuals have been—and are—directly affected by the shortcomings of the GRA 2004. While a system of self-declaration could potentially shorten that divide and minimise some of that tension, this article argues that self-declaration largely fails to offer radically new scenarios to non-binary trans-identified individuals in need of representation.

The Limits of Recognition

The GRA 2004 regulates trans identity in the UK. Through a series of requirements and procedures, it *recognises* applicants' gender identity and grants legal recognition of the new gender. When it came into effect, on 4 April 2005, the GRA was widely welcomed as a ground-breaking piece of legislation that placed Britain at

the forefront of international lesbian, gay, bisexual and transgender (LGBT) politics (Sharpe 2007a). Amongst its most emancipated provisions is the claim that biology (the physical body) is no longer paramount in the making of trans identity. However, the binarised understanding of subjectivity it promotes, the over reliance on medical narratives and terminology, and the problematic implications of that dialectical structure of recognition impose a specific rigidity in the way in which gender is configured. Such rigidity was understandably met with hesitation by those trans-identified individuals who do not feel represented by that dichotomy and do not wish to embark on an existence spelled by the orthodoxy of the gender binary. Predominant feminist legal theorists such as Sharpe (2007a, 2007b, 2007c, 2009), Grabham (2010, 2016) and Cowan (2005), have been particularly concerned by this shift from sex to gender: it suggests a move within the law towards the aesthetics of the material body, despite the act stating that anatomical body (biology) is no longer central. This contradiction is counter to what the act states; that is, it is gender, and not sex, that is the primary indicator taken into account for recognition, thus suggesting a more inclusive and fluid understanding of gender.¹

The GRA 2004 states that ‘a person of either gender who is aged at least 18, living in the other gender or having changed gender under the law’ (GRA Section 1(a) (b)) can apply for recognition if she or he:

- has or has had gender dysphoria;
- has lived in the acquired gender throughout the period of two years ending with the date on which the application is made;
- intends to continue to live in the acquired gender until death; and
- complies with the requirements imposed by and under Section 3.²

I will approach the analysis by considering two encompassing notions imbedded in the above criteria: the notion of *authenticity* and, perhaps even more importantly, the notion of *stability*, both understood as constitutive values of gender and reiterated throughout this legislation in various ways. What the principles stated above suggest is that, in order to fulfil the criteria that will lead to gender recognition, the applicant must demonstrate *sustained commitment* to their new gender. In other words, the applicant must demonstrate that they are capable of physically embodying those enactments that are usually identified with the new gender. This is a vision based on the assumption that identity is formed through a linear negotiation

¹ However, as Sharpe (2007a) indicates, biology still retained a significant role in the process of recognition, as evidenced in the case *M.T. v. J.T.* where the court declared that ‘a preoperative transsexual [...] should be classified according to biological criteria’ (3555A. 2d. 204 (1967) at 209). See: Sharpe (2007a, p. 59).

² Section 3 says that the candidate must present: (a) a report made by a registered medical practitioner practising in the field of gender dysphoria and a report made by another registered medical practitioner (who may, but need not, practise in that field), or (b) a report made by a chartered psychologist practising in that field and a report made by a registered medical practitioner (who may, but need not, practise in that field).

between the subject and the cultural, social, political norms that govern his or her environment.

What I argue is that such a rigid and uncompromising understanding of the processes of desire precludes all possibilities for gender fluidity and ambiguity. It disables the *potentialities* explored or unexplored that come from *living* gender: the autonomy of one's body, the spatial and temporal freedom to become oneself, and that space of ambiguity so very crucial to transgender subjectivities. I am aware that some trans theorists such as Jay Prosser (1998) and Viviane Namaste (2000) object to the idea of transgender identities being used as a political wedge to de-gender the law. In saying this, I do not suggest that transgender identities should or can be framed as subversion, nor that gender should or can be viewed as allegorical. As Prosser (1995) explains, the organic narrative structure of transgender identity is integral to a notion of home and sense of belonging, and coherent narratives play important and affirmative roles in the lives of many trans-identified individuals. However, the focus of this article is the positioning and representation of non-binary trans-identified subjects within the system of recognition under the GRA. For the sake of clarity, non-binary trans-identified individuals are transgender people who have a fluid gender identity and may only partially identify with one or the other gender in the binary. As a result of this, they may change their gender expression (Dean et al. 2000) or interpret gender identity in personal and unique ways. They may undergo some type of physical alteration (i.e. hormones or other partial bodily alteration), but typically do not fully align their physical sex with their internal sense of gender. While this article does in no way suggest that transgender identities, whether binary or non-binary, should be considered precarious, it recognises that there is a political point to be made in favour of gender ambiguity: the blurry, uneven movements of its uncertainty, the chaos of possibilities it encompasses act as fuel and are a major force behind activism and demand for change. Beyond the singular, the concern here is that such an unequivocal understanding of gender ends up producing a community of sameness, one that becomes inaccessible to those individuals that cannot match up to those standards of gender.

