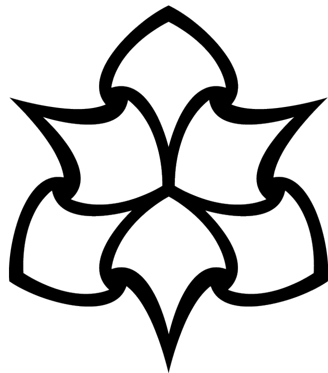

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"Sex Changes'? Paradigm Shifts in 'Sex' and 'Gender' Following the Gender Recognition Act?'

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Abstract

Gender transformations are normatively understood as somatic, based on surgical reassignment, where the sexed body is aligned with the gender identity of the individual through genital surgery – hence the common lexicon 'sex change surgery'. We suggest that the UK Gender Recognition Act 2004 challenges what constitutes a 'sex change' through the Act's definitions and also the conditions within which legal 'recognition' is permitted. The sex/gender distinction, (where sex normatively refers to the sexed body, and gender, to social identity) is demobilised both literally and legally. This paper discusses the history of medico-socio-legal definitions of sex have been developed through decision making processes when courts have been faced with people with gender variance and , in particular, the implications of the Gender Recognition Act for our contemporary legal understanding of sex. We ask, and attempt to answer, has 'sex' changed?

Keywords: Transgender; Transsexual; Sex; Gender; Sex change; Gender Identity; Legal identities

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Introduction

> Sex cannot be changed. It is no good the Minister shaking his head. Sex is decided by the chromosomes of a human being. If we have XX chromosomes, we are women; if we have XY chromosomes, we are men. I might perhaps accept the Bill if an additional requirement for registering changes of gender were that it had been discovered that those concerned had inappropriate chromosomes for the sex in which they had been registered. That is the only way in which the Bill could avoid telling a lie. So far as I know, there is no law nor any known medical procedure that can change the sex of a human being. The Bill purports to do so. It is therefore an objectionable farce. (Lord Tebbit, Gender Recognition Bill, House of Lords Second Reading, 18/12/03, Hansard: Column 1304)

1.1 In his contribution to the debate in the House of Lords on the Gender Recognition Act 2004 (GRA), Lord Tebbit mobilises a discourse of 'sex' based on chromosomes, as a somatic fact – and thus immutable**:** sex can not be changed by medical procedure nor by law. The Gender Recognition Act passed in 2004 (achieved by relentless campaigning by Press for Change, the UK transsexual lobby group) does exactly that: it changes the legal sex of trans people in the UK and gives them full legal recognition.[1]. Moreover, the Act does not require any 'medical procedure' (mentioned by Lord Tebbitt above), to change legal sex, as reassignment surgery is not mandatory. So what implications does the Gender Recognition Act have for current conceptualisations of what constitutes a 'sex change'? Does this effect changes in what constitutes 'male' or 'female'; 'man' or 'woman'? Has the category 'sex' changed?

1.2 In this paper we will discuss the various ways in which the historical socio-legal definitions of sex have been developed, and in particular the implications of the Gender Recognition Act for our legal understanding of sex now. We begin with the distinction between sex and gender and how this distinction historically evolved in legal, psycho-medical, sociological and feminist discourse. We will then detail the historical legal definitions of sex and gender, and the background to the Gender Recognition Act. We demonstrate, using the debates about the Gender Recognition Act in the House of Lords, how the assumed embeddedness of sex in scientific knowledge was used to discredit the idea that one can legally 'change sex'. Yet, paradoxically, it was also the mobilisation of scientific discourse in discussions over the category 'sex'

which demonstrated the failure of science to fully locate 'sex' at all - suggesting that 'sex' may not be an immutable somatic fact in ways that it has been previously understood. As we will discuss below, the distinction between sex and gender has 'mattered' in privileging knowledge of the sexed body, over what is understood as a social relation or identity (gender). Moreover, as Judith Butler (2004) has argued – and will be demonstrated in this paper, the terms that determine whether one is recognisable or legitimate as a sex/gender are bound up in relations of power, which cannot be reduced to the body or science. It is important to point out that what is understood as 'real sex' or 'real gender' in socio-legal discourses can deem some identities legitimate or illegitimate which means that these definitions have political as well as personal consequences..

1.3 For most people, at birth there is no incongruence between their genitals and the gender identity chosen for them by the midwife when s/he pronounces the sex of the baby. But for some people, as they grow there becomes a deep seated feeling that their gender identity is different from that afforded to people with their sexed genitals. The difference between sex and gender then, has underpinned and made possible trans identities – but as we shall discuss later, that same distinction was mobilised in an attempt to disallow trans people full legal recognition in their preferred gender.

1.4 Gender transformations are normatively understood as somatic, based on surgical reassignment, where the sexed body is aligned with the gender identity of the individual through genital surgery – hence the common lexicon 'sex change surgery'. Thus what was understood as incongruent (the bodily sex and the gender role/identity of an individual) are aligned. We suggest that the UK Gender Recognition Act 2004 challenges what constitutes a 'sex change' by the definitions of the Act and also the conditions within which legal 'recognition' is permitted. The sex/gender distinction, (where sex normatively refers to the sexed body, and gender, to social identity) is demobilised both literally and legally. Firstly, in the terminology of the Gender Recognition Act, gender identity becomes and *defines* legal sex:

> if the acquired *gender* is the male gender, the person's *sex* becomes that of a man and, if it is the female *gender*, the person's *sex* becomes that of a woman [S. 9 (1)].

1.5 Gender then, now determines 'sex'. This reverses the usual legal gender attribution process where from the moment of birth, the presence or absence of a penis constitutes the baby as male or female – the sexed body based on the genitals ascribes the gender identity and role of that person. In this scenario, sex determines gender. Secondly, since the Gender Recognition Act, legal recognition in an individual's acquired gender does not require 'sex change surgery'; legal sex transformations can now be literally disembodied.

