

Kent Academic Repository

Full text document (pdf)

Citation for published version

Cooper, Davina and Grabham, Emily and Renz, Flora (2020) Introduction to the Special Issue on the Future of Legal Gender: Exploring the Feminist Politics of Decertification. *feminists@law*, 10 (2). pp. 1-11. ISSN 2046-9551.

DOI

<https://doi.org/10.22024/UniKent%2F03%2Ffal.937>

Link to record in KAR

<https://kar.kent.ac.uk/84276/>

Document Version

Author's Accepted Manuscript

Copyright & reuse

Content in the Kent Academic Repository is made available for research purposes. Unless otherwise stated all content is protected by copyright and in the absence of an open licence (eg Creative Commons), permissions for further reuse of content should be sought from the publisher, author or other copyright holder.

Versions of research

The version in the Kent Academic Repository may differ from the final published version.

Users are advised to check <http://kar.kent.ac.uk> for the status of the paper. **Users should always cite the published version of record.**

Enquiries

For any further enquiries regarding the licence status of this document, please contact:

researchsupport@kent.ac.uk

If you believe this document infringes copyright then please contact the KAR admin team with the take-down information provided at <http://kar.kent.ac.uk/contact.html>

Introduction to the Special Issue on the Future of Legal Gender: Exploring the Feminist Politics of Decertification

Davina Cooper, Emily Grabham, Flora Renz*

What might be the consequences if the state no longer legally classified people as female or male based on a sex registered at birth? We call this the “decertification” question. Decertification refers to a situation in which state law steps back from recording, confirming, recognising, or standing behind sex/ gender¹ *as formally attributed aspects of personhood*. It is a question that lies at the heart of our ESRC-funded project on the Future of Legal Gender (FLaG), which began in May 2018.²

Our exploration of decertification is a response to two developments and one enduring feature of contemporary neoliberal countries, such as Britain. The two developments are the move towards legislative convergence in how men and women are formally treated in legislation (substantive gender-neutrality) and the growing recognition, by public and other bodies, of people’s self-described gender identities. The enduring feature is the gendered character and asymmetries of social and institutional life. This gendered character is not fixed; nevertheless, gender remains an organising

* Davina Cooper: Research Professor in Law, Dickson Poon School of Law, King’s College London, UK; email davina.cooper@kcl.ac.uk. Emily Grabham: Professor of Law, Kent Law School, University of Kent, UK; email E.Grabham@kent.ac.uk. Flora Renz: Lecturer in Law, Kent Law School, University of Kent, UK; email F.Renz@kent.ac.uk.

¹ The currently contested language of sex and gender makes usage of both terms difficult as there is no basic consensus among critical activists and scholars. This research project foregrounds gender as a sociological concept that gives “sex” meaning, authority, and shape. FLaG recognises that different bodily qualities and attributes, including reproductive ones, contribute to how life is experienced, including through forms of oppression. The FLaG project also recognises how “sex” has come to function as a political and legal resource (some would say weapon) in the struggle to assert binary and immutable bodily differences. Engaging with these usages, the project takes account of other research that questions the notion of coherent and fixed sexual difference. This latter research suggests that the qualities identified as making up the assemblage “sex” are provisional and changing, with social and technological processes combining with biological ones in ways that cannot be easily or usefully separated; that sex itself does not take a binary form; and that other bodily qualities (not conventionally aligned with sex) may, in different contexts, be more significant in shaping how social life is experienced.

² Alongside us, other project members are co-investigator, Elizabeth Peel, and research associates Robyn Emerton and Hannah Newman. The project ends on 31 March 2022.

principle of society-making processes, giving rise to distinctly patterned norms, practices, and unequal social relations. Given the conjuncture of these three trends, FLaG asks: is state withdrawal from formally registering, establishing, and assigning sex/ gender as an attribute of legal personhood an overdue reform? Might decertification liberate people from the strictures of state-enforced sex/ gender? Or is it, instead, a form of privatisation, withdrawing state responsibility for remedying gendered inequalities?