Similarly, the third point mentioned above, according to which the candidate must 'continue to live in the required gender until death' (GRA Section 2(c)), understands desire as a straightforward one-way journey. This is an assumption that poses a fundamental question of equity in its demand that transgender individuals should reach a standard of *gender permanence* that non-transgender individuals are not expected to pursue or display in any recognisable way at any point in their life. This legitimises the notion that *trans* is in itself non-authentic, something that looks like an artefact, and that needs fixed boundaries, instructions, pre-packed solutions in order to be defined, contained, represented, made recognisable and acceptable. These considerations are strengthened by the mechanism of recognition that is in place within the GRA (2004). The terms of this mechanism are informed by the Hegelian understanding according to which recognition is the result of an ongoing process of acknowledgement between the subject and the other. The negotiation between these two separate units generates their respective identities, the legitimisation of which remains dependent on each other's acceptance. I will return to this in the last section of this article.

The process of recognition within the GRA 2004 is currently regulated by the medical industry (i.e. endocrinologists, care providers, psychologists) which sets up standards by which applicants are assessed by a Gender Recognition Panel. The panel is made of women and men who *naturally* have personal, pre-formed ideas of what acceptable versions of women and men should be like, and how far their contours can be stretched. This emphasis on the representation of gender—what Sandland called the ‘public politics of the representational’ (Sandland 2005, p. 46)—on the one hand reinforces the idea of ‘proper’ gender that one should aspire to reach; on the other hand, it seeks to make gender visible: the more visible it is, the better and easier it can be *recognised* and located. It is those who sit outside of the boundaries of visibility and who fail to reproduce a gender who are let down by this mechanism. Their ‘neither, nor’ status, that way of *non-being* nurtures a vulnerability as an act of violence (Prosser 1998; Salamon 2010) which is the negation of that *being* they seek to become. A subject is such only insofar as it exists and can express its *potentialities*; to claim full ownership of one’s own specificity is an act of existence. Significantly, as Laverne Cox has observed ‘at the heart of the fight for trans justice is a level of stigma so intense and pervasive that trans folks are often told we don’t exist—that we’re really just the gender assigned at birth’ (Cox 2013). The determination to become other and to turn a narrative of denial into one of self-affirmation is precisely what makes this demand for stability so discriminatory.

Now, in this Hegelian master–slave logic, the subject who grants recognition is more likely to recognise categories with which it can easily identify, with the aim to generate *relevant* selves that can themselves help preserve what it (the subject) knows. The ‘until death’ commitment does nothing other than secure that the individual will feel obliged throughout the rest of their life to produce an as-stable-as-possible representation of their new gender so to become assimilated as *relevant*. Effectively, this is more than a spontaneous commitment; it is rather a declaration for life which turns the moment of recognition into a duration, that is, a series of interminable moments during which the individual is called to constantly embrace, enact and reproduce gender in the most credible way possible. The subject commits to the lifetime pursuit of an ideal of stability which is as necessary as it is impossible, and that can only be sustained through the incessant enactments of its requirements. Now, in many instances, stability coincides with safety, so it is easy to imagine that the better one complies to those rigid requirements of gender normativity and the binary, the easier it is to become recognised. The disparity of experiences between aligned and non-aligned trans individuals creates divisions within the same community and de-legitimation for those subjectivities that stand outside of this paradigm. This process of assimilation—or marginalisation—is never casual; it is rather the result of complex socio-political and cultural negotiations that exist as part of a wider political determination (Bourdieu 1991). In the instance of the GRA 2004, it appears that this legislation is in place to ensure gender loyalty to gender rather than respond to a principle of inclusivity and equality.

