



Strathprints Institutional Repository

Norrie, Kenneth (2006) Is the gender recognition act 2004 as important as it seems? In: First do no harm. Applied Legal Philosophy . Ashgate Publishing, Farnham, pp. 561-572. ISBN 0754626148 ,

This version is available at <http://strathprints.strath.ac.uk/30897/>

Strathprints is designed to allow users to access the research output of the University of Strathclyde. Unless otherwise explicitly stated on the manuscript, Copyright © and Moral Rights for the papers on this site are retained by the individual authors and/or other copyright owners. Please check the manuscript for details of any other licences that may have been applied. You may not engage in further distribution of the material for any profitmaking activities or any commercial gain. You may freely distribute both the url (<http://strathprints.strath.ac.uk/>) and the content of this paper for research or private study, educational, or not-for-profit purposes without prior permission or charge.

Any correspondence concerning this service should be sent to Strathprints administrator: strathprints@strath.ac.uk

Is the Gender Recognition Act 2004 as Important as it Seems?

Kenneth McK. Norrie

University of Strathclyde

Helpful comments on an earlier draft of this paper were made by Dr Stephen Whittle, Head of the Graduate School of Law, Manchester Metropolitan University and these are gratefully acknowledged. The argument presented here is mine, however, and not his. Responsibility for remaining errors is (of course) mine alone.

Introduction

Gender matters. However much the law strives for equal opportunities and outlaws sex discrimination, society remains gendered and so does the law. The assumed fact of gender will frequently determine how the law responds to particular persons or the circumstances they find themselves in or the relationships they enter into. This is so in a variety of areas of law, but perhaps most obviously in determining the validity of recognised and state-sanctioned conjugal relationships (that is to say marriage and civil partnership). Given the wide importance of gender, it is somewhat surprising that Parliament has never seen the need to lay down any criteria for the determining of an individual's gender. This is not to be explained on the basis that, until at any rate the development of gender reassignment surgery, gender is always certain, for the problem of the hermaphrodite has been exercising legal commentators for almost two millenia¹. It is, however, the ability of modern medical practice to respond in a practical way to the needs of transsexuals that has created an environment in which neither the courts nor the legislature can ignore either gender itself or individuals who seek to change from one to the other.

The Pre-2004 Transgender Cases

The story of George Jamieson, who became April Ashley and married the Hon Arthur Corbett, is well-known, as is Ormrod J's judgment annulling the

¹ See D. 1, v, 10.; Grotius *Jurisprudence of Holland* I, iii, 6; Sanchez *De Sancto Matrimonii* cvi, 380; Paulus, D, xxii, 5, 15.

marriage in the seminal case that followed². Ormrod J, a judge chosen to hear the case because of his medical as well as legal background, made two crucial findings: (i) that there were four factors to be taken into account in determining a person's gender: chromosomal, gonadal, genital and psychological and (ii) that when the first three are congruent at birth then that determines a person's gender for the rest of their life. Though a first instance decision, it dominated the law of England (and was assumed to reflect the law of Scotland) for over three decades, setting the rule not only in its own context (validity of marriage) but also in other areas of law such as the criminal law³ and employment discrimination law⁴. Regular challenges to the *Corbett* rule were made in the European Court of Human Rights, on the basis that the UK's position was inconsistent with the article 8 right to private life and the article 12 right to marry and found a family⁵ and, until 2002, these challenges were consistently rejected by the European Court (if with an ever-decreasing majority). Also at around that time the domestic English courts faced the most sustained challenge to the rule in *Corbett* since its decision, in a case which raised exactly the same issue, in the same context, if in rather more benign circumstances.

In *Bellinger v. Bellinger* the judge at first instance refused to grant a declaration of validity of a marriage between Mr and Mrs Bellinger, the latter having undergone gender reassignment surgery before a ceremony of marriage 20 years previously. The Court of Appeal refused the appeal and refused also to overrule *Corbett*, on the ground that to do so would involve a major change of the law which it is properly for Parliament rather than the court to make⁶. There was, however, a strong dissenting judgment from Thorpe LJ which, three months later, was founded upon by Chisholm J in the

² *Corbett v. Corbett* [1971] P 83.