This special issue explores these questions, drawing on research from the FLaG project. In this brief introduction, we sketch three key pillars of the research - gender, law, and prefiguration. These provide foundations but also directions for the discussion that follows. We then introduce the five articles, each of which is followed by responses from two interlocutors. All the papers were initially presented at a colloquium at King's College London in June 2019. We are very grateful to our discussants for their generous engagement. Listed in the order they appear in this special issue, they are Ruth Fletcher, Ambreena Manji, Christine Quinan, Jennifer Fraser, Kath Browne, Shona Hunter, Sumi Madhok, Vanessa Munro, Alain Pottage, and Helen Xanthaki. We should stress that, at this stage of the project, our aim is not to draw definitive conclusions about decertification but to elicit discussion around some developing lines of analysis. These have coalesced around four primary research strands: exploring what decertification entails; addressing its implications for equality agendas, and for single-sex provision, in particular; exploring the craft and implications of statutory drafting for enacting new formalised gender settlements; and understanding wider public attitudes and feelings about legal reform. Research on these four themes has involved over one hundred semi-structured interviews with service providers, municipal equality officers, lawyers and legal experts, government officials, trade unionists, school staff, NGO workers, sports and care sector workers, and members of different publics. In this special issue, we also draw on findings from a project survey that took place in the autumn of 2018, which generated over 3,000 responses (including over 1,000 qualitative responses as Peel and Newman, this issue, discuss). In addition, our analysis has benefited from comments, questions, discussions, and conversations across a range of fora, including public lectures, seminars and workshops with NGO and public sector staff, activists, academics, students, and others.

The articles that follow explore different dimensions of decertification, and the reactions it has elicited. However, we should stress that FLaG is not an advocacy project. In this special issue, we do not argue *for* the state's withdrawal from registering, confirming, or assigning sex/ gender. Nevertheless, decertification characterises a reform pathway that is gaining relevance and force. In Tasmania, Australia, the legal introduction in 2019 of an "opt-in" approach means birth certificates no longer record sex unless applicants specifically request it. Momentum for reform can also be seen in many governments' formal or informal acceptance of people's self-identified gender. While this has tended to be limited to two categories: female and male (women and men), third gender categories are also emerging – officially, informally, and somewhere in between – across a range of jurisdictions, making it likely that more governments will introduce law and policy in this direction (or at least consider it) over the coming years. Together, these changes suggest that understanding some of the stakes, concerns, and implications of decertification for gender, law, and community decision-making and practice is important and timely.

The first direction that FLaG faces is gender. This special issue traces the stakes and implications of different conceptions of gender. The conflict between sex-based rights advocacy and identity-based approaches to gender has come to dominate the political landscape; with the FLaG project also sometimes caught in the crossfire. Given the tendency for public discussion and governmental discourse to understand gender through existing tropes of intelligibility, such as rights, interests, identities, selfhood, and groups, it is unsurprising that this division has monopolised debate. However, retaining a broader sense of the choices, divisions, and possibilities for gender politics is crucial – that there is more at stake than whether sexes/ genders are two or multiple; whether they are felt, chosen or imposed; and whether personal gender claims should be affirmed or resisted. Questions that have emerged in our research foreground conceptual, strategic, temporal, and normative concerns – from questions about gender's meaning and location (in bodies, discourse, social structures), to how gender relates to other social relations (including race, class, and disability), to understanding gender's affects (including its harms and pleasures), to the political ambitions of social forces (for liberation, the meeting of needs and interests, new forms of subjectivity, or new worlds), to modes of political engagement (through policy, law reform, grass-roots

activism, prefigurative projects), to the relationship between present strategies and other times (is the present a site where past inequalities must be countered, a space for imagining and enacting future hopes, or something else)?

As a research project that is both critical and feminist, FLaG seeks to put these different questions and approaches into dialogue with each other as it carves out a space of inquiry that refuses to track current divisions. Our analysis departs from narrations of gender that treat it as a property of subjects, as well as from narrations which understand it as a monolithic force imposed on sexed bodies. Instead, we focus on conceptual accounts that foreground gender as a social phenomenon, shaped and rendered intelligible by other institutional features and relations, including capitalist and racialised globalisation processes. Gender's asymmetrical patterning affects bodies and subjects (even as it is also taken up and reworked by subjects). But gender also, importantly, contributes to how other institutions and aspects of social life are organised: from schools and sports to parliament, local government, and law. This social account of gender has been well-established in many areas of feminist scholarship; however, it has been passed over in recent conversations due to a growing tendency to approach gender as something that is subject-shaped – whether as an identity that people take up and give form to, or as something imposed on sexed bodies. At the same time, the articles in this special issue remain attentive to gender as a site of attachment, community, innovation, and dissent. Gender may be claimed as a source of hierarchical power and control – highlighting what can be done to others because of the gender that one has (a gender that may also be forged through what is done to others). But gender is also claimed by people seeking to make lives in gendered society liveable, to advance radical political projects, and as a source of meaning that may outlive its currently coded hierarchy.

