

“State Regimes of Gender: Legal Aspects of Gender Identity Registration, Trans-Relevant Policies and Quality of LGBTIQ Lives”: A Roundtable Discussion

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This roundtable took place at the European Conference on Politics and Gender (ECPG) in July 2019. This abridged version has been edited for clarity, continuity and cohesion. The audience was informed that the roundtable discussion and Q & A would be recorded, transcribed² and published.

Verena Molitor (Chair): This roundtable aims to investigate how gender, as a social process and regime, produces gender identities, often in non-deterministic and unpredictable ways. The right to not be discriminated against regardless of gender identity may, however, clash with practices of sex/gender categorization and gender-relevant policies of nation-states. Indeed, the attribution and registration of sex impacts the human rights of transgender, non-binary, queer and intersex persons. In bringing together expertise from political science, law, political sociology and gender studies, this roundtable: (1) asks how gender operates as a relation of power, particularly the value and possibilities of a more utopian politics of post-gender beyond existing identifications; (2) cultivates a discussion of the consequences of the systematic registration of legal sex and of sex/gender-related policies as they impact quality of life for queer and trans individuals, and (3) discusses theoretical and practical alternatives to such policies and practices. In examining relationships between gender as a relation of power, gender identity attribution and global justice, we also want to ask how non-binary genders are operationalized in policies and

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practices of nation-states and to think critically about whether undoing formal legal categorization would impact the gendering of social subjects. I would like to ask Davina Cooper to start with some introductory words on the broad topic of our roundtable.

Davina Cooper: If we take a feminist and critical perspective, are there good reasons to retain systems in which the state registers and recognises people as legally gendered subjects? This is the question that the research-council-funded project I'm currently undertaking – called The Future of Legal Gender – is asking. The project has just finished the first of three years. It aims to explore the challenges, implications, limits, but also hopes and stakes in “decertifying,” which is the term we are using, to identify a process in which the state steps back from assigning or confirming sex and gender in Britain.

“Decertification” doesn't have to mean that the state ignores questions of gender and equality, and that's important. Rather, they become matters dealt with without people having a formal gender status. So more like how British law would respond to people's ethnicity or their sexuality or religion.

Underpinning this project, however, is a broader question of how should gender be conceptualised? And I think we're experiencing what seems an unprecedented flux in gender's conceptualisation, as dominant notions of gender as the ordinary life of two sexes is unsettled. So, it's a good moment to think about, and perhaps intervene in, the emerging conceptions of gender that are taking hold. But doing so poses a series of questions. Firstly, if gender becomes understood as a social identity or aspect of personhood, what does this mean for feminist accounts of gender as a social system with asymmetrical roles, relations, and norms? Does the identity approach also read gender too narrowly, namely as inner feeling and outward expression? We might think of this as prefiguring what gender could come to mean. But how does it relate to broader accounts of gender, anchored in the gender division of labour, women's care work, sexual violence, normative heterosexuality, and so on?

Can we also still talk about gender as something that's *publicly done*: the scenes of gender, that are staged in work places, formal politics, and shared spaces? Or has gender become something that corresponds entirely and only to how people self-identify? I think that has major implications for critical politics and questions of

representation. Is there still a public life of gender which can't be reduced to people's own gender identity?

If gender *is* about identity and attachment, what does this also mean for accounts of gender that emphasise its intrinsic relationality – that gender, as social categories, takes the shape from the genders that they're not – Or does this argument no longer hold in a plurally gendered world, where males are no longer defined against females, and vice versa? Are genders differently relational, so that masculinities are constituted in relation to each other rather than against a contrasting femalehood? Or are genders no longer being constituted in contrasting, asymmetrical ways with any others? In some countries, are genders becoming more like ethnicities, perhaps defined by shared cultures and community belonging, rather than by what's outside? Or does this draw too much from the development of minor or less dominant gender identifications, and neglect how mainstream genders continue to operate?

Finally, from a critical perspective, how might we think about attachments to gender? What is this "thing," gender, that we are affirming an attachment to? What if anything is valuable in gender to make it worth staying in relationship with?

Now none of that is to discount the violent, excluding, humiliating experiences that non-conforming gender expressions can evoke. And, of course, what counts as non-conforming changes over time so this generational aspect to the debate is important to reflect upon. But in the discussion about gender identity, has gender itself become normalised? So beyond advocating for multiplicity, what does gender mean and do, and what can or might it mean and do, in the sense of offering, if it does offer, progressive resources into the future? If we *can* identify any positive valence in gender, to what extent might it be because gender is leaving or could leave male and female behind? Perhaps rather like religions which abandon god.

Tatiana Zimenkova: For me, as a sociologist, I say: Well, my very valued political scientist colleagues have sometimes very normative perspectives, saying, "Okay, what do we do? How do we speak about gender? Can we abolish gender registration and if so, what will happen?" And my question is: *Who* still needs gender? And I always propose this also to my students, and my students usually hate me for that. But what I mean in the sense of societal structures is, it is quite possible that, people stick to quite conservative things not because they're conservative. It can be that

institutions, policies, and organisations have a kind of integrated gender binarity, not because they are transphobic or intersexphobic, but just because of the resources they have. I had this talk with a town representative for gender equality, and I was telling her about theoretical considerations on the possibilities of abolishing gender registration, and then she said, “Oh please don’t do this! We still need gender! We just need to know how good we are in equality issues! We really need gender! We want to do something for women! And if the women are not there anymore, I cannot do something for them! Oh no, please stop your work!” I believe these kinds of thoughts and clear understandable logics are very visible in housing provisions, in gender equality issues, in gender pay gap registrations, and so on. So, gender *is* relevant in a structural sense, in structural means, for (in)equality. So what people are afraid of, and I understand why they are, is that those powers who are actually anti all these kinds of equality would say, “Okay, perfect. We don’t have to register it so we don’t have to invest in it anymore. So from now on, we don’t see these inequalities.” Probably this is a very utopic fear, I hope it is.

