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## **Non-binary gender concepts and the evolving legal treatment of UK transsexed individuals: a practical consideration of the possibilities of Butler**

By Alex Harris<sup>1</sup>

### **Abstract**

This essay seeks to bridge the gap between the UK legal system's treatment of transsexuals and post-structuralist gender theory. It argues that whilst the greater representation of transsexuals in UK legal discourse embodied in the Gender Recognition Act is a positive move forward in terms of classic liberal notions of human rights and in its acceptance of transsexuals as proper subjects before the law, it nonetheless represents an essentialist conception of transsexuals; requiring them to 'fit' within binary categories of male and female. It is argued that post-structuralist thought regarding gender can illuminate some of the problems inherent within the UK legal system's treatment of transsexuals and particularly focuses on the work of Judith Butler. There is further detailed consideration of the UK legal system's treatment of transsexuals prior to the Gender Recognition Act and a response to some of the criticisms levelled at the applicability of Butlerian thought to real-world scenarios.

*Key words:* transsexuals, judith butler, gender recognition act 2004

### **Introduction**

*'How* human beings should be represented in social thought is a pressing moral question, but *whether* they should be represented is not' (Binder & Weisberg, 1996-1997: p. 1151).

What, if any, is the place of post-structuralism in human rights law? Post-structuralism can be broadly conceptualised as a scepticism of the enlightenment – scepticism of the belief in the ability of language or discourse to accurately represent truth (Belsey, 2002: p. 10). Meanwhile, the English legal system's human rights jurisprudence still owes much to the Enlightenment – a belief in, amongst many other things, individual freedom and personal autonomy and on the reliability of scientific truth. The goal of this essay is certainly not to impugn or disavow the entire trajectory of human rights law and jurisprudence, but to question its application to the rights of transsexuals in the English legal system. What if the current framework of the Gender Recognition Act 2004 is inadequately representing the rights and the legitimate expectations of the subjects which it claims to represent? If the current 'truth' is failing in its goals of democratic representation – could there therefore be scope for accommodation of other forms of 'truth' within the legal discourse?

This essay will critically consider this possibility and ask in particular whether post-structuralist thought regarding gender has any applicability in the legal treatment of transsexed individuals in the law in light of the Gender Recognition Act 2004. The Act gives individuals the right to apply to have their legal gender reassigned, provided the subject 'has lived in the acquired gender throughout the period of two years ending with the date on which the application is made' and 'intends to continue to live in the acquired gender until death' (Section 2 (1) (b)-(c)). It will be argued that this piece of legislation is ultimately essentialist and suffers from the same adherence to supposedly objective gender criteria of male and

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female which stand in contrast to non-binary conceptions of gender articulated by post-structuralism which, it will be argued, presents a more accurate representation of the means by which gender identity is presented in the case of transsexuality. This essay will begin with an assessment of the theoretical background of post-structuralist thought regarding gender as an analytical framework for the legal analysis which follows. Particular attention will be drawn to the work of Judith Butler, whose conception of gender performativity and fluid, non-binary conceptions of gender run alongside the case of transsexuality (medicalised as gender dysphoria). Whilst there are, of course, strains of post-structuralism distinct from Butler's, since Butler's philosophy forms the most substantive attempt to apply post-structuralism to gender, it is perhaps the one most relevant for a critique of the law relating to transsexuals. As Sandland argues, the case of transsexuality forces law into 'revealing the contingency of its claim to truth' (1995), since transsexuality seems to disrupt the notion of a rigid separation between male and female, a separation which leaves little room for ambiguity. Finally, a critical analysis of the capabilities of Butlerian conceptions of gender will be applied to question what practical applicability, if any, post-structuralist thought has for the English legal system's treatment of so-called transgender subjects.

### **Transgender vs. Transsexed**

A crucial precursor to our discussion is the submission that the term transgender is itself a misnomer (Whittle, 2002: p. 7). As McGuiness and Alghrani note regarding individuals who undergo sexual reassignment surgery, whilst the biological 'sex' of the individuals is changed, '[t]he gender of these individuals remains constant' (2008: p. 264). This echoes the distinction between sex and gender implied by Beauvoir's notion that 'one is not born, but rather becomes, a woman' (1988: 295) - the act of birth being the biological 'truth' of the child's *sex*, the act of 'becoming' the discursive social construction of *gender*. In the case of sexual reassignment surgery, the 'becoming' is biological and the gender of the individual remains the same. The submission, therefore, is that individuals who have undergone sexual reassignment surgery are referred to as transsexed and *not* transgendered. For the purposes of this essay the former term will be favoured. It should be noted that, in a political and legal context, oftentimes the terms sex and gender are mistakenly used interchangeably and as though they were synonymous. For instance, in Parliament's debate over the Gender Recognition Bill at (HC Deb, 2004). Also in *Goodwin v UK* (2002) and in *Bellinger v Bellinger* 'for present purposes the two terms are interchangeable' (2002: 1177).

