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GENDER DYSPHORIA SYNDROME
^{of}
MEDICAL ASPECTS
AND
LEGAL CONSEQUENCES

/SR BY

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C O N T E N T S

	PAGE
PREFACE	
PART A - MEDICAL ASPECTS	1
CHAPTER I : THE TESTS USED IN DETERMINING SEX	
I INTRODUCTION	1
II CHROMOSOMAL CONSTITUTION	2
III THE GONADAL TEST	5
IV GENITALIA	5
V THE SEX OF REARING	6
VI THE HORMONAL BALANCE	7
VII SECONDARY SEX CHARACTERISTICS	15
VII THE PSYCHOLOGICAL SEX OR ASSUMED SEX ROLE	16
IX SUMMARY	16
CHAPTER II : CLASSIFICATION OF SEX TYPES EXCLUDING TRANSSEXUALISM	19
I INTRODUCTION	19
II VARIATIONS OF NORMAL TYPES	20
a) Klinefetter's syndrome (XXY)	20
b) 'Supermale' syndrome (XYY)	20
c) Turner's syndrome (X0)	21
d) Metafemale (XXX)	21
e) Sexual precocity	22
f) Eunuchoidism	22
III SEXUAL ANOMALIES	22
A. Anatomical Anamolies	23
Aa. Hermaphroditism	24
Ab. Masculinised Females	25
Ac. Feminised Males	26
1. Testicular Feminisation	26
2. Testicular Failure	27

	PAGE
B. Psychological Anomalies	27
Ba. Transvestism	27
Bb. Transsexualism	28
IV Homosexuality	28
 CHAPTER III : TRANSSEXUALISM AND ITS CAUSES	 30
I INTRODUCTION	30
II CAUSES OF TRANSSEXUALISM	38
A Biological causes	40
B Psychological causes	46
 CHAPTER IV : THE TREATMENT FOR TRANSSEXUALISM	 58
I INTRODUCTION	58
II HISTORICAL BACKGROUND	59
III THE PROCEDURE	63
A Pre-operative screening	64
B Pre-operative trial period	68
C The actual surgery	70
a) Male-Female Construction	70
b) Female-Male Construction	74
D Post-operative assessment	77
 PART B - THE LEGALITY OF THE TREATMENT	
 CHAPTER V : THE PRE-OPERATIVE TRANSSEXUAL	 84
I INTRODUCTION	84
II CROSS-DRESSING	84
Comparative Law	84
A 1. The United States	84
B South Africa	89
III HOMOSEXUAL CONDUCT	90
A Comparative Law	90
1. The United States of America	90
2. The United Kingdom	91

	<u>PAGE</u>
B South Africa	91
IV CRITICAL EVALUATION	92
V SUGGESTED SOLUTIONS	93
CHAPTER VI : THE OPERATION	95
I INTRODUCTION	95
II THE BASIC LEGALITY OF THE SURGERY	95
A General	95
B Comparative Law	100
1. The United States of America	100
2. Canada	104
3. The United Kingdom	105
4. Argentina	106
C. South Africa	108
III THE ISSUE OF CONSENT	108
A General	108
1. Informed Consent	115
2. Capacity to Consent	120
3. Voluntary Consent	121
4. Clear, unequivocal Consent	122
B Comparative Law	124
1. The United States of America	124
2. Belgium	126
3. Argentina	127
C South Africa	129
IV CRITICAL EVALUATION	130
V SUGGESTED SOLUTIONS	133
PART C - THE CURRENT LEGAL STATUS OF THE POST-OPERATIVE TRANSSEXUAL	
CHAPTER VII : DOCUMENTARY ALTERATION	139

	PAGE
I INTRODUCTION	139
II COMPARATIVE LAW	139
1. The United Kingdom	139
2. The United States of America	142
3. Canada	148
III SOUTH AFRICA	150
IV CRITICAL EVALUATION	155
V SUGGESTED SOLUTIONS	160
CHAPTER VII : MARRIAGE AND DIVORCE	161
A. MARRIAGE	161
I INTRODUCTION	161
II COMPARATIVE LAW	161
1. The United Kingdom	161
2. Canada	165
3. Australia	167
4. The United States of America	171
III SOUTH AFRICA	178
B. DIVORCE	181
I INTRODUCTION	181
II COMPARATIVE LAW	187
1. The United States of America	187
2. Canada	191
III SOUTH AFRICA	195
IV CRITICAL EVALUATION	196
V SUGGESTED SOLUTIONS	212
CHAPTER IX : MARRIAGE-RELATED ISSUES	216
I INTRODUCTION	216
II THE DIVISION OF PROPERTY	218

III	THE LAW OF INSOLVENCY	220
IV	THE LAW OF CRIMINAL PROCEDURE	222
V	THE LAW OF SUCCESSION	225
VI	THE LAW OF INSURANCE	227
VII	THE LAW OF DELICT	229
VII	THE LAW OF TAXATION	231
IX	THE CRIMINAL LAW	232
X	CUSTODY AND CHILD CARE	237
CHAPTER X : OTHER AREAS OF LAW		240
A	THE CRIMINAL LAW	240
I	INTRODUCTION	240
II	COMPARATIVE LAW	240
	1. The United Kingdom	240
	2. Canada	241
III	SOUTH AFRICA	241
B	INCARCERATION	245
I	INTRODUCTION	245
II	COMPARATIVE LAW	245
	1. The United States of America	245
	2. The United Kingdom	246
III	SOUTH AFRICA	246
C	INSTANCES OF SEX DISCRIMINATION	247
I	INTRODUCTION	247
II	COMPARATIVE LAW	247
	1. The United States of America	247
	2. The United Kingdom	248
	3. Canada	249
III	SOUTH AFRICA	249
IV	CRITICAL EVALUATION	251

V	SUGGESTED SOLUTIONS	253
	THE CONCLUSION	255
	BIBLIOGRAPHY	263

THE PREFACE

"Pray thee, take care, that tak'st my book in hand,
To read it well: that is, to understand."

(Ben Jonson)

The rapidity with which humanity has achieved so much since prehistoric times, can be accounted for, I think quite simply by the fact that there are many more of us upon whose talents and experiences, humanity can draw, and more important still, human achievements are, by virtue of our powers of reason and memory, accumulative. Man's genetic inheritance not only enables him to make conscious changes, but also to undertake unprecedented challenges for the furtherance of the human race as a whole. Infinitely he is still a part of nature and as such, must work with it and not against it in any way, but so too, I believe, he has the ability to determine what happens to himself and therefore the race as a whole. Thus, as man is awakened to speculation and conceptualisation, he becomes the change-maker, and not a pawn to be dictated to by capricious Nature. Civilisation has been one of the great accelerators of change: when skills and natural facts come together to make possible a new order of life based on a better understanding of the world at large and a common aim of harmony.

As civilisation is born and developed, there are new hazards and one inherent difficulty is to find a niche for each individual member of the conglomerate mould. It was not - and indeed is still not - easy. Categorisation does not fit humanity like a mantle - there will always be those unruly elements which defy the best efforts. It is still man's greatest challenge to live harmoniously, side by side with his bretheren.

A society proves its maturity by the degrees of humaness it shows in the treatment of those who do not conform to rigid rules entirely. A civilised society has for its guideline of behaviour, civilised in most cases - principles and rules enabling the existence of a cohesive, mutually beneficial background. Laws are necessary for the continuance of communal life and need to be acceptable in the first instance, to be truly effective. It makes sense therefore, to base a society's laws - by and large - upon community convictions and mores. There is therefore no need for laws governing those matters which do not, and cannot, undermine the strength and security of the social structure.

Over a very large area, the law is indifferent to sex - by this I do not include sexual activities, but mean simply the designation of a 'sex classification' to a particular person. Sex is irrelevant to most relationships which give rise to contractual and delictual rights and obligations and, in fact, also to the greater part of the criminal law. Perhaps, in response to an instinctive social ordering, or because of relatively infrequent sexual aberrations, most cultures have regulated social conduct in such a way as to protect the supposedly unique sexual bipolarity, in spite of its fallacious nature. In the light of medical progress, it would be improper now for the law to continue to rely on the outward appearance for sex determination, considering that such determination has very important future implications. A careful analysis should be made of the parameters of human sexuality the object of such analysis would be to arrive at an administerable and equitable legal standard, by which to test a person's sex, while preserving the traditional sexual dichotomy, as a basis. (1)

"The law is a living thing: it adapts and develops to fulfill the needs of the living people whom it both governs and serves. Like clothes, it should be made to fit people. It must never be strangled by the dead hand of long-discarded custom, belief, doctrine or principle". (2)

One of the reasons why I chose this specific subject-matter, is that I am more interested in the plight of individual human beings than that of humanity as a whole. To disregard the so-called trivial problems of isolated people for the greater cause of the human race as a unit, is to lose sight of individualism: the common 'wood and trees' syndrome. It is always a dangerous thing to catalogue and regiment. The transsexual is as much a person with hopes, fears, loves and hates, as the 'normal' person: all go to make up the colourful mosaic that is the genus homo sapiens. If we have laws to protect the nasciturus - an uncertain entity, a being not yet born - how much more important that we have laws to protect responsible, but suffering members already in society, or at the very least not have laws contrary to the happiness of such individuals.

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1. D.K. Smith 'Transsexualism, Sex Reassignment Surgery and the Law' (1971) 56 Cornell Law Review 464.
 2. Midland Bank Trust Company v Green (no. 3) (1981) All ER 744, per Sir George Baker, at 751.

It is said that charity begins at home. It is indeed both idle and fatuous, to speculate on global scales of famine, nuclear disarmament and civil wars in foreign states. The duty of a governing body is primarily to its country and thus, to each and every individual of which it is comprised. This is what the function of the law should be: the continued harmonious living of diverse people in the community. Laws that are archaic, out of contemporary step with other disciplines, unjust and arbitrarily discriminatory, should have no place in a civilised and aware society. A system of too many laws is just as inefficient as one with too few. The principle of 'live and let live' is a sound one to which to adhere - no one should encounter unnecessary interference and be denied rights of action, provided that those actions in no way consciously harm anyone else.

The topic then of this thesis, is the transsexual's right to undergo corrective surgery and the concomittant right to subsequent post-operative legal acceptance for all purposes. All this work consists of the author's own submissions, unless otherwise indicated.

"When in disgrace with fortune and man's eyes
I alone bewep my outcaste state,
And trouble deaf Heaven with my bootless cries,
And look upon myself, and curse my fate,
Wishing me like to one more rich in hope,
Featured like him, with friends possessed,
Desiring this man's art and that man's scope,
With what I most enjoy contented least,
Yet in these thoughts myself almost despising,
Haply I think on thee and then my state
Like to the lark at break of day arising,
From sullen earth, sings hymns at Heaven's gate;
For thy sweet love remembered, such wealth brings
That then I scorn to change my state with kings."

(W. Shakespeare : Sonnet 29)

PART A : THE MEDICAL BACKGROUND

CHAPTER I

THE TESTS USED IN DETERMINING SEX

I INTRODUCTION

"Perhaps with the overcoming of woman's oppression, the woman in man will be allowed to emerge." (Betty Roszak : Masculine and Feminine)

Although there is a tacit assumption in legal systems of the majority of civilised countries that there are two distinct sexes, and only two, medical science has long since discovered that one's sexual classification cannot be ascertained so easily. Doctors have devised many factors for the determination of sex and have divided the concept into several categories:

1. the sex chromosome constitution - the most fundamental;
2. the sex of hormonal patterns - the chemical balance;
3. the anatomical sex which is separated into:
 - a) genitalia - the most obvious;
 - b) gonads;
 - c) internal organs other than gonads;
 - d) secondary sex characteristics;
4. sex of rearing - usually the apparent sex; and
5. psychological or assumed sex role. ⁽¹⁾

While most people are clearly identifiable as either male or female by employing these criteria as a guide, there are persons who fail to slot into either end of the spectrum, exclusively. The problem is not necessarily solved by choosing a single test to govern, since no one test works in all cases. ⁽²⁾

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1. Dr John Money's list in 'The Sex Chromatin and Psychosexual Differentiation': The Sex Chromatin (K. Moore ed. 1966) cited in D.K. Bromwell 'MT v JT : An Enlightened Perspective on Transsexualism' (1977) 6 Capital Law Review 403.
 2. Although it is submitted that one's psychosexual identity does work in every case: 'normal' people are psychologically and physically in accord, and transsexuals are given psychological preference by the fact that corrective surgery is performed on the basis of this gender identity.

II CHROMOSOMAL CONSTITUTION

In the 1890's, microscopists noticed that male and female animals often showed chromosomal differences, and they began to suspect that these differences were related to sex determination.

The reproduction of living matter depends upon the ability of a parent cell to divide in such a way that an exact copy of the genetic information is made to ensure continuity of inheritance in the daughter cells. Genes, which are tiny specific portions of the DNA structure, are the units of genetic activity. Because the chromosomes exist in matching pairs - with the exception of the sex chromosomes - the genes are correspondingly paired. Genetic influences are transmitted to the child by elements of DNA contained in the parent germinal cells.

In man, the normal number of chromosomes in the body is 46, or 23 pairs.⁽³⁾ The basic chemical structure of the chromosomes appears to be remarkably stable. This stability is no doubt the result of natural selection over a very long period of evolution, during which less-stable genetic material, and consequently, the possibility of deleterious effects occurring, has been 'weeded' out.⁽⁴⁾ Nevertheless, changes or mutations do occur from time to time with effects that are usually harmful.⁽⁵⁾

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3. To maintain this number, in mitosis - somatic cell division - each chromosome divides length-wise into daughter chromatids. These separate from each other and pass into the two respective daughter cells derived from the dividing cell. In the daughter cell - by means of DNA replication each chromatid becomes a whole chromosome identical to that from which it was derived. In this way, the chromosomal number is kept constant. To produce the germinal cells, there is a further division known as meiosis, during which the number of chromosomes is halved so that a resulting zygote would not have a double complement thereof. There is also a process of crossing-over and by this means the chromosomes are not exact replicas of their parental derivation. This mechanism is important in bringing about hereditary variation with the species. H. Curtis Biology (2nd ed. 1976); V.A. Cowrie 'The Shape of Things to Come' (1979) 149 Nursing Mirror 16.
 4. Ibid
 5. Mutations occur constantly. The average spontaneous mutation rate for a given gene has been estimated to be 1 or 2 mutations per 100 000 genes, per generation. This means that in every 100 000 sperm cells, 1 or 2 can be expected to carry a new mutation for a particular gene. Natural mutations most probably arise through faulty replications of a small segment of DNA, so that the sequences of the bases are changed in that region. As a result, instructions from that part of the genetic code are altered: Curtis op cit 203.

A newly fertilised human egg (zygote) has 23 pairs of chromosomes, half from the mother and half from the father. In the female zygote one of the pairs is denoted by XX karyotype and in the male, by XY karyotype. It is on this pair that the whole differentiation of sex depends. The sex of the child is a totally male-determined factor as it depends on the chromosome pattern in the sperm. On average, brothers and sisters have half their complement of genes alike, and may grow to be very similar. However, external influences such as environment, as well as psychological influences, may cause siblings to develop into very dissimilar people. Build, personality and psychological makeup are largely inherited factors, but are subject to immense influence from the environment.⁽⁶⁾

It requires a complicated and difficult procedure to examine visibly the chromosome pattern of an individual and this is usually not a very practical test. A relatively simple test was discovered in the early 1950's, primarily by Dr Murray Barr. When human cells - usually scraped from the membrane of the mouth (buccal smear) - are stained and examined under a microscope, darkly stained areas can be seen in female cells but not in male cells. This darkly stained area is the sex chromatin which is formed by the fusion of two X chromosomes and is now known as the Barr Body. The presence of the Barr Body therefore establishes the presence of two X chromosomes, or a female pair. The absence of the Barr Body shows that only one X chromosome is present, and it is assumed that a Y chromosome is also present, indicating a male person. The test is adequate for simple assessments but it will show various results as indicated by the chart overleaf.⁽⁷⁾

6. Vide chapter three infra.

7. D.L. Hawley 'Legal Problems of Sex Determination' (1977) XV Alberta Law Review 122 at 129.

SEX CHROMOSOME FORMATION	NO. OF CHROMATIN BODIES	(PHYSICAL APPEARANCE) PHENOTYPE	(NUCLEAR SEX) GENOTYPE	ANOMALY OF THE INDIVIDUAL
1. XY	0	Male	Male	Normal Male
2. XY	0	Female	Male	Feminized Male
3. XO	0	Female	Male	Turner's Syndrome
4. XX	1	Female	Female	Normal Female
5. XXY	1	Male	Female	Klinefetter's Syndrome
6. XX	1	Male	Female	Masculinized Female
7. XXXY	2	Male	Female	Klinefetter's Syndrome
8. XXX	2	Female	Female	Metafemale
9. XX/YY	1/0	Both	Both	Hemaphrodite

This chart shows that although the determining presence or absence of a Barr Body will easily establish the sex of a normal male or female, it does not assist in determining the sex of any of the variations of the normal sex types. Thus, the test may show a sex classification that is in conflict with the apparent or assumed sex role of some individuals. The uncertainties of this test for individuals who are other than normal XX females or XY males necessitates the use of other tests for sex determination. Clearly, the test fails with those persons who are afflicted with chromosomal mutations.

The author is of the opinion that the chromosomal pattern of an individual may be regarded as the manifold around which other important components are structured, such as hormonal quantities, physiological and psychological considerations and environmental influences.

"The 'chromosomal sex' is merely of abstract, scientific and theoretical interest in the case of the transsexual... To insist that a person must live and be legally classified in accordance with his/her chromosomal sex, violates common sense as well as humanity. It reduces science to a mere technicality, and an absurd one at that. With the same justification, one may insist that Rembrandt's works are not paintings, but pieces of canvas covered with paint. Accurate but asinine".⁽⁸⁾

8. Letter from Dr Harry Benjamin to Cornell Law Review, January 6, 1971 cited in Smith, op cit 965.

III THE GONADAL TEST

The primary sex organs are the gonads in which the gametes are formed. In the male, they are the testes which develop in the abdominal cavity of the embryo, and descend into an external sac, the scrotum.⁽⁹⁾ The testes are tightly packed with seminiferous tubules, between which are interstitial cells that produce androgens, the male hormones.⁽¹⁰⁾ The gamete-producing organs in the female are the ovaries, each a solid mass of cells about 3cm long, suspended in the abdominal cavity.⁽¹¹⁾

Simply then the gonadal test ascertains whether a person has testes or ovaries. It involves an exploration of the abdomen and in some cases will include a histological examination of the gonad itself, to determine if its microscopic structure is characteristically testicular or ovarian.⁽¹²⁾ This standard too, has its drawbacks and is as inadequate on its own as the previous test, for it leaves the hermaphrodite - a person with the gonads of both sexes - unclassified. Furthermore, the same would be true of a person suffering from gonadal agenesis - a person who lacks gonads altogether.⁽¹³⁾

IV GENITALIA

Genitalia are the external sex organs: a penis in the male and a vulva in the female.⁽¹⁴⁾ The appearance of the genitalia is used to determine the sex of a new born infant and for this reason, is an important test. A child is raised in a particular sex role based on this sex assignment at birth. This test is also the perfunctory standard used for legal classification.

9. Curtis op cit 520.

10. Ibid. For more details regarding hormones, see later in this chapter.

11. Curtis op cit 531.

12. Hawley op cit 129.

13. G.W. Bartholemew 'Hermaphrodites and the Law' (1960) 2 Malaya Law Review 83 at 89.

14. This is the collective term for the female organs. The clitoris, which corresponds to the penis in the male - in early embryogenesis the structures are identical - is composed chiefly of erectile tissue. The clitoris itself, consists of the labia minora and majora : Curtis op cit 531.

Judge Ormrod stated that if the three primary factors - chromosomal, gonadal and genital - were incongruent, precedence should be given to the genital factor as this is the very criterion by which society classifies us. It is ironic however, that in the very case in point, the respondent had the external genitalia of a female, yet Ormrod J ignored this and proceeded to base his sex determination on the chromosomal factor.⁽¹⁵⁾

The problem with this test is that a cursory examination of the genitals on the birth of an infant, would result in the possibility of assigning feminised males, masculinised females and hermaphrodites to the wrong sex.⁽¹⁶⁾

V THE SEX OF REARING

"The birth of any child is a momentous event, for it is the beginning of a new person. It brings with it joy, frustration and the responsibility of adulthood. Children are prepared to love and be loved. It is through acting, interacting and reacting that the child learns its role in life - thus the parental relationship and the environment are crucial for the development of the child."⁽¹⁷⁾

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15. Corbett v Corbett (1970) (2) All E R 33. Vide Chapter eight infra for more details of this case.
16. One case has arisen, regarding the possible liability of a doctor or hospital for an incorrect determination of sex at birth. In Kaufmann v Israel Zion Hospital 83 Misc 714, 51 NYS 2d 412 (Sup Ct 1944), a physician incorrectly informed the parents of a new born infant that their child was female. Several days later the parents were informed of the error. The parents sued for the mental anguish they had suffered due to this mis-information and because they felt that the child given to them was somehow not really theirs. Justice Daly, following the traditional approach, ruled that there was no course of action for negligently-induced mental suffering, in the absence of physical injury. Although the rule stated in Kaufmann is still the law in America, there is apparently a trend towards allowing recovery at least where there is clear and convincing proof of genuine mental suffering: W Prosser Handbook of the Law of Torts (3rd ed. 1964) section 55. Smith op cit 967 is of the opinion that due to the damaging psychological effect an incorrect diagnosis of sex could have on a child - assuming the error remains undetected for a length of time - the law may impose liability in cases such as Kaufmann.
17. Nursing Mirror Oct. 1982, 155 no. 17 p 17.

The sex of rearing then is the sex - after being assigned at birth - in which a person is socialised. It is a more useful criterion of sex determination because it conforms to the social reality in that the individual has been trained in one sex and has normally adopted that sex vis-à-vis society. Likewise, society has accepted the individual in that role.

Normally, an individual retains a sex role throughout life and his social sex can be determined to a certain extent by such things as dress, occupation, sport preferences and other activities and attitudes. The sex of rearing might be relevant in the determination of the sex of an hermaphrodite (and other mutations for that matter), because the biological sex ambiguity could be resolved by development and social adjustment, in one particular sex.⁽¹⁸⁾ However, the sex of rearing fails completely in the case of the transsexual, because in most instances, this individual has been reared in his anatomical sex which is of course in conflict with the desired sex role.

VI THE HORMONAL BALANCE

In the human body are glands which manufacture substances known as hormones. There are about thirty of them from eight ductless glands.⁽¹⁹⁾ Some hormones can now be synthesised in the laboratory and even minute amounts are very powerful.⁽²⁰⁾

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18. Smith op cit 968. It is often the practice in hospitals - according to the medical staff to whom I have spoken - for the doctor to ask the mother of a new born hermaphrodite to choose the sex, in accordance with her preference.
19. John Garratt The Human Body (1972) 63.
20. DES (diethylstilbestrol) which is used in the 'morning after' pill, is a potent synthetic oestrogen. For a time it was used commercially to fatten cattle, but this practice is now forbidden by Government regulation since the hormone was found to cause cancer in experimental animals when administered in high doses: Curtis op cit 534.

Hormones control birth, pregnancy, sexual activity, growth and metabolism.⁽²¹⁾ Most hormone manufacture is under the control of the pituitary gland, the anterior part of which influences other glands such as the adrenals, thyroid and sex glands, to manufacture and secrete hormones themselves. The posterior lobe of the pituitary stores hormones which are produced in the part of the brain known as the hypothalamus.⁽²²⁾

As an embryo develops, its genetic potential unfolds. In the human embryo, germ cells - those which will later give rise to egg or sperm - can be traced to a little cluster of cells in the endoderm of the yolk sac.⁽²³⁾ If these cells are destroyed, no gametes are ever produced by the individual. It is hypothesised that the germ cells are set aside so early in development in order to minimise the possibility of copying 'mistakes' which might occur during many cellular divisions, and so help to ensure that the genetic material is passed on.⁽²⁴⁾ Such minor mistakes might be of no consequence in somatic cells, but could be of major importance in a germ cell which must carry the genetic instructions for the whole organism.

In humans, the influence of genes determining sex is not seen in the embryo until about the fifth week of foetal life. During the first weeks, all embryos are morphologically identical.⁽²⁵⁾ The sex hormones control the development of the sex organs and the secondary sex characteristics.⁽²⁶⁾ The principal male hormone is testosterone, produced, as previously stated, in the interstitial cells of the testes. Testosterone and other chemicals with testosterone-like effects are collectively known as androgens. Androgens produced in the male foetus are important in the development of the external genitalia. When the human male is ten years old, renewed androgen production is associated with the enlargement of the penis, testes and prostate gland, seminal vesicles and other accessory organs, as well as the development of typically male secondary characteristics.⁽²⁷⁾

21. Garratt op cit 63. _____

22. Ibid. _____

23. Curtis op cit 572. _____

24. Ibid. _____

25. Ibid. _____

26. For more details see later in this chapter.

27. Curtis op cit 527.

The production of testosterone is regulated by a gonadotrophic (stimulating) hormone called Lutenising Hormone (LH), produced by the pituitary gland.⁽²⁸⁾ LH acts on the interstitial cells to stimulate the output of testosterone, which in turn inhibits the release of LH. This type of regulatory system involving this 'shut off' mechanism is known as negative feedback. However, human testosterone production has also been shown to fluctuate measurably in response to environmental stimuli.⁽²⁹⁾

In the female, öogenesis is also under hormone control. Oestrogens are the female sex hormones and a variety of them - of which estradiol is probably the most important - are produced by the ovarian follicles, under the stimulation of Follicle Stimulating Hormone (FSH). Both oestrogen and progesterone are required to produce the endometrium (thickened lining of the uterus) for the implantation of the embryo.⁽³⁰⁾

The whole human body consists of different inter-relations of physiological functions. The neural and hormonal mechanisms of sexual behaviour are examples thereof.⁽³¹⁾ One aspect is the importance of male and female hormones in the critical stage of growth in the brain. Tests have shown that when testosterone has been injected into pregnant animals to produce masculinised female offspring, these pseudo-hermaphrodites are most likely to exhibit male sexual characteristics as adults, even though they had a female chromosomal pattern. Similarly, male rats, when castrated at birth - which cuts off testosterone supply - are feminised, and cannot be made to exhibit male behaviour, even with testosterone injections as adults.

28. The pituitary's production of LH is controlled by the hypothalamus. Ibid.

29. Curtis op cit 524. Hormonal influence is a suggested cause of transsexualism, vide chapter three infra.

30. Curtis op cit 534.

31. The following data are taken from a survey made by psychology students at the University of Natal, Durban, in the late 1960's, in a collection of unpublished articles. Experiments with hormones, on animals is also discussed in chapter three infra.

It is therefore apparent that in the absence of testosterone, the brain develops with a dominant circuit for female behaviour, and in the presence of testosterone at a critical stage in growth, dominant circuits for male behaviour are formed.⁽³²⁾ Therefore the relationship of hormones in neural (brain) growth is of vast importance for the future adult's sexual behaviour.⁽³³⁾

According to John Money, male and female hormones are not equally significant in affecting the hypothalamic pathways that will subsequently influence certain aspects of sexual behaviour. Rather, he states, it is the presence or absence of androgens which is the most determinative. Until about the fifth week of conception, as has been mentioned above, the embryo does not begin to differentiate sexually. Biological femaleness results from all absence of adrogenic hormones:

"In the particular context of neonatal (or prenatal) hormonal effects, the antithesis of androgen is not estrogen, but nothing."⁽³⁴⁾

During the fifth week of embryonic life, the germ cells migrate to the gonads. Animal experiments indicate that if the foetal gonads are removed in this critical developmental period, the infant will appear to be a normal female even if genetically male, and if the appropriate hormones are administered in adolescence, he/she will be a normal-appearing, (though sterile) female.⁽³⁵⁾

In Money's opinion, adrogens regulate both the development of the external genitalia and certain forms of behaviour and intelligence. As far as the external organs are concerned,

32. These findings do to some extent, support both Money and Ramey's points of view as regards causes of transsexualism (chapter three *infra*), although each writer has interpreted them according to his and her sexual slant.

33. The extent to which hormones influence the sexual behaviour of vertebrates varies along the psycho-genetic scale. In human beings, the goals of sexual desire appear to be much more variably determined than merely by hormones, due to the impact of cultural and sociological factors, as well as the existence of a higher degree of psychological development.

34. J Money and A Erhardt Man and Woman, Boy and Girl 10, cited in J Raymond The Transsexual Empire (1979) 51.

35. This supports Estelle Ramey's hypothesis that all people are female, and only when androgen is introduced do some become male.

"Feminine differentiation requires only the absence of androgen. It does not require the presence of a feminising substance".⁽³⁶⁾

If male hormones are administered to a genetically female foetus during early development, or even neonatally, the reproductive structures, including genitalia, become masculinised. Mary Jane Sherfey⁽³⁷⁾ points out that the use of this one hormone for sexual differentiation in the embryo, was probably an evolutionary adaptation to intra-uterine life. In reptiles and birds the foetus is essentially masculine and foetal oestrogens are required to produce the female pattern. If the mammalian embryo were sensitive to oestrogen however, all male embryos would be feminised by the oestrogens circulating in the mother's bloodstream during the long sojourn in the uterus.⁽³⁸⁾

Money claims that the presence or absence of androgens, affects behaviour. The absence of androgen - either at the prenatal critical period, or other critical periods - results in a brain 'organised' to produce so-called feminine behaviour and response.⁽³⁹⁾ Portions of the foetal brain affect not only hormonal and reproductive functions, but also behaviour such as tomboyism.

"The most likely hypothesis to explain the various features of tomboyism is fetally masculinised genetic females, in that their tomboyism is a sequel to a masculinising effect on the fetal brain."⁽⁴⁰⁾

Whereas Money stresses the 'overriding effects of androgen' in prenatal sex determination, the androgen principle has been stated in a contrasting way.

"For the little it is worth as a commentary on Adam's rib it is the female sex that is primal. The early embryo is female until the fifth or sixth week of fetal life. A testicular induction substance must be generated at this point, to suppress the growth of ovaries. No ovarian induction is required for the female differentiation because all mammalian embryos of either genetic sex have the innate capacity for femaleness."⁽⁴¹⁾

36. Vide note 34 supra.

37. M.J Sherfey The Nature and Evolution of Female Sexuality (1973) cited in Curtis op cit 527.

38. Ibid.

39. Vide page nine supra for the experiments done in this line.

40. Raymond op cit 108.

41. E Ramey Sex Hormones and Executive Ability (1973) cited in Raymond op cit 58.

Whichever way one views the problem - whether patriarchally or feministically - one cannot escape the fact that every individual is an interaction of both male and female hormones, which is a logical suggested cause of transsexualism. (42)

Another important area of research - and especially pertinent to the question of transsexualism - is whether the male and female roles are reversible. Evidence suggests that members of either sex can perform the behaviour of the other sex if treated when young with the 'opposite' hormones. (43) It has further been demonstrated that isolation or separation from the opposite sex has some effect on sexual behaviour. Thus, socialisation or interaction in a situation with members of the opposite sex during childhood has some effect on later sexual behaviour exhibited by the individual concerned. (44) Furthermore, social restrictions affect male and female sexual behaviour, and in our society, cause differentiation even though the hormonal state supposedly dictates the actions.

"The development of maleness is a complex and precarious process - a continuing struggle against the basic trend towards femaleness". (45)

Science is now shedding a good deal of new light on how the male foetus's Y Chromosome affects maleness: until recently, no one knew exactly how the Y chromosome enforces its insistence on masculinisation. (46) Dr Stephen Wachtel (47) has apparently found its chief 'deputy enforcer' - a Y-induced histocompatibility antigen (H-Y) that appears to occur on the surface of all male mammalian cells, and in fact, seems to be present in determining

42. Vide chapter three infra.

43. This obviously brings into question the role of each sex in marriage, and if one has artificial aids - as are supplied by corrective surgery - it is submitted that one has not changed sex if the requisite hormones are administered.

44. Further discussion on this point will be found in chapter three infra.

45. Ralph E. Peterson cited in D. Leff 'Genes, Gender and Genital Reversal' (1977) 18 Medical World News 45.

46. Leff op cit 46.

47. Of New York City's Memorial Sloan Kettering Cancer Centre.

sex throughout the vertebrate phyla.⁽⁴⁸⁾ Dr Wachtel claims that the mission of H-Y during embryogenesis,

"...seems to be directing the indifferent gonad to develop towards the hetero-gamete sex - in mammals, the male."⁽⁴⁹⁾

He suggests, that from the cell surface, it acts as a 'cell recognition signal' which causes the bi-potential gonad to turn into testes, thus launching the process of virilisation.⁽⁵⁰⁾ Dr J Miller⁽⁵¹⁾ calls the antigen, "the ultimate determinant of maleness".⁽⁵²⁾

"If H-Y antigen is really the long-sought product of mammalian testis-determining gene, then its expression on the cell surface should always be associated with the formation of at least, rudimentary testes, regardless of phenotype or apparent karyotype".⁽⁵³⁾

Thus, if a woman's blood tests indicate that she has H-Y antigen, she must be presumed to harbour cryptic testicular tissue, despite her XX karyotype

48. Leff op cit 46. Dr Wachtel's discovery of the sexuality strategic H-Y antigen was initiated by the need to explain male-female tissue graft rejections in genetically uniform strains of mice. The female-male skin grafts on the other hand, were successful. Scientists reasoned that the only possible histo-incompatibility resided in their oppositeness of sex. The females were literally allergic to some cell-surface factor inherent in maleness. Hence, the factor must be related to the Y chromosome since this was the only thing they did not share.

49. Ibid.

50. Ibid.

51. Of Columbia University.

52. Cited in Leff op cit 46. The 'new' antigen has already been put to work clinically to help decide in which direction ambiguous genitalia should be modified. It can also help to determine whether laparotomy should be performed to remove cryptic testicular tissue that may be carcinogenic.

53. Dr Wachtel, speaking at a symposium on 'The Genetic Mechanisms of Sexual Development', in Albany New York State, cited in Leff op cit 46.

and normal female genitalia.⁽⁵⁴⁾

In California, Susumu Ohno⁽⁵⁵⁾ has apparently supported Dr Wachtel's hypothesis.⁽⁵⁶⁾ Meanwhile, Wachtel's group has adduced evidence lately that the testis-inducing gene really does reside on the Y chromosome. They showed that in XYY men, the double dose of Y chromosome is matched by an extra amount of H-Y antigen in the cells.⁽⁵⁷⁾

54. Wachtel found support for his hypothesis in the wood lemming, a Scandanavian rodent. The female of the species is almost as likely to carry an XY karyotype as an XX. Despite this chromosomal masculinity, XY female lemmings are anatomically quite female and fertile. Wachtel found further that their Y-linked maleness gene yields no H-Y antigen, presumably because of some other gene - probably a mutation on the X chromosome - effectively switching off the Y, thus preserving the XY females from development of testicular tissue in utero. Dr Wachtel suggests further that a similar X-linked mutation perhaps explains some forms of gonadal dysgenesis in human females with an anomalous Y chromosome. Similarly, in a rare variant of Klinefetter's syndrome, there are human anatomical males with two X chromosomes and no apparent Y chromosome, who test positively for H-Y antigen. It is presumed that they have at least a fragment of the missing Y, translocated to some other chromosome from which it activates the creation of testicular tissue during gestation. This all goes as evidence to show how fallible the chromosome test for sex is, and that it should never be used on its own.

55. A cystogeneticist at the City of Hope Medical Centre, Pasadena.

56. Dr Ohno smashes, separates and interrupts the growth of the testes of new born mice. In vitro the cells re-aggregate to form testicular tubules. But when he blocks the H-Y antigen by adding specific antiserum to the culture, the cells grow into ovarian follicular aggregates instead : Leff op cit 46.

57. Ibid.

The clinical test of the H-Y antigen was first tried in 1976 when Dr New⁽⁵⁸⁾ told Wachtel of a two-year old patient with the ambiguous genitalia, including an elongated clitoris, but an apparently normal female karyotype. This child's endocrine responses implied that she harboured cryptic testicular tissue, although she was being reared as a girl. Her white blood cells tested positively for H-Y antigen and surgical exploration after 26 months confirmed the suspected diagnosis of true Hermaphroditism. She had an ovary on the left, co-existing with an ova-testis on the right. Even after the removal of all the testicular tissue, she continued to test positive for H-Y antigen showing the gene to be present in at least some of her somatic cells.⁽⁵⁹⁾

Dr Miller holds that the H-Y antigen test is a better index of the male-determining gene function, than the presence of the Y chromosome itself. As the tiniest chromosome in the karyotype, a Y can easily be overlooked, especially if translocated to another chromosome.⁽⁶⁰⁾

VII SECONDARY SEX CHARACTERISTICS

These are the hormone-induced external features peculiar to either males or females. In the male, they include an enlarged pharynx and a corresponding deepening of the voice; muscle development; larger skeletal size and facial hair growth.⁽⁶¹⁾ In the female, the secondary characteristics include stimulated breast development; growth of pubic hair and the distribution of adipose.

58. A Cornell paediatrician.

59. Leff op cit 47.

60. Vide chapter two infra for the many variations on chromosomal pattern, thereby refuting the supposed dichotomy of XX female and XY male.

61. In animals other than man, androgens are responsible for the lion's mane, the powerful musculature and fiery disposition of the stallion, the cock's comb and spurs, and a variety of behavioural patterns and various forms of aggression. Since almost the beginning of organised agriculture, domestic animals have been castrated in order to make them fatter, or more manageable, or both. As recently as the eighteenth century, selected boys were castrated before puberty in order to retain the purity of their soprano voices for Church and opera choirs. As a consequence of these early practices, the effects of testosterone - or the lack thereof - were the first hormonal influences to be recognised and studied : Curtis op cit 527.

VIII THE PSYCHOLOGICAL SEX OR ASSUMED SEX ROLE

This is the remaining determinant for sex considered medically relevant. Psychologists will rate as important, the role a person plays or seeks to play, and the image a person has as regards his sexual identity. Thus, they urge that sexuality is a combination of sex and gender. They point to the existence of abnormal psychological conditions which demonstrate themselves to be ambivalent, to a greater or lesser extent, to the biological sex. The most extreme of these psychological anomalies is transsexualism. (62)

A court of law is likely to shy away from such a standard as it is necessarily subjective. This test is however appealing, because it is at once practical and humane. In the case of the transsexual, the test gives recognition to his personal belief, which is usually not substantiated by any of the other tests. (63)

IX SUMMARY

Any, or all of the above tests could be used to test the sex of the average 'normal' person and for the 'normal' person they would all be in accord. But, as each of these tests is based on only one criterion, they are by themselves, inadequate for cases of anomaly. As has been seen, the chromosomal test can be fatal if used on its own as there are so many variants of the normal karyotype. Similarly, the character of the gonads is largely irrelevant as a determinant of sex in the social context. Even though the test of genitalia is used as the social sex determinant at birth, it too has proved inadequate in the case of abnormality or ambiguity. As regards the hormonal test it would appear that by artificial induction, the nature of biological characteristics can be altered so this does not appear to be a very accurate gauge of sex. As far as the secondary characteristics go, they are usually in agreement with chromosomal, gonadal and genital factors but still would be fallible if used on their own. Thus, the tests are, by themselves not conclusive in determining sex in cases of anomaly and therefore all factors cannot be required to coincide for a legally accepted test. A simple majority thereof, is also inadequate because it presupposes that all the factors are of equal importance and as the chromosomal anomalies have indicated, this cannot be the case.

62. I McColl Kennedy 'Transsexualism and Single Sex Marriage' (1973) Anglo-American Law Review 112.

63. Vide Chapter three infra for more details on transsexualism.

One work purports to establish a system for the legal determination of sex.⁽⁶⁴⁾ Simpson categorises the secondary characteristics of sex as 'presumptive evidence', while external characteristics such as genitalia are said to be 'highly probable evidence'. Chromosomal sex and gonadal sex are considered to be 'certain evidence' of an individual's sex. Such a system is clearly unacceptable in the light of current medical knowledge.

It has also been stated that:

"It is clear... that sexual differentiation is a relative rather than an absolute matter and as any classification of mankind for legal purposes into but two sexual categories must therefore be a purely arbitrary classification, it seems to follow that any attempt to define sex for legal purposes must take into account the specific purpose for which the classification is required, for it does not follow that what is a suitable criterion for one purpose, will necessarily be suitable...".⁽⁶⁵⁾

This ad hoc approach is, to this author, untenable. Not only is it illogical, but such a schizophrenic legal treatment can only have a detrimental effect on those individuals already plagued with instability and uncertainty. Consistent legal recognition of sex is imperative in order at least, to facilitate treatment of such individuals but this has not been forthcoming, in South Africa at least.⁽⁶⁶⁾

There is a growing body of opinion that the more important criterion is psychological orientation, especially where this is the dominant factor,⁽⁶⁷⁾ an hypothesis with which this author concurs.

64. I Taylor's Principles and Practice of Medical Jurisprudence (12th ed. Simpson 1965) cited in Smith op cit 969.

65. Bartholemew op cit 89.

66. Vide chapter six infra.

67. S A Strauss 'Transsexualism and the Law' (1970) 3 Comparative and International Law Journal of South Africa (hereinafter referred to as 'Strauss (5)') 348.

The author believes that the psychological orientation should have precedence for a number of reasons:

1. that the mind is innately superior to, and master of the body;⁽⁶⁸⁾
2. that with normal people the psychological sex will be congruent with the other anatomical features, thereby presenting no problem as regards determination on a psychological basis, and with the true transsexual and those belonging to the category of 'intersex', the psychological factor is the desired sex and the one with which the individual identifies and with which he feels most comfortable. Furthermore, the fact that he is going to live in that particular sex role should afford him the benefit of deciding what is best for himself; and
3. That the operation which is now performed throughout the world and is by and large, considered therapeutic,⁽⁶⁹⁾ is performed solely on the psychological choice of the transsexual, and by virtue of this fact, the psychological criterion is in essence, accorded the greatest status of all the tests. Common sense therefore dictates a recognition of a psycho-social criterion, at least after surgical intervention.

"As judges pride themselves on common sense above all things, I do not think that it is impossible that this situation could not be provided for in terms of case law... if the doctor certifies that this (sex) change has taken place, it should be recognised as a matter of law."⁽⁷⁰⁾

68. Romans I, 7-14.

69. Vide Chapter five infra.

70. R Green cited in Smith op cit 971.

C H A P T E R I I
 CLASSIFICATION OF SEX TYPES EXCLUDING TRANSSEXUALISM

I INTRODUCTION

"O! Mankind,
 Have in thy mind
 My passion smart,
 And thou shalt find
 Me full kind -
 Lo! Here is my heart." (fifteenth century anonymous lyric).

In the preceding chapter, the tests for sex determination were discussed. This chapter will now deal with those sex types that do not conform to the rigid norm of maleness and femaleness, and for which the sex tests are ambiguous, to say the least.

The dichotomy of male and female is not absolute: in fact there is a spectrum of sexuality ranging from predominantly male to predominantly female. One commentator explains that

"it can well be said that actually we are all 'intersexes' anatomically as well as endocrinologically. But we are male or female in the anatomical or endocrinological sense according to the predominant structures or hormones."⁽¹⁾

Generally, individuals do fall easily within a male or female sex pattern and are so classified. Some individuals, although basically in the range of normal types, exhibit characteristics which take them beyond the normal range in one way or another. From time to time, usually due to mistakes at the meiotic stage, homologues may not separate.⁽²⁾ In this case, one of the sex cells has one too many chromosomes and the other has one too few. This phenomenon is known as nondysjunction.⁽³⁾ The cell with one too few autosomes cannot produce a viable embryo, but the one with one too many, sometimes can.

1. Dr Harry Benjamin cited in W Scott Cole 'Transsexuals in Search of Legal Acceptance: The Constitutionality of the Chromosome Test' (1978) 15 San Diego Law Review 331 at 338.

2. Curtis op cit 221.

3. Ibid.

The result is an individual with one extra chromosome in every cell of his body.⁽⁴⁾ Nondysjunction may also produce individuals with extra sex chromosomes. The XY combination in the 23rd pair is associated with maleness, but so are the combinations of XXY, XXXY and even XXXXY. These males are usually sexually underdeveloped and sterile. So too, other than the XX pattern for females, one may get XXX which sometimes produces normal females, but many of the XXX females and all of the XO females are sterile.

II VARIATIONS OF NORMAL TYPES

a. Klinefetter's Syndrome (XXY)

This individual is a sterile male having 47 chromosomes instead of the usual 46, and thus an XXY pattern instead of the normal XY male pattern. The Y chromosome produces testes and testosterone but the second X chromosome may cause some breast development and a feminised body form. Dr Betty Steiner of the Clark Institute of Psychiatry, Toronto, is of the opinion that those people with Klinefetter's syndrome commonly exhibit such gender identity problems as transsexualism and bisexuality.⁽⁵⁾

b. Supermale syndrome (XYY)

The individuals here are males who again have 47 chromosomes but the extra one this time is another Y, thus giving the XYY pattern. Once referred to as 'supermales' these people are taller than average and exhibit all male physical criteria. The major factor which sets them apart from normal males is the apparent psycho-personality disorders which are present. These males are usually mentally retarded and extremely aggressive, which behaviour is impulsive and uncontrolled, and often results in criminal convictions and imprisonment. It has been discovered that white males with the extra Y chromosome are found in a higher percentage in institutions for the mentally disturbed or criminally insane, than among males studied at random.⁽⁶⁾

4. Ibid. The presence of the additional chromosome often produces widespread abnormalities. Among those who survive, many are mentally deficient. In fact, studies of abnormalities in human chromosome numbers among living subjects are usually carried out on patients in mental hospitals. These patients often have abnormalities of the heart and other organs as well, for example, Down's Syndrome.

5. Hawley op cit 124.

6. Curtis op cit 223.

They are also generally loners, and may have homosexual or bisexual tendencies. It is estimated that about 1 in every 1 000 males is XYY.⁽⁷⁾ The psychological problems associated with this problem appear to be capable of reversal by psychiatric treatment.⁽⁸⁾

c. Turner's Syndrome (XO)

This person is a sterile female lacking a chromosome and thus exhibiting an XO pattern instead of the normal XX. Because of the absence of one of the sex chromosomes, the ovaries fail to develop, no menstruation occurs and usually no secondary sex characteristics develop. Other congenital abnormalities are often present, including small stature, malformation of fingers and toes, heart disease and a webbed (short, thick) neck. Cyclic doses of oestrogen can be administered to produce the development of secondary sex characteristics.⁽⁹⁾

d. Metafemale (XXX)

Here we have a female with an extra X chromosome causing her pattern to read XXX.⁽¹⁰⁾ As with their male counterparts, these individuals were once referred to as 'superfemales' but this term has now been rejected for the more appropriate one of 'metafemale'. Such women exhibit characteristics such as infantile genitalia, a ceasing of the menstrual cycle at an early age, underdeveloped breasts and below normal intelligence. This condition appears to be rare.⁽¹¹⁾

7. Ibid.

8. Hawley op cit 124.

9. Ibid.

10. R Green and J Money Transsexualism and Reassignment Surgery (eds 1969) 487.

11. Ibid.

e. Sexual Precocity

This is the phenomenon of complete sexual growth and development in children. The etiology remains unknown, but the condition may be caused by hereditary factors, brain tumors, or tumors of the gonads.⁽¹²⁾ Girls under nine - and often as early as four - have early breast development, pubic hair and mature external genitalia, and may even have menstrual cycles. Boys under the age of ten, undergo rapid bodily growth, develop pubic and facial hair, adult external genitalia, a deepening of the voice, the possible presence of acne and the occurrence of erections and nocturnal emissions. There may or may not be the production of sperm.

Both boys and girls with such early sexual development, mature into normal adults. The only problem with this condition appears to be the social one associated with having a young child who seems to be a fully sexual adult.⁽¹³⁾

f. Eunochoidism

This condition occurs in both males and females and results when individuals fail to develop sexually at puberty. One frequent cause of this, is the failure of the pituitary gland to produce gonadotrophic hormones, and the second cause, is the failure of the gonads themselves, to function normally. Affected males usually have a very small penis, and marked growth in their long bones, which results in a form of gigantism.⁽¹⁴⁾ Affected females have an infantile vagina and uterus, lack other sex characteristics and are taller than average. Endocrine treatment can cause such individuals to develop according to a normal pattern.⁽¹⁵⁾

III SEXUAL ANOMALIES

Sir Roger Ormrod has compiled a chart setting out the relationship between the various sexual anomalies,⁽¹⁶⁾ which is represented on the following page.

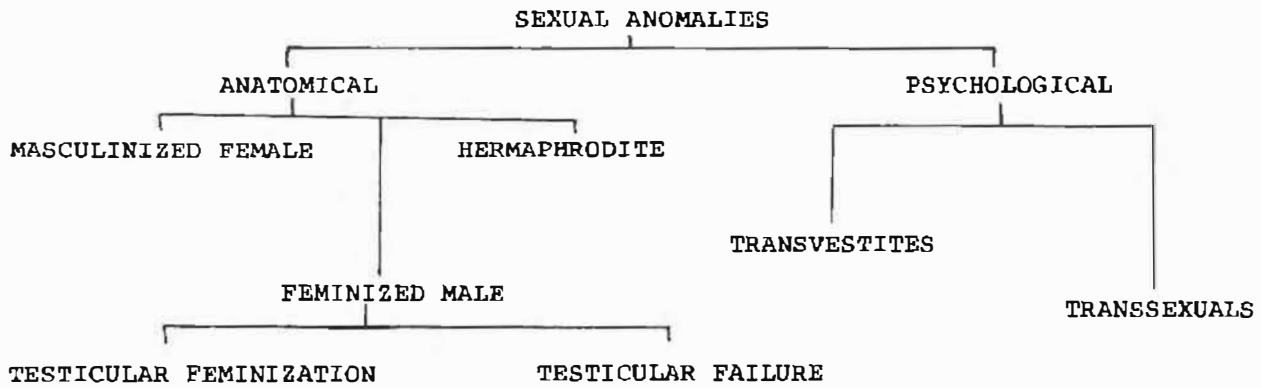
12. Hawley op cit 124.

13. Ibid.

14. Hawley op cit 125.

15. Ibid.

16. R Ormrod 'Medico-legal Aspects of Sex Determination' (1972) Medical Legal Journal 78.



Thus, there are two types of sexual anomaly : the anatomical and the psychological. The former can be discerned by an examination of the person, who may display any number of sexual characteristics normally associated with either male or female.