Verena and I, Christine [Quinan] too, are working with LGBTIQ police officers and policing, and looking at things like hospitals, imprisonment, and so on, and how they are all organised in terms of gender. So what does it actually mean in the sense of resources and investing money? If at one point we say, we have to open up the police as well, we have to open up the hospitals, so every person who comes to a hospital would have a choice of having a gender-neutral or queer room to be in, and I would really love for this kind of thing to happen, this kind of visibility of queer lives and gender identities and quality of lives to be possible. But the thing is, what kind of actors are we dealing with? And what kind of resource logics do they have? Then they say, “Oh! If we open up our prisons for more than two genders, how do we manage it in the sense of body checks, of literally putting people somewhere – accommodating citizens’ bodies into somewhere?” I’m afraid that citizens’ bodies and citizens are more governable as long as they’re binary. I’m afraid that we really have to look at this kind of logic, and I propose that we look at this kind of logic not anticipating that all of them are LGBTIQ-phobic, but that they’re simply trying to say, “We have to save resources.” And the question is, what do we do for that? How do we manage to work with this kind of fear? If we know, for example, that the gender pay gap and integration into the labour market are gendered dynamics, and the actors who are trying to promote equality need females to be visible, we can also say, “Okay, what happens in the labour market for people who give birth?” So we’re not caring about what kind of gender they have, but we’re caring about what kind of care work they do. We could do this. But the issue is, saying, well, we’re not registering gender anymore, and as Davina said, we can restrain from recording it but still provide for

accommodations for all these things. And I am afraid that if we really go for it academically, then we will quite soon have actors saying, “Okay, let’s try,” and then we have to provide possibilities for bringing together the resources and the question of queer quality of life. For me, this is the most interesting thing to look at the moment.

Verena Molitor: Thank you very much. You’ve already started to address Davina, but let’s keep this in mind for the discussion after we hear the others’ voices and opinions.

Anna van der Vleuten: Thank you, Verena. And thank you very much for inviting me to this panel. Let me start by saying that I’m very new to this domain, so I have never worked on gender identity registration, decertification, and other practices. I’m learning a lot rather than bringing new knowledge right now. I have a background in Political Science, International Relations and EU politics. I’m looking at the topic of gender identity, trans, intersex issues from a perspective of norm diffusion and norm contestation – the way in which norms change by being contested and by being, time and again, reframed and gaining new understandings and new content. However, as I said, I’m very new to this. So I want to share some thoughts based on a project we’re just about to start. And I’ve called my intervention “X for All.”

Binary normality is based on the idea that we can divide human beings into two stable categories: women and men. But, as Annemarie Mol, an anthropologist, already decades ago asked, what is a man and what is a woman? It’s *what*, it’s not “*who* is a woman” or “*who* is a man.” Traditionally we see sex as a representation of the body, the medical perspective. And in political debates, as in the Netherlands and elsewhere, about introducing a third marker or not and about gender identity registration, medical doctors are asked to give advice. So the medical perspective becomes relevant to the legal and political ones. However, *which* medical perspective? How do they distinguish between physical females and physical males? Sex as a spatial form – anatomy? As a hormonal system – endocrinology? As a set of chromosomes – genetics? What is a woman? What is a man? And what when we move from the physical to the psychological, to the ways in which an individual gives meaning to their physical being, the ways in which an individual creates an identity in stable or varying ways? What when we move back to the physical, and to bodies which cannot easily be categorised based on anatomy, endocrinology, and genetics? What we see is an increasing confusion and incapacity to act. There are medical professionals who increasingly are reluctant to practice interventions when there is no medical necessity. And I want to leave aside here questions of informed consent to

medical interventions, because that's a different topic, but rather focus on the ways in which binary thinking works, and how difficult it is to change that.

As part of this project we have started on norm contestations of the categories of sex and intersex people, we're working with a hospital and I was assisting with one of their meetings. There was this "case" – sorry for the word – there were twins born, and one of them was not identifiable unambiguously as a boy or a girl. So the doctors told the parents, had told the parents before giving birth – that they should wait a few days before giving the name or telling the world what it was, apart from being healthy. And the parents were panicking, what to tell the family. And there was also a class issue here, they had had very limited knowledge of the language, first of all, and had a very low level of education and had a migrant background. So that for them complicated the issue, what to tell the family in Morocco. They were begging the doctor to immediately erase the ambiguity, so the doctors had to deal with that. And they worried also because they said, "Well, will these parents be able to cope with an intersex child? Are they able to deal with this?" So, they were reluctant, they did not know. So that's this incapacity to act. And they were afraid that the parents would not know how to cope with all sorts of daily questions like which clothes to put on or how to play, which toys to give. When I was young, Legos were just building blocks, but nowadays Legos are very gendered, you might be aware of that. So the doctors were afraid that the child will be harassed in school, and so on and so forth. So this is how the binary normalcy kicks in. The doctors are afraid to intervene, but also afraid not to intervene.

What does it mean, then, for this child, if these parents can put an "X" in their child's identity card? That the child would have more space and time to decide whether they rather identify as boy, or as girl, or as neither, or as both. But if all other children will not have an "X," what would that mean for this child? So why not give all children this option? Why not put an "X" for all?

That's how far I got in my thinking about this, and referring to how to deal with this at a state and a theoretical level, as Davina already introduced for us to think about. I think it will only work if we are able to really, truly, 'intersectionalise' our thinking, able to intersectionalise policies and in such a way that we'll still be able to think through structural power inequalities based on sex/gender/identities/sexual orientations/so on. To really intersectionalise thinking, which would, on the one hand,

erase stable categories, but would, on the other hand, still enable identifying contextualised categories of underprivileged and privileged.

Verena Molitor: Thank you very much. You already raised the question: What would happen, if we just have the categories or the possibility to have the X category for every child? As I know Christine [Quinan] is doing research on the X category and also in relation to border crossing, could you give us some insight into your research? I think this would make for a good connection.