Sex and Gender

2.1 In the last 45 years, 'gender' has been understood as different to 'sex' by reference to a difference between the body, biology and being male or female ('sex') and social and cultural roles inscribed on bodies; masculinity and femininity ('gender'). But originally the categories 'male' and 'female' were understood as residing in one body and sex was a sociological category rather than a biological one (Laquer 1990). The idea that there was a male and female 'sex' in one body, was superseded by the concept of two 'sexes' based on bodily difference– the reproductive organs, which became the foundation of sexed difference in the eighteenth century (Laquer 1990). It is worth noting that Laquer claims that the two sex model was 'independent of biological facts' (1990: 153) and was informed by social and linguistic knowledge about 'two incommensurable sexes'. Following this, the idea of biological sex difference was strengthened by the development of endocrinology and the discovery of 'male' and 'female' sex hormones in the 1920s. It is suggested however, that this was a cultural and social interpretation rather than biological – a concept of sex difference was applied to hormones rather than the reverse (seeHausman 1995; Birke, 1986; Fausto Sterling,1985; 2000). The sex/gender distinction was developed in research on intersex people in the 1950s, which later gave rise to transsexual identities in the 1960s. John Money used the term 'gender role' in assessment of intersex people, suggesting that hormonal, gonadal, chromosomal sex or genitals did not determine gender orientation – which Money suggested could be 'learned', like a language (Hausman 1995). [2] Later, the psychoanalyst Robert Stoller (1968) used the distinction between sex and gender to argue that the biological sex of a person may not necessarily determine their 'core gender identity' – a feeling of being male or female (Stoller 1968). As Jay Prosser states, it is 'the difference between gender identity and sex that serves as the logic of transsexuality' (Prosser 1998: 43). Thus the sex/gender distinction enabled *trans*gender and *trans*sexual as categories.

2.2 The sex/gender distinction was adopted by early feminists for a politics of gender equality as it conceptualised the social and the biological as separate; thus women's subordination was due to social and political forces rather than biological differences (Oakley 1972). In the distinction between sex and gender, sex referred to biology; genitalia and reproduction (male and female) and gender referred to social and cultural classifications (masculine and feminine). Sex was to nature as gender was to culture. Sex was

seen as *prior* to gender. Therefore female sex was separated from feminine gender; women's role and status in society - hence the famous feminist motto 'biology does not equal destiny' (Reed, 1971). This distinction did suggest a nature/culture dichotomy which has been problematised by feminists (see for example Ortner 1974), but much early feminist work left the categories 'sex' and nature intact (Haraway 1996). The distinction between sex and gender was productive as it accounted for gender identities as separate from the body, which served an understanding of transsexual identity and served feminist equality politics by positing the category woman as a cultural construct, as separate from female sex.

2.3 Much debate has ensued in feminist theory about the usefulness of the distinction between sex and gender. One problem was that sex, if regarded as prior to gender, was left to the realm of the natural, suggested that the body was a neutral surface, leaving biology immune from the critical gaze. This meant that one could still call upon science, a normatively privileged form of knowledge for the 'facticity' of 'sex difference'. There is a large body of work by feminists critiquing science and research on 'sex differences' (see for example Bleier 1984, 1986; Birke 1986; Fausto-Sterling 1985, 1989, 2000; Hubbard 1990) suggesting that it can serve to maintain those differences. Many feminist critiques have argued that science can never be 'neutral' and that scientific narratives reflect and re-present social relations of gender (and race) (see for example Harding 1986; Martin 1991; Haraway 1989, 1991). Other work on the sex/gender distinction suggested that rather than sex being prior to gender, or as 'origin', gender preceded sex. Ethnomethodologists Kessler and McKenna (1978) argued that the 'two-sex' model was a product of the gender attribution process, therefore 'sex' could not be conceptualised in isolation as the idea of two distinct genders produced 'sex differences'. In other words, gender attributions are not based on an observation of biological sex differences, rather, attributions of 'male' and female' are read through the prism of 'sex difference'. But the 'matter' of the body remained under theorised until the late 1980s and early 1990s (Shildrick and Price 1999).

2.4 In the 1990s Butler (1993) argued that sex, the 'matter' of the body was produced through language discourse and institutions – a set of 'regulatory norms' which precede and exceed the sexed body. Butler argued that rather than existing independently, bodily 'sex' was a 'regulatory practice that *produces* the bodies it governs' (1993: 1). Additionally, biologist Fausto-Sterling (1993; 1992) argued mischievously that with manifest variations of chromosomal configurations, there were five sexes rather than two.[3] Kessler (1998) and Dreger (1998) researched the treatment and management of people born intersex critiquing the medical profession and its treatment of intersex people, suggesting that an ideology of two distinct 'sexes' was maintained by medical intervention into chromosomal gonadal and genital variation. This work and the rising profile of intersex activism in the United States raised awareness of the natural variation in sexed bodies and how the normative (two) sexed body was an ideology often enforced by non-consensual surgery, rather than being a 'natural fact'. Crucially they highlighted the variety of chromosomal genital and gonadal configurations, arguing that there was no one single reliable marker of sex difference at all. This work significantly challenged any calls to biology as an authority on putative 'sex differences' and problematised the distinction between sex and gender. Indeed Hausman suggests that discursively gender has now come to mean sex (1995: 190).

2.5 The sex/gender distinction remains contested however and rears its conceptual ugly head on occasions (see the exchange between Hood-Williams 1996 and Willmott 1996; Hood-Williams 1997). Underlying debates of the sex/gender distinction is the conceptualisation of gender as changeable and sex as immutable demonstrating the residual strength of the nature/culture binary – as demonstrated by Lord Tebbit's statement at the beginning of this paper: 'sex cannot be changed'. These terms are often reproduced in discussions about transsexuality where the category sex is often mobilised as more 'real' than gender (see Hird 2000). In the analysis later in this paper we will demonstrate the resonance of the idea of sex being rooted in biology and the body. But first we shall turn to the antecedents of the Gender Recognition Act and the historiography of legal sex.

Historical and Legal Perceptions of Sex and Gender

3.1 In many legal frameworks, the question of legal sex or gender has become increasingly irrelevant in contemporary cultures. With the recognition of equal opportunities and rights for women and men, there are very few circumstances left where the sex or gender of an individual might now be considered legally germane. Indeed, significant changes to various parts of English law have recently been changed to ensure its gender neutrality.[4] However, despite these new approaches, throughout history the law has concerned itself with sex determination. By reviewing the heritage of the Gender Recognition Act 2004 it is possible to see why a change of 'gender' was going to be the primary mechanism of changing 'sex' in the UK. The legislation had to both accommodate the new cultural concept of gender identity alongside the, to date, legal mechanisms that record the sex of a child at birth. In most cases it is a determination of apparent biological sex which produces a birth certificate. Despite the warning on the UK birth certificate to the effect that it should not be used as a form of identification, it is compulsorily demanded by many parties including

parts of government, as an identity document. The birth certificate and it's sex designator, which (from the case of Corbett) was to remain as given at birth, consequently disabled trans people from attempting to access or actually accessing, many jobs or services.