### **Essentialism and legal conceptions of gender**

In order to critique the essentialism of the law regarding transsexed individuals, it is first necessary to briefly outline what is meant by the term essentialism and how the law can be shown to operate according to this framework. Essentialism is a term subject to a variety of definitions and reconstitutions. The Oxford English Dictionary defines essentialism as '[t]he belief in real essences of things, esp. the view that the task of science and philosophy is to discover these and express them in definitions' (2010). Essentialism regarding individuals is, Mackie notes 'the view that individual things have essential properties, where an essential property of an object is a property that the object could not have existed without' (2006: p.1). In terms of gender, therefore, the essentialist conception holds that there are two binary categories of 'man' and 'woman' and that each of these categories has certain properties which precede its definition. For our purposes, however, it will not be necessary to embark on an exhaustive account of the varied and nuanced accounts of different kinds of essentialism in the hope that we may arrive at a constitution of essentialism itself, for such an effort would be

consigned to inadequacy. What will be necessary, however, is to discuss in what ways the legal treatment of transsexed individuals can be said to be essentialist. In other words: what are the essential qualities of essentialism and, furthermore, how are these in operation regarding the legal treatment of transsexuals?

The most notorious legal example of gendered or sexual essentialism is the test set out by Ormrod J. in *Corbett* (1971), in which essential qualities fixed at birth define for legal purposes the sex of the legal subject. Even the more recent House of Lords decision in *Bellinger*; an otherwise progressive judgment, is somewhat essentialist, referring to the need for 'objective criteria by which gender reassignment treatment could be assessed...' (2003). Furthermore, even the Gender Recognition Act 2004, a comparatively progressive piece of legislation, begins with the requirement that subjects who seek to have their gender legally reassigned must be 'living in the other gender' (s 1 (1) (a)). The notion of there being fixed categories of 'men' and 'women' which can be ascertained by reference to supposedly objective characteristics has been criticised (Cowan, 2005) and will be discussed at greater length below.

### **Butler's Conception of Gender**

If gender remains constant in the case of transsexed individuals, and the Gender Recognition Act requires individuals to be living in 'the other' gender, the first question to be asked is: what is the factor which remains constant; in other words - how may we seek to arrive upon a definition of gender? Turning back to Beauvoir's conception of woman as the 'other' to the 'one' of man, Irigaray supposes that the construction of binary gender categories (though she does not use the term 'binary') of male and female to be a more violent, ultimately hedonistic form of privileging the masculine in assigning definition to gender, characterised on 'masculine parameters...the vagina is valued for the lodging it offers the male organ when the forbidden hand has to find a replacement for pleasure-giving' (Irigaray, 1985). For instance, the Freudian notion of penis envy (Freud, 2009) is, for Irigaray, a hegemonic reiteration which devalues the feminine as merely supplementary to the hegemony of the 'male' (Irigaray, 1985: p.23) - '...there is no possible place for the "feminine", except the traditional place of the repressed, the censured' (Whitford, 1991: p.118).

Butler begins *Gender Trouble* with a consideration of both Beauvoir and Irigaray. Whilst Beauvoir 'turns to the failed reciprocity of an asymmetrical dialectic', Irigaray 'suggests that the dialectic itself is the monologic elaboration of a masculinist signifying economy' (Butler, 2008: p.18). Butler's suggestion is that feminist critique continues to explore and (presumably) reject the 'totalizing claims of a masculinist signifying economy, but also remain self-critical with respect to the totalizing gestures of feminism' (*Ibid*). This bears the characteristic hallmarks of Butler's dense and difficult style, but can be summed up as a rejection of the means by which feminism itself relies on a) the discursive construction of two demarcated gender categories and b) a conception of female identity as somehow universal or unique – that there is some shared experience of womanhood through which individuals can be united. It is from this starting point that Butler develops the concept of gender performativity, which is itself a blend of Foucault's conception of repressive power's presence in discursive regimes of truth (Foucault, 1991) with Derrida's deconstruction and notions of iterability (Derrida, 1976) and Hegelian existentialism (Boucher, 2006: p.115). Butler's theory furthermore relies on Althusser's interpolation – a theory of subject-formation, which is in itself an echo of Lacan's 'mirror stage' (Lacan, 1953: pp.11-17). Althusser's theory of interpolation posits that individuals are all always existing within an ideology, and that individuals enter an ideology through the mistaken perception that they are

its subjects (Althusser *trans.* Brewster, 1971: pp. 127-186). Similarly, Butler's conception of gender relies on the subconscious reiteration of a perceived notion of what constitutes the assigned gender role – male or female; '...a subject is hailed, the subject turns around, then accepts the terms by which he or she is hailed' (Butler, 1995: 6). As Boucher notes, 'because this effect of "hailing" is not a singular act, but a continuous repetition of ideological interpolations, the subject-citizen is constantly demonstrating their innocence through conformist practices' (2006: p.120). If Butler is therefore correct, what is apparent in the case of gender is that the legal means by which legal subjects are either 'male' or 'female' is merely an instance of the law recognising a phenomenon which it is itself reproducing, rather than representing a 'truth' or 'reality.'