The temporality mapped out here is paramount: first, we have the condition of the two-year lived experience in the gender of choice (which the abandoned reform proposed to remove) and then we have the ‘until death’ requirement which is effectively a declaration of intent for the future, for life. Not only do these predicaments

‘function as temporal mechanisms which influence trans agent’ (Grabham 2010, p. 113), but also cast a shadow on the experience trans individuals have of time and their bodies insofar as they create tension towards the imminent forthcoming (Bourdieu 2000), putting applicants in the vulnerable position of having to internalise and reproduce certain enactments in the hope that these prove enough to convince the Gender Recognition Panel of the solidity of their choice. The statutory declaration of *intention* of ‘until death’ is ‘a means of asserting the truth of a fact when it is not possible to bring other evidence’ (Grabham 2016, p. 135) and functions as a promise for the future or, as Grabham puts it, provides a ‘temporal horizon’ (Grabham 2016, p. 135) which effectively closes the materialisation of that category which it intends to form. The suspension of that temporal horizon, which is nothing other than the suspension of the *now* of the present, is not only a manipulation of time itself, but also a manipulation of life: it imposes a ‘*not-yet*’ purgatory (Nirta 2015) where the subject who awaits recognition will suspend its otherwise natural condition of *being* in the world, that is, in co-existence with contingency and all the physical and tangible phenomena of life (of being). Instead, it will be pushed to isolate itself and only entertain transcendental experiences of the life it yearns to pursue materially. This only adds pressure to conform, and distorts the ontological experience of being in the world; it holds the individual in a suspended spatiality of ‘not-yet’.

This conflictual temporal dislocation would be mitigated by a system of self-declaration, for the procedural simplification would help release some of the tension. However, while I recognise the pragmatic validity of self-declaration and the relief it could bring to some, I suggest that such a system would *still* not exempt from the obligations of recognition, because the terms by which that declaration can take place are *still* very much measured through the lens of authenticity and stability, both unequivocally fundamental values in the temporal dialectical economy of self-declaration. It is not a coincidence that this practice is called self-declaration (or self-determination) and not self-recognition: self-recognition situates agency onto the subject, that is, it would acknowledge the subject as the only self in charge of its own recognition. Instead, self-declaration preserves the same dialectical exchange between subject and object; a paradigm defined by a demand to entertain a hierarchical negotiation that can only be resolved when one—the weakest of the two—conforms to the values imposed by the other. In other words, when the subject self-declares, that act will be subjected to the expectations associated to one or the other gender: inevitably, the desire to fulfil that promise of self-declaration will produce pressure to match up with the contours of the most recognisable version of the new gender. Again, those subjectivities that cannot subscribe to one gender or the other will find themselves in a vulnerable position.

Controversy Around Self-Declaration

Before being officially abandoned by the Government in September 2020, plans to reform the GRA had been pursued by trans communities in the UK for some time. In the decade since the GRA (2004) was first introduced, there have been several

jurisdictional shortcomings generated by the shifts between gender identity advocacy and human rights law. As reported in The Women and Equalities Committee Report published by the House of Commons, the most significant deficiency of the GRA is the provision on spousal consent under the Marriage (Same Sex Couples) Act 2013 that imposes a veto on gender recognition. Another flaw is the exclusive terminology within the Equality Act 2010 which uses terms such as ‘gender reassignment’ and ‘transsexuals’, both found misleading and non-inclusive language that does not speak to non-binary members of the wider trans community. As detailed in the Transgender Equality session (2016), many report that trans people encounter significant problems in using general National Health System (NHS) services, due to the attitude of some clinicians and other staff who lack knowledge and understanding—and in some cases are prejudiced. This involves failure to ensure zero tolerance of transphobic behaviour.