3.2 For a variety of reasons, the historiography and function of 'sex' in the West reiterated the law's primary concern with the ownership and distribution of property and wealth. The essential desire of the law to confirm ownership was premised on male succession. It was within that framework that, at times, the law needed to determine 'sex'. There have always been moments when the midwife did indeed lift the baby and the question of whether there is a penis or not has been problematic (Whittle 2002). To this day, the question of the size of the penis continues to raise the matter of what legal sex a person is to the forefront of jurisprudence.[5]*

3.3 Legal systems have historically addressed the question under a variety of different principles. The possibility of a person being of both or neither sex was so problematic in the determination of property law that the primary principle has been to place the person in one category or the other. At the core of the debate the question has been if a sex has to be determined, then what method will be used to distinguish the features which will be used to determine which one of the two sexes is dominant? The debate that took place around the hermaphrodite body was not necessarily the hermaphrodite we would recognise today. Historically the hermaphrodite body was defined by physicians and lawyers or magistrates through an examination of the apparent mix of external characteristics such as a micro penis alongside a vagina, or a penis and later breast development. Now we would in fact consider many 'historical' hermaphrodites to be people with an intersex condition. It is acknowledged, now, that actual hermaphrodites; people with both sets of genitals and gonads are extremely rare.

3.4 To determine sex, firstly a decision has to be made as which of the individual's features were be evaluated in order to make that decision. According to Reis (1992) the Roman natural historian, Pliny (c.23AD-79AD) took the view that there was no such thing as a hermaphrodite, only cases of mistaken sex when the size of the clitoris was misinterpreted. It could be argued that this is not an accurate representation of what Pliny said in his Natural History,[6] and modern translations make numerous interpretations, but on referring to the original text one sees that Pliny actually said very little. But the interpretation used by Reiss represents the idea that sex could be determined by sexual activity as determined by the use of the clitoris/penis. Therefore, for all intents and purposes, Reis argues that the individual had the power to 'choose' their sex though their own choice of sexual activity – their psychological preference. According to Rosin (2004: 45), Ulpian (c.160AD – 228AD), a Roman Jurist, whose writing has formed the core of the Corpus Juris Civilias [7] a 'eunuch' was to be 'sexed' according to which that sex which prevailed but gives little guidance as to whether that refers to physical or psychological matters. Rosin, however, interprets that to mean physical sex characteristics. Similarly the medieval Islamic law of the Sunni Hanafi school considered the hermaphrodite to be a third sex but where sex had to be ascertained for inheritance or marriage purposes, the site of maximum stream of urination was evaluated, i.e. the dominant physical characteristics (Bouhidiba 2004).

3.5 Within modernist Roman and Common law contexts, legal sex has been determined in quite distinct ways following one or either of these two systems; the psychological or physical dominance of sexual characteristics. Historically therefore, in law, the medical diagnosis that a person was a medical hermaphrodite (i.e. had clear features of both sex organs) or was a person we would now know as having an intersex condition (a far more complex series of symptoms) was irrelevant as the only possibilities in law i.e. if their bodily difference was significant enough to record in one sex or the other. Most of the finer points of somatic variety that are used to today to determine that difference, such as chromosome structure or the form of gonadal tissue, could not be observed. So reliance had to be on distinctive physical features such as length of clitoris or depth of vaginal cavity, or alternatively on emotional makeup and day to day gender presentation, and gendered behaviour. There was no legal space or category in law, for people who would now be hermaphrodites, or people with an intersex condition; they were either men or women.

3.6 As already mentioned, sex determination was of great importance in marriage and property matters, but it was also important to determine whether sexual activity was sodomy or tribadism at a time when throughout most of Europe such activities were offences punishable by hard labour or death (Davenport-Hines 1990, Traub 2002).

3.7 Particularly well known within legal jurisprudence and gender studies is Foucault's (1980) history of Herculine Barbin. Designated as female at birth, and raised as a girl, Barbin was examined after being discovered in a love affair with a woman and found to have a complex genital structure. The question was whether this was 'same' sex sexual activity and the authorities insisted that Barbin choose to be one sex or the other. The choice s/he made was to be a man, but after Herculine's move to Paris s/he committed suicide rather than continue a life in which there was no coherent personal sense of self knowledge and

identity. Foucault wrote of Barbin as an illustration of the hegemony of heteronormativity, but Barbin's story illustrates what became an overriding principle of the Modern Roman law jurisdiction on sex determination. It is up to the individual to choose a sex, but that choice must then be for life and it must be firmly placed within a heteronorrmative context. Any sexual activity they desired or had with a member of their chosen sex would be considered by law to be either sodomy or tribadism (or such such similar local law) and they would be expected to face the consequences. Reis (1992) refers to the work of the late 19th century French medical jurisprudentialist Beck who mentions "an old French Law [that] allowed them great latitude. It enacted that hermaphrodites should choose one sex, and keep to it."[8]

3.8 The general principle in the Common Law system was quite different. The early English great jurisprudentialist, Judge Henry of Bracton (c. 1210-1268) recorded that 'a hermaphrodite was (to be) classed with male or female according to the predominance of the sexual organs' (in Greenberg 1998), in other words; somatic dominance.[9] Three hundred years later in the 16th century, Lord Chief Justice and law reporter, Sir Edward Coke (1552-1634) said in his treatise on the laws of succession to hereditary wealth and title in England that

> Every heire is either a male, or female, or an hermaphrodite, that is both male and female. And an hermaphrodite (which is also called Androgynus) shall be heire, either as male or female, according to that kind of the sexe which doth prevaile (in Greenberg 1998).

3.9 However, according to Traub, Coke was unusual in even acknowledging the existence of the possibility of a hermaphrodite, as by the early 16th century most writers were of the view that a person could be determined to be of one sex or the other.

3.10 What is clear, apart from the French system (as referred to by Reis), the determining features were to be physical aspects of the body. It became the job of the courts to make this determination. There is little mention of psychological sex (better termed as personal sense of self) though Dreger (1998) reports many instances of when the law intervened to determine sex where a person had different psychological features that could be identified as belonging to both men and women, but the gaze of the law was always on the physical. Dreger also shows the considerable lack of consensus amongst physicians in the 17th to 19th centuries as to what characteristics were considered specifically male or female. This debate has continued to this day in both medicine and law. For example, in 2000, in the case of W v W, the question of whether a marriage required a divorce to end it or was void depended upon whether one of the partners was a transsexual woman or an intersex woman. The court ultimately made the decision that she was an intersex woman based upon evidence she gave that her penis had been very small. This could be seen as the courts refusing to acknowledge the possibility of the transsexual person 'changing' their legal sex.