### **Gender Performativity**

A key part of Butler's thought on gender is her notion of gender performativity and Butler's use of the term 'performativity' and not 'performance' raises the question of how the former is distinct from the latter. In the preface to *Bodies that Matter*, Butler explains that one engaging in gender *performance* would be an 'instrumental subject, one who decides on its gender.' Such a subject 'fails to realize that its existence is already decided *by* gender' (Butler, 1993). In other words, 'performativity is not the act by which a subject brings into being what she/he names, but, rather, as that reiterative power of discourse to produce the phenomena that it regulates and constrains...' (Ibid: 2) Also, Gangé et al note '...gender [and] gender identity is learned and achieved at the interactional level, reified at the cultural level, and institutionally enforced via the family law, religion, politics, economy, medicine and the media' (1997: p.479). This echoes Foucault's theory of sexual discourse, in which discursive constraints on what is acceptable and unacceptable modes of analysing and referring to sex and sexuality is a biopolitical practise, by which individuals are subject to regulatory practises defined by medical (and supposedly objective) parameters (Foucault, 1997). Sex is therefore as much a discursive construction as gender inasmuch as sex is a conception which brings together different elements or parts of bodies into an objective 'truth' of the body.

For the purposes of our critique, therefore, essentialism, by means of its preference of the binary, cannot be a sufficient means of ascertaining an apparently enigmatic and elusive 'truth' of gender. The assumption that there must be legally defined categories of men and women is the result of a hegemony in which law is the signifier and final arbiter in who is male and who is female, without consideration of subjects which may disrupt this framework. Claims to law's objectivity regarding even the supposedly objective reality of sex is, in fact, as much subjected to repetition and rearticulation as the traditionally more fluid idea of gender. This echoes Monique Wittig, who argues that the construction of ontological difference via sexual, biological essentialism inevitably implies oppressive social categories of 'one' and the 'other', similar to Nietzschean masters and slaves, at least insofar as no agency to be 'good' or 'evil' in those setting the terms of discourse need be present, only those with power (the one; or the master) and those without (the other; or the slave) (Nietzsche, 1956: p.147) In 'The Category of Sex', Wittig argues:

'[d]ominance provides women with a body of data, of givens, of a prioris, which, all the more for being questionable, form a huge political construct, a tight network that affects everything, our thoughts, our gestures, our acts, our work, our feelings, our relationships' (Wittig, 1992: p.4).

It is, in other words, only possible to arrive at the hegemony of 'gender' by means of a discursive formation of 'sex.' Therefore, whilst gender is increasingly accepted as having a

psychological component, the masking of sex behind the veneer of scientific and, therefore, unquestionable objectivity forces people into one of two essential identities of either ‘male’ or ‘female’ which designates individuals with an identity which they are unable to choose for themselves and which is permanent (Herstein, 2010: p.50). As will become apparent, the Gender Recognition Act does little to change this – it simply reiterates the supposed permanence of gender and makes the reassignment an irreversible grant of a new gender (or, more accurately, a negation of the old) through parameters agreed upon by the state (see: Grabham, 2010: p.109).

## **The legal treatment of transsexed individuals – an evolving human rights issue**

### **Historical binary subversion**

Before discussing the recent developments in the legal treatment of transsexed individuals, it should be noted that sexual transgression in terms of subversion of the binary conception of gender is not new. In fact, subversion of binary gender norms has a long history, with fourth-century Christian writers bemoaning the Roman pagan *gali's* ‘deplorable mockery...[of] men taking the part of women, revealing with boastful ostentation this ignominy of impure and unchaste bodies’ (Roscoe, 1996: pp.195-230). Similarly, so-called ‘gender transgression’ has been shown to occur in the ancient Mesopotamian region of Akkad and with the *hijra* of modern-day India and Pakistan (*Ibid*). Whilst an in-depth discussion of historic transgressions of gender categories is outside the scope of this essay, it is useful to note that subversion of ordinary gender roles is historically common and may, in fact, be considered as a societal norm; as something to be expected rather than treated as a mere statistical anomaly or cultural peculiarity.

