In his opinion, which was followed by the European Court of Justice, the Advocate General had "broadly agreed" with both Procter & Gamble and the OHIM. He noted that Article 12(*b*) means that a trade mark may include descriptive signs or indications, or else the provision would serve no purpose. However, it was also clear from Article 7(1)(*c*) that it must not consist exclusively of them. He also sought to reassure the presumably "outdated" advocates of the English approach. Articles 7(1)(*c*) and 12(*b*) read in combination should, he said, "go far to meet the concern expressed long ago by an English judge: 'Wealthy traders are habitually eager to enclose part of the great common of the English language and to exclude the general public of the present day and of the future from access to the enclosure'" (at 847; citing *Joseph Crosfield & Sons' Application ("Perfection")* (1909) 26 R.P.C. 837, at 854 (C.A.). Whether the Master of the Rolls, Sir H. H. Cozens-Hardy, who was firmly committed to a clearly defined public domain, would indeed have been reassured is surely open to question.

JENNIFER DAVIS

DOES SEX MATTER?

ARE sex or gender crucial components of modern marriage? In *Bellinger* v. *Bellinger* [2001] EWCA Civ 1140, [2001] 2 F.L.R. 1048, the Court of Appeal returned to the question of the relevance of biological sex to the validity of marriage, first considered thirty years ago by Ormrod J. in *Corbett* v. *Corbett (otherwise Ashley)* [1971] P. 83. Both cases involved male-to-female transsexuals who had undergone gender reassignment surgery but in *Bellinger*, Mrs. Bellinger sought a declaration under section 55 of the Family Law Act 1986 that her marriage to Mr. Bellinger was valid at its inception and still subsisting (unlike *Corbett*, which involved a nullity petition). The Court, by a majority, upheld the decision of Johnson J. refusing the declaration.

The Matrimonial Causes Act 1973 s. 11(*c*) provides that a marriage will be void where the parties are not respectively "male and female", apparently giving statutory recognition to the classic definition of marriage in *Hyde* v. *Hyde and Woodmansee* (1866) L.R. 1 P. & D. 130, 133 as the "voluntary union for life of one man and one woman, to the exclusion of all others". Yet, while it is evident that Lord Penzance was talking about biological sex, it is open to argument that the reference to "male and female" in the legislation is a reference not to sex but to *gender*. Such an

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interpretation would admit of factors other than purely biological criteria and could, significantly, embrace a *psychological* element.

In *Corbett*, Ormrod J. adopted the former interpretation. He held that sex was an essential determinant of marriage, that it was fixed at birth and was immutable. Sex was to be determined by the threefold biological assessment of chromosomal, gonadal and genital factors, while excluding psychological and hormonal factors along with secondary sexual characteristics. The majority in *Bellinger* conceded that the expression "male and female" was broader than "man and woman" but refused to accept that the current state of medical evidence concerning the causes of gender dysphoria (in particular that relating to brain differentiation) required the Court to abandon the *Corbett* test. The Court distinguished the recent decision of Charles J. in *W* v. *W (Nullity: Gender)* [2001] 1 F.L.R. 324 on the basis that the biological indicators in that case had not been congruent. *W* v. *W* involved a person of indeterminate sex at birth, a so-called physical inter-sex. Her chromosomal and gonadal sex at birth was male but the appearance of her external genitalia was ambiguous. Her general appearance and gender orientation from early teens had been female and she too had later undergone male-to-female gender reassignment surgery. In these circumstances Charles J. was not bound by the *Corbett* decision, which depended on the congruence of all three biological criteria. It was, therefore, open to the judge to hold, taking into account wider psychological and hormonal factors, that the respondent was female at the time of her marriage, though registered as a boy at birth.

In a powerful dissenting judgment in *Bellinger*, Thorpe L.J. rejected the view that only physiological factors were relevant when taking into account scientific, medical and social change. He regarded the proposition that marriage depends on sex not gender as "now of very doubtful validity" and stated that there was "no logic or principle in excluding one vital component of personality, the psyche". The whole Court expressed strong concern that the Government had taken no steps to initiate a public consultation on the *Report of the Inter-Departmental Working Group on Transsexual People* (presented to Ministers in April 2000). The Court also noted that the European Court of Human Rights had found in several cases involving transsexuals that the United Kingdom was not in breach of either Article 8 or Article 12. Nevertheless, in *Sheffield and Horsham* v. *United Kingdom* (1998) 27 E.H.R.R. 63, it had been strongly critical of the failure in this country to legislate, given "the increased social acceptance of transsexualism and the increased recognition of the problems which post-operative transsexuals

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encounter". It was noted in that case that the United Kingdom was one of only four of the 23 States of the Council of Europe not to give legal recognition to a change of gender (the others being the Republic of Ireland, Andorra and Albania).