3.11 We see this still in the debate on transsexual people and which legal sex they should be able to have recorded on their paperwork. At birth trans people have no apparent 'physical' differences from those of their assigned sex. As such, until physical changes occur because of medical intervention, their 'sex' is not in question. It is only when clear somatic changes can be seen that sex becomes problematic for society and therefore the law. Trans people then will often need to make claim to the other sex, for identification purposes or even to be recognised in their new sex for the purpose of divorce, or child rearing.

3.12 Throughout the 20th century, few cases came before the courts, and determination of legal sex in England was primarily in the hands of physicians. There are several early autobiographies of people who we would now view as transsexual where it is clear that doctors cooperated in obtaining amended birth certificates and hence a new legal sex (Allen, 1954; Cowell, 1954; Turtle, 1963). Nevertheless, the historical lack of consensus between physicians, as mentioned by Dreger, still existed. With the development in the 1930s to 60s of transsexual medical therapies, disagreements continued, as the debate surrounding the aetiology of transsexualism overtook that of the determination of the sex of the hermaphrodite.

3.13 In 1969 a very strident version of this debate took place at the First International Symposium on Gender Identity, held in London.[10] The unedited verbatim transcript of the symposium proceedings shows several 'hot spots' where arguments broke out between endocrinologists from the Chelsea Women's Hospital and the psychiatric team from Charing Cross Hospital. The Chelsea team specialised in working with people with intersex conditions, and provided extensive support to women with Androgen Insensitivity syndrome, who are chromosomally male but testosterone immune and often require surgery to extend or form a vagina. As the clinic specialised in surgically creating neo-vaginas, in the 1950s and 60s it was increasingly accessed by transsexual women for its hormonal and surgical specialities. The Chelsea team very much took the view that transsexualism was a form of intersex condition, for which the cause was yet unknown. The Charing Cross view was that transsexualism was a psychological disorder, although a disorder for which the most successful treatment was often hormonal and surgical therapy.

3.14 The debate as to whether a transsexual person should be supported in their quest for a new legal sex was reduced to whether they were a form of hermaphrodite or mentally ill. If the former, then their sex was pre-determined at birth or could be re-determined through early medical intervention, hence their new legal sex could be recognised through an amended birth certificate. If the latter (mentally ill), the view was that they were of the sex pronounced at birth, and they should effectively be left without a 'true' sex recognition (and what became a form of social punishment) through their documentation, in order to maintain the 'historical record' of their birth sex.

3.15 This debate continues to this day with one school of thought supporting the hypothesis that a transsexual person is intersex following the research of Zhou, Hofman, Gooren and Swaab (1997), and the other, who insist that it is a mental health problem (Wyndzen, 2004). The primary problem with this debate is that Zhou et al's research does not enable determination of a person's physiological makeup until after death – as according to their research, the determining feature was found within a 'pin head' sized region of the brain of deceased trans women. Similarly it is impossible to determine that being transsexual is a mental health problem as it does not appear to have other mental health consequences for any other aspect of the transsexual person's functioning once gender transition has been facilitated (Wilson 1997). Although there has been a recent discourse of 'mistakes' of gender reassignment, there continues to be strong evidence that the quality of life and mental health is much improved for a significant majority of trans people since reassignment (Pflafflin and Junge 1998).[11]

Legal Questions of Sex and Gender

4.1 In the 20th century the courts did not appear to address the question of discovery of determination rules until the 1967 Scottish inheritance case of *John A.C Forbes-Sempill v The Hon. Ewan Forbes-Sempill* . [12] The facts concerned the inheritance of a baronetcy, and John wished to prevent his male cousin Ewan, who had been registered at birth as a girl, from receiving the considerable family estate under the rules of primogeniture. Ewan, a farmer and a doctor, had 'changed sex' in the mid 1940s and then using medical evidence from his former medical tutor and his practice partner, he obtained an amended birth certificate from the Aberdeen Registrar in 1952. Consequently he married and inherited the baronetcy of oldest seat in Scotland; Craigievar.

4.2 In 1965, a previous Scottish case determined that people treated for transsexualism were not able to have their birth certificates amended. The Court held that there was not

> any sanction for recording changes which have subsequently occurred (unless) the sex of a child was indeterminate at birth and it was later discovered when the child developed that an error had been made.[13]

4.3 The 'real' and crucial issues in the Sempill case were whether a respectable Scottish country gentleman (Ewan) rather than a dissolute Londoner (John) should look after what is one of the finest and oldest landed estates in Scotland. It is clear from the court transcript that the judge, Lord Hunter, had to find a way of making sure the 'right' decision was made, and the transcript is full of fantastic tales and premises. However, regarding determination of sex, Lord Hunter made some very interesting 'legal' discoveries.

4.4 Firstly, he held that the medical opinions given were probably quite correct in asserting that 'sex' is a spectrum, a view repeated by Lord Winston almost 40 years later in the House of Lords debate on the Gender Recognition Act (Gender Recognition Bill, House of Lords Report Stage, Hansard 03-02-2004, col.620). Despite that, following Bracton, and numerous other authorities, Lord Hunter held that a person had to be one sex or the other and that was determined according to the sexual characteristics which 'prevail or predominate' (*Forbes-Sempill,* page 14, para:A). Thus it was the role of the court to 'draw a firm line which leaves males on one side and females on the other' which was a question of fact (ibid page 16, para:B).

4.5 Lord Hunter. then moved beyond all of the other authorities and held that he would follow the advice of Professor C N Armstrong of Newcastle Royal Infirmary and consider four criteria of sex; chromosomal, gonadal, phenotypical (the appearance of the genitals) and psychological. He admitted that the evidence of the first two was problematic, but with regard to the third: phenotypical he prioritised the evidence of Ewan's wife. He held that although the evidence was clear that Ewan's genitals were predominately female in appearance, the fact that his wife asserted that he was able to penetrate her satisfactorily and that she was able to reach orgasm was of far greater importance (ibid page 27, para:B). Supporting this was the fact that no evidence had been raised that Ewan could function as a female in intercourse. Finally as regards psychological sex, he held that there was overwhelming evidence that in Ewan's case he was male and along with the other features it was an 'adminicle of evidence of some importance.' (ibid page 28, para E).

Thus Lord Hunter was able to find that Ewan was a 'true hermaphrodite in whom the male characteristics predominate.' Consequently, after referral to the then Home Secretary, Roy Jenkins, Ewan's succession to the baronetcy was confirmed.