### **Gender at common law: *Corbett v Corbett***

Perhaps the most well-known modern legal case concerning transsexed individuals is the first instance decision of *Corbett v Corbett* (1971). The case concerned the petitioner’s desire to have his marriage to a transsexual individual nullified on the basis that the person to whom he was married had undergone sexual reassignment surgery and was, therefore, biologically still male. As marriage was, by its legal definition, a union between a man and a woman (Hyde, 1866; Matrimonial Causes Act 1973 s 11 (c)) the only possible legal outcome, it was argued, was for the marriage to be declared null. Ormrod J., himself a former doctor, ruled in favour of the petitioner, establishing that it was not only necessary to establish that the respondent, the transsexual April Ashley (who had for some time been working as a successful female model), was either a man or a woman, but also that sex is an essential biological fact, fixed at birth. (*Corbett*, 1971: 106) Even prior to the recent legislative reforms, the decision in *Corbett* was criticised heavily by academics and by other judges, for instance, Martens J’s dissent in *Cossey v UK* was critical of *Corbett* and of the UK’s treatment of transsexuals in general, characterising it as ‘instinctively hostile and negative’ (1991: p.646). As Kavanaugh argues, Ormrod ‘erred when suggesting that a male to female transsexual cannot perform the essential role of a woman in marriage, without defining what this essential role is’ (2005: p.23). Kavanaugh further argues that supposed ‘essential’ roles of women in marriage (such as the ability to have children) have never been grounds for divorce. Kavanaugh’s critique is particularly useful for our discussion, as it highlights the point that the attempt to define men and women with regards to their essential characteristics in *Corbett* is an attempt to impose essentialism onto subjects before the law; specifically allowing judges the role of deciding what is a man and what is a woman, without questioning the assumptions upon which essentialism is based. Furthermore, Whittle notes that Ormrod J

‘constantly mixed the notions of “male and female” with those of “man and woman” and that, [h]e argues that marriage is a relationship based on sex rather than gender’ (1996: p.366). Finally, Whittle criticises the essentialism in *Corbett* by considering Ormrod J’s judgment that normal intercourse was not possible on the grounds that the respondent had an artificial vagina: ‘the construction of an artificial vagina is not restricted to transsexuals, for some women also have reconstructive surgery in acute cases of vaginal atresia (absence or closure of a normal body orifice) before they are able to have sexual intercourse. Are these people “not women?”’ (*Ibid*: 367). The submission, therefore, is that Ormrod J’s decision in *Corbett* was wrongly decided precisely because it relied on a branch of biological essentialism and the supposed certainty inherent in marriage as a union based on *sex* as opposed to one based on *gender*.

### Understanding *Corbett* via Butler

Butler’s submission is in fundamental opposition to the essentialism of Ormrod J in *Corbett*. In *Gender Trouble*, she wonders ‘[w]hat separates off ‘the body’ as indifferent to signification, and signification itself as the act of a radically disembodied consciousness or, rather, the act that radically disembodies that consciousness?’ (2008: p.176). This view is echoed by Irigaray, who supposes that in fields of discourse which claim objectivity (though Irigaray is specifically addressing science, we can presume to extend her critique to the supposedly objective or at least unbiased discipline of legal judgments), ‘[e]very piece of knowledge is produced by subjects in a given historical context. Even if that knowledge aims to be objective, even if its techniques are designed to ensure objectivity, [these forms of knowledge] always display certain choices...determined by the sex of the scholars involved’ (Irigaray, 1993: p.204).

Though Ormrod J. made some acknowledgement of the distinction between sex and gender (*Corbett*, 1971: p.107), the submission of Butler and Irigaray is that a simple declaration of the objective reality of sex as distinct from the performative gender is insufficient. If we apply Butler directly to Ormrod J’s judgment in *Corbett*, the permeating need to establish a category of ‘man’ and ‘woman’ is indicative of a ‘homophobic signifying economy’ which aims to avoid ‘polluted’ categories of persons (i.e. non-heterosexual) (Butler, 2008: 180). Indeed, one senses a certain kind of squeamishness in the language used in the judgment in *Corbett*, with its descriptions of homosexuals as ‘sexual deviants’ and its regard of the facts as ‘essentially pathetic’ (1971: p.92) (Martens J, in his dissenting judgment in *Cossey* also sensed this, noting Ormrod’s ‘[use of] terms which scarcely veil his distaste’ (1991: p.644)). Even if one sets aside this rather unfortunate use of language as mere rhetoric or simply irrelevant and instead treat *Corbett* as an exercise in biological essentialism, it is nonetheless indicative of a hegemony which treats bodies as the central focus of the law surrounding transsexuals - as structural, immovable totalities onto which, Butler argues, gender is subsequently inscribed (Butler, 2008: p.186). The preference of biological characteristics (specifically chromosomal, genital and gonadal) factors in determining sex was upheld and extended from the realm of merely family law to English criminal law by the Court of Appeal in the criminal case *R v Tan*, in which Parker J. rejected the defendant’s submission that psychological factors be taken into consideration for the purposes of the Sexual Offences Acts of 1956 and 1967 (1983: p.1064). *Tan* therefore widened the scope of the *Corbett* method of determination of sex beyond family law and, holding that a post-operative male-to-female transsexual would be convicted as a male living on the earnings of prostitution.