³ *R v. Tan* [1983] QB 1053, which involved a conviction for a gender-specific crime. This case was not followed in Australia: *R v. Harris and McGuinness* (1988) 17 NSWLR 158.

⁴ *White v. British Sugar Corporation* [1977] IRLR 121 (now overruled: see n. 39 below).

⁵ *Rees v. United Kingdom* [1986] 9 EHRR 56; *Cossey v. United Kingdom* (1990) 13 EHRR 622; *Sheffield & Horsham v. United Kingdom* (1998) 27 EHRR 163; *X, Y and Z v. United Kingdom* (1997) 24 EHRR 143. An in-depth analysis of the ECHR cases is to be found in R Reed "Transsexuals and European Human Rights Law" in Graupner and Tahmindjis (eds) *Sexuality and Human Rights: A Global Perspective*, Haworth Press 2005.

⁶ [2002] 2 WLR 411. See Norrie, "Family Law Update" (2001) 6 SLPQ 237.

Family Court of Australia in *Kevin and Jennifer v. Attorney General*⁷ where the claim was to all intents and purposes exactly the same. Chisholm J explains how *Corbett* had been based on scientific propositions that could not stand in light of understandings developed since 1970 and on social perceptions that were, even on their own terms, no more than unreasoned assertions. Nine months after *Kevin and Jennifer* the European Court in *Goodwin v. United Kingdom*⁸ also rejected *Corbett* (and their own previous jurisprudence on the issue), on the basis that it was indeed inconsistent with both articles 8 and 12 of the ECHR, and seven months after *Goodwin* Chisholm J's judgment in *Kevin* was upheld by the Full Court of the Family Court of Australia⁹ (if on different grounds). Less than two months after that, the House of Lords handed down their decision in *Bellinger*¹⁰. To the surprise of many, the House of Lords did not follow Thorpe LJ's dissent and reinterpret English law in a way that was consistent with the ECHR. Rather, they held that *Corbett* represented the true state of English law and that legislative rather than judicial change was the only possible route to ECHR consistency. Three months later and on the first anniversary of the European Court's decision in *Goodwin* the British Government published a draft Bill designed to reverse the rule in *Corbett* and *Bellinger*. The Gender Recognition Act 2004 came into force in April 2005.

The Gender Recognition Act 2004 and the Nature of Transsexualism

This Act allows individuals to apply to a Gender Recognition Panel, for the granting of a "Gender Recognition Certificate"¹¹, on the granting of which the applicant's gender becomes "the acquired gender"¹², subject to certain exceptions to be discussed later. The Panel is obliged to grant the Certificate if the applicant has or has had gender dysphoria, has lived in the acquired gender for at least two years, and intends to continue to do so for the rest of his or her life.¹³ As such, the Panel's decision is one of fact rather than

⁷ [2001] Fam CA 1074.

⁸ (2002) 35 EHRR 18.

⁹ [2003] Fam CA 94.

¹⁰ [2003] UKHL 21, [2003] 2 All ER 593.

¹¹ Gender Recognition Act 2004, s 1.

¹² *Ibid*, s 9.

¹³ *Ibid*, s. 2.

judgment. There is no requirement for surgical or any other form of medical treatment before an application may be made or a Certificate granted. A married person or a person in a civil partnership is not entitled to a Gender Recognition Certificate but may apply for an interim Gender Recognition Certificate¹⁴ which allows for the speedy dissolution of their marriage or civil partnership¹⁵: on such dissolution the divorce court will issue a full Gender Recognition Certificate¹⁶ which itself will entitle the parties to re-establish their legal relationship with their ex-spouse or ex-civil partner as, respectively, a civil partnership or a marriage.