In 2015, Stonewall established Stonewall Trans Advisory Group (STAG), a collective of 18 individuals with a variety of trans experiences or backgrounds and announced that progress was being made towards a new truly trans-inclusive reform that would bring together diversity of opinion and a space for all trans communities. Stonewall’s official report entitled ‘A Vision for Change’ (2017) identifies three key areas for improvement: empowering the individual, transforming institutions and changing laws. Each of these proposes structural and formal changes are designed to promote inclusivity and to allow trans people to better represent themselves on an individual, social and political level. In the same year, *Resolution 2048* of the Council of Europe’s Parliamentary Assembly expressed concerns over the pathologisation of gender recognition and called all Member States to ‘develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of transgender people on birth certificates, identity cards ... and other similar documents’ (2018). Alongside this, recent reforms in the Netherlands, Argentina, Denmark, Norway, Belgium, Columbia and Ireland (soon to be followed by other countries such as Sweden, where similar provisions are being considered) have adopted a model of gender recognition away from medical diagnosis. Amongst these jurisdictions, the Argentine, Danish, Dutch, Maltese and Irish laws understand gender identity to be far more than *just* a matter of gender expression, but as part of the right to self-development that is recognised to each individual. Accordingly, it is the exclusive right of the applicant to self-identify in the name of ‘free development of [the] person according to ... gender identity’ (Act No. XI of 2015).³

In January 2016, in line with the principles developed in these jurisdictions and following a cross-parliamentary inquiry which highlighted instances of discrimination within the health system where ‘GPs too often lack understanding and in some cases this leads to appropriate care not being provided’, the Equality Minister, Nicky Morgan, unveiled a package of reform that looked to simplify the current process of gender recognition. This decision was met with great satisfaction by those who had been campaigning. Suzanna Hopwood, a member of STAG, said: ‘Reform is one of the key priorities in our vision for removing the

³ See https://tgeu.org/wp-content/uploads/2015/04/Malta_GIGESC_trans_law_2015.pdf.

huge inequalities that trans people face in the UK. The current system is demeaning and broken' (Hopwood 2017). The main features of the proposed reform are the removal of medical evidence required for the application under the GRA, which also means the removal of a diagnosis for gender dysphoria; and the promotion of a less intrusive system of recognition. This consists of the dismissal of the two-year lived experience prior to the application, and a self-declaration system for legal gender recognition.

While the model of self-declaration has been considered 'the gold standard' (House of Commons, 2015) for a new updated law on gender recognition, this prospect met considerable criticism in the media and academia amongst certain minoritarian strands of trans-exclusionary feminism: the most recurrent concern revolves around the idea that, if not duly regulated, trans identity has the potential—and legal capacity if self-declaration was approved—to appropriate women's spaces, their socio-political positions, and to deform, or overwrite, a set of fundamental rights that women have fought hard to attain. In March 2008, speaking at the House of Commons, Sheila Jeffreys said that 'When men claim to be women [...] and parasitically occupy the bodies of the oppressed, they speak for the oppressed [...] They become to be recognised as the oppressed. There's no space for women's liberation' (Jeffreys 2008). This is a radical line of argument that comes from afar: it resonates with Robin Morgan's declaration of 1973 when, at the West Coast Lesbian Conference, she said:

I will not call a male 'she'; thirty-two years of suffering in this androcentric society, and of surviving, have earned me the title 'woman'; one walk down the street by a male transvestite, five minutes of his being hassled (which he may enjoy), and then he dares, he dares to think he understands our pain? No, in our mothers' names and in our own, we must not call him sister.

And again

Where the Man is concerned, we must not be separate fingers but one fist [...] I charge him as an opportunist, an infiltrator, and a destroyer – with the mentality of a rapist. And you know who he is. You can let him into your workshops – or you can deal with him. (Morgan 1973, cited in Pomerleau 2013).

Along those lines were also Janice Raymond's views expressed in *The Transsexual Empire* (1979, p. 104) where she wrote that.

all transsexuals rape women's bodies by reducing the real female form to artefact, appropriating this body for themselves... [colonise] feminist identification, culture, politics and sexuality... Because (MTF) transsexuals have lost their physical 'members' does not mean that they have lost their ability to penetrate women – women's mind, women's sexuality. Transsexuals merely cut off the most obvious means of invading women, so that they seem non-invasive.