The psychological anomalies usually cannot be determined by any physical tests, but are based on the belief or desire of the individual.⁽¹⁷⁾ It is important to note that this classification does not include homosexuals, the reason being that homosexuality is not based on a physical or mental 'mix up' in the person's gender identity, but is rather based on a sexual preference for a sex partner of the same sex.⁽¹⁸⁾

A. Anatomical Anomalies

These then are physical variations in an individual's body which exhibit some characteristics of both male and female, to some degree. These can be caused by various hormonal or genetic influences⁽¹⁹⁾ and result in a number of recognised conditions that fill the spectrum between normal males and females.⁽²⁰⁾

17. Ibid.

18. This phenomenon will be dealt with in greater detail at the close of this chapter.

19. Vide chapter one supra.

20. Hawley op cit 127.

A(a) Hermaphroditism

An hermaphrodite is a person born with the sexual organs of both sexes, one of which is usually predominant. The hermaphrodite has been known since the earliest times as a person who has some of the sexual characteristics of both sexes. As was cited in Corbett v Corbett, in all cases of intersex or hermaphroditism, there is a discrepancy between the first three sex determinants.⁽²²⁾ Hermaphroditism is therefore a

"...congenital condition of ambiguity of the reproductive structures so that the sex of the individual is not clearly defined as exclusively male or exclusively female...".⁽²³⁾

True hermaphrodites are generally considered as persons who are chromosomal mosaics, having both XX and XY cells, thus, both testicular and ovarian tissue is present.⁽²⁴⁾ Although hermaphroditism is rare, it is not a condition which manifests itself in exactly the same way in each affected individual. A vagina may or may not be present and this feature is sometimes used to assign the person to the female sex. Other individuals are orientated as females during early childhood but at puberty, when changes in the testicular element produce more androgen, a masculinising effect results. This may be the first recognisable sign of the condition and may lead to problems in sex role assignment, and the subsequent necessity for treatment.⁽²⁵⁾

22. Viz: chromosomal, gonadal and genital. For more details of this case, vide chapter eight infra.

23. Green and Money op cit 487.

24. Hawley op cit 127.

25. Smith op cit 970 note 40. This raises the interesting question of the age at which an hermaphrodite should be allowed to select his/her own sex. It is reasonable that the age of puberty should be chosen and in such a case, court approval might be sought before corrective surgery is undertaken. Whichever age is finally selected does not detract from the fact that people with sex ambiguities should be entitled to make the personal choice. In facilitating this, it is submitted by this author, that a birth certificate should be a temporary document, subject to later alteration if necessary.

A(b) Masculinised Females

These are victims of what is known as 'adrenogenital syndrome' or 'adrenal masculinisation'.⁽²⁶⁾ They are chromosomally normal XX females and have normal female gonads. This condition is caused when a female foetus is exposed to excessive amounts of testosterone⁽²⁷⁾ produced by tumors in the mother or the foetus, or possibly due to inappropriate medication during pregnancy. The result is the masculinisation of the external genitalia causing a large clitoris to develop which has the appearance of a penis, and in fused labia which appear to be an empty scrotum. These changes naturally lead to a wrong sex assignment at birth.⁽²⁸⁾ Such children are then usually raised as boys and their true sex may only be discovered when menstruation occurs at puberty, but some individuals may never discover their true sex and may simply regard themselves as sterile males because of the absence of testes.

These individuals are then medically female, and effective treatment is available. Adrenal suppression will result from steroid therapy and surgery will remove traces of maleness by reconstructing the perineum and then constructing a vaginal opening. Such correction is effective in children but may produce psychological and legal problems, if performed on adults.⁽²⁹⁾

26. Hawley op cit 127.

27. Vide chapter one supra and chapter three infra for the suggested effects of hormones as a cause of transsexualism.

28. Vide this author's comment in note 25 supra.

29. Hawley op cit 127. Thus, in these cases the sex of rearing is ignored, and precedence is given to the medical sex. It is submitted that this is all very well in those instances in which the child manifests feminine traits and is therefore considered to be transsexual in nature, but as the issue of the etiology of sexual identity confusion is by no means clear cut and a person may identify more fully with the role in which he/she is reared, it would be fatal to proceed to change him/her into the medical female he/she has proved to be. Be that as it may, it is submitted that until definite evidence is found, to prove that transsexualism is simply a mental delusion and there are no other biological and/or environmental causes, it would seem applicable to regard the corrective surgery in the case of masculinised females as the same as that demanded by a transsexual, and, it is submitted further, since the one has legal effect, why not the other?

A(c) Feminised Males

There are two types of feminised males, both types being chromosomally and gonadally males:

1. testicular feminisation - this is also known as androgen insensitivity. Here a person is born with the conventional XY male karyotype, but the cells of the body do not respond to androgen and the embryo develops as an apparent female. The Y chromosome causes the development of testicular tissue, but the testes remain in the abdomen. This is the only masculine result of the Y chromosome. These individuals do not develop male genitalia, nor do they develop any male secondary sex characteristics. Instead, they appear to be female, with some breast development, female-type genitalia - which include a somewhat shortened vagina and in some cases, an infantile uterus, but they do not menstruate as there are no ovaries present. The cells, also respond to oestrogen which - although produced in everyone to some extent - is ordinarily associated with females. Some of these individuals are capable of sexual intercourse as women and are usually raised as women and believe themselves to be women.⁽³⁰⁾ There is no known remedy for this condition, but it does not appear to lead to problems, since the individual is classified at birth in the female role and usually no question is posed as regards 'his' sex, since the signs of 'his' true masculinity do not appear physically.⁽³¹⁾

2. testicular failure - this syndrome is similar to testicular feminisation except that evidence of masculinity may appear at puberty. This may lead to a re-classification of sex, at that time, depending upon the role which the individual has assumed and wishes to retain and the degree of masculinisation or feminisation exhibited.⁽³²⁾

30. D Federman Abnormal Sexual Development (1967) 105, cited in Scott Cole op cit 355. It is submitted that this is a clear case evidencing the fact that the chromosomal pattern of a person should not be accorded the importance, which some courts of law have seen fit to do. Furthermore it is submitted, that the fact that a supposed male can live successfully as a female, substantiates the sound theory involving the principle of yin and yang: the dual sexuality of every human being, which renders the phenomenon of transsexualism a natural-type occurrence.

31. Hawley op cit 127.

32. Hawley op cit 128. It is submitted that if one is permitted tardy re-classification in such instances, then such re-classification should be available to the transsexual with all its attendant legalities, especially since the ultimate result is usually a happier individual.

B. Psychological Anomalies

Psychological sexual anomalies are those conditions under which a person has a mental image of himself which conflicts - to a greater or lesser degree - with his physiological sex. The etiologies of these anomalies are largely unknown, but some authors attribute them to genetics, hormones or the environment, either separately, or in varying combinations.⁽³³⁾

B(a) Transvestitism

The transvestite is one who experiences psychological relief and sexual arousal from cross-dressing.⁽³⁴⁾ The term 'transvestite' actually means dressing as the opposite sex, and covers inter alia transsexuals, some homosexuals, costume fetishists, female impersonation entertainers, deviant prostitutes and certain psychotics who suffer from delusions.⁽³⁵⁾

Transvestites are nearly - if not always - men. The phenomenon is apparently very rare in females. The aberration is intermittent in character, and it is not accompanied by the corresponding urge to live or pass as a member of the opposite sex at all times. Transvestite males are usually heterosexual, often married and have no wish to cease playing the male role in sexual activity.⁽³⁶⁾

"Most of the male transvestites live more or less normal masculine lives, many are married and have children and indulge in cross-dressing only occasionally. They have no wish to become female, and are anxious to retain their masculinity, but they retain an intense excitement from wearing full female clothing and going about in public dressed as women. The condition is not by any means closely associated with homosexuality, as is clearly demonstrated by those who lead apparently normal or fairly normal heterosexual lives".⁽³⁷⁾

33. Hawley op cit 125; chapter three infra.

34. H Benjamin and C Ihlenfeld 'Transsexualism' (1973) 73 American Journal of Nursing 453.

35. J Taitz 'The Legal Consequences of a Sex Change' (1980) 97 South African Law Journal 66.

36. Hawley op cit 127. Dr Benjamin (The Transsexual Phenomenon (1966) 29) has stated that "transvestites with their more or less pronounced gender indecision may actually all be transsexuals in varying degrees of intensity".

37. Ormrod op cit 78.

This condition generally does not lead to the knowledge or involvement of any persons outside the individual's family, except by accidental discovery when the individual is 'picked up' by a stranger or the police. (38)

B(b) Transsexualism

This phenomenon will be discussed at great length in the following chapter.

IV HOMOSEXUALITY

In closing this chapter on sexual anomalies and variants of the normal sex types, a word about homosexuality is in order. The homosexual has no gender identity conflict, but is simply psycho-sexually attracted to another person of his/her own sex. (39) As many as 1 in 10 people are homosexual, according to the most recent study. (40) Two main factors regarding homosexuality are:

- i) that whatever the incidence, it remains a minority preference; and
- ii) it is criticised and condemned by the majority. (41)

"From a religious viewpoint it is regarded as sinful and unnatural... and from a socio-legal stance it is legislated against - in males". (42)

The classic familial constellation reported for the male homosexual, includes a close-binding, intimate mother and a hostile, detached father. (43) More than four fifths of the fathers of the group studied were either physically or at least psychologically absent from the home, and in addition, they rarely took measures to protect their sons from the influences of a seductive, overly-close mother. (44)

38. Ibid. _____

39. Benjamin and Ihlenfeld op cit 454.

40. Statistics supplied by Mrs L Woolfson (psychologist), The Natal Witness 17 August 1978 at 3.

41. Ibid. _____

42. Ibid. Mrs Woolfson points out that the laws of most countries ignore the fact of female homosexuality : only four countries legislate against lesbianism - Austria, Greece, Switzerland and Finland. In South Africa, it is common knowledge that males can be charged under the Immorality Act for homosexual activity.

43. Bieber et al Homosexuality : A Psychoanalytic Study (1962) cited in G A Rekers 'Family Correlates of Male Childhood Gender Disturbances' (1983) 142 Journal of Genetic Psychology 31 at 33. This has also been proffered as a cause of transsexualism; chapter three infra.

44. Ibid. _____

Characteristics of a father that foster normal psycho-sexual adjustment - nurturance, affection, active involvement in the family, dominance - are notably lacking in the fathers of homosexuals. These fathers have been described by their sons as "indifferent and uninvolved".⁽⁴⁵⁾ Only 13% of homosexuals, compared with 66% of the heterosexual control group, identified with their fathers.⁽⁴⁶⁾

Recently there has been a controversial study in the United States which disputes the 'hostile father - domineering mother' etiology of homosexuality.⁽⁴⁷⁾ After interviewing 979 homosexuals, the Kinsey Institute for sex research at Indiana University, has revealed that homosexuality may be determined at birth, by biology. The study rejected the belief that homosexuality was generally caused by some early influence - that of a weak father, seductive mother or traumatic sexual experience.⁽⁴⁸⁾ It maintained that homosexuality was usually, although not always, a deep-rooted trait, present from infancy, and that it may well be biological and the result of hormone malfunction.⁽⁴⁹⁾ Two years prior to this research, the renowned sex research team of Masters and Johnson studied 300 homosexual men and women. Their findings were completely at odds with the Kinsey study.⁽⁵⁰⁾ Masters and Johnson found that homosexuality was neither an illness nor a biochemical disorder but rather, a 'learned behaviour' that 2 out of 3 homosexuals could unlearn.⁽⁵¹⁾ They estimated that there were as many as 21 million homosexuals in the United States alone, and that 1 man in every 3 and 1 woman in every 5, had at some time had a homosexual experience.⁽⁵²⁾

45. Soghir and Robins Male and Female Homosexuality : A Comprehensive Investigation (1973), cited in Rekers op cit 33.

46. Ibid.

47. The Daily News 25 September 1981 : 'They don't choose to be homosexual'.

48. Ibid.

49. Ibid.

50. Ibid.

51. Ibid. This still appears to be the more accepted theory, but the mere fact that these two theories are so divergent, is evidence of the difficulty in defining and classifying sexual identity disorders.

52. Ibid.

CHAPTER III
 TRANSSEXUALISM AND ITS POSSIBLE CAUSES

I INTRODUCTION

"Every night and every morn
 some to misery are born
 Every morn and every night
 some are born to sweet delight -
 Some are born to sweet delight
 Some are born to endless night." (W Blake 'Auguries of Innocence')

"It is a fine thing to be independent in life, and a proud sensation to know yourself unique: but a person who stands all on his own, utterly detached from his fellows, may come to feel that reality itself is an illusion - just as the poor convicts of the nineteenth century silence system, so isolated from their comrades that they were never allowed to see or hear another soul for years at a time, sometimes lost all grasp of their own existences and became non-persons even to themselves".⁽¹⁾

As we have seen,⁽²⁾ every newly-born child is usually classified at birth in one of the two sexes. Because most people's sex criteria are in harmony, it is difficult for the layman to empathise with, and understand the transsexual's dilemma: at best, the idea of a biologically sound male/female being tortured by the belief that he/she is a member of the opposite sex, is a paradox. Although this problem has been classified only recently, it is of course no novel issue.⁽³⁾

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1. J Morris Conundrum (1974) 41.
 2. Vide chapter one supra.
 3. The term transsexualism has taken only 30 odd years to become a household word. It was coined as a medical term by Dr Cauldwell who used it to classify a girl whom he described as obsessively wanting to be a boy. He called her condition psychopathia transsexualis. Before the publication of the famed Christine Jorgensen case in 1953, most people had never heard of the word, let alone the condition which it signified : Raymond op cit 20.

Transsexualism or 'gender dysphoria syndrome' is a rare, psychological condition.⁽⁴⁾ It has been described as

"... a passionate, lifelong conviction that one's psycho-gender - that indefinable feeling of maleness or femaleness-is opposite to one's anatomical sex".⁽⁵⁾

Transsexualism is also known as 'gender identity disorder' and 'cross-gender identity' and although an outsider regards it as a psychological problem, the sufferer himself, views it as a physical problem. In this condition a male individual for example, feels that he is truly female and is trapped by some accident of nature, in a male's body. The condition also affects women, who feel that they are really men in women's bodies, but statistically these are fewer.⁽⁶⁾ Several hypotheses are advanced for this:⁽⁷⁾

1. that the greater publicity given to male 'sex changes' has influenced more males to undergo the surgery;
2. that society affords the female more latitude for cross-sexed expression, masculinised clothing, male hobbies, etcetera are by and large not frowned upon when evidenced in females, therefore there is less social alienation. One author is of the opinion that one must blame the patriarchal society we live in, wherein men are supposed to be 'macho' and not exhibit any feminine tendencies, thereby denying an integral part of their make up and furthermore, as females are regarded with condescension, they try to emulate their masculine counterparts.^(7a)
3. that possibly the male-female surgery is easier and more practicable; and

4. This is the general medical consensus although a biological etiology has been hypothesised as is discussed later on in this chapter.

5. Taitz op cit 65.

6. Green and Money op cit 267.

7. Ibid.

7a Raymond op cit 25.

4. that it may be that transsexualism is a phenomenon which simply occurs more frequently in males. ⁽⁸⁾
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8. The number of transsexuals is not insignificant. One estimate is that there are 10 000 in the United States alone, including both pre-operative and post-operative transsexuals: Wall Street Journal 28 January 1977 at 1. There are about three to four times more male transsexuals than female transsexuals. Money suggests that this preponderance also reflects the fact that men are more vulnerable to 'psycho-sexual disorders' than women. Raymond op cit xvi offers her own solution. She suggests that the male recognises the power that a woman has by virtue of 'human biology' or 'birthing' and that transsexualism may be one way by which man attempts to possess the female's 'creative abilities'. In further support, she adds that transsexualism offers a unique perspective on sex-role stereotyping in a patriarchal society. The gender identity clinics at which transsexuals are counselled, reinforce this stereotypical behaviour. To some extent, this author concurs, as it is believed that society encourages sexual confusion by its too-rigid classification of 'male' and 'female' on the all too vulnerable visual test at birth. It is interesting to note the analysis of the male-female transsexual phenomenon given by Ralph Greenson in an address to the American Medical Association (cited in Raymond op cit 29) and which brings to mind the sentiments expressed by the Argentinian judge in the case of Dr Ricardo San Martin 123 La Ley 605 (CN Crim y Correc Argen 1966), discussed in greater detail in chapter eight infra. Greenson states that "it is horrifying - a danger to the human race - our only hope is that basic instincts will eventually win out... Men have contempt for women only on the surface. Underneath is a repressed envy... A man is never quite sure he is a man. He has to prove it over and over again." This author finds it incredible that educated and supposedly intelligent people can regard transsexualism as a threat to the continuance of the human race. Even though there are large numbers of transsexuals, there is of course an even greater number of people who are perfectly satisfied with their sex. It is submitted that it is highly unlikely that our existence is in jeopardy due to the transsexual. It is submitted further that the above views of both Raymond and Greenson reflect a dogged, feminist outlook and although interesting, are not of any great importance for the purpose of this work.

The typical transsexual is morphologically and physiologically normal. However, he harbours - with constant and persistent conviction - the desire to become a member of the opposite gender, and he progressively takes steps to become, and live in society, as a member of that sex. Transsexuals may in fact live their lives in the chosen gender, and this is often done quite successfully, on external appearances, but it does not always satisfy the transsexual himself. He may even engage in sexual activities with the persons of the same anatomical sex as himself but he does not consider this to be homosexual behaviour as he believes that he himself is in fact a member of the opposite sex. (9)

"...transsexualism... in its classic form is as distinct from transvestitism as it is from homosexuality. Both transvestites and homosexuals sometimes suppose that they would be happier if they could change sex, but they are generally mistaken. The transvestite gains his gratification from wearing the clothes of the opposite sex: he would sacrifice his pleasure by joining that sex: the homosexual by definition, prefers to make love with others of his own sort, and would only alienate himself and them, by changing. Transsexualism is something different in kind. It is NOT a sexual mode or preference. It is not an act of sex at all. It is a passionate, lifelong, ineradicable conviction, and no true transsexual has been disabused of it..." (10)

Transsexualism can be such a serious problem with the individual concerned, that he can develop suicidal tendencies, or at least, become subject to bouts of severe depression.

9. This fact compounds the problem of differentiating between transsexuals, homosexuals and transvestites. Thus, to the casual observer, a transsexual is both a transvestite and a homosexual. But transsexuals do not identify themselves with the latter, as they are looking for heterosexual partners. Also, unlike homosexuals, transsexuals do not club together. They regard themselves as patients seeking a cure, not socio-sexual variants pursuing a life-style: Leff op cit 56.

10. Morris op cit 10.

"I was born with the wrong body, being feminine by gender but male by sex, and I could achieve completeness only when the one was adjusted to the other".⁽¹¹⁾

There is no known cure for this condition, but surgery often has the effect of reducing the conflict in the individual's mind. A transsexual does not appear to respond favourably to any psychological treatment.⁽¹²⁾ The belief of the transsexual is constant and inflexible.

"No true transsexual has yet been persuaded, bullied, drugged, analysed, shamed, ridiculed or electrically shocked into acceptance of his physique. It is an immutable state....".⁽¹³⁾

Most transsexuals report that they have had their conviction for as long as they can remember.⁽¹⁴⁾ Two thirds of a group studied,⁽¹⁵⁾ felt that they belonged to the other sex by at least the age of five, and the cross-gender identification strengthened with time.

It is important for society to recognise that the transsexual who undergoes corrective surgery should be regarded as a person with a genuine conviction that he/she now belongs to the desired sex. There is a strong need to establish the credibility of the transsexual condition. Most people do not take the phenomenon seriously⁽¹⁶⁾ and regard the sufferer as some kind of 'freak'. Homosexuals have also been the recipients of ridicule and scorn in the past, but as this predeliction has become increasingly publicised

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11. Ibid. Psychiatrist Don Angus in Alberta, recalls a seventeen year old boy who carried radio-active charges in his pockets to destroy his testicles. Once encouraged to dress as a woman, he became a model citizen, and went onto hormones: Leff op cit 56.
 12. Vide chapter four infra.
 13. Morris op cit 10.
 14. I Pauly 'Adult Manifestation of Female Transsexuals' cited in Green and Money op cit 86.
 15. I Pauly 'The Current Status of the Sex Operation' (1966) Journal of Nervous and Mental Disease 460.
 16. Most people to whom this author has spoken, have suggested that perhaps transsexuals undergo the operation as a perverted sense of fun. Considering the expense and pain involved, this proposition is highly unlikely. Furthermore, the surgery is irreversible.

and understood⁽¹⁷⁾ it has been taken more seriously with the result that pleas for more humane treatment of homosexuals have been made.⁽¹⁸⁾ It is important for the transsexual that a parallel development occur in the acceptance of his condition.

"Transsexualism touches the boundaries of many of the existing academic disciplines in such a way as to raise fundamental questions about the territorial imperatives of biology, psychology, medicine and the law, to name but a few. Questions about the causes of transsexualism and the proper method of treatment have been hitherto restricted to the domain of psychology and medicine..."⁽¹⁹⁾
 Studies on hermaphroditism⁽²⁰⁾ have led to the view expressed by Biedl, "... that there is no such thing as pure male or pure female, but that each contains the elements of the other sex."⁽²¹⁾

In 1915 Freud said,

"there is no such thing as pure masculinity or pure femininity, either in the psychological or the biological sense. On the contrary, we find in every individual a combination of the characteristics of his or her sex, as biologically determined, with the biological traits belonging to the other sex."⁽²²⁾

17. Vide chapter two supra.

18. Scott Cole op cit 814.

19. Raymond op cit 1.

20. Vide chapter two supra for details of this phenomenon.

21. S Grothman The Human Body (1964) 537 cited in T Parschin-Rybkin 'Notes' (1972) 5 Ottawa Law Review 583.

22. Boehm The Femininity Complex in Men in Psycho-analysis and Male Sexuality 120 (H.M. Rutenbeck ed. 1966) cited in Parschin-Rybkin op cit 584.

A third authority has said that,

"... the attitude of 'assuming as much as possible of sexuality' does not mean that psycho-sexual dimorphism is not as real and as important as biological dimorphism, which is its basis. In recognising osmosis one does not need to deny cellular individuality and differences... We are bisexual throughout life and therefore in each man there is a woman, and in each woman, a man."⁽²³⁾

It was possibly the eighteenth century which first imposed upon western civilisation, rigid conceptions of maleness and femaleness and made the idea of sexual fluidity in some way, distasteful. Certainly, earlier centuries did not require the male to be so unyieldingly virile and the female so passive, as is evidenced by the comedies of Shakespeare⁽²⁴⁾ and to some extent, his historical portrayals and his tragedies.⁽²⁵⁾ There appeared to be more 'give and take' in those days and the word 'manly' had not acquired the intolerant connotation that the Victorians were to give it. Our contemporary world has still to shake off some of those shackles imposed on conscious and aware thought.

"Myths and history alike, I discovered, were full, if not of precedents at least of parallels - men who lived as women... hermaphrodites, transvestites... almost nobody has ever conformed absolutely to the conventional criteria of male and female... God, said Jewish chroniclers, created man in His own androgynous image 'male and female He created them' for in Him both were united... The Hindu pantheon is frequented by male-female divinities, and Greek mythology too is full of sexual equivocations."⁽²⁶⁾

In recent years, Dr Bem has developed theoretical arguments and presented empirical research supporting the re-definition of traditional concepts and measurements of masculinity and femininity.⁽²⁷⁾ In brief, Bem considers

23. David 'A Masculine Mythology in Female Sexuality' cited in Parschin-Rybkin op cit 584.

24. Twelfth Night is an ideal example of cross-dressing.

25. For example, Othello.

26. Morris op cit 44.

27. S.L. Bem 'The Measurement of Psychological Androgeny' (1974) Journal of Consulting Clinical Psychology 42 cited in M. Fleming et al 'Questioning Current Definitions of Gender Identity' (1980) 9(1) Archives of Sexual Behaviour 13 at 14 (hereinafter referred to as 'Fleming (1)').

these concepts of two logically independent dimensions - each with distinctive correlates which have been obscured by traditional bipolarity. This forced relationship has made it impossible to consider hypotheses about androgeny, which is the possession of both masculine and feminine personality characteristics, in relation to sex-typing and the inhibition of behaviour associated with the non-typed sex role.⁽²⁸⁾ Bem concludes that culturally imposed sex role definitions act as a 'restricting prison' for human personality and should be abolished: "behaviour should have no gender."⁽²⁹⁾

Through the words of a post-operative transsexual, one is brought face to face with the dilemma caused by the attitudes of Church and State, which insist upon the exclusive bipolarity of sex:

"...a male or a female? I felt that, despite my great social confusion in early years, the question was settled in the subconscious long before doctors entered my life, perhaps even before birth. The subject is still very contentious because it raises fundamental questions such as the relationship between mind and matter... I started out life as a boy. As I grew up, I turned into a feminine-looking boy. Perhaps I should have accepted by androgenous nature... but I couldn't... I felt myself to be essentially female. Why, I don't know... My early life had been such agony that it seemed that the psyche had said to itself, 'this life is shaping up into no shape at all. Something has got to take charge, so I'm going to', which resulted in great strength of purpose. Little wonder that among less single-minded transsexuals, self-mutilation and suicide are so common... The horror of a life in ambiguity and disguise, the constant fear of being exposed - one could not live with it and remain sane... You may feel that oh terms like intersex and transsexualism, they're only words, they don't really

28. Ibid. _____

29. Ibid. _____

"mean anything. And you would be wrong. Of course they are words, but that is a tremendous encouragement because it means that instead of my being a freak, modern knowledge had identified syndromes... to deal with conditions such as mine... One is a rarity, which makes learning to cope a very hard lesson, but one is not outside the discernible laws of Nature."⁽³⁰⁾

II CAUSES OF TRANSSEXUALISM

"My conviction of mistaken sex was still no more than a blur... I felt a yearning for I knew not what, as though there was a piece missing from my pattern... Nobody really knows why some children... discover in themselves the inexpugable belief that, despite all the physical evidence, they are really of the opposite sex. It happens at a very early age... and it is generally profoundly ingrained as it was with me by the fourth or fifth year. Some theorists suppose the child to be born with it: perhaps there are undiscovered constitutional or genetic factors, or perhaps, as American scientists have lately suggested, the foetus has been affected by misdirected hormones during pregnancy. Many more believe it to be solely the result of early environment... I have tried to analyse my own childish emotions, and to what I meant when I declared myself to be a girl in a boy's body... but for me it remains a riddle. So be it..."⁽³¹⁾

To put it in the words of Dr Armstrong⁽³²⁾

"...a transsexual is an individual convinced from the earliest recollection usually two to seven years, that he/she has been endowed with the wrong anatomical body."

30. D. Fallowell and A. Ashley April Ashley's Odyssey (1982) 14-17.

31. Morris op cit 12-14.

32. C Armstrong 'Transsexualism: A Medical Perspective' (1980) 6 Journal of Medical Ethics 90.

Since there are no criteria by which such a belief could claim factual basis, it would seem logical to describe the transsexual's problem as a delusion. However, the literature has been chary on this term, pointing out that transsexuals have no general tendency to delusion, but are, in all other respects, well-organised, and in touch with reality. Accordingly, the condition comes to be described in terms that make no reference to the patient's belief, but only to the discomfort and unhappiness with the gender role demanded by the body, and a deep-seated desire to be a member of the opposite sex.⁽³³⁾ So in transsexualism, we have to deal with a condition which has no real known treatment, and no all-encompassing cause.

Perhaps the earliest commentator on the possible cause of the phenomenon was Herodotus.⁽³⁴⁾ He explained the origin of what he referred to as 'Scythian illness' by resorting to divine causation. Apparently Venus, enraged by the plundering of her temple at Aschetos, changed Scythian males and their posterity into women, as a divine punishment for their misdeeds.

Herodotus notwithstanding, speculation and research focus upon two main categories of possible causes, one - comparable to that which has found favour among students of homosexuality - lies in the psycho-dynamics of the patient's home and early childhood.⁽³⁵⁾ The other is biological, based on the idea that a hormonal disorder may influence the nervous system at a certain point in foetal development, creating a disposition to gender disorder.⁽³⁶⁾ It must be stressed however, that both etiologies have only the status of hypotheses. One fact which remains certain is that there is a group of persons, perhaps 1 in 50 000, whose anxiety about the incongruity of their bodies is so great that their suffering is "beyond belief".⁽³⁷⁾ The only treatment which appears to have any effect is corrective surgery⁽³⁸⁾ and it is generally regarded as successful.

33. Ibid.

34. R Green 'Mythological, Historical and Cross-Cultural Aspects of Transsexualism' cited in Green and Money op cit 14.

35. O O'Donovan 'Transsexualism and Christian Marriage' (1983) XVI Journal of Religious Ethics 134.

36. Ibid.

37. Leff op cit 48.

38. Vide chapter four infra. The term 'corrective surgery' will be used in place of 'conversive surgery' 'sex reassignment surgery' etcetera, as this author believes that in the case of a true transsexual, there is no change, merely a re-affirmation - through the operation - of the real sex.

A. Biological Causes

The earlier theorists linked anatomy directly to destiny. Straightforward links between hormonal factors and behavioural results, were simplistically set forth.⁽³⁹⁾ John Money however, considers the connection to be indirect. He insists upon the mediating factor of the brain - more specifically the hypothalamus - which, when activated by specific sex hormones, sets up neural pathways for gender identity, which is developed later by post-natal socialisation.⁽⁴⁰⁾

"In the theory of psychosexual differentiation it is now outmoded to juxtapose nature versus nurture; the genetic versus the environmental; the innate versus the acquired; the biological versus the psychological or the instinctive versus the learned. Modern genetic theories avoid these antiquated dichotomies and postulate a genetic norm of reaction which for its proper expression requires phyletically prescribed environmental boundaries. If these boundaries are either too restricted or too diffuse, then the environment is lethal, and the genetic code cannot express itself, for the cells carrying it are non viable."⁽⁴¹⁾

39. Raymond op cit 46.

40. Dr Ray McKensie considers the fundamental cause to be "biological, probably subcortical"; cited in Leff op cit 56.

41. J Money and A Ehrhardt Man and Woman, Boy and Girl (1972) cited in Raymond op cit 47: "It takes a specifically programmed protoplasm subjected to life circumstances to produce a transsexual".

Money continues to state that hormonal influences act upon the brain and set up neural pathways to receive post-natal social gender identity signals, so that after birth, the biological programme shifts to one of psychological conditioning, and gender identity becomes largely a matter of biographical history.⁽⁴²⁾ Money and Ehrhardt admit that the social factors are the most influential part of gender identify differentiation, but that pre-natal hormonal factors are necessary to set the direction.⁽⁴³⁾

Benjamin and Ihlenfeld⁽⁴⁴⁾ suggest that for the anatomical male, transsexualism may result from a form of testicular feminisation during the foetal period, in which a biochemical defect prevents androgens from working their masculinising effects on the sex-specific areas of the hypothalamus.⁽⁴⁵⁾ In the anatomic female, it is theorised that androgenic influences on the foetal hypothalamus are increased at a critical stage in the development of the sex-specific structures.⁽⁴⁶⁾

42. Vide later in this chapter for psychological causes.

43. Money and Ehrhardt op cit note 41 supra.

44. Benjamin and Ihlenfeld op cit 456.

45. Ibid, chapter one supra for hormonal tests.

46. Ibid. Dr Armstrong states that the amount of androgen required for masculinising the brain is greater than that required to masculinise the genitals, so that sufficient androgen may be present in the foetus to produce an anatomical male, but still leave the brain improperly differentiated: Fallowell and Ashley op cit 198. This produces some argument against the proposition that the differences between male and female outlook are essentially due to cultural environment and conditioning. There is a case in America, of a normal baby boy whose penis was accidentally cut off by a doctor during circumsision. After discussion, it was decided that the best thing to do would be to convert him into a 'girl'. However, on reaching puberty, this 'girl' is revolting against the feminine role which was imposed, with the masculine gender strongly asserting itself: Fallowell and Ashley op cit 230. Thus it would appear that one cannot simply interchange human sexuality without any regard to the psychological gender, because for the successful transformation one requires the necessary psychological identification, as the true transsexual has. There is also a recent case of two siamese twins having been separated and one of them being turned into a 'girl' (vide chapter six infra). It will be interesting to see how this 'girl' will react when 'she' too reaches the age of puberty.

Erhardt believes that the pre-pubertal years are the ones most crucial to the psyche's gender identity, and that the lack of a competent vagina is not troublesome to a girl, whereas to a young boy, a diminutive penis could be devastating.⁽⁴⁷⁾ This penile defect has been studied in the transsexuals of a remote valley in the Dominican Republic.⁽⁴⁸⁾

These querodoces are born with a clitoris-like phallus, a labial-like scrotum, a blind vaginal pouch and labial testes. All have the normal male XY karyotype. At about the age of twelve, their voices suddenly deepen, muscle mass increases and the phallus enlarges to a functional penis. The Cornell team concluded that the bizarre defect is caused by a deficiency of the enzyme 5 α -reductase, which converts testosterone into dihydro-testosterone, (DHT) in utero and again at puberty, in specific androgen-dependent target tissues. During normal embryogenesis, DHT causes the evolution of the external male genitalia. At puberty the hormone produces facial hair and enlarges the prostate gland. It is concluded therefore that since the Dominican Republic post-pubertal men lack these secondary characteristics, it is the lack of DHT that has attenuated the Y chromosome's effects. Despite their upbringing as girls, these 'involuntary' transsexuals have unequivocally male psychosexual orientation and gender identity as adults.⁽⁴⁹⁾

"Even in 1977 we know precious little of how little boys and little girls grow up to be - and feel like - men and women".⁽⁵⁰⁾

47. Leff op cit 47.

48. Until puberty, these transsexuals seem like normal girls, but then they become psychologically and physically male. In four tiny villages southwest of the Island's capital, Cornell research teams have identified 38 of these querodoces ('penis-at-twelves'); 1 in every 90 births in the area is affected. This phenomenon has been traced back to a single genetic founder (ibid) - a suggestion that perhaps the cause of the syndrome is genetic.

49. Leff op cit 51.

50. Pauly cited in Leff op cit 51.

In 1979, as has been previously stated,⁽⁵¹⁾ it was announced that the H-Y antigen present in normal skin tissue was perhaps a significant factor influencing the Y chromosome.⁽⁵²⁾ Many factors can attenuate this chromosome's control over foetal sexual development. One of these, rare though it is, is microphallus. When a child is born with a fully formed but miniscule penis, "legitimate concern should arise" about whether the boy will be able to perform sexually as a male when he grows up. This, to some extent, goes hand in hand with the theory of Erhardt expressed earlier. However, if one exposes the infant to testosterone, one can obtain the growth of the phallus. Therefore it is obviously essential to know whether one is in fact dealing with microphallic penile tissue, or macrophallic clitoral tissue. Thus, the discovery of the H-Y antigen could prove the most important step in the diagnosis of transsexualism. The research in the subject still continues.

51. Vide chapter one supra.

52. Leff op cit 47. Dr Smith of the University of Washington claims that a "small penis may provide a clue to the foetal testosterone deficiency" (ibid). The surgical alternative to the testosterone treatment is of course the removal of the phallus and gonads and the fashioning of the labia, with the creation of a neo-vagina later. With life-long oestrogen supplementation after puberty, "expectations of normal breast development and normal female identity are excellent": Dr Kulin cited in Leff op cit 47. It is this author's submission that to take the rash steps of either hormonal treatment or surgery in childhood, should be delayed until the person himself, manifests psychologically with which gender he identifies. If the H-Y antigen is going to point exclusively to a masculine gender despite biological features to the contrary, then this will be a major breakthrough in the diagnosis and treatment of gender dysphoria. As recently as March, 1985, a new test for sex has been evolved. At a conference on gender identity disorders at the University of Natal, Pietermaritzburg in December 1985, this author had the opportunity to speak with Dr J Grace of the Bloodbank, Durban, who disclosed that geneticists are at present working on the 'gene probe test' which with luck, will be able to show conclusively whether an infant, despite his apparent karyotype, will develop into a boy or a girl. The test involves a microscopic analysis of the genetic material of the Y chromosome - the masculinising traits of which are contained in the very tip of the chromosome. It is theorised that during crossing-over in meiosis, the X chromosome which is much larger than the Y probably 'burgles' the genes at the tip of the Y - for these two chromosomes, being dissimilar pair end to end and not side by side as all others do - and therefore, even though a chromosome examination may show a Y chromosome present, this chromosome may in fact be genetically inert, because the X chromosome has taken over its genetic material. Only time will tell if this test will in fact be successful in sex determination, or not.

Money and Ehrhardt, although devoting themselves to the theory of hormonal factors in transsexualism, are careful to point out that these factors are "imperfectly understood".⁽⁵³⁾

"There may well be an as yet undiscovered fetal metabolic or hormonal component which acts to induce a predisposition to ambiguity or incongruity of post-natal gender identity differentiation. There may be a special disposition in the organisation of the brain towards the acquisition of roles and their disassociation in the manner of multiple personality... a pre-natal disposition is probably insufficient in itself, and needs to be augmented by post-natal social history."⁽⁵⁴⁾

Much of the theorising concerning hormonal activity is based on animal experimentation. On a scientific level, commentators have criticised such theories. Ann Oakey⁽⁵⁵⁾ for one, has stressed that animal research can only be applied hypothetically to humans, particularly in the field of sexual behaviour. Animals are subjected to a much more direct control mechanism than humans: the latter impose an additional control of learning. She concludes that although androgen may be significantly related to sexual behaviour, the social context of the monkeys used in the experimentation was of great importance.⁽⁵⁶⁾ As far as these animals are concerned, the role of sex hormones in instances of sexual arousal, is clearly outweighed by environmental factors.⁽⁵⁷⁾

53. Money and Ehrhardt op cit note 41 supra.

54. Vide note 60 infra.

55. Ann Oakey Sex, Gender and Society (1972) 113 cited in Raymond op cit 54.

56. For example, female rhesus monkeys injected with androgen show an increase in the male practice of 'mounting' but only if they are dominant members of their group initially. If subordinate females are injected, the incidence of mounting behaviour remains the same. Likewise, when dominant male monkeys who secrete testosterone in excess, are placed in a social environment where their dominance is not recognised, they become inferior members of the group and their testosterone output lessens considerably: ibid.

57. Ibid.

Elizabeth Adkins⁽⁵⁸⁾ in her turn has pointed to a number of factors in animal experiments which make human comparisons from animal data highly dubious. For example, the majority of the animal experiments use copulating behaviour as an example of sex differences. None of the human experiments do.⁽⁵⁹⁾

"The primary effect of early exposure to androgen in the female rat is that the capacity to display lordosis (the receptive posture) is impaired. Yet there is no human behaviour homologous to lordosis and in fact, human sexual behaviour is not particularly controlled by sex hormones at all."

It is of course also difficult to generalise about animal behaviour as there is such a marked species differentiation. Thus, analogies to human behaviour are all the more difficult to make. Humans, to a greater extent impose additional controls on any hormonal experiments,⁽⁶⁰⁾ socio-cultural factors in general, and it is the human ability to rationalise and learn that makes generalisations from other species suspect to say the least.

"The analogy becomes increasingly ridiculous when we add that the non-human female primate has no hymen (or) menopause... the males of these species are dominant, aggressive and show no desire or ability to give the female pleasure."⁽⁶¹⁾

In conclusion, even though biological data have been put forward as etiologies of transsexualism, they are neither conclusive, nor infallible. Be that as it may, these factors may, and probably do influence the 'fixing' of gender in the developing human being.

58. E Adkins 'Genes, Hormones and Gender' cited in Raymond op cit 55.

59. Ibid. _____

60. Observers have pointed out that human hormone levels vary according to environmental circumstances - many forms of stress have been correlated with a drop in testosterone level: J.W. Mason 'Psychologic Stress and Endocrine Function' cited in Raymond op cit 57.

61. Oakey op cit note 55.

b. Psychological Causes ⁽⁶²⁾

If biology begins the programme of gender identity, social factors set the direction of that behaviour. Basically, a social problem exists when there is a sizeable discrepancy between what is and what people think ought to be. ⁽⁶³⁾ Social problems can be categorised into two broad classes:

1. social disorganisation - which refers to the inadequacies in the social system that keep people's individual and collective purposes from being realised.

There are four main sources of social disorganisation: ⁽⁶⁴⁾

- a) conflicting interests and values;
- b) conflicting status and role obligations;
- c) faulty socialisation; ⁽⁶⁵⁾ and
- d) faulty social communications.

62. T Szatz The Myth of Mental Illness (1961), describes psychotic disorders as 'problems in living'. He does not view psychiatry as dealing with illnesses in the traditional sense, but rather as dealing with the inability to cope with the problem of being human. J Schafer Humanistic Psychology (1978) states that "a source of existential anxiety is individualisation, which guarantees that despite the possibilities of communication and empathy, we can never fully discover what it feels like to be somebody else. We are born alone and we die alone": cited (March 1983) 156 Nursing Mirror 9. It is submitted that this sobering thought makes it all the more vital that there should be understanding in our communication with others - to lift the scales of prejudice from our eyes and to allow compassion into our hearts.

63. R Merton and R Nisbet (eds) Contemporary Social Problems (4th ed 1976) 7.

64. Ibid.

65. Socialisation is the acquisition of the attitudes, values, skills and knowledge needed to fulfill social roles, or to modify them effectively: ibid.

2. deviant behaviour.⁽⁶⁶⁾ Whereas social disorganisation involves the defective arrangement or breakdown of systems of statuses and roles, deviant behaviour involves significant departures from norms socially assigned to various roles.⁽⁶⁷⁾

Two groups of deviant behaviour must be distinguished:

- a) non conforming behaviour; and
- b) aberrant behaviour.⁽⁶⁸⁾

Non conformers announce their dissent publicly. They challenge the legitimacy of social norms and their applicability to certain situations. Aberrants, on the other hand, try to hide their departures from social norms. They also acknowledge the legitimacy of the norms they violate: it is only that they find it expedient to violate them.⁽⁶⁹⁾ Transsexuals fall into the first group, homosexuals into the second.

Illness, whether physical or mental, is not only a misfortune, but a source of deviance.⁽⁷⁰⁾ The ill person cannot meet normal expectations. But we do not as a general rule, regard people who are ill to be at fault for their illness. In contemporary society, we respond to illness by providing health services: it is generally assumed that the medical profession will bring knowledge and technical skills to bear, in order, either to cure the 'disease' or limit its impairment.⁽⁷¹⁾

66. Merton and Nisbet op cit 25.

67. The term 'deviant behaviour' has become swollen with the connotation of moral censure. Yet frequently, departures from the established social norms do not work against the interests and values of significant groups, or even society at large. Ibid.

68. Ibid.

69. Ibid.

70. Merton and Nisbet op cit 105.

71. The problem should be in the doctor's hands. If he intimates a course of treatment, this decision should be respected. The practitioner should not be thwarted by old-fashioned legal attitudes. It is submitted that the law - in its service of the community - should follow closely in the footsteps of the medical profession when the issue at stake is the particular concern of the latter.

Mental disorders vary in type and severity, just as physical illnesses do. When we speak of a mental disorder, we mean to denote significant departures from normal cognitive and emotional functioning, so that the individual is impaired. The impaired individual may not see himself as ill, even though he may be desperately miserable.⁽⁷²⁾ Regardless of the cause of the disorder, the behaviour of the person will express not only distortions in thought processes or emotional upset, but also something of the normal personality and concerns of the person. Some mental disorders result from organic functions and some from stressful psychological experiences - often coupled with personality vulnerabilities - and some primarily reflect faulty strategies that have been learnt earlier in life.⁽⁷³⁾

Most studies advocating the psychological etiology of transsexualism, emphasise disturbance in early childhood.⁽⁷⁴⁾ Although the new born infant may be in a 'pre-psychological' state for several weeks following birth, the child begins to receive gender identity signals as the vital maternal-infant bond is developed. It is within the context of this bonding that the infant's social and psychological potentials unfold. If the bonding is delayed or impaired, the likelihood of later disorders in the child, increases.⁽⁷⁵⁾

72. Merton and Nisbet op cit 222.

73. Ibid.

74. R Green 'Sexual Identity and Conflict in Children and Adults' cited in E Halle et al 'The Role of Grandmothers in Transsexualism' (4 April 1980) 137 American Journal of Psychiatry 497.

75. Schwartz and Schwartz Vulnerable Infants: A Psychological Dilemma (1977) 108. The incidents of neurological and psychological abnormalities occurring during the first year of life is 4 times greater for premature babies as it is for full-term infants. On birth, not only the child suffers from separation from the mother during incubation, but so too does the mother suffer. The most pronounced examples manifest themselves in the guilt of and depression from producing an 'inadequate' child, which may lead to emotional rejection of the infant, or a dangerous lowering of maternal self-esteem. All of these are detrimental to the normal development of the child. Doctor Stoller too particularly emphasises the cause of dissonance between anatomical sex and psycho-social gender as the disturbance of the mother-child bond, early in life: Leff op cit 56.

Money states specifically that the critical period for gender identity is between the ages of 12 to 18 months. This is so because child-rearing in our culture is sexually distinctive, and from the date of birth the child receives gender identity signals from its parents.⁽⁷⁶⁾ He adds that there are exceptions to this age ceiling but that this is due to confused gender-rearing practices, for example, when parents are given conflicting diagnoses of their infant's sex. But he maintains that in the normal process of gender identity, the locking tight of the process occurs at an incredibly early age.

"When the gender identity gate closed behind you, it locked tight. You knew in the very core of your consciousness that you were male or female. Nothing short of disaster could ever shake that conviction... Once a sex distinction has worked or been pressured into the nuclear core of your gender schema, to dislodge it is to threaten you as an individual with destruction."⁽⁷⁷⁾

Obviously the theory that 'core' gender identity is locked tight by the age of 18 months has utmost relevance, for causation theories on transsexualism. The limit of 18 months may be a little arbitrary, but what is certain is that such gender identity is formed at a very early age:

"I was three or perhaps four years old when I realised that I had been born into the wrong body, and should really be a girl... What triggered so bizarre a thought I have long forgotten but the conviction was unfaltering from the start."⁽⁷⁸⁾

76. Raymond op cit 62.

77. J Money and P Tucker Sexual Signatures on being a Man or a Woman (1975) 119 cited in Raymond op cit 64.

78. Morris op cit 9.

By the time one is eight years of age 80% of one's brain cells have developed. There is the same rate of development in the human brain from the age of eight to eighty years, as there is between the age of seven and eight years. (80) Thus, one's concept of oneself will have become embedded firmly by the time one reaches the age of eight: one's identity has formed. Any conceptions formed during these critical years are consequently so much harder to break than any other conceptions formed later. Thus, if someone has been raised consciously or subconsciously in the role of a member of the opposite sex, it would appear to be virtually impossible to alter this state. (81)

Robert Stoller, psychoanalyst, has probably done the major work in developing psychological theories about causes of transsexualism, in the study of nine cases of male-female constructed transsexuals. (82) He refers to his basic approach as 'mothers feminised phallus' or 'blaming the mother'. He attributes male transsexualism to a classic mother-child relationship that occurs within the context of a disturbed marriage. (83) In the clinical cases under mention, the mothers were generally unhappy women, who often in early life wanted to be males themselves, and who in their marriages, were dominant and assertive. The child serves the mother as a phallus for which she has supposedly yearned. Masculinity is consequently not developed in the son. The transsexuals' fathers were supposedly passive men who were consistently absent from home, either physically or emotionally. The child himself did not pass through the normal formative stage of separation from the mother and subsequent individualisation.

80. Information supplied by members of staff in the Department of Psychology, for the degree of BSc Nursing, University of Natal, Durban. It was also imparted to this author that consequential to this data, the De Lange Commission is advocating that compulsory pre-primary school should commence at least one year prior to school - i.e. at about the age of four - because of the fact that the most important years of a child's life are those till the age of eight. Therefore, any culturally or environmentally deprived children would not suffer such a disadvantage if they were stimulated through the school environment during the most critical developmental stage: Joan Beck How to raise a Brighter Child (1976).

81. There is only slight hormonal production until puberty and by that time one has identified oneself sexually, mainly through environmental influences. It is unlikely therefore, according to members of staff (note 80 supra) that the pre-pubic period is important for any hormonal malfunction as regards sexual identity, except where chromosomal aberrations occur, or where the individual has been subjected to external hormonal influences.

82. R Stoller The Transsexual Experiment (1975) 38, cited in Raymond op cit 76.

83. Ibid.

The mother turned to her son for continuing fulfillment, concentrating totally on him and encouraging him to identify with her.⁽⁸⁴⁾ According to Stoller, given this extreme mother-son symbiosis which sometimes lasted into pubertal years, the boy began to feel that he was a woman despite the evidence of his senses that he was anatomically male. Having thus developed the 'core' gender identity in the early years of life, the boy cannot develop later on, along culturally dictated, masculine lines.

"The similarities of the findings are probably beyond coincidence; it appears, as has been noted often before in other males with strong feminine identification that the femininity of these males is the result of too much mother and too little father. These data do not point to a genetic, hormonal or other physiological element significantly contributing to the boy's gender identity... my thesis, to be better tested in the future, is that the degree of femininity that develops in a boy, and the form it takes, will vary according to exactly (not approximately) what is done to him in earliest childhood."⁽⁸⁵⁾

Although there are males who have a strong symbiotic relationship with their mothers in early childhood, and who do not emerge as transsexuals, it is because the quality of the relationship was different. Most probably, the mother did not have the same kind of physical relationship with her male child. Generally, in the transsexual's family, the marriage was held together in name only: although parents existed under the same roof, the marriages were sexless, and by and large, emotionally barren.⁽⁸⁶⁾

84. Ibid.

85. R Stoller 'Parental Influences in Male Transsexualism' cited in Green and Money op cit 166.

86. Ibid.

Although there are differences between male and female transsexuals, Stoller again, in dealing with female transsexuals, blames the mother.⁽⁸⁷⁾ The female infant who lacks feminine grace, and who is not 'cuddly' has a mother unable to show any emotional tone largely due to depression. Again, the father is rather passive and has little or no emotional rapport with his wife and child. As a result, the girl is used by both parents as a father-substitute to alleviate the mother's depression. The child's acting out of masculine characteristics is encouraged and becomes self-perpetuating as a sense of masculine identity.⁽⁸⁸⁾

Harry Benjamin also subscribes to the 'blaming the mother' syndrome.

"Typically, the mother keeps the male infant to herself. She gratifies his wishes instantly whenever possible. She enjoys and encourages actions which keeps the child close to her, and discourages attempts to move away. However, as the child grows, the mother may not be able to handle aggressive and active play and directs the male child to quieter companions, possibly girls. Gradually the child learns that the feminine actions bring a positive response from the mother and other members of the family."⁽⁸⁹⁾

N. Lukianovicz⁽⁹⁰⁾ suggests that the issue of 'castration anxiety' is one cause of transsexualism. (Obviously, this has no bearing on the female transsexual.) He maintains that the male transsexual attempts to overcome the anxiety of castration by creating an imaginary 'phallic woman' and subsequently identifying with and becoming her. This fantasy of a phallic woman, is a substitute for phallic exhibition which is inhibited by the castration anxiety.

87. Stoller op cit note 82 supra.

88. Ibid.

89. Benjamin and Ihlenfeld op cit 454.

90. N Lukianovicz 'A Survey of Various Aspects of Transvestism in the Light of our Present Knowledge' (1959) 128 Journal of Nervous and Mental Disorders 458.

Another psychoanalyst's explanation blames transsexualism on separation anxiety.

"To alleviate this anxiety, the child resorts to a fantasy of symbiotic fusion with the mother. In this way, mother and child become one and the danger of separation is nullified. We believe this reparative fantasy to be a psycho-dynamic basis for transsexualism in the male, and the transsexual phenomenon can be understood clinically as attempts to ward off any threats to the psychic fusion with the mother."⁽⁹¹⁾

According to this explanation then, the transsexual literally becomes the mother and to sustain this fantasy, he seeks to reverse his anatomical sex.

Henry Guze⁽⁹²⁾ offers 'experience deprivation' during critical periods of childhood development, as a primary cause of transsexualism. He maintains that as a rule, boys will develop psychologically in a feminine direction unless a male model is present in some way. "A boy child is superficially more like a girl... until he reaches pubescence".⁽⁹³⁾

91. L Oversey and E Person 'Gender Identity and Sexual Psychopathy in Men: A Psychodynamic Analysis of Homosexuality, Transsexualism and Transvestism' (1973) 1 Journal of the American Academy of Psycho-analysis 54.

92. H Guze 'Psycho-social Adjustment of Transsexuals: An Evaluation and Theoretical Formulation' cited in Green and Money op cit 179.

