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Talk about Legal Gender: Thoughts on what legal consciousness studies and discursive psychology together can reveal.

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In this Research in Progress article I discuss what legal gender status means for different members of the UK public. This builds on previous work on peoples' perspectives on legal gender reform (Peel & Newman, 2020) as part of the wider ESRC *Future of Legal Gender* (FLaG) project interrogating the feminist politics and praxis of decertifying gender as a legal entity (see Cooper, Grabham, & Renz, 2020). As the FLaG project focuses on the feminist politics of legal concerns, legal consciousness studies – a well-established approach in feminist socio-legal research (e.g., Harding, 2011) – and discursive psychology (which since its inception been closely associated with feminism, Wilkinson & Kitzinger, 1995; Weatherall, 2012) offer fitting feminist frameworks. In this short article, in-keeping with the multidisciplinary of FLaG, I combine insights from legal consciousness studies with discursive psychology, applying both to interview data² collected during the FLaG project between June 2019 and April 2020.

In the UK, legal gender is enacted through the Birth and Deaths Registration Act 1953 and crystallised via a traditional birth certification process, which is binary (sex is registered as either female or male), static and life-long, unless it is formally changed through obtaining a gender recognition certificate. What do people think about this way of doing things? And what are some of the different ways people talk about legal gender?

When focusing on discussion of the impact of legal gender on everyday lives insights from legal consciousness studies are pertinent. Patricia Ewick and Susan Silbey (1998) generated 'before', 'with' and 'against' the law types of legal consciousness – or ways of understanding legal things – based on interviews with people in New Jersey, USA. 'Before the law' meant the law was distinct from society, both grand and uninfluenceable. Ewick and Silbey's 'with the law' legal consciousness sees law as more of a game which is not totally separate from everyday life but also largely operates in particular settings, like courtrooms. 'Against the law' sees legality as 'dangerous to invoke' (p.192) or to be avoided. But as Rosie Harding (2011) writes, this form of legal

consciousness 'includes numerous methods of resisting legal power: resistance to both law's power and law's terrain, as well as to law's scope' (p.20).

Ewick and Silbey didn't ask people directly about law though, they asked about 'ordinary, daily events' (p. 252). Our research did ask people what they thought about how the law currently is, and how it impacts how they understand gender, and what difference (or not) they thought it would make if we did not have traditional birth certification. Ewick and Silbey also 'clean[ed] up' (p. 259) their interview transcripts. They got rid of the messy aspects of how people talk because they saw talk as a way to see what people 'believed' (thoughts and cognitions). Discursive psychology (Edwards & Potter, 1992; Wiggins, 2016), by contrast, views talk as a form of social action worth studying too, so it was important to represent these data transcripts as faithfully as possible to the spoken interview talk and explore *how* these interviewees talked, as well as what they said.

In the analysis that follows 'law' and 'gender' are fused together, recognising that 'there are many normative orders of various descriptions that are not attached to the state but which nevertheless are "legal"' (Harding, 2011, p. 30). Gender, in all its forms, is one such normative order. In these interviewees' discussion of everyday life and legal gender there were 'before gender', 'with gender', and 'against gender' legal consciousness discourses.

'Before legal gender' positioned gender as capturing and communicating immutable "facts" about bodies, and as a poor proxy for sex – the biological distinction that really matters. 'Before gender' was against changing how law currently registers sex, and sex rather than gender was the subject of their 'before the law' approach. Chloe³ provides a good example.

Chloe: I think sex really needs protecting in law. Gender is this sort of amorphous evolving thing I have very little interest in or to do with, whereas, sex is a biological reality and my life has, as has everybody's life, been totally affected by this biological reality. The fact is that females, in this patriarchal culture are systematically devalued and underrepresented in all sorts of contexts. I do need particular legal protection as female.

EP: It would be bad for women if the law didn't recognise sex in the way that it currently does from birth or—

Chloe: Obviously, I mean, that's why the protection is there, to protect women. We are in a situation at the moment where there is a pushback. We have far right people in power [...] Women's rights are not something that is a high priority to them. And so that's kind of the context within which I think of all my sisters who have struggled throughout the past 100 years to get us these protections.

There is a distinction between the 'biological reality' of sex and the 'amorphous evolving thing' that is gender, which is swiftly bracketed as of 'little interest' in any sense. There's no recognition of the ways in which laws have created, perpetuated, or failed to redress 'this patriarchal culture', rather a conceptualisation of law as offering 'particular legal protection as a female'.