Corbett v Corbett

5.1 In the case of Corbett v Corbett (1970) the judge, Justice Ormrod, was not able to refer to the decision in the Sempill case, as the case had been heard privately in Chambers. *Corbett* concerned the model, dancer and trans woman April Ashley. Ashley was a biological male who had undergone gender reassignment surgery to become a woman. On the breakdown of her marriage her husband petitioned for nullity on the grounds that

- the respondent remained a male and hence the marriage was void and
- the marriage was never consummated due to the incapacity of the respondent.

5.2 Justice Ormrod decided the case on both of these issues though in fact, after he had determined that Ashley was not a woman for the purposes of marriage, there was no reason to discuss the question of consummation as legal consummation could only take place between a man and a woman.

5.3 Regarding Ashley's legal sex, Ormrod devised a test based only on three factors i. the chromosomal, ii. the gonadal and iii. the genital features at the time of birth of the individual concerned. Justice Ormrod failed to address what his decision would have been if these three were not concordant. In Ashley's case he established all were 'male' at the time of birth. He did not consider either Ashley's choice (as in Barbin) not her psychological sex (as in Sempill), and as for her sexual function he determined that intercourse with a neo-vagina was not:

> ordinary and complete intercourse [or as] vera copula-of the natural. When such a cavity has been constructed in a male, the difference between sexual intercourse using it, and anal or intra-crural intercourse is, in my judgment, to be measured in centimetres. (*Corbett,* para 48)[14]

5.4 Justice Ormrod was not required to determine sex for all legal purposes, but only for the purposes of marriage. In his judgement he said: 'as the essential feature of marriage is that it is between a man and a woman, the question was whether Ashley was a woman or not'. He further said that the way to determine this was through biological criteria (ibid para 48). Effectively Ormrod held that a person's sex was not in anyway their own choice and had no relation to their sexual functioning or the use of their genitals. Instead it was to be determined by outsiders – in Ashley's case the midwife when she picked up her (him) at birth, and Ormrod's own conclusions after hearing the evidence of expert medical witnesses.

5.5 Three experts were called by each of the parties to the case. All of the six experts were to agree on the basic evidence; that there were two divisions of sexual difference:

> (those) primarily psychological in character, and those in which there are developmental abnormalities in the anatomy of the reproductive system (including the external genitalia) (ibid para 16)

5.6 In his decision Ormrod relied on a comparison of only two of them; Dr J B Randell, consultant psychiatrist at Charing Cross Hospital for Ashley's husband and representing Ashley, Professor C N Armstrong, of Newcastle Royal Infirmary. Randell asserted that Ashley was a 'male homosexual transsexualist' as a result of 'a psychological disorder arising after birth, probably as a result of some, as yet unspecified, experiences in early childhood.' (ibid para: 18). Armstrong, following his prior comments in Forbes-Semphill, argued that Ashley's condition arose before or at birth and that:

> the respondent was an example of the condition called inter-sex, a medical concept meaning something between intermediate and indeterminate sex, and should be 'assigned' to the female sex, mainly on account of the psychological abnormality of transsexualism.(ibid para: 18)

5.7 At appeal, *Corbett* became the precedent for determining legal sex. The decision determined that a combination of hormone treatment and surgery did not result in a change of sex assigned to a person at birth for the purposes of matrimonial law. The sex of a person is dependant only upon their gonadal, genital and chromosomal sex at birth. This decision has been followed as precedent throughout other matrimonial case law, for example the marriage of a transsexual man to a woman in *Peterson v Peterson* [1985][15]; in *Franklin v Franklin* (1990)[16], then in the criminal law in *R v Tan* [1983][17] and in employment law in *White v British Sugar Corporation*,.[18] The UK Government supported the rule of sex determination as decided by

Ormrod in all of the cases that went before the European Courts on the question of marriage.[19]

5.8 It is interesting to consider what might have happened if the Forbes-Sempill case had been appealed, and if Lord Hunter's decision had been upheld by a senior court. One might imagine that the last 35 years of refusal of basic family and equality rights to trans people might have been very different if Ormrod had seen the decision of a senior judge; Lord Hunter, in a senior court. He might then have felt obliged to follow the apparent precedent set and questioned whether the functional aspects of marriage had been successfully achieved by Corbett and Ashley. In fact, almost as if he did know, Ormrod went on to discuss the question of whether the marriage could be consummated and determined that Ashley's neo-vagina was little different than her anus, and hence sexual intercourse was effectively the practice of sodomy.

5.9 Recent decisions in the European Court of Justice have now started to challenge the previous limitations that sex could only possibly be changed after clear somatic changes. In the decision of *Goodwin & I v UK*[20] and *Grant v UK* , the court had not concerned itself with surgical status rather their concern had been the day to day life of the applicant. This has been the start of the new approach that is now being taken throughout Europe, forcing legal changes, and the recognition of a change of legal 'sex' without any prior medial determination.

The Gender Recognition Act 2004

6.1 The Gender Recognition Act 2004 (GRA) is the UK's government's response to the European Court of Human Rights (ECtHR) decisions, in the cases of *Goodwin v UK* and *I v UK Government* [2002].[21]

6.2 The court held that that accommodations should be made to recognise the new 'legal sex' of transsexual people, not by considering Judge Ormrod or Lord Hunter's criteria but by holding that the matter was a 'fait accompli'. Firstly because the state allowed doctors to provide gender reassignment and therefore considered it a reasonable thing to do. Secondly, that because gender reassignment was not easy, any notion that it was 'choice' or 'fancy' was no longer viable. And finally, with regard to affording rights, the debate on the aetiology of transsexualism was of no great importance. Fundamentally, transsexual people did exist and cause was irrelevant, what mattered was:

> the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable (I v UK Govt [2002] Para 70).

6.3 Put simply, post-operative transsexual people could no longer be left with a 'no-sex', 'intermediate sex' or 'both sex' legal status. Nowhere in the judgement is post-operative defined. The court further said:

> a test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual. There are other important factors — the acceptance of the condition of gender identity disorder by the medical professions and health authorities within Contracting States, the provision of treatment including surgery to assimilate the individual as closely as possible to the gender in which they perceive that they properly belong and the assumption by the transsexual of the social role of the assigned gender. (ibid Para 80)

6.4 The 'Corbett' test for determining sex then, was no longer deemed sufficient and other factors must be taken into account. The ECtHR has effectively upheld Lord Hunter's principle that a line has to be determined but as the court went on it created new determining factors:

> Where a State has authorised the treatment and surgery alleviating the condition of a transsexual, financed or assisted in financing the operations and indeed permits the artificial insemination of a woman living with a female-to-male transsexual (as demonstrated in the case of X., Y. and Z. v. the United Kingdom, cited above), it appears illogical to refuse to recognise the legal implications of the result to which the treatment leads (*Goodwin v UK Govt* [2002] Para 78).