93. This is similar to the line of thought of Ramey and other commentators of the same school, that all foetus's are female, and only with strong administration of androgens, is there masculinisation.

Lately it has been suggested,⁽⁹⁴⁾ that the father is the parent whose role behaviours may be the most likely to generate sex appropriate behaviours in children.⁽⁹⁵⁾ Paternal characteristics that foster the development of normal gender identity in children include paternal nurturing and dominance.⁽⁹⁶⁾ In contrast, the sex role learning process is adversely affected when fathers are either physically or psychologically absent from home.⁽⁹⁷⁾ Thus, the impact of paternal deprivation on psychosexual adjustment is most conspicuous in homosexuals and transsexual men.⁽⁹⁸⁾ Family dynamics of the male transsexuals studied here are also characterised by an overly-close relationship with the mother - as other research has shown - and by the passive, absent father.⁽⁹⁹⁾ In a study of 43 Swedish transsexuals, parental deprivation - as defined by divorce, death, illegitimacy, or placement away from home - was significantly higher in the transsexual group, occurring in 54% of the cases.⁽¹⁰⁰⁾

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94. B I Pagot 'Sex Differences in Toddlers' Behaviour and Parental Reaction' (1974) Developmental Psychology 10.
95. In the context of a review of adult cases of gender disturbance, a clinical study was pursued on the status of the father or father-substitute for 46 boys with deviations in male role development. Significantly fewer male models were found in the family backgrounds of severely gender-disturbed boys, as compared to mildly gender-disturbed boys. Male childhood gender disturbances was also found to be correlated with a higher incidence of psychiatric problems in both the mothers and the fathers and with atypical patterns of the boys involvement with their parents: (ibid).
96. E M Hetherington and J L Deur 'The Effects of Father Absence on Child Development' (1971) cited in Rekers et al op cit 32.
97. Mead and Rekers 'The Role of the Father in Normal Psychosexual Development' cited in Rekers et al op cit 32.
98. Ibid. However, as the majority of this research has had to rely on retrospective reports of the adult homosexuals, etcetera, one has to combat the influence of distorted memory. The person, usually to some extent, superimposes his adult outlook on his childhood feelings. So this father study is used to avoid some of the limitations inherent in the retrospective research: (ibid).
99. Ibid. _____
100. J Walinder Transsexualism A Study of 43 Cases (1967) cited in Rekers et al op cit 34.

Again, on the basis of clinical observation of 38 boys, boyhood femininity has been associated with the absence of an older male model during the boys' first years of life; maternal dominance, early rejection by the fathers and the indifference to or encouragement of, feminine behaviour by either parent. (101)

Stoller believes that the familial constellation of male homosexuals differs from those of male transsexuals in several respects. While the mothers of both groups are domineering and over-protective, the mothers of the transsexuals were, in addition, more competitive with males in their own childhoods and early adolescence and were more likely to encourage 'blissful closeness' with their sons. While the parents of homosexuals are more likely to divorce, the parents of transsexuals are more likely to remain married despite their psycho-physical estrangement. (102)

In the latest study on the causes of transsexualism, (103) 46 male children were referred to the child gender identity clinic of the University of California. Data on the psychiatric histories of the families were available for 30 of the 46 subjects. In 80% of the cases, mothers had a history of mental health problems and/or treatment, while the corresponding figures for the fathers was 45%. These findings suggest that the parents - especially the mothers of gender-disturbed boys, have a history of less than adequate psychiatric adjustment. (104) 67% of the biological fathers of the subjects were physically absent from home. 80% of the boys were under five years of age when the separation occurred. For the entire group, 38% had no male role present in the home. (105) When a father-figure was physically present, he was often psychologically remote from his family. In 82% of the cases the mother was the likely parent to which the child turned for sympathy.

101. Green op cit note 74 supra.

102. Cited in Rekers et al op cit 34.

103. Rekers op cit 35.

104. Ibid.

105. Ibid.

In addition, these boys were more likely to object to any separation from their mothers.⁽¹⁰⁶⁾ The various sources of clinical evidence above, suggest that fathering variables are correlated with male-role disturbance: this implicates a critical relationship between male gender-disturbances affecting the male-role model deprivation in the family.⁽¹⁰⁷⁾

Another line of research studies the role of the grandmother in the lives of gender-disturbed people.⁽¹⁰⁸⁾ Halle et al reported that after a course of six years evaluation of gender dysphoric subjects, a number of the patients spontaneously divulged that their maternal grandmothers had played a significant role in raising them during early childhood.⁽¹⁰⁹⁾ The grandmothers were described as "supportive, loving, and accepting of the patients' early feminine behaviour and cross-dressing". In addition, the grandmothers were admired for being strong and firm, yet willing to teach traditionally female homemaking skills. The mothers were characterised as capable, self-sacrificing, hard working and affectionate individuals who were often absent because of the need to work.⁽¹¹⁰⁾ In every case in which the grandmother was alive at the time of the evaluation, she was reported as being supportive of surgical reassignment.⁽¹¹¹⁾ Almost one third of a year's sample of patients diagnosed as transsexuals, were reared in a family setting in which the maternal grandmother was an important parental figure during early childhood. The presence of grandmothers per se does not lead to the development of transsexualism. However, the data suggest that the behaviour and attitudes of the grandmothers, played a role in the development of the disorder.⁽¹¹²⁾

106. Rekers et al op cit 38. _____

107. Rekers et al op cit 41. _____

108. Halle et al op cit 497. _____

109. Ibid. _____

110. Ibid. _____

111. Halle et al op cit 498. _____

112. Ibid. _____

According to the psychological theories, if the individual fails to adjust to his/her 'native' body and role, then he/she should be treated. If all forms of family and personal therapy fail to adjust the transsexual's mind to his/her body, then the transsexual's own solution of adapting the body to the mind should be given serious consideration. (113)

Whichever psychological theory is one's personal preference, it is submitted by this author, that however one views the problem both parents are to blame equally. One, for over-passiveness and the other for over-activeness. Although there is no clear-cut cause for gender dysphoria, it is nevertheless apparent that the environment and family relationships play crucial parts in the development of that very special and highly susceptible entity - the child. As every human being is, by nature, a combination of male and female - the yin and the yang - and as the balance between the two is so very fine in the formative years - and of course, also subject to possible hormonal and other metabolic influences - it is, to this author, no easy task to avoid gender disturbances in the precarious occupation of raising a child.

113. Raymond op cit 70. There are basically two types of male-female transsexual:

1. the male may alternate between female and male roles for years, but eventually the female personality becomes the stronger, demanding final repudiation of the male role. A forceful, persistent demand arises to be rid of the offensive-appearing male genitalia;
2. a boyhood of being a 'sissy'. He has an interest - and is usually encouraged - in pretty things, especially as regards feminine activities. Greater sexual pleasures arise from playing a feminine role and satisfying a man; E. Crovitz 'Treatment of the Transsexual and Medicolegal Issues' (1976) 1 Forensic Science 5.

C H A P T E R I V
THE TREATMENT FOR TRANSSEXUALISM

I INTRODUCTION

"Oh, who shall from the dungeon raise

A soul enslaved so many ways?

With bolts of bones that fettered stands

In feet, and manacled in hands..." (A. Marvell: A Dialogue Between
the Soul and the Body).

Since transsexuality captured the limelight in the 1950's,⁽¹⁾ it has become both a dilemma and a controversy in medicine and law. Basically, the phenomenon emerged into an interdisciplinary void and today, both scientists and lawyers are being asked to fill that void with acceptable answers. Having discussed in the preceding chapters the medical issues for tests for sex determination, various classifications of sex types and the possible causes of transsexualism, it is the object of this chapter to deal with the treatment available to the transsexual. By and large, the true transsexual does not respond to any form of psycho-analysis and therefore, the only 'curative' route open to him seems to be corrective surgery.

"...if we cannot alter the conviction to fit the body, should we not in certain circumstances, alter the body to fit the conviction?... I had reached the conclusion myself, that sex was not a division, but a continuum, that almost nobody was altogether of one sex or another, and that the infinite subtlety of the shading from one extreme to the other was one of the most beautiful of Nature's phenomena. Sex was like a biological pointer, but the gauge upon which it flickered was that very different device, gender. If sex was a matter of glands or valves, gender was psychological, cultural, or in my own view, spiritual. If one's sex, I reasoned, fell into the right place along the scale of the gender, well and good; if it fell anomalously... then came the conundrum. But, if one could not shift the scale, one could surely move the pointer. Gender might be beyond definition: sex, science could understand."⁽²⁾

1. Principally due to the sensational case of Christine Jorgensen.

2. Morris op cit 50.

II THE HISTORICAL BACKGROUND

History is littered with instances of auto-castration and genital mutilation: the manifestation of an individual's intense desire to 'change sex'. Sophocles' Tiresias, Virginia Woolf's Orlando and Gore Vidal's Myra Breckinridge have explored the idea of gender transformation in the context of literary fantasy. Such fantasy has given way to reality as advances in biomedical technology have allowed transsexuals to acquire opposite sex primary and secondary characteristics. (3)

Cultures both ancient and contemporary, have freely recognised a no-man's land between male and female and have allowed people to inhabit it without harassment. (4) The physicians of Anatolia for instance, castrated men who felt themselves to be female, permitting them henceforth to live in the female role. Hippocrates too, reported the existence of 'un-men' amongst Scythians: they bore themselves as women, did women's work and were generally believed to have been feminised by divine decree. (5) In ancient Alexandria, we read of men "not ashamed to employ every device to change artificially their male nature into female" - even to the amputation of their genitalia. (6)

Among more primitive peoples as recorded by Sir James Frazer in the Golden Bough,

"there is a custom widely spread... in accordance with which some men dress as women and act as women throughout their lives. Often, they are dedicated and trained to their vocation from childhood." (7)

So too, we find the Sarombavy of Madagascar, who altogether forget their sex and are regarded as entirely female. (8) The 'soft men' of the Chukchee Eskimo were ordered into the assumed sex by the elders at childhood, were

3. Fleming (1) op cit 14. _____

4. Morris op cit 45. _____

5. Vide chapter three supra. _____

6. Morris op cit 468. _____

7. Ibid. _____

8. Ibid. _____

permitted to marry men and lived as women for the rest of their lives. We also hear of Andean sorcerers obliged - by tribal laws - to change roles; of Mohare Indian boys publicly initiated into 'girlhood'; of young Tahitians encouraged in infancy, to think of themselves as members of the opposite sex. The examples are endless, and it is a common trait among less-sophisticated peoples, that to straddle the sexes was not a disgrace, but a privilege and often was accompanied by supernatural powers and priestly functions. (9)

Perhaps the first sex conversion operation occurred at the command of the Roman Emperor, Nero. It is believed that Nero, in a rage, kicked his pregnant wife in the abdomen and killed her. He attempted to find someone else whose face resembled hers, and the person who came closest to filling the order was a young male, ex-slave, named Sporum. Nero reportedly ordered his surgeons to transform Sporum into a woman and after the conversion, the two were formally married. (10)

While Abraham (11) reported on the first sex reassignment of two male transvestites in 1931, it was not until the publication of Lily Elbe's controversial autobiography (12) that corrective surgery became popular and a practical solution for the transsexual's dilemma.

9. Ibid.

10. Bromwell op cit 404. Nero notwithstanding, it has been suggested that the first known instance of real sex reassignment was that of a young Danish painter, Einer Wegener, who came to think of himself as two people - male and female. Haunted and confused by the situation, he found his way in 1930 to the clinic of a pioneer Dresden sexologist, and there, in a series of operations, his male physique was altered, and an attempt was made to substitute female organs. Nothing was known of hormones then and the doctors even tried to transplant ovaries into his body. But although for a time, he was able to live happily in his new sex role, his moment of release was brief, for he died the following year: Morris op cit 47.

11. F Abraham 'Genitalunwandlung an zwei maenlichen transvestiten' (1931) 18 Zeitschrift für Sexualwissenschaft 223.

12. N Hayer Man into Woman (1933) cited in L M Lothstein 'Sex Reassignment Surgery: Historical, Bioethical and Theoretical Issues' (1982) April 139 American Journal of Psychiatry 417 at 418.

In the years between 1931 and 1952, sporadic and piece-meal reports of transsexuals undergoing operations came forth, primarily from Germany and Switzerland.⁽¹³⁾ In 1951 an American George Jorgensen, managed to obtain surgery in Denmark,⁽¹⁴⁾ under a team of Danish physicians headed by Christian Hamburger. Since the publication of her autobiography,⁽¹⁵⁾ many fellow-sufferers have attempted to emulate her. But doctors were still very against the surgery mainly on account of possible adverse publicity,⁽¹⁶⁾ and they were also repelled by the thought of being pestered by all kinds of exhibitionists.⁽¹⁷⁾

The operation has only in the last three decades, become 'respectable'. Up till the 1960's, it was considered by most surgeons to be a cross between a racket and a very expensive placebo. It was, wrote one London practitioner in the late 1950's, as though when a man said he was Nelson, you were to cut off his arm to satisfy his illusion.⁽¹⁸⁾

13. Raymond op cit 21.

14. At the time that Jorgensen was transsexed, there were few places which offered the surgery - Istanbul, Casablanca, Germany and Switzerland were the most frequent locations to which transsexuals travelled, provided they could afford the cost and were willing to risk little, if no medical follow-up (ibid).

15. C Jorgensen A Personal Autobiography (1968).

16. Vide Dr Pauly's survey in Chapter five infra. See also MM Belli 'Transsexual Surgery: A New Tort?' (1978) Journal of Family Law 487 at 489.

17. Morris op cit 115.

18. Ibid. There have been forty four cases of auto-castration reported in England since 1900. Before 1954 reports, all publications were of psychotic individuals with organised delusions: M A Haberman 'Autocastration in Transsexuals' (1979) 135 American Journal of Psychiatry 437.

Then in the late 1960's, Dr Harry Benjamin began treating transsexuals and publicising his research. With the founding of the Harry Benjamin Foundation in 1964, Benjamin brought together a group of professionals from many specialities, to do systematic research on transsexuals.⁽¹⁹⁾ A major expansion of research in this field occurred in 1967 when the Johns Hopkins Gender Identity Clinic in Maryland announced that it would be the first American institution to devote itself to the performance of transsexual surgery, on a select but serious scale.⁽²⁰⁾ It was not until this institution began that corrective surgery gained acceptance and was begun to be performed in other respected medical institutions.⁽²¹⁾

By 1972, when Jan Morris underwent the surgery, the climate of medical opinion had shifted largely due to the persuasion of Dr Benjamin. The old psychiatric treatments had been discredited and more doctors conceded that surgery might, after all, be the right approach to the problem which by now was not uncommon.⁽²²⁾

"Psychotherapy, with the aim of curing transsexualism... is a useless undertaking with present available methods. The mind of the transsexual cannot be changed in its false gender orientation. All attempts to this effect have failed."⁽²³⁾

19. Raymond op cit 21. Although the operations have been possible surgically since the early 1930's the hormonal and surgical techniques were not refined and made public until the 1950's.

20. Ibid. This institution has subsequently closed, but the reasons therefor do not appear to be clear cut.

21. There are now an estimated 30 institutions: Raymond op cit 22.

22. Morris op cit 115. Experts in the field of transsexualism have concluded that in every reported case, the psychological treatment of trying to cure the transsexual of his/her belief, is futile.

23. Scott Cole op cit 331.

III THE PROCEDURE

Gender identity clinics have been instituted in America among other countries, to counsel and refer candidates for surgery if they are judged to be real transsexuals. (24) The Johns Hopkins Hospital has served as a model for others of the same nature. (25) It consisted of a team of psychiatrists, psychologists, plastic surgeons, gynaecologists, urologists and endocrinologists. A potential patient is extensively tested, interviewed, evaluated and scrutinised by this selected team. Only when this evaluation indicates that this individual is, in all likelihood, a true transsexual and is physically and mentally suited to treatment, can he proceed to surgery. (26)

In treating the transsexual according to the Johns Hopkins method, there are four general areas of management which the medical practitioners must observe: (27)

1. evaluation of motivation for corrective surgery;
2. evaluation of the patient's understanding of the practicalities of changing sex; (28)
3. implementation of an extensive pre-operative trial period; and
4. for those who undergo the surgery, a period of post-operative adjustment. (29)

24. There are no such institutions in South Africa, as far as this author could ascertain and no set prescribed regulations.

25. Raymond op cit 21.

26. Ibid. This evaluation is very important and unfortunately is not followed in many jurisdictions, including South Africa. This author is therefore taking the example of the American clinics, as they appear the most thorough.

27. Ibid.

28. Which obviously involves the legal issue of consent.

29. R Green Human Sexuality : A Health Practitioners Text (1975) cited in Bromwell op cit 407. This is crucial, as it affords the patient a feeling of belonging, and not having simply been a guinea pig.

A. Pre-operative Screening

Screening to eliminate those with serious mental problems, is but one phase of the psychological evaluation.⁽³⁰⁾ The assessment of transsexualism has taken many forms.⁽³¹⁾ All have focused on either establishing standardised procedures that will differentiate transsexuals from non-transsexuals, or attempting to predict who, among a group of transsexuals, will receive surgical correction.⁽³²⁾

The 'Draw a Person Test' (DAP) is one of the most frequently used projective measures employed in this area of research. Since 1949 and the early work of Machover,⁽³³⁾ it has been argued that the sex of the first figure drawn on the DAP reflects the drawer's sexual identity. The assumption is that if the sex of the first figure drawn is opposite to that of the drawer's anatomical sex, there is a strong likelihood that the subject is sexually maladjusted. Although there have been criticisms levelled at this proposition in the past, there is also more recent, moderate support for the contention.⁽³⁴⁾ In a recent study which examined DAP drawings of a few transsexual men and women, Fleming and associates⁽³⁵⁾ found that male transsexuals drew female figures first, significantly more often than a population of non-transsexual men. Similarly, but to a lesser degree, female transsexuals drew male figures first, more often than the control group of non-transsexual women.

30. Most gender clinics report that many applicants for surgery are actually sociopaths seeking notoriety; masochistic homosexuals, or borderline psychotics; Belli op cit 49.

31. M Fleming er al 'The Use of AODT in the Assessment and Disposition of the Transsexual' (1982) 38 Journal of Clinical Psychology (hereinafter referred to as 'Fleming (2)') 408.

32. Ibid.

33. Ibid.

34. Ibid.

35. Ibid.

It has been noted that one of the inherent problems with the DAP is that it requires the drawing of a human figure which must be either male or female and it is felt that this may interfere with an important aspect of projection.⁽³⁶⁾ Because gender is a crucial variable in the assessment of transsexualism, it is important to have a measure that does not rely on a choice based on sex, but allows for the fullest and most accurate assessment of the underlying core gender.⁽³⁷⁾

The 'Animal and Opposite Drawing Technique' (AODT) - first introduced by Koocher and Simmons in 1971 - requests that the subject draw one animal and then another which he considers to be the opposite of the first.⁽³⁸⁾ The presence or absence of sexual opposites in an AODT protocol is therefore a valuable variable because gender is only one dimension along which two animal figures can be opposed.⁽³⁹⁾

Nineteen transsexuals of Boston Gender Identity Service were administered the DAP and the AODT tests. At the end of the evaluation process, ten were recommended for, and subsequently underwent, surgery.⁽⁴⁰⁾ In order to establish the sex of the animals drawn in the AODT,⁽⁴¹⁾ eighty normal controls - matched on age and education of the subjects - were asked to rate each

36. Ibid.

37. Ibid.

38. It is important to note that, unlike the DAP, the AODT does not instruct the subject to draw a second figure which is opposed in sex, and therefore allows the subject to oppose drawings along a variety of dimensions (ibid.).

39. In addition, sex must be projected onto the animal drawings, because animal types are not clearly representative of any gender.

40. Fleming (2) op cit 421.

41. Ibid.

animal as either masculine or feminine.⁽⁴²⁾ A content analysis was then performed on the transsexuals' responses to the question of why the animals drawn were opposite.⁽⁴³⁾ An example of each response category is presented by the Table⁽⁴⁴⁾ which is exhibited below.

RESPONSE CATEGORIES ON AODT TECHNIQUE

CATEGORY	EXAMPLE
1. Domesticity	one animal tame, other is wild
2. Physical characteristics	one animal furry, other is slimy
3. Sex	one animal male, other is female
4. Predator-prey	one animal hunts, other is hunted
5. Natural habitat	one animal lives in water, other in air
6. Disposition	one animal courageous, other is timid
7. Active-passive	one animal aggressive, other is passive
8. Size	one animal large, other is small
9. Myth-reality	one exists, other doesn't really
10. Conventional Comparison	one animal always opposed to the other (e.g. dog and cat fight)
11. Other	one animal graceful, other clumsy one animal intelligent, other dumb
12. Total no. of responses	Count of no. of responses by subject

Tests were performed on all twelve of the response categories, which were carried out in order to examine differences within the various dimensions along which the transsexual subjects opposed their two animal drawings. All ten of the "biological" females drew male animals first, and all ten of the post-operative subjects (5 men and 5 women) drew first figures opposite to their "biological" sex. Only the non-operative male-females drew first figures that were congruent with their "biological" sex.

42. Those animals not rated either male or female were designated 'neuter'. Animals designated feminine were: cat, swan, angelfish, bird, goldfish, pig, mare and rabbit. Those rated masculine were: dog, horse, turtle, hamster, donkey, hippo, rooster, dragon, tom cat, pug dog, sheep dog, and wire-haired terrier. The only neuter animal was a spider (ibid).

43. Twelve categories were created, vide the table above.

44. Fleming (2) op cit 422.

In short, it appears that successful candidates for surgery, drew first animals opposite to their own "biological" sex, using as their basis of opposition mainly the criteria of sex. Those transsexuals who are viewed as unlikely candidates for surgery, do not use the animal's sex as a basis for their opposition. (45)

The motivation for corrective surgery is another important factor. Some male psychotic homosexuals and transvestites might feel the need to become females to facilitate their sexual enjoyment in a less hostile setting. Males with these disorders would be poor candidates since their sexual identification is- and always has been - male. (46) The males for whom corrective surgery should be most successful are those who, from an early age, were femininely identified and behaved as girls. They also probably belong to a female circle of friends, do not find cross-dressing sexually arousing as do transvestites - and are sexually attracted to heterosexual males unlike homosexuals. (47)

Motivation for women differs somewhat. There is no female equivalent to the male transvestite. No females report arousal by wearing men's clothing. (48) The women who make the best candidates for the surgery are those who behaved as tomboys and retained masculine traits during adolescence. These females must be distinguished from 'butch' lesbians - very masculine acting homosexual females - who consider themselves very masculine, but not men. (49)

45. Fleming (2) op cit 424 _____

46. Bromwell op cit 407. _____

47. Ibid. _____

48. Ibid. _____

49. Ibid. _____

For the doctor attempting to help the potential transsexual, historical analysis differs from the average patient. Since potential transsexuals appear to be greatly affected by accounts of their biological features, clinical emphasis has shifted from evaluating their history, to evaluating their present and future. Thus the patients are obliged to live in the chosen sex role for a period of time.

B. Pre-operative Treatment Period

This living in the desired sex role is to assess the measure of success hoped to be achieved after actual surgery has been undertaken. This obviously brings with it, a number of legal problems and social difficulties.⁽⁵⁰⁾ A most important consideration is the length of time in which the patient is observed, prior to surgery. Dr Randell of Charing Cross Hospital, London, requires his patients to live in the desired sex for at least six months prior to surgery.⁽⁵¹⁾ He does not consider the surgery justified unless there has been

"...unequivocal demonstration that they are markedly better adjusted in the role they desire than the role they have left."⁽⁵²⁾

During this pre-operative period, contra-sex hormones are usually administered.⁽⁵³⁾ Since the discovery of hormones early in the century, they have been successfully isolated and produced.⁽⁵⁴⁾ For males, the administration of the female hormones oestrogen and progesterone, is prescribed. This is referred to as 'hormonal castration'.⁽⁵⁵⁾ This hormonal treatment has two effects:

50. Vide chapter five infra, which deals with such legal issues.

51. Smith op cit 978.

52. Ibid.

53. Bromwell op cit 408.

54. Morris op cit 100. She reveals that the pills she took thrice-daily, were manufactured in Canada from the urine of pregnant mares (ibid).

55. Raymond op cit 32.

1. it suppresses the existing physiological characteristics; and
2. develops and maintains the opposite anatomical sex characteristics. (56)

"This femininisation of the male patient can be accomplished by female hormones... which develop the breasts, soften the skin, reduce the body hair, diminish erections and decrease libidinous conflict by suppressing testicular androgen production." (57)

In addition, the gonads are inhibited, the testes atrophy, the distribution of the subcutaneous fat is altered in the female direction and muscular strength diminishes. Very often, beard growth hardly diminishes and for this reason, the transsexual is obliged to undergo a costly and discomforting process of electrolysis. (58) As regards the voice, there is very little alteration, and many of the transsexuals seek speech therapy. (59)

Hormones are administered in diverse ways: the oestrogens of 17B estriol and esterone can be taken orally. Estradiol-monobenzoate can be intramuscularly injected, biweekly. The oestrogens can also be applied as ointments or alcoholic solutions and absorbed through the skin. (60) Such hormonal treatment is long-term and in many cases, lifelong.

For the female, androgen is prescribed during the trial period. This masculinising hormone will lower her voice and will promote the growth of facial hair. Androgen also cause the cessation of menses, promotes general corporal hair growth and causes cliteral hypertrophy. Another result of adrogen administration may be the increased desire for sexual gratification. (61)

56. C Hamburger 'Endocrine Treatment of Male and Female Transsexuals' cited in Green and Money op cit 291.

57. Benjamin and Ihlenfeld op cit 454.

58. Bromwell op cit 409.

59. Ibid. _____

60. Raymond op cit 32.

61. Bromwell op cit 409.

"The transsexual cannot have accurate knowledge or feeling of the experience of living and being treated as a member of the opposite sex until he spends sufficient time living in that role... Present data indicate that the length of time spent by a patient in actual experience in the opposite sex role prior to surgery is of critical importance in our determining the extent of the possible future cases."⁽⁶²⁾

After the stage of living as a member of the opposite sex has been completed successfully, surgery becomes a medical confirmation of what has by now, become a social fact.

C. The Actual Surgery

a. Male to female construction

The surgery requires the combined techniques of a gynaecologist, urologist and a plastic surgeon.⁽⁶³⁾ The total procedure takes place in three stages, although all of them may not be desired by the patient. These are penectomy, orchiectomy (removal of testes) and vaginoplasty (creation of an artificial vagina). Some transsexuals only undergo the first and second steps and indeed, some writers recommend this approach.⁽⁶⁴⁾

The vagina is constructed by creating a cavity between the prostate gland and the rectum. An artificial vagina is formed from a skin graft from the thigh, and lined with penile or scrotal tissue.⁽⁶⁵⁾ Thus orgasmic sensation is possible. The shape of the artificial vagina is maintained by a mould that is worn continuously for several weeks following surgery. Once healing has occurred, manual dilation or penile insertion at least biweekly, is necessary to prevent narrowing which can result through the contraction of the scar tissue.⁽⁶⁶⁾

62. N Knox et al 'Psychiatric Evaluation of Male Transsexuals for Surgery' cited in Green and Money op cit 132.

63. Morris op cit 102.

64. For example, Hamburger op cit note 56 supra.

65. N Block and A Tessler 'Transsexualism and Surgical Procedures' (March 1971) Surgery, Gynaecology and Obstetrics 132.

66. Benjamin and Ihlenfeld op cit 645.

"After the operation, a speculum had been inserted in the vagina (a beak-like instrument that can be screwed open and closed). This is to prevent the vagina from closing up, and to guarantee the smooth healing of the vaginal walls, which are heavily clotted with blood while the blood vessels re-align themselves. Every morning the speculum had to be removed, to allow for examination, and this in itself was another painful procedure."⁽⁶⁷⁾

The next most common step is the enlargement of the breasts - usually with inserted implants. This is often followed up with increased oestrogen therapy.⁽⁶⁸⁾ Following surgery, the transsexual receives oral maintenance doses of oestrogen thus becoming a medically-managed individual.

"Without these hormones, post-operative patients would experience climacteric symptoms, including hot flushes and deterioration of general body tone."⁽⁶⁹⁾

Surgery often does not end with vaginal construction. Secondary operations are often sought by the patient, usually for aesthetic reasons and/or to correct real or psychologically felt complications. This cosmetic surgery frequently has nothing to do with refashioning the genitalia themselves. It ranges from limb surgery to eye surgery, to skin revision and even tattoo excision.⁽⁷⁰⁾ All these procedures are undertaken by the transsexual in the hope of conforming more to the fashionable, stereo-typed bodily image.⁽⁷¹⁾

67. Fallowell and Ashley op cit 88.

68. Raymond op cit 33.

69. Benjamin and Ihlenfeld

70. Raymond op cit 34.

71. Ibid.

She consulted a psychiatrist and psychologist who referred her to a gynaecologist. The latter firmly concurred with Lauren's decision to undergo corrective surgery, and he stated that it was really the only choice she had for reaffirming her 'womanhood'.⁽⁷⁶⁾

"I was in hospital for four days and had the corrective surgery completed in one session. Physically it was almost like having a nose job: I was in pain but didn't feel like I'd undergone a dramatic transformation. It wasn't exactly a pleasant experience, but I survived and left hospital feeling exactly the same person - except with more confidence and an overwhelming sense of release... After all those years, I really was a woman... Physically, I've never encountered any problems... I function totally successfully as a woman - sexually, emotionally and mentally."⁽⁷⁷⁾

The gynaecologist who performed Lauren's operation has, in fact, performed most of these operations in South Africa, and he commented on Lauren's case:

"I first met Lauren when she was seventeen... Even at that young age, she was exceptionally emotionally mature. She was extremely feminine... in every way it seemed right that she should be a woman. She was also anatomically very well suited to corrective surgery... corrective surgery is a highly complicated business: it is not just a question of creating a vagina. In women, the bones of the pelvic arch are fairly wide open, so that a baby's head can go through. A typical male pelvis however, is very narrow, often making it very difficult to create a vagina in an acceptable position... Lauren was lucky. She is anatomically very feminine... She had no adverse masculine features that could handicap a surgical approach, and presented none of the problems associated with the more anatomically masculine patients. She doesn't even have any problem with body or facial hair."⁽⁷⁸⁾

76. Ibid. Lauren was seventeen years of age, and one of the youngest people in South Africa to undergo the treatment. There is little regulation and no state control in any way in the treatment as the Department of Health and Welfare informed this author.

77. Note 74 supra. Lauren claims that most of her boyfriends never suspected that she was anything but a woman.

78. Ibid.

Bleeding can be a problem in the breast area. The lack of overlying breast tissue covering the implants, offers little protection from even the slightest injury.⁽⁷²⁾ Such injury may cause subsequent expulsion of the prosthesis, again necessitating further surgery. As far as the genitalia are concerned, problems may also arise. It has been reported that surgical complications are uncommon, but the most recurrent ones include the narrowing of the vagina, recto-vaginal fistulas and the narrowing of the urethra. Overall, it has been said that,

"... the final external appearance of the genitalia varies, not only from patient to patient, but with the surgical technique employed. Few patients are truly satisfied. Many seek corrective changes." (73)

One very satisfied post-operative transsexual, is the South African model, Lauren.⁽⁷⁴⁾ She was born a boy into a conservative and sheltered family life. By the time she was eleven years old she realised she was more female than male.

"I started thinking about where I was going and what I wanted to be, and becoming increasingly convinced that being a boy was definitely not the correct path for me... By the time I had matriculated I'd realised that I was always going to want to be a woman. That in almost every way I was a woman." (75)

72. Raymond op cit 35.

73. Creighton, Belinder and Govilian cited in Raymond op cit 35.

74. 'Beautiful Lauren was born a Boy' (1 June 1984) Scope Magazine 36.

75. Ibid. She studied Beauty Culture and Physiology and qualified as a Beauty Therapist in Durban.

The proof of the success of the operation in this case, is that Lauren is one of South Africa's top models.⁽⁷⁹⁾

b. Female to male construction

Taitz⁽⁸⁰⁾ is of the opinion that the operations for the female transsexual are not as complicated as those for the male transsexual. However, because of the inherent difficulties in constructing a functional penis, experts are hesitant to suggest surgery for the female transsexual.⁽⁸¹⁾

Again, the surgery usually involves several steps, all of which are not necessarily undertaken. Mastectomy, hysterectomy and oöporrectomy (removal of the ovaries) are the surgical procedures which most female transsexuals undergo.⁽⁸²⁾

Since testosterone causes only moderate reduction in the breasts, the patient usually undergoes a mastectomy. The hysterectomy and the removal of the ovaries constitute the following step. The vagina remains. Phallus construction, when undertaken, begins in conjunction with the hysterectomy. It is technically possible to construct a penis surgically, by rotating a tube flap of skin from the left lower quadrant of the abdomen and closing the vaginal orifice. A urinary conduit can be led through such a phallus, so that the constructed penis may be used for urination.⁽⁸³⁾ But the new penis lacks sensitivity and can become erect only through the insertion of certain stiffening material that remains in the penis all the time or can be inserted and removed through an opening in the skin.⁽⁸⁴⁾

79. Ibid.

80. Taitz op cit 66.

81. R Green 'Sexual Identity Conflict in Children and Adults' cited in Scott Cole op cit 337.

82. Raymond op cit 36.

83. However, because of complications, many surgeons have decided against constructing the phallus so that it can be used for urination. Instead, the female urethra is maintained in its existing position beneath the constructed penis: Raymond op cit 36.

84. Ibid.

Phalloplasty is still far from perfected. Penile construction was developed during World War I by the pioneer British plastic surgeon, Sir Harold Gillies.⁽⁸⁵⁾ Little progress has been made since the Gillies classic tube-in-tube pedicle flap operation.⁽⁸⁶⁾ Every attempt must compromise between fashioning a pseudo-penis long enough to appear adequate and one short enough to permit passing the urethra through the middle. "Sensation and erectility continue to elude the surgeon."⁽⁸⁷⁾

Many patients accept that the neo-penis typically remains an alien appendage while the artificial vagina in the male-female counterpart becomes a part of her body image.

"I feel satisfied with the fact that my new penis is cosmetically good. I'm glad to have a penis after 32 years; if and when something better comes along, I'll be the first on the doorstep to get it."⁽⁸⁸⁾

85. Leff op cit 58. Gillies would show his students slides of a convincing neo-penis, pieced together from abdominal skin flaps, with the umbilicus converted to a meatus and exclaim: "you see gentlemen, a thing of beauty - but alas, no joy forever."

86. Ibid.

87. C Horton, cited in Leff op cit 58.

88. A female-male transsexual who attended a Norfolk conference with his wife, cited in Leff op cit 58.

Many female-male transsexuals stop treatment after obtaining hormone treatment, mastectomy and hysterectomy, feeling that they do not wish to undergo the multi-staged procedure of phalloplasty. (89)

The last stage has now been reached. (90) The transsexual now maintains his new sex status for life. He appears, behaves and functions in society, as a member of his chosen sex. Both males and females are capable of orgasm. (91) There is also obviously no dual sex role after surgery has been performed. The individual is no longer of his original sex physically and is also sterile.

"Post-operatively, transsexuals are able to have satisfactory sexual relations as members of their newly aligned sex." (92)

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89. It is submitted that this is a strong rebuttal to the suggestion that transsexualism is sex-centred, or in fact, a sexual deviance. The patient is prepared to accept little rewarding sexual activity, at the price of appearing as a member of the desired sex. However, some transsexuals do undergo phalloplasty. In fact there is a report of one patient who underwent thirty three operations in an attempt to obtain a satisfactory penis: Raymond op cit 37. The strength of the urge was apparently encouraged by the 'fear of discovery'. Most transsexuals express anxiety about being placed in an uncontrolled environment, through accident or illness and thereby being unmasked: Raymond op cit 38.
90. On average, the male-female surgery and hospitalisation can cost from \$3 000 to \$6 000. The female-male operation involves more surgery and can cost up to \$12 000: Raymond op cit 22.
91. One follow-up study reported a 95% post-operative orgasm success and a 26% marriage rate among male-female patients: Leff op cit 45.
92. J Money 'Sex Errors of the Body' cited in Scott Cole op cit 338. Post operatively, the male transsexual does not experience the typical 'penis phantom' as is found in amputations. The penis was not the centre of erotic stimulation and seems expendable. This disregard of penile eroticism represents an inhibition of functioning, sustained by the feminine gender identity, which the patient describes as his 'mental femininity': Crowitz op cit 1.

As Dr Randell commented in regard to male-female transsexuals,

"... typical comments after the operation include feelings of deep satisfaction at having achieved, as they felt, a true female status, despite admission that they were in fact only castrated, feminised males. They reported an absence of self-consciousness and a feeling of being at ease and having ultimately achieved a happy state with more peace of mind. Increased feelings of femininity occurred, along with the development of a sense of identity with all women. They began to think of themselves as women, rather than disabled males. The fear of detection and being suspected disappeared, despite the fact that several were not entirely credible as females. Several described a sense of release and a change of mental attitude; they felt that it was now impossible to prove that they were not women. Most expressed a level of satisfaction in their new castrated status, far superior to anything they had experienced as men. Acceptance as women by other women and by the world at large was the ultimate satisfaction. The possession of a female vulva was of secondary importance to this."⁽⁹³⁾

After surgery has been performed, it is desirable, and in fact, necessary to have a post-operative follow-up, which is aimed at the total assimilation of the individual into society, in the 'new' role.

D. Post-operative Assessment

The beginning of serious research was initiated with the publication of Dr Benjamin's classic follow-up study on post-operative transsexuals.⁽⁹⁴⁾ Of 73 men and 20 women who underwent the surgery, 85% of the men and 95% of the women, showed satisfactory outcomes. These assessments were based on impressionistic evidence; patients' personal reports and anecdotal material in respect of the patients' socio-biological and psychological statuses. There were as yet, no attempts to obtain standardised data from each patient.⁽⁹⁵⁾

93. Green and Money op cit 374-5. Self-image, more than libido, seems to be the underlying motivation for corrective surgery: transsexuals do not display usually strong sex drives: Leff op cit 58.

94. Benjamin op cit 128.

95. Ibid.

Later, in 1966, Benjamin published further findings on fifty one post-operative transsexuals.

"Assessment of post-operative status was made and considered 'good' if the total life situation was successful and with good integration into the world of women and an acceptance by society and the patient's family... If the result lacked one of these features, including the ability to experience orgasm, the result was considered 'satisfactory'... Where appearance and functions were unsatisfactory, despite relief from unhappiness in the male role, the result of the operation was designated 'doubtful'..."⁽⁹⁶⁾

There were seventeen cases designated 'good'; twenty seven as 'satisfactory'; five as 'doubtful' on this assessment. Only one patient was regarded as having a totally unsatisfactory result.

Money and Brennan's study⁽⁹⁷⁾ of six post-surgical women corroborated Benjamin's findings. They concluded that,

"...the evidence to date, is that sex reassignment does indeed improve the human condition of the afflicted individual."⁽⁹⁸⁾

In 1968, in a review of 121 cases Pauly⁽⁹⁹⁾ concluded that a group of transsexuals who underwent corrective surgery was ten times more likely to have a satisfactory outcome in terms of social and emotional status, than a group who did not.

96. Ibid.

97. J Money and J Brennan 'Sexual Dimorphism in the Psychology of Female Transsexuals' (1968) 147 Journal of Nervous and Mental Disorders 487 at 499.

98. Ibid.

99. I Pauly cited in Lothstein op cit 418.

John Randell reported on post-operative results of 29 men and 6 women. (100)

According to the male and female adjusting ratings, 72% of the men and 83% of the women, had satisfactory outcomes. Although two of the men committed suicide, Randell concluded that the patients as a whole, demonstrated lessened environmental conflicts; significantly decreased levels of anxiety and improvements in family relationships and employment.

"The post-operative results reported above indicate that the majority of males and females undergoing the operation for sex reassignment are subjectively improved both in their adjustment to their environment and in their own feelings of well-being and satisfaction in the gender role". (101)

The follow-up studies throughout the 1960's focused on gross socio-psychological measures of improvement, entirely. The consensus of these studies was that the surgery was a treatment of choice for the patient. (102) Despite the few negative conclusions, (103) most investigations were optimistic about the surgery. Citing an 80% 'cure' rate for the surgery, the investigators were in accord that traditional psychiatric intervention was to no avail in the treatment of transsexualism, whereas the operative intervention was. (104)

Throughout the 1970's, an increasing number of transsexuals sought corrective surgery. Encouraged by the changing societal views as regards sex roles, many of them were given external support to change their sex, rather than the internal probing as to the nature of their psychological distress. (105) Lacking a formal scheme for the diagnosis of the syndrome, and lacking standards in medico-surgical care, the profession of psychiatry was unprepared

100. J Randell 'Pre-operative and Post-operative Status of Male and Female Transsexuals' cited in Green and Money op cit 156.

101. Ibid.

102. Lothstein op cit 419.

103. For example, cases of suicide, psychiatric disturbances and role-reversal.

104. Lothstein op cit 419.

105. Ibid.

to respond adequately to the transsexual's plight. Furthermore, follow-up became increasingly difficult as the surgery was now widely offered.⁽¹⁰⁶⁾ Despite these procedural difficulties, the initial studies in the 1970's widened the field of investigation and continued to contribute significantly to advances in knowledge of the syndrome.⁽¹⁰⁷⁾

The first apparent study of the 1970's was that of Money and Ehrhardt.⁽¹⁰⁸⁾ They investigated seventeen men and seven women and compared the patients' pre-operative and post-operative adjustment along five dimensions:

1. capacity for a lasting relationship with a partner;
2. adjustment to work;
3. criminality;
4. mental state; and
5. patient's subjective opinion of the result.

Only one woman was reported to have been dissatisfied with the cosmetic results but she nevertheless stated that she would undergo the procedure again. The patients' general satisfactory adjustment, prompted the investigators to conclude that,

"...if one is able to stipulate specific criteria for sex reassignment surgery, then it can be seen that the outcome of the sex change, that is, the psychological and social situation of the transsexual, is often times better than worse."⁽¹⁰⁹⁾

In the second study in the 1970's, Hoenig et al⁽¹¹⁰⁾ reviewed the literature on sex reassignment surgery and reported on a follow-up of eight of their own patients. Although one of the patients was judged to have a poor outcome, none of them expressed regret over the surgery, and the authors concluded that,

106. Ibid.

107. Ibid.

108. J Money and A Ehrhardt 'Transsexuelle nach Geschlechtswechsel' cited in Lothstein op cit 419.

109. Ibid.

110. J Hoenig et al 'Surgical Treatment for Transsexualism' (1971) 47 Acta Psychiatria Scandanavia 106 at 133.

"...the treatment helps the majority of patients, both subjectively and objectively... But the operation can in no sense be regarded as a cure."⁽¹¹¹⁾

This was the first study to acknowledge that high incidence of psychopathology among post-operative transsexuals and to challenge the notion that the surgery can cure the transsexual.

Ihlenfeld's review⁽¹¹²⁾ of Benjamin's findings, indicated that most adult transsexuals achieved good results with sex reassignment surgery. His optimism led him to consider the possible surgical benefits for patients in their fifties and sixties.

Walinder and Thuwe⁽¹¹³⁾ have conducted the most extensive follow-up study to date. They examined the socio-psychiatric histories of twenty four reassigned transsexuals and expanded on Money and Ehrhardt's five-fold criteria⁽¹¹⁴⁾ by elaborating on the social aspects, place of residence, social security benefits, alcoholism, criminality, periods of certified sickness and disability pensions. Other adjustment criteria included sexual life, attitudes of relatives, work records, patient's subjective opinion and investigators assessment.⁽¹¹⁵⁾ By studying their patients for at least three years post-operatively, they attempted to eliminate the usual immediate post-surgery adaption effect. They found that the biological females generally had a better outcome: overall, 91% of the women and 69% of the men had satisfactory outcomes. These results were consistent with those of Benjamin, Randell, Money and Ehrhardt, and Walinder and Thuwe concluded that

111. Ibid.

112. C Ihlenfeld 'The Outcome of Hormonal-surgical Intervention in the Transsexual Condition' cited in Lothstein op cit 421.

113. J Walinder and I Thuwe A Social Psychiatric Follow-up Study of 24 Reassigned Transsexuals cited in Lothstein op cit 421.

114. Vide note 108 supra.

115. Vide note 113 supra.

"...taking the men and women together, the outcome was clearly favourable in 80% of the cases. The proportion of unsuccessful cases in our series is about the same as that found by Hoenig et al... When we considered the severe suffering and the many difficulties experienced by untreated transsexuals in various fields of life, the treatment programme appears to be fully justified both mentally and ethically."⁽¹¹⁶⁾

Lothstein⁽¹¹⁷⁾ studied two groups of patients after the surgery: group one consisted of seven biological males who had undergone the operation before the establishment of the gender identity clinic at the Western Reserve Medical School while group two - eight biological males and six biological females - had had surgery after intensive evaluation and long-term psychological and medical treatment. The average follow-up period was one to nine years. This was ostensibly the first research study in which patient data were systematically collected and assimilated and in which each patient was required to participate in intensive psychological treatment.⁽¹¹⁸⁾ The results suggested moderate post-surgical sexual and social gains, accompanied by marked depression and psychological confusion. All patients reported however on being satisfied subjectively with the surgery. It was concluded that character structure and neurotic functioning were not permanently altered by sex surgery. Moreover, it was stated, that all patients should be provided with counselling and psychotherapy to enable them to adjust to their new socio-sexual status. Corrective surgery does not in itself, cure the patient's dilemma: it merely facilitates its resolution. The integration of gender role and identity needs psychotherapy.⁽¹¹⁹⁾ Thus, it is submitted that the

116. Ibid.

117. Lothstein op cit 547.

118. Ibid.

119. It is therefore important that the treatment should not stop at the operation, but for maximum efficacy, should include post-operative counselling. It is submitted that even though a person has believed indefatigably that he is a member of the opposite sex, he has usually been treated socially as a member of his obvious sex: this crust of imposed identity needs to be whittled away with psychiatric assistance, to reveal the person as a successful participant in his 'new' role.

germain conclusion of this study was that all pre-operative and subsequent post-operative transsexuals should undergo extensive psychotherapy. (120)

120. This author will be so bold as to opine that this is not only laudible, but very necessary. The pre-operative analysis should be utilised to separate those candidates who will receive surgery ultimately, from those who, it is concluded, will not benefit from such intervention. Surgery should be the last resort and once performed, post-operative psychotherapy is vital to enable a firmer and more successful adaptation to the chosen role.

PART B : THE LEGALITY OF THE TREATMENT

CHAPTER V

THE PRE-OPERATIVE TRANSSEXUAL.

I INTRODUCTION

"We live in an age which has more need of good examples than of precepts".

George Herbert

As has been seen with the preceding chapter, there are various stages of treatment the transsexual must undergo, and only the very last is the corrective surgery itself. Before that, the pre-operative transsexual is obliged to live in the desired role for a length of time. This of course brings him within the ambit of special problems, as inherent in the syndrome are behavioural patterns that are likely to bring the transsexual into contact with the police. In many jurisdictions, a person is liable for prosecution for cross-dressing and homosexual activities, both of which the pre-operative transsexual may encounter to a greater or lesser extent.

II CROSS-DRESSINGA. Comparative law.1. The United States of America.

The laws of at least eleven states in America could be used to prosecute transsexuals who cross-dress prior to surgery.⁽¹⁾ In New York, a vagrant was formerly described as:

"... a person, who having his face painted, colored, covered or concealed or being otherwise disguised in a manner calculated to prevent his being identified, appears in a road, public highway, or in a field, lot, wood or enclosure".⁽²⁾

1. These states are: Arizona, California, Colorado, Idaho, Nevada, New York, Oklahoma, Oregon, Texas, Utah and Washington. One such law was originally enacted over one hundred years ago, to deter farmers who had been attacking officers who enforced unpopular rent laws. The farmers dressed as Indians to disguise themselves. The statute accordingly made it illegal to appear publicly, with the face painted or to be otherwise disguised in such a way as to prevent identification: New York Penal Law s240 35 (McKinley 1967).

2. New York Code of Criminal Procedure s887(7) (McKinley 1958).

The present penal code of New York holds a person guilty of loitering when he:

"... being masked or in any manner disguised by unusual or unnatural attire or facial alteration, loiters, remains or congregates in a public place, except in connection with a masquerade party or like entertainment".⁽³⁾

However, the courts have, in many instances taken a different view of the problem. In the following cases, ordinances prohibiting cross-dressing were held to be prima facie invalid as unconstitutionally vague. In Columbus v Rogers⁽⁴⁾ a city ordinance which stated that:

"No person shall appear upon any public street or other public place in a state of nudity or in a dress not belonging to his/her sex, or in an indecent or lewd dress",

was held to be unconstitutionally vague on the grounds that it failed to give fair notice of the conduct forbidden by the ordinance and to provide guidelines to law-enforcement officers. The court noted that modes of dress for men and women are historically subject to changes of fashion. Moreover, it is not uncommon today, for individuals to purposefully, but innocently, wear apparel which is intended as the attire of those of the opposite sex. The defect then, is that the term of the ordinance, when considered in the light of contemporary dress habits, makes it too vague so that "men of common intelligence must necessarily guess at its meaning and differ as to its application".

A similar statute was held to be vague in Cincinnati v Adams.⁽⁵⁾ Here, the defendant moved to dismiss a complaint in which he was charged with violating a city ordinance providing that:

"No person within the city...shall appear in a dress or costume not customarily worn by his/her sex, or in a disguise when such dress, apparel or disguise is worn with the intent of committing any indecent or immoral act or of violating any ordinance of the city...or law of the state...".

3. Cited in Smith op cit 990.

4. (1975) 41 Ohio St 2d 161 12 ALR (4th) 1250.

5. (1974) 42 Ohio Misc 48 71 12 ALR (4th) 1250.

The court rejected the defendant's contention that a transvestite's mode of dress is an expression protected by the First Amendment. Although recognising that freedom of expression is not limited exclusively to speech and could include one's manner of dress and personal grooming, if truly representative of a philosophy, idealism or point of view, the court held that there was no evidence to support the defence contention that his costume represented a philosophy or ideal. However, the court did hold the ordinance to be unconstitutionally vague and violative of the defendant's right to due process, as it failed to give a person of ordinary intelligence fair notice that his contemplated conduct was forbidden by the statute. The court noted further, that the ordinance not only limited one's mode of dress in public, but that its prohibitions also extended to the privacy of one's own home.

In the following cases, ordinances specifically dealing with cross-dressing - although not found to be unconstitutionally vague - were held to be inapplicable or invalid as applied to the particular defendants. In Doe v McConn⁽⁶⁾ - an action for declaratory and injunctive relief brought by transsexual defendants who cross-dressed in preparation for corrective surgery - the court declared a city ordinance making it illegal to appear in public areas "dressed with the designed intention to disguise his/her sex as that of the opposite sex" unconstitutional as applied to the particular defendants. The court noted that an integral part of pre-surgical treatment requires the transsexual to wear the clothes of the desired sex, throughout the pre-operative stage, and that the ordinance in question directly inhibited treatment of the transsexual. The court noted that no exception for the transsexual had in fact been made under the ordinance in question, even when such person was under a doctor's care.

Similarly, in Chicago v Wilson⁽⁷⁾ the court held that a city ordinance prohibiting any person from appearing in a public place "in a dress not belonging to his/her sex with the intent to conceal his/her sex"⁽⁸⁾ was unconstitutional for the two male defendants who were required to wear female clothing and adopt a female lifestyle as part of pre-operative therapy. The court stated that the city had asserted four reasons for the total ban on cross-dressing in public:

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6. (1980 SD Tex 489F Supp 76 12 ALR (4th) 1251.
 7. (1978) 75 Ill 2d 525 12 ALR (4th) 1251.
 8. Municipal Code of the City of Chicago s192-8.