Different forms of contemporary and hopeful attachment sometimes jostle, and sometimes coincide, with relations of gendered detachment – from collective projects directed towards gender's abolition to personal attempts to live without a gender identity. FLaG grapples with these issues, holding open for analysis questions already circulating such as whether gender should be abandoned or revised and whether the two may converge in conditions where revisions are so significant that gender in its

current form no longer exists. These are also questions on which contributors to this special issue diverge. This collection of articles and commentaries collectively explores critical and interdisciplinary approaches to the future of legal gender, but they do not take a single common path. Instead, the contributions forge tracks that diverge, fuse, and cross over each other, as they trace different approaches to gender's meaning, presence, normativity, and hoped-for futures.

The second direction that FLaG faces is law. Feminist scholarship has been hugely influential in analysing law's work in maintaining gendered relations of subordination, exploitation, and disadvantage. This work has focused primarily on women as the subordinated category, subject position, and class of concern, although more recently work has expanded to include other subordinated or marginalised gender statuses (and identities). This special issue aims to contribute to feminist legal scholarship, and particularly to work that critically interrogates law's efforts and capacity to lessen gender-based inequalities. In many respects, our focus on decertification might appear to be narrow, removing the legal status of one specific category: gender/ sex that currently structures legal personhood, and that locates people in relation to diverse regulatory and distributive processes: from pensions and maternity provisions to single-sex schools and hospital wards. Importantly, decertification, as we approach it, would not in itself remove state law from providing a formal remedial structure for discrimination on grounds of sex/ gender. What it would mean is that such claims would not have, and could not rely upon, a formal legal designation as female or male based on birth certificate records. In this way, sex/ gender would be placed on a par with other social relations that, in Britain, are not currently treated as formalised aspects of personhood by state law, such as sexual orientation and race/ethnicity. Given the enduring character of these relations of inequality, as well as others, such as class (that are also not recognised as shaping and composing *legal* personhood), we do not assume that decertification would undo the hierarchical or asymmetrical ordering work undertaken by governmental and other institutional processes when it comes to gender. At the same time, critical exploration of decertification poses important questions about the value of law, including anti-discrimination law, in undoing (or remedying) inequality.

Feminist legal scholarship has long expressed misgivings about the contribution that law and contemporary equality law instruments can make to lessening gender-based inequalities. From this perspective, the value in retaining formal sex/ gender status, as a tool to help tackle gendered inequalities, seems doubtful. Yet, what has also emerged from our research is the value that many feminist policymakers, NGOs activists, and others accord to law, arguing that it provides important practical tools and discursive justifications for countering women's subordination - even as others argue that a more expansive legal gaze is needed to incorporate other vulnerable gendered subjects. Within this rocky and uneven legal landscape, our research project explores the stakes and anticipated effects of state law abandoning its practice of imposing sex/ gender classifications on subjects. Equality law is, unsurprisingly, a central piece of this discussion. But the legislative use of gender-based terms (and here we include terms such as sex, male, woman, mother, father, same- and opposite sex) embraces a diverse range of legal fields and sectors far beyond equality law. Thus, one challenge for this project, as a law reform project, is to explore how these different legal areas might be reformed if the formal language and status of sex/ gender could no longer be counted on.

Asking people their views on decertification reveals the value of a proposal such as this in bringing people's attitudes, feelings, and understandings of law and law reform into sharp relief. Responses to one specific pathway for legal change demonstrate something of people's hopes and concerns about the future, about gender and, also, about law *as it is*. To explore the legal consciousness of different stakeholders and publics towards a proposal that, in Britain, is not yet on the law reform table, even as some have felt at times that it might be drawing close, we draw on the political device of prefiguration. FLaG is a prefigurative law reform project in several respects. For those who advocate it, decertification itself constitutes a prefigurative approach to sex/ gender by treating its terms as if they no longer had the human significance necessary to warrant registration by the state. But decertification is prefigurative in another respect - namely, as a proposal that is addressed in this research project *as if* it were worthy of law reform scrutiny. To prefigure reform in this way allows a legal proposal associated with a time ahead to be rehearsed. This makes it possible to explore its

potential, to identify its limits and challenges and, perhaps, to resolve at least some of them thereby easing the proposal's "proper" arrival on the political agenda.