C.L. Quinan: Everything that's been stated and asked thus far are very much questions I am exploring as well. But I'm approaching this topic from the specific case of border crossing, as border crossings are spaces where we're asked to show proof of our identity – and as the same time as there have been more and more options around declaring one's gender identity beyond "M" and "F", there have also been increased uses of biometric technologies that rely on binary gender. So that's where I'm coming from. This tension between binary gender embedded in border security technologies and trans and non-binary mobility.

Through their reliance on biometric body-based technologies, state regimes of border security disproportionately, I would argue, impact trans and gender diverse individuals, particularly when bodies do not match the reading of security agents and/or the technologies themselves, like full body scanners, facial recognition software, and even 'older' biometric technologies like fingerprints – there have been some studies suggesting that sex can be identified in fingerprints. When bodies don't match the readings of the machines or the agents as unequivocally male or female, security responses can be activated. So in being labelled as potentially suspicious or threatening, such individuals can be interrogated, detained, and humiliated, which is exacerbated for those experiencing intersecting forms of oppression, including racial and religious profiling.

While this method of border management has harmful effects on those who do not match gender norms, it also prompts critical questions regarding the role of binary gender as an often-invisible structuring principle. Very recently, however, recognition of non-binary gender has given rise to many reforms in law and policy, which might on the surface appear quite progressive and might look like they could improve the mobility of trans and gender diverse populations. For example, Australia was the first

to adopt the X category as a sex/gender marker on a wide scale. There were other places before that (for example, Nepal), but Australia was the first to allow for this widely, although it is important to mention that securing this marker still requires obtaining medical documentation. A number of additional countries have third gender and non-binary possibilities, of which the X marker is the most common. Here in the Netherlands, for example, the first X passports were recently issued. In Germany and Austria, there have also been developments regarding options for allowing for a third gender outside the binary. While this changing landscape might suggest improved human rights - including the right to mobility and migration - there is little evidence that there has been any review of these kinds of legislative instruments. They have also not been immune to critique – because of course policies that claim to address diversity and inclusion by adding new categories could run the risk of identity politics-based approaches, which could, in fact, reify sex and gender norms. Changes to gender markers must also be thought about contextually, as identification documents have been used to regulate and target populations. And this, of course, is happening at the same time as borders are increasingly securitised and surveilled.

Given this current climate, there are several questions that I want to pose, so I'll just put them out there and we can perhaps later return to some of them. While border crossings can present enormous pitfalls for gender diverse populations, the relative abundance of global state-based legislative and policy-level changes made with respect to gender identity and autonomy purport to make movement easier. However, given that travelling and migration can be dangerous and stressful when one does not meet sex and gender norms, could the X be a solution, or will it potentially create further complications, discriminations, and exclusions? I'm thinking also about the fact that if it is not widely adopted, what happens when an agent encounters this marker? Does this sort of legal innovation work in context of people's lives? How do changes to legal gender affect people's lives on the ground? Might the introduction of sex and gender registration policies that more adequately represent non-binary bodies and identities also be seen as part of a post-9/11 surveillance discourse successfully closing the net around all those subjects considered as "other" to the modern nation-state? More generally, in this neoliberal era of individualism, state control, and changing notions of citizenship, what do we make of the expansion of gender categories and legislative and policy-related changes regarding gender identity and autonomy? And, my last question, what impact might they have on mobility, migration, and state regimes of border control?

Verena Molitor: Thank you very much. We'll come back to these questions and also to the Australian case. But first I would like to give the floor to Alexander, just to give us some insight into the Russian case. This is slightly different; it is about how people talk about non-binary individuals in Russia and what kinds of terminology they have tried to find.

Alexander Kondakov: Thank you very much. It is indeed weird – my presence here. I'm sure you know that Russia is not developing any kind of law in relation to recognition of genders beyond the binary system which heavily relies on, as we say in Russia, "traditional" understanding of gender norms. But what I want to do here is to offer a kind of mental experiment to look at how law deals with categories in general, and Russia would be an example that shows the logic of categorisation within legal discourse, without claiming that Russia, *actual* Russia and *actual* Russian policies, has anything to do with the topic here.

It's a mental experiment, and I depart from an assumption that current law and current legal systems or any bureaucracies for that matter actually operate based on categories, based on categorisations of people, and this is a very crucial element of legal discourse. So how does law work, when those categories are taken away, or when some kind of new logic is offered to be part of the system?

I have two examples here to offer in this intervention. The first one is a case of a murder of a transgender person somewhere in Moscow and a court decision that has been written to deal with the case by a Russian judge there in the first instance court. The decision is written without any awareness of the existence of the category transgender – that would have really simplified the judge's role, if he could have used that category to communicate what he wanted to say in his decision; it would have been a much easier task than what happened in the actual case.

So how did this judge deal with this complexity? It turned out that law has this capability of contextually dealing with the issue it has taken. In that particular case, for example, depending on the context, the judge referred to the victim with a variety of different categories, for instance, as "a man," "a woman," "a gay person," "a person with non-traditional sexual orientation," "a boy," "a girl," "she," "he," and so on and so forth. Depending on what was relevant at the moment the event was happening and described in the court decision, the category shifted from one to another.

Another example that I have for you to think about is the introduction of just one category for the whole variety of sexual identities in Russia. We have a huge development of something called “legal prohibition/ban of homosexual propaganda,” which started in 2006 with banning exactly this, the “propaganda of homosexuality.” Then it developed into something very different. In various regions there were laws introduced in relation to that. And eventually, by 2012, they arrived to the conclusion that what they want to ban is propaganda of “sodomy, lesbianism, bisexuality, and transgenderism.” This kind of list of categories resembles a very commonly used acronym, LGBT, reinterpreted within the Russian legislators’ weird logic. These were regional developments – that law eventually arrived to the federal level in 2013, and there they had a very different approach: They decided to get rid of those categories because they actually promote LGBT discourse, and offered a category that has already been used in legal decisions before. What they prohibited was “propaganda of non-traditional sexual relationships.”

Now, how do judges deal with this? I will give you several examples of when they are forced to use that category to refer to any sexual diversity.