1. to protect citizens from fraud;
2. to aid in the description and detection of criminals;
3. to prevent crimes in washrooms; and
4. to prevent inherently anti-social behaviour which is contrary to the accepted norms of society.

The court stated that finding that the Constitution provided the individual with some measure of protection with regard to his choice of appearance, answers only the initial issue. The second issue is to determine the circumstances under which the interest can be infringed. As Kelly v Johnson⁽⁹⁾ suggests, the degree of protection to be accorded to an individual's choice of appearance is dependant on the context in which the right is asserted. It is therefore incumbent on the state to analyse both the circumstances under which the right is asserted, and the reasons which the state offers for its intrusion.

The court found no evidence to support the four reasons put forward by the city and noted that neither of the defendants were engaged in deviant sexual conduct or any other criminal activity and that without evidence to the contrary, it could not assume that individuals who cross-dress for purposes of therapy, are prone to commit crimes.

The court, in dismissing the charges, also pointed out that the state had enacted a statute authorising the issuance of a new birth certificate following surgery⁽¹⁰⁾ and that the legislature therefore had recognised impliedly the necessity and the validity of the surgery. It would be inconsistent therefore, to allow the surgery yet at the same time impede the necessary therapy in preparation for such surgery. It is submitted

9. (1976) 425 US 238, 96 S Ct 1440 12 ALR (4th) 1251. The Supreme Court was confronted with the issue of whether one's choice of appearance was constitutionally protected from government infringement. The court acknowledged that the due process clause of the Fourteenth Amendment "affords not only a procedural guarantee against deprivation of 'liberty' but likewise, protects substantive aspects of liberty against unconstitutional restrictions by the state". The court observed however, that it assumed that the population at large does have some sort of liberty interest in matters of personal appearance. Powell J (at 1447) stated that: "when the state has an interest in regulating one's personal appearance there must be a weighing of the degree of infringement of the individual's liberty interest against the need for the regulation".

10. Vital Records Act (Ill Rev Stat 1977) ch 111½ para 73 s17 (1)(d).

that one could extend this recognition of the validity of the surgery as to the recognition of status of the person thereafter, because it is just as inconsistent to allow the surgery and then to give little, or no legal effect thereto.

The court went on to state that it had long recognised restrictions upon the state's power to regulate matters pertinent to one's choice of lifestyle which has not been demonstrated to be harmful to society's health, safety or welfare. (11)

"The notion that the state can regulate one's personal appearance, unconfined by any constitutional strictures whatsoever, is fundamentally inconsistent with values of privacy, self-identity, autonomy and personal integrity that ... the constitution was designed to protect". (12)

In Columbus v Zanders, (13), unlike the McConn and Wilson cases, the court did not hold the ordinance in question to be unconstitutional, but held instead that the defendant could not be criminally responsible for violating the ordinance where, because he was a true transsexual suffering from a mental defect over which he had little control, his conduct, in dressing and posing as a female, was more the result of an irresistible impulse or loss of will power than a deliberate act of violation of the ordinance in question. The court rejected however that the ordinance deprived the defendant of the right of expression, or of privacy, or of due process, noting that the ordinance had a very real relation to public safety and general welfare. It is submitted that the rationes of this case will not be followed readily, as there is ample evidence to the contrary, that a transsexual is not suffering from a 'mental defect'.

11. Haller Sign Works v Physical Culture Training School (1911) 249 Ill 436, 94 NE 920. In this case, which involved the regulation of billboards for aesthetic purposes, the court noted "the citizen has always been supposed to be free to determine the style of architecture of his house ... the style and quality of the clothes that he and his family will wear and it has never been thought that the legislature could invade private rights so far as to prescribe the course to be pursued in these and other matters, although the highly cultured may find on every street in every town and city, many things that are not only open to criticism but shocking to the aesthetic taste" (at 923 of the report).

12. Kelly v Johnson supra.

13. (1970) 25 Ohio Misc 144 54 Ohio Ops 2d 142, 266 NE 2d 602; 12 ALR (4th) 1251.

B. South Africa.

In South Africa, there is no Parliamentary enactment directly in point on the issue of cross-dressing. However, a person can be convicted of public indecency if his conduct either tends to deprave or if it outrages public decency.⁽¹⁴⁾ It would appear that cross-dressing could fall under this broad tenet. However, the circumstances under which the conduct is performed, must be taken into account, as has been stated in R v M⁽¹⁵⁾ in which it was concluded that

"(although) courts of law certainly discountenance anything immoral ... there (must be) some acts of an immoral nature which they cannot reach".

Milton⁽¹⁶⁾ submits that it must be a serious affront to public decency before the law will step in. Otherwise, the person's conduct should be regarded as a piece of private immorality, unless of course it constitutes some other common law or statutory offence. In various provincial ordinances⁽¹⁷⁾ it has been stated that

"Any person who is guilty of ... indecent behaviour⁽¹⁸⁾ in any street⁽¹⁸⁾ ... or public place ... commits an offence".⁽¹⁹⁾

It is submitted that although these enactments conceivably could be extended to include cross-dressing, the state would have to prove conclusively that such behaviour is offensive to the public mores, or in fact is illegal because it is accompanied by other behaviour such as soliciting, which is punishable by law, on its own.

14. J. Milton South African Criminal Law and Procedure vol II (2nd ed 1982) 257. This tenet was reaffirmed in S v F 1977(2) SAI(T) at 4F.

15. 1915 CPD 384 at 340.

16. Op cit 288.

17. Police Offences Act 1882 (C); Police Offences Ordinance 1902(0) and Natal Law No. 15 of 1869.

18. For a definition of what constitutes 'indecent behaviour', vide R v Stewart (1910) 27 SC 42 at 43.

19. s9(C) and s27(0).

III HOMOSEXUAL CONDUCT.

A. Comparative law.

1. The United States of America.

At present, there are provisions against homosexual behaviour in at least thirty two of the states.⁽²⁰⁾ Statutes prohibiting the commission of lewd and lascivious acts in an unnatural manner, were ruled constitutional in Arizona v Bateman.⁽²¹⁾ This decision renders certain acts between consenting adults - even if married and in the privacy of their own homes - a felony and subject to imprisonment for up to twenty years. Although this case did not deal specifically with the transsexual, it conceivably could apply, for the court held that the police power of a state may intrude into the bedrooms of even consenting, heterosexual or homosexual adults and that the legislature could separate those relations it found 'distasteful' and make them subject to punishment.⁽²²⁾

In U S v Collins⁽²³⁾ the District of Columbia Superior Court indicated that at least one court was aware of the transsexual's special problems as regards the criminal law.⁽²⁴⁾ The court described the police acts enforcing a sexual exploitation statute against a transsexual, as violating the individual's constitutional rights. The defendants were arrested for soliciting. In each case, the alleged victims were under cover police officers and the solicitations involved words and nothing more. Although the decision revolved around the deception on the part of the police officers, the court intimated its cognizance of the unique position of the transsexual and distinguished this case from those involving solicitation for prostitution or for lewd or immoral purposes. The court described the police actions as depriving the transsexual of liberty by "exploiting their immutable vulnerabilities".⁽²⁵⁾

20. For example, New York Penal Code, section 130 (McKinley 1967); S. Twardy 'Medico-Legal aspects of Transsexualism' (1980) Medical Trial Technique Quarterly 249 at 300.

21. 429 US 1302 50 LED 2d 97 S Ct 1 (1976).

22. It is submitted that such a ruling smacks of militarism which is totally out of consonance with the values for which the United States supposedly stand.

23. 17 Crim L Rpt 2013 (1975).

24. "Transsexuals are not all hookers, panderers and female impersonators" though some practice these occupations to amass the large sums of money needed for the hormonal and surgical treatments: Leff op cit 56.

25. 2014 of the report.

In a survey undertaken by Dr Money at Johns Hopkins, twenty four cases were studied in an effort to determine objectively the results of corrective surgery performed, in social terms.⁽²⁶⁾ Although six of the group had been arrested prior to surgery, - the arrests stemmed from charges of cross-dressing, impersonation and soliciting - only two were re-arrested. Dr Money found it significant that

" no patients acquired a police record for the first time, following reassignment. The majority melted into law-abiding obscurity. The cost to society for policing and jailing transsexuals did not increase it more likely decreased".⁽²⁷⁾

2. The United Kingdom

In 1967, as a result of the Wolfenden Committee Report,⁽²⁸⁾ the law relating to homosexual behaviour in England was amended. The Sexual Offences Act⁽²⁹⁾ now provides inter alia that

"(1) A homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of twenty one years".

B. South Africa.

In South Africa, a male may be prosecuted under the Immorality Act⁽³⁰⁾ for homosexual conduct. Section 20A states that,

"(1) A male person who commits with another male person at a party an act which is calculated to stimulate sexual passion or to give sexual gratification, shall be guilty of an offence".⁽³¹⁾

It is interesting that from this wording, female homosexuality is expressly excluded, and furthermore, the conduct is only criminal if performed at a party. Section 20A(2) defines a 'party' as

"any occasion where more than two persons are present".

Thus, the statute does not prohibit such behaviour when performed in private and in this regard is similar to the English enactment. In fact the court

26. Cited in Smith op cit 977.

27. Ibid.

28. Report of the Committee of Homosexual Offences and Prostitution (1957) Cmd 247.

29. (1967) s1.

30. Act 23 of 1957.

31. As inserted by s3 of the Immorality Amendment Act 57 of 1969.

in S v C⁽³²⁾ held that the object of section 20A was not to punish acts performed in private. As long as there were no more than two persons present, the state had failed to prove its case.

IV CRITICAL EVALUATION

In spite of the fact that there exist in the United States statutes which prohibit cross-dressing, the courts in general, while interpreting such statutes, have found the enactments to be either constitutionally vague or inapplicable to the plaintiff concerned. A statute such as that in Columbus, should not be permitted to stand as it is. Not only is it vague, but it is also impractical as it offers no guidelines and no restrictions on the ambit of cross-dressing. The Cincinnati statute too, is unacceptable as it extends its application to the domain of the home, and as such is a gross violation of the individual's right to privacy. On the wording of such statutes it is virtually impossible for a person to know whether he is committing an offence or not. The courts⁽³³⁾ however, have been aware of the problem which faces the transsexual under treatment and have, in such cases, decided in favour of the defendant transsexual, at least affording him some measure of protection. In South Africa, as has been shown, there is no direct enactment in issue, but the law against public indecency, could be utilised to prosecute the transsexual who cross-dresses. It is submitted, however, that it serves no purpose in today's age of androgenous apparel, and all such statutes are impractical in the extreme.

It is admitted that it is necessary to protect society from any fraud likely to be perpetrated against it where a person cross-dresses with the intention of criminally concealing his/her identity, but where such cross-dressing is a reflection of cultural fashions or in fact, a necessary part of treatment as with the transsexual, the enactment loses sight of the reason for its existence - the protection of society against fraud.

While cross-dressing in public is also presumably offensive to the general public's aesthetic preferences, this preference of society must be balanced against the individual's well being. The fear of fraud, washroom crimes, and the like, enumerated as reasons for the existence of such statutes⁽³⁴⁾

32. 1983 (4) 344 (T).

33. Doe v McConnell and Chicago v Wilson supra.

34. Chicago v Wilson supra.

cannot be said to apply to the transsexual under treatment. There is in fact no evidence that cross-dressing when performed as part of therapy is harmful to society. It is the author's submission that the reason for cross-dressing is in fact to facilitate the adaptation of the transsexual into society in his new role, and as such, is ultimately beneficial for society if such adaptation is successful. Therefore, there can be no logical bar against cross-dressing on the part of the pre-operative transsexual.

Although there are enactments prohibiting homosexuality too, in various jurisdictions, in most of them it is only a crime when practiced in public, with the notable exception of the Arizona statute.⁽³⁵⁾ With the advent of the Wolfenden Committee in England, and the decriminalisation of homosexuality in many of the United States⁽³⁶⁾ however, the potential hazard with which the pre-operative transsexual is faced, has been lessened. It could of course be argued that a transsexual is not a homosexual, but in fact heterosexual in both desire and outlook, and therefore these statutes which are aimed primarily at homosexuals are not applicable to the pre-operative transsexual. If there is a necessity for such statutes - which, it is submitted there is not, as, if adults are consenting they should be free to indulge in whatever activities they choose, provided they do not harm anyone else - then at least they should not extend to the privacy of one's own home.

V SUGGESTED SOLUTIONS

It is submitted that such enactments - where deemed necessary by the social mores of the community - which categorically prohibit homosexual behaviour and cross-dressing, should be amended and made subject to the very real exception of the pre-operative transsexual under treatment. Furthermore, such statutes pertaining to cross-dressing as they stand,⁽³⁷⁾ serve no practical purpose as they are too broad to be applied fairly and reasonably. Courts then should continue their narrow interpretation of the wording as was done in Columbus v Rogers, precluding such exceptions as transsexuals from the ambit of application. From the above decisions dealing with cross-dressing, it would appear that the courts in the United States are going out of their way to find either little, or no application for these statutes

35. In this day and age, and in a supposedly free country as the States professes to be, this statute is a gross violation of the individual's right to privacy.

36. For example, Conn Gen. Stat Ann section 539-87, 55a-65 (1972).

37 Those mentioned in the United States, and the possible application of the South African enactment against public indecency.

and thus it would appear that the most sensible line of action to adopt would be to repeal such statutes, or at least amend them to render them practicable and unambiguous, and to make exception for the transsexual.

If such amendment is not deemed advisable to suit the relatively few transsexuals who come into contact with these various laws, then emphasis should be placed on methods to prevent such contact with these laws. Dr Meyer of John Hopkins advocated that

"... the most obvious guide-line is that if you're going to cross-dress don't be obvious about it".⁽³⁸⁾

Another preventative measure is the carrying of a card or letter from the doctor, describing the individual's condition and stating that the mode of dress and behaviour is required for the purposes of proper treatment. Such a permit has been issued to a pre-operative patient by the Pennsylvania Bureau of Special Health Services.⁽³⁹⁾ The Erickson Foundation will also supply such a card upon request and the certification of a physician. The authority of such cards is questionable but as one commentator noted,

"...because generally there is so little law in this area, whoever presumes to fill the void is likely to have at least some influence".⁽⁴⁰⁾

It is therefore the author's submission that in those jurisdictions in which cross-dressing and/or homosexuality are criminal activities - including South Africa - and in which the legislature cannot see its way to amending such laws, then the transsexual should be able to obtain a certificate from his doctor to advise law enforcement officers of the true position. Such certificate then, will be effective proof nullifying the mens rea for the crime, and as such, the person cannot be said to have committed the crime. It is submitted further that such certificates be given legal recognition, if they are issued after extensive evaluation and the doctor is satisfied that the activity involved is necessary for the treatment of the pre-operative transsexual. As the operation is performed legally in most jurisdictions⁽⁴¹⁾ it only seems sensible that all the treatment be legally recognised.

38. Smith op cit 990.

39. Ibid.

40. Twardy op cit 303. Police in Hamburg, Germany, upon a doctor's certificate issue special cards to transvestites. These cards do not give permission to cross-dress per se but as a practical matter, make the transsexual relatively immune from arrest: Smith op cit 991.

41. Vide chapter six infra for more details in this respect.

CHAPTER VI

THE OPERATION

I INTRODUCTION

"Life is not a spectacle or a feast; it is a predicament".

George Santayana.

Before discussing the legal position of the post-operative transsexual - the subject matter of the next section - the first step is to investigate the aspects of the operation itself. Therefore it is necessary to decide from the outset whether or not the operation can be regarded as legal. If the answer is in the negative, then that is the end of that, for the basic illegality of the surgery would render any consequences thereto illegal as well. If on the other hand, the answer is in the affirmative, then one must take a strong stand for consistency and demand that judicial cognizance be taken of the post-operative situation, for all purposes. To prove and sustain the basic legality of the operation, it must be shown that corrective surgery is performed for therapeutic purposes.

The second step after the former issue has been decided, is the issue of valid consent to such an operation, should it be regarded as basically legal. This consent is necessary in order to vitiate any criminal or delictual liability on the part of the doctor involved.

II THE BASIC LEGALITY OF THE SURGERY.A. General.

A priori, any form of bodily harm - including medical operations - is an assault, for which one can be liable both criminally and delictually. In South African criminal law, an assault is defined as:

"...(consisting) in unlawfully and intentionally
 (1) applying force to the person of another or
 (2) inspiring a belief in that other that force is
 immediately to be applied to him".⁽¹⁾

1. Milton op cit 466

A single act may constitute both a crime and a delict. In general terms, a delict can be described as wrongful and blameworthy conduct which causes harm to a person.⁽²⁾ The element of wrongfulness constitutes the fundamental requisite for delictual liability.⁽³⁾ Conduct is wrongful if it either infringes a legally recognised right of the plaintiff, or constitutes a breach of a legal duty owed by the defendant to the plaintiff.⁽⁴⁾ Various formulations have been offered as criteria for wrongfulness:

1. reasonableness;⁽⁵⁾
2. legal convictions of the community;⁽⁶⁾ and
3. boni mores.⁽⁷⁾

Policy issues - weighing up conflicting interests such as history, morality and justice - have become recognised increasingly as playing a role in the issue of wrongfulness.⁽⁸⁾

"n Handeling is wederegtelik nie alleen wanneer dit in stryd met n wet of die gemene reg is nie, maar ook wanneer dit in stryd is met die redelikheid soos aangewys en bekragtig deur die natuurreg." ⁽⁹⁾

It is an open debate as to whether the objective of corrective surgery falls into the category of justifiable non-therapeutic treatment, or if it in itself could be considered as therapeutic.

"Surgery is lawful provided its object is to cure the patient." ⁽¹⁰⁾

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2. Voet Commentarius 41.1.1; Whittaker v Roos and Bateman; Morant v Roos and Bateman 1912 AD 92 at 113. The general principles of the modern law of delict in South Africa essentially are derived from the Roman-Dutch law: J.C. Van der Walt Delict: Principles and Cases (1981) 11.
 3. Herschel v Mrupe 1954 (3) SA 464 (A).
 4. Van der Walt op cit 21; Universiteit van Pretoria v Tommy Meyer Films (Edms) Bpk 1977 (4) SA 376 (T).
 5. Regal v African Superslate (Pty) Ltd 1963 (1) SA 102 (AD) at 111-112.
 6. Minister van Polisie v Ewels 1975 (3) SA 590 (AD).
 7. Meskin v Anglo-American Corporation 1968 (4) SA 793 (W) at 807.
 8. Administrator, Natal v Trust Bank 1979 (3) SA 824 (AD).
 9. Strauss Toestemming tot benadeling as verweer in die Strafreë en die Deliktreg (1961) (hereinafter referred to as 'Strauss (1)') 217.
 10. P.H. Winfield On Tort (6th ed 1954) 29. Therapy per se has covered a multitude of medical sins: the 'welfare of the individual or society' has often provided a camouflage for the worst forms of experimentation, for example, pre-frontal lobotomy.

There are many uncertainties inherent in a nebulous term such as 'therapy'. How, for instance, is the therapeutic value of treatment to be decided? Is the overriding consideration the success of the operation; the opinion of the surgeon or the subjective report of the patient? Take for instance the case of plastic surgery. This form of medicine is a growing branch of the profession and in great demand, not only in emergencies, but cosmetically as well. What of the patient with a perfectly acceptable nose who nevertheless wishes it to be converted into 'the perfect nose'? There may be no objective therapeutic value to such procedure yet it may result in profound and lasting subjective changes in the confidence and self-esteem of the person concerned.⁽¹¹⁾ It is submitted that a transsexual is seeking very similar treatment. Corrective surgery can be seen to include a very elaborate form of plastic surgery, and in these cases, the urge for the change is not due to supposed 'vanity' but to a desperate attempt to attain social acceptance, and thus, happiness.

In America the interest in beauty should be accepted as a warrant for doing surgically sanctioned procedures, if not attended by appreciable risk of death",⁽¹²⁾

and

"Toestemming tot die kosmetiese operasie ... kan nie sonder meer as sederstrydig aangesien word nie, tensy die operasie 'n bedreiging vir die lewe of gesondheid van die benadeelde inhou. Selfs ernstige ingrypings van kosmetiese aard kom as geregverdig voor, waar die oogmerk is om 'n nadelige psigiese toestand van die benadeelde te bekamp".⁽¹³⁾

Criticism of the controversial subject of corrective surgery focuses on two main points:

1. the questionable appropriateness of surgery, to bring a healthy body into conformity with the demands of a psychological disorder: a paradoxical use of the healing art;⁽¹⁴⁾ and

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11. M.T. Edgerton 'A new Male-Female Surgical Technique' (1973) 61 Proceedings of the Second Interdisciplinary Symposium on Gender Dysphoria Syndrome 139 (hereinafter referred to as 'Edgerton (1)').
 12. Strauss (1) op cit 468 citing Smith 'Antecedent Grounds ... in Surgery' (1942) 14 Rocky Mt Law Review 233.
 13. Ibid. It is submitted that having the 'wrong' body for one's psychological sex can be regarded as "n nadelige psigiese toestand."
 14. O'Donovan op cit 137.

2. The questionable long-term benefit to the patient.⁽¹⁵⁾

The medical profession is not in complete concord as to the wisdom of corrective surgery.⁽¹⁶⁾ Most clinicians who recommend the surgery as treatment of choice also tend to believe that psychotherapy is useless with gender dysphoric patients. On the other hand, those clinicians who consider the surgery as an illegitimate form of treatment, usually characterise it as "mutilative and anti-therapeutic".⁽¹⁷⁾ They point to the complex psychological, legal, medical and bioethical issues that are neglected or by-passed by the reassignment procedures. They argue that the surgery leads to mistreatment and mismanagement of the gender dysphoric patient.⁽¹⁸⁾ In one study, the majority of the 300 physicians questioned opposed corrective surgery for the transsexual.⁽¹⁹⁾ In support of their view, the clinicians cited studies indicating that various modes of psychotherapy can stabilise the gender dysphoric patient successfully, without recourse to surgery.⁽²⁰⁾

Dr Pauly⁽²¹⁾ undertook a survey in 1966 and concluded that neither a majority of psychiatrists, nor the general practitioners questioned, would approve of the operation, despite the fact that only one in four was actually of the opinion that such surgery would be detrimental to the patient. This led Pauly to conclude that other factors influenced their decisions.

"It appears that the primary deterrent is a practical, self-protective one, wherein the physician is reluctant to jeopardise his hard-earned reputation".⁽²²⁾

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15. Studies indicate a high vulnerability to depression in post-operative transsexuals, although there are of course many who report a greater contentment. A disturbing minority wish to return to their original sex role, (ibid). It is submitted that perhaps in these instances pre-operative evaluation had not been thorough enough.
16. Smith op cit 973, vide chapter four supra for more details on post-operative assessment.
17. Smith op cit 973.
18. Lothstein op cit 417.
19. R. Green 'Attitudes towards Transsexualism and Sex Reassignment' in Green and Money op cit 14.
20. L. Lothstein and S. Levine 'Expressive Psychotherapy with Gender Dysphoric Patients' cited in Lothstein op cit 417.
21. Pauly op cit 460.
22. Ibid.

He justified this conclusion on the basis of the answers supplied by these practitioners regarding a legal change of sex after surgery has been performed. 75% recommended a 'legal change of sex', 80% favoured legal permission for the patient to be identified and to marry in the 'new' role and 50% would even allow the converted transsexual to adopt a child. (23)

Two years later, Dr Pauly administered a second test and found more favourable results. (24) He concluded that

"... it is ... possible that this represents a real trend in the last few years towards more acceptance of the transsexual's problem, related to the influence of numerous publications and presentations ... from the institutions (performing the surgery) ...". (25)

A corollary of the main issue of therapy is the question as to whether or not, medicine is obliged to alleviate all suffering and to render the world 'disease-free'. There are many ethical issues to be considered, especially in the instance of transsexualism. It has in fact been suggested that a 'change of sex' would be against the laws of God and nature. (26) This is an illogical absurdity: man, having been endowed with supposed free will, wisdom and intelligence - the mere biological terminology of 'homo sapiens' speaks for itself - is now, according to the propounder of such a view, unable to utilise these qualities to rectify 'mistakes of nature'. If such interference on the part of God's 'own images' were contra natura, this would cause all advancements in the field of science and medicine to be against God's wishes. The malformed baby then should be denied corrective surgery; the siamese twins condemned to a life of bondage; and so forth - hardly in keeping with the Christian doctrine of a benign, omniscient God. The author can find no religious authority suggesting that man is not entitled to meliorate his lot. On the contrary:

23. Ibid.

24. Cited in Smith op cit 976.

25. Ibid.

26. The Irish Times 23 April 1983, reporting on a case concerning homosexuals.

"Were you a slave when called? Never mind. But if you can gain your freedom, avail yourself of the opportunity."⁽²⁷⁾

If one is to subscribe to the doctrine of free will one must do so for all purposes. God only decreed Ten Commandments: all other human actions should be left necessarily to individual discretion.

"...the current availability of reputable physician teams who offer sincere efforts to understand and treat the transsexual patient, may represent the greatest progress that medicine has made over the past decade in dealing with gender disorders ... certainly it offers doctors unrivalled opportunity to study and understand the dynamics of gender as it relates to human function and self-imagery".⁽²⁸⁾

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27. 1 Corinthians 7.21. While on a religious tangent, the author would like to make mention of several views of the established Church. Jewish law prohibits sterilisation, and as the corrective surgery includes sterilisation it would appear that a doctor should refuse the transsexual's request, because the primary prohibition falls on the doctor. B.A. Brody, E.F. Healy 'Marriage, Morality and Sex Change' (August 1981) Hastings Centre Report 8 at 9. But if neither patient or physician is Jewish, logically there can be no prohibition. From the Catholic point of view, it would appear that the surgery is approved of for certain forms of hermaphroditism as a remedy for 'nature's defects': Brody op cit 10. But it is a totally different matter where "psychic hermaphroditism" - as Healy puts it - is concerned. "Excising the testes and penis would constitute a grave mutilation of the human body" (ibid). Two points are apparent from Healy's approach: 1. That basic gender is determined by genitalia and 2. mutilation is morally permissible only when "it is necessary to preserve the body's health or integrity". Healy, along with other commentators (B.M. Ashley and K.D. O'Rourke (1977) 'Health Ethics' cited in Brody op cit 10), believes that the treatment is not properly psycho-therapeutic because it yields to the neurotic "illusions of the patients, rather than attempting to ameliorate them". (sic: this is precisely what corrective surgery aims to do. Furthermore, it has yet to be proven that transsexualism is an illusion and not in fact biologically based). N. Mason ('The Transsexual Dilemma: Being a Transsexual' (1980) 6 Journal of Medical Ethics 85 at 88) states that "... as far as I am concerned, there is no doubt of the rightness of my decision to change roles ... One priest did think that I should have remained in my former role and 'borne my cross' ... I cannot subscribe to this theology. Is it really being Christian to reject the offer of help, especially if it enables one to become more of a whole person?"
28. M.T. Edgerton 'Transsexualism - A Surgical Problem?' (October 1978) 54 Plastic and Reconstructive Surgery 448 (hereinafter referred to as 'Edgerton (2)').

B. Comparative Law.

1. The United States of America.

It is common cause that some courts in the United States have considered corrective surgery as a possible type of mayhem.⁽²⁹⁾ A New York Court called 'sex reversal'

"... an experimental form of psychotherapy by which mutilating surgery is conducted on a person with the intent of setting his mind at ease".⁽³⁰⁾

The history of the law in this area in the United States is interesting, and sheds illumination on the reasons for the particular approach to the problem. The starting point was the introduction of the crime of mayhem into early American common law, which crime is committed by inflicting an injury which reduced the victim's ability to fight.⁽³¹⁾ The common law penalty was biblical justice: an eye for an eye. However, it became apparent that retaliation in kind was inadequate since the offence could be repeated, but the punishment could not.⁽³²⁾ Mayhem gradually evolved into a more personal and less combative offence, and soon embraced disfigurement which did not necessarily decrease pugilistic might.⁽³³⁾ Today in the United States it is generally a statutory offence with the emphasis having shifted from

- 29 Belli op cit 493. Castration is undeniably mayhem, yet effective corrective surgery depends on castration (ibid). In a case involving voluntary, non-therapeutic sterilisation, a Californian court ruled that vasectomies do not constitute mayhem, since they do not render the patient impotent or 'unable to fight for the king': Jessin v County of Shasta 274 Cal App 2d 737, 79 Cal Rptr 359 (1969).
30. Hartin v Director of the Bureau of Records 75 Misc 2d, 229 347 NYS 2d 515 (Sup Ct 1973). This court considered the surgery as no better than mutilation and disapproved of resolving a person's 'unhealthy mental state' by drastic physical means.
31. Wilful maiming was a crime against the king as well as the victim, since the victim was rendered useless in combat. Blackstone (Commentaries on the Law in England (1803) at s205) defined the crime as "violently depriving another of the use of such of his members as may render him less able in fighting, or depriving him of those parts, the loss of which in all animales, abates their courage".
33. Belli op cit 492.
33. U S v Cook 462 F 2d 301 (D.C.Cr 1972).

"... military and combative effects of the injury, to the preservation of the human body in normal functioning ... what is important now is not the victim's capacity for attack or defence, but the integrity of his person". (34)

Many mayhem statutes are in existence now which prohibit any act unlawfully and maliciously depriving a human being of a member of his body, or disables, disfigures or renders it useless, and castration is implicitly included. (35)

In the criminal law field an authority, after reviewing the law as regards surgical operations concluded that the law is

"... in an uncertain state and one depending very much on the views of the judge as to what is desirable and what is undesirable conduct". (36)

Furthermore, the criminal law and medical licencing boards forbid treatment without sufficient medical indication, and the unwarranted removal of bodily parts. (37)

The civil law position is less problematical - the position being that any operation performed by a surgeon is prima facie an assault, rendered lawful by voluntary, informed consent. (38)

It has been suggested that a theory which could distinguish corrective surgery from mayhem is the right to privacy as protected by the Bill of Rights. It was contended that the transsexual has the same right to privacy as a pregnant woman contemplating abortion to make her personal decision in privacy, without interference from the state. (39)

34. Ibid.

35. For example, Cal Penal Code section 203.

36. J.C. Smith and B. Hogan Criminal Law (1st ed 1965) 268.

37. Belli op cit 491.

38. McColl Kennedy op cit 118.

39. Belli op cit 498. The case of Roe v Wade 410 U S 114 (1973) recognised the right of personal privacy in decisions regarding marriage, procreation, contraception and even abortion. Later cases even included voluntary non-therapeutic sterilisation within this zone of privacy: Jessin v County of Shasta supra. It is submitted that by logical extension, this case could cover corrective surgery, which entails such voluntary sterilisation.

Furthermore, it was found in Doe v State Dept of Public Welfare⁽⁴⁰⁾ that the only medical treatment known to be successful in treating the problem of transsexualism is the "radical sex conversion surgical procedure requested". But this is not all on the issue of the legality of the operation in the United States, as to date there have been several cases in which it was decided that corrective surgery could be considered as treatment covered by the federal medical aid program, which surely would not be considered if the treatment were illegal. In Rush v Parham⁽⁴¹⁾ corrective surgery sought under the recommendation of the patient's psychologist and surgeon, was held to be allowable under the governing medical provisions. The patient had been diagnosed by at least two physicians as a true transsexual and the court noted that even though there is a state prohibition against expenditure of funds for this purpose, it held that it was a prohibition against the federal requirements that assistance be rendered to all eligible parties in all circumstances of medical necessity, and the court stated further that the governing physician was the proper party to determine whether the requested surgery involved a medical necessity.

In B v Lackner⁽⁴²⁾ the Superior Court of San Francisco denied the plaintiff's petition for a writ of mandate directing Medi-Cal⁽⁴³⁾ to authorize treatment for corrective surgery. The plaintiff had consulted a plastic surgeon who had diagnosed that she was suffering from transsexualism, and determined that it was medically necessary and reasonable to perform the surgery. The Director of the Californian Department of Health refused the application for Medi-Cal to finance the operation, stating that such an operation was a cosmetic one which was not covered by the medical program. The Californian Court of Appeals reversed this decision, concluding that it was clearly impossible to regard corrective surgery as merely cosmetic in nature.⁽⁴⁴⁾ The defence counsel stated that the state's refusal to consider the appellant's evidence of medical need, was arbitrary and capricious, and violated her rights to equal protection.⁽⁴⁵⁾ Dr. Liebman asserted that

40. (1977) Minn 257 NW 2d 816, 819 Sup Ct Minn.

41. (1977) ND Ga 440 F Supp 383.

42. (1978) (1st Dist) 80 Cal App 3d 64, 145 Cal.

43. The state of California's plan for participation in the federal Medicaid.

44. Cosmetic surgery, under the program is defined as "surgical procedure to alter the texture or configuration of the skin and the skin's relationship with contiguous structures of the body".

45. See also the case of Brown v Merlo (1973) 8 Cal 3d 855, 106 Cal Rptr 388 at 392.

the plaintiff

"... must have this (corrective surgery) to alleviate her emotional problems, prevent them from exacerbation and to rehabilitate her to the point where she can function as a normal person and participate fully in society".⁽⁴⁶⁾

Dr Crewes concluded by stating that

"As a general rule, transsexuals have an improved psychological, social and vocational adjustment after surgery ... Numerous attempts by way of therapy, pharmacology, behavioural and disciplinary approaches have generally been unavailing in treating the transsexual".⁽⁴⁷⁾

2. Canada.

There are no cases directly in point, but section 45 of the Criminal Code⁽⁴⁸⁾ protects doctors from criminal liability when surgery is performed for the benefit of the patient with reasonable care and skill, and with regard to the health of that person.⁽⁴⁹⁾ There is in fact such a medical case at present in which a doctor has had to decide on assigning a new sex to a siamese twin.

"Canadian surgeons plan to separate siamese twin boys in an operation which will turn at least one of them into a girl ... The twins share the same liver, intestinal and urinary tracts, some bones, and a single set of male sex organs".⁽⁵⁰⁾

It is submitted therefore that since the operation has been performed as a matter of necessity in this case, there should be no reason why a transsexual should not be able to choose to undergo the same operation, bearing in mind his adult status and the fact of his valid consent thereto.

46. B v Lackner supra at 64 145 Cal.

47. Ibid.

48. Canadian Criminal Code (Martin 1970).

49. Hawley op cit 124.

50. The Natal Witness 21 July 1984.

At least in the latter case, one would be certain of the patient's gender identity, whereas with the siamese twin there is no guarantee that 'she' may not later reject 'her' imposed feminine role because the male impulses within are stronger.⁽⁵¹⁾ It is arguable also as to whether or not the corrective surgery for the transsexual is in fact not a necessity too, as in the case of the siamese twins, especially if it is performed in order to alleviate manic depression and avoid suicide attempts.

3. The United Kingdom

Here too, there has been no case directly dealing with the legality of corrective surgery. However, in a dictum delivered by Judge Ormrod in Corbett v Corbett⁽⁵²⁾ it was observed that

"There is obviously room for differences of opinion on the ethical aspect of such operations, but if they are undertaken for genuine, therapeutic purposes, it is a matter for the decision of the patient and the doctors concerned in his case. The passing of section 1 of the Sexual Offences Act 1967 seems to have removed any legal objection which there might have been to such procedures".⁽⁵³⁾

Section 1 of the said Act provides:

"Notwithstanding any statutory or common law provision ... a homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of twenty one years."

It is not clear as to exactly what relationship exists between legislation on homosexuality and corrective surgery, but presumably the analogy which the learned judge was attempting to draw was that such decisions concerning sexuality and which therefore include the issue of corrective surgery, should be left in the private arena to be of concern only to those directly involved. Although this sentiment is laudable, Ormrod J however, did not in fact give it any substance at all with his final decision on the sex

51. Vide chapter three supra for a similar case.

52. (1970) 2 All E R 33. This case is dealt with in greater detail in the next section.

53. At 43 of the report.

of the post-operative transsexual, in the case before him. Furthermore, in making this comparison, the judge is in fact equating transsexualism with homosexuality, which is medically incorrect. According to this tenet it is inferred that a transsexual who has undergone the operation has nevertheless not changed sex, but when having what he considers to be a heterosexual relationship with a person of the anatomical opposite sex, he will escape prosecution for homosexuality by virtue of section 1. This leads us to conclude that the use of an artificial vagina - supplied by the operation - is homosexual in nature, which hardly fits the usual description of homosexual behaviour.

Be that as it may, it would appear that the operation is lawful in the United Kingdom, if undertaken for therapeutic purposes. The subsequent refusal to recognise this fact however, makes the acceptance of the surgery ridiculous.

4. Argentina.

In Argentina in the case of Dr Franciso Defazio⁽⁵⁴⁾ the accused had been convicted of aggravated assault on three charges brought as a result of corrective surgery. The first charge involved a person who was diagnosed as a pseudo-hermaphrodite: he had a male karyotype, testicular tissue, female libido and female sex hormones. The court held that the operation was not injurious to the patient as it did not involve the removal of any useful organs and that the surgery was intended to adapt the patient to his psychological sex. The conviction was accordingly set aside.

The second case involved the brother of the first patient who had normal male genitals, but whose behaviour was distinctly that of a female. The forensic physicians however concluded that 'he' was male because of his karyotype. The defence physicians on the other hand, testified that the patient was "intersexual" and that the operation successfully orientated his "bio-psychological sex", socially.

The third case involved a person who had shown signs of femininity since childhood. He had been subjected to male hormone treatment, but without

54. 138 La Ley 592 (C N Crim y Correc Argen 1969). See also S.A. Strauss Doctor, Patient and the Law (1980) (hereinafter referred to as 'Strauss (2)') 216.

favourable results. He had marked female characteristics such as wide hips, lack of facial hair, and feminine bone structure, but normal male genitals. (It must be remembered that although transsexualism may be a psychologically based syndrome, this by no means precludes the possibility of physical abnormalities and this in fact substantiates the psychological belief of the transsexual.⁽⁵⁵⁾ This third case was considered to be even more feminine than the two previous ones.

The court came to the conclusion that the convictions had to be quashed. Even if one were to assume that the operations had in fact been injurious to the patients there had been no proof of dolus or awareness of such a possibility, on the part of the doctor.⁽⁵⁶⁾ The court, per Judge Victoria pointed out that the conflicting evidence was understandable, as the subject matter was one fraught with difficulty and one in which recent scientific discoveries had led to rapidly changing criteria.

"The physician is under a duty to proceed according to what he considers best for his patient and we as judges must be extremely cautious in passing judgment on this".⁽⁵⁷⁾

Judge Esteves in his turn observed that all surgical operations can be said to cause bodily injury of some sort or another, and that criminal liability can only be based either on culpa or dolus. He stated that much had been made of the designation of the sex of the patients on their birth certificates, but that male and female are the only designations in fact accepted by the Registry, and these are based on external criteria. This leaves no room for any sex in between. He continued to say that it was not simply a question of the actions performed by the accused but of very complicated scientific problems regarding diagnosis and therapeutics and it is not judicially feasible to solve a medical problem. With this the author concurs. Esteves J continued in a most sensible way to insist that cognizance be taken of medical progress and that the greater internal influ-

55. As was noted in the case dealing with the South African model, Lauren supra.

56. If the doctor had been negligent, which he was not, then there could have been a delictual case. As it was there was the defence of volenti non fit injuria in operation. It must be noted that no mention was made of the intrinsically unlawful nature of the operation - as there was in the earlier case of Dr Ricardo San Martin infra so it must have been accepted as therapeutic.

57. Strauss (2) op cit 217.

ence of one factor relating to sex classification in contrast with another external factor, renders diagnosis of 'true sex' difficult. The appellant had diagnosed the three patients as transsexuals in the light of his medical knowledge and therefore his decision to operate cannot be regarded as irresponsible since his specialised technique and ability had been thought of highly. This decision was a breakthrough in enlightened thinking.

C. South Africa.

In South Africa, although there is no legislation against the surgery or any law in fact on the legality of the operation, it is practiced freely and without set regulations.⁽⁵⁸⁾ Strauss⁽⁵⁹⁾ in fact contends that such surgery which would relieve the psycho-neurotic condition in unmarried transsexuals, should not be considered as categorically contra bonos mores. This author is in agreement with this submission and would also go so far as to say that despite the dearth of case law on this point, the fact that the 1974 legislation envisaged the operation's occurrence and made provision for its legal recognition as far as the alteration of documents is concerned, is tantamount to sanctioning the medical procedure.

III THE ISSUE OF CONSENT

A. General.

Having discussed the basic legality of the operation, on therapeutic grounds, one must deal with the requirements of a valid consent, which is necessary in order to exonerate the doctor from delictual and/or criminal liability.⁽⁶⁰⁾

"We are aware of no rule or principle of law which could extend to (the surgeon) free licence respecting surgical operations".⁽⁶¹⁾

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58. Letter dated March 1984, to this author from a renowned Durban gynaecologist, who has been responsible for the majority of the operations performed in South Africa.
59. S.A. Strauss 'The Sex Change Operation: Two Interesting Decisions' (1967) 84 South African Law Journal 15 (hereinafter referred to as 'Strauss (3)').
60. Proof of the existence of a recognised ground for justification such as self-defence, necessity, volenti or statutory authority conclusively demonstrates the reasonableness, and therefore the lawfulness of the defendant's conduct: Van der Walt op cit 22.
61. Mohr v Williams 95 Minn 261 (1905). See also Ex Parte Dixie 1950 (4) S A 748 (W).

Consent to the infliction of harm can be a ground of justification, but such consent in the first instance, must be permitted by law.⁽⁶²⁾ In respect of one's property, the law allows one to do with it as one pleases, but not so with one's own body. What one is permitted to do with one's body depends largely on the mores of the situation. Thus the consent to being killed or to serious injury without the presence of a serious social purpose would be contra bonos mores.⁽⁶³⁾ So, although the law does permit a person to consent to a surgical operation reasonably necessary to save his life or health, it does not sanction experimental treatment in which a person is a 'guinea pig' in the interests of science.⁽⁶⁴⁾ Similarly, it would appear that any drastic operation of a non-therapeutic nature is unlawful⁽⁶⁵⁾ unless a legally justified purpose is sought to be attained thereby. Obviously, with the development of medical science and technology, many problems are created in the area of consent. As Strauss puts it,

"... kan die versoek en toestemming van 'n pasiënt tot sogenaamde plastiese sjirurgie met die oog op verhoging van sy liggaamlike skoonheid, sonder dat dit enige geneeskundige doel dien, die sjirurg van aanspreeklikheid vrywaar? Kan die arts wat 'n ongehude op laasgenoemde versoek steriliseer hom op die toestemming van die pasiënt beroep ten einde aan aanspreeklikheid teenoor die pasiënt te ontkom?"⁽⁶⁶⁾

A person who willingly consents to the defendant's act, in the form of either a specific harmful act, or an activity involving a risk of harm, cannot complain that a delict has been committed against him.⁽⁶⁷⁾ This

62. S.A. Strauss 'Bodily Injury and the Defence of Consent' (1964) 81 South African Law Journal (hereinafter referred to as 'Strauss (4)'), 179.

63. Van der Walt op cit 54.

64. Except per s3 of The Post Mortem Examinations and Removal of Tissues Act 30 of 1952: A.V. Lansdown 'Guinea Pigs of Hippocrates and the Criminal Law' (1960) 77 South African Law Journal 117.

65. For example, the law has ruled that a dentist who undertakes general extraction to enable a person to accept an appointment as a circus clown would be guilty of assault with intent to do grievous bodily harm: per Lord Denning in Bravery v Bravery (1954) 3 All E R 59 at 67.

66. Strauss (1) op cit 91.

67. Lampert v Hefer (1966) (2) S A 507 (A).

principle - well known to Roman and Roman-Dutch law⁽⁶⁸⁾ is expressed commonly in the maxim volenti non fit injuria, although the maxim was not expressed in this form in the Roman law.⁽⁶⁹⁾ According to Winfield⁽⁷⁰⁾ the maxim was reported in an English decision in 1305 precisely as it is used today.⁽⁷¹⁾ Whatever its precise historical origin, the fact remains that the principle of volenti is a part of South African, English and American law.⁽⁷²⁾

In Roman law voluntas has several meanings⁽⁷³⁾ intention, free will, consent.

"Hierbenewens is voluntas ook in die volgende besondere betekenis gebruik: bedoeling of opset, vrye wil, willekeur, goeie wil ... toestemming aanvaarding..."⁽⁷⁴⁾

Black's Law Dictionary defines consent as

"Voluntary agreement by a person in the possession and exercise of sufficient mentality to make an intelligent choice to do something proposed by another",

and goes on to state that consent is

"an act of reason".⁽⁷⁵⁾

There is apparently a distinction between will and consent. In R v Dee⁽⁷⁶⁾ it was held that:

"Where the will does not accompany the act, there is no consent";

and Strauss:⁽⁷⁷⁾

"Daar kan geen toestemming sonder wil wees nie".⁽⁷⁸⁾

68. D. 9.2.11 pr; D. 47.10.1.5; De Groot Inleiding 3.35.8; Voet Commentarius 9.2.24.

69. Strauss (1) op cit 2.

70. In Strauss (1) op cit 2.

71. Ibid. —

72. Ibid. —

73. D.44.7.3.2; D.50.16.21.9.

74. Strauss (1) op cit 17.

75. Bouvier's Law Dictionary defines consent as "the power of mind which directs the actions of a man" in Strauss (1) op cit 23.

76. 15 Cox CC 579 at 599.

77. Strauss (1) op cit 23.

78. This is stated more fully in the requirement of voluntary consent.

Although certain authorities do distinguish between what Strauss calls 'volkome wil' and 'minder volkome wil'⁽⁷⁹⁾ he himself does not agree with this tenet.

"Hierdie teenstelling is m.i. regtens onjuis. Regtens het iemand óf wil óf nie gewil nie".⁽⁸⁰⁾

It is submitted that this is the correct view. Strauss does however subscribe to the view that one must make a distinction between the concepts of 'against the will' and 'without consent'.⁽⁸¹⁾

The defence of volenti although recognised in South African law, is applied with great caution and circumspection.⁽⁸²⁾ Volenti as a general defence can take two forms:

1. consent to a specific harmful act of the defendant; and
2. the assumption of the risk of harm connected with the activity of the defendant.⁽⁸³⁾

An example of the first type is the consent to undergo surgical operations.⁽⁸⁴⁾ In the so-called 'risk cases' the plaintiff does not consent to a specific act and injury but deliberately exposes himself to an act involving a risk of harm.⁽⁸⁵⁾ So besides the defence of volenti non fit injuria there is also 'voluntary assumption of risk'. A typical such situation is the patient undergoing a specific operation - to which he has consented - who is made aware of the possibilities of complications and consents thereto as well.⁽⁸⁶⁾ Although this principle has been used occasionally in criminal law, it has remained more a part of the private law. The nature of the doctrine unfortunately has not always been dealt with lucidly and succinctly by the courts⁽⁸⁷⁾ so there is no clear cut formula.

79. Strauss (1) op cit 25. See Matthaëus Prol 2.14 who mentions plena et perfecta voluntas and minus plena voluntas.

80. Strauss (1) op cit 25.

81. Ibid. See also R v Z 1960 (1) S A 739 (A).

82. Netherlands Insurance Co of South Africa Ltd. v Van der Vyfer 1968 (1) S A 412 (A) at 421; Santam Insurance Co Ltd. v Vorster 1973 (4) S A 764 (A) at 778.

83. Van der Walt op cit 51.

84. Esterhuyzen v Administrator, Transvaal 1957 (3) S A 710 (T); Stoffberg v Elliot 1923 C P D 148.

85. Lampert v Hefer supra.

86. Lampert v Hefer supra; Alberts v Engelbrecht 1961 (2) S A 644 (T); National Meat Suppliers (Pty) Ltd v Cape Town City Council 1938 C P D 498; R.J. McKerron Law of Delict (7th ed 1971) 62.

87. Strauss (1) op cit 60. According to him, voluntary assumption of risk is just consent to a certain liability. One must distinguish however, voluntary assumption of risk from agreement not to sue': Essa v Divaris 1947 (1) S A 463 (A).

There has been a measure of English law influence in the South African law pertaining to the issue of voluntary assumption of risk⁽⁸⁸⁾ and one such influence is the 'duty of care'.⁽⁸⁹⁾ Innes CJ in Jameson Minors v C S A R⁽⁹⁰⁾ stated that,

"The term negligence as used in our courts simply means a failure to exercise the degree of diligence which the law requires under the circumstances of each case".

Similarly

"Voluntary assumption of risk does not of course absolve the defendant from any duty of care in respect of the creation of risks which the injured party neither expressly nor impliedly consents to run".⁽⁹¹⁾

As Greenberg JP stated in Mordt NO v Union Government,⁽⁹²⁾

"The duty of such persons however is ordinarily discharged if the manufacturer warns his purchaser of the dangerous nature of the article. Probably the reason why this is sufficient is that there is no negligence on his part because he has done what a reasonable person would do to prevent injury, or because a reasonable person would not anticipate that the purchaser would not pass the warning on".

It has been held that the duty of care in voluntary assumption of risk cases does not fall away, but that there ceases to be an actionable breach thereof.

"I think there is a duty though I agree that there is no actionable breach of that duty, if the person injured ... voluntarily elects to encounter (harm)"⁽⁹³⁾

88. Strauss (1) op cit 308.

89. Strauss (1) op cit 309; see also Burnett and Taylor v De Beers Cons. Mines Ltd. (1885) 8 H C 65.

90. 1908 TS 575 at 586.

91. S A R v Cruywagen 1938 T P D 219; Lampert v Hefer supra.

92. 1938 T P D 589.

93. Yarmouth v France (1887) 19 Q B D 647 per Lord Esher.

Once consent has been obtained, it remains for the defendant to exercise such skill and knowledge required by law. Lack of skill per se is not negligent, but it is negligent to engage in any potentially dangerous activity unless one has the skill usually associated with that activity.⁽⁹⁴⁾ A doctor therefore, can only be held liable delictually if he was in fact negligent after obtaining the necessary consent, as he is expected to conform to the standard of the reasonably competent and experienced practitioner at that time, in that country.⁽⁹⁵⁾

"The standard of care required of a medical practitioner who undertakes the treatment of a patient is not the highest possible degree of professional skill, but reasonable skill and care".⁽⁹⁶⁾

Strauss⁽⁹⁷⁾ goes further to state that,

"Where a patient consults a doctor who undertakes to treat him, the doctor assumes no greater duty than to treat the patient with due care and skill, unless the doctor has expressly guaranteed that the patient will be healed by his treatment - something which the prudent doctor will generally not do."

The ability to consent is an

"... expression of the individualistic, philosophical premise that each man is master of his fate, and therefore is allowed to limit his rights as he pleases."⁽⁹⁸⁾

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94. Mitchell v Dixon 1914 (AD) 519: Imperitia culpa adnumeratur - a person engaged in a calling which demands special knowledge must not only exercise reasonable care, but also measure up to the standard of competence of a reasonable man professing such knowledge and skill.
95. Van Wyk v Lewis 1924 AD 438. Here the defendant doctor performed an operation on the plaintiff who afterwards complained of stomach aches. On investigation, it was discovered that a swab had been left inside him. It was held that the doctor was not liable for negligence because it is not the general practice of a doctor himself to check swabs and instruments.
96. Brits and Another v Tsatsovolakis 1976 (2) S A 891 (T).
97. Strauss (2) op cit 20.
98. Van der Walt op cit 51. It is submitted that an extension of the person's initial right, is the other concomitant right of the individual to choose the course of treatment he thinks best suits his needs.