6.5 So, sex is determined through chromosomes, gonads and genitals at birth *and* gender reassignment treatment. The state would have to ban all gender reassignment treatment to avoid having to afford the recognition of the 'new' sex of a transsexual person.

6.6 Thus when determining 'legal sex', the Court's endorsement of the human rights basis for legal recognition of the new 'sex' of 'post-operative' transsexual people was the minimum line behind which the UK government could not retreat. The authorities had to provide legal registration which enabled trans people to enforce their rights to privacy and marriage to a member of the same natal sex under the European Convention. However, as a minimum line, it was perfectly possible for a government to go one

step further and to make legal recognition available to those who are pre- or non-treatment and thus include those trans people who for health, disability or other reason are unable or unwilling to undergo surgical intervention. This appears to be exactly what the Gender Recognition Act 2004 (GRA) has done.

6.7 The GRA affords legal recognition in the acquired gender (sex) role to transsexual people who have been diagnosed as having gender dysphoria[22]. His Honour Judge Harris who was president of the first Gender Recognition Panel clearly was uncomfortable with simply getting this diagnostic statement, rather he wanted confirmation that gender reassignment surgery had been undergone, or at the very least was intended to be undergone. As such he read into S.3 of the GRA a requirement that the medical reports should contain:

> details of any treatment carried out or planned with a view to modifying sexual characteristics" (Harris, J: 2005, para 2)

and specifically he required these diagnostic statements to include, under paragraph 12 of the medical report for the Panel to see:

> details of the non-surgical (e.g. hormonal) treatment to date (giving details of medications prescribed, with dates) and an indication of treatment planned, and date of referral for surgery, or, if no referral, the reasons for nonreferral. (Harris J, 2005, para 7).

6.8 These proposals were unacceptable both to the 'experts' meant to provide them, who argued that the time necessary to prepare the reports would become prohibitive to the National Health Service, and also to the trans community who vehemently argued that the law was being judicially extended beyond the original intention of parliament. Eventually an agreement was reached, but it was clear that the Gender Recognition Panel members were uncomfortable with the idea of legal gender recognition for non-operative transsexual people. In the same proposal they originally intended to see extensive diagnostic notes on each applicant stating that they had lived for at least 2 years in their new gender and committed to do so permanently in the future.

6.9 The legal recognition is (almost) complete and includes the right to marry or contract a civil partnership in the acquired gender (we say almost, in that there is provision for religious bodies to not respect the privacy rights obtained in *Goodwin* & I.)[23] Under the Act, transsexual people can apply for a Gender Recognition Certificate, which will make them legally a member of their acquired gender. If their birth was registered in the UK they will be provided with a new birth certificate in that gender (GRA, s.21).

6.10 The Act does not have specific medical requirements other than a diagnosis. Thus a person does not have to have undergone hormone therapy or gender reassignment surgery in order to obtain legal recognition (though it is acknowledged that these will undoubtedly ease the route to legal recognition). Consequently there may well be legal women who have a penis, and (more commonly because of the limitations of surgery to make a penis) men who have a vagina. Even though according to the ECtHR, the UK government could have decided to make gender reassignment surgery a pre-requisite for the right to marry, that route has not been taken. There were several reasons for making this decision: A few trans people who are living permanently in their new gender are unable to tolerate the doses of hormones because they will face serious health risks or even death, or some trans people will not seek surgery.

6.11 Since the implantation of the Gender Recognition Act in April 2004, 1704 people have been awarded a gender recognition certificate and a further 148 applications are being processed (as of January 2007). Only 40 applications have been rejected, and most of these are ex-patriots who have been unable to meet the medical evidence requirements.

6.12 One of the binding principles of the Act is that its effect is not retrospective. On recognition former family responsibilities are retained as if the individual were of the previous gender. Former marriages must be ended when applying for the new gender. This has been a particularly controversial area, with many transsexual people in pre-existing marriages being very concerned about the demand for them to choose between their Article 12 (marriage) and Article 8 (privacy) rights under the European Convention. However, a solution has been put in place; if a transsexual person is in a pre-existing marriage or civil partnership they cannot be awarded a full GRC, but instead, if they meet all the other requirements, they will receive an Interim Certificate. The Interim Certificate does not afford legal rights in the acquired gender, but it will enable a quick and easy annulment of a marriage or civil partnership which will then lead to a full GRC being awarded. If the couple then intend formally to continue their relationship, a mechanism has been created whereas an award of nullity is made by the court which will then provide a formal transfer from Interim Certificate to full GRC. If the couple have prepared well, they could then proceed immediately to a registrar's office and have a marriage or civil partnership enacted (whichever is the opposite of their former arrangement) on the same day. Although not marriage, in reality it is 'as good as' for those who wish to

have their gender recognised. Families, for example where a couple live together and have children by donor insemination, will not be recognised until they have gone through formal mechanisms such as marriage and adoption have taken place and pension benefits can only be obtained from the point of recognition.

The New European Union Sexes

7.1 The European Court of Justice has effectively ignored *Corbett* in recent years (*P v S & Cornwall County Council*[24], *KB v National Health Service Pensions Agency* [25]) in discrimination cases. Rather than concerning itself with the sex of the transsexual person, it has concerned itself with finding an appropriate comparator. In *P v S & CCC* the comparator was to be someone who had not undergone gender reassignment treatments. In *KB*, a complex case involving survivor pension benefits for the transsexual partner of a female NHS employee, the comparator was to be:

> a heterosexual couple where neither partner's identity is the result of gender reassignment surgery and the couple are therefore able to marry (*KB*, Para:31).

7.2 In the recent case of *Richards v Secretary of State for Work and Pensions* ,[26] concerning discrimination in a transsexual woman's pension age entitlement, Advocate General Jacobs appears to have gone much further than either the European Court of Human Rights or the Gender Recognition Act itself. The question was whether a trans woman who had not obtained a gender recognition certificate should have been entitled to full pension benefits as if always having been a woman. Jacobs opinion is not binding (but it was ultimately followed by the Court). Jacobs has proposed a new position which could significantly alter the determination of legal sex. Introducing a combination of the 'French' notion of personal choice and the view of Professor Armstrong (who was the ignored expert in *Corbett)* that they have pre-birth intersex condition, he suggests:

> that the reasoning to be used in applying sex discrimination law to the case of transsexual persons should differ from the classical model which is always based on a straightforward comparison between men and women (*Richards,* para: 42).