First of all, they use other legal categories that are there in the law, like “social group,” for example, or “sexual minority,” a very important and popular category in Russian law. These are very formal categories, they can also be very romantic, like in this case, “the court agrees with the defendant’s attorney and believes that the mitigating fact in this case is the fact of the victim’s amoral behaviour because he offered same-sex love to the defendant.” Thus “same-sex *love*” is also part of this vocabulary.

“Buggery,” “sodomy” - we have a special word for that, *мужеложство* – men lying with men. Interestingly courts do use community terms also, no matter what. So “the victim (was) offered 10,000 roubles in return for his silence, but he rejected this offer saying that this could not change anything and he would still tell his relatives that he was a Gay.” “A Gay” here in the decision is written with a capital G, in order to, somehow, point out that it’s a category. Then *наши*, or “ours”: “He said, ‘Let’s go to one of ours.’” In the text, by “ours,” he meant gay community. So a lot of community terms. Or this: “The defendant asked him whether he was a member of LGBT society, and he replied he was.” So society, or community. Or derogatory terms: “Someone

mentioned that the victim was a passive homosexual. He decided to murder the victim because he hates such people." Or "fag," "faggot," those were used too.

The most common way is this "non-traditional sexual orientation." But it is not used unequivocally. Judges still think they have to mention what it actually means. Like here for example: "He was a person of non-traditional sexual orientation, a bisexual." Or, in a different case: "He is a bisexual, to be exact, a person with non-traditional sexual orientation."

All these categories actually constitute a huge variety of vocabulary, of the language in the hands of legal professionals, even in that quite hostile and violent context. I just have them all here: gay, bisexual, lesbian, LGBT, social group, sexual minority, same-sex love, sodomy, *наши*, the "ours," community, homosexual, fag, faggot, queer, a person with non-traditional sexual orientation... There's a huge range of categories. And I think that that vocabulary even proliferates when the legislators try to squeeze the whole variety of people's experiences into just one little box. As soon as this non-traditional sexual orientation is introduced into the law, judges feel obliged to explain what it means and offer this huge range of categories that they take not only from official and formal discourses but also from community languages.

Verena Molitor: Thank you very much. Maybe we can stay with this law issue and go back to the case in the beginning, because as you can see it's also now a more general topic. Is it important to use gender and sex categories in law? It's a question to all of you, but especially to Davina and Alexander, I think. Why is it important?

Davina Cooper: This is exactly the sort of question our project is asking. One thing that's interesting and that struck me during the research is the difference of response from feminist NGOs and feminist policy makers, as opposed to feminist critical academics. Talking to academics, they say, "Well actually, having formal legal status makes very little difference. Equality law is very unsatisfactory, and there is no clear evidence that having a formal legal status, as opposed to an informal one, impacts on how effective law is as a remedial structure – as a way of dealing with – certainly not with gender exploitation – but even gender discrimination or inequality; it's marginal. But what feminist policy makers and feminist NGOs do see it is more effective – more effective in a remedial way – in terms of generating data to suggest it. And then there's the whole issue of single sex provision, and how you deal with that in a self-

determination framework. We can discuss that; I think it's an interesting issue. And that's where a lot of the debate in Britain has ended up focusing. In a way, it has become a question of collective self-determination of a group to say, we get to decide who belongs in our group; and whether that's acceptable or not; and when it might be acceptable.

Alexander Kondakov: Well, I guess there are many instances where law does help to address very specific, very important issues of justice, and even helps to first articulate and formulate those problems and issues, and then maybe to certain extent restores that justice or provides some kind of remedy. But it's true that there are more and more people, more and more voices raised, saying that law doesn't provide the justice we need, or law doesn't provide the justice we want. And what is the response of state bureaucracies to these kinds of voices? Usually, it's "Okay, let's change the law." Or "Let's make it better. Let's try to address your concerns." And I don't think that it really helps. I mean, we can fix some small issues, we can fix some texts, but the larger question still remains unaddressed, and the larger question is: Are there other ways of dealing with injustices rather than law, ways which would also be effective in addressing those injustices in gender and sexuality domains but also in other domains, too. And what are those social institutions that can deal with those injustices more effectively than law? Law, current law at least, is an invention of modernity, that probably is not there anymore, maybe we find ourselves in a different society now that is less categoric, that is more fluid and flexible. So what would be a new institution that could deal with that complexity? Of course, I have no answer to that.

Tatiana Zimenkova: Can I say just one thing? I believe it's also really a question of wording because, as you know, in Germany this third category was introduced into the law, and one of the results of this – and this is what I want to ask – is that, for example, every job application of Germany, or every job position announced, has to be announced as open to male, female, and diverse. Because German professions usually are very gendered in their naming, they want to make sure that everybody feels free to apply. For sure it makes visible that there are more than two genders, but at the same time, the wording "diverse" directly others everybody who is not male or female, right? So, everybody is free to apply, the males and females and the others. The question is: Is it good because it makes this visible and it makes people see "We are wanted in our professional qualifications so we feel open to apply," or does it again make visible this othering in every job announcement and you see 'German Railways is looking for new people for this and this job, and we're looking for all these three (genders).'"? We even had a friend who is a lawyer, and they are looking for a

new lawyer for the agency she works for. And she asked us, “We’re looking for all three of them. How do we name it? How do we say this?” So, what did this law actually produce? And for what?

C.L. Quinan: I have a question about that as well because, of course, in the German case the X is very limited and is only used in special cases for intersex individuals. So, I would also wonder what kind of effects this might have in terms of other people who might not identify as intersex, but say, in terms of gender as well, who might identify as non-binary or something beyond male and female or man and woman. So, I wonder also what kinds of impacts that would have. But I want to return to the question that Anna asked us to think about: Could we imagine a world in which X is for all? And this also links to this question of decertification. Maybe you thought I was sceptical of the X, which in some ways I am, but I also see great potential in it, and I would love to imagine a world in which that is *the marker*. But right now, there are so many restraints and constraints on it – I’m specifically interested in passports, and right now in the sex/gender field, there’s only M and F – and X in a handful of places. You cannot leave it blank. So, X could be a solution. But right now, because there are so few cases of this that it puts people that hold that marker in a situation that is potentially uncomfortable.