"It is a fundamental principle of the common law (England) that volenti non fit injuria - to one who consents no harm is done. The attitude of the courts has not been one of paternalism. Where no public interest is involved, they have left the individual to work out his own destiny, and are not concerned with protecting him from his own folly in permitting others from damaging him".⁽⁹⁹⁾

Legally, the doctor's right to operate on or treat a patient, is based entirely upon the patient's consent:⁽¹⁰⁰⁾ therefore essentially, the legal relationship between doctor and patient is a consensual one.⁽¹⁰¹⁾ In the normal course of events obtaining a legal consent does not present practical difficulties. By consulting a doctor in the first place, the patient tacitly consents to such treatment as in the doctor's opinion, is medically indicated.⁽¹⁰²⁾

"By going into a hospital (a man) does not waive or give up his right to absolute security of the person he still has the right to say what operation he will submit to, and unless his consent to an operation is expressly obtained, any operation performed upon him without his consent is an unlawful interference with his right of security and control of his own body".⁽¹⁰³⁾

There are four golden rules relating to the issue of consent by the patient:⁽¹⁰⁴⁾

1. the doctor must obtain an INFORMED CONSENT;
2. the patient must have THE CAPACITY TO CONSENT;

99. Prosser op cit 82.

100. Apart from those cases where a patient is under a statutory duty to submit to vaccination or an examination for the purposes of public health and apart from emergency cases where the patient is brought to the doctor in an unconscious or semi-conscious state: Strauss (2) op cit 3.

101. Ibid. See also Stoffberg v Elliot supra.

102. Ibid.

103. My underlining. This, it is submitted, is tantamount to sanctioning corrective surgery, because the law recognises a person's right to control his own body, and therefore a person should be free to choose what he deems best for his welfare.

104. Strauss (2) op cit 20.

3. the consent must be FREE AND VOLUNTARY; and
4. the consent must be COMPREHENSIVE.

1. Informed consent.

In order to operate as a defence, consent must be real, based on knowledge of the material facts allegedly consented to by the plaintiff.⁽¹⁰⁵⁾ In this context, we use the expression 'informed consent'. This doctrine of informed consent has spanned untold controversy in the courts, among legal scholars, and within the medical profession. Although often condemned by medical practitioners as a "myth and a fiction",⁽¹⁰⁶⁾ it is received favourably by legal scholars in general. Informed consent is an ethical command.⁽¹⁰⁷⁾ It has - as has been mentioned previously - deep and strong roots in the individualistic tradition of the common law. The concept is comprised of two legal duties imposed on physicians:

1. to inform patients about the treatment; and
2. to obtain their consent to it.⁽¹⁰⁸⁾

The physician's role in decision-making is to determine, from a medical perspective what the patient's problem is (diagnosis), how, if at all, it may be ameliorated, and then what the possible pitfalls of the treatment may be. Next, the doctor's role is to communicate this information to the patient, who will then utilise it in the context of his/her own personal values and subjective preferences.⁽¹⁰⁹⁾

Basically, there is little dispute as to the kind of information the physician must impart to his patient - the so-called elements of disclosure.⁽¹¹⁰⁾ The plaintiff must have a clear knowledge of the harm and risk involved in the conduct of the defendant.⁽¹¹¹⁾ As was held in Esterhuysen v Adminis-

105. S.A. Strauss and Strydom Die Suid-Afrikaanse Geneeskundige Reg (1967) 211.

106. H.K. Beecher 'Consent in Clinical Experimentation - Myth and Reality' (January 1966) 195 Journal of American Medical Association 34-5.

107. M.D. Hillier Medical Ethics and the Law (1981) 197.

108. In addition to safe-guarding the right of self-determination, informed consent encourages patients to make intelligent decisions about medical care. Hillier op cit 197.

109. Ibid.

110. Hillier op cit 200.

111. Union Government (Minister of Railways and Harbours) v Matthee 1917 AD 688; Alberts v Engelbrecht supra; Netherlands Insurance Co of SA Ltd v Van der Vyfer supra.

trator, Transvaal, (112)

"A therapist who knows beforehand of the serious risks to which his patient will be exposed by treatment, must explain the situation and the risks to the patient, otherwise consent to undergo the medical treatment will not be considered consent in the legal sense of the word. The mere fact that a patient agrees to be admitted to a hospital for an operation or treatment does not in itself imply consent to any operation or treatment which the hospital or doctors consider beneficial. To operate without consent would be justified only in a case of urgent necessity." (113)

The central information component is of course the possible negative results that may occur from undergoing a particular procedure. The physician must also explain the nature of such procedure and closely related to this, is the benefit which the patient may expect to gain reasonably therefrom. Finally, the patient is entitled to be informed of any possible alternative treatments that might be employed, as well as the consequences thereof. (114)

Knowledge of the harm is not sufficient. (115) The plaintiff must also have appreciated the nature and extent of the harm and the risk involved. (116)

"Mere knowledge is not a conclusive defence. There may be a perception of the existence of a danger, without comprehension of the risk". (117)

Also,

"In die moderne reg word algemeen geleer dat toestemming gegrond moet wees op kennis en begrip aan die kant van die toestemmende." ¹¹⁸

112. 1957 (3) SA 710 (T).

113. See also Stoffberg v Elliot supra; and Ex Parte Dixie supra.

114. Hillier op cit 201.

115. Van der Walt op cit 52.

116. Rosseau v Viljoen 1970 (3) SA 410 (C); Lampert v Hefer supra; Santam v Vorster supra.

117. Thomas v Quartermaine (1887) Q B D 685 at 696.

118. Strauss (1) op cit 108. (My underlining).

Thorough knowledge of something is not tantamount to consent thereto⁽¹¹⁹⁾ and consent to an action is not necessarily consent to its consequences.

"A person manifesting assent to the conduct of another may be mistaken to its ... consequences."⁽¹²⁰⁾

Obviously too, consent to one action of which the plaintiff is knowledgeable is not regarded as consent to another action or consequence of which he is unaware even if the two actions are very similar in nature.⁽¹²¹⁾ Furthermore, mistake or misrepresentation, makes consent unlikely.⁽¹²²⁾ But not every misrepresentation has the effect of defeating the consent: the error must be germane to the action. Strauss⁽¹²³⁾ feels that the contention in R v Ashwell⁽¹²⁴⁾ viz: "in order that there may be consent, a man must be under no mistake as to that to which he consents" - is too strongly stated. Rather, he concurs with the view held in R v Clarence⁽¹²⁵⁾ that it is not necessarily true that consent obtained by fraud is no consent at all. Furthermore, the mistake must be a legal one to vitiate consent.

"Volgens ons skrywers moet error gebillick (iustus) wees ten einde as grond vir restitution in interim te geld."⁽¹²⁶⁾

Obviously there can be no consent where a person is fully misrepresented to about the deed and/or its consequences.⁽¹²⁷⁾

Describing the elements of informed consent is facile in comparison with the issue of how much information the physician must disclose. Legally, there is no duty upon a doctor to inform a patient 'fully' of the diagnosis.⁽¹²⁸⁾ There are several reasons for this inter alia that some of

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119. Ibid.
120. Cited in Strauss (1) op cit 109; See also Donn v Hamilton (1939) 1 K B 509 at 517; Stoffberg v Elliot supra.
121. Mandelbaum v Bekker 1927 CPD 375.
122. Strauss (1) op cit 121.
123. Strauss (1) op cit 122.
123. (1885) 16 Cox CC 1 14.
125. (1888) 16 Cox CC 511 at 515.
126. Strauss (1) op cit 142, referring to Huber 4.41.6.; Voet 4.1.26.
127. Coombs v Mason 1931 NPD 105; Alberts v Engelbrecht supra.
128. Strauss (2) op cit 6. The diagnosis involves the "scientific assessment of the case on the basis of the doctor's knowledge, skill and experience".

what the physician knows is too complex to be relayed meaningfully to the layman.⁽¹²⁹⁾ It is more important to inform the patient as to the treatment and its expected results. The patient should be informed in unequivocal terms of those results which are inevitable.⁽¹³⁰⁾ A problem that may arise is that no matter how accurate the prognosis is, under the circumstances of the operation, new facts may come to light.⁽¹³¹⁾ The doctor is not obliged to tell the patient of all atypical consequences which might occur.⁽¹³²⁾ It is obviously for the doctor's own protection as well, that he make the patient aware of all the attendant consequences.⁽¹³³⁾ If it is not possible to make a final diagnosis before the operation is commenced, then the doctor must bring this to the attention of the patient.⁽¹³⁴⁾ If the patient has not been informed prior to the operation or treatment of the eventual consequences thereof, or even of previously unlikely consequences which now seem possible, then there is simply no consent.⁽¹³⁵⁾ The nature of the proposed medical procedure should be described in simple terms in "such detail that he may apply his mind intelligently to these".⁽¹³⁶⁾

"The patient's interest in information does not extend to a lengthy polysyllable discourse on all the possible complications. A mini-course in medical science is not required".⁽¹³⁷⁾

The courts then have agreed that the physician need not make total disclosure, but must make a reasonable disclosure of the information that is material to making a decision about the treatment.

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129. It may be impractical to attempt to give the patient a reliable account of this assessment; Strauss and Strydom op cit 175.
130. Strauss op cit (2). He goes on to state that in giving such information it is wise for the doctor to under-estimate rather than over-estimate the intelligence of the patient.
131. Strauss (1) op cit 134.
132. Ibid.
133. Strauss (1) op cit 137.
134. Ibid.
135. Ibid.
136. Strauss (2) op cit 6.
137. Cobbs v Grant 502 P 2d 111 (Cal 1972).

"The duty of the physician to disclose ... is limited to those disclosures which a reasonable medical practitioner would make under the same or similar circumstances". (138)

A problem arises when the doctor's decision to inform the patient of the seriousness of his ailment would in fact affect the latter so adversely as to be detrimental to his treatment. In Richter and Another v Hamman's Estate (139) Watermeyer J said:

"A doctor whose advise is sought about an operation to which dangers are attached - and there are dangers attached to most operations - is in a dilemma. If he fails to disclose the risks, he may render himself liable to an action for assault, whereas if he discloses them he might well frighten the patient into not having the operation when the doctor knows full well that it would be in the patient's interests to have it". (140)

Smith (141) suggests that the doctor is privileged to withhold on therapeutic grounds, the diagnosis of a serious ailment such as cancer, from a patient who is unstable, temperamental or neurotic, and if his/her condition would be placed in danger if he/she were enlightened as to his/her problem. In the event of a mishap the doctor must rely on grounds other than consent for his defence. (142)

In the last analysis - in the instance particularly of corrective surgery it is -the patient who should, and does exercise the final decisional authority, whether or not to undergo the operation, once he has been evaluated and found a suitable candidate for it. This is necessarily so, because it is

138. Natalson v Kine 360 P 2d 1093, 1106 (Kan 1960). This court rejected the subjective, patient-orientated standard. Hence the physician is not obligated to disclose what the particular patient would have wanted to know, but rather, what the reasonable patient would expect to know.

139. 1976 (3) SA 226 (C) at 232G.

140. In this case, the likelihood of any complications was so uncommon that the court held that the fact that the defendant had not mentioned the possibility thereof, did not constitute negligence.

141. Cited in Strauss (1) op cit 139.

142. Ibid.

the patient who will in the most personal way, reap the ultimate benefits of the surgery, and also experience any of the subjective failures thereof. The corrective surgery is as yet imperfect, but this may of course be insufficient to deter a determined transsexual, and as such even though he chooses to undergo the treatment, he may in some way still be disappointed with the final result. This is of course the risk that has to be faced: which in many cases is considered more acceptable than living a life of subterfuge.

2. Capacity to consent.

As consent is a legal act, it requires in principle that the party to the act has the legal capacity to perform a juristic act.⁽¹⁴³⁾ The consenting person is deemed to have the necessary legal capacity if he has the mental capability and maturity to evaluate responsibly, the nature, extent and implications of his consent.⁽¹⁴⁴⁾

The existence of legal capacity in this sense therefore is relative to the particular circumstances of the case, and more especially to the nature of the interests involved and the seriousness of any potentially harmful conduct.⁽¹⁴⁵⁾ An adult must be in "sound and sober senses" in order to give "valid consent".⁽¹⁴⁶⁾

It must be borne in mind that a person suffering from a mental disability cannot enter into contracts and from the point of criminal and delictual liability, cannot consent to actions which - if it were not for his consent - would constitute a criminal offence or a civil delict.⁽¹⁴⁷⁾ The test applied in practice is whether the person concerned was capable of appreciating and understanding the nature of the transaction into which he purported to enter.⁽¹⁴⁸⁾

143. Van der Walt op cit 54.

144. Ibid.

145. Ibid.

146. Strauss (2) op cit 4. If the person is intoxicated, strongly under the influence of drugs or pre-medication, unconscious or in a complete state of shock, he is legally incapable of giving consent.

147. Strauss (2) op cit 16. Generally, an insane person cannot consent to any juristic act. See also R v S 1951 (3) SA 209 (K); R v M 1953 (4) SA 393 (A); R v Oosthuyzen 1954 (1) P H H 70 (A).

148. Van der Walt op cit 55.

3. Voluntary consent.

For consent to be valid, it must have been freely and voluntarily given. (149)

Whether the consent has been freely given in fact, depends entirely on the circumstances of the case, and in particular, on the moral, social and economic pressures restricting the plaintiff's freedom of choice. (150)

"It (volenti non fit injuria) does not apply to consent by any pressures whether social, economic or simply habit".

In Insurance Commission v Joyce (151) it was held that:

"Under modern authority, consent or voluntary assumption of risk is not to be implied where, notwithstanding knowledge, the person concerned has exposed himself to the danger only because of the exigency of the situation in which he stands. If he has no real or practical choice, he does not voluntarily consent. (152)

The general opinion of the writers in criminal law seems to be that "n gedwonge wil geen wil is nie". (153) Salmond (154) also states that consent obtained by duress "is no real consent". (155)

"A man cannot be said to be truly 'willing' unless he is in a position to choose freely, and freedom of choice predicates not only full knowledge of the circumstances upon which the exercise of choice is conditioned but, the absence from his mind of any feeling of constraint in order that nothing shall interfere with the freedom of his will". (156)

149. R v McCoy 1953 (2) SA 4 (SR).

150. Imperial Cheen Industries v Shatwell 1965 AC 656 at 686, per Lord Pearce.

151. 77 CLR 39 (1948) at 57.

152. See also Bravery v Bravery 154 (3) All ER 59; Amin v Ebrahim 1926 1 at 7.

153. Strauss (1) op cit 166.

154. Salmond On the Law of Torts (17th ed R Heuston 1977) 46.

155. See also R v McCoy supra; Minister of Justice: In re R v Gesa, R v De Jongh 1959 (1) SA 234 (A).

156. Bowater v Rowley Regis Borough Corp. (1944) 1 KB 476.

To claim - as some have, that the consent of the transsexual to corrective surgery is not voluntary because he is under severe mental stress, is an anathema. Mental stress does not, in the first place, connote incapacity, and in the second place, the fact that the candidates for surgery are selected on the basis of the absence of substantial psychopathology,⁽¹⁵⁷⁾ is strong evidence in the patient's favour that his consent is indeed voluntary. In no way is the transsexual forced to undergo surgery: in fact, he desires it in order that he may bring his offending physiology into line with his inner gender identity. To claim that the transsexual is forced into the decision regarding surgery because he has no viable choice, is to say that the person who has a physical malformation which can be rectified surgically is forced into having such surgery even though he does not want it. This is not so: we all have to, at some time or another take a major decision in the pursuit of personal fulfilment. Each person's decision is peculiar to him, and him only.

4. Clear, unequivocal consent.

Although the legal relationship between doctor and patient is consensual, as has been stated previously, the law does not require a formal contract for all cases. Ordinarily, such contract is established tacitly when the doctor, having been consulted by the patient, commences to make diagnosis.⁽¹⁵⁸⁾ Consent, or the assumption of risk - although permitted to be tacit - requires a clear intention of restricting one's rights. Enticement; a request; a provocative challenge; encouragement; acquiescence and submission⁽¹⁵⁹⁾ reflect states of mind which are not necessarily reconciliable with such an intention.⁽¹⁶⁰⁾ Wharburton⁽¹⁶¹⁾ commenting on English law states that

"Mere submission is not consent, for there may be submission without consent and while the feelings are repugnant to the act being done."

157. Belli op cit 491.

158. Strauss (2) op cit 8.

159. R v Z 1960 (1) SA 739 (A) at 745; R v Swiggelaar 1949 (4) SA 235 (C); 1950 P H H 61 (AD).

160. Van der Walt op cit 52.

161. Cited in Strauss (1) op cit 33.

As Strauss puts it⁽¹⁶²⁾

"Toesterming is meer as blote kennis en begrip⁽¹⁶³⁾
en is iets aktiefs.⁽¹⁶⁴⁾ Dit moet na buite blyk.⁽¹⁶⁵⁾

All that is important, is that the intention is made obvious.⁽¹⁶⁶⁾ Although Watermeyer J in Stoffberg v Elliot⁽¹⁶⁷⁾ insisted on express consent in medical operations, it has been accepted that consent can be implied as well as express.⁽¹⁶⁸⁾ Strauss⁽¹⁶⁹⁾ states that for the doctor's own safety there must be subsequently no question about what exactly the patient has consented to. He suggests, that where the treatment is very drastic or unusual - as in the case of corrective surgery - it may be to the advantage of the doctor to take a written and signed consent in which the nature of the treatment is described in detail.⁽¹⁷⁰⁾ Generally, the consent given by the patient on the admission form in the hospital, should be reasonably specific and comprehensive. Consent to unspecified treatment would be ruled as invalid on the ground of vagueness.⁽¹⁷¹⁾

As consent naturally must be unequivocal, the problem arises when a patient stipulates his own definite conditions for treatment. Although consent may be conditional,⁽¹⁷²⁾ where the conditions are such that the doctor is

162. Ibid. _____

163. Currie v Rhodesia Railways Ltd. 1928 SR 91; Stolzenberg v Lurie 1959 (2) SA 69 at 73.

164. R v Taylor 1927 CPD 11 at 20: "There must be an active consent".

165. Esterhuyzen v Administrator, Transvaal supra; R v Mosago 1935 AD 32.

166. Strauss (1) op cit 34.

167. 1923 CPD 148.

168. R v M 1947 (2) SA 489 (N).

169. Strauss (2) op cit 8.

170. Ibid. _____

171. Strauss (2) op cit 9. See also Verhoef v Meyer (unreported case of the Transvaal Provincial Division, November 1976) which illustrates the advisability in drastic circumstances, for the doctor to set out in writing, the essential nature of the operation, the risks involved, and the necessity of taking a detailed consent, (ibid).

172. Strauss (1) op cit 202.

precluded from practicing 'good medicine', there is usually one safe thing for him to do - refuse the case.⁽¹⁷³⁾ The important thing for the doctor to realise if he takes the case is that he simply may not ignore the conditions imposed by the patient: if he does so, the question of true consent hangs in the balance.⁽¹⁷⁴⁾ One last item that should be mentioned, is that consent given subsequent to the infliction of injury is ineffective. However, it may amount to an agreement not to institute an action on the ground of the defendant's wrongful conduct - pactum de non petendo.⁽¹⁷⁵⁾

If all the above requirements for consent are satisfied, then such consent is real, and a doctor - in the case of corrective surgery for example - would have a legitimate defence to any action based on supposed assault.

B. Comparative Law

1. The United States of America.

It is axiomatic that surgery without valid, informed consent is technical assault or mayhem.⁽¹⁷⁶⁾ If the operation is regarded as mayhem then of course any consent thereto is invalid, because a criminal act amounts to a breach of public peace and one cannot consent to an act which disturbs the public peace.⁽¹⁷⁷⁾

"Consent is immaterial when there is any hurt or injury calculated to interfere with the health or comfort of the victim".⁽¹⁷⁸⁾

173. Strauss (2) op cit 8.

174. Ibid.

175. Van der Walt op cit 54.

176. Berkley v Anderson 1 Cal App 3d 790, 82 Cal Rptr 67 (Ct App 1970).

177. S v Fransua 85 NM 173, 510 P 2d 106 (Ct App 1973) - in which it was held that one cannot consent to a shooting.

178. Commonwealth v Farrell 322 Mass 606, 78 NE 2d 697 (1949). If sex reversal is considered unlawful then consent may preclude civil liability as in the case of abortion, where some courts have held that consent to a criminal abortion bars recovery for assault and battery: Sayadoff v Warda 125 Cal App 2d 626, 270 P 2d 140 (Dist Ct App 1954). The court stated that anti-abortion statutes are primarily for the protection of the unborn child and the public, and not the woman, so there is no reason to compensate her for her voluntary act.

However, most jurisdictions have held the operation to be lawful and therefore not mayhem. Although there have been no cases directly dealing with the capacity of the transsexual to consent to such treatment, it has been suggested that he lacks such capacity because the desire - which is regarded as an obsession - is in itself, a symptom of a complex, psycho-sexual dysphoria. In a Californian prosecution for assault and battery committed during the production of sado-masochistic films, the defendant pleaded the consent of his victim as a defence. The court held that the victim's consent to the bizarre actions was only apparent and lacked legal validity.⁽¹⁷⁹⁾ The court considered the masochistic victim to be suffering from a mental aberration that compelled him to submit to the beatings.

"It is a matter of common knowledge that a normal person in full possession of his faculties does not freely consent to the use upon himself of force likely to produce bodily injury".

Does this necessarily imply that anyone who seeks drastic surgery, is mentally incompetent? A transsexual should not be regarded as 'insane' simply because he has a gender identity crisis. It is submitted that in allowing corrective surgery, one would not be pandering to an insane delusion but merely assisting adjustment and the attainment of felicity. In every other sphere than his gender identity, the true transsexual is fully cognizant and appreciative and therefore he should not be categorised with those mentally incompetent to consent.⁽¹⁸⁰⁾ The types of questions normally asked as regards the consent of a mentally disabled person, viz: are the patient's mental abilities such that he can take cognizance of the type of treatment? Can he appreciate the nature and consequences of the treatment? Can he form the desire to undergo the treatment or at least reconcile himself to the fact that he will undergo the treatment? - can, and are, all answered in the affirmative in the case of the true transsexual. As Strauss states

"In this context, it is the mental abilities of the patient that are decisive, and not necessarily the exact classification or diagnosis of the type of mental disability from which he is suffering."⁽¹⁸¹⁾

179. People v Samuels 250 Cal App 2d 501, 58 Cal Rptr 439 (1967).

180. Dr J. Grace from the Bloodbank in Durban, who has completed his MSc dealing specifically with gender dysphoria and intersex, is of this opinion too.

181. Strauss (2) op cit 16.

It is submitted that there is no comparison between the transsexual seeking corrective surgery, and a masochistic victim apparently suffering from a mental aberration.

2. Belgium.

There has been one case reported in Belgium dealing with the legality of corrective surgery. In Dr Fardeau et alii⁽¹⁸²⁾ the accused were charged in consequence with the death of a transsexual who had undergone corrective surgery and who had died as a result of complications arising therefrom.⁽¹⁸³⁾ According to the evidence, the patient had male genitals, but female breasts, and was living as a female. He had claimed that he was not homosexual, but felt that he was transsexual. He was subjected to a thorough examination by a panel of physicians. The prosecution contended that the accused could not rely on the defence of justification because they had not acted with a curative objective and that they had not obtained a clear and free consent.⁽¹⁸⁴⁾ It was further contended that the operation was performed with the sole objective of placating the desire of the patient and not with the intention of bringing about a cure. The accused however claimed that surgery had been undertaken to restore the patient's psychological equilibrium and to facilitate his social re-acceptance, and as such the operation was legally justifiable. Upholding the defence contention, the court confirmed the view that the knowledge which a judge possesses does not entitle him to interfere with medical methods and theories. It is this author's submission that this commendable attitude is the only acceptable one, when dealing with issues which are primarily medical. It is a pity that such reasoning has not been emulated by other jurisdictions.

The court also referred to the evidence of Prof Hastings, to the effect that in the majority of cases in which he had operated, the patient had afterwards lived a more harmonious life. The court further recognised the value of extensive pre-operative evaluation because:

"The highly exceptional and irreversible nature of the operation and its repercussions upon the entire future of the patient render it imperative that recourse should not be had to such an operation without as complete an examination as possible."⁽¹⁸⁵⁾

182. 1969 Journal de Tribunaux 635. See also Strauss (2) op cit 215.

183. Ibid.

184. Ibid.

185. At 642 of the report

In conclusion, the court ruled that the patient had given free and voluntary consent and that he had been quite an intelligent and balanced person, apart from his sexual maladjustment - thus offering legal proof of the fact that a transsexual is competent to consent.⁽¹⁸⁶⁾

3. Argentina.

The case of Dr Ricardo San Martin⁽¹⁸⁷⁾ which deals directly with the issue of consent, was actually the first case on transsexualism in Argentina, coming some three years before the one of Dr Defazio. In the case under mention, the defendant surgeon emasculated his victim. According to the court, the patient was a homosexual, who did not manifest any female characteristics. Furthermore, his mental age was found to be that of a twelve-year old, and on the basis of this, his consent to the surgery was negated.⁽¹⁸⁸⁾ The accused was criminally charged with, and convicted of assault.

The court adopted the chromosomal criterion for sex determination, in deciding whether the emasculated person could be regarded as female.

"He was a man and will continue to be so until the day he dies. No female chromatin bodies were found in his cellular nuclei."⁽¹⁸⁹⁾

In addition, the court suggested that sex was determined by the ability to procreate such contention, it is submitted obviously denies the characteristic of masculinity or femininity to anyone who happens to be sterile.

"There is no scientific reason for the removal of a healthy penis from a physically healthy man nor the desire to placate the perverted sexual craving of the victim can justify such a removal The consent of the victim does not alleviate the crime ... the perverted mind of the victim prevents him from

186. Ibid.

187. 123 Le Ley 605 (CN Crim y Correc. Argen 1966); also Strauss (2) op cit 216.

188. The court also negated the patient's consent because there was evidence of wrongful intention the part of the doctor. Although San Martin alleged that the operation was performed because of cancer in the patient's penis, it was proven that the patient had not requested any chemical examination beforehand. The doctor had also not preserved the allegedly diseased penis, nor had he prescribed any post-operative treatment. This, coupled with the plastic creation of a vagina, indicated that the surgery had not been performed because of cancer (at 612 of the report).

189. Ibid.

rightfully disposing of his body ... The action of the accused absolutely defies all that nature imposes. He knew he could not change a man into a woman. He attempted to simulate this. However far medicine advances it can never violate the secrets of creation - procreation and death."⁽¹⁹⁰⁾

The decision of the court as it relates to the consent of the mentally incompetent, in this author's opinion, is justifiable per se, but, it is submitted that rather than resting its decision on sexual grounds, the court should have ruled the consent invalid due to the mental age of the patient.

"The consent was invalidated by the mental incompetence of the victim, whose sexual craving distorted the real scope and significance of the operation even supposing the best results".⁽¹⁹¹⁾

It is submitted further that in the absence of full details, it would appear that this was not a case dealing with a true transsexual and therefore the decision could not be seen as a bar against true corrective surgery. In any event, the court seemed to have been too complacent about its knowledge as regards medical progress. It may have been improbable in 1966, to imagine the advancements made today, but it was not impossible. Already this judgment is out of date because science can control both birth - by means of artificial insemination - and death - by sustaining people on machines when they are, for all intents and purposes, dead. Furthermore, it is submitted that the court made an alarmingly naive suggestion when it held that

"Mankind would subsist although every man in this world were to have his arms cut off, were to lose his property, his honour and his fatherland. However, if an act such as this were allowed to go unpunished - if it were not severely punished - a gap would be opened into which the whole human race could fall".⁽¹⁹²⁾

It is submitted in conclusion, that as only a small minority of people are diagnosed as transsexuals, and even fewer actually undergo the surgery, it is hardly likely that the whole future of the human race will be jeopardised, if the transsexual was to be allowed this measure of alleviation from the dilemma.

190. Ibid.

191. Ibid.

192. At 613 of the report.

C. South Africa.

There are no cases dealing with the consent of a transsexual to corrective surgery. However, in both the criminal and delictual law, an action which prima facie might constitute an assault upon another person, is palliated in the case of the consent of the alleged victim.⁽¹³⁹⁾ Although the defence of volenti non fit injuria is of almost universal application in the field of delict,⁽¹⁹⁴⁾ in the criminal law however, where it is in the interests of the state that the public peace be kept and the lives and health of the citizens preserved, the doctrine of consent is permitted a very limited application.⁽¹⁹⁵⁾

There have in fact been suggestions that the whole concept of volenti be limited in scope, and Strauss is of the opinion that it is due to "die kwyning van die laissez-faire gedagte en die opkoms van die sosialisme".⁽¹⁹⁶⁾ It may even be said that apart from medical operations, sexual affairs in which consent prevents any incidence of criminal liability, and bodily contests that are not inimical to the interests of society, all other acts which could constitute assault, do.⁽¹⁹⁷⁾

"If an act is unlawful in the sense of being itself a criminal act, it cannot be rendered lawful because the person to whose detriment it is done, consents to it".⁽¹⁹⁸⁾

"Any person may waive rights conferred by law solely for his benefit ... But public as well as individual interests are concerned where public policy requires the observance of a statute, then the benefit of its provisions cannot be waived by the individual because he is not the only person interested".⁽¹⁹⁹⁾

Thus, along this line of thought, although corrective surgery might be considered as an assault, it has in fact not only been performed with regularity, but a statute has tacitly recognised its legality, by making

193. Milton op cit 471.

194. The exception being the case of seduction.

195. S v Collett 1978 (3) SA 206 (RAD).

196. Strauss (1) op cit 6.

197. R v McCoy 1953 (2) SA 3 (SR).

198. Strauss (1) op cit 290, quoting from Halsbury's Laws of England (3rd ed 1957) 10.

199. Morrison v Anglo-Deep Gold Mines Ltd. 1905 TS 775.

provision for the consequences of the operation. Thus the provisions of section 7B remove any prohibition there might have been to the surgery. Of course, this is only so in the event of the transsexual giving his legally required consent thereto.

IV CRITICAL EVALUATION.

It is submitted that the basic trend in The United States of allowing corrective surgery to be covered by the state medical aid schemes, is proof positive of its legality, and as indicated in B v Lackner the court subscribes to the view that such treatment is the only effective method available. Furthermore, the Belgian case of Dr Fardeau et alii as well as the second case in Argentina, of Dr Defazio both decided along equitable lines and recognised the therapeutic value of the operation and therefore regarded corrective surgery as legal, if performed with the necessary consent. Both courts also concluded that the transsexual had the capacity to consent and did so voluntarily. It has been suggested that a transsexual should not be permitted to consent to the surgery, and that the state has an interest in striking out such consent.⁽²⁰⁰⁾ It is however the author's submission that while courts should not be slow to protect the unwary from possible error, the transsexual is well able to understand what is involved, and has in fact usually undergone extensive screening. A bar on the part of the state to his consent would be an unwarranted interference in his private decision.

The two Argentinian cases, together with the Belgian cases are then the only ones directly dealing with the issue of the legality of the corrective surgery and it is refreshing to see that as far back as the late 1960s courts were handing down sensible and reasoned judgments in the issue of transsexualism. The case of Dr San Martin is then the only case deciding against the surgery and it is the author's submission that this judgment is now outdated and in fact erroneously decided upon and therefore precedence should be given to the later, more enlightened case of Defazio.

200. Mc Coll Kennedy op cit 118.

Despite the contentions to the contrary,⁽²⁰¹⁾ the medical theory has been advanced that the justification of the surgery lies in the fact that it is indeed therapeutic, because where psycho-therapy has been known to fail, such treatment is the only viable alternative: to convert the sufferer's external physiology to his internal psychological orientation, thereby bringing about equilibrium.⁽²⁰²⁾

The cases deciding the issue of the legality of the treatment⁽²⁰³⁾ do not, it is submitted, establish any definite trend towards either legal acceptance or rejection of the surgery, and in fact, by and large, the operation is unobjectionable in most jurisdictions, provided it is undertaken for genuine therapeutic purposes.⁽²⁰⁴⁾ It has even been suggested that since the surgery is relatively common it should be socially and legally accepted on this basis.⁽²⁰⁵⁾

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201. The Dutch Commission of Inquiry Gezondheidsraad Rapport Betreffende Plastische-Chirurgische Geslachtstransformatie (1965) came to the following conclusion: "There are insufficient grounds for treating transsexuals surgically in the sense of sex transformation. Where this is nevertheless undertaken, it must be realised that each operation is attended by a great and uncertain risk, not only in the somatic sense, but also and in particular, in the psychological sense and there is no certainty whatsoever about its effect". It was pointed out that experience in the field of plastic surgery generally shows that the results are almost always disappointing. The fact remains, the Commission continued, that there can be no true conversion of sex, particularly as regards the procreative function. It is submitted that this statement loses sight of the fact that the psychological identity of a person is just as important - if not more so - than the physical one. Furthermore this criterion of procreation for sex determination is as has been stated before, totally unrealistic. Cited in Strauss (2) op cit 216.
202. Strauss (5) op cit 348.
203. There being only the three - two in Argentina and one in Belgium - directly in point.
204. Taitz op cit 19.
205. Strauss (3) op cit 215.

While the surgery has definite medico-surgical and psychological limitations,⁽²⁰⁶⁾ there is insufficient evidence to warrant its prohibition. There is undoubtedly evidence that patients do not benefit fully from the surgery,⁽²⁰⁷⁾ but there is evidence too, of the fact that many transsexuals have been enabled to lead a happier life due to surgical intervention.

"All ... problems, real and imagined, have been worth tolerating in order to live a life freed from conflict, which was making existence so unhappy. No longer do I feel that I am acting a part but am free to be myself. The release from conflict has meant that I have, according to my friends, become more relaxed and confident. As a result, deeper relationships have been possible with old friends, and I have been able to be outgoing enough to make new friends ... My previous role may have been less fraught with the medical, legal and moral problems ... but it was a life of extreme unhappiness and conflict ... What has been more important than becoming male socially has been the ability to become myself. It was a choice between existence and life. Given these circumstances, was there in fact a choice to be made? I think not." (208)

206. Even though corrective surgery is far from established as a safe medical procedure, and as such could be regarded as experimental, it is submitted that this accusation could be levelled against many other progressive, surgical methods, such as heart transplants. In fact in this instance, the legislature actually pre-empted the occurrence of this operation. Strauss ((2) op cit 121) states "The heart transplants did not catch South African law altogether unawares. The field had been prepared, legally speaking, as long ago as 1952. In that year, The Post-Mortem Examinations and Removal of Tissues Act (30 of 1952) was placed on our statute book". It is the author's submission that corrective surgery is potentially less dangerous than other such drastic operations for the simple reason that the body of the transsexual is usually healthy, and well able to withstand the gruelling experience of paying this relatively small price to obtain the desired peace of mind. On the other hand, the very necessity of something like a heart transplant, is due to the fact that the body is no longer healthy, and in essence, the operation is to enable life to be prolonged, rather than simply endured, as in the case of the transsexual.

207. It is submitted that this is probably due to incorrect diagnosis on insufficient pre-operative evaluation, rather than to any fault on the part of the surgery itself.

208. Mason op cit 87-89.

Dr Randell also described most post-operative transsexuals - in his experience - as reporting a greater well-being and improved adjustment, with a feeling that they have been accepted as members of their 'new' sex.⁽²⁰⁹⁾ He concludes that

"The future of these surgically converted patients is somewhat problematical⁽²¹⁰⁾ but the immediate post-operative results suggest that the operation was justified in the light of the subjective and objective improvement in the life adjustment.⁽²¹¹⁾

V SUGGESTED SOLUTIONS

It is submitted that in the light of such reports as Randell's, a strong but rebuttable presumption could be created that the operation is beneficial to the patient and therefore in some degree to society as well. It is submitted further that the transsexual should have the personal right to decide for himself whether to undergo the treatment or not. Autonomy, or the right to self-determination, constitutes one of the most essential ethical principles. Tony Honoré⁽²¹²⁾ holds that an important consideration in western society as regards personal decisions is the idea of human rights, especially the right of each human being to express and develop his/her own personality. As with most human matters, ethical questions are rarely solved: they are lived with. It is submitted that it is how we do this which makes the difference. Ethical issues can be divided roughly between those that address problems at a societal level, - those that represent broad social policies, usually involving governmental action predicated on public demand or need - and those directed at concerns on the individual level - by contrast, those which people commonly encounter at a personal level during the course of

209 Cited in Green and Money op cit 387.

120. It is submitted that this is largely due to legal stubbornness and conservatism.

211. Green and Money op cit 387.

212. Sex Law (1978) 3-6.

their lifetimes, and not infrequently relating to decisions regarding medical treatment.⁽²¹³⁾ It is submitted that the whole question of transsexualism falls into the latter category and as such is for decision on the private level alone.

The historical connection between medicine and ethics is clear. In every medical decision - regardless of the skill and expertise employed on the part of the doctor - some value judgment is made. Every decision requires a choice between competing values, and every decision involves a risk, just as not to decide also involves some risk.⁽²¹⁴⁾ Today's solution may of course be tomorrow's problem just as today's problem might easily become tomorrow's solution.

"with few exceptions, a solution to any problem will bring new difficulties. These may or may not be worse than the original problem and one must decide, not between problem and answer, but between degrees of difficulty. Is the new situation really going to be better than the last?"⁽²¹⁵⁾

It is submitted that one has to take calculated chances, otherwise one might as well exist in cotton wool. The field of medicine has, in the preceding few years, lent more weight to psychological considerations.⁽²¹⁶⁾ It is submitted further that it would be incongruous for the psychological test to be accepted - which it should be, as man in a union of mind and body with the former holding precedence⁽²¹⁷⁾ - and then for the law to hold that the operation is illegal. After all the surgery is only performed on the psychological ground that it will meliorate the patient's condition. It is therefore this author's submission that the surgery is justified if the patient finds life intolerable, is emotionally and mentally stable in other respects and has given the necessary consent.⁽²¹⁸⁾

213. Hillier op cit 8.

214. Hillier op cit 90.

215. Mason op cit 85. Such then is the 'choice' of the transsexual.

216. The law in at least one jurisdiction has also given due weight to the psychological orientation of the post-operative transsexual. Vide infra for details on the American case of MT v JT 140 NJ Super 77 355 A 2d 304 (1976) 63 ALR 3d 1197.

217. "To set the mind on the flesh is death, but to set the mind on the spirit is life and peace": Romans 7; 6-9.

218. See also Armstrong op cit 90.

"In modern western societies, personal inviolability and freedom of will are values which are very highly rated". (219)

Thus, it is submitted the state can have no legitimate interest in interfering with the rights of the transsexual to decide to undergo the surgery, if such surgery can be shown to have a therapeutic purpose. Such a decision also cannot be regarded as contra bonos mores on the ground of possible fraud, because there is only the intention of the transsexual to become his true self, not to conceal his identity. Furthermore

"The mentally competent individual's right to control his own destiny in accordance with his own value system, his 'selfbeskikingereg', must be rated even higher than his health and life". (220)

It is this author's opinion, that a decision of a person - whose existence is one of such misery that he has entertained thoughts of self-destruction or anti-social acts - to undergo corrective surgery in an attempt to alleviate his personal suffering and thereby attain some measure of happiness cannot be viewed as a contravention of social mores especially if such personal decision in no way affects others. The attainment of a unified identity through surgery is surely to the advantage of both the individual and society because a contented human being is far less likely to perform anti-social acts, than a person wracked with frustration and confusion. This is common sense.

By and large, then, corrective surgery has been accepted as justifiable legally in the jurisdictions under mention, due to its therapeutic nature and if properly consented to. It is submitted that this line of reasoning is the only sensible one to take. Although the surgery has not been perfected technically, it is, to date, the only form of treatment that has any measure of success with the transsexual. The medical profession has recognised its beneficial quality and it is not for the law to ignore such expert evidence.

It is submitted also that although the transsexual should have a personal right to decide whether or not to undergo the treatment, this should not be an absolute right, as the choice must be dependant on the opinion of the medical screening team and furthermore, this right should also be limited

219 Strauss (2) op cit 50.

220. Strauss (2) op cit 51.

by the state's interest in seeing that the surgery is performed under safe conditions, with proper evaluation and medical care. This necessitates the enforcement of strict pre-operative regulations, and it is submitted that such procedure should be instituted in South Africa, as it has been in the United States, preferably under the auspices of the Legislature. This would not only minimise the possibility of error, but would ensure also that the operation is being performed upon a true transsexual and therefore with a therapeutic objective.

As regards the issue of consent, the procedure followed by the University of Minnesota could be adopted as a guideline for South African institutions performing the operation. Here ⁽²²¹⁾ the transsexual is required:

1. to be of age, but it is submitted that a minor with the necessary parental or court consent should also be allowed to undergo the treatment;
2. to be unmarried;
3. to retain independant counsel - or it is submitted, legal aid in the case of indigents - to discuss the effect of the required consent and to ensure that he is informed about the surgery adequately. The legal advisor also witnesses the patient's signature to the consent form, and stands ready to assist in post-operative legal procedures to effect a change in civil status. It is submitted that the latter is very important, because at least the advisor can inform the transsexual beforehand as to what legal recognition he is entitled, thereby prewarning him against disappointment on later discovering that he does not have full, post-operative legal effect.

As regards the requirement of single status, it is submitted that this is in fact imperative in order to obviate problems which will arise if the transsexual were still married. In this regard, the question arises as to whether or not the objection of the spouse to the operation is effective. A few religious commentators have considered the issue. Under Jewish law, neither spouse can unilaterally end those obligations which marriage brings into existence. ⁽²²²⁾.

221. Prof Hastings 'Inauguration of a research project on the transsexual in a University medical centre' cited in Green and Money op cit 248.

222. Brody op cit 9.

The termination of the marriage must be based on mutual consent. Of course, this was basically the South African law before 1979. So the question is only of academic interest from this stance in South Africa, but in other countries, where religious laws other than Christianity have some weight, this might be a pertinent issue. Under Jewish law then, it would appear that a spouse could object to the decision of his/her partner, to undergo surgery, and therefore legally prevent such action. If the transsexual nevertheless decided to undergo the operation, this step would be illegal because he/she in effect, would be terminating the marriage unilaterally, which is not permissible. However, there are two options open to a person who wishes to terminate his marriage unilaterally: ⁽²²³⁾

1. he convinces the court that it should pressure his spouse to consent, because of some fault on that spouse's part; or
2. he obtains the consent of the other spouse by inducement. It is submitted, that if a person persists in undergoing the operation, it probably would be better all round to permit him to do so, but he should be compelled to make sufficient provision for his family. ⁽²²⁴⁾

Similarly, from a Catholic slant, marriage is seen as a sacramental covenant wherein reciprocal responsibilities are undertaken, and rights received. It is suggested therefore that the decision on the part of the married transsexual to undergo surgery would be viewed as an injustice to the wife and family. ⁽²²⁵⁾ Furthermore, traditional casuistry would contend that there in fact has been no change of sex and so even if the surgery were completed, the marriage would effectively still be in existence. This is much the same reasoning, and therefore illogical outcome of the decision in W v W. ⁽²²⁶⁾

223. Ibid.

224. For more details in this regard vide chapter eight infra.

225. Brody op cit 11.

226. 1976 (2) SA 308 (W).

In traditional Protestantism, it is quite clear that the wife's consent is irrelevant in the determination of the morality of the corrective surgery.⁽²²⁷⁾ This is because the reformers held a fundamentally androcentric view of marriage. However, if the wife wished to undergo the operation the husband would have to approve her choice, as reproduction was always seen as one of the purposes of marriage.⁽²²⁸⁾

It is submitted, that over and above the requirements stipulated by the University of Minnesota, a further requirement of the Johns Hopkins Institute - while it was still in operation - is that the patient secure the consent of his next-of-kin to the treatment. This will ensure against the giving of erroneous personal biography and also safeguards the surgeon against possible law suits brought by the next-of-kin. It would also guarantee at least minimal familial acceptance of the procedure, thereby facilitating post-operative rehabilitation.⁽²²⁹⁾

If all these requirements, together with strict pre-operative screening were enforced by legislation, in South Africa, there would of course be less likelihood of errors occurring, and more likelihood of the surgery being performed for the proper objective of therapy. In allowing the operation, it is submitted that one is recognising the possibility of a 'change of sex' and therefore the result of the operation should be given full legal effect. Not to do so, creates the anomalies that are now evident in those jurisdictions which refuse to give the surgery its due recognition.

227. Brody op cit 12.

228. Ibid.

229. J. Money 'Sex Reassignment' (1970) 9 International Journal of Psychiatry 249 at 258.

230. This will be dealt with in greater detail in the following section.

PART C : THE CURRENT LEGAL STATUS OF THE POST OPERATIVE TRANSSEXUAL
 CHAPTER VII
 DOCUMENTARY ALTERATION

I INTRODUCTION

"Show me the prison, show me the jail
 Show me the prisoner whose life has gone stale,
 I'll show you a young man with so many reasons why,
 There but for fortune, go you and I". (Phil Oaks : 'There but
 for Fortune').

In obtaining recognition for the 'change of sex', the transsexual's first step logically, is to effect alteration in his official documents. This involves the re-registration in the new gender role.

II COMPARATIVE LAW

1. The United Kingdom

The question of a transsexual's birth record changes does not appear to have been the subject of litigation in England.⁽¹⁾ Mason, in his personal experience found that there was little difficulty in having his name changed - especially when the request was supported by his medical practitioner⁽²⁾ - but there was an executive refusal to allow him to alter the sex designation in his birth certificate. It is possible to have one's passport altered in Britain, because it does not state gender, thus it would appear that some documents are permitted to be altered, but only in so far as such alteration does not involve sex. Armstrong⁽³⁾ suggests that if a medical practitioner is of the opinion that the transsexual - with or without surgery - would be enabled to lead a happier life in the assumed sex role, he would be justified in recommending inter alia

"...re-registration by statutory declaration by two
 persons - his/her doctor and one parent or friend"

in terms of section 29(3) of the Births and Deaths Registry Act of 1953.

1. However, at present there is a case which has been referred to the Court of Human Rights in Strassborg - No. 9532/81 v The UK - which deals with the problem of having documents altered: J Norton 'The Transsexual and the Law' (21 July 1984) New Law Journal 621.

2. Mason op cit 85.

3. op cit 90.

He goes on to clarify that this re-registration would cover employment - as it did with April Ashley - and certain contractual relationships in which sex is a relevant factor, but that it would not suffice to alter a birth certificate, as this has to be shown to have been incorrect at date of issue.

Such changes by marginal error have been allowed, apparently at the request of the doctor, who must declare that there was an error in the original entry.⁽⁴⁾ The Registrar-General is empowered to order a complete entry to be altered when he is satisfied that there has in fact been an error of fact or substance, in relation to the birth.⁽⁵⁾

The sole reported attempt to challenge this has been in Scotland. In the case of X Petitioner,⁽⁶⁾ a request for a change of birth certificate and name by a transsexual, was denied. X was born in 1907, and at the time of the petition, was fifty years of age. At birth, he was registered as male, and subsequently raised as male. He married in 1939 and became the father of two children. In the medical evidence it was stated that since childhood, X's interests and attitudes were markedly feminine, and that he had "to make conscious efforts to play the role of a male and to suppress spontaneous behaviour which would betray his effeminacy and bring him into ridicule".⁽⁷⁾ These characteristics later became more apparent and caused the breakdown of his marriage. In the course of the ten years prior to the petition, there had been physical changes involving the development of breasts and the atrophy of the male genitalia. He also had begun cross-dressing by this stage. In the infirmary where he was at the time of the petition, he was allowed to cross-dress and 'behave' as a woman. It was said also that his feminine behaviour, attitudes and general characteristics were most striking and consistent, and that any attempts to force him to live as a male, might now have serious consequences. Medical reports stated that X was absolutely and fixedly convinced that he should be a woman, and there was no evidence of unsound mind on his part.

4. Mason op cit 85.

5. Births and Deaths Registration Act of 1953, s 29(3).

6. (1957) S L T 61.

7. Ibid.

The first question that was considered was, that assuming that a change of sex had occurred, whether Section 63 of the Act ⁽⁸⁾ could be invoked to alter the sex designation in the birth register. In the opinion of the Sheriff-Substitute, the section could not be invoked for this particular purpose because it was felt that the section dealt only with the procedure on the discovery of an error in the entry in the register. ⁽⁹⁾

"I do not think it gives any sanction for recording changes which have subsequently occurred... The situation would be different if, as sometimes happens, the sex of the child was indeterminate at birth, and it was later discovered that when the child developed, that an error had been made."

The Sheriff-Substitute adopted the chromosomal test for the basis of his decision that the petitioner was still of the male persuasion. ⁽¹⁰⁾

"The doctors are careful to stress that this is not a case of hermaphroditism, but is a genuine case of a very rare condition of transsexualism and that the changes which have taken place are irreversible. For the present purposes, I... accept that diagnosis. It is however stated that skin and blood tests still show X's basic sex to be male and that changes have not yet reached the deepest level of sex determination. It seems to me... that while X could be described as an abnormal male, it would be impossible to describe him as a female." ⁽¹¹⁾

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8. Births, Deaths and Marriages Act (Scotland) 1854. Section 63 enacts that "If any error shall be discovered to have been committed in the entry of any birth in any register, it shall be lawful for the Sheriff, upon coming to the knowledge of such erroneous entry, to summon before him any person concerned in the making of such erroneous entry, and if the Sheriff is satisfied that any error has been committed in such entry, he shall direct a corrected entry of the birth... to be made in a separate register book, to be called 'The Register of Corrected entries'."
 9. On its wording, the section is directed to a correction of an entry which is erroneous as at the date on which the information was given.
 10. At 62 of the report.
 11. It would appear, that throughout legal systems there is a great tendency to rely on terms such as 'normal' and 'abnormal' with regard to sexuality, which practice, it is submitted, is blind to the fact that sex cannot be defined accurately as a bipolarity and that there are many types of medical intersex, as shown in chapter two supra.

2. The United States of America

At common law in the United States, changes of name have been relatively easy, as long as it was apparent that there was no motive of fraud, or any prejudice to third parties involved.⁽¹²⁾ Statutory enactments in most states also makes provision for name changes, when reasonable grounds therefor are shown, there is also no intent to defraud third parties and proper notice is given to all creditors, by publication.⁽¹³⁾

Courts too have recognised that the transsexual has a need for a name change and have granted such changes for the sole purpose of having the name match the transsexual's assumed role. In In Re Anonymous⁽¹⁴⁾ the court stated that

"...an individual may assume any name, in the absence of fraud or any interference with the rights of others... The civil rights law provisions establishing judicial procedure for changes of name are in addition to, and not in substitution for, the common law methods of change... The transsexual whose male organs were removed, was entitled to change name from an obviously 'male' name to an obviously 'female' one.⁽¹⁵⁾

In addition to this conclusion, the court took the opportunity to criticise both the chromosomal test for sex determination and the notion that the potential fraud outweighs the need for the transsexual to conceal his sex by effecting a name change.⁽¹⁶⁾

12. Twardy op cit 265.

13. For example Ohio Rev Section 117.01 (Baldwin 1976).

14. 15 Misc 2d 813 293 NYS 2d 834 (1968) at 293 NYS 2d 837. This was the first reported case in which the post-operative transsexual requested a name change.

15. At 293 NYS 2d 837 of the report. Twardy op cit 266 points out that this change of name goes beyond the psychological gratification of assuming the desired identity, as it may be essential in proving the continuity of land titles, inheritance, licences and the like.