A great deal has changed since the 1970s, yet the question of what a woman is; what affects, intensities and practices make her body; what position she occupies

in the world, remains central to feminist theory. The focus of these debates is the question of nature, the materiality of the body—so unequivocally present in trans-embodiment. Butler's famous account of the discursive construction of sexed bodies (Butler 1990) was seen by some trans theorists (Prosser 1995, 1998; Halberstam 1994, 1998; Namaste 2000; Serano 2007) as foreclosing attention to the 'lived material bodies and evolving corporeal practices' (Alaimo and Hekman 2008, p. 3) and failing to capture the role of the body in the formation of our sense of self. Counter to this is the vision that biology is paramount, and any configuration that theorises the nature/culture opposition away falls short of considering the inevitability of sexual differences.⁴ It is not the aim of this essay to analyse the different feminist approaches to transgender theory and politics, but it is important to note that the relationship between the two has historically been fraught.

Decades of activism and the conquest of important civil rights—the Gender Recognition Act 2004 amongst these—have inevitably reshaped narratives around transgender subjectivity; new cultural, political and social awareness around diversity and inclusivity have reduced, at least in some parts of the world, essentialisms, segregation and discrimination. Similarly, the growing presence of trans narratives in the media and popular culture have also helped wide audiences to become aware of the phenomenon and contributed towards the formation of more welcoming social and working environments. Nonetheless, the debate around self-declaration has revisited the essentialist tones of the past and has exposed some of the issues that have traditionally created division within public opinion, politics and academia. For example, in 2017 author, journalist and broadcaster Melanie Phillips writes that

all that will be needed in future is for a man to say he is now a woman and vice versa for their birth certificate to be changed [...] Such a birth certificate will thus be a lie. For whether or not the person should be recognised as having changed sex now, he or she was born a girl or a boy [...] What is on the cards is oppression, socially engineered dysfunction and the loss of individual freedom. (Phillips 2017).

To say that gender (self)declaration is a lie, something non-*authentic* and therefore *unstable*, means to rely on the biological body as the primary indicator of gender. While this is commonly correct for non-trans individuals, it is not the case for large numbers of trans people and to dismiss *tout-court* that sex and gender are not the same thing is unjust. In another article, written by Helen Lewis and which appeared in the *New Statesman* on 19 July 2017, it is argued that self-declaration would make domestic abuse shelters unsafe for women because 'sometimes the segregation is for safety' (Lewis 2017) and that some activists fear a self-declaration system could potentially harm the real transsexuals, that is, those undertaking coherent transitions following the model of the GRA. Accordingly, they feel that the excessive simplification of a self-declaration practice would increase the production of those who simply 'put it on' and that a system with no gatekeeping could make de-transition a new

⁴ See, for example, Keller (1985), Longino (2002), Haraway (1989), Harding (1986).

trend. This would be a threat to the ways in which we secure sex-segregated services such as rape shelters or sports competition, and a concern over the type of collective socio-cultural changes that may occur if people were to gain legal recognition without a medical diagnosis, medical treatment or a two-year naturalisation period.

It may be useful to look at what happened in the Republic of Ireland where self-declaration has been a law for over four years. Propelled by the Parliamentary Assembly of the Council of Europe (PACE) that called for a comprehensive resolution that would finally address some of the inequalities trans individuals have to face in order to obtain legal recognition, in 2015 the Republic of Ireland passed a bill that allows individuals over 18 years of age to self-declare their gender identity and obtain a new birth certificate. This new piece of legislation, much like the proposed reform currently discussed in the UK, bans compulsory medical treatment and mental health diagnosis as a requirement for recognition, and resolves the legislative impasse around marriage. This is a significant improvement that has enabled those who are married to stay in their marriage upon recognition of their gender and to ensure that spouse and children do not suffer a loss of rights in the process. According to the annual report published by the Irish Department of Social Protection,⁵ 109 individuals were granted recognition by the end of 2016. These have decreased to 99 in 2017, and increased to 133 in 2018, the last data available at the time of writing this article. There were no reversals and no cases of false appropriation of transsexual identity, if we may call it so, according to GIRE (Gender Identity Research and Education Society). On the contrary, this gradual and contained increase suggests that the system is far from being abused or used unconscientiously.