Anna van der Vleuten: Like the example of German railways and the “m/f/d,” on the one hand it’s about this making visible, “yes, we acknowledge there is more to the world than m and f,” and if you would leave it out and just not mention it, then the danger is – I should point it out already – that the default option, again, becomes male, then we are back to where we do not want to go back to. So, it is on the one hand how to not silence, how to make visible diversity, but then on the other hand how to avoid categorisation in one way or the other, or in very intelligent ways as the Russian judges did. So, on the one hand, how can we prevent the default option becoming again standard, male, and the other thing is what would empower, what empowers more: making visible? And in what way? What empowers?

Verena Molitor: Maybe we can give the question to all of you. It’s very interesting because if we were to have the X for everyone, everyone is equal, but this would not be the case. This is a big problem. Because then there might be this male standard.

Anna van der Vleuten: Because that was the reason in the first place why they started adding first the F.

Audience Member 1: I'm working on intersex rights in the Netherlands, Germany and Belgium. I just wanted to add, because it's exactly about this point regarding what empowers. I've also found evidence of intersex organisations in Germany who actually found that parents feel more pressured by the third category and that this third category actually scares them. Like the example that you named, there are many examples of this hospital situation where it's this sense of urgency and that this category "undetermined" or "diverse" or whatever the term actually pressures the parents more into choosing a male or female label that might not fit at all, and also pressures them more into surgical interventions that aren't necessary. So, it can have actually very far-reaching consequences, negative consequences, this third option. I just wanted to add that.

Tatiana Zimenkova: Returning to Anna's comment about X for all, my question would be if the X might become a marker of class. In other words, what kinds of parents would have the capital to allow this for their child. What sort of education level and knowledge about gender or knowledge about the legal possibilities would one need to have to access this marker?

C.L. Quinan: What if the X was *required* for all?

Davina Cooper: It would take all the meaning away from the category so then you don't have it. There is a Canadian case in British Columbia, where the parent didn't want to gender their baby legally and so were trying to keep sex off their birth certificate. So, there are a few parents who are doing that despite, as you say, the minoritised position of those refusing. But coming back to your question, which I think is a really important one: What empowers? One way of looking at it is to go back to Nancy Fraser's account of a politics of redistribution, and a politics of recognition; and whether this debate over gender has got very focused on a politics of recognition, at the expense of thinking about redistribution of resources and power. And in terms of what law can do, which I think picks up your point, Alex, it could reconstitute the sort of the systemic dimensions of a society, in terms of how it's organised. The choice is currently being framed between do we have a plurality of social identities and categories where the state provides the categories and recognises the identities, or

should it withdraw them all. And then the risk is, if the state no longer engages, does it just replicate the status quo where the dominant gender becomes the norm? What you need at the same time are those state policies or changes that allow the normative and structural aspects of inequalities to be tackled. I think when you route too much through identity categories you get into fights about boundaries and fights about categories, when the issues are actually more about social inequalities. Should we then focus on social inequalities rather than the groups they've been customarily aligned with? In Britain, some of the care policies and policies around reproduction can use a gender neutral-language. But there are tensions because some people aren't happy about taking out the gender categories to talk about carers or people who're pregnant; it's very contested.

Verena Molitor: But do you think, all of you also, do we first have to change language? Because I talked about this to a social linguist who said, yes, you can talk about this topic and put it into law and everything, but it all starts with the language we use. I'm not sure. What do you think about this? Because I'm also interested in all these linguistic issues so I think first of all maybe we have to change language, because with language we start to articulate these categories, and this is the beginning, the starting point.

Davina Cooper: My feeling is that there isn't one right starting point. Language does things and it's important but I don't think it is where things start, but we wouldn't say somewhere else is where it starts. I don't think the problem is this notion that there is one social practice that's determinative or one structure that's determinative rather than seeing them as multiple entry points really. Concepts and terms can be very capacious. At one time, refusing to disavow womanhood as a subordinate, devalued social category meant the category "woman" was being stretched and moved in a whole range of directions so that women could be anything: butch, independent, physically assertive, confident and so on. Now people are creating a plurality of categories to identify lots of different kinds of gender expression, but materially social lives in question may not be much different. The terms are different. The fights are over the terms. So, I don't think you need necessarily new languages as the only way of reimagining or redoing social life, it's just one dimension.

Anna van der Vleuten: To your point about how important language is, I think we all agree. However, on the other hand, I think it becomes very much a legal issue because the law fixes, it uses the category, it uses the language, and it looks as if meaning is

fixed, whereas in political discourse it is not fixed, but it is remade time and again. And then the question is how do politics and law relate to each other? To what extent, for instance, are judges who are doing the interpretation able to give new meaning to the words, or are they just very clumsily trying to get around them? Also, law, of course, is limited, in the sense that it is very well able to deal with individual cases as far as they fit the law in one way or the other. However, law cannot deal with structural inequalities, that's beyond the law, and that's where things get trickier because then also, as you pointed out, class issues come in, which then links back to language and to different capacities also to express, like the parents in the example I gave. So, the limitations we have or the possibilities and resources we have are different and there is a class issue to that.

Verena Molitor: So maybe it's only then shifting problems, right?

Anna van der Vleuten: Yes, I think that's what we are worried about also.

Tatiana Zimenkova: As you were speaking about language and about judges, I was thinking of a presentation we heard yesterday [during the ECPG conference], where official authorities approach NGOs to define who is LGBTIQ in order for the authorities to make a decision on refugee cases. My question is – and all of us, we are speaking about different types of experts – Anna, you were speaking about medical experts. All of us who do research on border crossing know that somebody has to decide which body is, well, fitting enough in order to be able to cross the border, and for border crossing there are a lot of issues. But the question is, in all of our cases, who is it who will be asked as an expert in order for certain policies, laws, and so on to be put into practices? Because I believe, academically, we all have great ideas, but then certain individuals in certain positions have to make decisions that affect lives. And people who have to make decisions in health provisions say, “But the person is a woman”. And sometimes I hear these arguments like, we need binary because breast cancer is an important thing for women and if we don't have the category of women, we could not provide for this group of people so that they get medical necessities, prevention therapies and prevention examinations in order for breast cancer to be detected as early as possible. And the argument is that for that we need the gender binary. So, the question is, who are actually the experts? Are we the experts?