16. Bromwell op cit 817.

Again in another case, the court rejected the argument that the potential fraud outweighs the need for the transsexual to change his name. In Re Anonymous⁽¹⁷⁾ it was stated that

"Ordinarily, one has the right at common law to adopt or use any name so long as fraud or prejudice to others, is non-existent. Where it does not appear that any fraud or prejudice to others would result, 'transsexual' was authorised to have name changed from obviously male name to female name...."

It has been suggested that in the light of the foregoing such cases, even in states where there is no express statutory provision for a change of name by the post-operative transsexual the courts may grant such requests with relative ease, to allow the transsexual to gain social acceptance in the new role.⁽¹⁸⁾

However, despite the relative ease of the occurrence of the change of name, an appropriate amendment to the birth certificate has proved an entirely different matter. Fifteen states⁽¹⁹⁾ have permitted the post-operative change of sex designation, although only three of them have specifically provided by statute for this contingency.⁽²⁰⁾ Illinois requires simply:

"An affidavit by a physician that he has performed an operation on a person, and that by reason of the operation the sex designation on such birth record should be changed."⁽²¹⁾

The Louisiana statute is more complex and provides inter alia that:

"Any person born in Louisiana, who, after having been diagnosed as a transsexual or as a pseudo-hermaphrodite, has sustained sex reassignment or corrective surgery which has changed the anatomical structure of the sex of the individual to that of the sex other than that which appears on the original birth certificate of the

17. 64 Misc 2d 309 314 NYS 2d 668 (1970) at 314 NYS 2d 680. It is interesting in this quote to note the patent avoidance of the personal gender pronouns, as if the court was at a loss to place such a person, sexually. This is however not really surprising because the whole concept of transsexualism was still judicially novel at this time.

18. Twardy op cit 260.

19. Alabama, California, Hawaii, Illinois, Louisiana, Maryland, New Jersey, North Carolina, Virginia, Pennsylvania, Texas, Tennessee, Iowa, Colorado and Minnesota.

20 Ari Rev Stat Ann s 36-326 (West 1974); Ill Ann Stat ch 111, s 73-77 (Smith-Hurd 1966) and La Rev Stat s 40 : 336 (West 1976).

21. Note 20 supra.

"individual, may petition a court of competent jurisdiction... to obtain a new certificate..."⁽²²⁾

Courts however have been opposed frequently, to permitting alterations in birth certificates of post-operative transsexuals. At present, there are two leading cases on this issue, both of New York State.⁽²³⁾ In Anonymous v Weiner, a male-female transsexual sought to have the sex designation on her birth record altered. In relying on a report from the committee on public health of the New York Academy of Medicine, the court denied the request. It set forth three state interests which it elicited in disallowing the amendment:

1. in applying the chromosomal test in the birth certificate context, one was ensuring the accuracy of public records.

"It is obvious that the purpose of a birth certificate is to accurately set forth the information which by law it is required to contain."⁽²⁴⁾

2. the protection against fraud.⁽²⁵⁾ The theory here is that the transsexual is misrepresenting himself if his birth certificate designates him as belonging to the 'new' sex and his desire of concealment of his original

22. Note 20 supra. Thus it would appear, that whereas in Illinois the decision is executive, it is a judicial one in Louisiana. Furthermore, the Illinois statute is hesitant to use medical terms and as such is rather vague, whereas the Louisiana statute is far more explicit. In Louisiana the original certificate is only available to the transsexual, and then only on a court order. McColl Kennedy op cit 120 note 124, cites an interesting practice in Minnesota which is not sanctioned specifically by law but whereby a new birth certificate is issued with a code number which indicates that a previous certificate exists. This practice prevents the possibility of fraud if the code is known to the relevant agencies.

23. The first, and in fact, the first in the United States dealing with transsexualism, is Anonymous v Weiner 50 Misc 2d 380, 382, 270 NYS 2d 319, 321 (1966). The second is Hartin v Director of Bureau of Records and Statistics 75 Misc 2d 229, 347 NYS 2d 515 (1973).

24. At 270 NYS 321 of the report.

25. Ibid.

- sex is outweighed by public policy.⁽²⁶⁾ As an earlier decision noted,⁽²⁷⁾ it is a greater fraud for a transsexual to have his original sex reflected in his birth certificate when he himself is living in the assumed role, with which this author is in agreement. In any event the court felt that any judicial intervention on its part would be a usurpation of the executive's function.⁽²⁸⁾
3. the need to prevent laws and records from being used "as a means to help psychologically ill persons in their social adaptation" (sic).⁽²⁹⁾ This statement was based on the ultimate conclusion of the Academy.⁽³⁰⁾

26. It is submitted that this is a tenuous statement as the transsexual has no conception of fraud or concealment as he believes that he is in fact a member of the desired sex.
27. In Re Anonymous (1968) supra: "A male transsexual who submits to sex reassignment is anatomically and psychologically a female in fact... It would seem to this court that the probability of fraud, if any, exists to a much greater extent when the birth certificate is permitted, without annotation of any type, to classify the individual as male, when in fact the individual comports himself as a female."
28. At 270 NYS 2d 322 of the report.
29. Ibid. It is submitted that it is reasonable to assume that any measures not injurious to others, should be employed in alleviating the suffering of others.
30. Another state interest in forbidding amendments to birth certificates in the case of transsexuals was expressed in the dissenting opinion in a case which, unlike Weiner did allow a transsexual to alter his birth certificate. In K v Dept of Human Resources 2601 App 311 316-7 552 P 2d 840 845-6 (1976) the dissenting judge was of the opinion that a birth certificate is to be a record of certain facts about an individual at the time of his birth. Thus, even if the state were to recognise that the legal sex of the transsexual had changed since birth, the actual certificate should not be amended because the designation of the transsexual in his original sex would be accurate for the purposes of the certificate. It is submitted that this view not only ignores the fact that there could be ambiguities at the time of birth, but in fact evokes strictures in evaluating precisely when a transsexual becomes a victim of the phenomenon, which rules out the possibility of transsexualism having been predetermined before birth. As there is no definite proof regarding the onset of transsexualism, this intimation is inaccurate and unscientific.

The criticism of Weiner in In Re Anonymous⁽³¹⁾ apparently went unrecognized, as the Weiner decision was affirmed by the same court in Hartin's case.⁽³²⁾ The court re-echoed the same rationale and in addition, agreed with the Board of Health that

"Surgery for the transsexual is an experimental form of psychotherapy by which mutilating surgery is conducted on a person with the intent of setting his mind at ease, and that nonetheless, does not change the body cells governing sexuality".⁽³³⁾

In a more recent case, the New York court still refused the unqualified issuance of birth certificates reflecting the altered sex of the post-operative transsexual. In Anomymous v Mellon⁽³⁴⁾ the court held that

"If reasonable grounds existed for refusal of the Bureau of Vital Records of the City Department of Health to grant the request by the transsexual whose birth certificate designated sex as 'male' and who had become a woman after sex reassignment surgery, to show sex on the birth certificate as 'female', the court, no matter what its opinion, would not substitute its own for administrative determination. As to the transsexual who became a woman after sex reassignment surgery, the Bureau of Vital Records... did not act irrationally, arbitrarily and without basis in issuing an amended birth certificate showing a female name where designated by the court order, but refusing to issue a birth certificate showing sex as 'female'."⁽³⁵⁾

Although Weiner and Hartin reflect the judicial view of New York State regarding birth certificate changes, a 1975 federal district court held that the Connecticut Commissioner of Health must show a substantial state interest to justify the decision refusing to change birth certificates of post-operative transsexuals.

31. Note 14 supra.

32. Note 23 supra.

33. The court also took into consideration the fact that Hartin, while serving in the United States Navy as a male, married and fathered a child. He was divorced in 1971.

34. 91 Misc 2d 375, 398 NYS 2d 99 (1977).

35. at 398 NYS 2d 99 of the report.

In Darnell v Lloyd,⁽³⁶⁾ the complainant alleged that the Commissioner had violated her rights to equal protection in that he had granted other requests for birth certificate amendments. The Health Commissioner in his motion, claimed that the complainant had not stated a cause of action. This was rejected by the Court and the dispute was ultimately settled by an agreement to adopt a new procedure by which a transsexual could obtain a change on his birth certificate to reflect his 'new' sex. Such change would be permitted if the transsexual submitted affidavits from a psychiatrist and a surgeon which attested to the patient's mental status and verified that sex reassignment surgery had been performed.

Regarding secondary sources of identity, it would appear that post-operative transsexuals have had reasonable success in having changes made on drivers' licences, occupational licences and other records.⁽³⁷⁾ According to Dr Walker⁽³⁸⁾ many churches re-issue baptismal certificates with both name and sex amendments while the armed services refer such requests to the Department of Defence, which apparently has become increasingly unreceptive to such requests.⁽³⁹⁾

36. 395 F Supp 1210 (D Conn 1975).

37. Twardy op cit 268. By 1971, the Catholic church had given its approval for at least one operation on the ground that "this operation is necessary for the mental and emotional health of a transsexual and as such is required for him to live a normal life": Smith op cit 976. The Church then issued a new certificate of baptism (ibid). In addition, a Presbyterian minister underwent surgery and was granted a new certificate in Iowa: Toronto Daily Star 1968 cited in Smith op cit 976. In Hartin the Roman Catholic church re-issued the plaintiff with a new baptismal certificate which reflected the change of name and sex.

38. Twardy op cit 268.

39. Ibid.

3. Canada

Most provinces do not provide for an alteration of sex designation on birth certificates of post-operative transsexuals.⁽⁴⁰⁾ However, five provinces have passed such legislation.⁽⁴¹⁾ Examples thereof are as follows:

In Alberta, the statute provides that

"Where any person has had his anatomical sex structure changed to a sex other than that which appears on his birth certificate, the Director, on production to him of

- a) two affidavits of two duly qualified medical practitioners, each affidavit deposing that the anatomical sex of the person has changed, and
- b) evidence satisfactory to him as to the identity of the person, shall
- c) if the sex of the person is registered in Alberta, cause a notation of the change to be made on the registration thereof, and
- d) if the sex of the person is registered outside Alberta, transmit to the office in charge of registration of births and marriages in that jurisdiction in which the person is registered, a copy of the proof of the change of sex produced to the Director.

(2) Every birth or marriage certificate issued after the making of a notation under this section, shall be issued as if the registration had been made with the sex as changed."

In British Columbia, the statute declares that:

"Where a person in respect of whom transsexual surgery has been performed is unmarried on the date he applies under this section, the Director shall upon application made to him in accordance with subsection (2) change the sex designation on the registration of birth of such person in a manner that the sex designation is consistent with the intended results of the transsexual surgery

40. Hawley op cit 137.

41. Alberta, British Columbia, New Brunswick, Ontario, Manitoba. Saskatchewan is following suit.

(2) an application under subsection (1) shall be made in the prescribed form by the person in respect of whom the transsexual surgery was performed and shall be accompanied by

a) the certificate of a medical practitioner qualified and licenced to practice medicine... explaining the surgical procedures carried out and certifying that he performed the transsexual surgery on the applicant...

b) the certificate of a medical practitioner who did not perform the transsexual surgery but who is qualified and licenced to practice medicine in the province ... certifying that

i) he examined the applicant;

ii) the results of his examination substantiate the certificate of the practitioner who performed the transsexual surgery; and

iii) the results of the transsexual surgery are in accordance with the requirements of the regulation.

(3) Every birth certificate registered after the registration of birth is changed under this section shall be issued as if the original registration had been made showing the sex designation as changed under the section."

New Brunswick too, has made provision for post-operative alteration of documents, amending its Health Act to read as follows:

"52(1)(1) Where a person has undergone transsexual surgery and is unmarried at the time he makes an application under this section, that person may make an application to the Registrar to cause a notation to be made on the birth registration of that person so that the registration is consistent with the intended results of the surgery.

(2) A person applying for a change under subsection (1) may also apply to have his given name or names changed.

(3) The Registrar shall cause to be made a notation of the changes referred to in subsections (1) and (2) where the application is made in the form prescribed by the Registrar and is accompanied by:

a) the certificates of two medical practitioners certifying that:

- i) they examined the applicant; and
 - ii) the results of the transsexual surgery are in accordance with the requirements of the regulations, and
- a. evidence satisfactory to the Registrar as to the identity of the person making the application.

(4) Every birth certificate issued after the making of a notation under this section shall be issued as if registration had been made with the sex designation and names, changed."⁽⁴²⁾

It is pertinent to note that the above examples stipulate the single status of the applicant, as a pre-requisite. This is not difficult to understand, as if it were otherwise, many legal problems would ensue. Furthermore, both stipulate that surgery must be in accordance with regulations which means that the operation is strictly monitored by law, which is also a commendable and necessary measure. The effect of the change is retro-active as far as the appearance of the Registry is concerned, but obviously cannot be intended to be retro-active in respect of the events in the life of the individual before he underwent the corrective surgery. The result of this legislation therefore appears to be that persons who have undergone corrective surgery can be registered as a member of their 'new' sex as if they had always been of that sex for all purposes, subsequent to the change in registration. In the light of this it should be assumed that legal recognition is in toto. But this unfortunately does not appear to be the case.⁽⁴³⁾

III SOUTH AFRICA

The phenomenon of transsexualism is not recognised by our common law and neither is there a custom which supports even the vaguest notion of a 'sex change'.

42. Hawley op cit 132.

43. It has been suggested that the Corbett decision might be followed in matrimonial issues: vide chapter eight infra.

"Our common law relating to persons, property, contract, marriage, inheritance, delict and even crimes, was largely founded and developed on the concept of two basic and immutably determined sexes. Were it otherwise, our common law regarding the status of the sexes would not have developed as it did."⁽⁴⁴⁾

However, several male transsexuals have been allowed to re-register officially as females after corrective surgery.⁽⁴⁵⁾ In 1972, the apparently first re-registration of a female-male transsexual was allowed. This case shall be dealt with now, briefly.

The case of Fredrica X,⁽⁴⁶⁾ Fredrica was born in 1939, the third child of parents who had lost a son in infancy and who already had a daughter two years older than the patient. Fredrica's father had always wanted a son and therefore her birth was a great disappointment to him. Consequently, he unconsciously - and often consciously - treated her as a boy. From an early age, she herself had always preferred her father's company, showing an interest in his masculine pursuits and none whatsoever in the traditional feminine activities.⁽⁴⁷⁾ In primary school, she associated with the boys, and although forced to wear dresses to school, she voluntarily chose to wear trousers in her free time. She had a good relationship with her father, but resented her mother, who always tried to force her into feminine activities. She decided to take up nursing when she left school, as a method of getting away from home.

In her first year, she discovered that she was emotionally attracted to females, which she did not regard as unnatural. Her friends and acquaintances treated her as a male throughout training, and during this period she dated several girls in her role as a male. At this time, her physical development began to cause her great anxiety which led to severe bouts of depression, until she decided to seek psychiatric assistance.

44. Taitz op cit 69.

45. Strauss (2) op cit 221.

46. All the information pertaining to this case is from Strauss (2), he having obtained the facts from the patient himself.

47. Although the causes of transsexualism are by no means clear, it is suggested that environmental factors to play an important role: chapter three supra. This appears to be largely the case with Fredrica.

Various tests were carried out to determine if there was any hormonal imbalance. The results were never made known to her, but it was suggested that she think about a 'sex change". After a few years, she again sought psychiatric help and this time was told that she was a homosexual, and would have to learn to adjust to and live with, the situation as there was nothing that could be done to alter it. Fredrica states:

"I lived a completely double life, conforming where it was impossible to do otherwise, and living as a male socially. No one ever doubted or queried that I was a male, but when I was dressed in female clothing, I was constantly subjected to ridicule, and have been thrown out of female toilets and accused of masquerading as a female."

In 1967-69 she underwent psycho-analysis with a clinical psychologist.

"I had given considerable thought to this (living as a male) and firmly believed that only in this way would I be free and able to live a normal life. I had supported myself and accepted my responsibility since I had left home and did not consider myself to be neurotic."⁽⁴⁸⁾

In 1971, she decided to have her breasts removed, "as these were a constant source of embarrassment to me, also limiting my recreation and manner of dress". Three months later, she underwent a hysterectomy and an oophorectomy and was put on a maintenance dose of testosterone.

At this stage, she sought legal advice on the question of re-registration as a male. This had the immediate practical results which she had hoped to achieve, and thus she officially became Mr Fredric X. He is now employed as a male nurse in the same institution in which he was working prior to re-registration and his colleagues and friends have, by and large, shown a sympathetic understanding to his situation. Strauss ⁽⁴⁹⁾ states that no one coming into contact with Frederic would have the slightest doubt that he is a male. He does not give any impression of either a mannish female or an effeminate male.

48. Strauss (2) op cit 222.

49. Strauss (2) op cit 223.

Frederic's application for re-registration was based on a statement by the patient supplemented by detailed certificates issued by the practitioners who attended her. A brief résumé of these medical reports will be dealt with now, all of which substantiate the patient's conviction that he was always really a man.

Clinical psychologist: He stated that when Fredrica consulted him, she was having 'departures' - behaving in what appeared to be a totally unconscious and dissociated manner. She was physically female but strongly resented her female characteristics. She was however, mannish in appearance, and her gestures were masculine. She had lesbian affairs which were unstable because of her anxiety at becoming emotionally involved. In the course of her therapy, the 'departures' ceased, although she feared that the therapy might change her masculine tendencies and she did her best to make the psychologist aware of her need to remain masculine. He regarded her need to be a man as a way of integrating her aggressive impulses into her personality. He also believed, that for her to have been so strongly male-orientated, there must have been a constitutional and genetic predisposition in her personality. Given this predisposition and her family environment the total picture is of someone deeply dissatisfied with what life had given her, and trying her utmost to modify this in order to find some personal gratification and satisfaction.

'I recommended that the final step legalising the change should be taken to enable her to live as closely as possible to the sexual identity of her choice and hopefully reduce many of the conflicts which had plagued her in the past... I therefore suggest that whatever action remains to be taken, be taken on humane grounds.'

General practitioner:

"I associate myself with her application for a change in sexual status."

His reasons were inter alia her masculine outlook, mannerisms, taste in clothing, hobbies and recreation. On physical examination, her general stature and hair distribution of trunk and head was more in keeping with those of a male than a female. Because of her mannerisms, she had been socially ostracised and this isolation had had severe psychological effects on her. He stated that he found her mentally and emotionally stable, but that the frustrations of her predicament had been the direct cause of severe

bouts of depression and introversion. He concluded that if Fredrica was recognised as a male person, she would be happier and lead a more contented life, free to follow her interests without ridicule. She would be freed from the obligation to conform to feminine behaviour and dress, which did not come naturally to her. Finally he stated that:

"In my view, there is no ulterior or perverted motive in her desire to apply for a change of sex status."

Surgeon: On performing the mastectomy, he discovered that Fredrica had fibro-adenosis, which in all probability, resulted from a hormonal imbalance. He too found that she was more masculine in her physique and hair distribution, than feminine.

Medical Officer in his capacity as her employer: He noted that on engaging Fredrica, she had marked male characteristics. He fully supported the change as it was obvious that the patient would fit into the community much more easily as a male. (50)

Psychiatrist: He had known Fredrica for more than ten years, during which time she had suffered traumatic episodes in which her femininity was challenged publicly. He insisted that in evaluating a sex status, one had to take into account seven factors: chromosomes; hormones; gonads; internal genital morphology; external genital morphology and psychological identity. Where there is ambiguity in any of the first five, medical treatment is directed towards the gender-role and not the physical determinates. (51) As Fredrica had undergone sex reassignment surgery, it was deemed timely by him that her re-classification as a male be forthcoming, as this is the gender-role which she is fulfilling adequately. Her psychological identification and outlook had been those of a transsexual with a decided male gender-role, which was incompatible with her apparent feminine physical appearance at the time. He concluded that it would be in her best interests to be accepted as a male. (52)

50. Strauss (2) op cit 227.

51. Strauss (2) op cit 228. This is the only sensible method of sex designation as far as this author is concerned.

52. The question of re-construction of male genitalia was discussed, but due to various reasons it was decided not to undergo this. The patient is therefore in all respects except external appearance of the genitalia, decidedly male.

Before Fredrica's case, there were no provisions in any Act, for re-registration. However, shortly afterwards, the Births, Marriages and Deaths Registration Act ⁽⁵³⁾ was amended ⁽⁵⁴⁾ to allow for re-registration on applying to the Registrar of births and deaths in the Department of the Interior. The amended section now reads

"The Director-General may, on the recommendation of the Secretary of Health, alter in the birth register of any person who has undergone a change of sex, the description of the sex of such person and may for this purpose call for such medical reports and institute such investigations as he may deem necessary."⁽⁵⁵⁾

IV CRITICAL EVALUATION

As we have seen from the above discussion, there have been instances of official refusal for re-registration - primarily in Britain and the United States. This refusal is on the grounds that the existing law only permits alteration in cases of error and as sex is determined by karyotype, there is no change of sex after corrective surgery, and therefore no need to alter the birth certificate. It is submitted that one should disregard the chromosomal test - which, as medical knowledge has shown, is both impractical and inaccurate - and apply instead the more rational assumed gender-anatomy test for the post-operative transsexual as was done in the case of Fredrica. It is submitted further, that if this was done, it is clear that an alteration would in fact be necessary in order to reflect the true situation. When the transsexual used this certificate in society, it would be consistent with his apparent sex, whereas if the certificate remained unchanged, it would be in direct conflict with his social sex. But as long as the transsexual's sex is determined by pre-operative criteria and karyotype, there will rarely appear to be a mistake as to sex determination as far as the records are concerned, and therefore no possibility of later alteration. It is submitted that depending on how one views the phenomenon of transsexualism, it could be argued that there has in fact been a mistake of designation at birth. If one gives due weight to the psychological criterion, it could be said that such psychological sex might be predetermined

53. Act 81 of 1963.

54. By section 1 of Births, Marriages and Deaths Amendment Act 51 of 1974.

55. Section 7B as inserted by s 1 of Act 51 of 1974, as amended by section 4 of Births, Marriages and Deaths Registration Amendment Act 35 of 1982.

before birth, as it is certainly in evidence from a very early age. Therefore the birth certificate - which is not a medical record as it does not reflect the whole sex of the individual, but just the visually determined sex for the purposes of the law - should be subject to alteration when the child in fact develops according to his/her true sex.

There are, as has been seen, several jurisdictions which do permit alteration of birth certificates, thereby tacitly rejecting the chromosomal test for sex determination in favour of the post-operative sex of the transsexual, which, it is submitted, is the only rational thing to do. All of these statutes require some type of medical testimony - although it is not a direct stipulation in the South African enactment, and is left to the discretion of the relevant official.

The problem however, with these enactments - and more specifically the South African one - is that they only provide for alteration of birth certificates, and no more. Thus the ambit of application is unrealistically restricted. It may be argued that by acknowledging the possibility of the 'change of sex', Parliament has impliedly superceded the common law which is silent on this issue. However,

"It is a well-known cannon of construction that we cannot infer that a statute intends to alter the common law. The statute must either explicitly say that it is the intention or the inference from the Ordinance must be such that we can come to no other conclusion than that the legislature did have such an intention."⁽⁵⁶⁾

It is the function of the legislature to enact law, and the function of the judiciary to administer and interpret that law. The courts can do no more than to seek and express the intention of the legislature and may not attribute to the legislation any meaning or effect not intended by the legislature.⁽⁵⁷⁾

56. Casserley v Stubbs 1916 TPD 310 at 312 per Wessels J.

57. Harris v Law Society of Good Hope 1917 CPD 951.

There are a number of factors to be taken into account when trying to establish the intention of the legislature. One is the imprecision and ambiguity of the language. All statutes suffer to some extent, from vagueness and generality. This however is not the problem with section 7B of the South African Act. More applicable, is the Parliamentary process and poor draughtsmanship, in that it leaves the question of recognising sex changes in other spheres, untouched. Judges have suffered much from poor draughtsmanship. We find Lord Campbell bemoaning the fact regarding:

"... an ill-penned enactment putting judges into an embarrassing situation of being bound to make sense out of nonsense and to reconcile what is irreconcilable."⁽⁵⁸⁾

It is with the greatest respect that this author submits that Nesdadt J did not appear to make sense out of nonsense, in refusing to extend the application of a 7B as regards the matrimonial sphere, in order that the law would not be made foolish and inconsistent, but that in fact, he achieved the reverse. The fact that Parliament had seen fit to provide a procedure of re-registration clearly indicates that it has recognised the concept of sex reassignment and although the section only deals with re-registration, it is logical that the legislature should be seen to recognise such changes in toto. Smit⁽⁵⁹⁾ states that

"Die beslissing van Regter Nesdadt, wat op koue natuurwetenskaplike argument berus, is presies die teenoorgestelde van dit wat die wetgewer met Artikel 7B beoog."

The courts are free to adopt one of three recognised approaches in interpreting a statute:

58. Winchester Court Ltd v Miller 1944 KB 134.

59. P.C. Smit 'Juridiese Bepaling van Geslag' (1977) Tydskrif vir Regwetenskap 106 at 113.

1. the mischief rule;
2. the golden or absurdity rule; and
3. the literal rule.

Although South African courts have tended towards the literal, strict approach to interpretation - probably because ours is a common law system with legislation interwoven⁽⁶⁰⁾ - it is submitted that the first rule is to be preferred as it represents a functional method of interpretation.

In applying the mischief rule,⁽⁶¹⁾ the interpreter must consider four premises:

1. what the law was before the measure was passed;
2. what the defect/mischief was for which the law had not provided;
3. what remedy the legislature has now provided; and
4. the reason for the remedy.⁽⁶²⁾

Taitz⁽⁶³⁾ in applying the mischief rule to s 7B obtains the following results.

1. prior to the enactment no law existed for the alteration of the sex description of a person who had undergone a sex change;
2. the defect in the law was the absence of any statutory provision, including procedure, for the alteration of the sex description in the Birth Register of a person who had undergone a change of sex;
3. the remedy provided by the legislature was the authority to alter the sex description and the administrative procedure to be followed by the relevant official, the Secretary of the Interior; and
4. the reason for the remedy was to make possible the change of sex description in the birth register of a person who had undergone a change of sex.

60. Statutes therefore tend to be regarded with suspicion by the courts and are consequently interpreted strictly with the judiciary either having no power to correct errors or fill lacunae, or not wishing to take such power upon itself. This attitude therefore has the disadvantage in that it can operate to give nonsensical - as in W v W - or unduly harsh results to legislation.

61. As formulated in Heydon's case (1584) 3 Co Rep 7a at 7b.

62. Taitz op cit 71. See also Hleka v Johannesburg City Council 1941 (1) SA 842 (A) at 852, where it was cited with approval by Van den Heever JA.

63. Op cit 71.

Taitz comes to the conclusion from this analysis that the interpretation of section 7B as it stands, is correct. It is not possible to extend the words of the enactment to include other instances of recognition of a change of sex,⁽⁶⁴⁾ but it is submitted here, that this does not categorically rule out the possibility of a judicial extension to the enactment, using the recognition of a change of sex accorded by section 7B as the foundation of the argument. For whichever way one wishes to interpret section 7B, it is nevertheless evident that the legislature does envisage the factual possibility of a 'sex change' and has gone so far as to accord it some recognition. If the section is not afforded legal recognition, then clearly the legislature has failed to achieve any purpose - save to give the post-operative transsexual the empty spes that he/she may now recommence life according to his/her sexual adaptation.

"Dit word te oorweging gegee dat dit wel die bedoeling van die wetgewer is dat 'n persoon se geslag, in sy alledaagse sosiologiese (en nie suiwer tegnies-biologiese) konteks gesien, kan verander. Om vir so 'n gebeurlikheid voorsiening te maak is Artikel 7B van ook op die wetboek geplaas."⁽⁶⁵⁾

In conclusion, it is interesting to note that Taitz found support for the argument of a general recognition of sex change, in the Parliamentary debates preceding the passing of section 7B:⁽⁶⁶⁾

"The amending legislation... is required in order to give a legal foundation to an administrative practice which has been followed for some time in respect of altering birth registers. For the past few years, the Department of the Interior has, on request, altered the person's sex description in his/her birth register after such a person has undergone a change of sex as a result of medical treatment..."⁽⁶⁷⁾

64. Ibid.

65. Smit op cit 113.

66. Such debates however, may not be used to construe the intention of the legislature, because this would be against all principles of construction: Taitz op cit 72.

67. As per Deputy Minister of the Interior, House of Assembly Debates 4 October 1974.

V SUGGESTED SOLUTIONS

It is submitted, that while it is laudible that South Africa is on a par with the more enlightened jurisdictions as regards granting re-registration, the enactment as it stands is too limited in scope to be of any real use. Section 7B was evidently enacted by Parliament because it realised that the phenomenon of transsexualism was now ineluctably part of modern medicine and therefore could be ignored by the law no longer. Considering that the operation has not been prohibited by law - and in fact should not be - it is clear that in this regard at least, the law is keeping up with medicine. As far as giving legal cognizance to the effect of the operation by allowing re-registration, the South African Parliament has taken a commendably progressive step in dealing with the transsexual problem. However, as the legislation stops short here, it offers no real solace to the post-operative transsexual.

It is further submitted, that not only should re-registration specifically relate to unmarried transsexuals - as is required in the Canadian statutory examples given thereby avoiding legal problems inherent in the situation if the transsexual were still married at the time of his conversion, but that the enactment should be broadened to cover all spheres of law, including marriage - as has been the tacit implication with the Alberta Statute. It is submitted in conclusion, that in order to avoid all the possible anomalies, legislation such as that enacted in West Germany⁽⁶⁸⁾ should be adopted and employed in South Africa as it is evident that the judiciary is not going to take any progressive steps. The legislature should now complete the good work it has begun and extend the application of section 7B to all areas of the post-operative transsexual's life.

68. Gesetz "Über die Änderung Der Vornamen und Der Feststellung Der Geschlechtszugehörigkeit in Besonderen Fällen (Transsexuellen gesetz - TSG) Nr 56 - Tag der Ausgabe Bonn den 16 Sept 1980 vorm 10. This legislation will be dealt with in greater detail at the end of chapter eight infra.

C H A P T E R V I I I
M A R R I A G E A N D D I V O R C E

A. MARRIAGE.

I. INTRODUCTION

"Let us not to the marriage of true minds,
Admit impediments." (Shakespeare)

Marriage is a desire of most people, and the transsexual is no exception. Although re-registration in the 'new' role has been permitted in several jurisdictions - including South Africa- the status of the post-operative transsexual's marriage has had a far from satisfactory outcome.

II COMPARATIVE LAW

1. The United Kingdom.

The most celebrated case pertinent to the issue of the validity of the post-operative transsexual's marriage, is the English one of Corbett v Corbett.⁽¹⁾ This case revolved around the petition by a husband praying for a declaration that the marriage ceremony in which he participated was null and void because the respondent at the time of the ceremony was a person of the male sex, or in the alternative, for a decree of nullity on the ground of the non-consummation, owing to the incapacity or wilful refusal on the part of the respondent.⁽²⁾

The relevant facts of the case are as follows.⁽³⁾ The respondent was born in 1935 in Liverpool, and registered at birth as a boy. 'He' was raised as a boy, and it had not been suggested at any time that there had been a mistake in the sex of the child. In 1951, at the age of sixteen years, 'he' joined the Navy and at the age of seventeen, was referred to the psychiatric department of Walton Hospital where it was observed that 'he' presented a womanish appearance and "had little bodily and facial hair". After some six months treatment, the doctor in charge concluded that

"This boy is a constitutional homosexual who says he wants to become a woman. He has had numerous homosexual experiences and his homosexuality is at the root of his depression. On examination, apart from his womanish appearance, there was no abnormal finding".⁽⁴⁾

1. (1970) 2 All ER 33.

2. Ibid.

3. At 35 of the report.

4. At 36 of the report. It must be remembered that very little was known about the phenomenon of transsexualism at this time (1953).

By 1956, the respondent had become a member of a troupe of female impersonators by which state 'he' was already taking oestrogen to encourage the development of breasts and a feminine physique. In May 1960, 'he' underwent corrective surgery in Casablanca. Following the operation, the respondent returned to London and began calling herself April Ashley and dressed and lived as a female. About six months later, she met the petitioner for the first time. In September 1963, the parties underwent a ceremony of marriage in Gibraltar at the time of which, the petitioner was aware that the respondent had undergone corrective surgery. The parties lived together for no more than fourteen days.

The essence of the judgment is delivered by Judge Ormrod, who states that:

"The case therefore resolves itself into the primary issue of the validity of the marriage, which depends on the true sex of the respondent and the second issue of the incapacity of the parties, or their respective willingness or unwillingness to consummate the marriage IF there was a marriage to consummate".⁽⁵⁾

In the first instance, Ormrod J appeared to be favourably impressed with the petitioner's testimony.

"In the witness box, he described his sexual experience in considerable detail with apparent frankness and without obvious embarrassment."⁽⁶⁾ He was in fact, an

5. At 35 of the report.

6. However, from the respondent's point of view, his testimony had another aspect to it. "Suddenly I realised what he (Arthur) was doing. So did my medical and legal advisers. Arthur was emphatically presenting himself as a deviate in vivid detail ... By adopting this confessional approach, by posing as a pervert since struck by contrition he was able to convey the impression that our marriage was no more than a squalid prank, some deliberate mockery of moral society perpetrated by a couple of queers for their own twisted amusement. By implication, I too was a deviate and no more than a deviate. He appeared to be apologising in court, and sympathy was forthcoming. I was not apologising for being myself, and sympathy was not forthcoming. A few days into the case, Ormrod suddenly asked if it were necessary to continue wasting the taxpayers' money ... In the face of his alarming lack of interest in the debate, my counsel began to look very worried indeed": Fallowell and Ashley op cit 216.

unusually good witness, answering all the questions put to him carefully and without any attempt at prevarication or evasion".⁽⁷⁾

It is ironic therefore that when he came to describing his deviant behaviour, Ormrod J was suitably impressed, but when Corbett continued to declare that his feelings for the respondent had been that of a man for a woman, the learned judge dismissed this evidence as 'fantasies'.

" soon he (Corbett) developed for her (Ashley) the interest of a man for a woman. He said she looked like a woman, dressed like a woman, and acted like a woman. He disclosed his true identity to the respondent to show that his feelings had become those of a full man in love with a girl, not those of a transvestite in love with a transsexual. He repeatedly said that he looked on the respondent as a woman, and was attracted to her as a woman. While I accept his account of his sexual experience from a qualitative point of view, I am sceptical about the quantity of it but I have no difficulty in concluding that he is a man who is extremely prone to all kinds of sexual fantasies and practices. He is an unreliable yardstick
 "(8) ...

There was general agreement amongst the doctors as to the basic principles and facts, but there was a divergence of opinion as regards the classification of the respondent.

"Dr Randell considered that the respondent is properly classified as a male homosexual transsexualist. Prof Dewhurst agreed and said that the description 'castrated male' would be correct. Dr Armstrong agreed that the evidence was typical of a male transsexual, but he considered that there was also evidence that the respondent was not a physically normal male. He said that the respondent was an example of the condition called intersex ... and should be assigned to the female

7. At 37 of the report.

8. At 38 of the report.

sex, mainly on account of the psychological abnormality of transsexualism. Prof Roth was prepared to regard the case as one of intersex, and thought that the respondent might be classified as a woman 'socially'. He would not recommend that the respondent should attempt to live in society as a male ... I am inclined to prefer the evidence of Dr Randell⁽⁹⁾ ... my conclusion is that the respondent is correctly described as a male transsexual, possibly with some comparatively minor physical abnormality".⁽¹⁰⁾

All the medical witnesses accepted that there are at least four criteria for assessing the sexual condition of an individual:

1. chromosomal factors;
2. gonadal factors;
3. genital factors; and
4. psychological factors.⁽¹¹⁾

Ormrod J concluded that the respondent had shown a male karyotype and therefore was chromosomally male. He concluded further, that prior to the operation the respondent had had male gonads and testicles - bearing in mind of course that the learned judge was not aware whether or not the gonads were normal, as such information was not forthcoming. The respondent therefore was held to be psychologically transsexual (sic) and that any operation had not affected 'her' status as male. Thus 'her' sex for the purposes of marriage was not that of a biological female.

"My conclusion therefore is that the respondent is not a woman for the purposes of marriage but is a biological male and has been so since birth".⁽¹²⁾

9. At 43 of the report.
10. At 44 of the report.
11. Ibid.
12. At 49 of the report. The respondent states her contention at 207 of her autobiography: "... since the scientific definition of sex is not clearcut in all cases, and since marriage is also a legal and social relationship between a man and a woman I should be regarded as a woman for the purposes of marriage because, as a result of my operation, I could function in no other way. The judge confined his deliberation to my original, biological classification, disregarding the psychological factor, and the fundamental developments to which it gave rise, was the central weakness of the case and the reason for its unsatisfactory outcome."

In arriving at this decision, Ormrod J discussed his idea of marriage.

"Since marriage is essentially a relationship between a man and a woman, the validity of the marriage in this case, depends in my judgment, upon whether the respondent is or is not a woman. The question then becomes what is meant by the word 'woman' in the context of marriage, for I am not concerned to determine the 'legal sex' of the respondent at large.⁽¹³⁾ Having regard to the essentially heterosexual character of the relationship which is called marriage, the criteria must in my judgment, be biological. For even the most extreme degree of transsexualism cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage"⁽¹⁴⁾.

Conspicuously absent from this opinion is a description of this "essential role". This opens up several avenues of speculation. If, by this phrase, Ormrod J meant the ability to procreate, he would void innumerable marriages throughout the world. If he meant the ability to have sexual intercourse as a woman, then he ignored the uncontroverted evidence of the medical examiners who reported that there "is no impediment on 'her' part to sexual intercourse".⁽¹⁵⁾ If Ormrod J meant the ability to look like and act like a woman, he rebutted his own admission that Miss Ashley's outward appearance ... was convincingly feminine."

The learned judge, ruling on the alternative held that even if the respondent were female at the time of the marriage, the marriage would be a nullity still, due to non-consummation. He based his findings on the ground that it was impossible for consummation to occur where a person has an artificial vagina, because this could not amount to vera copula.⁽¹⁶⁾

13. This author wonders how many sexes a person in fact does have, if he does not have a legal sex 'at large'?

14. At 48 of the report. (My underlining).

15. At 41 of the report. "April Corbett had had an operation for the construction of an artificial vagina, and the surgical result was remarkable good" (ibid). In addition, Miss Ashley had testified to successful sexual relations with at least one man prior to her marriage (at 37 of the report).

16. At 49 of the report.

However, this point was found to be unsubstantiated in the earlier decision of S v S⁽¹⁷⁾, with which this author is in accord.

"For myself, I find it difficult to see why the enlargement of a vestigial vagina should be regarded as producing something different in kind from a vagina artificially created from nothing.⁽¹⁸⁾ The operation involved in either case is substantially the same ... in either case there is no more than a cul-de-sac and there can be no possibility of a child being conceived ... the inability to conceive a child is no ground for saying that the marriage cannot be consummated ... what else, it may be asked, remains to differentiate between intercourse by means of a vagina artificially enlarged? ... be regarded as amounting to vera copula".⁽¹⁹⁾

All in all, it is submitted that it is patently obvious from this judgment that Ormrod J has gone out of his way to find any objection to this marriage which he evidently finds distasteful and it is submitted further that none of his reasons hold much water.

2. Canada.

In Canada the definition of marriage as enunciated in Hyde v Hyde and Woodmansee⁽²⁰⁾ has been used: a voluntary consent of both parties being of the opposite sex to each other. This was re-affirmed in the 1975 case of North v Matheson in which two men purported to marry one another. They applied to have their 'marriage' registered at the Vital Statistics office. On application to court after official refusal of their request, their claim was dismissed as the court held that the definition in Hyde's case was the acceptable one. It was concluded that the ceremony was not one of marriage so there was nothing to register, in effect.

17. S v S (otherwise W) (no 2) 1962 All ER 55.

18. Or, it is submitted, from a previously male organ.

19. To start getting caught in the semantics involved is tantamount to claiming that there is a standard size to which genitalia should conform and anything less renders the person 'abnormal'.

20. (1866) LRP and D 130.

The parties must also comply with the statutory regulations, and have the necessary capacity.⁽²¹⁾ The status of the post-operative transsexual's marriage in Canada is uncertain, and some authorities are of the opinion that if the question came up for adjudication, it would be decided along the lines of Corbett v Corbett.⁽²²⁾ In criticising this case, Parschin-Rybkin refers to the case of D v A.⁽²³⁾ She claims that the artificial vagina does permit a degree of penetration sufficient to complete the natural act of copulation. Taking into account also the decision in Miller v Miller⁽²⁴⁾ it is submitted that it would appear logical to assume that the post-operative transsexual is capable of fulfilling the role of a woman and furthermore, the fact that sterility does not result in a declaration of nullity under Canadian law is further evidence that the inability of the transsexual to procreate is also no bar against her capacity to marry.⁽²⁵⁾ It is submitted that there is - in the light of the foregoing case and also in light of such statutes as the one in Alberta dealing with re-registration - no reason why Canadian judges should feel compelled to follow the Corbett decision, and it is hoped that this will not transpire.

3. Australia.

To date, there is no case directly in issue on the marriage of the post-operative transsexual in Australia, but there has been one on the related topic of the marriage of an hermaphrodite. In the Corbett case Ormrod J specifically left this area open, but an Australian court had the opportunity of examining it in the case of The Marriage of C and D (falsely called C).⁽²⁵⁾ Like the Corbett case it involved the purported marriage which lacked a supposed heterosexual character but unlike the former cases one of the parties was an

21. MOSS v MOSS (1897) 263.

22. Hawley op cit; O'Donovan op cit 139.

23. 163 Eng Rep 1039 (Ecct Ct 1845).

24. (1947) O.R 213 (CA).

25. Parschin-Rybkin op cit 586.

26. (1979) FLC 90(CCH); H.A. Finlay 'Sexual Identity and the Law of Nullity' (1980) 54 Australian Law Journal 115.

hermaphrodite verus ⁽²⁷⁾ the other - the applicant - was a woman. The husband was unable to consummate the marriage and the wife sought to sever whatever legal bond there was between them.

C was regarded at birth as a male with a gross phallic deformity. According to the current medical opinion such deformity could not be corrected until the boy had reached the age of sixteen years - presumably because normally all growth ceases at this age. Consequently, he grew up socially and psychologically a male. On later investigation, he was found to have a right-sided ovary and fallopian tube, which were subsequently removed. The next embarrassment were his well-formed breasts which were also surgically removed later. A chromosomal count was taken and in the cells examined the karyotype was female although the possibility of different patterns in cells not examined, was left open.⁽²⁸⁾ Despite the several female characteristics he exhibited, it was decided medically that he was definitely a male and his genitals were surgically improved then.⁽²⁹⁾ He showed no personality disorder of any kind. Thus, at the time he decided to marry the girl of his choice he was described as "an average-sized, non-athletic type of male" with hair growth on the upper lip but not on the cheeks. His voice was masculine and he a short phallus of reasonable girth, and one testicle - slightly smaller than average - on the left side. The marriage lasted for nine years, until 1978. Considering the inability of C to consummate the union it is surprising that the duration was

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27. There are four groups of cases in which there is a departure from the normal sexual development, and the most uncommon is that of the true hermaphrodite or gonadal intersex. Three main subgroups are distinguished according to the anatomical distribution of the gonadal tissue. The subgroup to which C belonged, is one of a "unilateral variety with a) a gonad on one side, and b) on the other side, one or two ovatestes". This subgroup is apparently the least common; a rarity in a rare condition: Finlay op cit 115.
28. Vide chapter one supra.
29. This is a primary example of a case in which classification on karyotype would have been ludicrous and was in fact not even considered medically. The importance attributed to such a test - as in the case in the Corbett decision - is misplaced. "In spite of the bisexual gonadal structure, the female chromosomal arrangement ... there was no doubt in view of the assigned male sex, the male psycho-sexual orientation ... that he should continue in the sex in which he had been reared": cited in Finlay op cit 117.

in fact of such a length, and it is submitted that this is a clear indication that the overriding importance of the sexual act, for the validity of marriage, is not of the strength it is purported to be, and it is refreshing to see that there are some people who do not rate sexual intercourse as being of paramount importance. It is this author's opinion that a marriage relationship should have more substance than that.

The wife sought a declaration as to the validity of her marriage, pursuant to section 113 of the Family Law Act.⁽³⁰⁾ However, Judge Bell rejected her application and indicated that the appropriate method of proceeding was by way of nullity.⁽³¹⁾ The learned judge concluded that the ground for nullity was the 'absence of consent' on the part of the applicant.

"...the wife was contemplating immediately prior to marriage and did in fact believe that she was marrying a male. She did not in fact marry a male but a combination of both male and female, and notwithstanding that the husband exhibited as a male, he was in fact not, and the wife was mistaken as to the identity of her husband".⁽³²⁾

This author concurs with Finlay⁽³³⁾ in suggesting that the learned judge based his decision on a misconception of the word 'identity'. There was no suggestion that the person the applicant married was not the person she intended to marry. At most, it could be said that there had been an error in substantia which is no ground for nullity. This problem of error was discussed by Jeune P in Moss v Moss⁽³⁴⁾ where it was held that there are four types of error:

1. error of person;
2. error of condition (bondage or servitude);
3. error of fortune (financial endowment); and
4. error of quality (virginity, nobility, chastity),

None of the latter three are considered as vitiating consent, and the author submits that they all fall under the general category of error in substantia.

30. Of 1975.

31. Finlay op cit 117. Bell J instructed that the law to be applied was that in existence at the time of the marriage which was the Matrimonial Causes Act at 1959. The grounds for a void marriage were contained in s 18(1) and the particular ground invoked in C and D was S 18(1)(d), namely the absence of consent due to the applicant's mistake "as to the identity of the other party".

32. Finlay op cit 117.

33. Ibid.

34. (1987) 263 at 271, quoting from Ayliffe's Parergon Juris Canonici, an authority on canon law.

The only error to have a nullifying effect is the error as to person. What this means is explained by Ayliffe:

" as when I have thoughts of marrying Ursula, yet by mistake of the person I have married Isobella. For an error of this kind is not only an impediment to a marriage contract, but it even dissolves the contract itself, through a defect in consent of the person contracting".⁽³⁵⁾

It is important to make a distinction between an error as to a person's identity, and an error as to his attributes or qualities. In C and D the error was to the respondent's sex - if in reality there was such an error. Medical practitioners had defined him as male, and it is submitted with respect, that a judge has no right to argue with this authority. It is submitted further, that if one adopted Bell J's reasoning that the respondent was not in fact a male, then the vitiating element is more fatal than error as to identity, for it goes to the very definition of the marriage, which is required to be heterosexual in character. Thus the issue at stake is whether an hermaphrodite who has undergone corrective surgery, can contract a valid marriage. As far back as Canonical law, it was decided that if the sex drive of mature years is evident, an hermaphrodite can contract a valid marriage. Such a person must choose his sex and swear never to masquerade as the other sex.⁽³⁶⁾ What sensible advice, even in those dark days.

However, there has been an evolving judicial attitude in Australia, towards a progressive attitude of marriage, moving away from the more traditional one. A clear example involves the concept of living together. In In Re A Minor⁽³⁷⁾ Bridge J had held that the intention to live together was contrary to proper standards of moral restraint, and that the court cannot and will not encourage such behaviour by suggesting approval or condemnation of the immoral behaviour involved. That was in 1964. In 1973, a different view was taken.⁽³⁸⁾ In Andrews v Parker⁽³⁹⁾ Stable J stated:

35. Ibid.

36. Freisen Geschichte des Kanonischen Eherechts 343-5 cited in Finlay op cit 120.

37. (1964) 6 FLR 129. Here the Supreme Court of the Australian Territory refused an application to set aside a refusal of parental consent in terms of s 17 of the Marriage Act 1961.

38. There is at present in Australia, a lively debate on the issue regarding de facto spouses as legal spouses for the purposes of the law.

39. (1973) QD R 933 at 1104.

"Surely what is immoral must be judged by the current standards of morality of the community. What was apparently regarded with pious horror ... would, I observe, today hardly draw a raised eyebrow or a gentle 'tut tut'. It is notorious that there are many people living together as husband or wife without the benefit of the clergy. So much so, that in this century, Parliament in fact has extended social service benefits to whom in the legislation are called 'dependant females' ...The point I have, perhaps too laboriously been trying to make is that social judgments today upon matters of 'immorality' are as different from those of last century as is the bikini from the bustle."

This case represents a refreshing judicial awareness of social change in the matrimonial sphere but it is to be lamented that such clear-sightedness is not pervasive throughout the whole area. It certainly does not touch on the one aspect which is pertinent to this work: the 'one man and one woman' in marriage, as Lord Penzance put it.⁽⁴⁰⁾

4. The United States of America.

In the light of increasing pressure for the recognition of civil rights of homosexuals - an issue peculiar to the United States due to their distinctive Constitution - as well as the rising incidence of corrective surgery, the question has been posed as to whether two persons of the same sex at birth may contract a marriage with each other.

"Unlike in determining sex for the purposes of a birth certificate, where the court may feel that a little philosophising about sex and gender is a harmless exercise in futility,⁽⁴¹⁾ the legal determination of sex for the purpose of marriage touches on the most fundamental underpinnings of society. As increasing numbers of homosexuals, transsexuals and bisexuals publicly declare their sexual affiliations, the courts are increasingly faced with questions whether nonheterosexuality should be a barrier to marriage".⁽⁴²⁾

40. Hyde v Hyde and Woodmansee supra.

41. Certainly not to the transsexual concerned, and it is submitted that no serious-minded court of law should or would adopt this attitude.

42. Twardy op cit 270.

In all the American cases which have considered this point, the view has been held that since marriage is a relationship which involves the union of a man and a woman as husband and wife, there may be no valid marital contract entered into between persons of the same sex.

Affirming a judgment holding that two females were not entitled to have issued to them a licence to marry each other, the Kentucky court in Jones v. Hallahan⁽⁴³⁾ stated that the relationship proposed by the females did not authorise the issuance of a marriage certificate, because what was proposed by them was not a marriage. The court held that the females were prevented from marrying - not by a statute or refusal of the county clerk to issue them the licence - but rather by their own incapacity of entering into a marriage as that term was defined. Indeed, if the females had concealed from the clerk the fact that they were of the same sex, and he had issued a licence on the strength of this and a subsequent ceremony had been performed, the resulting relationship still would not constitute a marriage. It should be remembered for the record, that in this case both females were biological and psychological females and that no question of transsexualism was raised and there had been no attempt by either of them to undergo the necessary surgery to enable her to live as a man.

In Baker v Nelson⁽⁴⁴⁾ the court in Minnesota held that a marriage of two persons of the same sex was not authorised by state statutes. It was contended that the prohibition of 'same-sex marriages' denied the males concerned, a fundamental right guaranteed in the Ninth Amendment to the Federal Constitution and also denied equal protection. Observing that the constitutional challenges were based on the contention that the right to marry without regard to the sex of the parties was a fundamental right of all persons and that restricting marriage to only couples of the opposite sex was irrational (sic) and invidiously discriminatory, the court emphasised that it was not persuaded by these contentions. It is this author's opinion that it must be borne in mind that the people involved are at perfect liberty to have a relationship with each other, but that relationship cannot be called 'marriage' by virtue of the very definition of the term.

43. (1973 Ky) 501 SW 2d 588, 63 ALR 3d 1195.

44. (1971) 291 Minn 310 191 NW 2d 185 63 ALR 3d 1195.