Though it is clear that the Act is designed to reverse the rule in *Corbett* and *Bellinger*, the requirement to satisfy the European Convention on Human Rights has meant that it goes very much further than simply allowing transgendered persons to marry in their new gender. It is, however, not immediately apparent either how far the Act goes or, as we will see, the extent to which it remains necessary to rely on its terms. These matters depend, at least partly, upon the mischief that the Act is designed to address, and the key to understanding what that mischief is lies in long-established judicial attitudes to the very nature of transsexualism, which remain of crucial importance. In *Corbett* the medical evidence variously described April Ashley as “a male homosexual transsexualist”, “a castrated male” and “an intersex”.¹⁷ Ormrod J described transsexuals as persons with “an extremely powerful urge to become a member of the opposite sex”, who suffer psychologically “but do not respond favourably to psychological treatment”.¹⁸ This is reflected in the description offered by Lord Nicholls in *Bellinger*:

“Transsexual people are born with the anatomy of a person of one sex but with an unshakeable belief or feeling that they are persons of the opposite sex. They experience themselves as being of the opposite

¹⁴ Ibid, s 4(3) as amended by s 250 of the Civil Partnership Act 2004.

¹⁵ Gender Recognition Act 2004, sched 2, amending s 12 of the Matrimonial Causes Act 1973 for England and Wales, s 1 of the Divorce (Scotland) Act 1976 for Scotland, and art 14 of the Matrimonial Causes (Northern Ireland) Order for Northern Ireland.

¹⁶ Gender Recognition Act 2004, s. 5.

¹⁷ [1971] P at 99.

¹⁸ Ibid at 98.

sex ... The aetiology of this condition remains uncertain. It is now generally recognised as a psychiatric disorder”¹⁹.

These passages show that both Ormrod J and Lord Nicholls see gender dysphoria as a disorder of the mind: they regard it as axiomatic that for persons with whom there is a gender disparity between the body and the mind it is *self-evidently* the mind and not the body that is suffering the disorder and that surgery or medical intervention is appropriate only because psychological intervention is ineffective. Yet whoever is “generally recognising” this assertion, it is not transsexual people who are much more likely to regard the abnormality as being one of the body²⁰ - it is their body that is wrong rather than their mind, with the result that surgery or medical intervention is appropriate in its own terms, which is to ensure that their body is altered to reflect the reality of their mind. The supposition that transsexualism is a disorder of the mind allows the judges to make a more crucial assertion: that surgery to alter the body may well harmonise the body with the mind but it neither cures transsexualism nor gives the patient the “right” or “true” body. Reflecting Ormrod J’s language of the “artificial vagina” that April Ashley possessed²¹, Lord Nicholls describes gender reassignment as follows: “For men [surgery] may mean castration or inversion of the penis to create a false vagina. For women it may mean a mastectomy, hysterectomy or creation of a false penis by phalloplasty”²². The surgery, in other words, is designed not to reflect reality or fact, but to falsify the patient’s body as a way of ameliorating (but not curing) the disorder of the mind. It is but second best to a cure, which would be altering the mind rather than the body. “The purpose of these operations [castration, amputation of the penis and construction of an artificial vagina]” declared Ormrod J in *Corbett* “is, of course, to help to relieve the patient’s symptoms and to assist in the management of their disorder; it is not to change their sex”.²³ In *Bellinger* Lord Nicholls uses virtually the same language: “the aim of the surgery is to make the individual feel more

¹⁹ [2003] UKHL 21 at para 7.

²⁰ Recognised by Baroness Hale in *A v. Chief Constable of West Yorkshire Police* [2004] UKHL 21 at para 26.

²¹ [1971] P at 98.

²² [2003] UKHL 21, per Lord Nicholls at para 40.

²³ [1971] P at 98.

comfortable with his or her body, *not to 'turn a man into a woman' or vice versa*"²⁴. Lord Hope is to the same effect:

"The essence of the problem, as I see it, lies in the impossibility of changing completely the sex which individuals acquire when they are born ... (M)edical science is unable, in its present state, to complete the process. It cannot turn a man into a woman or turn a woman into a man. That is not what the treatment seeks to do after all, although it is described as gender reassignment surgery"²⁵.