Alexander Kondakov: It's a great question. I just wanted to point out that we are of course the experts, but also we are in this very privileged and important position of working in universities and educating those people who will go there and implement law and regulations, and not all people who enforce the law or other kinds of regulations go to universities, but definitely so far most of the things that are out there in the world were at a certain point produced in a university. Maybe it's not the case anymore, maybe there is knowledge production that is happening outside of university walls. But we still have some role in it, and we are also getting to a point when we are encouraged to exchange more and more between different disciplines, which is also very important here. We have already touched upon so many different issues and different fields, not only law but medicine and policing and border control, registration, management, state administration, all these kinds of things. I guess a conference is like that, it should help to advance those kinds of knowledges and then go and educate those people who will go and enforce regulations in different ways. This is a job of very concrete specific people who sit in the courtroom, who sit in a window at border control and check compliance of bodies that appear in front of them against regulations that someone created at a certain point. That person hopefully is educated by us.

Verena Molitor: I would like to ask Christine about this – because you also raised the question of border crossing – and you had conducted some interviews in Australia. Can you give us maybe some insights into how does it work there in terms of border crossing and also authorities when they are confronted with such cases?

C.L. Quinan: I have to state that in Australia, although I did speak with police, I didn't speak with border agents. I was largely interviewing people who either have an X in their passport and other identity documents or who are seeking to change their documentation to X. Of those people who have an X, not all of them have yet to travel. For many it was also a statement, an activist stance that they are taking in choosing to have an X. But as I mentioned before, Australia does require a medical declaration, which also becomes a class issue, in having access to a GP or therapist who is willing to sign off on this form that then needs to be sent to the passport office. So that's something to really consider. This is, however, not the case in all places. For example, in New Zealand the X is permitted by self-declaration. As far as those who have travelled with X, no one I spoke with has had any serious issues such as being barred entry. But there's such little data at this point so conclusions cannot yet be drawn. I also did a set of interviews prior to this that involved speaking with trans- and nonbinary-identifying individuals about their experiences in border crossings, and

they very regularly have experienced issues, whether in terms of body scanners or agents asking “why doesn’t this document match who I see in front of me?”

Anecdotally speaking, one thing I will say that when arriving in Australia, I was quite surprised that I never even had to speak with a border agent. This border crossing is facilitated entirely through machines. At least for some passports this is the case. So, in a sense, you don’t even encounter a person if you have a machine-readable passport from a select group of nations. There is, however, facial recognition in place at that machine, which itself comes to function as the border, that checks the passport against the holder. And that is all done through biometric technology. But that’s another question, and one for which I’m currently examining the gender-related aspects.

Verena Molitor: Thank you. Maybe we can open up the floor for comments and questions.

Audience Member 2: I want to follow up with your [Verena’s] question about language. I’m sort of in between cultures. I think that language has much to do with culture. I just remember when my second child was getting a name in Germany, his second name was sort of not clear whether it was a boy or a girl’s name, then I had to go back to prove that it was a male name. And this doesn’t happen in the US. So, I think that culture is very much part of that. And that made me start thinking about, what kind of cultures do we know of that have more than two genders? What cultures could we look at to see how they deal with this situation that we are dealing with? Maybe there’s some answers there.

Davina Cooper: As I understand it in some places there have been long traditions or histories of other genders, but in the colonial and postcolonial situation, it’s become very institutionalised and disciplined. I think India has introduced – other people here know more than me – but India has introduced recognition of a third gender. I don’t think it’s a kind of transformative approach to gender in general.

Audience Member 2: But what did they do beforehand? I mean, we have to look pretty closely.

Davina Cooper: Pre-colonial.

Audience Member 2: Yes. How did they deal with that? Or what was it in that culture?

Davina Cooper: I guess that goes to a bigger question about what is the role of state – of status really. I'm coming from the British context but what, if anything, do you want to exist as a legal status, whether it is spouses' status or your national status or your sex? There are abolition movements around all of those things, and if you abolish all forms of status-based recognition or status-based rights, privileges, disadvantages, immunities and so on, then the challenge is – coming back to your question – how do you avoid the neoliberal context of, you know, becoming just a resource really, a circulating resource. Moving away from status seems a good thing in lots of ways, particularly if it's about elective identities and fluidity, and if people can widely access it so it's not concentrated in a few privileged people who can create this self-realised life. What are the social conditions in which this is happening? In another way it comes back to your question about language, which comes first? You can say nothing really comes first, it's all kind of co-constituting. But if we are talking about abandoning certain forms of status in quite conservatively neoliberal conditions, how is that then going to be played out? Can it be played out in progressive ways rather than reactionary ways? What might make that possible?

Tatiana Zimenkova: I would also say that it goes even further in this kind of cultural sense, in which states actually want to include this in an ID document. For example, I don't know whether you've ever seen the Russian passport. You don't only have your registration and your gender for sure, but you have a stamp with every marriage you ever started, a stamp if you also have been divorced, and all of your children are included. So, every police officer who controls you knows everything about your marital status and your family. And in Germany, you could date somebody for ages and then you might eventually learn that this person is married, but in Russia you just have to take out this person's passport while they sleep and look in it and you know. But it's also the question why it happens and why it happens like this. And my question is what happens if a person with an X marker enters a country with no possibility for a visa application for a third gender. We crossed the Russian border a couple of months ago, and you really had to state that you are male or female, and Verena just forgot to do it and the officer came back and said, "I'm so sorry ma'am,

could you please tell us what you are? Because otherwise you're not allowed to enter the country." Then legally, being neither male nor female, you would be forced to lie in visa application documents, you would be forced to violate the visa regime before you enter the country. So how does that work?

