



City Research Online

City St George's, University of London

Citation: Renz, F. (2015). Consenting to gender? Trans spouses after same-sex marriage. In: Monk, D. & Barker, N. (Eds.), From Civil Partnership to Same Sex Marriage 2004 - 2014: Interdisciplinary Reflections. (pp. 83-97). UK: Routledge. ISBN 9781138797536

This is the accepted version of the paper.

This version of the publication may differ from the final published version. To cite this item please consult the publisher's version.

Permanent repository link: <https://city-ref-test.eprints-hosting.org/id/eprint/15331/>

Copyright and Reuse: Copyright and Moral Rights remain with the author(s) and/or copyright holders. Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge, unless otherwise indicated, provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way. For full details of reuse please refer to [City Research Online policy](#).

Consenting to Gender? Trans Spouses after Same-Sex Marriageⁱ

Flora Renz

University of Kent

Introduction

The new and widely celebrated advances in LGB rights made by the introduction of same sex marriage also affected the rights of trans people. The Marriage (Same Sex Couples) Act 2013 amends the Gender Recognition Act 2004 (GRA), which allows a person to legally change their gender, as indicated on their birth certificate, by obtaining a Gender Recognition Certificate (GRC). The new changes made to the GRA were supposed to remedy existing discrimination affecting the marriage rights of trans people.ⁱⁱ Previously, in the original version of the GRA, a GRC was granted as long as the following conditions were fulfilled: the applicant is over the age of 18; has medical evidence supporting their diagnosis with gender dysphoria; has lived in their “new” gender for two years prior to the application and continues to do so for the rest of their life; and is not currently married or in a civil partnership (Gender Recognition Act 2004, ss.1-3). An applicant who is married or in a civil partnership at the time of their application can only obtain an “interim” GRC which is valid for six months, to give the applicant time to dissolve their relationship. Additionally and also related specifically to the context of marriage, the GRA amends the Matrimonial Causes Act 1973 to the effect that non-disclosure about the fact that one has obtained a GRC makes marriages voidable,ⁱⁱⁱ again highlighting the fundamental role gender plays in official understandings of marriage. The Marriage (Same Sex Couples) Act 2014 removes the “divorce” requirement for pre-existing relationships and instead applicants who are in a legally recognized relationship at the time of their application now need to show evidence of their spouse’s consent before they can obtain a full, rather than an interim, GRC. However, this does not change the fact that not disclosing the existence of a GRC makes an otherwise valid marriage voidable. The GRA as a whole clearly suggests a causal link between sex/gender and sexuality, which means that a change of one’s sex also leads to a change of one’s sexuality. Without the availability of same sex marriage this meant that trans people had to change from one relationship category to the other to reflect their “new” sexual orientation.

In this chapter I will be making three suggestions related to this change. Firstly, that trans people's gender identity is perceived as "inauthentic" and "deceptive", essentially as an attempt to deceive their supposedly vulnerable cisgender^{iv} partners. Secondly, the gay marriage amendment to the GRA in many ways mirrors the amendments made in 2002 to the Matrimonial Causes Act 1973 to resolve the problem of the *agunah* in Jewish divorces. Lastly, comparing the two legal interventions seems to suggest that the government in both scenarios feels that the women involved in these marriages need additional legal protection as they are vulnerable and perhaps even being exploited by their partners. In the context of the GRA this actually implies lingering homophobia and distrust of trans people and their identity claims.

To theoretically engage with this legal change Foucault's work on the concept of governmentality can help to highlight the intersections between discriminatory practices affecting trans people today, and now redundant case law and the construction of moralistic concerns about the way people should behave and express their (gender) identity. The GRA specifically encourages individuals to express gender identity in ways that adhere to normative presumptions about sex and gender. Namely that both - sex and gender - should be binary to perpetuate a fixed sex/gender dichotomy. Although gender reassignment/confirmation surgery is not an official requirement for a legal change of gender under the GRA, many charities and support groups advise potential applicants that for a successful application they need to at least express a desire to undergo surgery.^v

In its original form, the GRA was clearly aimed at preserving marriage as a purely heterosexual union by requiring couples who would be considered to be of the same sex, after one partner obtained a GRC, to dissolve their relationship (Gender Recognition Act 2004, s.4(3)). As this legal provision shows, there are no explicit sanctions or punishments attached to failing to meet the standards of the GRA, but instead the implicit sanctions are a denial of rights, such as the right to marry, and formal legal recognition. Originally a lack of a GRC would have had a more far-reaching impact but at present it is possible to change most forms of ID, such as passports and driving licenses, with "only" a doctor's report confirming that a change of gender is permanent (GOV.UK, 2014).