It is important, however, not to overstate the value or feasibility of anticipating one possible legal future, given the suite of changes that are likely to precede or accompany its arrival. What decertification means or looks like in Britain in 2020, as we conduct our research, cannot resolve the complexities that its political and legal assessment would face at a subsequent date. At the same time, considering decertification now provides an opportunity for some "ground-surveying" (if not necessarily "clearing") – identifying challenges and issues that its formal progression would need to address and ideally resolve. But beyond its anticipatory, if critical, rehearsal, addressing decertification also allows it to *materialise* in the present. In other words, prefigurative law reform does not simply observe *what could be* as if it were a phantom visitor floating in from another time with no presence in the present. It also invites others to engage, interactively and collaboratively, with a law reform proposal, *taking shape and existing* as an academic research project. It is worth stressing that whatever consequences or effects this engagement has are unlikely to be those of accomplishment (certainly in the short term). Discussing decertification does not, itself, bring such a measure into being or even necessarily make its realisation more likely. Aside from the fact that FLaG is a project of exploration rather than of advocacy as we have said, the authority of an academic project is not the same as that of a government department (and even government departments may fail to accomplish the legislative programmes they advance). As a result, what our exploration of decertification can and will do is shaped – if not determined - by its academic home and register. At the same time, this project takes place in a context where different bodies internationally – activist, policy, legal, political, and academic – are exploring sex/ gender deregistration reforms. While we do not know, at this stage, where these will lead, FLaG has been designed as a reflexive project. And so, in its final stages, we will reflect, explicitly and critically, on the relationship of our prefigurative law reform methodology to this vibrant, wider political terrain.

We now turn to the five articles in this special issue. In the first article *Pulling the thread of decertification: What challenges are raised by the proposal to reform legal*

gender status Davina Cooper and Robyn Emerton explore the hopes, politics, and concerns that decertification raises as a mechanism for de-formalising sex/ gender. The article considers decertification, as a speculative reform initiative, in two primary ways. First, it asks what contribution, if any, might decertification make to a feminist politics intent on undoing gender-based hierarchies. Second, it explores what decertification can offer as a methodological research thread that brings certain concerns, issues, and hopes into view. Setting decertification alongside an alternative reform strategy of legally recognising multiple gender identities, the article explores the feminist benefits of decertification; the criticisms it faces; and different ways of responding to feminist concerns. Here, the article turns to governmental strategies, such as privacy design and risk assessment, already being utilised to address the growing informalisation of sex/ gender, and the criticisms that can and have been made of these strategies. It then considers decertification's relationship to more radical political projects intent on questioning and unsettling existing orderings. Finally, the article considers the risks of androcentrism and gender-neutral law and argues for the need to embed decertification within a wider multiplex progressive agenda.

The next article by Flora Renz focuses on the question of how decertification would affect single-sex services. In *The challenge of same sex provision: How many girls does a girls' school need?* Renz analyses some early findings from her socio-legal study of single-sex schools, drawing on semi-structured interviews with education policy experts and head teachers. Renz addresses two interlinked questions about the challenges that decertification may pose to the provision of single sex-services generally, and education in particular: first, what does gender differentiation aim to achieve; and second, how do secondary education providers (and other service providers) currently approach the challenges that their differentiation policies face? Renz sets out the reasons for single-sex education. She then summarises current legal rights, requirements, and debates concerning the inclusion of trans and non-binary pupils within single-sex schools, noting how adjustments to uniform policies and administrative practices are used as part of an ensemble of approaches that challenge gender stereotypes overall rather than focusing on individuals. She explores how ideas of 'community' and 'inclusivity' significantly shape interviewees' approach to gender and its boundaries so that trans and gender non-conforming pupils are understood as

belonging to the school community. Presenting schools as a productive example of a 'jurisdiction', in which written gender rules interact with unwritten official practices, and a 'case by case' approach, schools' capacity to adapt is highlighted. Renz points to the 'flexible and situational' understandings of sex and gender that such schools can support, but also notes that different schools may take distinct approaches to Equality Act requirements. She concludes by returning to a set of questions about the definition and potential transformative effects of single-sex education for girls.