If medical science is unable to do this, then the law cannot do so either, and the Gender Recognition Act 2004 is, therefore, of limited scope - it does not turn a man into a woman, nor does it tackle the "impossibility" of changing sex. Rather, it merely permits individuals to be treated for the purposes of the law *as if* they belonged to the gender that they live their lives in rather than the gender that they (in reality) remain. Put shortly, the Act creates a legal fiction which allows the law to ignore for most purposes the individual's real gender.

Gender Reassignment and Marriage

The explanation for this insistence on immutability of "real" gender lies, I suggest, in the perceived need for absolute certainty within the context in which *Corbett* and *Bellinger* arose, that is to say marriage²⁶. Ormrod J denied that April Ashley was a woman because, with a merely artificial vagina, she could not naturally perform "the essential role of a woman in marriage"²⁷ and that "having regard to the essentially heterosexual character of the relationship which is called marriage, the criteria [for determining gender in that context] must ... be biological".²⁸ Lord Hope and Lord Nicholls similarly hold that the meaning of the words "male" and "female" within the context of marriage must refer back to the role that men and women usually play in

²⁴ [2003] UKHL 21 at para 41, emphasis added.

²⁵ *Ibid* at para 57.

²⁶ In the words of Baroness Hale in *A v. Chief Constable of West Yorkshire Police* [2004] UKHL 21 at para 51: "Marriage is still a status good against the world in which clarity and consistency are vital".

²⁷ [1971] P at 106.

²⁸ *Ibid*.

procreation: they assume (as the European Court does not²⁹) that procreation and marriage are inherently *and necessarily* connected with the result that “male” and “female” in marriage law are words referring not so much to gender roles as procreative potential.

“Of course”, says Lord Hope,³⁰ “it is not given to every man or every woman to have, or to want to have, children. But the ability to reproduce one’s own kind lies at the heart of all creation, and the single characteristic which invariably distinguishes the adult male from the adult female throughout the animal kingdom is the part which each sex plays in the act of reproduction. When Parliament uses the words ‘male’ and ‘female’ in section 11(c) of the [Matrimonial Causes Act 1973] it must be taken to have used those words in the sense which they normally would have when they are used to describe a person’s sex, even though they are plainly capable of including men and women who happen to be infertile or are past the age of childbearing”.

There is no question but that there is a clear difference in the factual role that each gender plays in the natural process of reproduction, but it is a leap of logic to assume from this that these roles require to be replicated in the legal institution of marriage. For it should not be forgotten that marriage is a legal construct rather than a natural state of being. Animals who mate for life, like swans, mate, they do not marry; bull walruses with harems of cows are *not* polygamists. Yet Lord Nicholls is quite deliberate in drawing what he perceives as an essential link between procreation and marriage. He defines gender, for the purposes of marriage, as involving a general capacity to reproduce, since the primary *raison d’être* of marriage was for many centuries reproduction³¹. The fact that modern society no longer sees marriage this way was one of the major reasons why the Family Court of Australia felt able to depart from the *Corbett* precedent³², but Lord Nicholls is altogether unwilling to go so far. He states merely that “for a long time now the

²⁹ *Goodwin v. United Kingdom* (2002) 35 EHRR 18 at para 98.

³⁰ [2003] UKHL 21 at para 64.

³¹ *Ibid* at para 46.