From legal controls to medical certificates such as those required in the GRA, as well as for passports, trans people are seen by law-makers as needing extra control and

regulation due to the fact that their very existence highlights the artifice of the sex/gender binary and of heteronormativity.^{vi} This finds its most recent expression in the new spousal consent amendment to the GRA, which is supposed to remedy discrimination against trans people but in fact exposes the deeply problematic heteronormative foundation of the GRA.

Regulating sex/gender

Following Mitchell Dean (2010) I am suggesting that a theory of governmentality can help problematize regulation, be it legal or otherwise, by highlighting some of the unwritten rules and norms which are the foundation of regulations. Based on this, a governmentality analysis seems particularly appropriate in the context of legal rules which by themselves rarely contain explanations of their intended, never mind unintended, outcomes. Given that previous case law was highly transphobic, this approach is especially relevant in the case of the GRA, which at first glance suggests a clear break from the highly discriminatory decisions reached in earlier cases. There seem to be obvious connections between the transphobic norms at the heart of judicial decisions in previous cases and the supposedly more “progressive” piece of legislation in force now.

Governmental techniques of regulation aim to encourage specific behaviour in accordance with, sometimes contradictory, but nevertheless political, norms or objectives (Dean, 1996: 217). While governmental techniques may stem from the government itself, they are not synonymous with it and occur in a wide variety of contexts that are not necessarily associated with the explicit work of governing a country. These techniques are often not considered to be political themselves (Miller and Rose 2008: 200). Interpreted this way, the GRA is not just a largely administrative legal framework for recognising gender identity, but rather a piece of governmental technology that is linked to clearly political rationalities and specific truths about gender, sexuality and family life. That is not to say that the GRA is the effect of a direct implementation of a consistent rationality. It is however to suggest that, to quote Miller and Rose, this law has “a meaning and effect” (2008: 200) on people which is highly political.

For the purposes of day-to-day social interaction, trans people’s physical or aesthetic outside appearance is likely to be of greater importance than their legal status when it comes to the determination of their gender identity by others. By and large people

categorise others based on their appearance, whereas official documents, especially birth certificates, are only visible to a select few. Indeed, Schilt and Westbrook (2009: 443) suggest that in most social interactions trans people's ability to pass as cisgender is more important than the specifics of their "private bodies"; however, they also concede that this may not hold true in all contexts. Schilt and Westbrook argue that primarily during sexual encounters, or in sexualized settings, gender determination relies less on outward appearance. Due to the fact that the GRA, and specifically the parts of it that relate to legally recognized relationships, deal with such sexualized settings, may partially explain some of the tensions and more problematic requirements inherent within the GRA. For instance that non-disclosure about the fact that one has obtained a GRC makes marriages voidable.^{vii} As such it is important to keep in mind that the GRA was passed mainly as a response to case law that dealt with questions about the validity of marriages, specifically *Goodwin v United Kingdom* (28957/95) [2002] Fam. Law 738. The GRA is always focused on regulating the exact nature of people's sex/gender and sexuality.

Furthermore, Schilt and Westbrook (2014: 34) suggest that in the context of legal regulations such as gender recognition, a more stringent standard of gender determination may also apply, even when the specific law does not deal with sexualized settings or issues. Following this logic Schilt and Westbrook argue that this is due to the fact that the determination of sex/gender can, and in the context of law and public policy often does, also take place on the level of the "imaginary". For example, by focusing on imagined or hypothetical scenarios involving trans people which rarely correspond to reality and as such often involve a fear of the unknown or a lack of comprehension:

"Imagined interactions and legal or policy decisions, in contrast, often demand more explicit, officially defined criteria. Such a focus on developing explicit criteria for determining gender has grown alongside new surgical possibilities for gender transitions." (Schilt and Westbrook, 2014: 36).

Exactly this imaginary determination seems to have been the case in the debates about the GRA, both in 2003 and in the more recent same sex marriage debates, which often involved references to hypothetical scenarios. To provide just one example of these imaginary determinations, Lord Chan suggested that most applicants would not undergo any type of surgery and as such there would be "reports of outrage by women protesting against the use of their toilets by people possessing gender recognition certificates as

women who have male genitalia” (Hansard, HL Deb (2003-2004) 655 col. 1308). That this scenario is not based on any kind of factual evidence does not seem to have prevented legislators from taking it into consideration. Indeed much of the debate around both the GRA and the new amendment to it seems to be based more on stereotypes and moral panics, which means that the resulting legislation, even when beneficial to LGB individuals in general, often discriminates against trans people in an attempt to officially regulate their expressions of identity and sexuality. Overall, trans people, specifically those who are, or want to be, in legally recognised relationships, face a much higher scrutiny of their identity claims and their conduct, then cisgender people in the same position.

