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"GENDER IS NO SUBSTITUTE FOR SEX"[1]: A COMPARATIVE HUMAN RIGHTS ANALYSIS OF THE LEGAL REGULATION OF SEXUAL IDENTITY

ABSTRACT. U.K. regulation of sexual identity within a marriage context has traditionally been linked to biological sex. In response to the European Court of Human Rights decisions in *Goodwin* and *I.*,[2] and in order to address the question of whether a transsexual person can be treated as a "real" member of their adoptive sex, the U.K. has recently passed the Gender Recognition Act 2004. While the Act appears to signal a move away from biology and towards a conception of sexual identity based on gender rather than sex, questions of sexual identity remain rooted in medico-legal assessments of the individual transsexual body/mind. In contrast, because transsexual people in some parts of Canada have been able to marry in their post-operative sex since 1990, contemporary debates on the sexual identity of transsexual people in British Columbia and Ontario do not focus on the validity of marriage, and more frequently centre upon the provision of goods and services, in human rights contexts where sex is said to matter. Currently in Canada this is prompting questions of what it means to be a woman in society, how the law should interpret sex and gender, and how, if at all, the parameters of sexual identity should be established in law. This article seeks to compare recent U.K. legal conceptualisations of transsexuality with Canadian law in this area. As human rights discourse begins to grow in the U.K., the question remains as to whether or not gender will become an adequate substitute for sex.

KEY WORDS: Canadian Charter, gender, human rights, sex, transgender/transsexual

Introduction

The question of what sex a person is seems particularly relevant in the U.K. at the present moment. Case law addressing sexual identity

[1] See Johnson "Gender is no substitute for Sex" *Daily Telegraph*, 24 February 2004. I am being disingenuous here as the author of the article is arguing that replacing the term sex with gender in relation to transsexuality is erroneous and an annoying Americanism, whereas I am arguing that neither term is adequate.

[2] *Goodwin* v. *U.K.* [2002] 35 E.H.R.R. 18; *I.* v.*U.K.* [2002] 2 F.L.R. 518.

within the areas of sport, marriage, and employment law is emerging at an astonishing rate, not only at a national level but also within Europe and internationally. Most recent in the U.K. has been the advent of the Gender Recognition Act 2004. Outside law, transsexual people[3] are also everywhere – in television advertisements, billboard advertisements, day time and reality television shows, and soap operas.[4] Clearly sexual identity is an issue that merits attention and analysis.

With such contemporary relevance in mind the following discussion is divided into three parts. First I will explore how recent (particularly feminist) theorists have understood the term 'sex' and how that relates to 'gender', in order to demonstrate that the development of discourses of sex and gender has had a direct impact on the legal regulation of the sexed body. Secondly I will place questions about the definition of sexual identity in the context of U.K. law on transsexuality, focusing on the law relating to birth certificates and marriage, and including an examination of the potential impact of European human rights discourse on this area. Finally, I concentrate on recent developments in sexual identity law in a Canadian context. In contrast to the U.K., Canadian courts, for example in British Columbia and Ontario, have largely recognised the post-operative sex of transsexual people

[3] "Transsexual" has begun to be used as an adjective rather than a noun. See Press for Change (2003b, para. A.2.a, n.2). Many people also use the term trans rather than transsexual or transgender (Whittle 1998). I will be using this term alongside transsexual and transgender. Whittle also contends (2002, p. 7) that the term transsexual is a misnomer – a trans person wants their sexual identity confirmed through an acknowledgement of their "true" gender. I would also argue that it is the gender of a trans person that runs counter to society's expectations, as it does not match their 'natural sex'. Transgender is probably then a more appropriate description. However, I continue to use the term transsexual in relation to these issues in the U.K. as it is this term that is currently utilised in legal and medical discourse, as well as some parts of the trans movement.

[4] See e.g. a recent U.K. television advert for the soft drink *irn bru*; the U.K. reality show and competition *Big Brother*, 2004, won by a trans woman; and the popular U.K. television soap opera *Coronation Street*, to name but a few. There was also recently a pop song in the U.K. charts called "Your Mother's got a Penis" by the Welsh rap band, Goldie Lookin' Chain.

for the purposes of marriage.[5] Debates in recent case law in these jurisdictions have instead related to sexual identity in non-marriage human rights contexts. U.K. law on marriage tends to concentrate on defining the term, sex and, in doing so, relies very much on biology and medical evidence. While Canadian marriage law also relies on medicine to the extent that surgery is required legally to change one's sex, current debates on sexual identity have not focused on marriage, and so medical assessments of sex have not played a major part in the emerging Canadian jurisprudence. Because sexual identity has been discussed more frequently in the discrimination context, Canadian law has been freer to grapple instead with gender (as defined by social practice). Although the Canadian experience offers an example of how to look beyond binary sex categories, I will argue that their approach does not necessarily escape binary categories altogether. Canadian jurisprudence does, however, have a longer tradition of looking at the social meanings and practices of gender. Very recent U.K. law on both employment issues and marriage law, influenced by the Human Rights Act 1998, arguably demonstrate a move towards gender rather than sex, perhaps following in the footsteps of the Canadian approach, but this policy shift to substitute gender for sex has been resisted by the U.K. courts, and is not unproblematic, as discussed below.

An examination of the concepts 'sex' and 'gender' is first necessary to provide a back-drop for analysis of the legal construction of sexual identity in both U.K. and Canadian law, and provides the foundation for my argument that legal discourse relies upon particular definitions of sex and gender, definitions which in turn inform the legal regulation of transsexuality.

[5] I say largely because Whittle (2002) notes two Canadian marriage cases from the early 1990s, both deciding the same issue. In each case a trans man had married a woman. A new birth certificate registered the trans person as male. However, the courts annulled the marriage on the basis that the FtM person had not undergone enough transformative surgery properly to be called a husband in marriage. For critique see Whittle (2002, pp. 11–12; p. 168). Note also that Canadian courts have recently recognised the validity of same-sex marriage. Federal legislation defining marriage as "the union of two persons" is currently before the Supreme Court of Canada. Thus even if a transsexual person had not undergone "sufficient" surgery it is likely that such a marriage would now be valid.

SEX OR GENDER?

As part of second wave feminism, there was a well-documented move to distinguish between sex and gender (Kessler & McKenna 1978). Sex was said to be based on basic biological characteristics (for example chromosomes and hormones), while gender was explained as the social manifestations and practices associated with biological maleness or femaleness. Feminists emphasised this distinction because they wanted to demonstrate that differences between men and women which were widely assumed to be natural (for example behaving in a 'feminine' manner in terms of dress, language and so on) and which therefore provided the basis for differential treatment, were in fact part of gender roles and therefore socially produced and escapable rather than natural and inevitable. Femininity, that is, the practice of gender, was a social construct (and therefore alterable in law and practice) while femaleness was biological.