7.3 As such, according the Jacobs, in the case of *KB*, the correct comparator in the case of the female-to-male transsexual was therefore a male person whose identity was not the result of gender reassignment surgery. Therefore in *Richards,* 'the correct comparator in the present case concerning a male-to-female transsexual person is a female person whose identity is not the result of gender reassignment surgery' (ibid para: 45).[27]

7.4 Taken to its literal conclusion, if such a decision can be made with regard to pension rights which collect over a lifetime, then presumably that lifetime is to be regarded as if always of the acquired gender. Could we then presume that regardless of what is said in the GRA, that when transsexual people commence living in their acquired gender they then have the potential to ask the courts to determine that they have always been of that gender? As such, sex would become merely a matter of the enactment of choice. Following *P v S and* CCC, which was concerned entirely with gender and not sex there have been several discrimination cases where the courts have given no regard to the surgical status of the transsexual applicant, effectively supporting the idea that the courts do not see surgery as a necessarily determinant of sex.[28] As such, S.9 (1) of the GRA could then be read by the courts as:

> Where a full gender recognition certificate is issued to a person, the person's gender becomes [*and has previously*] *been* for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex *is* that of a man and, if it is the female gender, the person's sex *is* that of a woman). (Gender Recognition Act s.9(1)) (emphasis added)

7.5 The Act has already introduced two crucial changes. Firstly, the sex/gender distinction is demobilised with both terms in the wording of the act. Indeed, in the sex/gender distinction, female usually refers to *sex,* the sexed body, and woman usually refers to *gender;* the cultural meaning of female sex. In the terms of the Act the referents change round; *gender* refers to *female* and *sex* refers to *woman*. This suggests that the terms are interchangeable. Secondly, in the wording of the Act, gender *precedes* sex. Normatively in the sex gender distinction sex precedes gender; gender is culture written onto the sexed body. In the terms of the Gender Recognition Act, one's gender precedes one's sex. One's acquired *gende*r becomes the *sex* in which one is recognised in law. Referring back to Stoller's work in the 60s we can see how the sex/gender distinction paved a way for an understanding of gender identity as separate from sex. In the Gender Recognition Act, gender identity transforms legal sex - they are in effect, the same thing. Moreover, there is no recourse to the sexed body which suggests that the body's sex as a taxonomical tool has in some way become redundant. Legal sex then, corresponds with one's acquired gender, and the theorisation

of sex is no longer necessary.

What about sex?

8.1 What does this mean for sex? In the House of Lords debates one can see, as the quote from Lord Tebbit demonstrates, that one strategy used to block the bill from doing what it was intended, was to call upon sex as a category using biological discourse and discussing chromosomes, genitals and gonads (as Judge Ormrod did in the April Ashley case). As Tebbit stated; 'Sex is decided by the chromosomes of a human being'. Moreover he tried to table an amendment (no.128) to define sex and gender in the following way

> 'Sex' means the biological categorisation as male or female by virtue of chromosomes, genitalia and gonads'; 'gender' means the social and cultural categorisation as male or female by virtue of personal choice or lifestyle.

8.2 Tebbit cites the sex gender distinction in the original terms mentioned earlier. However, in a very interesting move, medical experts were called upon in these debates. In the House of Lords 2nd sitting the eminent professor (and television celebrity) Lord Winston, stated that:

> The definition of sex is extremely complicated… Genetics is rapidly changing our understanding of where sex is determined. But to define it simply as genital, hormonal or, as the noble Lord, Lord Tebbit, seeks to do, as gonadal, is a travesty of what really happens… I urge the House to be very cautious about defining it in terms of chromosomal, genital or any other simple definition. It simply is not medically just, and I am sure that it would produce bad law. (Gender Recognition Bill, House of Lords Report Stage, Hansard 03-02-2004, cols.619-620)

8.3 In this sense although the distinction between sex and gender was re-mobilised through biological discourse by Lord Tebbit, that same discourse drawn upon by Lord Winston *removed* the distinction, demonstrating not only how the distinction between sex and gender has 'moved' to being interchangeable but how the categories used to determine biological sex are incredibly *unstable*. What Lord Winston is suggesting is that biological sex cannot be changed, but neither can it be relied upon to definitively categorise. Moreover, for the purposes of the gender recognition act, 'changing sex' was never about changing biology but about changing legal definitions of what gender recognition/legal sex was.

8.4 Indeed in the debates in the House of Lords, Lord Filkin stated:

> the Bill is about legal recognition and it will define a person's sex in law. We consider the arguments about the meaning of the words 'sex' and 'gender' to be beside the point. There is no stark dichotomy between the meaning of the words. Language, as I said, is fluid. Our sense of the words 'sex' and 'gender' has changed over time and no doubt will do so in the future. While the meaning of the word 'sex' is not the same as that of 'gender', the word 'sex' is increasingly in use in ways that go beyond a narrow biological definition (House of Lords Report Stage, Hansard 29-01-04, col. 366).

8.5 Sex then is 'beyond' a biological definition as held by the ECtHR and the ECJ, and Lord Filkin appears to echo Hausman's (1995) claim that gender has come to mean sex. Indeed the terms are interchangeable under the GR Act and as such, for the law it is recognised to be as mutable as gender, because our new understanding of it is that it is part of a changing social world, following Lord Winston's remarks.

8.6 Legal sex has never been consistently determined by biology as this paper has detailed, - the decision has been incumbent upon a range of people from judges to physicians In determining the sex of 'hermaphrodites' in Roman law, individuals could 'choose' their sex though their own choice of sexual activity – their psychological preference (Rosin 2004). In the case of Herculine Barbin, the principle was that of heteronormativity rather than biology (Foucault 1980). In other instances, the physiology of an individual was used to determine legal sex. In English Common Law, the legal sex of a 'hermaphrodite' was to be determined by the predominance of the sexual organs. Throughout the 20th century, physicians determined sex and it would seem that doctors cooperated in obtaining amended birth certificates and hence a new legal sex (Allen, 1954; Cowell, 1954; Turtle, 1963), although there was a lack of consensus between physicians on what determined sex (Dreger 1998). Lord Hunter's ruling in the 1967 case of John A.C Forbes-Sempill v The Hon. Ewan Forbes Sempill, used (hetero)sexual functioning as a factor in his decision as well as psychological sex. Judge Ormrod in the Corbett v Corbett case however referred to biological understanding of sex again to determine legal sex. What has determined legal sex then, has always been bound up in social relations – for example the prohibition of homosexuality, as well as physicality. But as we have seen, recent decisions in the ECJ and ECtHR have now changed the debates

perhaps even providing the answer that legal sex is no longer determined solely by physicality, sexual desire or relations, but rather entirely by social interactions..