³² *Re Kevin and Jennifer* at para 153.

emphasis has been different. Various expressed, there is much more emphasis now on the ‘mutual society, help and comfort that the one ought to have of the other’³³. However, even when marriage was the primary social environment in which procreation took place, it never followed that individual marriages required to be procreative in intent or potential: the infertile can marry validly, as can those who deliberately take steps to avoid reproduction. The House of Lords itself over 50 years ago accepted that consummation could validate a marriage even when steps were positively taken to avoid procreation³⁴. Since individual marriages do not require to be procreative, it is illogical to define gender for the purposes of marriage in terms of procreative potential. In reality, *Bellinger* represents a judicial fear, not of those who are lacking “all the equipment” (in Lord Hope’s unfortunate phrase³⁵), but that marriage will lose its opposite-sex character. If gender reassignment surgery does not in reality turn a man into a woman but that “man” is permitted to marry a man, then the very nature of marriage is altered - it is opened up to same-sex couples (so long as one of the men has had his penis chopped off first). Lord Hope let the mask slip with a remarkable misinterpretation of the result in *Goodwin v. UK*. He says this “[The] problem would be solved if it were possible for a transsexual to marry a person of the *same* sex, which is indeed what the European Court of Human Rights has now held should be the position in *Goodwin*”.³⁶ The European Court held no such thing. Recognising a change of gender actually allows marriage to remain opposite-sex, but only if gender is recognised as being as much a legal construct as marriage itself. Lord Hope’s slip is explained by his underlying belief that, whatever the law says, a person’s “true” gender remains defined by the body he or she was born with. Dressed up as a requirement for procreative potential, the true message of *Bellinger* is that while the law may evolve in such a way that a person’s legal gender can change, a person’s true gender (and thereby the opposite-sex nature of the legal institution of marriage) remains immutable.

³³ [2003] UKHL 21 at para 46.

³⁴ *Baxter v. Baxter* 1948 AC 274, in which it was held that the wearing of a condom does not prevent consummation. The very asking of the question illustrates graphically just how artificial and technical the concept of marriage is.

³⁵ [2003] UKHL 21 at para 57.

³⁶ *Ibid* at para 69, emphasis added.

Gender Reassignment in Other Contexts

It needs always to be remembered that Ormrod J in *Corbett* was careful to limit his conclusions to their own context, and though there is no need in logic to follow these conclusions in areas other than marriage, subsequent cases assumed that there was³⁷. Nothing in the House of Lords decision in *Bellinger* suggests an application of that case wider than marriage and the heavy reliance on the nature of marriage and on the interpretation of the particular marriage statute in question suggests strongly that, at the very least, different arguments would need to be deployed in different contexts if the same conclusion is to be reached. In fact, shortly after *Bellinger*, the same court held that a different conclusion was possible, indeed required, in different circumstances, with the result that a person was for the first time in the United Kingdom legally recognised as belonging to their new gender, this even before the coming into effect of the Gender Recognition Act 2004.

*A v. Chief Constable of West Yorkshire Police*³⁸ involved a male to female transsexual who had had her application to become a police officer rejected on the basis of her transsexuality. To discriminate in employment against a person because of their transgender status has for some time now been recognised as being contrary to the Sex Discrimination Act 1975³⁹, but the Chief Constable sought to rely on the defence that being of one gender or the other was a “genuine occupational qualification” for the police force, as a result of statutory rules requiring that when the police undertake intimate body searches only male police officers may search males and only female police officers may search females.

The House of Lords were unanimous in rejecting this defence, on the ground that it would have been within the operational control of the Chief Constable to exempt Ms A from carrying out such searches at all: this would have been a more proportionate response to the situation than the outright refusal to

³⁷ See notes 6 & 7 above.

³⁸ [2004] UKHL 21.

³⁹ *P v. S and Cornwall County Council* [1996] 1 ECR 2143, [1996] 2 CMLR 247; *KB v. National Health Service Pensions Agency* [2004] IRLR 240.