Similarly, a gender recognition certificate, whether it is obtained under the GRA 2004 or through a simplified process such as that proposed in the dismissed reform, will not in any way facilitate or hinder inappropriate or illegal behaviour. Self-determination would not mitigate where criminal acts such as sexual harassment, sexual abuse, or rape occurred. The interaction between the GRA 2004 and the Equality Act 2010 can be intricate; however, as stated by the Equality and Human Rights Commission⁶ in a statement published in July 2018, removing barriers to acquiring legal gender recognition will in no way erode the special status of important spaces and services, such as women's refuges or health services. The law around illegal behaviour would remain the same. This is, and would continue to be, true in all segregated spaces such as rape shelters, prisons, and refuges. These spaces *already* have the tools to perform risk assessment and monitoring to ensure that those who are admitted are not abusers, perpetrators or assaulters, and it is their responsibility to continue to use all the tools they have to guarantee safety to those they admit. Furthermore, those individuals who are currently undergoing their two-year lived experience and who are therefore living in the new gender (under the terms of the GRA 2004), can already legally use the public toilet they feel best represents their new gender (without yet having obtained a Gender Recognition Certificate). This

⁵ Full report can be found here: <https://www.gov.ie/en/collection/ea16c-gender-recognition-annual-reports/>.

⁶ Full report can be found here: <https://www.equalityhumanrights.com/en/legal-responses/consultation-responses>.

has been the case for years and cis-women have for the very best part accepted it as a sign of a mature and inclusive society.⁷

In her blog, journalist Sarah Ditum writes:

sometimes it's simply a question of volume, as with the conversion of toilets to 'gender neutral'. Because in practice only those with penises can use urinals, 'gender neutral' toilets in practice means giving male patrons access to both stalls and urinals while women only have access to stalls, which are now in even greater demand. The end result, when this was tried at the Barbican, was huge queues for women. (Ditum 2017).

It is safe to say that to stand in a queue is not a particularly pleasant way of spending one's time, but we accept it as part of communal living. It is also safe to say that civil, cooperative behaviour is a necessary trait that we should collectively and actively encourage in our modern, forward-thinking, diverse society, and that there cannot be progress without inclusivity. The issue around transgender people in public toilets has been largely debated over the last decade (see, for example, Gershenson and Penner 2010; Penner 2005, pp. 81–98; Greed 2003; Nirta 2015, pp. 271–288) and it is not the object of this discussion, but the negotiation of public space cannot elude transgender bodies: it must come to terms with the materiality of their subjectivity, an ontological difference that claims its right to inhabit space and take part in the spatial economy of day-to-day life.

This is a battle with implications that reach far beyond legal rights for trans individuals. It is a political act which should see trans people and feminists of all traditions come together and join forces in solidarity. It is only through the autonomy to signify for oneself, the freedom over one's body and the independence to negotiate one's spatial and temporal experiences that together, as feminists, as a society, we can affirm our individual emancipation. As I will explain in the next section, a mode of self-differentiation that abandons the categorical compartmentalisation of identity and spaces (and therefore representation of those categories and identities) is a conquest from which both feminist groups of all traditions and trans groups could benefit collectively. It is a conquest because through self-differentiation each singular subjectivity is legitimised by its own singularity (not by identification with a category) and at the same time empowered through collective participation in each other's affirmation. This twofold type of individual and collective activism would embrace, in some cases instigate, political and social acts of radicalism and give support to anyone, to those who push for diversity, to break ties and invest in new possibilities (Ahmed 2017, p. 162). This involves the need to reconsider together our cultural and social practices, undo what we know or take for granted without knowing, rethink architecture, re-configure the built environment, ask different questions,

⁷ Dunne's Parliamentary Enquiry Oral Evidence: Transgender Equality Inquiry, HC 390 Tuesday 13 October 2015 confirms that '[A]ll of the research seems to be saying that if you are able to put in place robust frameworks that explain to people everyone's presence in the particular shelter and that everyone knows all of the ground rules and has a clear understanding, these facilities work perfectly well and inclusion in no way detracts from the ability of individuals to use the services and their experience.' <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/39007.htm>.

build more toilets if that is the real problem, remove boundaries and create more space, and take this as an opportunity to finally move away from normative essentialisms. For these are anachronistic in our society of today and inevitably lead to forms of discrimination, exclusion and antagonism.