How to regulate the problem of the Agunot?

A similar example of governmental and legal intervention in the context of intimate relationships would be the legal regulation of the granting of the *get* in Jewish divorces. This situation shows some interesting parallels to the recent amendment to the GRA, primarily that they designate one spouse as inherently vulnerable. Under Jewish law a divorce can only be finalised once the husband grants his wife a *get*, effectively “a bill of divorcement” (Miller, 1997:2). Without the *get* the parties remain married, even if a civil divorce has been finalised (Katzenberg and Rosenblatt, 1999). This process normally runs parallel to a civil divorce and is ideally unproblematic. However, in some cases husbands have made the granting of the *get* conditional upon financial payments, more favourable conditions in the divorce, or custody of children. As the lack of a *get* means that the wife cannot remarry under Jewish law, she becomes an *agunah* - a chained wife, whose future children’s marriages are also restricted. This effectively allows for husbands to put pressure on their wives during divorce proceedings and shifts the power balance in favour of the husband (Freeman, 1999). An example for this would be a case like *Brett v Brett* (1969), in which a judge intervened on behalf of a wife whose husband refused to grant her a *get* unless she lowered her demand for maintenance payments.

After extensive lobbying and requests from the Jewish community, the government intervened in these marriages due to the lack of a consistent response by the rabbinical courts. This was done in the form of the Divorce (Religious Marriages) Act 2002. The Act gives courts the power to make the granting of a decree absolute conditional on the prior dissolution of the religious marriage. This means that although this is not a perfect solution, as it only prevents the wife being coerced into a less favourable settlement as

long as the husband wants a civil divorce, it nevertheless seems to have reduced the number of women becoming *agunot* (AHRC, 2011). The government here essentially intervenes in relationships, which would otherwise be considered private, to encourage specific types of behavior that are considered to be desirable in this case, to quote Helen Reece, “divorcing responsibly” and with minimal conflict (Reece, 2003).

Michael Freeman argues that the government was justified to intervene in these specific marriages due to several key reasons: a) the *get* rules specifically discriminate against women and states have an obligation to essentially even the playing field between the two parties 2001:372); b) “blackmail”, which according to him is what the *get* leads to, is a crime and as such the state has an interest to intervene to protect the “victims”; c) law reform has a clear symbolic value, especially when targeted at a specific group of people, in this case women perceived as particularly vulnerable (Freeman, 2001:381).^{viii} Particularly the issue of symbolism raises some interesting question in regards to the recent amendments to the GRA, such as who the state considers deserving or in need of legal protection.

Questions of authenticity and the heterosexual nature of marriage

While many governmental programmes rely on technologies of self-regulation rather than legal sanctions; governing through the encouragement of particular forms of subject and identity formation seems to find a particularly obvious expression in state attempts to regulate gender and sexuality (Valverde, 2009:91). As such the denial of legally recognised relationships for same sex couples pre-2004 privileges and favours heterosexuality in the same way that the lack of legal recognition for trans people privileges and favours cisgender people. Trans people are not breaking the law by refusing to adhere to normative modes of gender expression but the refusal to grant legal recognition to non-binary gender identities encourages and implicitly privileges certain types of gender expression, i.e. those that match traditional male/female norms. As Dan Irving suggests, allowing for a legal recognition process can effectively discourage challenges to the status quo by discouraging certain types of behaviour in return for (limited) rights and freedoms (2008: 39). In this case this means that allowing trans people to obtain legal recognition in a gender other than the one they were assigned at birth, as long as they meet strict guidelines and fall within the normative gender binary, may

prevent a challenge to the gender binary more generally which could occur if there was no legal recognition at all.

In the case of the GRA the regulation of identity seems to be based around several key concerns. Firstly, the GRA is based on the assumption that gender is, and should be, binary and ideally static rather than manifold and fluid. As such applicants have to promise they will live in their gender for the rest of their lives and gender “options” are limited to male and female. Although particularly the promise to live in one’s gender permanently is unlikely to be legally enforceable (Grabham, 2010), this nevertheless serves to restrict access to GRCs to those who are willing and able to at least nominally adhere to this mode of gendered existence.