employ her. More crucially they held⁴⁰ that the words “woman” and “man” in the Sex Discrimination Act 1975 do not refer, in that context, to procreative ability (even if imaginary) but rather must be read “as referring to the acquired gender of a post-operative transsexual who is visually and for all practical purposes indistinguishable from non-transsexual members of that gender”⁴¹. In reaching that result the Court relied heavily on the European Court of Justice’s interpretation of the Equal Treatment Directive⁴² and in particular its decision in *P v. S & Cornwall County Council*,⁴³ described by Lord Nicholls⁴⁴ as “the sheet-anchor of Ms A’s case”. A narrow application of *A v. West Yorkshire Police* would limit it to equal treatment cases, but the decision is actually much wider. Their Lordships rejected the crucial finding in *Corbett* and endorsed in *Bellinger* that legal gender is determined at birth and cannot thereafter be altered: it was this finding that had allowed the *Corbett* rule to be extended beyond the narrow confines of marriage. A wider *ratio* of *A v. West Yorkshire Police* is that gender can only be determined by an identification of the best way to further the policy of the particular statute in question. In *A v. West Yorkshire Police* that policy was “to afford protection to the dignity and privacy of those being searched in a situation where they may well be peculiarly vulnerable”,⁴⁵ and this was achieved by accepting that the applicant belonged to her new gender, *even without the enactment of the Gender Recognition Act*. This means that the definition of “male” and “female” might be different depending upon the issue - the same person may be male for one purpose (say, following *Bellinger*, marriage) and female for another (following *A v. West Yorkshire Police*, performing intimate body searches).

This is not a limited or academic point. Even after the coming into force of the Gender Recognition Act 2004, there will be individuals who have not sought, or are in the process of seeking, or who are not eligible to obtain, a Gender Recognition Certificate but who are living their lives in the other gender to that in which they were brought up. A person may not have lived in the new

⁴⁰ Lord Rodger of Earlsferry dissenting.

⁴¹ [2004] UKHL 21, per Lord Bingham at para 11.

⁴² 76/207/EEC.

⁴³ [1996] 1 ECR 2143, [1996] 2 CMLR 247.

⁴⁴ [2004] UKHL 21 at para 10.

⁴⁵ Per Lord Rodger at para 19.

gender for two years; an individual may have sound reasons for not wishing to bring a successful marriage to an end; the individual may be too young to access the Act; or the question may arise after the death of the transsexual person. With every gender-specific legal rule the court faced with a transsexual person who does not (or does not yet or never did) possess a Gender Recognition Certificate will have to ask whether the real purpose of the statute is achieved by recognising or by refusing recognition of the new gender. *Corbett* and *Bellinger* relied heavily on procreative potential to deny recognition; *A v. West Yorkshire Police* relied heavily on the Equal Treatment Directive to allow recognition. But there is no middle way between recognition and non-recognition in any one situation and the question becomes which approach is likely to be adopted in contexts other than equal treatment and marriage. I suggest that the underlying rationale in *Corbett* and *Bellinger* is inherently narrow (procreative potential) while the underlying rationale in *A v. West Yorkshire Police* (furthering the policy of the statute) is inherently wide, with the result that it will now be difficult to deny recognition of the new gender for the purpose of any rule to which procreation can be shown to be entirely irrelevant. The Gender Recognition Act becomes, therefore, of much more limited scope than at first sight appears. We may test this by applying *Bellinger* and *A v. West Yorkshire Police* to a number of different gender-specific statutory provisions: whenever the former applies the Act must be used to effect a gender change, but when the latter applies the Act may be avoided.

One such statutory provision is the rule in the Children (Scotland) Act 1995 that a children's hearing (the tribunal in Scotland charged with making decisions in respect of child offenders and neglected children) shall be composed of a panel of three members, at least one of whom is a man and at least one of whom is a woman⁴⁶. Procreative potential is self-evidently not relevant to the ability of a panel member to make appropriate decisions as to the welfare of a child. If a person who has changed sex is to all intents and purposes indistinguishable in his or her acquired gender from a person born

⁴⁶ Children (Scotland) Act 1995, s 39(5).

into that gender, then the new gender ought to be accepted even without, or before the granting of, a Gender Recognition Certificate, for in that way the social policy behind the legislative rule (ensuring that each child who appears before a hearing can relate in gender terms to at least one of the decision-makers) is thereby achieved.