Despite the incendiary polarisation of views, systems of self-identification (such as that adopted in Ireland) show that a new narrative is possible, that gendered hierarchies of power can be challenged, pushed forward and reshaped. Its promise to remove the medical diagnosis from the paradigm of recognition is impactful and should not be underestimated: it can lessen the supremacy of recognition and rearticulate the socio-political discourse around transgender. It challenges on a formal level the institutions of femininity and masculinity; the way in which the medical industry has framed them so far; and opens up a new space for individuals to appropriate that narrative and the desires, needs, wishes, and affects they wish to claim. Further, it will remove the psychological handicap that has always characterised trans identities thus eradicating the pathologisation of trans subjectivities from the process of gender recognition. To allow different types of *relevant* stories to emerge means to formally smear the institutionalised surface of a mechanism that simplifies desires into formulas, and empowers individuals to tell their own story. These are defining concerns with common ground to both radical and moderate strands of feminism.

Beyond Recognition

The question of gender recognition needs to be posed in different terms. The discourse around recognition requires undoing the dialectical and exclusory hierarchy that structurally, inevitably, favours majoritarian identities over self-differentiation. Such a shift involves the assumption of a collective responsibility that, through ‘politics of acts’ (Grosz 2002, p. 470) encourages the individual right to claim one’s own specificities and re-write one’s own story, starting afresh each time. Self-declaration is much too engulfed in the stasis of identity to enable such a radical and outward process. The most incontrovertible limit of this model of recognition is perhaps the structural impossibility to acknowledge that trans subjectivities are *also* a question of matter and embodiment. Recognition as status and as legitimation fails to account for the day-to-day lived experience that involves coming to terms constantly and in every way with the materiality of the body, and the disagreement between that fundamental corporeal disobedience and the pulls of normativity. Non-binary trans individuals are inherently unfit for this model which is not structurally configured to resolve this struggle; it simply does not have the tools to face up to and acknowledge anything that deviates from its hegemonic trajectory.⁸

⁸ Some countries, such as Australia, Denmark, India and Canada offer a voluntary non-binary, third gender classification indicated with the non-binary marker X (Australia, Denmark, Canada). Other countries, such as Austria and Germany, allow a ‘non-classification’ option. While these are more inclusive legal attempts to create an in-between legal space that accounts for non-binary subjectivities, the problem with these ‘third gender’ classifications is that by setting out to represent all that the binary is not, they end up reinforcing what the binary is, and what it stands for. This aggravates the divide between categories (identities) and inevitably strengthens the logic of recognition.

The twofold conceptualisation of the body within recognition shuts down any possibility of dialogue between representation and the multiple ways in which trans bodies exist, especially those who fail to find an acceptable compromise with the narrow-mindedness of categories. The recurring narrative of ‘the wrong body’ that is usually associated to transgender experiences is the perfect example of how disobedience is assimilated and synthesised into a category, something that becomes visible, ‘a thing’. Through the simplification of ‘the wrong body’, we automatically ban the possibility of ‘other bodies’ and create a space of relevance of certain bodies over others: what is right on one side, what is wrong on the other side. This mechanism of assimilation and simplification is the only one admissible within a paradigm of recognition, where the differential affirmation of *the* self is not a possibility. The only contemplated possibility is the recognition of *a* self that will find its legitimization *to be* through negation, a declared and unrenounceable characteristic of recognition. Self-declaration is caught up in this dead end: it is not a self-differential practice; it cannot be, in so far as it has to play with the rules of recognition, rules which truncate its potential force the moment before it can affirm its difference.