The incorporation of the distinction between sex and gender into mainstream social and legal thinking is demonstrated by the judgement of Dame Butler-Sloss and Lord Justice Walker in the recent English Court of Appeal case on transsexuality, *Bellinger v. Bellinger*:[6]

> The words 'sex' and 'gender' are sometimes used interchangeably, but today more frequently denote a difference. Mrs. Cox [Mrs. Bellinger's lawyer] submitted that gender was broader than sex. Her suggested definition was that 'gender' related to culturally and socially specific expectations of behaviour and attitude, mapped onto men and women by society. It included self-definition, that is to say, what a person recognised himself to be... It would seem from the definition proposed by Mrs. Cox, with which we would not disagree, that it would be impossible to identify gender at the moment of the birth of the child.[7]

Despite widespread legal and social reliance on the distinction between sex and gender, from the late 1980s onwards some feminists have moved to question the distinction. As McNay states, it implies reliance on the body as an essential fixed biological entity (1992, p. 22). Thus, it is said that long-standing feminist arguments based on sex and gender

[6] [2002] Fam. 150 at 160.

[7] While I agree that it is impossible to identify gender at the moment of birth, given that gender here is understood to mean social practices and behaviours, the judicial reasoning in this paragraph obscures the fact that once a baby's sex is identified, usually at the moment of birth, society assumes that gender will develop correspondingly – i.e., a girl will be feminine, a boy masculine.

as oppositional have successfully demonstrated that expectations and assumptions about men's and women's social behaviour are constructed, but leave sex and the body, undertheorised in the 'natural' realm of biology. Gender as social behaviour can be challenged, changed, while sex is presumed to be left intact. In addition, there is no recognition of the way in which our understanding of each term is bound up with the other, conceptually as well as in practice.

Recently then, feminist scholars have challenged the dichotomy, turning their attention to the question of sex. Building on the analyses of theorists such as Butler (1990), the post-modern feminist argument is that sex itself (the interpretation of bodies) is a social construction. More than that, sex, or sexed bodies, are produced through discourses about gender and sexuality (Nelson 1999, p. 337). This interrogation of the sexed body is based on a Foucauldian interpretation of the relationship between sex and sexuality. Foucault rejects any distinction between sex as natural and sexuality as construction. According to Foucault, not only is sexuality a product of power relations, but sex is too. Sex is the concept that (artificially, he suggest) binds together lots of different elements of our bodies –

> anatomical elements, biological functions, conduct, sensations, and pleasures, and it enabled one to make use of this fictitious unity as a causal principle, an omnipresent meaning, a secret to be discovered everywhere: sex was thus able to function as a unique signifier and as a universal signified. (1984, p. 154)

Furthermore, sex does not precede sexuality, rather the reverse is true – the deployment of sexuality is part of the exercise of power that produces sex. Therefore we cannot say that sex is real and sexuality a construct; rather we must demonstrate that sex is a product of sexuality - "sexuality is a very real historical formation; it is what gave rise to the notion of sex, as a speculative element necessary to its operation" (1984, p. 157). And as psychoanalytic feminists, amongst others, have argued, "the female body and the feminine gender are not radically discontinuous as the sex/gender distinction implies" (McNay 1992, p. 23).[8]

[8] For psychoanalytic feminist critiques of the feminist focus on gender as opposed to sex, and of the undertheorisation of the body see McNay (1992). Butler (1993) applies a Foucauldian analysis to gender in order to show how the concept of gender produces sex – i.e. that the practice of seeing only two ways of doing and being gender produces two biological sexes. See also Hird (2002, p. 588).

The question posed then is whether there is a difference between sex and gender, and if so what that difference might be. Bibbings, for example, has identified how difficult it is "(linguistically and conceptually) to analyse the concepts 'sex' and 'gender'. If they are so interwoven, would it not be more accurate to talk of sex and gender as one thing?" (2004, p. 223–4). In the following discussion, in acknowledgment of my own understanding of these terms as interwoven, that is, that they are inevitably bound up with each other rather than distinct, I will use the phrase sex/gender.[9] However occasionally I also use the traditional dichotomous terms "sex" (biology) and "gender" (social), while recognising these as problematic, because this reflects the general understanding of sexual identity.

The remainder of this article examines legal discourse on sexual identity set within the context of transsexuality. Why transsexuality? Sandland (1995, p. 45) states that with transsexuality, law is forced into "revealing the contingency of its claim to truth". This is because transsexuality demonstrates the problematic basis of the idea that maleness/femaleness is determined by birth sex and undermines the idea that one can never cross from one side of the sex binary to the other. Transsexuality has potential for subverting legal discourse's binary approach to sex(uality)/gender and may thereby serve to create space for the emergence of counter discourses so as to "multiply the available range of gender identities, to make law less prescriptive" (Sandland 1995, p. 45). However, I will demonstrate that developing legal discourse on transsexuality, while ostensibly offering a challenge to natural biological and linear understandings of sex and gender, does not engage with the idea that sex is a construct. Nor does the legal regulation of sexual identity acknowledge that there is a spectrum of possibilities of sex/gender, the existence of which confounds the binary sex and gender system. Legal regulation of sexual identity depends on the dichotomous framework of sex and gender in order to make sense of the non-sense of transsexuality. Because post-operative transsexual people are, literally, "made to fit" within existing sex and gender structures, they are no longer a threat to the heteronormative order.

[9] Rubin (1975) first coined the term "sex/gender system" to describe the way in which women are caught in a nexus of expectations and constraints by way of both nature *and* culture. Here I am using it to describe how normative proscriptions of sexual identity rely upon the *interweaving* of the traditional concepts of sex and gender and upon slippage between the terms, despite the fact that they are usually described as distinct. I agree with Bibbings that for some feminist and other theoretical analyses of sexual identity, sex and gender are really understood as one combined and complex concept.

As Munro puts it, the disruption caused by transsexuality is, in the end, fairly minimal (2003, p. 441). This demonstrates the continuing power of discourses of sex and gender. Thus the potential for law to "multiply the available range of gender identities" and therefore respect the right to freely define one's own sexual identity seems like a distant and unlikely reality.

I will now analyse constructions of sex in U.K. and Canadian legal discourse, through a discussion of the treatment of transsexual people.[10] In the process, I will address the impact of human rights legislation applied in the Canadian context and consider how transgender engagements with law in the U.K. might benefit from the Canadian experience. An analysis of U.K. and Canadian case law on transsexuality appears to show that legal understandings of 'sex' (here understood to mean biology or sexed bodies) and the criteria that are used to decide sex seem to shift in different social/temporal contexts. However, alongside this apparent fluidity, it remains the case that legal reasoning does nothing to challenge the distinction between sex and gender or the biological and therefore 'natural' basis of that distinction. Legal discourse on sexual identity, particularly transsexuality, does not allow a Foucauldian reading of sex as constructed. On the contrary, the legal regulation of sexual identity, which is based on the perception that sex and gender are distinct, perpetuates the idea of the fundamental, biological and natural truth of sex, whilst simultaneously illustrating the impossibility of that position.

Sex not Gender: U.K. Case Law on Sex in Marriage

In the U.K., according to section 11(c) of the Matrimonial Causes Act 1973, parties to marriage must be respectively male and female, otherwise the marriage is null and void. Thus U.K. law has not historically recognised the post-operative sex of a transsexual person for the purposes of marriage; a post-operative transsexual woman could not marry a man since she was regarded, despite surgery, as being biologically male.

This was confirmed by *Corbett v. Corbett*,[11] a nullity case which laid down a biological test for sex in the area of marriage and

[10] Hereafter, with regard to the sexual identity of transsexual people, I refer to the recognition of a change in gender rather than sex, as this is the approach taken by trans activist groups such as Press for Change.