C.L. Quinan: Many nations have said they will not deny a visa application if there is a mismatch between the passport marker and the marker that's in the visa application. I can't say for everywhere. There is only one country that I know of that specifically states that you cannot enter with a nonspecific gender marker, the United Arab Emirates (UAE). So, for Australians with X in their passports, it states on the Australian government's travel advisory page, "you cannot enter the UAE with an X in your passport." But there are also stories about people who have wanted to travel to Mecca for their pilgrimage and were denied visa applications, specifically for the Umrah. So, there *is* an issue in this respect – I think this also speaks to questions of undertaking, say, religious-based migration or economic-based migration, it's those who are perhaps already vulnerable because of intersecting forms of oppression who are being denied such possibilities in these cases.

And another important thing is that there is a logistical issue in terms of airlines as well. We are almost always asked to identify as "male" or "female" when purchasing a ticket. In Australia you are typically given another option (such as X). When I can, I will use a neutral form of address and fortunately I can say "Dr" – and in my fieldwork, I spoke with people who don't have a doctorate or any degree for that matter, but still use this neutral form of address. As a sidenote, I was flying recently and upon choosing "Dr", it actually forced me to select "Dr" (male) or "Dr" (female). Clearly, these ideas about gender are very much built into the system!

Audience Member 3: I also have a question about passports. There are countries like India with the Hijra or in Thailand the Kathoey that have a long tradition of historically and culturally accepting this third gender or sex. Do you know how they happen to deal in terms of law with this third sex in passports?

C.L. Quinan: For the most part, they can elect to have an X if the nation allows for it as is the case in India, for example. Passports are regulated by the International Civil Aviation Organisation (ICAO), so any member state – and there are almost two hundred member states in the ICAO – can choose to allow their citizens to have X in

their passports, but only a handful of places in the world, say ten or so, have allowed for that, India being one. In some places, any gender diverse people, including trans, intersex, and non-binary individuals, seeking to update their documents will be given an X. So, there's no choice involved. So that's also a question to think about – when is this forced by the state, and when can you actually elect that?

Audience Member 4: This is all very interesting and engaging. I've been recently studying the situation in Argentina and how they are dealing with non-binary registrations in different fields of the law, also criminal law. And although the gender identity law in Argentina is binary – you can change your sex from one to the other, with no need for any kind of medical or psychological or any type of report – it's still binary. But there have been cases in which people who do not identify with the binary opted for a neutral form. And they have been granted an ID with no statement of sex. So it's left blank, it says nothing. But it's only at the registry level. Every other implication which is very gendered in the different fields of law, for example, labour law, retirement ages are still different for men and women. So, we'll recognise it, it's the recognition phase, but in the practice of implementation, this has very specific consequences.

You were talking about jails, that's also an issue, because they really don't know where to place non-binary people, and it's a big issue, because also the trans community is facing criminalisation, and the number of trans people in jail because of drug dealing, for example, is very high. So, it's really an issue of where to place them. And another difficulty is that there are very specific hospitals which deal with the intersex population. So, every intersex child is flown over from any place in the country to that specific hospital. And there is no medical history accessible to intersex people. So, I think it goes beyond sex recognition to bodily history that you may need for health consequences. When we think about how we bring this into practice, I wonder whether we can talk of law and whether a law can erase gender registration, or we should actually start by looking at different fields in law, criminal law, labour law, and property law. For property law in Argentina, for example, we still register whether you are married or not because that would have implications in terms of your property. So, there are these different layers.

Davina Cooper: What you are saying is really interesting. And in a way, the fact our project emerged and is focused on the jurisdiction of England and Wales is partly because there's been such a movement towards gender neutrality in every area of

statutory law, that you can then ask the question actually: What work, if anything, is having a legal sex/gender doing? But of course, even in a country like Britain where you could decertify sex/gender so that people are no longer the bearers of legal sex or gender, and statutory law no longer explicitly genders them, you've got this massive edifice of case law, and you've got statutory interpretation, you've got all sorts of things, governmental circulars, guidance, secondary legislation. So, you've got this huge wider edifice which has got this endless long history of inscribing sex and gender into it in all sorts of ways. So, one of the things that interests me is, what then happens to that edifice when it's then presented with these legally non-gendered bodies and people? How does that legal edifice re-gender them and how might that edifice shift if courts can't make legal assumptions about people's sex or gender? Except that they may need to, in certain contexts – in Britain, although you don't have a legal religion, if you want accommodation by your employer so that you can pray at certain times, the state or law will then, in fact, be recognising your religion, but it's largely based on you saying, this is my religion, this is what I need to do, and then there's the question, has the employer accommodated you as far as they should legally? And then that raises the question about opportunistic entering of categories. Some people say, I need to pray eight times a day, or – no, they need to do it in a way that's recognised for some faiths, but is it about a matter of saying, this is the faith I am? Do you need to show a kind of community recognition that you are in that faith? Do you need to show a history or some length of time of being in that faith? At one place where it has played out in Scotland, it's kind of copying off television really. The American television series *Orange is the New Black* had this story of someone claiming to be Jewish in order to get better food, and that then happened, according to the media, in a prison in Scotland where the prisoners said, we are Jewish, we want kosher food, because kosher food was seen as being better quality. So, it was kind of a sensible move. And there was no legal edifice that said there was anything required to prove that you were Jewish in this context because nobody had ever thought of people opportunistically claiming to be Jewish in the prison. I don't know how this ended up, but these things are emergent and changing – which of the categories, in what contexts, seem to carry things that might be preferable for particular people?