The legal system in the UK has more recently recognised the rights of transsexuals, with the introduction of the Sex Discrimination (Gender Reassignment) Regulations 1999 (SI

1999/1102) prohibiting discrimination of transsexuals largely in the field of employment (with an exception for appointment of religious ministers). Subsequently, the courts were more sympathetic in their judgments concerning transsexuals, as in the case of *A v Chief Constable of West Yorkshire Police* (2005) in which a male-to-female post-operative transsexual had been refused employment on the basis that she would not be able to carry out all her duties as a police constable, specifically the requirement in section 54(9) of the Police and Criminal Evidence Act 1984 that personal searches of detained persons be conducted by someone 'of the same sex as the person searched.' Lord Bingham rejected the reasoning of the Chief Constable, stating that nobody who was of the same gender as the one the post-operative transsexual could reasonably object to intimate searches (A, 2005: 58). Legal rights of transsexuals were further recognised by the UK Government's April 2000 Report of the Interdepartmental Working Group on Transsexual People (2000: Web) which, whilst not explicitly recommending any change in the way the UK treats transsexual citizens, nonetheless outlined possibilities for reform in the UK legal system for gender reassignment.

In terms of UK domestic case law, perhaps the most significant recent judgment prior to the 2004 Gender Recognition Act is *Bellinger v Bellinger*. The case involved a post-operative male to female transsexual, who sought a declaration that her marriage to her husband was valid under the Family Law Act 1986. The Court of Appeal relied on the standard *Corbett* test to declare that the marriage was invalid (Bellinger, 2002). On appeal to the House of Lords, this declaration of invalidity was ultimately upheld (Bellinger, 2003). What distinguishes *Bellinger* from judgments like *Corbett*, however, is the detailed recognition of the existence of gender dysphoria and its importance in the assignment of gender recognised in Lord Nicholls' judgment (*Ibid*: 471). Furthermore, Lord Nicholls acknowledged that s 11(c) of the Matrimonial Causes Act was incompatible with the European Convention. The reason for upholding the Court of Appeal's decision was one of constitutionality, rather than issues surrounding gender *à la Corbett* – that matters of such importance should be for Parliament to decide and not the courts. Nonetheless, *Bellinger*, as mentioned above, still demonstrates jurisprudential insistence on essential fixed categories of men and women, determined by an underlying, unalterable scientific 'truth': '[i]ndividuals cannot choose for themselves whether they wish to be known or treated as male or female. Self-definition is not acceptable. That would make nonsense of the underlying biological basis of the distinction' (*Ibid*: 477). What is clear from even a relatively forward-thinking judgment like *Bellinger* is, as Cowan notes, that the 'law continues to engage with transsexuality in a way that attempts to biologise and heterosexualise even the 'queerest' subject (Cowan, 2004: p.91). Jurisprudentially, therefore, 'transsexuals certainly do not constitute a third sex' (*P v S and Cornwall County Council*, 1996) and the 'recognition' of transsexuals is at its heart an assimilation of the transsexual subject into the binary heteronormative order – the transsexual is forced to choose between one or the other and have done with it.

### **Strasbourg jurisprudence**

In the past, the European Court of Human Rights allowed the UK a fairly wide margin of appreciation in denying transsexuals the legal recognition of their gender. The first case in which a transsexual made an application under the ECHR was *Van Oosterwijk v Belgium* (1981) in which the applicant, a Belgian lawyer, argued that the Belgian legal requirement to carry identification everywhere constituted a violation of his Article 8 and Article 12 rights (respectively: right to respect for private and family life and right to marriage). The court found that there had been a violation of both Article 8 and Article 12 rights, but that as domestic remedies for those breaches had not been exhausted, the court was unable to hear

the case on its merits. The first European case concerning UK transsexuals was *Rees v UK*, in which the facts were similar, but allowing a wide margin of appreciation to the UK in the absence of a European consensus, the UK's refusal to issue a new birth certificate to a post-operative transsexual was found to not be in breach of Article 8 of the Convention. Subsequently, there were some piecemeal developments in the legal status of transsexuals in the UK, such as the above-mentioned *P v S and Cornwall City Council* (1996) in which it was held that discrimination based on gender reassignment was a violation of Article 5(1) of Council Directive 76/207/EEC of 9 February 1976 (forbidding workplace discrimination based on sex). The wider picture, however, was left largely unchanged and the legal status of transsexuals remaining in their birth gender remained.

The two most important modern European judgments regarding the legal status of transsexuals in the United Kingdom are the European Court of Human Rights' decisions in *Goodwin v UK* (2002) and *I v UK* (2003). In *Goodwin*, the applicant, a male to female post-operative transsexual, alleged that the failure of the United Kingdom to recognise her as a female for the purposes of social security, pensions and retirement age constituted a breach of Article 8, Article 12, Article 13 and Article 14 of the European Convention on Human Rights (Respectively: right to respect for private and family life, right to marriage, right to an effective remedy for breaches of the convention and protection from discrimination). The ECtHR held that there was a violation of Articles 8 and 12 (and Article 14, though there were no further legal issues raised by that Article in particular). Furthermore, she had undergone harassment at work, resulting in a sexual harassment case in the Industrial Tribunal, which failed because she was considered by law to be a man (2002: 455). The ECtHR gave a detailed overview of the evolving status of UK transsexuals, noting that out of the 37 Member States of the Council of Europe, only four (including the UK, the others being Ireland, Andorra and Albania (BBC News, 2002: Web) did not permit a change of birth certificate after gender reassignment surgery (Goodwin, 2002: p.465). The distinction from *Rees*, then, was that a consensus could now be said to exist on the legal status of transsexuals across member states. Furthermore, the court considered the legal status of transsexuals in other jurisdictions, particularly the Australian case of *Re Kevin* which made explicit reference to the *Corbett* test, rejecting it on the basis that it 'would impose indefensible suffering on people who have already had more than their share of difficulty, with no benefit to society' (2001). Specifically, *Goodwin* rejected *Corbett*-style biological essentialism: '[t]he Court is not persuaded therefore that the state of medical science or scientific knowledge provides any determining argument as regards the legal recognition of transsexuals' (2002: p.473). The facts and legal issues in *I* were virtually identical, differing in largely superficial ways and so a detailed examination of both cases is not necessary. It need only be mentioned that the rejection of *Corbett* essentialism was identical in *I* as it was in *Goodwin*, to the point where both judgments use the same phrase to rule against *Corbett*. (I, 2003: 63).