[11] *(Otherwise Ashley)* [1970] 2 All E.R. 33.

re-emphasised the heterosexual basis of marriage. Mr Ormrod J.'s decision was that although the respondent, April Ashley, might be of female gender psychologically, to argue that she should be treated as a woman in marriage was to confuse sex with gender. Since the basis of sexual difference in marriage was biology rather than psychology, April Ashley could not ever legally marry a man, and her marriage was annulled. So viewed, sex is not a matter of choice in law; rather it is an essential biological characteristic (O'Donovan 1993, p. 50). The distinction is made clearly between natural, biological sex and socially produced gender.

This is the basis of the separation of sex from gender in transsexuality cases. U.K. courts have adhered to this division, treating gender as a social/psychological factor that can always be trumped by biological sex (particularly chromosomes). *Corbett* has also historically informed judicial decisions on sex in other commonwealth jurisdictions including Canada, Australia and Singapore. *Corbett* was never overruled by a domestic court although it was challenged by the European Court of Human Rights decision in *Goodwin v. U.K.*[12] The court in *Goodwin* held that by refusing to recognise the post-operative sex of transsexuals, the U.K. was violating Articles 8 (the right to respect for private life) and 12 (the right to marry and found a family) of the European Convention on Human Rights. The judges acknowledged that the *Corbett* test for sex (congruence of genetic and physiological traits) is no longer appropriate, and that gender and social/psychological traits must also be considered in determining sexual identity. The E.Ct.H.R. also urged the U.K. to reform the law governing transsexual people, a recommendation that has since been taken forward in the form of the new Gender Recognition Act, discussed below.

Notwithstanding *Goodwin*, the continued impact of *Corbett* on the legal definition of 'sex' in the U.K. was confirmed as recently as last year in the House of Lords decision in *Bellinger v. Bellinger*.[13] Moreover, although *Corbett* precedes *Bellinger* by over 30 years, the two cases use almost identical terminology and the judgements in *Bellinger* are informed by the same medical and binary notions of sex as those expressed by Justice Ormrod in *Corbett*. Despite the 'disappearance' of sex in favour of gender, as displayed in *Goodwin*, and in the new Gender Recognition Act, the House of Lords in *Bellinger* clung to the tradition

[12] *Goodwin v. U.K.* (2002) 35 E.H.R.R. 18.

[13] *Bellinger v. Bellinger* [2002] Fam. 150 (C.A.); [2001] 1 F.L.R. 389 (H.C.).

of *Corbett* in its adherence to heteronormative and biological binary ideas about what it is to be male/female (see Cowan 2004). An analysis of *Bellinger* in the House of Lords demonstrates judicial reiteration of the idea that sexual identity is about sex (that is, biological and natural) rather than gender. U.K. case law leaves intact not only the sex/gender distinction *per se*, but also the notion that marriage is based on sex (the natural fixed biological body), as opposed to gender (socially constructed masculinity/femininity).

Gender not Sex: the Gender Recognition Act and Anti-discrimination Law

In contradistinction to the development of case law, new legislation in the U.K. has moved away from sex as the defining characteristic of sexual identity and embraced gender as its champion. By way of a long consultation process, reflected in various working reports,[14] and as a direct response to the finding in *Goodwin* that the U.K. was in breach of Articles 8 and 12 of the E.C.H.R., the U.K. parliament has recently passed the Gender Recognition Act 2004. The legislation includes many welcome changes to the law and, crucially, it allows the new sexual identity of a transsexual person to be recognised in a reissued birth certificate acknowledging their 'adopted' gender for the purposes of marriage. In effect, if a person born and registered as male perceives themselves to be gendered female, and wishes to live and be legally recognised as female, that person can apply for a Gender Recognition Certificate (GRC). This will be granted if their gender is judged as successful by the ''Gender Recognition Panel'' (a body to be composed of at least one legal and at least one medical expert).[15] A GRC depends primarily on the medical assessment of an individual's self-perception; the applicant will have ''lived in the acquired gender throughout the period of 2 years and intends to continue to live in the acquired gender until death.''[16] There is no

[14] See e.g., the Home Office Report of the Interdepartmental Working Group on Transsexual People, published in April 2000. There was, in addition, consultation with the Scottish organisation, Equality Network, on proposals for legal recognition of transsexuals, leading to E.N. publishing policy proposals in January 2003.

[15] It is still unclear exactly how this panel will be constituted but it is evident that the recognition process will be governed by medical assessments. See Press for Change (2003a).

[16] Gender Recognition Act 2004, s.2(1).

biological test for sex as in *Corbett*. One particularly positive element of the Act is that the pre/post operative distinction will be undermined because lack of surgery does not automatically prevent a successful application for gender recognition.[17] And once granted, the certificate ensures that the "acquired" gender is officially recognised for all purposes (Section 9). However the determination and validation of sexual identity will clearly still be in the hands of medical experts. There is no telling what kinds of views on sex or sexuality those 'experts' will hold – for example, some doctors may believe that gender reassignment treatment or indeed a GRC, would be inappropriate for a male to female (MtF) butch (that is, not displaying conventional feminine characteristics but rather displaying what are thought of as masculine characteristics) lesbian, as that person was not displaying gendered behaviour appropriate to the new sexual identity.[18]

In the main, the Act has been greeted positively by the trans community.[19] However, while reforming some of the worst aspects of U.K. law on transsexuality, problems have been identified particularly in relation to the requirement that pre-existing legal marriages must be dissolved before a transsexual person can be granted a full GRC (although an interim certificate can be granted whilst the marriage subsists). For many this is not much of a choice – they can either annul their marriage, thereby giving up the associated financial benefits in order to achieve legal recognition, or remain married but sacrifice legal acknowledgement of their 'true' sexual identity. In addition to this problem, some have voiced concern over the continued medicalisation of transsexuality, and the perception that transsexual people suffer from a form of mental illness or syndrome

[17] Section 2 does not require the applicant to have actually had transformative surgery.

[18] One of the psychological indicators of a successful (and heterosexual) transition is for a transsexual person to form relationships with those of the same birth sex during the 2 years 'real life test' (Sharpe 2002, p. 181, fn., 26). This is despite the claim that there are proportionately more gay and lesbian individuals in the transsexual community than there are in the general population. See Interdepartmental Working Group on Transsexuality Report (2000: Annex 2, para. 4.4.7).

[19] Press for Change (2003a). See also generally discussion on the Bill on the Press for Change website, www.pfc.org.uk. There is a critique of the mainstream trans movement's implicit acceptance of the liberal models of citizenship that underpin its fight for reform (Monro 2003). The criticism is similar to that made of the gay and lesbian movement's "assimilationist" calls for liberal equality from the late 1970s throughout the 1980s. See Weeks (1990).

(Sharpe 2002, p. 182; Whittle 2002, p. 38). The Gender Recognition Act does nothing to challenge this medicalisation.

Moreover, the legislation does not engage with questions of discrimination against transsexual people with regard to the provision of goods or services.[20] Government response to criticism over this has been to indicate that a forthcoming E.U. Directive will address this gap.[21] However discrimination against transsexual people in the provision of goods and services currently remains lawful, as illustrated in the recent case where MtF transsexual people were thrown out of a pub for using the female toilets.[22] The Equal Opportunities Commission has assisted in at least three other cases on this issue that have all settled and not come before the courts (Slater 2002, p. 16). As human rights claims generally become more frequent in the U.K., and as the corresponding jurisprudence emerges, it is likely that this area will develop apace.