The second and more crucial issue, at least for the purposes of this discussion, underpinning much of the law in this context, seems to be concerns about “fraud” or the “inauthenticity” of trans people and their gender identity. This issue has led some commentators to suggest that this is in fact a thinly veiled excuse for homophobia (Sharpe, 2002: 66). As a result of this logic, Alex Sharpe argues, trans people are often expected to explicitly define themselves as heterosexual. Homosexual desire is a factor that could indicate that a trans person is ‘inauthentic’, i.e. not really trans but a homosexual person trying to gain access to marriage or deceive their partner. For example in the pre- GRA case of *Corbett v Corbett* [1971] P 83 April Ashley, formerly Corbett, was described by Ormrod J as a “female impersonator” rather than as a woman throughout the proceedings. He refused to accept her identity despite the fact that she had undergone gender reassignment surgery; instead he insisted Ashley was actually a homosexual man. In addition to a description of sex as unchangeable and binary, Ormrod J also argued that marriage is an institution that is based on (biological) sex and not gender and more specifically founded upon the capacity for heterosexual intercourse (*Corbett v Corbett*: 106-107). This suggests that at least some of the reluctance to recognise Ashley as female was based on a deep seated fear of inadvertently allowing same sex marriages. In fact Alex Sharpe goes so far as to describe the judgment in *Corbett* as “riddled with homophobic anxiety” (2001: para 3), an assessment that only becomes more damning when considering that *Corbett* remained valid precedent until the introduction of the GRA.

Building on this point of gender authenticity, a similar concern about a trans person pretending to be “normal” or heterosexual can be found in *J v ST (formerly J)(transsexual ancillary relief)* [1998] Fam 103. The judge specifically points out that S-T, who was the spouse of a trans man, had no previous sexual experience and generally describes her as sheltered and naive. According to him this allowed J to “pretend” to be male. The judgment is heavily based on concerns about maintaining marriage as an exclusively heterosexual union (*J v S-T*: 141) and again highlights the importance of ‘natural’ heterosexual intercourse to marriage. Although *Corbett* and *J v ST*, provide the most explicit judicial comments about a fear of trans people effectively committing fraud against either their spouse or the state, other pre-GRA cases also more generally highlight the idea that marriage should remain a purely heterosexual union. This implies that if a trans person married in a sex/gender other than the one that they were assigned at birth, they would violate this principle and destabilize marriage as a heterosexual social institution (see Lord Nichols in *Bellinger v Bellinger* [2003] 2 AC 467).

More specifically this line of cases also serves to give the impression that the cisgender spouses of trans people are always potentially vulnerable victims of deception who the law needs to protect. While this is made fairly explicit in the case law, there is no explicit statement about this in the GRA or the Marriage (Same Sex Couples) Act 2013. But, the fact that applicants have to provide a tremendous amount of evidence of their gender identity^{ix} in addition to living in their desired gender for two years prior to their application, and then promise to stay in that gender for the rest of their lives, shows that there are clear, continuing concerns about the validity of trans peoples’ gender identity (s.2 Gender Recognition Act 2004). To that extent one reading of the GRA could suggest that it contains the potential for queer and non-binary forms of gender presentation, as it theoretically allows one to be recognized as a gender without possessing the physical characteristics normally associated with that gender. A closer look, however, shows that it is nevertheless a highly medicalised process which relies almost exclusively on medical concepts, terminology and evidence. This was made explicit in the parliamentary debates around the GRA, which ran parallel to the debates about the Civil Partnership Act, in which even those in favour of granting trans people legal recognition highlighted the pressing need for legal tests and barriers so that trans people would prove their “commitment” to their gender:

Lord Filkin: *“It is a necessary part of ensuring that before a decision is taken by the panel, the person has demonstrated their fundamental commitment to the very major change that they want to undertake.”*

(HL Deb (2003-2004) 656 col. 26, also HL Deb (2003-2004) 657 col.375; Lord Chan, Hansard, HL Deb (2003-2004) 655 col. 1309).

As a result the medical and legal experts on the Gender Recognition Panel become the gatekeepers tasked with checking the medical evidence and official documents provided by applicants to avoid the, entirely hypothetical, potential for “fraudulent” applications. And the queer or feminist potential of the Act is confined within the strict borderlines of normative sex/gender construction.

Obviously the law has moved on from the outright denial of trans people’s existence and their right to marry that can be found in *Corbett v Corbett*. The GRA is clearly a positive development in transgender jurisprudence. It not only provides a method of obtaining legal recognition of their gender for trans people and as such brings English law in line with the decision made by the ECtHR in *Goodwin v UK*, but also proves to be a more progressive method of recognition than those currently available in many other countries as it does not make gender reassignment surgery an official requirement. In fact Alex Sharpe describes the GRA as one of the most progressive legal frameworks (in the EU at that specific time) allowing for trans people’s recognition (Sharpe, 2009:242). However, until the introduction of same sex marriage, a GRC was only available to unmarried trans people or those who were willing to convert their relationship from a marriage into a civil partnership, and vice versa, when applying for their certificate. This effectively amounted to a legally mandated divorce for applicants in a pre-existing recognised relationship and clearly highlights the difficulties inherent in relying on law to affect changes in wider social attitudes towards specific groups such as trans people (Spade, 2011).