In Anonymous v Anonymous⁽⁴⁵⁾ in an action in which the plaintiff male sought a declaration as to the status of his marriage, the court declared that the ceremony in which the plaintiff and defendant took part, did not in fact of law, create a marriage contract, and that the parties were not, and never had been, husband and wife, or parties to a valid marriage. In this instance, the couple had married with the plaintiff male fully believing that his 'wife' was a female, only to discover on the wedding night that 'she' had male genitals. Notwithstanding the defendant's assertions that he would undergo an operation involving corrective surgery, the plaintiff left, and the marriage was never consummated. The court concluded that the marriage ceremony was a nullity, and that no legal relationship could be created by it. Even if the defendant was a true transsexual it is submitted that it is easy to understand the court's finding that the defendant was in fact not female in spite of his psychological identification with femininity. If the defendant's body had been brought into balance with the psychological identification before the purported marriage, then, it is submitted further, the court should have had no problem in ruling the marriage as heterosexual in nature and therefore valid. It is this author's opinion that a court cannot give credence to a pre-operative transsexual's gender identity, for practical reasons, but if that person had proven his belief in his feminine gender by undergoing corrective surgery, then the court should recognise the fait accompli and give sanction of it.

The first case in American law dealing with marriage of a post-operative transsexual was that of Frances B v Mark B.⁽⁴⁶⁾ This New York decision involved a female-male transsexual, who subsequent to corrective surgery married a biological woman. The wife brought an action for annulment on the ground that her spouse had defrauded her by not informing her of the operative intervention and that he was also unable to consummate the marriage. The defendant, although having undergone a hysterectomy and mastectomy, had not altered his female genitalia, and was consequently incapable of performing sexually as a male. While the inability to consummate the marriage would have been sufficient to justify the annulment the court maintained that the defendant was in fact still a woman. The court point out that New York neither specifically prohibited marriages between persons of the same sex, nor

45. (1971) 67 Misc 2d 982, 325 NYS 2d 499, 63 ALR 3d 1196.

46. 78 Misc 2d 112, 355 NYS 2d 712 (1974) 63 ALR 3d 1197.

authorised the issuance of the marriage licence. It also pointed out that marriage was, and always had been a contract between a man and a woman. Even if the defendant were a male trapped in a female body, the record indicated that the entrapped male had never successfully escaped to enable the defendant to perform as a male in marriage and that the surgery had not achieved this result. The court concluded that while the defendant might be able to function as a male in other relationships, he could not do so as a husband, especially as regards procreation.

"While it is possible that the defendant may function as a male in other situations and in other relationships, defendant cannot function as a husband by assuming male duties and obligations inherent in the marriage relationship ... Apparently hormone treatments and surgery have not succeeded in supplying the necessary apparatus to enable defendant to function as a man for the purposes of procreation".⁽⁴⁷⁾

Although this author believes that the ultimate decision as regards the nullity of the marriage, is correct, it is, however, submitted that the ratio therefor, is not. It is - as we have seen - arguable whether the function of marriage is solely procreation in this day and age. It is submitted that the view is anachronistic under the veil of changing conceptions and has been whitewashed effectively by social progress. It is submitted further that the defendant in this case is at a disadvantage in the legal arena in that he did not undergo complete surgery and have a male member constructed. This raises the issue of exactly what physicality one has to possess as regards the visual sexual appearance because the court obviously regarded the defendant as a female still because the visual test did not reflect the necessary genitalia which presumably would have enabled him to perform the elusive husbandly function alluded to. Impotence does not preclude the validity of a marriage per se. It is respectfully submitted that this case should have been decided on the fraud issue: not in that the husband had undergone corrective surgery and had not informed the wife, but that he was in fact impotent and sterile.

Similarly, on the same reasoning as the previous cases, the court in Singer v Hara,⁽⁴⁸⁾ held that the Washington state marriage statute in effect prohibited

47. At 118 of the report. The court cited the legal definition of marriage as follows: "Marriage is the civil status, condition or relation of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbered upon those whose association is founded on the distinction of sex."

48. (1974) 11 Wash App 247 522 P 2d 1187 63 ALR 3d 1197.

'same-sex marriages' and that the prohibition did not offend the state's equal rights amendment against sex discrimination, nor did it offend the amendments to the Constitution. Having reference to the fact that a prohibition against 'same-sex marriages' did not discriminate any more against one sex or the other, the court rejected the analogous argument put forward by the Supreme Court in Loving v Virginia⁽⁴⁹⁾ in support of striking down anti-miscegenation statutes, that the fact that such statutes affected all races equally did not remove from them the taint of discrimination. The Washington court reasoned however, that it was not an impermissible sex discrimination which underlay the prohibition against 'same-sex marriages' but the very nature of the definition of marriage itself.

The turning point in American case law, was the progressive decision of MT v JT.⁽⁵⁰⁾ It is the first court in history to hold that a transsexual's marriage is valid. This New Jersey case had an inauspicious beginning when MT filed a complaint in the Juvenile and Domestic Relations Court for support and maintenance. The legal issue was heightened significantly when JT interposed the defence that MT was a male and therefore the marriage was void and consequently he had no legal duty of support.

MT testified that she was born a male, and as a youngster did not participate in sports and that at an early age she became interested in boys. At the age of fourteen she began dressing in a feminine manner and later began dating men. MT first met her future husband JT in 1964, and explained to him her feelings about being a woman. Soon thereafter, she began living with him, and in 1970 she consulted Dr Ihlenfeld as regards corrective surgery.⁽⁵¹⁾ In 1971, upon the doctor's advice, she approached a surgeon who agreed to perform the operation which she underwent in May that year. The defendant paid for the operation, and in August 1972 the parties went through a ceremonial marriage in New York State and soon moved to New Jersey. They lived together as man and wife for two years during which time JT supported her. In October 1974, he left the communal home and also ceased to support her.

At the trial court, MT called three medical witnesses who testified as to the aspects of transsexualism, and the validity of the 'change of sex'. JT in his defence, called a medical witness - his adoptive father - to testify

49. (1967) 388 US 1. 18 LED 2d 1010, 87 S Ct 1817.

50. 140 NJ Super 77 355 A 2d 304 (1976) 63 ALR 3d 1197.

51. Dr Ihlenfeld appeared as an expert witness in the case under mention.

that MT was still a male because she had no female sex organs. The trial judge ruled that MT had been of the female psychological gender all her conscious life and that her anatomical change through surgery meant that she was now a female and therefore was a woman at the time of her marriage. The Superior Court affirmed this laudible decision. (52)

In its decision as to the validity of the post-operative transsexual's marriage, the court of appeal surveyed the Corbett case, noting its disagreement therewith. It recognised that there were several criteria which may be relevant in determining an individual's sex, in addition to the anatomical test. (53) It concluded on this point that it must

"... disagree with the conclusion reached in Corbett that, for the purposes of marriage sex is somehow irrevocably cast at the moment of birth, and that adjudicating the capacity to enter marriage, sex in its biological sense should be the exclusive standard". (54)

The court went on to explain that its departure from the English decision stemmed from a fundamentally different understanding of what is meant by 'sex' for marital purposes. It continued to explain that the evidence and authority it examined, demonstrated that a person's sex embraces the gender and that

"...indeed it has been observed that the 'psychological sex of an individual' while not serviceable for all purposes, is practical, realistic and humane". (55)

The court further challenged the premise in Corbett that 'true' sex is ascertained by biological criteria, and in its stead, offered the dual test of anatomy-gender. It stated therefore that it was

" ... compelled to the conclusion that for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity of sex must be governed by the congruence of these standards". (56)

52. At 207 of the report.

53. At 208 of the report.

54. At 209 of the report.

55. Ibid. It is submitted that the only foreseeable instance in which the psychological sex will fail as a test on its own, is the case of the pre-operative transsexual, but once the surgery has aligned body and mind, it is just as serviceable as it is for the 'normal' person.

56. Ibid.

The basis of this decision was

"... the tacit but valid assumption of the lower court and the experts upon whom reliance was placed, that for the purposes of marriage under the circumstances of this case, it is the sexual capacity of the individual which must be scrutinised. Sexual capacity or sexuality in this frame of reference requires the coalescence of both the physical ability and the psychological and emotional orientation to engage in sexual intercourse as either a male or a female".⁽⁵⁷⁾

The court apparently was impressed by the fact that sexual intercourse can and did take place in the 'new' role: this therefore indicated some measure of congruence now between the anatomy and the gender of the individual, which could not be disregarded easily. The court was further untroubled by the fact - unlike the Corbett decision - that the physical ability was conferred artificially⁽⁵⁸⁾ and instead saw that the only logical stance to adopt was to give legal effect to a fait accompli. This high evaluation of the technical achievements, is one of the significant points of contrast with the English ruling, which only considered the given biological characteristics of the transsexual prior to surgery. The other point of notable contrast was the American court's refusal to regard the transsexual's biological sex on its own. It is submitted that biological criteria cannot be considered as any kind of totality separate from the psyche and the only rational statement on mankind is one in which there is no divorce between the physical and the mental.

MT v JT made a cursory analysis of the previous case law dealing with the validity of a transsexual's marriage⁽⁵⁹⁾ et al, and in summing up, stated that

"... in this case the transsexual's gender and genitalia are no longer discordant; they have been harmonised through medical treatment. The plaintiff had become physically and psychologically unified and fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy. Consequently plaintiff should be considered as a member of the female sex for marital pur-

57. Ibid.

58. Such reasoning in fact echoes the English decision of S v S supra.

59. Particularly Frances B v Mark B supra.

poses. It follows that such an individual would have the capacity to enter into a valid marriage relationship with a person of the opposite sex, and did so here. In so ruling, we do no more than give legal effect to a fait accompli based upon medical judgment and actions which are irreversible. Such recognition will promote the individual's quest for inner peace and personal happiness, while in no way disserving any societal interest, principle of public order or precept of morality".⁽⁶⁰⁾

III SOUTH AFRICA

The first known case publicising the plight of the transsexual in South Africa revolved around divorce proceedings in which one of the parties had undergone corrective surgery prior to the marriage. It should be noted en passant, that a person who has undergone such surgery and who has subsequently obtained an amended birth certificate - which is permissible in South Africa - will encounter no difficulty in having his/her marriage solemnised.⁽⁶¹⁾ The marriage officer is bound to accept the information contained in the official document, unless he is convinced that he cannot rely thereon. As the post-operative transsexual looks just like anyone else in his/her assumed sex, there is very little likelihood of his/her sex being challenged.⁽⁶²⁾

In Jonker v Jonker⁽⁶³⁾ a man who had married a male-female post-operative transsexual, was granted an order of restitution in lieu of the requested

60 At 211 of the report. The author is in total accord with this reasoning. Not only is the legal recognition of the gender of a post-operative transsexual in no way harmful to society, but it has the added attraction of being beneficial to the sufferer.

61. Taitz op cit 73.

62. One of the external requirements of a valid marriage is that it must be solemnised by a competent marriage officer in accordance with the provisions of the Marriage Act 25 of 1961. A marriage officer may not solemnise a marriage unless each of the two parties produces to him, his/her identity document or prescribed affidavit in terms of s 12. The marriage comes into existence when the marriage officer indicates that the parties are husband and wife in terms of s 30(1). (My underlining). Even at common law, Consummation is not required for the coming into existence of a binding marriage: Voet 23. 2. 93; Wientraub v Wientraub 1921 CPD 595.

63. Reported in the Sunday Times, Johannesburg, 1 March 1970.

divorce order.⁽⁶⁴⁾ As the case is unreported - a startling fact considering the novelty of this contentious area of law and the paucity of available legal information thereon - the reasons for the decision are open to speculation.

The second South African case of W v W⁽⁶⁵⁾ has become a cause célèbre and has been criticised by most of South Africa's legal writers of note.⁽⁶⁶⁾ This case also considered the marital status of the post-operative transsexual. The plaintiff was described as an adult 'female' who had however been born and registered as a male.⁽⁶⁷⁾ In 1970, at the age of twenty seven years, she underwent corrective surgery on psychiatric advise. Since then she has passed in society as a female and her sex description was altered on her birth certificate. Her husband had been aware of her 'change of sex' before they were married so there was no question of fraud. They had had normal sexual relations. In fact Nesdadt J stated that

"... her marriage to the defendant ... was consummated and the parties had normal sexual relations. The breakdown in the marriage was not due to any inadequacy as a woman on the part of the plaintiff". (sic)⁽⁶⁸⁾

The plaintiff was seeking a divorce on the grounds of her husband's adultery,⁽⁶⁹⁾ only to find herself the object of unpleasant judicial probing. The application for divorce was refused, and in its stead the court tentatively put forward the decision to annul the marriage. The language in which such decision was couched is evident of the uncertainty in the mind of the learned judge as he made his pronouncement.

"My finding the plaintiff was a male prior to the operation entitles me, I think, to annul the marriage and I would be prepared to make such an order, provided the summons is, on notice to the defendant appropriately amended. I do not consider that I can grant the relief under the claim for alternative relief".⁽⁷⁰⁾

64. See generally Taitz op cit 73; Strauss (5) op cit 356.

65. 1976 (2) SA 308 (W).

66. Including C.P. Smit; S.A. Strauss; D.B. Van Niekerk and M.L. Lupton.

67. At 309H of the report.

68. At 310B of the report.

69. As this case was before the new Divorce Law of 1979, one of the grounds for divorce which had to be proven was adultery.

70. At 315F of the report. That was that: no thought was given to incidental matters arising out of such a decision, such as division of property etcetera.

In arriving at his ultimate decision, Nesdadt J applied the principles for sex determination as enunciated in the English case of Corbett v Corbett,⁽⁷¹⁾ in preference to the New York decision of In Re Anonymous,⁽⁷²⁾ where it was stated by Pecora J⁽⁷³⁾

"Where there is disharmony between psychological sex and the anatomical sex, the social sex or gender will be determined by anatomical sex. Where however, with or without medical intervention, the psychological sex and the anatomical sex are harmonised, then the social sex should be made to conform to the harmonised status of the individual ...".⁽⁷⁴⁾

Nesdadt J felt obliged to refute these views on the basis that their acceptance would

"... subvert the requirement of our law that a valid marriage requires the parties to be of the opposite sex".⁽⁷⁵⁾

He therefore concluded that

"... imitation cannot be equated with actual transformation. If what I may call this pseudo-woman is, for the purposes of marriage properly to be regarded as female, then in the absence of medical evidence justifying such a finding, the intervention of the Legislature would be necessary".⁽⁷⁶⁾

The learned judge continued to state that the issue was not whether, after the operation, the plaintiff was an effective female, nor whether she

71. (1970) 2 All ER 33.

72. (1968) 57 Misc 2d 813; vide chapter seven supra for more details.

73. At 816 of the report.

74. This is a clear case of affording the post-operative transsexual his new identity in law. It is submitted that once the surgery has been performed, there is nothing one can do about it. If there is an objection to the surgery, this should be raised at the outset, and therefore involve the prohibition of the corrective surgery itself. Nothing is gained by closing the stable door after the horse has bolted.

75. At 314A of the report.

76. There are many references of the fact that transsexualism can only be treated by surgery. "This condition ... has so far proved intransigent to every mode of psychiatric treatment ...": O'Donovan op cit 136.

looked like a female, nor whether society had accepted her as a female, nor whether she was capable of sexual intercourse with a male - what more does he want? - the only issue was whether the plaintiff, at the time of her marriage, was a woman. He found no justification for concluding that a person in the plaintiff's position was a woman for the purposes of marriage.⁽⁷⁷⁾

Applying the sex tests from Corbett he felt that although the operation had supplied the plaintiff with certain female characteristics - in fact everything except her chromosomal constitution was now female - the XY chromosomal pattern should be the deciding factor. Both Judges Ormrod and Nesdadt relied heavily on the biological criteria and gave little weight to the psychological orientation of the individual.

B. DIVORCE.

I INTRODUCTION

On the basis of the decisions which do not recognise the new sex role of the post-operative transsexual for the purposes of marriage, there will of course be difficulties in the event of a married transsexual subsequently undergoing corrective surgery.

Green, in criticising the Corbett decision makes the telling point:

"... where a 'normal' marriage has taken place, and subsequently either spouse is discovered to be transsexual, the factual adaptation of the individual to the gender with which he identifies (corrective surgery) is in itself apparently of no significance. Despite the fact that in the case one may have effectively two men or two women married to each other, the law presumably shuts its eyes and regards the transsexual spouse as he is biologically identified".⁽⁷⁸⁾

Let us also consider the question - hypothetical though it is - of a married couple both undergoing corrective surgery, and in effect, 'swopping roles', so to speak.

77. McColl Kennedy op cit 121. Vide chapter three supra dealing the the causes of transsexualism.

78. D. Green 'Transsexualism and Marriage' (1970) 120 New Law Journal 210.

This hypothesis is no more bizarre than that advocated by the Argentinian judge in 1966⁽⁷⁹⁾ who held that to recognise the 'change of sex' operation would be to jeopardise the future of the whole human race, on the premise that everyone would be wanting to undergo the surgery,⁽⁸⁰⁾ and therefore no one would be able to procreate. In such a case, as this author is imagining, the marriage could not be considered void on the grounds of homosexuality because in effect there would still be two parties of the same sex as the law does not recognise that any change of sex has occurred. The law would be constrained therefore, to consider the marriage valid, and would in effect be giving legal efficacy to the marriage of a post-operative transsexual, contrary to the Nesdadt decision wherein the post-operative transsexual cannot be a party to a valid marriage.

79. Dr Ricardo San Martin 123 Le Ley 605 (Crim y Corec Argen 1966).

80. Many people to whom this author has spoken about transsexualism have the same unfounded fears, and also believe that to allow a change of sex would be to encourage chaos as a person might make a habit of the practice. The author's response to this is simply to point out that such a fear is basically untenable because such operations are irreversible, and that the whole nature of the phenomenon disallows such action. Ordinarily, 'normal' men and women have no lasting desire to alternate sexes, so, it is submitted, why should a transsexual, who, as far as he himself is concerned, is and only ever has been of the one sex, and through the operation he is merely reconciling his body with his true gender identity. Furthermore, it is submitted that even if the operation were reversible it is hardly likely that a person's 'sense of adventure' would extend to such lengths of masochism as to voluntarily undergo painful - and yes, expensive - trauma more than once. "In South Africa, there is a stigma attached to people who don't conform exactly to society's norms: But I don't feel any different to any other woman I want people to understand from a human point of view that I am an ordinary human being like every other human being. I don't think that is a lot to ask ... Some people think that corrective surgery is an easy way out. It's not - it's the hard way out and it has got to be for real." Scope Magazine (June 1 1984) 41.

When first embarking on this study of transsexualism, the author was troubled by the possibility of a transsexual marrying in the pre-operative role. Did such action on the part of the transsexual indicate a weakness in his/her belief that he/she was a member of the opposite sex?⁽⁸¹⁾ Would not any consideration of marriage to a person of the same psychological sex not be repugnant to him/her? Or was the whole basis the eternal struggle for recognition of one's desired gender, as well as the very real problem of the financial constraint that drives people to accept the superficial role of their anatomical sex, in order to achieve some semblance of normality in society? In reading Conundrum⁽⁸²⁾ the author was able to find most of the answers to these questions.

Nothing in the world would make me abandon my gender, concealed from everyone though it remained... Yet I was not indifferent to the magnetisms of the body... In short, I see now that I wished very much that I could one day be a mother... When, later in life, I reached the putative age of maternity, finding myself still incapable of the role, I did the next best thing and became a father instead."⁽⁸³⁾

Morris was in her early twenties when she first started trudging the long road of treatment. She decided, after being inspired by Wegener's sad tale⁽⁸⁴⁾ that she too would rather die young than live a long life of falsehood. On retrospection she realised that not one of the medical persons whom she consulted knew anything about the matter at all, and in the state of medical awareness of the time - the 1950's - it must have been baffling to have been confronted by a healthy, and evidently sane man, declaring

81. Many doctors consider the prior marriage in the original sex to be an indication that the individual is not a true transsexual: Smith op cit 1008.

82. The autobiography of Jan Morris.

83. Morris op cit 150. Although the author realises that this book is not by any means a legal authority, its point of view is included for the personal touch. After all, we are dealing with people here and not just legal principles.

84. Vide chapter four supra for details of this case.

that he wanted to be a woman. British psychiatry had traditionally leant towards physical explanations for mental disturbances. Even decades later, practitioners seldom seemed to grasp the idea and regarded the treatment of transsexuals simply as a means of enabling them to live with their delusions.⁽⁸⁵⁾ The first person that she met who seemed to understand her problem, was Dr Benjamin who was already in his sixties.⁽⁸⁶⁾ He insisted that a change of body must be the last resort, and urged Morris to try and live like a man, and achieve an equilibrium. Morris accepted the advice, believing that possibly there were facets to her problem which she could not yet perceive.⁽⁸⁷⁾ The existence was necessarily a confused one, and the only alleviating factor was that she fell in love and subsequently married in her pre-operative role.

"I have enjoyed one particular love of an intensity so different from all the rest... that it overrode, from the start all my sexual ambiguities, and acted like a key to the latch of my conundrum... It was a marriage that had no right to work, yet it worked like a dream, living testimony one might say, to the power of mind over matter... For my part, in performing the sexual act with Elizabeth, I felt I was consummating a trust, and with luck giving ourselves the incomparable gift of children... We could scarcely call our sexual relationship a satisfactory one, since I would have been perfectly content without any sexual relationship at all... It was apparent to Elizabeth sooner than it was to me, that one day I must appease my conflicts... I honoured though, an unspoken obligation to our marriage: that until my family was safely in the world and Elizabeth fulfilled as a mother, if not a wife, I would bide my time."⁽⁸⁸⁾

85. Morris op cit 48.

86. Dr Benjamin - an endocrinologist - had come late in life to the study of sexual anxieties. It was he who formally recognised the existence of transsexualism - people whose problems lay deeper than physical medicine and deeper even than 'curative' surgery: Morris op cit 49.

87. Morris op cit 51.

88. Morris op cit 57-61.

This author had felt on certain occasions the difficulty in reconciling the transsexual's belief with the action of marrying pre-operatively, especially if the transsexual had remained in his original state for many years.⁽⁸⁹⁾ But then it was realised that the author was also falling into the trap of considering transsexualism as a sex-related syndrome. Transsexualism, it is submitted, is not sex based as a sexual deviance is, but rather, is gender based, as in identity. So of course it is perfectly feasible to understand how two people can have a deep strong union without the act of sexual intercourse taking first priority. Sexual intercourse is important to a marriage but it is certainly not the "be all and end all" thereof.

"I knew it (sex) at once to be a different thing from gender - or rather, a different thing from the inner factor which I identified in myself as femaleness. This seemed to me, while germane in human relationships, almost incidental... To me, gender is not physical at all, but is altogether insubstantial. It is soul perhaps... It is more truly life and love than any combination of genitals, ovaries and hormones. It is the essentialness of onesself, the psyche, the fragment of unity."⁽⁹⁰⁾

89. For example, the case reported in The Natal Witness 16 June 1984. A seventy year old World War II fighter pilot was to undergo corrective surgery in England. He had been married twice, and now wished to remarry - as a woman. A television reporter stated that the patient already wore woman's clothing: "He simply looks like a granny. There is no doubt in his mind that he wants to undergo the operation." These operations are seldom performed on people over fifty five years, and this man could be the oldest person to undergo corrective surgery. This author finds this case extremely difficult to reconcile with the voluminous literature on the subject in which transsexual's have held their conviction of confused gender identity from a very young age. This author cannot help surmising that perhaps this man is giving way to an adventurous caprice - particularly taking into account the relative tameness of his life in comparison to his 'fighter pilot days'. Perhaps this is an attempt to alleviate the boredom of old age. However, this may be a misjudgment of his motives, and he could have suffered from similar drawbacks as Morris did as regards the expense of surgery and the inexperience of the techniques available.

90. Morris op cit 28.

It must also be remembered that in spite of the fact that the syndrome has been in existence since perhaps time immemorial,⁽⁹¹⁾ it has been identified only very recently in the medical field, and such investigation into its nature is still very much in the embryonic stage. Thus, through ignorance, and believing perhaps that his is only deviant behaviour, - or for reasons of fear, conservatism, terror of ostracism - the transsexual has had to suppress his inner desire to express himself truly, in a valiant attempt to conform in society. Any marriage which might ensue is an extension of that desire to be accepted. With the advances of medical science, the problem becomes clear and in lieu of continuing the life of mockery and charade, the transsexual - even at a late time in life - decides to take the final step and give precedence to the conviction of true gender.

"Still, for forty years, a sexual purpose dominated, distracted and tormented my life: the tragic and irrational ambition, instinctively formulated, but deliberately pursued, to escape from maleness into womanhood... As I grew older my conflict became more explicit to me, and I began to feel that I was living in a falsehood. I was in masquerade, my female reality, which I had no words to define, clothed in a male pretence. Psychiatrists have often asked if this gave me a sense of guilt, but the opposite is true. I felt, that in wishing so fervently and so ceaselessly to be transplanted into a girl's body, I was aiming at a more divine condition, an inner reconciliation."⁽⁹²⁾

The divorce laws in many jurisdictions will, in all probability, provide grounds for dissolution of the marriage should the contingency of a married transsexual who decides to undergo corrective surgery, arise.

91. Ibid.

92. Morris op cit 16.

II COMPARATIVE LAW

1. The United States of America

In the United States, grounds for divorce are purely statutory for each state.⁽⁹³⁾ Reference by way of analogy to cases involving homosexuality however, indicates that questions as to sexual identity strike so deeply at one of the most basic elements of marriage - the exclusive sexual bond between the spouses - that courts are not reluctant to dissolve marriages in which serious problems of sexual identity arise. The court in the following case, found little difficulty in holding that the transsexualism of the one spouse was sufficiently detrimental to the marriage relationship - particularly in the light of the mental anguish imposed on the heterosexual spouse - to justify divorce on the ground of cruelties or indignities.⁽⁹⁴⁾

In Steinke v Steinke⁽⁹⁵⁾ the court of Common Pleas of Bucks County, had dismissed the claim of a wife for divorce, holding that the purported grounds were not established since the husband's conduct of wearing woman's clothing and adopting woman's attributes with the aid of hormones was due to the compulsion of a psychiatric disorder. The Superior Court of Pennsylvania however, reversed the decision and granted the decree of divorce holding that the husband's transsexual behaviour justified the granting of the divorce and that such conduct could not be excused as being symptomatic of mental illness in the absence of evidence to corroborate the husband's testimony that he suffered from a mental disease. The ground for divorce was therefore indignities offered by the husband, to the wife.

93. In States which have enacted some form of 'no fault' divorce statute, the question whether transsexualism constitutes grounds for divorce may be avoided since the heterosexual spouse can seek a divorce without establishing any fault on the part of the transsexual spouse, and is probably likely to happen in order to avoid publicity.

94. See also P v P (1972) 121 NJ Super 368, 297 A 2d which held that a spouse had grounds for divorce because of her husband's transvestitism. It is submitted that this ground for divorce will not be necessary in those states in which a change of sex is recognised, because the marriage would be annulled rather, on the basis of its homosexual nature.

95 (1975) 238 Pa Super 74 357 A 2d 674, 82 ALR 3d 705.

The parties had met in 1971 when the appellant was sixteen years old, and the respondent, twenty. They eloped to Maryland and were married. Shortly after this the respondent claimed that he never wanted to grow up and started wearing nappies and waterproofs. In 1972, when their daughter was born, he ceased this activity and decided instead, that he wished to be a woman. To this end, he began taking hormones. As the situation persisted, the appellant took her husband to a psychiatrist, but after a few visits, he refused to keep the appointments. He went instead, to a doctor who began guiding him in a six month program leading to corrective surgery. He also began to assume the total identity and appearance of a woman, and the situation became known for the first time, to family and friends. The appellant demanded that the respondent leave home, which he did, and continued living as a woman. When the doctors informed him in 1974 that he was not a fit patient for the surgery, he had already come to the conclusion himself - this is a perfect demonstration of how vital pre-operative screening is, and how fortunate that it was performed in this case. The respondent ceased his hormone treatment, felt himself 'cured' and resumed life as a male. At this time, the appellant filed for a divorce, and the court ruled that there were insufficient grounds because the husband's conduct stemmed from a psychotic disorder.⁽⁹⁶⁾ The appropriate Divorce Act⁽⁹⁷⁾ allows the innocent and injured partner to a marriage to obtain a divorce from the bond of matrimony where the other spouse "shall have offered such indignities to the person of the injured and innocent spouse as to render his/her condition intolerable and life burdensome." 'Indignities' has not been defined by law, but rather, conduct alleged to be productive of such indignities has been evaluated in each case.⁽⁹⁸⁾ It has generally been decided that such conduct must constitute a course of behaviour which is humiliating and degrading to the injured spouse, making life intolerable. Such conduct is understood to manifest the spirit of malevolence and estrangement, which has come to replace natural affection in the marriage.⁽⁹⁹⁾ The Superior Court found that the appellant considered life intolerable, and recognised that unnatural sexual conduct represented indignities. Where such conduct has been established, it had been held that divorce is appropriately granted.⁽¹⁰⁰⁾

96. See also Dougherty v Dougherty 235 Pa Super 122, 339 A 2d 81 (1975); Barr v Barr 232 Pa Super 9 331 A 2d 774 (1974).

97. The Divorce Act of 2 May 1929 P L 1237 s 10(1)(f) as amended, 23 PS s 10(1)(f).

98. Boyer v Boyer 183 Pa Super 260 130 A 2d 265 (1957).

99. Barr v Barr supra.

100. Crissman v Crissman 220 Pa Super 387 281 A 2d 719 (1971) dealing with homosexual conduct on the part of the husband, as a ground for divorce.

The court of appeal noted the correctness of the lower court's decision that conduct arising from mental ill health cannot constitute indignities because it must be regarded as unintentional and lacking in the spirit of hate which is the heart of the charge of indignities.⁽¹⁰¹⁾ But it did not believe that the conduct on the part of the respondent was in fact due to mental illness.

"In this day of growing acceptance of transvestite and homosexual behaviour, with sex change operations a common place occurrence... we hesitate to accept the view that mental imbalance is displayed when an individual experiments with one of these concepts... We remain unconvinced by the husband's unsubstantiated testimony that he was compelled by mental illness to adopt the patterns of living he displayed... As such, it cannot excuse the indignities complained of, and can constitute grounds for divorce. Although the appellee's conduct had a destructive impact on his marriage, he managed other aspects of his life... successfully...".

In certain special situations, legislation in Pennsylvania has provided that a marriage may be dissolved for functional reasons, that is, although neither spouse has done anything wrong, the marriage cannot work, and therefore should be discontinued. Thus a divorce may be obtained where the defendant spouse "was and still is naturally and incurably impotent or incapable of procreation."⁽¹⁰²⁾ The use of the word 'naturally'⁽¹⁰³⁾ is pertinent here. Should a marriage involving a post-operative transsexual be allowed in Pennsylvania, it is submitted that this section could not be invoked as a ground for divorce, because the impotence - if any - and the inability to procreate would not be 'natural' but would have been artificially caused. Similarly, this ground it is submitted, could not be invoked in the instance of a married person subsequently undergoing corrective surgery. It would appear then that in this case the only ground for divorce would be indignities.

101. Barr v Barr supra

102. s 1(a) of the Divorce Law of 1929.

103. My underlining.

Apart from this provision - which also includes the ground of insanity, and a marriage contracted between two people of prohibited degrees of relationship⁽¹⁰⁴⁾ - a divorce may not be obtained in Pennsylvania unless the plaintiff spouse is "innocent and injured" and the defendant has done something that he/she knew was wrong.⁽¹⁰⁵⁾ It is therefore submitted that it is important to establish from whose point of view the situation must be looked - from the wife's view that she suffered indignities, or from the husband's view that he knew he had done something wrong. If the latter, then it is submitted that a problem arises when a genuine transsexual wishes to undergo surgery, believing it to be in his best interests and the only thing he can do. Thus, he has no conception that what he is doing is wrong. It is submitted that a spouse should be entitled to the divorce in this instance in that she has suffered indignities, but that the knowledge of wrongfulness only extends its scope to the fact that the defendant was not mentally incompetent and could appreciate his act even if he does not believe it to be wrong. It is respectfully submitted that what the concurring judge in Steinke said cannot be accepted as correct:

"... the right to obtain a divorce in Pennsylvania is defined in putative terms... one who commits any of the certain enumerated wrongs may be punished by being divorced by his/her spouse."⁽¹⁰⁶⁾

In Saucier v Saucier⁽¹⁰⁷⁾ it was held that persistent denial of sexual intercourse to one's spouse was a legal ground for separation, therefore it is submitted that a spouse who has undergone corrective surgery could be divorced on this ground, assuming of course that the law in the state of Louisiana does not recognise the change of sex post-operatively, because if it did, then there would be an action for annulment not divorce. However, along these lines, it was held in New York State⁽¹⁰⁸⁾ that mere cessation of intercourse without demand for sex by the one spouse and refusal by the other, is not sufficient grounds for divorce, thus it is a technicality as to whether inability could amount to refusal for the purposes of this case.

104. Divorce Act of 22 September 1972 P L 880 No. 202 s 1, 23 Pa CS.

105. My underlining. s 10 (1)(f) 23 P S.

106. ALR 3d at 717.

107. (1978 La App) 357 So 2d 1378 s 4.

108. Nicholson v Nicholson (1982 2d Dept) 87 App Div 2d 645, 449 NYS 2d 4.

Most states have laws which allow for annulment if one of the parties is incapable of consummating the marriage, and if the other spouse was unaware of the sexual incapacity at the time of the marriage.⁽¹⁰⁹⁾ In California, the statute is silent as to whether the non-incapacitated spouse need know of the incapacity at the time of the marriage.⁽¹¹⁰⁾ It is submitted therefore that a marriage in California can be annulled even if both parties were aware of the sexual incapacity at the time of the marriage. This would leave the sexually incapacitated spouse in a precarious position because his partner could void the marriage any time it suited him/her.⁽¹¹¹⁾ In such a jurisdiction, the sexual capacity of a spouse becomes significant in terms of whether the marriage is void or not.⁽¹¹²⁾ In the other statutes the requirement of knowledge of the sexual incapacity is the deciding factor. Although the ability to consummate a marriage is fundamental to the institution, when a person is aware of his partner's incapacity and nevertheless is willing to marry that person, then the state should - and to a large extent does - recognise the marriage as valid.⁽¹¹³⁾

2. Canada

The divorce law of Canada is regulated by the Divorce Act of 1970 which applies throughout the country. There are only three grounds which possibly could be affected directly by the problem of sex determination:

1. if one party to a marriage suffered from and practised transvestitism which rendered future cohabitation intolerable to the other spouse, grounds for cruelty would exist.⁽¹¹⁴⁾ It is submitted that transsexualism

109. For example Del Code tit 13 s 1551 (1953).

110. Cal Civ Code s 4425 (West 1970).

111. Scott Cole op cit 349.

112. It is submitted that a male-female transsexual would be relatively safe from annulment, but a female-male transsexual - because the procedure has not been perfected - would be in grave danger of having his marriage annulled at any time. This is hardly a credit for judicial consistency.

113. It is submitted that the state has no interest in not recognising a marriage between two persons who willingly marry, despite the sexual incapacity of the one. Thus, the capability or not of consummation should in effect have no application to the transsexual marriage, in which the other spouse has full knowledge regarding the true position.

114. Divorce Act RSC 1970 CD 8 s 3(d); see also C v C (1971) 1 RFL 127 (NBQB) and the English case of T v T (1961) 105 SJ 935.

could also be a ground for divorce here where it rendered the continued cohabitation of the spouses intolerable. In determining the exact extent of the cruelty to be proved, Oppal LJ in Saad v Saad⁽¹¹⁵⁾ stated that

"Care must be exercised in applying the standard set forth in section 3(d) that conduct relied upon to establish cruelty is not a trivial act, but one of a 'grave and weighty nature', and not merely conduct which can be characterised as little more than a manifestation of an incompatibility of temperament between the spouses."

In this case, the petitioner sought a divorce on the allegations of cruelty pursuant to section 3(d). The wife had refused to undergo treatment which would render her capable of procreation, even though she was aware that her husband wanted children. Due to her decision, her husband had become severely depressed. On this basis, Oppal LJ regarded the need of the husband to have children and the wife's subsequent refusal therein as grounds for cruelty, as the wife's decision had had an adverse effect on the husband. It is submitted that a decision to undergo corrective surgery could be viewed as cruelty under this section, as not only would it be a denial of procreation, but also a denial of conjugal rights.⁽¹¹⁶⁾

2. Non consummation because of disability for a period of one year, gives rise to grounds of divorce.⁽¹¹⁷⁾ It is submitted that the post-operative transsexual male would be covered by this section, as due to the imperfection of the operation in this case, he would be unable to consummate the marriage.

115. 14 Dominion LR (4th) 1985 76, quoting from Schroeder JA in Knoll v Knoll 1970 10 DLR (3d) 199.

116. See also Lauder v Lauder (1949) 1 All ER 76.

117. Divorce Act s 4(1)(d).

3. It might be possible to obtain grounds for divorce on the basis of adultery⁽¹¹⁸⁾ or a homosexual act⁽¹¹⁹⁾ if one spouse has sexual intercourse with a post-operative transsexual. It has been suggested that the sex of the co-respondent would not be called into question because adultery or homosexual conduct could be pleaded on alternative grounds.⁽¹²⁰⁾ Regardless of how the court determined the sex of the co-respondent, one of the grounds would apply since adultery has been defined as including "mutual intercourse" which can be less than penetration⁽¹²¹⁾ and a homosexual act has been defined as including "mutual fondling which results in sexual climax".⁽¹²²⁾ On this basis, it is submitted that almost any sexual act can be classified within these broad tenets and give rise to a ground for divorce. It is also possible that such sexual conduct could constitute grounds for cruelty.⁽¹²³⁾

It has also been suggested that where a married transsexual undergoes corrective surgery, this could be viewed as presuming that the pre-operative transsexual is now dead, "for in fact, that body no longer exists".⁽¹²⁴⁾ She goes on to state, that prior to the operation, the transsexual could be required to execute a document disposing of his assets among his wife and children - if he were male-female - and his "post-operative counterpart".⁽¹²⁵⁾ To remedy a failure to make adequate provision for the family, the legislature could deem them to be dependants within the terms of the Dependants Relief Act.⁽¹²⁶⁾ There has been a case recently dealing with a homosexual relationship and marriage.

118. Divorce Act s 3(a).

119. Divorce Act s 3(b).

120. Hawley op cit 137.

121. Sapsford v Sapsford and Furtado (1954) 394.

122. M v M (1972) 24 DLR (2d) 114 (P.E.I.S.C.).

123. Countway v Countway (1968) 70 DLR (2d) 73 (NS) Div Ct. Here the grounds for cruelty were proven when the husband turned homosexual.

124. Parschin-Rybkin op cit 587.

125. Ibid.

126. Ont Rev Stat C 126 (1970).

In Anderson v Luoma⁽¹²⁷⁾ the parties, who were lesbians, entered into what they characterised as a common law relationship in 1975, pooling their incomes and agreeing to have children by artificial insemination. Two children were subsequently born, but after eight years the relationship deteriorated and the defendant threatened to evict the plaintiff and the children. The plaintiff therefore applied for interim maintenance and possession of the 'matrimonial' home. Wallace J held that the Family Relations Act⁽¹²⁸⁾ does not purport to affect the legal responsibilities which homosexuals have to each other or to children born of them through artificial insemination. Accordingly the plaintiff was not entitled to receive interim payments for herself and her children.⁽¹²⁹⁾

Section 1 of the Family Relations Act defines 'spouse' as a husband and wife, and includes

"(c) except under part three, a man or woman, not married to each other who lived together as husband or wife (my underlining) for a period not less than two years where an application made under this Act is made by one of them against the other, not more than one year after the date they ceased living together as husband and wife."

The judge therefore stated that all the plaintiff could do was claim damages for breach of contract of mutual support. She was not entitled to specific performance under common law, and certainly not under the Family Relations Act.

Taking this judgment into account, it would appear at first blush, that if the marriage of the post-operative transsexual were decided along the Corbett lines, there would be no relief under the Family Relations Act either, as such union would be regarded as homosexual in nature. However, it is this author's submission that as far as the wording of section 1(c) goes, it could be argued that as the transsexual and his/her spouse are living as husband and wife they are covered by this Act and therefore entitled to the relief thereunder. In any event, if the Corbett decision is not followed in Canada, there will be no problem, as the transsexual and his/her partner would be bona fide spouses.

127. 14 DLR 1985 749.

128. R S B C 1979 c 121.

129. See also Masai Minerals Ltd et al v Heritage Resources Ltd et al (1981) 119 DLR (3d) 389.

III SOUTH AFRICA

Before the 1979 divorce reform, the grounds for divorce included adultery. At the time of the W v W decision the grounds which applied were those under the old law. With regard to this said decision, a curious point comes to one's notice. Although Nesdadt J required the plaintiff transsexual to prove the existence of a valid marriage - in spite of the evidence in her favour⁽¹³⁰⁾ - he made a ruling on the point of the alleged adultery to the effect that

"That they (the plaintiff and defendant) satisfied me that this court has jurisdiction and that the defendant committed the adultery as alleged."⁽¹³¹⁾

This statement is blatantly incongruous with the ratio of the case. Adultery, by its very definition, demands the existence of a valid marriage.

"Adultery is the voluntary sexual intercourse of a married person with a person of the opposite sex other than the lawful spouse of the married person."⁽¹³²⁾

Yet in spite of this, Nesdadt J held that the plaintiff had failed to prove the existence of a valid marriage.⁽¹³³⁾ It is submitted therefore, that on this premise it would be impossible for the learned judge to have found that adultery was proven. Furthermore, it is submitted that such a decision by the court is contra bonos mores: the defendant who willingly, and with full knowledge as to the circumstances, contracted a marriage with the plaintiff, yet he is exonerated from his 'extra marital affairs' because there is supposedly no marriage in existence, even though the court saw fit to hold that he had committed adultery. It would be interesting to see the thrust of legal decisions were adultery still a crime. However, at least in this regard, the law has kept pace with the changes in societal

130. Plaintiff handed in a marriage certificate which reflected that a properly solemnised marriage had been entered into between herself and the defendant. H R Mahlo South African Law of Husband and Wife 515 states that "the proof (of a marriage) must be the best available which means that normally an authenticated copy of the marriage certificate must be produced (my underlining)". See also Anderson v Anderson 1942 WLD 86; Wittekind v Wittekind 1948 (1) SA 826 (W).

131. At 309F of the report.

132. Concise Oxford Dictionary (ed. Fowler and Fowler); Bartholomew op cit 108 argues that since, in relation to adultery there must be penetration, the possession by the one part of an organ capable of being penetrated, and by the other of an organ capable of penetrating would be sufficient for the purpose of the law relating to adultery, without any further question as to the sex of the parties. The author is in total agreement with this argument, which also reflects the sentiments put forward by the English case of S v S (1962) 3 All ER 55.

133. At 315F of the report.

convictions.⁽¹³⁴⁾ It is submitted further that a corollary to this unfortunate position is the situation of the innocent spouse who could not be granted relief as a result of her husband's adulterous relations with a post-operative female - such as the plaintiff in W v W - because she is not regarded as a member of the opposite sex.

It is submitted that under the old divorce law it would have been difficult to dissolve a marriage in which one of the spouses underwent corrective surgery while still married, because by and large the divorce had to be proved on fault grounds, as is still the case in American states. However now under the new divorce law, it is possible for unilateral divorce if the plaintiff can prove that there has been irretrievable breakdown of the marriage, which is presumably the case because the spouses would no longer be able to have normal sexual relations.

IV CRITICAL EVALUATION

The cases in which it is ruled that the marriage of a post-operative transsexual is invalid, all do so on the basis of the sex of an individual as determined pre-operatively and therefore exclusively on karyotype. Ormrod J - subsequently followed by the South African and Australian judges - set out his criteria for determining sex, concluding that if these biological factors are congruent, there is no problem with sex determination. It is submitted that he therefore disregards the possibility of ambiguity between biological factors and the psychological factor, being any type of problem. This intimation is grossly unrealistic. Such a person, as has been proven cannot simply accept his plight stoically and attempt to live happily according to a sex with which he fails to identify, purely because it seems judicially easier to ignore the importance of the psyche. Despite their erudition, Judges Ormrod, Nesdadt Bell and those of New York State, give no effect to the psychological sex of an individual. It is submitted that if a system of sex classification is adopted, which is at variance with prevailing

134. Green v Fitzgerald 1914 (AD) 88. However, under the Natal Code of Bantu Law (contained in schedule to the law no. 19 of 1891 (Natal) as amended and substituted by Proc no. R 195 of 1967), adultery is still an offence where the marriage is by a customary union. It is incongruous therefore that in the case of such a putative marriage a person can be punished for adultery, but not in the case of a valid one.

medical views, strong justification therefor, is needed.⁽¹³⁵⁾ Dewhurst even went so far as to state that

"We do not determine sex - in medicine we determine the sex in which it is best for the individual to live."⁽¹³⁶⁾

Ormrod J had intimated that he was in accord with this statement, thereby implying that there are other criteria over and above the one's he used. Yet he failed to mention these and even went so far as to limit his enquiry, by concluding that the psychological factor had no weight, despite the fact that the medical evidence supported the view that when the two standards clash, the only effective treatment is to try and reconcile the discord in favour of the assumed role. In ignoring the psychological factor it is submitted that Judge Ormrod assumes that there is a distinction between biological and psychological and that the former is ordained whereas the latter is chosen. It is submitted that this view overlooks the fact that the transsexual is living proof of the actuality whereby the psyche may operate in defiance of 'biological truths' despite what the law says it should do, and furthermore it is not conclusively proven that the psyche is entirely chosen, and may in itself, be pre-determined before birth. It was also contended that the biological features are fixed at birth at the latest, and cannot be changed.^(136a) Such a fatalistic approach ignores the subtle but nevertheless human social and physical development. It excludes that essence of human existence: the ability to affect one's own destiny. It reduces life to a "collection of mere physical events".^(136b) The author is of the opinion that such an important decision as sex classification should not be made rigidly and unalterably, at birth. It cannot in any circumstance, be conclusive in the case of the intersex. It is submitted further that if Ormrod J was only interested in the sex of an individual for the purposes of marriage as he claimed, he should have been satisfied with the sex role at the time of the marriage as this is the relevant time one would imagine.

135. The issue is not how many criteria there are, but the fact that they may not all point to the same conclusion. Thus, the more criteria one recognises, the greater the likelihood of divergence and the stronger the case for allowing the psyche of the individual to prevail.

136. At 44 of the report.

136a. At 47 of the report.

136b. Smith op cit 1007.

The South African judge quoted Ormrod J in stating that the ultimate purpose of the operation is not to change the patient's sex, but to relieve the patient's symptoms.⁽¹³⁷⁾ This author submits that the former contention is not claimed to be true: the law persists in asking the wrong question. A transsexual does not consider that he is changing sex - by simple definition of the syndrome. Pre-operatively, he is between two extremes. The operation is merely the method of rectifying an abnormality. It is submitted further that the raison d'être of the surgery is fundamentally therapeutic in reconciling the errant body with the dominant mind, and allowing the operation to take place at all, is necessarily giving precedence to the psychological factor of sex determination. Thus it is the author's submission that if the surgery is performed the classification of sex should remain in accordance with the gender identity of the patient and not suddenly revert to biological standards. It is also submitted that it is totally illogical to ignore the operative intervention. It is a fait accompli - a patent demonstration of the person's desired sex. To ignore the operation is tantamount to enjoining one to ignore reality because it is distasteful or difficult to comprehend. This is hardly a commendable stance for an eminent jurist to adopt. As the respondent in the Corbett stated,

"... these operations did not take place for the hell of it, they are not a branch of light entertainment - and yet Ormrod persisted in viewing the operation as a kind of wantonness on my part".⁽¹³⁸⁾

The judicial trend to ignore the psyche and the operative intervention, has not found much favour with commentators on the subject. Several South African writers have criticised Nesdadt J's decision - and by implication such criticism includes other judges who have decided along similar lines.

137. At 311G of the report.

138. Fallowell and Ashley op cit 228. Miss Ashley went on to state that she felt that "Ormrod didn't like me ... I knew that Ormrod was disconcerted by me. He never once looked me straight in the eye but glanced furtively in my direction and mumbled his references to me as if they were distasteful to him. His behaviour towards me was contemptuous. Judges are the absolute rulers of their domain, and can play at being God, a temptation they do not always resist" (at 217).

Smit¹³⁹ comments that

"Die oortuiging word egter uitgespreek dat die reg ten aansien van geslagsbepaling, nie die vraag, en ook nie die antwoord daarop, vanuit 'n suiwer tegniese-biologiese standpunt moet benader nie. Geslag gesien in sy sosiologiese konteks, word nie in die alledaagse gang van sake op hierdie wyse bepaal nie. Veel eerder word gekyk na die totale beeld van alle faktore wat 'n rol by geslagsbepaling kan speel."

Lupton's objection to the Nesdadt decision is also to do with the fact that more emphasis should have been given to the psychological attitude of the person concerned.⁽¹⁴⁰⁾ In conclusion, he states that the learned judge

"... failed to seize an opportunity to hand down a humane, equitable and progressive judgement".⁽¹⁴¹⁾

Taitz⁽¹⁴²⁾ in disagreeing with these submissions contends that the court rightly found that the plaintiff had not proved that at the time of her marriage, she was female. He bases this on the fact that the plaintiff did not call any medical witnesses and therefore the judge, on the given biological facts had to rule that the plaintiff was male.

"It would have been improper for Nesdadt J to refer to the opinions of psychiatrists which had not been introduced through the ordinary rules of evidence. No expert medical witnesses were called by the plaintiff".⁽¹⁴³⁾

In answer to this, it is submitted that the fact that the plaintiff had undergone corrective surgery which was regarded as a "complete success"⁽¹⁴⁴⁾ is evidence of her true sex.⁽¹⁴⁵⁾ Furthermore, it is submitted that her

139. op cit 111.

140. M.L. Lupton 'The Validity of Post-operative Transsexual Marriages' (1976) 93 South African Law Journal 385.

141. Lupton op cit 389.

142. Taitz op cit 75.

143. Ibid.

144. W v W supra at 310A.

145. It is submitted that a pre-operative transsexual is not totally of one sex, but requires the operation to perfect the real sex, not to change sex.

'change of sex' has been reflected in her birth certificate and thereby has been given legal recognition by the executive through the support of the legislature. It would seem therefore that the judiciary is outnumbered in its decision to ignore the change of sex. Nesdadt J also states⁽¹⁴⁶⁾ that the "breakdown of the marriage was not due to any inadequacy as a woman⁽¹⁴⁷⁾ on the part of the plaintiff." Thus it is submitted that if she was an adequate woman in marriage, she should logically be regarded as an adequate woman for marriage.

Taitz also disagrees with Lupton's suggestion that Nesdadt J failed to "seize an opportunity to hand down a humane ... judgment" and claims that this would be to bely the "function of the judiciary". He states that although from time to time the Bench goes beyond its basic function of "interpreting and applying the law" it certainly would not do so in regard to an issue that is as controversial as a change of sex. Thus for Nesdadt J to have flown in the face of accepted convention - particularly in the absence of expert medical opinion - would not only be "incorrect, but quite improper".⁽¹⁴⁸⁾ It is the author's submission, in response to this, that firstly, the court in being 'humane' is not necessarily going beyond its function: on the contrary, it is giving due respect to the field of medicine by recognising that a medical issue such as the determination of sex, should be left to the auspices of the proper discipline and not be a matter for judicial adjudication. Judicial notice should in fact be taken of the medical assessments for sex. In any event, it is submitted further, that the fact that the plaintiff called no expert medical witnesses, should have posed no problem. Not only is a judge at perfect liberty to call witnesses himself and to request other particulars mero motu in the interests of justice, but as he relied solely on the biological facts deposed by the parties themselves,⁽¹⁴⁹⁾ this author sees no reason why he could not have just as easily, relied on the psychological facts supplied by the parties themselves, and give such facts legal cognizance too. After all, the plaintiff is the best judge of the way she feels psychologically. Secondly, it is submitted,

146. At 310B of the report.

147. My underlining.

148. Taitz op cit 76.

149. At 312 of the report.

that since there is no definite law on the "controversial" subject of transsexualism, Nesdadt could hardly be regarded as "flying in the face of convention" by taking the provisions of section 7B into account and logically extending their application. The court would not be making law in such circumstances, but merely following the example of the legislature.