While there is as yet no specific law governing this discrimination in the context of goods and services, the Sex Discrimination (Gender Reassignment) Regulations 1999, amending the Sex Discrimination Act 1975, explicitly allow for discrimination claims where prejudicial treatment arises in an employment context. A transsexual person can claim discrimination at any stage of gender transition, and under s.2A(1) the comparator groups are transsexual people and non-transsexual people. As discussed below, this mirrors the Canadian approach of treating trans people as a distinct rights-claiming group and does not require the individual to be identified as either male or female.

For example, in *Croft v. Royal Mail Group Plc*,[23] a pre-operative MtF transsexual person made a claim of discrimination because she was not allowed to use the female bathroom. The claim failed before

[20] Protection from discrimination in an employment context is conferred by the Sex Discrimination Act 1975 following amendments introduced in 1999 (Sex Discrimination (Gender-reassignment) Regulations 1999); see further below.

[21] J.C.H.R. (2003–04), para. 4.31/32. The proposal for the Directive on Equal Treatment in the Provision of Goods and Services was issued by the Commission on 14 November 2003. The European Convention on Human Rights does not protect individuals from discrimination except insofar as the discrimination refers to another Convention right, and does not protect individuals from discrimination in the provision of goods and services.

[22] See "Transsexuals lose case over right to use the ladies", *The Guardian*, 15 August 2003. Note that this case involved pre-operative transsexual MtF people.

[23] [2003] I.R.L.R. 592.

the Court of Appeal. Sarah Croft's employer suggested that they had tried to accommodate her by providing access to a disabled unisex toilet instead. The court here accepted that no matter what stage of gender transition a person is at, they cannot be discriminated against. However they upheld the employer's position that transitioning transsexual people were not immediately entitled to be treated as members of the sex to which they aspired.[24] As long as the employer had taken reasonable steps to preclude potential harassment of Sarah Croft when she used the facilities (which they claimed they had done by prohibiting her use of both men's and women's toilets), they would not be guilty of sex discrimination. Here Croft is left in a no-man/woman's land of neither male nor female, but somehow a third category. This is aptly captured by the supposed appropriateness and sufficiency of a facility that is marked as unisex and disabled. Situated nowhere, Croft cannot successfully claim sex discrimination as man or a woman. Even the claim based on transsexual status fails.

However, this position is now cast into doubt given that, as explained above, the new Gender Recognition Act states that a person granted a GRC becomes their new gender for all purposes – that is, a MtF transsexual person can claim discrimination as a woman (rather than a transsexual person) on the basis that she should be treated as a woman (rather than a transsexual person). Meanwhile, those who are still in transition, who are not regarded as having made appropriate or sufficient changes and so have not gained the certificate, would presumably continue to claim discrimination in an employment context as transsexual people rather than as women or men.[25]

A final point of interest is the government's choice of terminology in the Act. The legislation is designed to recognise an individual's ''acquired'' gender rather than their transformative sex. What exactly is being acknowledged here? Recognition of gender as a leading factor in sexual identity might seem progressive but it also implies

[24] The court relies heavily on *Bellinger* (H.L.), and also refers to the impact of *Goodwin*, in suggesting that a 'new' gender, and its accompanying benefits, is only available to those who have undergone genital transformation surgery. In light of the Gender Recognition Act this can surely no longer be the case, as a person is their 'new' gender for all purposes once a certificate has been granted, and this does not necessarily depend on surgical transformation.

[25] Perhaps then the term transsexual will be reserved for those who do not finally cross but inhabit the transitional space. Note also that transition is defined in the Regulations as that which occurs under medical supervision.

that there is no possibility of changing one's sex, that is biological sex, which is the position explicitly adopted by the House of Lords in *Bellinger*. The move towards gender challenges the way in which sexual identity has historically been defined, but does not challenge the perception that sex is immutable. The distinction between sex and gender is retained; only the balance between the two has shifted. A system of legal recognition of identity that prioritises gender over sex is helpful to those like Mrs. Bellinger who wish to change their sexual identity (and in many cases their body) to reflect their sense of gender. However introduction of such a system by way of the Gender Recognition Act does not in itself aid the longterm aim of undermining the dichotomous and binary nature of sex and gender categories, or the privileging of heterosexual marriage. As Sharpe (2002, p. 138) suggests "...reform that is channelled through categories other than sex enables law to distribute marginal groups around sex while maintaining intact a traditional and (bio)logical understanding of sex".

On the other hand, while the Act seems to reflect a preoccupation with the *appearance* that marriages are 'normal' (by ensuring through certification that the parties are opposite-sex), a more subversive reading would suggest that the lack of requirement for surgery allows for some marriages to be in *substance* same-sex.[26] The possibility of the Act validating a number of what in substance are same-sex marriages does demonstrate the potential for queering the heterosexual basis of marriage. At the same time however the U.K. government is firmly adherent to the view that marriage is only available to opposite-sex couples as confirmed by the recently passed Civil Partnerships Act 2004. Only those transsexuals who overcome the deeply gendered medical hurdles will be allowed to marry in their new sexual identity, and in many cases this will involve surgical intervention.

At any rate, even if we recognise that legal and public debate over issues of sexuality "creates opportunities to contest hegemonic categories" (Hunter 1995, p. 86), and that we can use these discursive spaces to challenge the exclusion of certain identities (Stychin 1995), it is clear that legal regulation of transsexuality is connected to the

[26] I.e., involving same sexed bodies. I am indebted to an anonymous reviewer who persuaded me to make more of the issue of the subversive potential of the Act.

control of dangerous (non-hetero)sexualities and their threat to the heteronormative order (Cowan 2004).[27] At the moment then it remains to be seen how the Act will impact in practice upon transsexual people, and what the future holds for transgender jurisprudence. We must however remember Sharpe's warning to always examine the ''discursive effects of reform'' (2002, p. 190).

Sexual Identity in Canada: What Makes a Woman?

Despite historical reliance on *Corbett*, Canadian law governing sexual identity seems in the last decade to have taken a difference course. My analysis here relies mainly on cases that have arisen in British Columbia.

A significant linguistic difference provides the initial clue that the Canadians have approached sexual identity from another perspective – the most recent examples of Canadian legal discourse refer to transgender people rather than transsexual people. One reading of this is that the term 'transgender' demonstrates commitment to the idea of sexual identity being based on criteria other than biological sex, and a recognition that gender is just as important, if not more so, than sex. Terminology in the U.K. is beginning to reflect this idea. However I would suggest that such usage could also be read as a reification of sex as biology, and a refusal to engage with the construction of sex. As I argued above, to use the safe terminology of gender (which as even the judges know, is constructed) is one way of recognising change in sexual identity without having to accept the possibility that sex too is a social and discursive construct. It is therefore necessary to look beyond the terminology and examine the substance of Canadian law on sexual identity. How have the Canadian courts interpreted sex and gender?