Equal Marriage Rights for all?

The Marriage (Same Sex Couples) Act 2013, includes an amendment to the GRA which allows trans people who are married or in a civil partnership to legally remain in their relationship even if they transition. Once it comes into force it replaces the existing requirement contained in ss. 4-5 of the GRA. These sections together set out one of the key requirements for a successful GRC application, namely that applicants who are either

married or in a civil partnership had to dissolve their existing relationship, which they can if they so choose, change to the appropriate legal relationship to match their new gender. Stephen Whittle explains quite clearly that this requirement was introduced primarily to alleviate concerns by religious groups about the introduction of “inadvertent” same sex marriages when one spouse changed their gender while remaining married (2006: 270).

This may also mirror the original medical requirements for the “treatment” of trans people, with many clinics originally demanding that patients divorce before undergoing treatment, again because of fears of “inadvertent” same sex marriages, however medical guidelines have since removed this requirement (Fausto-Sterling, 2000: 107). Trans individuals who want legal recognition of their gender identity have to conform with the dominant knowledge about the relationship between gender and sexuality, i.e. if you become a man in the eyes of the law but continue to be in a relationship with another man you cannot be heterosexual and as such your relationship status must be changed. Those who fail to live up to these standards or reject them are excluded and denied legal rights. Considering the strongly worded and often homophobic statements made by judges in pre-GRA cases dealing with trans people, the idea that marriage needs to be maintained as a purely heterosexual union is clearly a key concern in this area.

The legalisation of same sex marriage is obviously a positive development in so far as trans people will no longer be forced to choose between either the legal recognition of their relationship or the legal recognition of their gender identity. However the amendment introduces a new requirement which states that the cisgender spouse will have to give written consent before their partner can obtain a full rather than an interim GRC and that the spouse will be officially notified once the application is made (Marriage (Same Sex Couples) Act 2013, sch. 5 s.2). The completed consent form needs to be submitted together with all other evidential documents and the application will then be processed as usual. However if a relationship has broken down but still exists legally, without their spouse’s consent trans people will only be able to apply for an interim GRC which expires after six months at which point they have to restart the entire recognition process (sch. 5 s.3 Marriage (Same Sex Couples) Act 2013). Apart from the emotional cost of this process, the financial cost of re-starting the legal process can be significant as there is a fee for each application. The creation of this amendment highlights that the debate around whether trans people are inauthentic or potentially trying to deceive someone is very much

present in legal discourse, especially in the context of intimate relationships where a lingering fear of the transgression of the gender binary still seems to exist.

“Protecting” the non-trans spouse

This continuing transphobia is evidenced most clearly by some of the statements made during the debate stages of Marriage (Same Sex Couples) Act. Until the final reading in the House of Lords there seemed to be some confusion, even on part of law-makers, whether consent was meant to be to a spouse’s transition or the continuation of the relationship itself (HL Deb (2013-2014) 747 col. 296). The language used during the debates in both houses also clearly constructs the spouses of trans people as being in need of additional legal protection and remedies other than those available to couples already. For example during the third reading in the House of Commons, Helen Grant MP specifically discussed that not disclosing the possession of a GRC makes a marriage voidable and argued that this could not be changed as it was crucial to protect cisgender spouses from not being aware of their partner’s gender. She then carried on to explain that she had seen no evidence of cisgender spouses obstructing their partner’s transition process out of spite, or to gain some material advantage, similar to some Jewish divorce cases, which was one of the key concerns mentioned by critics of the amendment (HC Deb (2013-14) 563 col. 1146). The obvious problem with Grant’s reassurance is that until now spouses have never before been in a position to do so. It is very telling that in regards to the *get* concerns about undue influence on one of the spouses was exactly what triggered legal intervention, whereas in regards to married trans people such concerns are simply and erroneously dismissed. This seems to suggest that while Jewish women are seen as individuals who are deserving of state protection, quite the opposite applies to trans people with a cisgender spouse.

Julian Huppert MP actually highlighted some of the problematic assumptions about trans people made by many MPs in the context of this debate which he argued seemed to suggest that legislators thought spouses actually were never fully or properly consenting when they married a trans person:

“I was worried by some of the language about not fully consenting to a marriage, although I am sure the Minister did not mean to imply that people need to be protected from transgender spouses or transgender people—I am sure that is not what was intended” (HC Deb (2013-14) 563 col. 1146-1147)

However other MPs seemed unwilling to engage with his argument, and the debate continued without acknowledging the problematic undertones of this new amendment, which was in general not covered in any detail by much of the media.