## **Statutory framework: The Gender Recognition Act 2004**

### ***The debate***

As a result of *Goodwin* and *I*, the UK government began debating a Gender Recognition Bill designed to give rights to transsexuals who were living 'in a state of limbo, between the gender in which they are living and the gender in which they were born; because that is how the law defines them' (HC Deb, 2003: Col 66-68). The second reading of the Gender Recognition Bill further refers to the need to 'enable same-sex partners to acquire a legal status for their relationships' (HC Deb, 2004: Col 48) (this, presumably, refers to the Ormrod J's declaration that the marriage in *Corbett* was null and void due to the petitioner's status as a male transsexual). Though there was some Conservative opposition to the bill *per*

se (Mr. Andrew Robathan MP dismissed it as ‘the most arrant nonsense’) (*Ibid*: Col 53) the general consensus in Parliament was that gender dysphoria was a medical condition ‘whereby a person feels driven to live in the opposite gender’ (*Ibid*: Col 55). The issue, then, was a classical liberal, rights-based issue of the human rights of transsexuals to ‘enjoy the rights and responsibilities appropriate to their acquired gender...’ (*Ibid*: Col 57).

### ***The Act***

The Gender Recognition Act was ultimately passed and goes some way to addressing the long standing problems inherent in the *Corbett* favourability of biological characteristics; of sex rather than gender. In a particularly radical shift from the *Corbett* favourability of fixed medical criteria, there is no requirement for one applying for gender reassignment to have undergone any kind of surgical procedure (S 2) eliminating the pre/post-operative distinction. Furthermore, the acquired gender is recognised ‘for all purposes’ (S 9), with an exemption for sports bodies in order to ensure fair competition (S 19 (2) (a)). Whilst this goes some way to recognising the psychological aspect of gender and no doubt a positive move away from *Corbett*, Cowan notes that there is still a reliance on medical expert opinion in the submission of evidence to the Gender Recognition Panel: ‘[t]here is no telling what kinds of views on sex or sexuality those “experts” will hold’ (Cowan, 2005: p.76). Sharpe further notes that ‘the grounding of claims in disability has obvious potential for negative discursive fallout for transgender people, given that of necessity such a strategy relies on a view of transgender people as psychiatrically disordered’ (Sharpe, 2002: p.138). This medicalisation of transsexualism as a mental illness was especially present in the House of Lords’ debate on the Bill, with Baroness O’ Cathain equating transsexualism with other irrational phobias or delusions:

‘If a person is paranoid and believes that he is being chased by secret agents, we do not hire a 24-hour bodyguard and buy them elaborate security devices. Similarly, if a person suffers from agoraphobia, we do not brick them into their home. Yet, instead of getting them all possible psychological help, surgeons trap transsexual people in their delusion by performing sex reassignment surgery’ (HL Deb, 2003: Col 1310).

The medicalisation of transsexualism in the Gender Recognition Act therefore preserves in spirit the notion of *Corbett* that behind the cases of transsexualism there lies an attainable ‘truth’ of the gendered subject which can be realised through measured, dispassionate scientific analysis and which precedes the subject itself. As Sandland argues, the s2 (1) (a) requirement that individuals be first diagnosed as mentally disordered before they can successfully be reassigned reveals the law’s focus on not the expectations of the individual applicant, but on the ‘truth’ of the medical diagnosis. The Gender Recognition Act, therefore, requires transsexuals to ‘forever abandon their gender ambiguity in return for recognition’ (Sandland, 2009: p.255).

Furthermore, Whittle notes the dubious nature of the requirement that those already married or in civil partnerships end their current marriage or civil partnership and register a new one, either a marriage under the Matrimonial Causes Act or a civil partnership under the Civil Partnerships Act 2004 as ‘simply a sop to the Christian lobby’ (Whittle, 2005: p.271). Sandland is, meanwhile, less forgiving: ‘[a]ny legislation which requires to a happy and legally valid marriage to have that marriage set aside in order to preserve the purity of an increasingly outdated ideal can hardly be described as a great leap forward’ (2009: p.255).