In this new shift away from recognition that I propose, it is bodies—not categories—that lead the way to self-affirmation through the engagement and regulation of their own unique processes of becoming. Any future theorisation cannot ignore the ontological condition of *being* a body. A body is not simply matter, it is *vital* matter, and it is precisely that vitalism that makes, unmakes, creates and transforms that of which the body is made. The essentialism of the nature/culture dichotomy does not consider that nature is first and foremost a productive force: Grosz returns to the work of Darwin to trace down a *natural*, biological impetus within the body, a propulsion for what is new, for the active forces that outwrite and transform the old into the future, into what is to come (Grosz 2000). The body is then ontologically involved in this constant process of active becoming, a mechanism capable of unravelling its own biology through ‘the virtualities, the potentialities, within biological existence that enable cultural, social and historical forces to work with and actively transform that existence’ (Grosz 1999a, b, p. 33). Recognising this creativity that is intrinsic in the body offers a way of mobilising those forces that see the body as a continuum rather than a dichotomy, as a process whereby ‘nature throws up all this diversity and society needs to accept it’ (Lane 2009, p. 137), that is, where cultural and social existence is oriented towards the multiplicity of the body.

Beyond recognition, it is possible to think of creative practices of individuation where desires and forces can come together to express their full potentialities and participate, each with their own intensities, in the formation of their individual identity. Such a practice would not need the framework of recognition to create a platform: it would approach *being* from the perspective of multiplicity, it would find legitimization in the strengths of its self-differentiation. Individuation finds its upmost strength in the affirmation and not in the negation of the other. This means that the moment of contact between two or more subjects does not contemplate trauma, rejection, abnegation. In this dynamic space of inclusion, identity would not require a category for representation, nor would it need to certify its degree of stability: it would rather be encouraged to create links and share affects with other subjects in a mode of constant change and becoming. Significantly,

Deleuze insists that the only encounter that can dignify the self is one that works by means of affirmation, not exclusion (Deleuze 1994). Recognition is a practice of exclusion, of essentialisms, binarisms, extremisms and it causes inequality.

No longer in need to validate oneself through the negation of the other, individuation is a sustainable practice that triggers a process of multiple self-differentiation, a new ethics of inclusivity and equality that repositions the individual, and not a pre-packed ideal of gender, at the centre of the discourse. In practical terms, perhaps a shift from statute law to a system closer to case and common law, which work case by case to resolve ambiguities, may provide a bottom-up approach through which individuals would be empowered to identify their own deficit in rights and equality, rather than a top-down system that attempts to diagnose entire sections of society and lay out patterns of recognition for each group. This would preserve the spirit of the law and provide a more humane approach to individual circumstances. It is possible to imagine such practices as interlocking intersections of rights that reflect the circumstances of the singular. In place of a fit-all model of recognition, self-differentiation promotes a twofold process of affirmation. Individual affirmation because the recognition of the circumstances of the singular would affirm and legitimise the right to *be* of each individual. Collective affirmation because it would gradually introduce an efficient and sustainable model through which all individuals—regardless of their subjectivity or degree of adherence to a category—would find validation through a legal system that encourages self-affirmation. A ‘politics of acts’ does precisely this; namely, it creates tools, systems, networks and spaces for different languages and concepts to emerge and in so doing, it enhances the ontological difference of each individual providing opportunities for affirmation.

Considering the irregular outcome of the Gender Recognition Act (2004) in the fifteen years since it was first approved, this is an opportunity to reassess the terms of the system of recognition and think whether the discussion should *still* be reduced to a question of gender stability, categories and identity. Are we sure that trans subjectivity needs recognition if, as we have seen, this does not guarantee acceptance, affirmation, inclusion to all? Instead of recognition as the primary condition for identity, theorists, policy makers, legal and medical practitioners should accept the challenge of a sustainable framework based on self-differentiation. In such a vision, difference would be understood not as a qualifying attribute, rather as a constitutional ontological and unmediated condition of *being*. This new way of looking at individuals and desires would produce a different way of understanding and *doing* politics, new modes of action beyond recognition, new practices of self-differentiation that look into the future, yet rooted in the materiality of a present that demands innovative and joyful ethics of inclusion.

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