As mentioned above, deciding sex in the *Corbett* sense for the purposes of marriage is no longer necessary in the Canadian context – at least in British Columbia. By way of Section 27 of the 1996 Vital Statistics Act,[28] if a person in B.C. has surgery to change their anatomical sex, they can apply to have their birth certificate changed

[27] Of course if the U.K. were to allow same-sex marriage these issues would not be as important since it would not matter in marriage cases which sex a transsexual or intersexual person truly was. Clearly however for some individuals it is still important that they are able to have their birth certificate reflect their 'true' sexual identity.

[28] R.S.B.C. 1996, c. 479 (as amended), originally section 36 of the 1990 Vital Statistics Act.

to reflect their post-operative sex. It is then possible for a trans person to marry someone of the opposite sex to the trans person's newly registered sex. This provision allowed trans people in B.C. to marry while countries such as the U.K resisted such a move, but in this case the ability to marry as a transsexual person is still dependent upon surgical intervention (which is painful, intrusive, potentially expensive and not necessarily successful). As discussed earlier, the requirement for surgery is not present in the system introduced by the U.K.'s Gender Recognition Act, and in this respect the U.K.'s approach is to be preferred.

Given the recent changes in Canada with regard to same-sex marriage, the validity of a transsexual marriage will no longer be dependent upon surgery and re-registration of sex. Clearly however the question of surgery still has a bearing on whether or not a trans person can legally re-register in their 'new' sex. A transsexual woman who has not had surgery could therefore marry a man, and regard herself as heterosexual, but for the purposes of birth registration she would be recorded as male, and regarded legally as a partner in a same-sex marriage. While legal regulation here again allows for the queering of a socio-legal system that attempts to categorise and dichotomise sex, gender and sexuality, for some transsexual people it is important to be able to register and to be legally recognised as their 'new' sex. For this reason the legal requirement for surgery is untenable and should be removed.

Aside from this issue, recent questions about sexual identity have not arisen in the marriage context. Where controversial questions of sexual identity have arisen in recent years they have largely been discrimination claims either under the Canadian Charter of Rights and Freedoms or provincial human rights codes, and it is here that analyses of sex/gender have been most exploratory.[29] These claims

[29] Sharpe (2002), considering U.S. federal jurisprudence, believes that discrimination analyses lend themselves to the more exploratory approach because unlike marriage cases, discrimination cases are not usually motivated by the sexed body parts and therefore it is more difficult to constrain sex within a male/female dichotomy in such cases. I believe there is some truth in this, but I believe that legal discourse also reflects an established resistance to allowing sex/gender fluidity in marriage because such fluidity would allow for troubling third/fourth/ad infinitum categories of sex/gender, which are not containable within the normative dyadic sex and gender system that forms the basis of marriage. That is, there is less at stake, heteronormatively speaking, in legal recognition of sex/gender fluidity in discrimination cases.

relate to for example, whether a MtF transsexual person should be able to use women's bathrooms in public places;[30] or whether a MtF transsexual person should be allowed to volunteer in a rape crisis centre[31] or lesbian drop in centre;[32] fn. and whether a convicted MtF transsexual person should be incarcerated in a male or a female prison.[33]

Judgements in these cases do not focus on the specific meaning of sex. Rather, sex is only deemed important in so far as it provides the ground upon which the trans person makes their discrimination claim. For example, in the 1999 case of *Mamela v. Vancouver Lesbian Connection*,[34] the court held that by not allowing Mamela, a MtF transsexual person, to participate as a volunteer in the drop in centre, Vancouver Lesbian Connection, was discriminating against her on the grounds of sex. The earlier case of *Sheridan v. Sanctuary Investments Ltd. (No. 3)* found that discrimination against a transsexual is by definition discrimination on the basis of sex.[35] And interestingly, there the court does not try to decide whether transsexual people are 'really' men or women, but acknowledges that the current binary sex system may not quite reflect their sexual identities. According to the judge in *Sheridan*:

> In my view... I am satisfied that discrimination against a transsexual constitutes discrimination on the basis of sex. Whether the discrimination is regarded as differential treatment because the transsexual falls outside the traditional man/woman dichotomy... or because male-to-female transsexuals are regarded as a subgroup of

[30] As in *Sheridan v, Sanctuary Investments Ltd.* (No. 3) (1999) 33 C.H.R.R. D/467 (B.C.H.R.T.).

[31] *Nixon v. Vancouver Rape Relief Society* [2002] B.C.H.R.T.D. no. 1 (Q.L.).

[32] *Mamela v. Vancouver Lesbian Connection* (1999) 36 C.H.R.R. D/318 (B.C.H.R.T.).

[33] *Kavanagh v. Canada* [2001] C.H.R.D. No. 21 (Q.L.).

[34] 36 C.H.R.R. D/318 (B.C.H.R.T.)

[35] The courts came to the same conclusion in the European case of *P. v. S and Cornwall County Council* [1996] All E.R. (E.C.) 397, although on the slightly different basis that a transsexual person suffers because they are compared with those of the sex they are deemed to have belonged to before surgery. *P. v. S.* provided the impetus for the introduction of (limited) anti-discrimination protection for transsexuals in the U.K. (see above).

females (and vice versa)... the result is the same: transsexuals experience discrimination because of the lack of congruence between the criteria that determine sex."[36]

What happens in *Mamela* is not a deconstruction of sex but a focus on gender and self-identity. In *Mamela*, the court accepted the petitioner's self-identification as a transsexual lesbian female (even though she was pre-operative, a deciding factor in Canadian 'sex in marriage' cases) who did not accept the label 'woman' because she believed 'woman' to be a political construct which is always defined in relation to man. The court did not question this self-identification, and did not spend time debating the meaning of the terms lesbian or female, much less woman. The case turned on a finding of fact that M. is a transsexual person. There was no verbal gymnastic process which tries to fit M. within either the biological male or the female category. Her sex, in the traditional binary sense, was not defined. She is transsexual and should be treated according to her membership of that category. The court decided that Mamela's exclusion from the Vancouver Lesbian Connection on the basis of her transsexual status (and her identification as female) was sex discrimination in the provision of a service or facility customarily available to the public (Section 8 of the B.C. Human Rights Code).

In the 2001 case of *Kavanagh v. Canada*,[37] the court did more fully discuss the question of what it means to "live as a woman". The context of the question was the placement of a pre-operative MtF transsexual person in an appropriate prison. In this case the court again conceded that Kavanagh fell outwith the traditional male/female dichotomy (a point unfortunately not further pursued) and so neither male nor female prisons were appropriate for her. Equally inappropriate was a dedicated unit for MtF transsexuals (due to their small number within the system). The lesser of two evils, they concluded, was to house Kavanagh within a male prison but to give her extra support and attention. While Kavanagh was relegated to the prison appropriate for the gender in which she has not chosen to live,

[36] [1999] 33 C.H.R.R. D/467 (B.C.H.R.T.) paragraph 93. Section 13 of the 1996 Human Rights Code protects against discrimination in employment, and section 8 protects against discrimination in relation to accommodation, services or facilities. The European Charter of Fundamental Rights, which is as yet non-binding, does have a free standing right to equality (Article 20). It also prohibits any discrimination (Article 21), and provides a right to equality in all areas, including employment, work and pay (Article 23). Goods and services are not specifically mentioned.