Our discussion thus far has largely been concerned with the distinction between sex and gender and the evolution of the law in recognising this distinction, on grounds which rely heavily on classical liberalism. However, Cowan argues that this distinction itself is part of the need to establish a dichotomous framework in which transsexed subjects are made to ‘fit’

into a certain category, lest they be a threat to the heteronormative order (Cowan, 2005: p.72) (for Butler, heterosexuality is itself a discursive production; 'an effect of the sex/gender system which purports merely to describe it' (Jagose, 1996: p. 84)). This is further outlined by Speer and Potter, who, in positing a 'real world' application of Butlerian gender concepts by pairing performativity with discursive psychology, state '[h]eterosexism normalizes heterosexuality and buttresses a rigidly demarcated two gender system (2002: p.174). Cowan's further submission is that the Gender Recognition Act merely shifts the focus of law's reliance on sex to gender, whilst keeping both categories intact (2005: p.79). As Sharpe argues 'reform that is channelled through categories other than sex enables law to distribute marginal groups around sex whilst maintaining intact a traditional and (bio)logical understanding of sex' (Sharpe, 2002: p.138). The question is whether temporality can be a suitable framework for UK law, rather than the current structuralist framework of binary gender categories. Is Butler's philosophy or, perhaps more appropriately, a philosophy of gender temporality of any practical significance for the UK legal system's conception of gender?

### **The 'feminist struggle' and the practical goals of Butlerian concepts**

One of the most pressing criticisms of Butler's conception of gender is that it lacks, or has so far failed to demonstrate, any political applicability. For instance, Fraser argues that Butler is 'deeply anti-humanist' and that her infamous linguistic obscurity is 'far enough removed from our everyday ways of talking and thinking about ourselves to require some justification. Why should we use such a self-distancing idiom? What are its theoretical advantages (and disadvantages)? What is its likely political impact? In the absence of any attention to these issues, [Butler] at times projects an aura of esotericism unredeemed by any evident gains' (Fraser, 1995: p.67).

The charge made here is that post-structuralism is inherently abstract and lacks political applicability or the capacity for true social change. Nussbaum makes a similar point, and contends that much gender-based scholarship engages in a 'virtually complete turning from the material side of life, toward a type of verbal and symbolic politics that makes only the flimsiest of connections with the real situation of real women' (Nussbaum, 1999: p.38). Furthermore, Nussbaum argues that in reality, linguistic obscurity conceals simplistic and unoriginal ideas in Butler's work:

'When Butler's notions are stated clearly and succinctly, one sees that, without a lot more distinctions and arguments, they don't go far, and they are not especially new. Thus obscurity fills the void left by an absence of a real complexity of thought and argument' (*Ibid*: 39)

As has been discussed earlier, the charge that Butler's idea of performativity is not a philosophy *sui generis* is largely true, insofar as it is a reapplication to the field of gender studies of, amongst others, Nietzschean-Foucauldian conceptions of power with Althusserian-Lacanian theories of subject-formation. Nussbaum goes some way to restating Butler's performativity in a clear and concise manner. Performativity is, Nussbaum argues, somewhat backed empirically by the means by which adults treat children based on the gender they believe the baby to have. If it is a girl, it will be cuddled, bounced if a boy; its crying will be perceived as anger from a boy, fear from a girl (*Ibid*: 41). Nussbaum's critique of Butler is that the supposition that there is nothing inert in babies prior to their experience via discursive constraints such as gender lacks an empirical basis. Nussbaum contends that Butler instead prefers 'to remain on the high plane of metaphysical abstraction' (*Ibid*). rather than

engage in empirical applications of performativity. Furthermore, Fraser contends that Butler's dismissal of subjectivation (by viewing subjects as constructed via exclusion – the 'one' and the 'other') demonstrates irreverence to the feminist struggle and lacks historical merit (Fraser, 1995: pp. 68-69). The submission Fraser makes, therefore, is to reformulate both post-structuralism and Critical Theory, in which 'we might conceive subjectivity as endowed with critical capacities *and* as culturally constructed (*Ibid*: 71). What seems to be the main critique of Butler from Nussbaum, meanwhile is that her work is built on a quietism in which Foucauldian systems of power become inescapable; subversions of perceived norms becoming the preferred means of resistance (Butler, 1997). As Nussbaum argues, slavery and laws regarding rape 'were changed by feminists who would not give parodic performance as their answer, who thought that power, where bad, should, and would, yield before justice' (Nussbaum, 1999: p. 43) How, then, might one seek to liberate Butlerian notions of power and subject-formation from this defeatism or constraint to the purely theoretical? Is such liberation possible?