As a result of very vocal complaints by trans people about the new requirement for spousal consent, Baroness Barker in the House of Lords tabled an amendment which would have placed a time limit of 6 months on spouses' ability to withhold consent:

"The amendments would do two things. First, they would give a spouse the right to be notified. I understand that at the moment the first time a spouse may receive any notification that a partner is going through gender reassignment is when court papers are delivered seeking an annulment."

(HL Deb (2013-14) 746 col. 1146).

Although this would have limited the damaging effect of the consent amendment somewhat, Barker nevertheless suggested that it was important that spouses would be notified when their partner applied for a GRC, based again on the unrealistic assumption that spouses are often not aware of their partner transitioning. This shows that at the very least law-makers have little awareness of how the legal recognition process actually works and at worst they seem to assume trans people are actively trying to deceive their partners.

Similarly, Baroness Butler-Sloss who has generally been supportive of trans issues when sitting in the Court of Appeal described the spouses of trans people as "those who are left behind" and argued that they needed special legal protection. Even the language used here could be seen as parallel to the *get* issue where the *agunot* were left behind while their husband was free to move on to a new relationship without suffering any consequences. Clearly in regards to the GRA even those who are critical of this amendment seemed to assume that trans people's spouses need additional legal protection that goes beyond the legal remedies that are already available to couples when a relationship breaks down. This can only really be explained if we accept that there is a presumption that the spouses of trans people are somehow more at risk than everyone else:

"The Bill seeks to strike a fair balance between the Article 8 rights to respect for the private and family life of both spouses. The trans spouse has a right to be granted their gender

recognition without unnecessary delay, but the non-trans spouse also has a right to have a say in the future of their marriage following their spouse gaining gender recognition.”

(Baroness Stowell of Beeston, HL Deb (2013-14) 746 col. 520)

As such it seems unsurprising that the amendment tabled by Baroness Barker failed with Baroness Stowell of Beeston arguing that it was more important to protect the right of trans people's spouses instead. She argued that while trans people could simply divorce a spouse who refused to give consent to their transition, the other spouse needed a remedy other than divorce, without ever articulating why exactly this was the case or what this would entail. The language used about balancing the rights of the two spouses here obscures the fact that the cisgender spouse seems to be treated by default as a victim.

Additionally most peers in the debate seemed to assume that the cisgender spouse in need of legal protection would be female. This may be a coincidence but it also links back to cases such as *J v ST* where the female spouses of trans people were described as particularly vulnerable and as essentially victimised simply by the transgender status of their partner. This also gives support to Schilt's and Westbrook's (2009) argument that policy makers generally make laws and regulations concerning trans people based on purely hypothetical examples with little or no regard for the day to day realities of living as a trans person in a specific society. In this case law makers clearly imagined a married person who was assigned male at birth suddenly deciding to transition and being able to do so successfully in a matter of weeks with little regard for their spouse's feelings about this matter. The fact that this scenario is entirely unrealistic seems to have been of little importance to legislators.

Importantly, this amendment of the GRA also mirrors the governmental intervention on behalf of Jewish women. In both cases the female spouses seem to be perceived as being in an inherently disadvantaged position in their relationship which in turn justifies additional intervention to supposedly even the balance of power between spouses. This seems somewhat logical in Jewish divorces due to the gender discrimination inherent in the get rules, whereas in the case of GRA this can only be justified if being married to a trans person is treated as a disadvantage in and of itself.

Concluding Thoughts

I would argue that trans people who want legal recognition of their gender identity clearly have to conform with existing dominant knowledge about what constitutes an acceptable expression of gender or sexuality. The GRA effectively encourages those who want or need legal recognition to adhere to traditional norms about gender and sexuality; whereas those who fail to live up to these standards are much less likely to meet the evidence threshold for a GRC application unless they modify their personal narratives to fit those norms. As a result a change of gender is always imagined to also lead to a change of sexuality, at least in the official imagination, which is why the introduction of same sex marriage has brought some advantages to a specific group of trans people. Without it married trans people are not really able to escape the causal links made between gender and sexuality which previously forced them to choose between the continuation of their marriage/civil partnership and the legal recognition of their gender identity.