[37] [2001] C.H.R.D. No. 21 (Q.L.)

the court here accepted that to try to place transsexuals within the male/female binary is extremely difficult, both practically and conceptually.[38]

Clearly in these cases, Canadian courts have tended towards the view that transsexual people are a distinct rights-claiming group (regardless of operative status), and that discrimination against a transsexual person in the provision of goods or services or in employment is discrimination on the grounds of sex. This approach appears to provide an attractive solution to the problem of sex/gender attribution, more attractive than the path taken in the European Court of Justice case, *P. v. S*, which held the proper comparator group to be people of the transsexual person's birth sex.[39] The former approach, in Canadian goods and services cases, is not, as I suggested above, based on which sex a person is or used to be, but rather the fact that they are transsexual. The court thereby accepts self-identity and avoids messy debates over sex/gender criteria. It does not however provide clear guidelines as to what exactly is a transsexual person, and whether it is or should be completely a matter of self-definition.

The other distinction between the Canadian and U.K. approach to note here is the importance of the pre/post operative distinction.[40] Whereas Canadian discrimination law has interrogated gender, accepting self-identity as an important part of gender regardless of the pre-post operative distinction, U.K. non-marriage cases have relied more upon surgical transformation of the body as the moment where someone's gender can be definitely be said to have crossed

[38] In 1998, the U.K., for the first time, imprisoned a MtF transsexual person in a woman's prison, although the person in this context was post-operative. See B.B.C. News, 1 September 1998, archived at http://www.pfc.org.uk/news/1998/macr-bbc.htm. As in Canada, it is usual in the U.K. for a pre-operative transsexual person to be accommodated within a prison according to their birth sex although Her Majesty's Prisons guidelines claim that each case will be treated on its own merits. Recommendations for the reform of prison and probation guidelines on transsexual people in the criminal justice system are suggested by Whittle and Stephen's (2001) pilot study, reported on the Press for Change website at http://www.pfc.org.uk/legal/cjsprov. See also the Judicial Studies Board Equal Treatment Bench Book 2004, Chapter 6.2.

[39] *Supra*, n.35. This is no longer the appropriate comparison – under the Sex Discrimination (Gender Reassignment) Regulations 1999, s.2A(1) the comparator groups are transsexual people and non-transsexual people.

[40] For critique of the pre/post-operative distinction, see for example Denike and Renshaw (2002, para. 4.4).

over. The defining moment of surgical intervention in the U.K. is effectively now overridden by the Gender Recognition system, which does not require surgery. The impact of this may be that the pre/post operative distinction becomes less important (although that remains to be tested). However legal and social acknowledgment of one's sexual identity in the U.K. remains rooted in the expert medical analysis of the state of the transsexed body/mind, while Canadian discussions of sexual identity in discrimination claims have been more open to the importance of self-perception in gender. But is gender, as defined by the self, an adequate replacement for sex in defining sexual identity?

Recently the B.C. case of *Nixon v. Vancouver Rape Relief Society*[41] brought these questions of sex/gender attribution to the fore and the question of how to categorise someone as male or female was directly addressed. Kimberly Nixon, a MtF transsexual person, brought an application to the B.C. Human Rights Tribunal that she had been discriminated against on the grounds of sex, by Vancouver Rape Relief (VRR). She had tried to volunteer as a helper at VRR's counselling service for rape victims and been turned away. VRR tried to justify its actions on the basis that Nixon was not a woman, in the sense that she had lived some of her life as a man, and therefore had not undergone the social and lived experience of being treated as a woman living under patriarchy. She would not therefore, they argued, be able to relate properly to women rape victims coming to VRR for advice. Women in a rape crisis centre, they submitted, need a safe and unambiguous space and this could not be the case if counsellors were transsexual women.

Interestingly, in contrast to the legal situation in the U.K., both parties accepted that sex and gender exist along a continuum and neither are binary.[42] There is no explicit reference to the construction of sex, but at least there is some acknowledgement of the inadequacy of the traditional binary divisions. It was accepted by VRR that Nixon is legally a woman. The question posed by them was whether or not she had the social qualifications as a woman in order to provide services to VRR clients. VRR claimed a *bona fide* occupational requirement that their volunteers have life-long social experience of being a woman, thereby stating that Kimberley Nixon did not

[41] [2002] B.C.H.R.T.D. no. 1 (Q.L.).

[42] *Ibid*, paragraph 13. See also the argument of co-counsel Christine Boyle, cited on Vancouver Rape Relief's website at www.rapereliefshelter.bc.ca.

have the requisite qualifications to be a counsellor or a member of the organisation.

The argument as to whether Nixon is a woman for VRR's purposes is clearly based on gender rather than sex. Using a social rather than biological line of reasoning, the implication of VRR's submissions is that Nixon was not "woman enough".[43] While this is clearly a social argument, that is, it recognises that one's gender is constructed by one's lived experiences, it is so deterministic about what it means to have the social experience of being raised as a woman that it may as well be based on biological considerations. The universalising tendency evident in this view has been the subject of much feminist criticism.[44] Furthermore, VRR's position obscures the fact that trans people such as Nixon who believe themselves to be the sex/gender opposite to that expected of them, are unlikely to have had a pure social experience of being brought up as either male or female.

VRR's argument was ultimately rejected by the Tribunal. In the end it was held that VRR had discriminated against Nixon on the basis of sex (under sections 8 and 13 of the B.C. Human Rights Code), and she was awarded damages for injury to dignity.[45] The argument in this case centred upon "what makes a woman". Polarised views were adopted not only by the parties to the case but also within feminist and legal communities. However the Tribunal member, while dealing with the issue of discrimination, does not give any guidance as to how to balance these views, or how we should decide on an individual's sexual identity, or in fact under what circumstances it may be important to make that judgement in the first place. The finding is that Nixon is a transsexual person and has suffered discrimination on the grounds of sex. And while it is accepted in the case by all the parties and the Tribunal member, that sex and gender exist on a continuum, we are no closer to knowing when, if ever, it will be important to defend clear binary male/female boundaries of sex (as was suggested in *Kavanagh*). As Christine Boyle, co-counsel for

[43] This point was made in the judgement – see *Nixon v. Vancouver Rape Relief Society* [2002] B.C.H.R.T.D. 1, para. 202.

[44] There are many examples to choose from, but see Spelman (1988); Fuss (1989); and Young (1997) amongst others, arguing that "the 'essentialist' category of 'women' is unsatisfactory because if based on biology it obscures any social content to 'women', and if based on shared social characteristics, is bound to fail when met by the complex and diverse reality of women's lives" (Young 1997, p. 32).

[45] Kimberly Nixon was awarded $7500 (Canadian), the highest amount ever awarded by the tribunal.

Nixon, said, "which distinctions on that continuum are non-discriminatory?"[46] Notwithstanding the fact that both parties to this case ignore sex in favour of gender, that both agree on Nixon's status as a transsexual person and recognise the continuum of sexes/genders, the case highlights the fundamental problems of how we actually define gender and who gets to define sexual identity.

The Tribunal decision was recently overturned by the Supreme Court of British Columbia on application for judicial review.[47] The court decided that Section 41 of the Human Rights Code (which sets out circumstances where private organisations can discriminate) would permit VRR to discriminate against Nixon and the Tribunal finding of discrimination against Nixon was struck down.