As has been demonstrated already, the UK legal system has made some significant progress in acknowledging the non-essentialist nature of gender, demonstrated by the grant of significant rights to transsexuals. This notion of non-essentialism, however, is not strictly Butlerian, or even Beauvoirian. Non-essentialist conceptions of gender exist in philosophical texts much earlier than *The Second Sex*, or *Gender Trouble*, such as in John Stuart Mills' essay *On the Subjection of Women*: 'I deny that anyone knows, or can know, the nature of the two sexes, as long as they have only been seen in their present relation to one another...' here, Mills seems to be acknowledging the specifically discursive nature of gender, that it is defined according to what it is set against. Furthermore '[w]hat is now called the nature of women is an eminently artificial thing — the result of forced repression in some directions, unnatural stimulation in others' (Mill, 1998: p. 453).

It is argued that the problem with a sincere application of Butlerian concepts as a way to structure social change is that, if Butler is read as a continuance of Foucault, such Foucauldian systems of power, with the denial of individual agency and the scepticism regarding inert characteristics which precede discursive influences, are also inherently sceptical of the possibilities for social change. As Boucher argues '[t]he problem is that this [Foucauldian interpretation] arguably resulted in a form of objectivist determinism that prevents the emergence of effective resistance while mechanically reducing the subject to an effect of institutional socialisation' (Boucher, 2006: p. 123). Butler goes some ways to distinguishing her ideas of subject-formation and agency from Foucault in her contributions to *Contingency, Hegemony, Universality* ('[i]t does not follow...that we are all always-already trapped, and that there is no resistance to regulation or to the form of subjection that regulation takes') (Butler, Laclau & Žižek, 2000: p. 151). However, Butler still remains fundamentally sceptical, if not dismissive, of the positive effects of social and political change. In the case of rights to marriage for gay and lesbian couples, for instance, she argues 'those who seek marriage identify not only with those who have gained the blessing of the state, but with the state itself. Thus the petition not only augments state power, but accepts the state as the necessary venue for democratization itself' (*Ibid*: 176). In other words – in order to view the acceptance of transsexuals as a political end, one first needs to accept that the state assigned the signifying role of who is acceptable and who is not in the heteronormative framework. The Gender Recognition Act, therefore, is not only essentialist, but is still part of a larger regulatory contingency of discursive and regulatory constraints on the sexual conduct of individuals, which harkens back to Foucault (1991).

This does not, however, imply that there is no place for Butler's brand of post-structuralism within legal discourse and as Herstein argues, Butler's theory and post-structuralism in general is best read as a scepticism of grand, unifying moral theories,

institutions, etc. rather than a rejection of them outright (2010). What seems to be obvious throughout Butler's work is an implicit assumption that individuals should be fairly represented in the law and that regulation 'determines, more or less, what we are, what we can be' (2001). Whilst Sharpe praises the Gender Recognition Act for its renunciation of the requirement for individuals to undergo sex-reassignment surgery, '[the] law has not divorced itself from a concern with the body' (2009). In other words, the Gender Recognition Act is an exercise of biopolitical power, in which the 'self' of gender is exercised through a legal/discursive fixation on the body as opposed to 'a self that is beyond discourse itself' (Butler, 2001). Whilst it is clearly not the place of law to ruminate on such concepts as the metaphysical self or notions of 'I' and it is difficult to imagine a discursive construction of that which is outside discourse, we can still aim to detach legal discourse from the structured binary categories in which the exercise of biopolitical elaborations of male and female leave the transsexual self without legal expression – as legal unmentionables whose existence is merely disruptive of the heteronormative order and is to be medicalised and remedied – the subject brought back to the fray through the act of recognition. Butlerian thought, therefore, might view the Gender Recognition Act as a piece of legislation which still falls into the same trap of *Corbett*, since it treats transsexuals as subjects to be identified according to a supposedly objective biopolitical criteria, regulated and treated as mentally disordered and then reassigned into a binary order which itself remains undisrupted.

## Conclusion

As has been demonstrated, there has been significant progress in the role of democratization with regards to transsexual individuals. Where the law set out by *Corbett* treated transsexuals people as non-persons, there is now a recognition that gender dysphoria is a serious issue for a minority of people in the United Kingdom. The Labour government was especially forthcoming in granting democratic rights to individuals suffering from a lack of legal recognition of the gender they actually inhabit. Whittle and others have criticised the bill on these classically liberal terms, arguing that, for all its positive aspects, the Gender Recognition Act still treats transsexuals as people suffering from congenital disorders. Nonetheless, if we accept the liberal framework, the Gender Recognition Act is a positive move forward.

What the Gender Recognition Act 2004 fails to do, however, is consider the possibility of an order beyond the binary notions of male and female and treats transsexuals as individuals subject to assimilation within a heteronormative framework. The *Corbett* test used the scientific 'reality' of sex as its basis for denying transsexuals rights and the Gender Recognition Act 2004, similarly, uses the language of scientific certainty to make the law's focus the 'truth' of the gender of the applicants as opposed to the applicant's self-identification. The individual 'is brought back into the gendered order and their problematic past...is rendered, so far as law can do it, invisible' (Sandland, 2009: p. 254). What this essay has demonstrated is that other possibilities for conceptualising transsexuals in the legal sphere do exist and may in fact be more useful than the current adopted framework in providing transsexuals with the recognition that they need and deserve.

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