There has clearly been a change from the way governmental technologies were employed in *Corbett v Corbett* to deal with the 'problem' of trans people and the way the GRA provides a mechanism for legal recognition. However even in its most recent incarnation and with the legalization of same sex marriage, the GRA seems to be underpinned by fears about trans people potentially deceiving their partners. Following Freeman's argument, the new amendment clearly has a symbolic value. Just like the government's intervention in Jewish marriages designated Jewish women as a group in need of special protection due to their disadvantaged status; the new amendment to the GRA specifically designates cisgender spouses, who are again mainly imagined to be women, in need of similar protection. This means that while Jewish men are seen as potentially being tempted to hold their partners to ransom, all trans spouses are seen as disadvantaging or perhaps even harming their spouses by transitioning. Paradoxically it is actually trans spouses who are now likely to be held to ransom by a vindictive spouse refusing to grant consent, thereby delaying the legal transition process until the marriage is dissolved. The fact that both measures seem to be primarily aimed at protecting cis women who are seen as particularly vulnerable may merely be a coincidence but nevertheless suggests some highly troublesome assumptions on behalf of law-makers about trans people, their gender identity, their motivations and their relationships and kinship.

One explanation could be that, following Helen Reece's argument, marriage is one of the key social mechanisms that shape an individual's identity (Reece, 2003: 111). Similarly

Sedgwick argues that erotic identity, in this case as expressed by marrying someone, is always relational and subject to transference (Sedgwick, 1990: 81). If we assume this to be true then a person's transition obviously does not just change their identity but also implicitly that of their spouse. Effectively this suggests gender still seems to be so fundamental to marriage that just being married to a trans person is enough to make a person so vulnerable that extra legal "protection" is required. This seems to be based on a fear of trans people transitioning in secret thereby creating a need not just for written consent but also for an official notification process which in no way reflects the lived reality of most trans people. Despite the fact that same sex marriage has now become a legal reality, the resulting amendments to the GRA suggest that gender and sexuality are still perceived as fundamental aspects of individual identity, as well as of marriage. That trans people cannot be granted equal access to marriage rights in line with cisgender people, as their very existence highlights how fragile the presumption is that sex, gender and sexuality are always fixed and causally linked. Logically this means that while marriage is now available for homosexual as well as heterosexual couples this does not in fact make marriage blind to the respective gender of each party. The new amendment to the GRA clearly suggests that despite the legalisation of same sex marriage sex/gender is far from becoming irrelevant to the concept of marriage itself.

Bibliography

AHRC Report 'Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts' 2011

Butler, J. *Gender trouble: Feminism and the subversion of identity*. (New York: Routledge 1989)

Dean, M. *Governmentality: Power and Rule in Modern Society* (Sage: London 2nd edn 2010)

Dean, M. 'Foucault, government and the enfolding of authority' in Barry, A., Osborne, T. and Rose, N. *Foucault and Political Reason: Liberalism, Neo Liberalism and Nationalities of Government* (London : UCL Press, 1996) 209-29

Fausto-Sterling, A. *Sexing the body: Gender politics and the construction of sexuality*. (Basic Books, 2000)

Freeman, M. "Is the Jewish get any business of the State?" R. O'Dair and A. Lewis, *Law and Religion: Current Legal Issues* 4 (2001)

Freeman, M., "Divorce: 'The Dayanim Must Act' ", Jewish Chronicle (17 December 1999)

Grabham, E. "Governing Permanence: Trans Subjects, Time, and the Gender Recognition Act." *Social & Legal Studies* 19.1 (2010): 107-126

GOV.UK, 2014 "Passports: change your name and personal details" [online] Available at: <<https://www.gov.uk/changing-passport-information/changing-your-gender>> [Accessed 15 June 2014]

Hansard, HL Deb (2013-14) 746

Hansard, HC Deb (2013-14) 563

Hansard, HL Deb (2003-2004) 657

Hansard, HL Deb (2003-2004) 656

Hansard, HL Deb (2003-2004) 655

Irving, D. "Normalized Transgressions: Legitimizing the Transsexual Body as Productive." *Radical History Review* 100 (2008): 38

Katzenberg, S. and Rosenblatt, J., "Getting the 'Get' ", *Family Law* Volume 29 (1999), 165–167

Kitzinger, C. "Heteronormativity in action: Reproducing the heterosexual nuclear family in after-hours medical calls" *Social Problems* 52 (4) (2005), 477-98

Miller, J.D. "History of the Agunah in America: A Clash of Religious Law and Social Progress" 19 *Women's Rts. L. Rep.* 1 (1997-1998) 1-16

Miller, P. and Rose, N. *Governing the Present* (Cambridge: Polity 2008)

Press for Change, 'The Standard Track Gender Recognition Application Process' [online] <<http://www.pfc.org.uk/StandardTrackGRCS.html>> [Accessed 18 May 2014])