Another gender-specific rule is contained in the Human Fertilisation and Embryology Act 1990, whereby the male partner of a woman who gives birth after infertility treatment shall be deemed to be the father of the child⁴⁷. In *X, Y and Z v. United Kingdom*⁴⁸ the European Court held that the refusal to accept that a female to male transsexual could be regarded as a “man” for this purpose was not contrary to the article 8 right to family life. The point of the rule in the 1990 Act is to confer paternity on a man who *is not and cannot be* the natural father. The rule, in other words, is *engaged* by lack of procreative potential, so that very lack cannot be used to deny the rule’s application in particular circumstances: *Bellinger* is therefore of no relevance. The aim of the 1990 rule appears to be to ensure that children born through infertility treatment have fathers in both the legal and the social sense. It might well be argued that since the applicant in *X, Y and Z* adopts the social role of father (confirmed by the granting to him of parental responsibility) and since recognition of his legal fatherhood would allow the statutory purpose to be achieved, the effect of applying the wide interpretation of *A v. West Yorkshire Police* suggested above will be to put in doubt the continued authority of *X, Y and Z v. United Kingdom*.

Again, the Civil Partnership Act 2004 creates an institution for same-sex couples equivalent in most respects to marriage. It is, however, limited in availability to couples who are of the same sex and is therefore, at least relationally, every bit as gender-specific as marriage. The question is this: Can a male to female transsexual enter into a civil partnership with a female in the absence of a Gender Recognition Certificate? In other words, is gender, for the purposes of civil partnership, determined by the marriage rule

⁴⁷ Human Fertilisation and Embryology Act 1990, s 28(3).

⁴⁸ (1997) 24 EHRR 143.

in *Bellinger* or by the social rule in *A v. West Yorkshire Police*? The initial temptation would be to say that since civil partnership is designed to replicate marriage the same rule should apply. However, it is a mistake to see civil partnership as replicating marriage. The legislature was very careful to maintain a number of differences, most of them relating to conjugal sexual activity and parenthood⁴⁹. These were the very issues that determined the approach in *Bellinger* but they are quite deliberately not relevant for civil partnership. And if procreative potential is at the heart of *Bellinger*, its irrelevance to civil partnership could not be clearer.⁵⁰ So we must try to identify a purpose behind the gender-specificity in the rules for civil partnership other than any relating to sexual activity. If the purpose of the same-sex requirement in the Civil Partnership Act is to clearly differentiate that institution from marriage and to reinforce the opposite-sex nature of the institution of marriage, then this is, in fact, achieved more readily by recognising than by denying the validity of a civil partnership entered into by two persons who lead their lives and present to the world as a couple of the same gender, notwithstanding that one of them used to be of the opposite gender. The fear in *Bellinger*, as we have seen, was fundamentally the fear of same-sex marriage. This fear would be realised, at least outwardly, by insisting that a transsexual person retains their original gender, thereby requiring that person to enter into a marriage with a person who is the same gender as that in which the transsexual person now presents to the world, rather than a civil partnership. An argument against this might be that the Gender Recognition Act provides a ready means by which a transsexual can seek recognition of his or her new gender and that to rely upon the wide interpretation of *A v. West Yorkshire Police* is to avoid this statutory mechanism. But there is nothing in the Gender Recognition Act, or in *A v. West Yorkshire Police*, that *requires* the use of the statutory procedure. The Act nowhere provides, as it could easily have done, that recognition of a new gender can be achieved *only* by the statutory process. And that process might not be available: for example a civil partnership may be entered into in

⁴⁹ In relation to the Scottish differences between marriage and civil partnership, see Norrie "What the Civil Partnership Act 2004 Does Not Do" 2005 SLT (News) 35.

⁵⁰ Same-sex couples can and do nurture children together, but they do not and cannot procreate together.

from the age of 16, but a Gender Recognition Certificate cannot be applied for until the person is 18⁵¹.