In the course of his judgement, Mr. Justice Edwards rejected the view that the Vital Statistics Act determines that a female transsexual person is woman for all legal purposes, as the Act "did not address all the potential legal consequences of sex reassignment surgery" (para. 50). Clearly this is judicial acknowledgement that the meaning of both sex and gender can vary in different contexts. He appears to accept VRR's argument that while Nixon may have been in some senses a woman all her life, and although she had eventually been pronounced legally a woman, if socially she had not always been unambiguously female, she was "not woman enough" for their purposes (para. 118). In effect, Rape Relief's assertion that they should be able to decide what criteria to use to measure and assess sex for the purposes of s.41 was upheld (para. 85). VRR argued that this was a situation where it is important to try to define sexual identity, and that they rather than Nixon herself should be allowed to decide whether she was, for their purposes, a woman.

The court also found that in applying the test for discrimination (which the court distilled to be whether there had been harm to Kimberley Nixon's dignity), Nixon had not in fact been discriminated against. This was firstly, he said, because the wrong test of discrimination had been used by the Tribunal. The main point of contention here was whether or not the definition of discrimination developed through the Canadian Charter of Rights and Freedoms jurisprudence could apply in a case of discrimination brought under the Human Rights Code. This question has implications that extend beyond this

[46] *Supra*, n.42.

[47] *Vancouver Rape Relief v. Nixon et. al.*, [2003] B.C.S.C. 1936.

case, and may be part of the reason that the case is likely to end up before the Supreme Court of Canada.[48]

While this problem does not seem to be directly transferable to the U.K.,[49] in this situation, as in the U.K. case of *Croft*, there is disagreement about what kinds of treatment actually amount to discrimination and whether the employer or prospective employer has done enough to rebut the discrimination claim. Furthermore, it is at least conceivable that U.K. courts in future cases may find themselves in conflict about gender; the notion of what is actually meant by gender, as expressed in domestic law in the form of the Gender Recognition Act, may differ from developing ideas about gender expressed in European case law, or in the European Convention on Human Rights (or the Charter of Fundamental Rights).

Secondly, Nixon had not been discriminated against, the court held, because the harm to dignity test had not been met (Boyle 2004, p. 40). Mr. Justice Edwards said that while he could accept that subjectively Ms. Nixon's dignity had been harmed, the correct test for assessing harm to dignity was both subjective and objective (that is, the reasonable person in the circumstances of the claimant). Even though Nixon had suffered prior disadvantage and discrimination by virtue of the fact that she was transgendered, the judge maintained that objectively speaking, no reasonable person would claim that their dignity had been harmed by VRR's actions. He explained that "exclusion by a state action has a potential impact on human dignity which exclusion by a self-defining organisation like Rape Relief never could have...It was not a public indignity" (paragraph 147). Exclusion from VRR is exclusion from a "backwater" (paragraph 154).

This reasoning is more visibly relevant to developing U.K. human rights jurisprudence on transsexuality. In *Nixon*, there is firstly the issue of whether or not, objectively speaking, Kimberley Nixon's dignity had

[48] For in in-depth discussion see Boyle (2004). Briefly, the significance of the issue is that in Charter case law, distinctions and differential treatment are not treated as *prima facie* instances of discrimination, whereas under human rights legislation differential treatment is treated as *prima facie* discrimination that has to be justified. Therefore Rape Relief's exclusion of Nixon was treated as *prima facie* discrimination by the Human Rights Tribunal, which VRR had failed to justify, while a different test applied by the B.C. Supreme Court led to the opposite result.

[49] Domestic regulation on discrimination has to be compatible and consistent with E.U. regulation where E.U. provision exists. Arguably two different notions of discrimination might develop where there are domestic rules but no applicable E.U. provision.

been harmed. To say that VRR is a backwater and not an organ of the state does not mean that the impact of its actions can be dismissed. Given Nixon's history of having been abused and discriminated against, which the court acknowledged, a ''reasonable'' person in her shoes might be thought to have suffered harm to dignity if the very community she seeks acceptance from, reject her. The reasoning of the Court on this point is more confusing than illuminating, and highlights one of the inherent problems of the dignity test. The concept of dignity is not without its critics or its flaws. Questions have been raised in Canada as to the scope of the concept and whether it is too narrow (Boyle 2004, pp. 42–44). Similar problems may also arise in the U.K. The European Convention on Human Rights does not guarantee respect for human dignity, but the European Charter of Fundamental Rights states in Article 1: ''Human dignity is inviolable. It must be respected and protected''. The Charter is not yet binding on member states, and is part of the European Draft Constitution, although to date it has rarely even been mentioned by the European Court of Justice (Douglas-Scott 2004). There is therefore no U.K. and little European jurisprudence on the meaning of dignity, and how this human right can be protected, much less how gender and dignity might interact.[50]

Nixon has appealed to the B.C. Court of Appeal, so the issue is not yet resolved. But the case raises important questions about what gender is, when should gender rather than sex be the standard of measurement, to what extent sex/gender is a matter of self-identification, and when if ever it might be important to have an 'objective' legal assessment of what one's sex/gender is. The dispute here is particularly thorny because it is played out between two historically disadvantaged groups – women who have been sexually assaulted, and trans people. A feminist ideology of rape and gender is in direct conflict with a transgender ideology of sex and gender.[51] One

[50] In a recent E.C.J. case involving a pay-related discrimination claim made by a transsexual person, the opinion of the Advocate General (delivered 10 June 2003) does, at para. AG 77, make brief reference to human dignity: *K.B. v. National Health Service Pensions Agency and Another* [2004] 1 C.M.L.R. 28. Some have suggested that German law may provide guidance on the interpretation of dignity as Article 1(1) of their constitution states that ''human dignity shall be inviolable''. Interpretation of the right there has not, however, been unproblematic. For a discussion, see Jones (2004).

[51] The question of the inclusion of MtF transsexual people within women only spaces has historically been a thorny one for feminists and the tension between the feminist and transsexual communities is long-standing – see Raymond (1979) and Sweeney (2004). For a more recent analysis of the debate, see Califia (1997). There is some anti-trans literature on Vancouver Rape Relief's website at www.rapereliefshelter.bc.ca/issues/menewes.html.

clear message to take from *Nixon* then is that even where one is pronounced legally a woman, there may be situations where living as, working as and being a woman is also dependent on careful negotiation with the surrounding community.[52] This is true regardless of the basis (sex or gender or otherwise) of sexual identity.[53]

A brief final point to note here is the predominance of cases in this area involving MtF, rather than female to male, transsexual people. Statistically more people transition from MtF than the reverse (the Interdepartmental Working Group of Transsexual People Report 2000 estimates one in every four or five transsexual people transitions from female to male), but this does not explain why these troubling questions of sexual identity do not seem to come up when transsexual men seek access to male space. The question of what makes a man does not seem to arise as frequently. One possible explanation is that transsexual men pass more easily and go less noticed in men's spaces, or it might be because women's spaces, more so than men's, continue to be legally and socially protected, for well established historical reasons. The issue of what it means to be a man in this context has not been of central concern.[54] The question is, sadly, beyond the scope of this article, but one which undoubtedly needs addressing.[55]

The fundamental questions underpinning this discussion are: should it ever be necessary to ask law to define sexual identity? The answer to this question may be no. Sex appears to be important in areas of criminal law, marriage law, and in the regulation of sports. However, this need not be the case – the U.K. could legislate for gender-neutral criminal offences, legalise same-sex marriage and could regulate sport on the basis of prohibiting athletes from taking hormones (including those required to maintain a change of gender) rather than interrogating what sex they are.[56] Sex, and gender, for the purposes of the law, could become irrelevant. But if the answer is yes,

[52] The difficulty of defining community was faced in the Canadian case of *R. v. Powley* [2003], SCC 43.