Reece, H. *Divorcing Responsibly* (Hart Publishing, 2003)

Ratzlav-Katz, N 'Statistics Dispel Claims of 'Thousands of Israeli Agunot'' Arutz Sheva, 27.6.2007 [online] <http://www.israelnationalnews.com/News/News.aspx/122884#.U3ior_IdWSo last accessed 18.05.2014> [Accessed 18 May 2014]

Rich, A. "Compulsory heterosexuality and lesbian existence" *Signs: Journal of Women in Culture and Society* 5 (4) (1980): 631-60

Schilt, K. and Westbrook, L. "Doing Gender, Doing Heteronormativity "Gender Normals," Transgender People, and the Social Maintenance of Heterosexuality." *Gender & Society* 23.4 (2009): 440-464

Sedgwick, Eve Kosofsky. *Epistemology of the Closet*. (University of California Press, 1990, 2008 edn.)

Sharpe, A. "Transgender Marriage and the Legal Obligation to Disclose Gender History." *The Modern Law Review* 75.1 (2012): 33-53

Sharpe, A. 'Gender Recognition in the UK: A Great Leap Forward' *Social and Legal Studies* 18(2) (2009) 241

Sharpe, A. "English Transgender Law Reform and the Spectre of Corbett." *Feminist Legal Studies* 10.1 (2002) 65-89

Sharpe, A. 'From Functionality to Aesthetics: The Architecture of Transgender Jurisprudence' *Murdoch University Electronic Journal of Law* (2001)

Spade, D *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (South End Press, 2011)

Spade, D. "Resisting medicine, re/modeling gender." *Berkeley Women's LJ* 18 (2003): 15

Westbrook, L. and Schilt, K. "Doing Gender, Determining Gender Transgender People, Gender Panics, and the Maintenance of the Sex/Gender/Sexuality System." *Gender & Society* 28.1 (2014): 32-57

Whittle, S. "The Opposite of Sex is Politics—The UK Gender Recognition Act and Why it is Not Perfect, Just Like You and Me: FORUM." *Journal of Gender Studies* 15.3 (2006): 267-271

Valverde, Mariana. *Law's Dream of a Common Knowledge* (Princeton University Press, 2009)

Cases

Brett v Brett [1969] 1 All ER 1007

Corbett v Corbett [1971] P 83

Goodwin v United Kingdom (28957/95) [2002] Fam. Law 738

J v ST (formerly J)(transsexual ancillary relief) [1998] Fam 103

Bellinger v Bellinger [2003] 2 AC 467

ⁱ Many thanks to Davina Cooper and Emily Grabham for their invaluable feedback and advice. Thanks also to P. S. Bouklis. I am grateful for funding and ongoing support from Kent Law School.

ⁱⁱ Following Dean Spade I am using the term “trans” throughout this chapter to “indicate people who identify as transgender, transsexual, or within the transgender spectrum.” (Spade, 2003: 15-16)

ⁱⁱⁱ For a detailed critique of this provision see Sharpe, 2012).

^{iv} Similar to Schilt and Westbrook I am using “cis” or “cisgender” to replace “the terms “nontransgender” or “bio man/bio woman” to refer to individuals who have a match between the gender they were assigned at birth, their bodies and their personal identity.” (Schilt and Westbrook, 2009). Although this term has generated some academic and non-academic debate, it nevertheless seems a useful shorthand term in this context and avoids stigmatising trans people as “others” in contrast to an otherwise “normally” gendered population.

^v See for example Press for Change’s advice to applicants which suggests that even if applicants actually do not want surgery, their doctor should not mention this in the official medical statement (Press for Change, *‘The Standard Track Gender Recognition Process’*)

^{vi} By this I mean wide reaching social practices and discourses which support the idea that sex and gender are both binary and causally linked to each other and that heterosexuality is, if not the only, then at least the most acceptable form of sexuality (for a more detailed discussion see Kitzinger 2005, Butler 1989, Rich 1980).

^{vii} Trans people who have obtained a GRC and want to enter into a civil partnership or marriage need to disclose the fact that they have obtained a GRC as otherwise their relationship will be voidable. This has not been changed with the introduction of same sex marriage (for a detailed critique see Sharpe, 2012).

^{viii} The specific legal provisions dealing with the *get* as well as other forms of religious marriage/divorce can now be found in the Divorce (Religious Marriages) Act 2002.

^{ix} Implementing s.3 Gender Recognition Act 2004, this evidence generally includes at least two detailed medical reports and at least five other documents such as passports, driving licenses and household bills.