There are other discursive devices too, which together function to create a persuasive account that presents the view that biological sex sits before law as self-evident. First, words or phrases hearably going to extremes ('*everybody's* life been *totally* affected', and '*all* my sisters who have struggled *throughout* the past 100 years') manage Chloe's investment in the account by positioning an alternative feminist view as inconceivable and inappropriate. Second, her footing shifts and use of 'we' ('We are in a situation...', 'We have far right people...') function to position the account as believable and merely reporting "the facts" of the matter.

'With legal gender' accounts gave a looser more flexible framing of gender, existing as a legal entity but not positively or negatively influencing everyday life. A bit like 'with the law', legal gender was associated with just documents and forms - 'only when you have to tick those boxes' (Aida). 'With gender' was ambivalent to change. Davey provides a clear illustration:

My legal gender, I think it- I don't think it does [affect my life], actually. Not in a negative way or a positive way, just- it's just something that I quote when I am asked what my gender is, basically.

Davey's account is delivered with some disfluency (i.e., self-repair 'I think it-') and constructs the importance of legal gender as modest, and 'just' made significant when

requested. There is a lack of specificity in this account, Davey doesn't indicate who or which bodies are 'ask[ing]' for his gender. Again, this works to generally downplay the effect it has on his everyday life.

'Against legal gender' was critical of the current gendered order represented through cisnormative and binary operations of legal gender. 'Against' accounts are pro changing how law currently registers sex because of its binary structure, and in some cases against gender *per se*. Juan offers an example of personal difficulty with the current binary system:

I have mentioned the annoyance that I feel at getting labelled with gendered honorifics that don't match my understanding of myself. That is just through every time you have to fill in a form where gender says male or female. And for example, I don't know if that's a legal issue but equal opportunities forms in the UK rarely have space for any other option and that's a mandatory thing. It's generally frustrating I think "Would it make my life easier in the sense of not having to deal with those minor annoyances, to have legal recognition as a non-binary person? Hell, yeah".

In this account Juan reiterates their 'annoyance' at the available titles not being reflective of their sense of self and this being imposed ('getting labelled'). They then both minimise ('just') and formulate in an extreme way ('every time') the prevalence of binary gender on 'forms', and the compulsory nature of the existing framework ('mandatory'). Juan produces the question of having a different regulatory framework as being prompted by the endemic irritation ('generally frustrating') of the current one, and the construction of their talk in a question-and-answer format works discursively in two ways. First, this structure demonstrates through its form that these issues are problems that can be solved – the question is answered. Second, the 'hell yeah' in response to life being easier is unequivocal, enthusiastic and displays emotion communicating the importance of change.

Concluding thoughts

The before/with/against legal gender discourses surface three positions on the topic of decertification (abolishing female or male as formal legal statuses). 'Before legal gender' consciousness is anti-decertification, it would be problematic for natal females. 'With legal gender' is neither for nor against decertification, but creates space where it could occur though its impact would be limited. 'Against legal gender' is pro-decertification, as not to do so is harmful for already marginalised groups (Newman & Peel, under submission). Talk about how gender could be regulated differently was mostly created by the questions asked (e.g., How do you think your legal gender status impacts your everyday experiences if at all?). By focusing on *how* these forms of legal consciousness were produced there is an invitation too to take seriously the construction of talk about socio-legal topics.

In terms of the wider critical feminist project of considering the implications of regulating sex/gender differently in England and Wales, combining legal consciousness studies with discursive psychology contributes to our understanding of lay conceptualisations of the symbolic and practical significance of the State's enactment of gender. Wider consideration of the question of whether there is good reason to continue with the present binary system of formalised sex/gender can be found in the forthcoming FLaG book entitled *Prefiguring the Law: The Politics and Challenges of Decertifying Gender and Experimental Law Reform* (Cooper & Renz, frth.). How gender would function if constructed and protected similarly to religion and belief, or sexual identity (sexual orientation as denoted in the Equality Act 2010) is a psychological question as well as a socio-legal question. And (re)consideration and exploration of gender's connections to legal categories, I hope, will be of interest to feminist psychologists.

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Notes

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² Forty-four interviews (mean age 42.7 years, range 20-77) were conducted with cisgender women (n=27) and men (n=8) and trans and gender diverse people (n=9). Fourteen of the interviewees were parents of dependent children.

³ All participant names are pseudonyms.