Elizabeth Peel and Hannah Newman continue the work of exploring the impact of decertification on a wide range of constituencies. In *Gender's wider stakes: Lay attitudes to legal gender reform*, they analyse the project's Attitudes to Legal Gender survey, which ran from October to December 2018, resulting in over 3,000 responses. Whilst there is now a very established and vibrant field of feminist legal research in Britain, social attitudes to legal gender are under-researched, as Peel and Newman point out. In their analysis of the survey data, they trace people's everyday experiences and understandings of gender, legal gender status, and thoughts about reform. Peel and Newman adopt interpretive frameworks of cisgenderism and endosexism as routes into their analysis of the data to provide a social model for understanding people's gender attitudes. Cisgenderism refers to ideological accounts that understand gender as binary, where lived gender is assumed to align with the gender assigned at birth. Endosexism refers to approaches to gender that erase the lived experiences of intersex people. These concepts provide touch points for Peel and Newman as they tease out the implications for law reform of layered, complex understandings and articulations of gender.

In the fourth article – *Taking public responsibility for gender: When personal identity and institutional feminist politics meet*, Davina Cooper explores the challenge that soft decertification poses. In soft (or de facto) decertification, sex/ gender continues to be legally registered, assigned and confirmed by the state, but public and other bodies act as if it were otherwise. While this could mean treating sex/ gender as if it was no longer a salient feature of personhood, the emerging tendency has been to treat gender as if it was anchored in other authoring or identification processes. As glimpses of de facto decertification emerge, this article explores its implications for

equality initiatives hitherto focused on addressing the asymmetrically patterned lives of women and men. It considers new ways of understanding gender that are coming to the fore, and the challenges that arise for bodies engaged in equality governance in trying to address them. At the heart of the discussion is the question of responsibility - the ethical, political, and legal obligation to pay attention or respond, that is anchored in different bodies' capacity to undo or ameliorate social inequality and injustice. What does responsibility for gender entail when gender is treated as both institutionalised and self-determined; public and private? Cooper focuses on two contexts where contemporary equality governance in Britain addresses gender as a site of remaking and unmaking. The first concerns the front-stage initiatives and policies of public sector provision; the second concerns the back-stage scenes of organisational action, where informal decision-making arises. In both cases, taking responsibility for gender is far from straight-forward; yet, the essay argues for the importance of doing so. This is not just despite, but because of, the complex conditions that responsibility must grapple with when institutional gendered forms also exist as individual attachments.

The final article in this special issue, *Exploring the textual alchemy of legal gender: Experimental statutes and the message in the medium* turns to the challenge of engaging with decertification as a feminist law reform project. One of the aims of the FLag project is to produce an experimental statute decertifying gender in the law of England & Wales. To this end, Emily Grabham focuses on the conceptual and discursive power of statutory text, tracing its complex co-articulation with changing gender norms. The article draws on empirical research – including interviews with legislative drafters, drafting experts, and feminist legal activists - to explore the politics of writing an experimental feminist statute to decertify gender. Grabham explores how apparently timeless expressions of sex/gender in statutes have shifted in response to social change and legal innovation. She also argues that the method matters: the act of writing an experimental statute pulls feminists into relationships, norms, professional debates, and epistemologies of expertise and governance around legislative drafting that are likely to fundamentally affect what we think is possible and what we can achieve. Yet this can also help feminist scholars harness the power and potential of prefigurative feminist thinking.

Taken together, these five articles and the ten commentaries that accompany them convey something of the rich and complicated topology that decertification entails. Typically, law reform projects start with a problem and then seek to identify the best solution; this research inverts the process – starting with one possible legal response to the problem of gender inequality in order to explore what its questioning and examination uncover and illuminate. Whether decertification is desirable, from a feminist perspective, as a reform that would help to diminish gender’s social significance and force as a mode of hierarchical ordering remains an open question. What also remains an open question, and one increasingly important for this research, are the other legal, political and welfare developments that would need to accompany or precede decertification. By problematising the normalised status accorded legal sex/gender, and researching one mechanism for undoing this status, we seek to contribute to the body of work that critically explores what gender means, the many ways it is enacted and changes, and law’s place and role in maintaining and transforming gendered norms and practices. The articles, and responses from our discussants, identify some of the analytical threads we are exploring. We make them public, at this mid-stage of our project, and welcome further and wider discussion – read on, and enjoy.