8.7 As the Gender Recognition Act states that one's acquired gender becomes one's legal sex then there is little difference between sex and gender. Indeed sex is preceded and exceeded by gender by the terms of the Gender Recognition Act. Sex in this sense is determined by gender identity – the social role that one chooses to take. This reverses the original gender attribution at birth which as based on the genitals (and strictly speaking not based on other 'known' identifiers of biological sex such as chromosomes). For the Gender Recognition Act, the body is irrelevant, as neither bodily modification, nor the presence or lack of a penis is determinative. Moreover, the Gender Recognition Act is performative (see Butler 1990), in that as a form of speech-act, what it 'does' is makes gender into sex in law. Indeed, as one of the authors was present at the meeting in the Department of Constitutional Affairs where the question of 'gender' or 'sex' was discussed, it can be verified that the decision to use gender was to bring a contemporary recognition of the complexities of the question to the Act. The decision to include 'sex' as well as gender within the GRA was to acknowledge this and to ensure that the Act could not be challenged.

8.8 The Gender Recognition Act enables legal 'sex changes' - what legally constitutes male and female has changed. We share Sandland's (2005) view that as we can now have men with vaginas and women with penises, the act does undermine the binary of two morphologically distinct sexes. We also agree that this poses no challenge to the *idea* that there are legally only two sexes (Sandland, 2005; Cowan 2005). However, what it *means* to be legally recognised as a man or a woman has now been redefined as it is not based on the body or biology. Thus, the Gender Recognition Act may not undermine the threat that trans people pose to the binary system of sex/gender (Sandland 2005; Cowan 2005). There are still only two legal sexes to choose from, but Gender Recognition Certificates will not be forcibly issued to all trans people – regardless of where they may place themselves on the gender spectrum; nor will all trans people wish to apply for one. Rather, the Gender Recognition Act offers those transsexual people who *do* identify as men or women, the right to be legally recognised as such even if one is a woman with a penis or a man with a vagina. The privileges afforded by legal recognition and gendered belonging should never be underestimated (Prosser 1998) and the desire for these does not make gender/sexual dissidents 'apolitical and acquiescent' (Morland 2007: 13). Changing sex for the purposes of legal recognition then, is not about changing biology or changing bodies to 'match' genders, but about changing how sex is legally defined. In that sense 'having a sex change' has a different meaning with new political consequences and challenges.

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Notes

[1].In this paper we use the term trans people which is currently a preferred term which includes those who may identify as transsexual or transgender.

[2] Money maintained this belief until 1997 when it was discovered that a patient of his who proved this thesis, emerged as deeply unhappy living in the female gender role. This role had been imposed the patient in 1967 when his penis was accidentally severed during a circumcision when he was a baby. This case is now known as the 'Joan/John case'. (See Colapinto 2000; Butler 2001).

[3] See Iain Morland 'Why five sexes are not enough' (2007) for a critique of Fausto-Sterling's argument.

[4] e.g. the Sexual Offences Act 2003 achieves gender neutrality by ensuring that offences are relevant only to the body parts assaulted – and for example, the main offence of rape is now gender neutral as far as the victim is concerned and though the perpetrator is required to have a penis, the similar offence of Assault by Penetration, which is completely gender neutral carried the same levels of punishment.

[5] See the discussion on penis size in W v W (Physical Inter-sex) [2001] Fam. 111 and Bellinger v Bellinger (Attorney-General Intervening) [2001] EWCA Civ 1140. See also Dreger 1998; Fausto-Sterling 2000; Kessler 1998 for a critique.

[6] Pliny the Elder, Natural History, 11:9

[7] Civil Law Code of the Roman Empire, and the basis of many modern codified Civil Laws.

[8] Beck and Beck, *Elements of Medical Jurisprudence* , p 129 cited in Reis,E. Impossible Hermaphrodites : Intersex in America: 1620–1960, *The Journal 0f American History,* 92:2, pp 411-441

[9] Bracton on the Laws and Customs of England.

[10] Accessed at the LSE Rare Books Room

[11] This research constitutes the most comprehensive longitudinal review of gender reassignment covering 30 years and reviewing over 70 studies of 2000 patients in 13 countries.

[12] See Angus Campbell “Successful sex in succession: sex in dispute – the Forbes-Sempill case and possible implications” The Juridical Review 1998 p257-279, 325-347.

[13] Sheriff Court of Perth and Angus at Perth, X- Petitioner, [1957], Sheriff Court Reports, Scots Law Times News p. 62.

[14] Corbett v Corbett [1970] 2 All E.R. 33, 48; [1970] 2 W.L.R. 1306-1324

[15] Peterson v Peterson [12 July 1985] The Times

[16] Franklin v Franklin (1990)

[17] Rv Tan [1983] QB 1053

[18] White v British Sugar Corporation [1977] IRLR 121

[19] However, we should not forget the unreported case of R v Matthews (28th Oct 1996) in which the Reading Crown Court found that penile penetration of a male to female transsexual's artificially constructed vagina amounted to rape.

[20] Christine Goodwin v. UK Government, Application No. 28957/95 [1995] ECHR; I v. UK Government, Application No. 25608/94 [1994] ECHR), and Grant v. United Kingdom (No.32570/03) ECtHR, 2006

[21] Christine Goodwin v. UK Government, Application No. 28957/95 [1995] ECHR; I v. UK Government, Application No. 25608/94 [1994] ECHR)

[22] Gender Recognition Act 2004. S.3.2

[23] The Gender Recognition (Disclosure of Information) Order 2005

[24] P v S and Corrnwall County Council [1996] IRLR 347

[25] KB v (1) National Health Service Pensions Agency and (2) Secretary of State for Health, C-117/01 [2004] IRLR 240)

[26] Richards v Secretary of State for Work and Pensions, Case C-423/04, Opinion Of Advocate General Jacobs, delivered on 15 December 2005

[27] The final decision of the ECJ is reported as Richards v Secretary of State for Work and Pensions (Case C-423/04)

[28] See Croft v. Royal Mail Group Plc [2003] IRLR 592

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