[53] Other issues arising from the case that require further probing include whether the Charter's principle of promotion of equality is achieved and whether equality here is substantive.

[54] There are activist and support groups specifically for FtM transsexual people such as FtM Network (http://www.ftm.org.uk) and FtM International (http://www.ftm.org.uk).

[55] I am indebted to Lois Bibbings and to an anonymous reviewer for highlighting this point.

[56] See "I.O.C. allows sex change athletes," *Glasgow Herald*, 18 May 2004.

it is sometimes important to define sexual identity, as Vancouver Rape Relief would argue, what criteria should be used to make that categorisation? Which distinctions on the sexual identity continuum are discriminatory? These are central questions that must be addressed if we wish to fairly reflect self-identity and the social reality of the many and varied combinations of sex/gender/sexuality (Devor, 1996) while at the same time recognising the interest that groups such as Vancouver Rape Relief may have in the question of what makes a woman.

Where differential treatment takes place in the context of ameliorating the position of an already disadvantaged group (for example positive discrimination) or providing a service to an already disadvantaged group (such as rape counselling), it may still be necessary to be able to identify the target group along sex or gender lines – that is, it may still be necessary to discriminate for some purposes, and as I have argued above, using gender rather than sex does not in itself help us to know if, when and how these lines should be drawn. Within the present sex and gender system, turning to gender in the U.K. may be just as binary and constraining as using sex to define sexual identity. It may also reproduce stereotypical assumptions about appropriate gendered behaviour (Sharpe 2002, p. 53). But even if the U.K. takes the Canadian path of allowing a more fluid and continuum-based view of sex and gender, it may not be sufficient to avoid disputes over what it really means to 'be' a woman. Gender, it seems, may not be a substitute for sex.

Conclusions

U.K. case law has long grappled with questions of sex, and how to define it, in the context of marriage. Arguably, the U.K. has relied far more on medical notions of sexual identity than Canadian law, if only because the foundation of legal reasoning on transsexuality in the U.K. rests within the marriage context. Canadian legal discourse has focused on the question of the 'true' nature of sex in marriage cases, albeit retaining the requirement for reassignment surgery. Neither jurisdiction has allowed fundamental challenges to the social construction sex/gender in the transsexual marriage context. However Canadian discrimination cases have provided an important platform from which to address difficult questions of what it means to be woman in society, and under what circumstances it will be important

as either a question of law or a question of human dignity as to which category an individual is assigned. U.K. legal discourse on transsexuality is now moving towards a concept of transsexuality as based on gender than sex, and is beginning to deal with discrimination claims similar to those that have arisen in Canada. While the two jurisdictions have over the last decade discussed the issue of sexual identity from different perspectives, the underlying issue appears to come down to the same question – what makes a woman?

Unlike Canada, the U.K. has no written constitution, and Article 14 of the E.C.H.R. does not provide a freestanding right to equality such as that enshrined in Section 15 of the Canadian Charter of Rights and Freedoms.[57] Clearly the two jurisdictions are fundamentally different, and it is therefore likely that U.K. jurisprudence on this issue will develop in a distinct way. As it does, gender may become a substitute for sex, as in Canada. However, the U.K.'s Gender Recognition Act, while allowing transsexual people to marry in their newly registered sex, while recognising the importance of gender, and while not requiring that successful gender reassignment be dependent upon surgery (unlike Canada), still leaves intact the idea that the world of sexual identity is based on a male/female distinction. The perception is still that really there are only two sexes and two genders, even if we are never absolutely clear as to how that distinction is to be made. And transsexual people must be assigned, legally and medically, to one of those two categories (the most suitable category being the one where their bodies and genders can be matched up) in order to make sense of their identities (Hird 2002, p. 580). A view of sexual identity based on gender, even when it occurs within a human rights context, does not necessarily challenge the sex/gender dichotomy, or the heterosexual framework of families and partnerships Sharpe (2002).

Notwithstanding this, there is much we can learn from the Canadian treatment of transsexuality. Canadian legal discourse on sexual identity in a discrimination context recognises the importance of self-identity in sex/gender attribution, and that a successful claim of discrimination does not depend on the finality of surgical transformation of the body. In addition, these Canadian cases have at least challenged the notion that sex and gender are binary. And the move

[57] For a discussion of Section 15, see McColgan (2000 p. 41 *et seq*). Obviously the European Charter of Fundamental Rights may have an impact in this area in the future.

towards recognising same-sex marriages in Canada demonstrates that there is an ongoing process of challenge to traditional notions of where sex (and gender) matters. However neither jurisdiction has engaged fully with the issue of the (legal) construction of sex, nor the question of whether law needs to distinguish between people on the basis of sex/gender at all. Within the current bilateral framework that imagines only two possibilities, two (oppositional) types of sexual identity, it is difficult for law, and for other discourses, to understand transsexuality *unless* we distinguish sex from gender. The heteronormative framework only allows us to eschew one sex or gender if we adopt the other. I am not suggesting that individuals who wish to do so should not be allowed to define themselves as 'men' or 'women' in the traditional sense. But recognising the construction of binary sex involves recognising that there are many more possibilities than two, and therefore we should not try to fit disparate bodies/socially lived experiences into this artificial binary system. Surely this is a human rights issue.

A continuum of sexual identities has at least been imagined in Canadian legal discourse, if not as yet in the U.K., and this not only more accurately reflects lived experience of sex/gender/sexuality, but also avoids the 'sex change mistakes' problems that are currently in the public arena.[58] These problems arise when someone who has changed sex and lives in their 'new' gender, changes their mind and wishes to change back again. Forcing subjects to live in a binary and dichotomous sex and gender system leads to a discourse of 'mistakes'. Developing a legal and social framework that does not compel subjects to live in one of two categories, and does not attempt to 'freeze' sex and gender, is the only way to recognise the complexity of human sexual subjectivity. As Hird says, ''Indeed, it is the possibility of transcending sex and gender altogether that offers...the most interesting possibilities'' (2002, p. 591). The issues raised here are relevant not only to the regulation of sexual identity through legal discourse, but also to medical and other discourses that shore up the binary system of sex and gender, and refuse to acknowledge the constructed

[58] There has been a recent spate of these reports, some would suggest as part of a backlash against gains made by the trans community. See: ''Torment of sex change soldier trapped in a woman's body'', Scotland on Sunday, 28 April 2002; ''Mistaken Identity'', *The Guardian Weekend*, 31 July 2004; ''Accused doctor quits transsexualism committee'', *The Guardian*, 28 September 2004. In addition see www.transgenderzone.com/features/changemeback.htm and www.pfc.org.uk/pfclists/news-arc/2004q3/msg00103.htm.

nature of sex. But the above discussion highlights in particular the trouble that law has in mediating the tension between its need for clear boundaries around its categories of sex and gender, and the overwhelming evidence that such labels and categories are inadequate.

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