A rather more difficult question concerns those areas explicitly excluded from the operation of the Gender Recognition Act. On the granting of a Gender Recognition Certificate the acquired gender is recognised for all purposes other than the stated exceptions, but the Act does not explicitly state that the new sex is not recognised - merely that the Gender Recognition Certificate does not have effect in the stated circumstances. So the question arises whether *A v. West Yorkshire Police* could be used to provide recognition in such circumstances. One exception is parental status⁵² but that, being a matter of procreation, is likely to be governed if not by the Act then by *Bellinger*. Another exception to the effect of the Gender Recognition Certificate is succession to titles of honour.⁵³ Again, because of the centuries old assumptions upon which legitimacy for this purpose is based (primogeniture and blood-link) any argument based on *A v. West Yorkshire Police* is likely to fail. Entitlement to take part in gender-limited sporting events may be prohibited or restricted notwithstanding the possession of a Gender Recognition Certificate,⁵⁴ but only if this is “necessary to secure (a) fair competition or (b) the safety of competitors”. If such restriction is not so necessary then the Gender Recognition Certificate must be given effect to; and if a Certificate is not possessed then applying the wide rationale in *A v. West Yorkshire Police* suggests that recognition of the new gender must be allowed in those sports in which no competitive advantage is obtained by having the physical attributes of the other gender (bowls, croquet and the like).

Perhaps most difficult of all are the gender-specific offences. A Gender Recognition Certificate does not have effect in this context⁵⁵. So a male to female transsexual who holds a Gender Recognition Certificate can be

⁵¹ Gender Recognition Act 2004, s 1(1).

⁵² 2004 Act, s 12.

⁵³ 2004 Act, s 16.

⁵⁴ 2004 Act, s 19. See *Richards v. United States Tennis Association* 400 NYS 2d 267 (1977).

⁵⁵ 2004 Act, s 20.

convicted of being a male living off the earnings of a prostitute; a female to male transsexual can be raped but a male to female transsexual cannot be⁵⁶. An argument based on the social utility of these (socially useless⁵⁷) rules may well be precluded by the very fact that Parliament has chosen to retain them and to provide that they are unaffected by the statutory Gender Recognition Certificate: if so the court may well feel obliged to hold that they are unaffected by a non-statutory change of gender via *A v. West Yorkshire Police*. It is submitted, however, that this is to read more effect into the 2004 Act than its terms provide, for as we have seen the Act does not explicitly exclude gender recognition by means other than the statutory process. The ideal solution to this problem is, of course, to render the criminal law entirely gender-neutral, but until that is done transsexuals may be unable to obtain the benefits (or to avoid the disadvantages) of the gender in which they actually live their lives.

Conclusion

The Gender Recognition Act 2004 was fought for over the course of three decades. Its passing was rightly seen as a great victory for the transgender community, and for the human rights of equality and dignity. Especially after *Bellinger* it was seen as a dramatic metamorphosis in the UK's attitudes to gender and gender-roles. But if the full implications of *A v. West Yorkshire Police* are as described above and its wide rationale adopted in areas beyond equal treatment then the effect of the 2004 Act is limited to marriage and, perhaps, re-registration of birth certificates. Having shown willful wrongheadedness in *Bellinger*⁵⁸, the House of Lords redeemed themselves very shortly thereafter in *A v. West Yorkshire Police*. The earlier case made the Act inevitable, while the latter case rendered it for many purposes unnecessary.

⁵⁶ Unless statute makes that offence non-gender-specific, as it has done in England but not in Scotland.

⁵⁷ Interestingly, Baroness Hale in *A v. West Yorkshire Police* at para 52 suggested that it was to avoid this very nonsense that the Court of Appeal in *R v. Tan* [1983] QB 1953 "found it convenient" to follow *Corbett* to ensure that the male to female transsexual in that case could be convicted of the gender-specific offence of living off the earnings of a prostitute.

⁵⁸ A more detailed analysis of that case may be found in Norrie "*Bellinger v. Bellinger*, the House of Lords and the Gender Recognition Bill" (2004) 8 Edin LR 93.