The majority differed from Thorpe L.J. in what should be done about this state of affairs. According to the majority it was a matter for Parliament rather than the courts to take action. Thorpe L.J., disagreeing, thought that the family justice system should be sufficiently flexible to accommodate social change, that there were no compelling policy reasons to deny the petitioner legal recognition of her marriage and that his experience over the last decade suggested how hard it was "for any department to gain a slot for family law reform by primary legislation".

Both *Bellinger* and *W* v. *W* reveal an apparent preoccupation with questions of sex and gender, but it is arguable that they are really more concerned with *sexuality* and the capacity for its expression in sexual relations. Thorpe L.J. noted that scientific changes had "diminished the once cardinal role of procreative sex". It is worth remembering in this context that, in the immediate post-war period, the House of Lords held that the possibility of conception was not an essential prerequisite for consummation (*Baxter* v. *Baxter* [1948] A.C. 274). Moreover, the law has long made concessions to the elderly who may wish to marry on the understanding that sexual relations are to play no part in their relationship (*Brodie* v. *Brodie* [1917] P. 271, *Morgan* v. *Morgan* [1959] P. 92). Yet, even so, for Thorpe L.J. the sexual dimension of a couple's relationship is an "essential ingredient" and one of "cardinal importance". Thus it was crucial that Mrs. Bellinger, possessing as she did "an orifice which [could] be described as an artificial vagina", was apparently capable of heterosexual intercourse.

This view of heterosexual intercourse as occupying a central role in marriage today is questionable, as is the continued relevance of biological sex and gender. Recognition is increasingly given to the social and emotional interdependence found in familial arrangements (see especially *FitzPatrick* v. *Sterling Housing Association* [2001] 1 A.C. 27) which include single-sex relationships. In these latter relationships the capacity for *heterosexual* intercourse is of course nil and, if homosexual marriage is ever recognised (as it already is in the Netherlands), there could surely be no requirement of consummation. Heterosexual intercourse is also fast losing its centrality in the acquisition of legal parenthood. Quite apart from adoption, scientific advance has multiplied the occasions on which children are conceived without the necessity of any sexual

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relationship. Yet here too the United Kingdom has adhered to the traditional view that a legal father must have been registered male at birth (*X, Y and Z* v. *The United Kingdom* [1997] 2 F.L.R. 892) and that parenthood is gender-specific in that there can be only one mother and one father and not two of either. Increasingly the argument is likely to be pressed, from a human rights perspective, that marriage is about the commitment of two *persons* (of whatever sex, gender or sexuality) to each other and that parenthood is primarily about the social commitment to children and not about the sex or gender of the adults concerned. Indeed, the reality is that sex, gender and sexuality are all of diminishing significance in the new family law of the twenty-first century, and these decisions, though recent, are liable to be quickly overtaken by events.

ANDREW BAINHAM

CHEATING THE PUBLIC REVENUE: FICTIONS AND HUMAN RIGHTS

THE decisions of the House of Lords in *R.* v. *Allen* [2001] UKHL 45, [2001] 3 W.L.R. 843 and *R.* v. *Dimsey* [2001] UKHL 46, [2001] 3 W.L.R. 843 concerned appeals against convictions for cheating and conspiring to cheat the public revenue. The appeals were heard together before the Court of Appeal (noted (2000) 59 C.L.J. 42) and before the House of Lords, although separate decisions were handed down in the latter court. Both cases arose from the evasion of tax through the use of overseas companies. Allen had evaded his own tax liability by, *inter alia*, making false declarations of his income and Dimsey, a financial services adviser, had administered overseas companies for various clients, including Allen, to evade their tax liability. The grounds of appeal fell under two main headings. A third ground, relating to Allen alone, was that benefits in kind received by him from overseas companies of which he was a shadow director were not taxable. It was held that he was liable to pay tax on such benefits, even though the link between those benefits and the services he provided as a shadow director might be tenuous.

1. The deeming provision

Both Allen and Dimsey argued that they were not guilty of cheating the public revenue of corporation tax because the overseas companies were not liable to pay such tax. This issue was considered by Lord Scott in Dimsey's appeal. The defendants' argument turned on the proper interpretation of section 739(2) of

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