Alexander Kondakov: I just wanted to say that, you know I have a dream, the dream is that there will be different commissions in different countries assembled and they will sit down, they will look at all those issues, and really get to details of how can we – regardless of what the law was before the gathering of that commission – how can we write a different piece of legislation in relation to those specific things, like jails, shared property, or pensions. For example, like for pensions with different ages, I think it's not the case anymore in European Union, right? But in Russia for example

and in the Soviet Union, that very same legislation still exists and was enacted only to acknowledge that women have double shifts, they work their job on the market and then they go home... and they have to work again. So, the Soviet legislators thought, "Okay, let's give them five years more of pension." And it's still there in current legislation, though they're aiming at abolishing that rule. But is it a good thing? Was there a commission gathered? Did they really think about it? Did they address that particular issue? Was there any intervention made? Now people do things that way, at least in Europe. In Russia, of course, it's said that it's very different but of course they look at Europe and they copy more or less everything that is happening here. So, I think that's more or less the idea. People have to really sit down and address it. You actually are already doing it in England and Wales and probably Scotland.

Davina Cooper: It really follows on what you are saying, that then what are the mechanisms that get used to deal with some difficult areas? What you are seeing in Britain is that privacy rationalities become a way of managing different kinds of bodies in the changing rooms or toilets. You create these private stalls. Or in the context of different bodies in women's prisons, risk assessment is used. In sports there's talk of focusing on mainly capabilities or capacities. In other contexts, questions of where does decision-making authority lie? How does it get redistributed? All these criteria and principles are emerging as ways of dealing with the challenging issues around moving to a self-determination framework. But are they also problematic, relying on privacy to do work? Or relying on risk assessment? That's the kind of – whether it's the meta level or the next level of where reflection is. The principles that are being brought in may not be good principles to then embed and give a lot of weight to. From a critical perspective, you don't necessarily want privacy to be the solution to the question of mixed bodies, or bodies in proximity.

Tatiana Zimenkova: Thank you very much again for your question because it shows us how interdisciplinary the problem is, and how many aspects we would forget if we would not collaborate on this in an interdisciplinary way.

Audience Member 5: Listening to what you were saying earlier next to some other things, it really brings up debates about racial and ethnic statistics gathering. I'm familiar with friends in the United States primarily and those are sort of stereotypical comparative cases, where in one situation it is illegal to gather statistics, in a colour-blind society, which leads to all kinds of policy problems in terms of measuring

inequality. I wonder if you thought about how that issue of race and ethnicity informs some of your work, if at all.

Davina Cooper: I think you are right. It's an interesting challenge. Except – and it's an argument that's often made by feminists who say we need constant, consistent data, we need consistent categories over time, otherwise how do we understand inequality. But I think two things: One is that, in reality, people are self-identifying in data collection because they aren't being required to produce evidence to “prove” their status. There's a second point about which are the categories that are relevant or valuable at any given moment and these will shift? I also think that the categories that you use that show the starkest representation of the problem may not be the best way of generating data that show what to do about it. So, if you say, well there's still the gender pay gap after so many decades of having legislation, might it be interesting to see what happens to people who identify as non-binary or agendered or trans in terms of pay, in terms of how their pay shifts? Might we learn anything from that? So, I think different kinds of data do different kinds of work. What's your feeling in terms of what you might learn from collecting ethnically based data, which in Britain is completely self-identified, the categories themselves can be deeply problematic?

Audience Member 5: Absolutely. I mean I don't have the solution or – I actually don't have many clear thoughts about it, but it was just something that struck me. But, also, it's different, right? Often times those categories are not on passports or are not necessarily required to cross borders, although they are used to make other decisions in more tacit ways. Because the data part is different than research, like you said, it depends what context we are using it in, and it's generally self-determined. But your point about trans really does make sense to me too because there is plenty of research to suggest that people who transition to male even visibly get many of the benefits of male privilege, including a bump in salary, you are listened to at talks, whatever.

Anna van der Vleuten: I absolutely agree. And, also, I would add to use the word intersectionality again. I know that the European Institute for Gender Equality has started to try and use in an intersectional way, also this gender pay gap or many other of those issues, it is not simply about men and women and the other, because that then also has all sorts of privileges and differences *within* those categories. According to me, if you really want to, from a policy maker's point of view, if you really want to change something about that, or from an activist point of view, if you wanted to problematise this, then you need a different type of data. So, this would also have to

do with your comment upon the limits of racial or ethnic statistical gathering. So yes, we would need data in order to uncover structural inequalities; however, the data does not mean to have those fixed categories.

Verena Molitor: Maybe we should take the last question. Unfortunately, time is almost up.

Audience Member 6: Maybe it's a misplaced question but still I wanted to ask if you are willing to reflect a little bit on how LGBT rights play into international inequality, and how then there's a whole re-installment of the idea of hierarchical states, some are more developed already and have the X and others wouldn't even allow people with an X to enter the country. If I'm making sense, there's a whole global imaginary as well, some countries are ahead of the game, more developed, and then how does that also recolonise in a way what is the right way to do it. So somehow this plays into what you were saying about the dream and having different committees, even though the idea of committees is also an interesting one. It goes with the idea of a really individualised way of framing the issue as well, and maybe how LGBT rights would relate to collective rights, how it has been pushed forward especially in Latin America.

C.L. Quinan: I think we should be cognizant of how the language of "LGBT" and "trans" is exported and put onto different populations that would not necessarily have otherwise been seen under the category of "transgender". But in terms of the places that allow for the X, it is an assortment of countries that you might not expect to find together: Nepal, Bangladesh, India, Pakistan, Australia, New Zealand, Malta, Canada, Denmark, and in very specific cases in other places, including in the Netherlands. So, I think in some ways, this is reordering what we might think of as the "progressive" locations, that is, who is setting the agenda for acceptance of gender diversity. In fact, Nepal was the very first place to allow for the X.

Alexander Kondakov: I would just say that by committees I mean anarchist assemblies. This is one thing. And, of course, it's such a weird thing that we map countries in relation to some unknown and very phobic criteria of how they deal with LGBT populations within their boundaries without acknowledging a lot of other intersectional inequalities that they have that influence their LGBT populations, too. And especially knowing the fact that the major share in measuring those kinds of

things and colouring the world map in different colours is if you recognise or not same-sex marriage, which is just one thing in the very complicated lives of people.

Verena Molitor: Thank you to the panel. Thank you for listening and being such a great audience. And hopefully we all stay in touch to discuss such important issues.