All the post-operative transsexuals in the cases which did not recognise the change of sex, were consequently unable to be regarded as female for the purposes of a valid marriage. It has been and still remains important to the Christian understanding of marriage, that it be a contract between two people of opposite sexes.⁽¹⁵⁰⁾

"Marriage fulfills and so makes sense of a feature of our common biological nature. Human beings came into existence with a dimorphically differentiated sexuality, clearly ordered at the biological level towards the heterosexual union as the human mode of procreation...

What marriage can do which other relationships cannot do is to disclose the goodness of biological nature, by elevating it to its teleological fulfilment in personal relationships. Other relationships, however important in themselves and however rich in intimacy and fidelity, do not disclose the meaning of biological nature in this way".⁽¹⁵¹⁾

In the light of this passage, can the marriage of the post-operative transsexual fit into this definition? It is the author's submission that the idea does not prima facie challenge the Christian insistence on heterosex-

150. "What then is the nature of this institution as understood in Christendom? ... I conceive that marriage ... may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others" per Lord Penzance in Hyde v Hyde and Woodmansee (1866) LR Pand D130 at 133. This author agrees with this contention, but submits that the requirement of heterosexuality does not mean exclusively that the parties be biologically bipolar. It is submitted that there is little reason why the sex determination of a person should not be gauged on the gender-anatomy identity. In none of the traditional precedences on marriage is there an insistence on the biological criteria. Considering that they are hardly infallible in themselves, this is not surprising.

151. O'Donovan op cit 141.

uality. The transsexual unlike the homosexual, wishes to be committed to just such a union of man and woman as the church claims marriage to be. He/she intends to belong to the marriage entirely as a member of the assumed sex, to complement the other party both sexually and socially.

"Society has no business wanting to know what a person's real sex is. It is enough for it to accept prime facie the role she (a transsexual under discussion here) assumes and any deeper knowledge should be left to her and her spouse. We (the Church) expect that the candidates for marriage should be believing Christians, and so we require that they should have been baptised; but we know well enough that the sign of baptism does not ensure the reality of faith for which we look. We explain to candidates the nature of the vows they are to take, and demand their explicit 'I will' and yet often suspect that a couple may be promising themselves divorce 'if it doesn't work out', even as they forswear the thought before the altar. We do not try to probe too deep, but are prepared to live with a measure of public illusion in this sphere; why then should the fact of 'artificial v natural sex' interest anyone except the participating spouses, so long as they are content with the situation?"⁽¹⁵²⁾

It is submitted that the operative word in the passage is 'spouse', thereby denoting a marriage relationship, because it has been said that this point of view would sanction a homosexual 'marriage'. It is submitted that this is of course a contradiction in terms. Marriage by its very nature is between two people of the opposite sex, and whereas the post-operative transsexual and his/her spouse are arguably of opposite sexes,⁽¹⁵³⁾ homosexuals, by definition never are, nor do they desire to be of different sexes. The essence of the latter union revolves around the desire to have sexual relations with a person of the same sex. For this reason it is submitted that a homosexual union can never be let in through the back door and be regarded as a marriage. Thus, it is submitted there is little danger of the value of marriage being subverted.

152. O'Donovan op cit 141.

153. It is submitted that this is so because not only the unswerving belief in the desired sex, but now also the anatomical transformation render him/her a member of the opposite sex to that of his spouse.

Both Judges Ormrod and Nesdadt insist on the 'essential role of a woman in marriage' which they state precludes the post-operative transsexual from marrying.⁽¹⁵⁴⁾ But what this essential role is, this author is at a loss to ascertain, for the following reasons. Firstly, Ormrod J insists that

"It (marriage) is the institution upon which a family is built, and in which the capacity for natural, heterosexual intercourse is an essential element".⁽¹⁵⁵⁾

If this is to be regarded as fact, then it bodes ill for those elderly people who marry for companionship and love, and certainly not to acquire a family. It is ridiculous to presume that such marriages are judicially invalid. It is submitted that the same can be said of those marriages in which one spouse is impotent or sterile either from the outset, or due to an accident. These unions too cannot be regarded as open to annulment on this basis.⁽¹⁵⁶⁾

"Procreation is, after all, not the only aim of marriage and as the marriage of impotent persons is allowed⁽¹⁵⁷⁾ there seems to be no logical moral, social or legal reason which militates against a marriage of this kind under discussion".⁽¹⁵⁸⁾

It is submitted that it is logical to hold that a post-operative transsexual should not have his marriage annulled on the grounds of impotence if his spouse was aware of the situation at the time of the marriage. In any event most successful operations involving corrective surgery - at least those involving the change from male-female - do not nullify sexual potency.

154. Corbett v Corbett supra at 48.

155. Ibid.

156. It is submitted that if the spurious excuse is introduced that these are rare occurrences, and therefore the exceptional contingency which makes the rule, then the same excuse can be used in support of the transsexual marriage. What is just for the legal goose must necessarily be so for the legal gander, anti-discrimination being the basis of the sauce.

157. One instance where such a marriage may be set aside is of course that which involves concealment of the fact by one of the parties that he is impotent. The marriage will be voidable at the instance of the innocent spouse if she can prove that she was unaware of her partner's impotence at the time of the marriage. Wells v Dean-Wilcocks 1924 CPD 89. The plaintiff cannot succeed if she were aware of the fact: Smith v Smith 1961 3 SA 359 (SR). See generally Hahlo op cit 500 et seq.

158. D.B. Van Niekerk 'Sex Change Operations and the Law' (1970) 87 South African Law Journal 239 at 241.

Impotence too, must be distinguished from sterility, the latter being the inability to conceive children although able to participate in sexual intercourse. It is not the mere presence of sterility which constitutes the ground for action, but rather the fraudulent concealment of such fact from the other spouse.⁽¹⁵⁹⁾ Therefore it is submitted that the post-operative transsexual who has apprised his partner of the situation could not - in South African law at least - have his marriage annulled on the ground of impotence or sterility. This fact has failed to impress the judiciary.

Thus the notion that marriage is solely for procreation is passé.⁽¹⁶⁰⁾ In fact, depending on one's definition of marriage it is submitted that marriage is not only a biological relationship. The biological relationship is called coitus. Taking this fact into account, any attempt to define a man and a woman for the purposes of marriage purely on biological criteria, is a non sequitur. For example

"It (marriage) has of course many other characteristics of which companionship and mutual support is an important one, but the characteristics which distinguish it from all other relationship can only be met by two persons of the opposite sex".⁽¹⁶¹⁾

Marriage in contemporary parlance can be perceived as a secular or sacred cultural institution: the fulfilment of a contract satisfied by solemnisation. The consent of the parties is the germain factor, the ability or inability

159. Venter v Venter 1949 (4) SA 123 (W). In this case the impression was given that if one party fraudulently conceals that he/she is sterile the other party may have the marriage set aside. Here the wife was aware of the fact that, as a result of an operation, she was sterile, but she concealed the fact from her husband. When he applied to have the marriage set aside his application was refused because he had not alleged in his pleadings that his wife had been fraudulent in her concealment.

160. See for example Venter v Venter supra.

161. Both transsexuals in the English and South African cases demonstrated not only the ability for companionship and mutual support, but also the ability to engage in sexual relations. Yet both were denied recognition of their assumed female sex.

per se does not make or break a marriage. In Lindo v Belisario⁽¹⁶²⁾ Sir William Scott stated

"It is a present and perfect consent, the which alone maketh matrimony without either public solemnisation or carnal copulation, for neither is the one nor the other the essence of matrimony, but consent only."

Only an error as to the nature of the ceremony - error in negotio or to the identity of the other person - error in persona - or to the sexual potency of the other party, renders the marriage voidable at the instance of the other party, and not void.⁽¹⁶³⁾ A misrepresentation - even of a fraudulent nature which does not result in one of the above-mentioned categories of iusti errores - has no effect whatsoever upon the validity of the marriage.⁽¹⁶⁴⁾ The approach of our courts then is conservative in this respect: only an extremely serious misrepresentation will give rise to an action of nullity.⁽¹⁶⁵⁾ It has always therefore been difficult to find grounds for annulment especially when both parties were fully in consensus. It is therefore hard to equate the instance of annulment in W v W with these rigid rules of our common law.⁽¹⁶⁶⁾

162. (1795) 1 Hag Con 215 at 230. Marriage is a sui generis agreement in terms of family law and therefore the normal contractual principles concerning the effects of factors excluding consensus are not fully applicable: Lee and Honoré Family, Things and Succession (2nd ed Erasmus, Van der Merwe and Van Wyk 1983) 36.

163. Voet 23.2.6; Van Niekerk v Van Niekerk 1959 (4) SA 658 (W) at 665.

164. Voet 23.2.6.; Stander v Stander 1929 (AD) 349.

165. Stander v Stander supra.

166. It is submitted that one must decide from the outset whether marriage is for the people, or people for marriage. If the former, then personal happiness will be afforded precedence over the rigid sustaining of the social institution. If the latter, then at the risk of jeopardising personal gratification one is obliged to affirm the status quo. It is the author's submission that the former tenet must be favoured. If it is not, then many people would be disqualified automatically from ever contracting a valid marriage. Thus, it is submitted, one should view marriage as a means of attaining stability; creating a secure relationship and limiting occurrences of disorganised breakdown in society. On this basis, there is no merited reason for disallowing the post-operative transsexual the right to marry, too.

Thirdly and finally as regards the essential role of the woman in marriage it must be noted that terms such as 'natural' and 'unnatural' in relation to sexual behaviour have been specifically rejected in England at least, by the Report of the Committee on Homosexual Offences and Prostitution,

"for they depend for their force upon certain explicit theological or philosophical interpretations and without these interpretations their use imparts an approving or condemnatory note into a discussion where dispassionate thought and statement should not be hindered by adherence to particular preconceptions". (167)

On the foregoing submissions, the author is of the opinion that there is not one valid instance to vitiate the sex of the transsexuals in the English and South African cases as that of a woman. Both not only filled every requirement of the essential role of the woman in marriage, they also were quite capable of fulfilling the personal consequences of marriage, inter alia, consortium.⁽¹⁶⁸⁾ Furthermore, the evidence in the English case regarding the supposed non-consummation was not conclusively proven. In any event, this does not detract from the fact that the respondent was capable of consummating the marriage, albeit in a physically artificial manner: the psychological feminine sway was certainly present and that is of great importance.⁽¹⁶⁹⁾ Dr Benjamin has commented upon the Corbett case to the effect that,

167. Cmnd 247, para 35 17.

168. Despite the fact that the respondent in the Corbett case could not be regarded as a woman for the purposes of marriage, she was considered just that for social purposes, and had been granted a national insurance card in her role as a woman (at 38 of the report). To be regarded as female for some social purposes, and male for others is preposterous and it is submitted, arises from the attempt of the law to usurp the function of medicine in determining the sex of the individual.

169. Immediately after the Corbett judgment, on 2 February 1970, a court in Grasse, France ruled in the case of H el ene Hautiere - a post-operative female transsexual - that she was a female for legal purposes and could marry as she wished because "she possesses external genitalia of a feminine type and because her psychological behaviour is without a doubt, that of a woman.": cited in Fallowell and Ashley op cit 227. It is submitted that this was indeed an admirable ratio. Prof Mills, who was one of Miss Ashley's medical witnesses remarked that "there is a great deal of snobbery in this case (Corbett v Corbett)": Fallowell and Ashley op cit 216. By this he meant that not only was there a prejudice against transsexuals but also perhaps the subconscious intransigence and hauteur of educated men who had no intention of revising fixed notions such as the definitions of marriage, man and woman (ibid).

"... the judge's ruling is terribly illogical. It is a very inhuman decision ... While we should be very careful and conservative in advising the operation, once it has been done, we should do all in our power to make life easier for them ... Chromosomal tests are a purely technical thing and of no practical value, but could nobody see this?"⁽¹⁷⁰⁾

And then the erudite comment of Dr Jones.⁽¹⁷¹⁾

"The sex an individual considers himself to be is an equally important factor ... it is not the operation that changes sex. The operation merely enforces a decision that has been made. One who is familiar with this particular problem soon comes to the conclusion that you cannot disregard the fact that someone believes he is a female".⁽¹⁷²⁾

In passing it must be noted that in England after the Corbett case, Parliament passed the Nullity of Marriages Amendment Act.⁽¹⁷³⁾ However it does nothing to clarify matters as the section merely provides that a marriage is void if either of the parties "are not respectively male and female".⁽¹⁷⁴⁾ This section was in fact enacted contrary to the recommendation of the Law Commission in its report on The Nullity of Marriages.⁽¹⁷⁵⁾ The Commission was of the opinion that the Corbett decision should not remain law, and that matrimonial relief - possible if a decree of nullity is granted - "is not appropriate". It was conceded however that "the question involved is an issue of social policy on which Parliament will be the judge".⁽¹⁷⁶⁾ Parliament duly judged and decided to allow the parties in these "tragic cases" the

170. Fallowell and Ashley op cit 227.

171. Of Johns Hopkins Medical School, Baltimore.

172. Fallowell and Ashley op cit 227.

173. 1971 chapter 44 section 1(c).

174. McColl Kennedy op cit 125.

175. Law Commission No. 3 H.M.S.O. 1970 paras. 30-32 15-6.

176. McColl Kennedy op cit 6 note 44.

dignity of a degree of nullity, so that - if deemed appropriate - provision for ancillary relief could be made by the court, and the unsavoury examination of their sexuality - rendered necessary if the only course was a declaration as to status - could be avoided.

The neutral terms of 'male' and 'female' used by Parliament are supposedly justified by the view that it would be an open matter left for a court at a later stage, to determine sex in the light of further medical evidence and possibly reach a conclusion other than the one arrived at by Judge Ormrod. The Solicitor-General however, considered the amendment "out of consonance with reality"⁽¹⁷⁷⁾ and the author concurs with this sentiment. It is therefore submitted that if by using neutral terms the legislature is allowing for a possible change in the future from the view held by Ormrod J then it is in fact tacitly implying that it will countenance a classification of sex not on Judge Ormrod's biological criteria but presumably, on the gender-identity tests. If this is so, it is submitted that Parliament should have simply enacted this itself, considering that it is to be the judge of such issues of "social policy". It is further submitted that the effect of the amendment is that it purports to uphold the Corbett decision, yet recognises that this decision might be incorrect, which is a blatant contradiction in terms.

Lyons MP demonstrates lucidly the confusion in the minds of the legislators:

"The way that a judge decides the sex of a particular person, is and always will remain a question of fact. It is a question of fact which will change with the change in medical opinion ... If medical opinion were that the mere sex change operation were enough to change a person from a man into a woman, or a woman into a man, that would be the end of the case ... If in the end, medical opinion is able to state with greater certainty who is male and who is female on tests which were not applied in the Corbett case, then some new court can apply these tests because the evidence will have changed and the question of fact therefore would also have changed".⁽¹⁷⁸⁾

177. Hansard cols 1838.

178. Hansard cols 1832-3.

It is submitted that the decisions which disallow a post-operative change of sex for the purposes of marriage, do nothing to offer a solution to the problem of the person who does not slot into the conventional norm of sexuality. The judges have, in their short-sighted and tenacious insistence of sex-determination by pre-operative criteria, created in effect, a class of non-people. At the moment, on the basis of these decisions, a transsexual who undergoes the legal corrective surgery, remains, for the purposes of the law, as a member of his original sex and therefore a person who has undergone irreversible surgical mutilation. All this has been based on the very unreliable factor of karyotype, which has been shown time and time again, to be completely fallible. Judge Ormrod set the pace by setting up a legal scale for weighing the relative importance of medical criteria, without, it is submitted, offering any convincing justification for his choice and despite the fact that the expert medical opinion would have him avoid such an inflexible stance. These tests were then categorically set out and slavishly followed in South Africa and Australia. In respect of this, it should be pointed out that this practice on the part of the South African judge, was erroneous, in that Nesdadt J could not adopt the evidence placed before the English judge as it was not a finding of law.⁽¹⁷⁹⁾ Furthermore, he did not take into account advances made in the medical field since 1970. The chromosomal test is not regarded highly by medical experts, and more weight is being attributed to the psychological factor.⁽¹⁸⁰⁾ It is therefore submitted that Nesdadt J not only overlooked the doctrine of stare decisis⁽¹⁸¹⁾ in his tenacious acceptance of the Corbett ratio but it appears that any considerations of common sense and policy eluded him. He states that

"I agree with the observation ... that it is not for the jurist to solve the problem of what a person's sex is. It is essentially a question of fact in regard to which the courts ought to be guided by the opinions of experts in the field of medicine".⁽¹⁸²⁾

This statement is very laudible, except that totally to the contrary he did in fact decide the issue without any such expert guidance. The plaintiff who had sought recourse to a court of law, in all good faith, from her husband's adulterous action little realised that she would not be able to

179. See also Strauss (5) op cit 348 and Van Niekerk op cit 239.

180. For example, by R. Green, J. Money, H. Benjamin. Vide chapters one to four supra.

181. Taitz op cit 75.

182. At 311B of the report.

rely on her marriage certificate and that the 'matrimonial' state in which she had lived for a number of years, had in fact never existed in the eyes of the law.

Although the Nesdadt decision in following Ormrod J is considered unequitable, the stance adopted by Bell in Australia is even worse, in which it was held that the respondent hermaphrodite was neither male nor female and therefore could not qualify for marriage. It is submitted that not only does this bizarre judgment demonstrate a lamentable lack of medical knowledge but also shows to what lengths a judge will go in order to avoid facing issues that are 'out of the ordinary' and therefore obviously distasteful to him. It is submitted further that Bell J could have decided the whole question on the issue of non-consummation, which would have at least left the respondent with some vestige of dignity, and also allowed him to contemplate marriage again in the future. Bell J simply adopted the three test approach as enunciated in the Corbett decision, and failed to make mention of the fact that Ormrod J had specifically left the question of ambiguous sex open.⁽¹⁸³⁾ At least the post-operative in England and South Africa are judicially - if not practically - free to marry in the future whereas the respondent in Australia can never marry because according to the learned judge he is neither male nor female.

"Nobody with an awareness of the psychological difficulties facing transsexuals in their attempts to lead a normal life can regard this result with equanimity".⁽¹⁸⁴⁾

It is submitted that it is indeed inconceivable that anyone - let alone a judge - can inflict such catastrophic punishment upon someone for a 'crime' which nature has committed.

"The right to marry is one of the fundamental civil rights of man".⁽¹⁸⁵⁾

The desire of the post-operative transsexual to exercise this right, is

183. The factors were congruent in the English case, but of course incongruent in the Australian case. See also Ellison Khan 'The True Hermaphrodite - Of No Sex?' (1981) 89 South African Law Journal 111 at 112.

184. R Bailey 'Recent Cases' (1979) 53 Australian Law Journal 659.

185. Loving v Virginia (1967) 388 US 1, 12.

perfectly natural but most jurisdictions have rendered this an impossible (186) To date the only case which has adopted a realistic view of the transsexual dilemma and has not ignored operative intervention or the psychological gender identity of the individual is the American one of MT v JT. The significance of this decision is obvious: it is precedence for the proposition that the post-operative transsexual has, in effect, altered his sex from the erroneous anatomical one, to that of his assumed sex, while also fulfilling the general requirement of heterosexuality in marriage. This decision - while expressly excluding the purported marriages of pre-operative transsexuals in their assumed roles (187) furthers the cause of ensuring the right to marry. Although the United States Supreme Court has never expressly recognised a constitutional right to marry, it has been arguably implied tacitly. (188)

Despite this laudible decision however, there is no guarantee that the New Jersey court will be followed in other jurisdictions. At least one commentator has criticised the decision for

" wandering far from the issue being litigated and (for the) degree of personal conviction some judges are willing to write into opinions dealing with complex issues to which there appear to be no clearcut answers". (189)

186. Ellison Khan op cit 113 puts forward tentative suggestions as to what a South African court would do in the case of an hermaphrodite's marriage. He states that both grounds of the ruling of Bell J rest on the conclusion that the respondent was not a male. Assuming that this is correct, he suggests that our courts would be prepared to set aside the union on the ground of operative error. He doubts though, that such an action based on error would be brought because an action could be brought on the basis that a marriage between two people of the same sex is null and void. Hahlo op cit 66 states that this is in fact our law.

187. For reasons of common sense and policy.

188. For example, Loving v Virginia 388 US 1, 12 (1967) in which the court held invalid a Virginia statute which forbade interracial marriages. Speaking for the majority, Warren CJ stated "marriage is one of the basic civil rights of man, fundamental to our very existence and survival." Even though the state is justified in regulating marriage, this power is limited to those aspects of marriage which might adversely affect society as a whole: Reynolds v US 98 US 145 (1878) in which the court upheld Utah's law prohibiting polygamous marriages.

189. Twardy op cit 249.

It is submitted in answer to this, that this case is certainly not the only one guilty of applying personal opinion - if this was in fact the case here - as the Corbett decision is just as much to blame for this, and this is simply a factor which has to be taken into account whenever one has to deal with an issue of law in which there is a paucity of decisions. However, it is further submitted by this author that in the case of MT v JT the judge can be excused on the basis that his supposed 'personal convictions' are progressive and humane, whereas those of the other judges under mention are not, and therefore have no justification.

Although MT v JT deals solely with the matrimonial sphere, it is submitted that there is no reason why it should not be applied to all spheres especially considering that judges have been more lenient in other regards, such as alteration of documents.

"... it is the opinion of the court that if the psychological choice of a person is medically sound and not a mere whim, and irreversible sex reassignment surgery has been performed, society has no right from prohibiting the transsexual from leading a normal life. Are we to look upon a person as an exhibit in a circus side-show? What harm had said person done to society? The entire area of transsexualism is repugnant to the nature of many persons within our society. However, this should not govern the legal acceptance of the fact".⁽¹⁹⁰⁾

The author submits that despite the criticisms of this decision, it is the only stance to be adopted which does not close its eyes to reality and in fact has offered a great deal of assistance to the transsexual in his post-operative adjustment and ultimate attainment of contentment.

V SUGGESTED SOLUTIONS.

On the foregoing, there can be only one solution to the iniquitous injustice as regards the legal position of the validity of post-operative transsexual marriages. The courts - except for the one in New Jersey - have not seen fit to give due weight to medical guidance to accept the very real fact that

190. At 207 of the report. It is the author's contention that society should be educated rather and made aware of these contingencies, and that the jurists should guide the way.

the phenomenon of transsexualism exists and so does the corrective surgery. One curious point about the South African decision was the decision to conduct the proceedings in camera.⁽¹⁹¹⁾ The Supreme Court Act⁽¹⁹²⁾ provides:

"Save as is otherwise provided in any law, all proceedings in any court of a division shall, except in so far as such court may in special cases otherwise direct, be carried on in open court."

The court in W v W accepted the argument that the interests of the community did not demand that this normal rule apply.⁽¹⁹³⁾ It is therefore this author's submission that if it is not in the interests of the community to have the fact that the plaintiff is a transsexual, publicised then this is tantamount to claiming that the issue is a private one between the spouses only. It is further submitted that if the only interested parties concerned regard their marriage as a valid one, then this should be left to them, and not be unnecessarily tampered with by an overzealous judiciary. In fact the court should uphold the institution of marriage wherever possible, this relationship being the bedrock of our civilised society.

"That the state has always taken an interest in the institution of marriage, is obvious, but there should certainly be limits upon the state's right of intervention in a sphere such as the marital relationship, which is so intimately private and personal. It is difficult, nay impossible, to see how the interests of society at large can be detrimentally affected if a union between a person who had 'successfully' undergone a sex change operation, and a member of the ostensibly opposite sex, is upheld".⁽¹⁹⁴⁾

It is therefore this author's contention that the personal issue of marriage be left to the privacy of the people concerned. Unfortunately the courts have been given the opportunity to interfere, and have left their indelible print on this area of family law. Even though in South Africa, Nesdadt J did acknowledge that the legislature had recognised the factual possibility of a change of sex, he gave no effect to it, preferring instead

191. At 308H of the report.

192. 59 of 1959 at s 16.

193. At 310C of the report.

194. Van Niekerk op cit 241.

to follow the English case. What the legislature had apparently given, the judiciary saw fit to take away. Such inconstantia juris should not be tolerated.

As the courts therefore have been of no assistance in this area, in general, it is submitted that the legislature now step in and rectify the inequitable position and grant to the post-operative transsexual, those rights which are common cause among 'normal' people. It is submitted that to judge the post-operative transsexual on his pre-operative sex of chromosomes and genitalia, is unrealistic as both his mind, and now his body are along the assumed gender identity.

It is therefore suggested that in South Africa, section 7B should be extended to provide for post-operative legal recognition in all spheres, and that legislation such as that in West Germany should be followed.

In conclusion it must be mentioned that all the cases dealing with marriages could have - if there was a need for dissolution - and should have been dissolved by divorce. In each case there was a substantial ground for the divorce - for example, adultery in the South African case, and presumably cruelty in the English case due to wilful refusal to consummate. It must be remembered that in South Africa at least, there are very few grounds for the annulment of a marriage and in most instances, such marriage is only voidable and not void ab initio. It is argued therefore that if the sex of the post-operative transsexual is taken at the only relevant time - post-operatively - there is no ground for the declaration of nullity of the marriage. This sensible acceptance of the 'new' sex of the post-operative transsexual would also obviate the anomalies which arise when a person is regarded as different sexes for different purposes. It will also prevent the problems which could occur if a married transsexual subsequently decides to undergo corrective surgery. As it stands, in South Africa - and other jurisdictions - there will have been no legal change of sex and therefore the marriage, although farcical, would still be in existence. It is evident that the possibility of this has occurred, as with the Morris case. In such situations, it is submitted, there would be presumably grounds for divorce - in South Africa, irretrievable breakdown due to impossibility of performance; in the United States, due to indignities and cruelty. It is submitted though, that there could be no possibility of annulment in those jurisdictions which do not recognise the post-operative change of sex, as there is then no question

of homosexuality. In certain jurisdictions - England being one - the unmarried status of the pre-operative transsexual was a pre-requisite to treatment which necessitates the need for the patient to file for divorce in the advent of him/her being married. It is submitted that not only does this entail expensive litigation, but the possibility might arise that insufficient grounds - on the existing grounds of divorce in a country, especially one with the 'fault' principle, might be pleaded.

It is this author's submission then that the only solution to all these problems would be to follow the example set by West Germany in which the legislation not only provides for total recognition in the post-operative role, but also provide for the automatic dissolution of an existing marriage, on re-registration in the post-operative role. Furthermore, it is submitted that the suggestions Parschin-Rybkin - the execution of a document pre-operatively, to provide for the family - should also be adopted, thereby ensuring that the family is in no way financially neglected. It is submitted therefore that such provisions as have been outlined above, should be expressly enacted by Parliament and therefore become enforceable law in South Africa.

Under the 1980 legislation in West Germany,⁽¹⁹⁵⁾ a transsexual legally belongs to his/her chosen sex and attracts the rights and duties of that sex. This legislation allows the post-operative transsexual to revise his/her birth certificate to conform with his/her chosen sex.⁽¹⁹⁶⁾

To obtain the necessary declaration, the transsexual must:

- a) be over twenty one;
- b) usually have had corrective surgery, but if, for medical reasons, this is not possible, then treatment which renders it impossible for the transsexual to revert to his/her original role, is sufficient, and
- c) be capable no longer of procreation.

The transsexual however, retains his/her original sex in relation to any children, so that maintenance obligations remain unaltered.

195. Gesetz Über Die Änderung Der Vornamen Und Der Feststellung Der Geschlechtszugehörigkeit in Besonderen Fällen (Transsexuellengesetz) Nr 56 Tog Der Ausgabe: Bonn den 16 Sept 1980 vorm 10.

196. This legislation is similar to that in Italy and France: The Guardian (3 October 1981).

C H A P T E R I X
MARRIAGE-RELATED ISSUES

I INTRODUCTION.

"Do not do unto others as you would that they should
do unto you. Their tastes may not be the same."

George Bernard Shaw

This chapter is devoted to those areas of law which are affected by the marital status of an individual directly. It consists - almost exclusively - of this author's extrapolations on these areas as they pertain to the post-operative transsexual as a consequence of the decision of the South African case of W v W. Where there are examples from other jurisdictions available, they will be drawn on to give a comparative study, where possible.

The W v W, Nesdadt J ruled that a marriage contracted between a post-operative transsexual and a person of the opposite sex is invalid and void ab initio. He regards a post-operative transsexual as remaining in his birth-designated sex and it is common cause that persons of the same sex cannot marry each other.⁽¹⁾ A marriage which is void ab initio, produces none of the legal incidents of marriage.⁽²⁾ The woman does not acquire her husband's domicile;⁽³⁾ there are no reciprocal duties of support; the parties do not succeed each other ab intestato; children born of the union are illegitimate and the parties are entitled to contract a lawful marriage with someone else.

The nullity of a void marriage is absolute.⁽⁴⁾ It may be relied upon by either of the parties, even after the death of the other, or by an interested third party, even after the death of both of them. In accordance with the maxim quod ab initio non valet, in tractu temporis non conualescet, a void marriage cannot be ratified, nor does it gain validity with the passage of time.⁽⁵⁾

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1. Lee and Honoré op cit 15; Hahlo The South African Law of Husband and Wife (4th ed 1975) 66.
 2. Lee and Honoré op cit 91; Hahlo op cit 487; Wells v Dean-Willocks 1924 CPD 89 at 92; Ex Parte Strachan 1946 NPD 592.
 3. Hahlo op cit 488.
 4. Ibid.
 5. Wells v Dean-Willcocks supra at 92.

No annulment by a court is required.⁽⁶⁾ The effect of a decree of nullity in respect of void marriages is purely declaratory and not - like a decree of divorce - constitutive. It does not change the status of the parties, but merely places on record that they are not married to each other.⁽⁷⁾ Bearing this in mind, it is evident that a post-operative transsexual, since 1976, who contemplates marriage, should be aware that he/she does not have the capacity to marry, but the situation regarding those marriages already entered into before 1976, is far from clear. It would appear that a couple who married in good faith in the belief that the marriage was valid and who have no inclination to terminate such a union, would have nothing to prevent them from continuing to represent themselves as husband and wife. If such people did not come forward to declare their legal position, it seems unlikely that anyone else would, or that such 'concealment' would be to the detriment of society. With this 'informal' situation regarding annulment, there would be no pressing duty on the parties to admit the non-existence of their marriage. In fact, it is submitted that human nature dictates otherwise. Despite fractious elements in society, man - for whatever personal reasons - is, on the whole, conservative and moral as regards marriage and therefore in all probability, would prefer not to represent himself suddenly as not married, but would rather maintain the status quo, by silence. Furthermore, juristic acts aimed at the discouragement of marriage - which relationship is the bedrock of our society - or the encouragement of the dissolution of marriage, are contrary to public policy.⁽⁸⁾ So too, an agreement prohibiting a person from marrying at all, is contra bonus mores and void.⁽⁹⁾ It is submitted therefore that a judicial decision which has the same effect as such an agreement, should be regarded as contra bonos mores also. The decision in W v W effectively prohibits the post-operative transsexual from marrying at all - he cannot marry legally in his new role and also cannot marry in his original role for practical and psychological reasons.

6. Lee and Honore op cit 28; Hahlo op cit 487.

7. Ibid; Ex Parte Marais 1942 CPD 242; Ex Parte Oxton 1948 (1) SA 1011 (C). In most continental systems, even a void marriage must be annulled formally, which seems eminently more sensible.

8. Voet 24.2.2; Voet 23.4.16; Middleton v Carr 1949 (2) SA 374 (A) at 388.

9. Voet 2.14.21; Edgecombe v Hodgson 1092 19 SC 226.

There is also in our law, the presumption of lawful marriage where it is proved that two persons went through a form of marriage and subsequently lived together as man and wife.⁽¹⁰⁾ Mere cohabitation as husband and wife - if the parties were considered and reputed to be married by those who knew them - is also sufficient to raise such a presumption.⁽¹¹⁾ It is submitted therefore, that to all intents and purposes a marriage involving a post-operative transsexual could continue as a valid marriage for as long as the parties wished, with no one being any the wiser and with no one being affected by the situation adversely, and the longer the situation prevails the more difficult it will be to unravel the legal tangles eventually. It is in instances of ignoring the legal presumption as to the validity of the marriage, that problems manifest themselves and these will be dealt with now by this author.

II THE DIVISION OF PROPERTY.

What is the position in a void marriage of the property acquired during that union? Whenever a marriage takes place in community of property, all the property of each spouse, rests ipso jure in that community. Consequently, as soon as the marriage takes place, each spouse becomes owner of an undivided half-share of that property.⁽¹²⁾ If the marriage involved a post-operative transsexual - prior to the 1976 ruling - how would one determine the proprietary rights of each party? Restitutio in integrum is blatantly impossible, as it is unlikely that the property would be in its original form still. The assets could not divest according to principles of the dissolution of a partnership, as a partnership is a legal relationship between two or more persons who carry on a lawful business to which each contributes something, with the object of making a profit and of sharing it between them.⁽¹³⁾ By 'business', is meant any activity which occupies the time and attention of a person for the purpose of making a profit.⁽¹⁴⁾ The author contends that such a description does not fit the definition of marriage which usually is not viewed as a business enterprise for profit-making.

10. Ochberg v Ochberg's Estate 1941 CPD 15.

11. Voet 23.2.5.; Levine v Levine 1939 CPD 246.

12. Voet 23.2.68.: Rosenberg v Dry's Executors 1911 AD 688.

13. Grotius 3.21.1; Voet 17.2.1; Rhodesian Railways v Commissioner of Taxes 1925 AD 465. Mühlmann v Mühlmann 1984 (3) 102 (A) the court held that it would not infer easily, a relationship of partnership between spouses.

14. Platt v Commissioner of Inland Revenue 1922 AD 32.

A tentative solution has been proffered that where it is only discovered sometime after the 'marriage' that the spouses are of one sex, it may lead to inequitable results if the marriage is treated as null and void ad initio. Thus the termination of the union should be considered as a dissolution analogous to the death of one partner.⁽¹⁵⁾ It is submitted that this solution is unacceptable as it appears to acknowledge the existence of a valid marriage, only to terminate such marriage in the following breath, so as to remain in accord with the current judicial trend. Obviously, the only solution is to recognise the validity of the marriage of the post-operative transsexual. However, as this unfortunately is not the position at the moment, this author wishes to offer a personal suggestion, which possibly could militate against inequitable division of property, in the light of the law as it stands at present.

There are a few exceptions to the rule that a marriage is void ab initio.⁽¹⁶⁾ If one or both of the parties were bona fide, the court could declare - at the instance of the innocent party/parties - that certain consequences of a valid marriage attach to the 'marriage': matrimonium putativum.⁽¹⁷⁾ Inter alia, such consequences include proprietary rights. If both parties were bona fide and they had not entered into an antenuptial contract, it must be assumed that they intended a universal partnership. If they had lived together for a length of time, the court may decree that their combined property be shared equally between them.⁽¹⁸⁾ If only one party was bona fide, community of property takes place if it is to the advantage of the innocent spouse, but not otherwise.⁽¹⁹⁾ Where the parties were married under an antenuptial contract and both were in good faith, the contract is binding on them both.⁽²⁰⁾ If only one was in good faith, the contract

1. Hahlo op cit 487.

16. Hahlo op cit 488.

17. Ibid. The requirement for a putative marriage is 'good faith': Naicker v Naidoo 1959 (3) SA 768 (D); Vather v Seedat 1973 (3) SA 389 (N). One or both of the spouses must have been ignorant of the impediment to their marriage. This would hold true then for the marriage of the post-operative transsexual contracted before 1976. Furthermore, the marriage cannot be putative unless there was at least the appearance of a marriage ceremony: Hahlo op cit 495; Moola and Others v Aulsbrook NO and Others 1983 (1) SA 687 (N).

18. Hahlo op cit 497.

19. Ibid.

20. Ibid.

can be enforced by the innocent party only. It is therefore this author's submission as regards the present legal position, that a marriage involving a post-operative transsexual - at least for the purposes of property division - should be regarded as putative. Obviously - as previously stated - none of these problems would arise if the marriage were sanctioned by law from the outset.

In terms of The Matrimonial Property Act,⁽²²⁾

"... every marriage out of community of property in terms of an antenuptial contract ... which is entered into after the commencement of this Act, is subject to the accrual system specified in the chapter except where expressly excluded in the antenuptial contract ...
3 (1) At the dissolution of a marriage subject to the accrual system - by divorce/death⁽²³⁾ a spouse whose estate shows no accrual or a small accrual has a claim against the other spouse for an amount equal to half the difference between the accrual of the respective estates."

This section can have no effect on the division of property of the marriage of the post-operative transsexual because, not only might the marriage be in community of property or not specifically according to the accrual regime, but in any event, the section only comes into operation on "divorce/death". As the transsexual's marriage is null and void ab initio, this section is of no assistance here.

III THE LAW OF INSOLVENCY.

As none of the legal consequences of a valid marriage obtain, it is clear that prior to 1984, the prohibition of donation between spouses was of no effect.⁽²³⁾ The purpose of this prohibition was to protect a spouse against

21. Mahlo op cit498.

22. Act 88 of 1984, chapter 1 (2).

23. My underlining.

24. Kilburn v Estate Kilburn 1931 AD 501. In Foot NO v Voster 1983 (3) 179 (0) it was held that evidence given by an insolvent at an interrogation in terms of section 65 of the Insolvency Act 24 of 1936, is not admissible against his wife in an application in connection with immovable property registered in her name. It would appear that there is no such protection for the post-operative transsexual and his 'spouse' as they are not legal spouses.

exploitation by the other spouse,⁽²⁵⁾ but in conjunction with section 21 of the Insolvency Act,⁽²⁶⁾ it also served to safe-guard creditors against collusion by spouses. The post-operative transsexual and his partner, therefore could have continued to represent themselves as married, but would have had a perfect right to make donations to each other, thus possibly defrauding creditors. However now, in terms of section 22 of The Matrimonial Property Act,⁽²⁷⁾ donations between spouses are permissible so this problem is of academic interest only.

Since the inability to pay debts is normally the fault of the debtor himself, the chief result of an insolvency order is to protect other persons from the insolvent. If the insolvent is married in community of property, that which is the misfortune of one, is the misfortune of both.⁽²⁸⁾ 'Spouse' for this purpose includes a 'reputed spouse' and in fact means a legal spouse, a person married according to any law or custom and also a woman living with a man as his wife.⁽²⁹⁾ However, one could not - in the light of the Nesdadt decision - regard the couple in that case as 'reputed spouses' because this would be tantamount to saying that people of the same sex who are living together can be regarded as married for the purposes of the Insolvency Act. It is submitted that this definitely would not meet with judicial approval. If however, such a marriage involving a post-operative transsexual were - in the name of equity - to be given legal sanction for the purpose of this Act, then this stance already undermines the strength and supposed justification of the Nesdadt judgment and begins to reveal the very unstable foundations upon which it is built.

25. Voet 24.1.1; Lee and Honore op cit 46.

26. Act 24 of 1936.

27. Act 88 of 1984.

28. With marriages out of community of property, the assets of the solvent spouse also vest in the trustee, until such time as that spouse proves that such property is his/hers alone. On doing so, he/she may reclaim such property: section 21 (1) of the Insolvency Act; Conrad v Conrad's Trustee 1930 NLR: Kilburn v Kilburn's Estate supra at 507.

28. Section 21(1) of the Insolvency Act; Chaplin v Gregory 1950 SA (C): "By introducing this subsection the legislature quite obviously intended to bring into the net, persons who, while not legally married, were occupying the de facto position of husband and wife."

Furthermore, it would be unjust to give legal recognition to the marriage only in order to protect third parties, to the detriment of the transsexual himself. It is submitted that this is almost as if a person is being punished for a condition over which he has no control.

Another problem arising in the sphere of insolvency law, is the question of trusteeship. Persons disqualified from such a position in terms of section 55 of the Insolvency Act include, inter alia, persons related to the insolvent by consanguinity or affinity, within the third degree. This is so, in order that a relationship of the utmost bona fides can be maintained, because such excluded persons clearly would have an interest opposed to the general body of creditors. However, in the wake of W v W, a spouse of a transsexual marriage would not be disqualified, even though his/her relationship has been on a par with that of a husband/wife. It is submitted that in view of the inequity of this, an interpretation of the statute in all probability would be invoked so as not to render the transsexual spouse an exception. If this occurs, yet another instance will be provided in which the transsexual's marriage is deemed legal for the sake of equity.⁽³⁰⁾

IV THE LAW OF CRIMINAL PROCEDURE

In terms of the Criminal Procedure Act,⁽³¹⁾ the spouse of an accused is not competent in law to give evidence for the prosecution.⁽³²⁾ Furthermore, there is a privilege arising out of the marital state. Section 198 of the Criminal Procedure Act provides that:

30. A similar situation would arise in connection with any other offices which normally would preclude spouses and family, for example, directors of companies.

31. Act 51 of 1977, at section 198.

32. This section is subject to the exceptions set out in section 195(1), viz: That where one spouse is charged with any of the following offences, the other spouse will be compellable as a witness: a) any offence committed against the person of either of them, or a child of either of them; b) any contraventions of the Maintenance Act 23 of 1963; c) bigamy; d) incest; e) abduction; f) certain contraventions of the Immorality Act 23 of 1957; g) perjury committed in connection with, or for the purpose of any judicial proceedings instituted or to be instituted or contemplated by one of them against the other.

"(1) A husband shall not be compelled to disclose any communication made to him by his wife during the marriage, and a wife shall not be compelled to disclose any communication made to her by her husband during the marriage;

(2) A person whose marriage has been dissolved or annulled by a competent court shall not be compelled to give evidence as to any matter or thing which occurred during the subsistence of the marriage, and as to which he or she could not have been compelled to give evidence if the marriage were subsisting."

This is derived from the English Evidence Amendment Act⁽³³⁾ and the privilege may be claimed by the spouse to whom the communication was made only.⁽³⁴⁾

A spouse is allowed to refuse to answer any question in any circumstances in which his/her spouse would be allowed to claim privilege.⁽³⁵⁾ Principally, the right to refuse to disclose communications from one spouse to the other during a marriage, is restricted to current spouses but it is also extended by section 198(2) as seen above, so that spouses of a marriage which has been dissolved or annulled by a competent court shall not be compelled to give evidence as to any matter which occurred during the subsistence of the marriage. From this, it would appear that only a divorced spouse, or a spouse of a judicially annulled marriage, can claim this privilege and not a widow⁽³⁶⁾ nor a spouse whose marriage has been dissolved

33. Of 1956. at section 3. In South Africa, there is a similar provision for civil procedure in section 10 of the Civil Procedure Evidence Act 25 of 1965.

34. H.M. Advocate v H.D. 1953 SC (Scotland).

35. Section 199 of the Criminal Procedure Act 51 of 1977, which provides that "No person shall at criminal procedure be compelled to answer any question or to give any evidence if the question or evidence is such that under the circumstances the husband or wife of such person if under examination as a witness may lawfully refuse and cannot be compelled to answer."

36. In England, it was decided that the privilege conferred on spouses in respect of communications during the marriage comes to an end when the marriage is terminated, therefore a widow could not refuse to disclose a communication from her late husband: Shanton v Tyler (1934) All E R AC.

extra-judicially. (37)

It is presumed therefore that this privilege under the Criminal Procedure Act would not extend to a transsexual 'spouse' as the marriage in question is void ab initio and therefore does not require a court to annul it. The principal reason for the marital privilege is that public opinion would find it unacceptable if the spouses were forced to disclose communications between each other (38) and society should endanger the marital relationship in no way. A further point raised is that it could encourage perjury if one spouse was forced to incriminate the other. It is submitted therefore, that to disallow people this privilege because the marriage they entered into - in all good faith - is void, is grossly unjust. The confidences shared between a transsexual and his partner in reality are no different from those between other spouses.

"So much of the happiness of human life may fairly be said to depend on the inviolability of domestic confidence, that the alarm and unhappiness occasioned to society by invading its sanctity, and compelling the disclosure of confidential communications between husband and wife, would be a far greater evil than the disadvantage which may occasionally arise from the loss of the light which such revelations might throw on questions in dispute". (39)

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37. For example, by legislation: Russ v Russ 1962 All E R. Under the Civil Procedure Act however, such privilege does extend to marriages annulled by extra-judicial means and this privilege only applies to "a matter or thing which occurred during the subsistence of the marriage".
38. Rumpling v DPP 1962 (3) All E R 256 at 261B. Viscount Radcliffe (at 260) expressed the view that the principle of common law was to prevent not only a testimonial confrontation between spouses, but went further to protect marital confidences as such. The common law rule in England, of the unity of spouses has now been incorporated in section 2(2)(a) of our Criminal Procedure Act so that a husband and wife cannot be convicted of the crime of conspiracy if they are the only parties thereto. It is submitted that probably this rule would not apply to the transsexual's marriage - yet another instance of the detrimental invocation of the law.
39. Per Viscount Radcliffe (at 264F) quoting from the second report of the Commissioner's enquiry into the process, practice and system of pleading in the Superior Court, dealing with communications of spouses inter se.

The communications in any relationship accorded the status of marriage originate in confidence, as those communications in valid marriages do. It is submitted that there is no substantial difference. That confidence is essential to the relationship and such relationship is one which ought to be encouraged by the law and the injury that would inure to it by disclosure, is probably greater than the benefit that would result in the judicial investigation of the truth.⁽⁴⁰⁾ However, it is submitted that by making the transsexual an exception to this laudible principle, the beneficial aim of the provision loses some of its veracity and impetus.

V THE LAW OF SUCCESSION

Under the Succession Act⁽⁴¹⁾ rights of succession ab intestato were conferred upon a surviving spouse.⁽⁴²⁾ A spouse is entitled to succeed on intestacy now only if married to the deceased by a valid, monogamous marriage.⁽⁴³⁾ If the surviving spouse is the only heir, he/she is entitled to the whole inheritance.⁽⁴⁴⁾

A transsexual spouse under this legislation would be denied all rights of inheritance ab intestato as the marriage is considered invalid. It is submitted that this would be unjust, especially taking into consideration the fact that the parties believed that they were legally husband and wife.

If the deceased had not executed a will - in the belief that his spouse would inherit nevertheless - and therefore made no provision for his partner, the latter would not be entitled to a cent. Supposing that the inheritance had devolved in fact before the 1976 judgment, what recourse would the 'rightful' heir under intestacy have, in reclaiming his/her inheritance? Such

40. D. Zefferet 'Confidentiality and the Courts' (1974) 91 South African Law Journal 432 at 443.

41. Act 13 of 1934 as amended.

42. Formerly under the Schepensdamrecht, a surviving spouse had no rights of succession ab intestato.

43. Section 1(1)(a) as amended by the Succession Amendment Act 44 of 1982. A surviving spouse, married in community of property, is entitled to a child's share or so much as together with the survivor's share in the joint estate, does not exceed R50 000 in value, whichever is the greater. In terms of section 1(1)(b), if the spouses are married out of community of property the survivor is entitled to a child's share or so much as does not exceed R50 000 in value, whichever is the greater

44. Section 1(1)(d).

intestate devolution to the surviving 'spouse' would be spurious now in the light of W v W and this would involve a tedious hunt for the supposed rightful heir. Public sense of decency revolts against such a denial of inheritance to the 'spouse'. Many people die intestate and even more are unaware of the ramifications of the law. As both mistake of fact and mistake of law are defences in the law,⁽⁴⁵⁾ it is submitted that two people who erred in their belief that their marriage was valid - and therefore expected all the normal consequences to ensue - should be given the benefit of the doubt. The root of the problem is not the statutory provision of course. It is yet again, the case law which appears to be in existence with no apparent thought applied to its creation. Be that as it may, our law as it stands at present prevents a transsexual 'spouse' from inheriting ab intestato.⁽⁴⁶⁾

As far as testate inheritance goes, problems arise in the event of sex designations in the will. If the testator specifies that the bequest is to go to "my husband/wife" does this bequest become invalid if there is no valid marital relationship? It is submitted that the answer to this would be in the negative. The principle object of a court in interpreting a will is to ascertain the intention of the testator,⁽⁴⁷⁾ from the language used as far as can be gathered, from the will itself and from such extrinsic evidence as is admissible.⁽⁴⁸⁾ In the interpretation of a will, the court is entitled to have regard to the material facts and circumstances known to the testator, when he executed the will.⁽⁴⁹⁾ It is presumed therefore

45. S v De Blom 1977 (3) SA 513 (AD).

46. Hahlo op cit 498 states that in applying the principles regarding property rights in a putative marriage to succession, it would appear that a 'spouse' in good faith does succeed his/her partner, if the latter dies intestate before the marriage is annulled. There is no case law in support of this but if it were adopted, it is submitted that at least there would be some measure of justice meted out. Nevertheless, this still does not assist the spouse whose partner dies intestate after annulment. It must be remembered that once a party becomes aware of the true position, he is no longer in good faith if he continues to ignore the true facts.

47. Gordon's Bay Estates v Smuts 1923 AD 160, re-affirmed in Ex Parte Sadie 1940 AD 26.

48. "... the golden rule for the interpreting of testaments is to ascertain the wishes of the testator from the language used": Robertson v Robertsons Executors 1914 AD 503.

49. Allen No v Estate Bloch 1976 (2) 519 376 (C).

that what the testator meant at the time of executing the will, is the important issue: at the time of execution he bequeathed to whom he believed was his husband/wife, even if it was discovered subsequently that there was no valid marriage. Thus it is submitted that for this purpose the heir would be regarded as the spouse of the testator and entitled to his/her inheritance. Furthermore, while on the subject of testate succession, problems might arise also if there is a bequest involving a sex-related term but no name, for instance a bequest to "my son", which son has undergone corrective surgery subsequent to the execution of the will. The important issue here again is the intention of the testator: thus the bequest must devolve upon the person whom he believed to be his 'son'. It is submitted that this is similar to the case in which a person bequeaths to his "wife, Jane" and subsequently obtains a divorce. If he does not alter his will, such bequest will still go to Jane despite the fact that she is no longer his 'wife'. The germain time in issue is the date of execution of the will and not the date of demise of the testator. So although the transsexual has altered his gender identity, he is still the same person: the person whom the testator intended to benefit.

Of course, if the decision in W v W were followed, there would be no problem because the 'son' would still be the 'son' in spite of having undergone corrective surgery; possibly the only instance in which adhering to the Nesdadt decision would be to the advantage of the transsexual. But even if the decision were not followed and the change were given effect to and the operative intervention recognised, it is submitted that no court would rule that the beneficiary would forfeit his inheritance if transsexed, because this would be contrary to the testator's express wishes, so it is evident that we can well do without this one instance where the decision in W v W if followed, works to the advantage of the post-operative transsexual.

VI THE LAW OF INSURANCE

The Amendment Act⁽⁵⁰⁾ to the Compulsory Motor Vehicle Insurance Act⁽⁵¹⁾ reduces the potential liability of the driver and the liability of the third party

50. Act 23 of 1980, sections 2 and 3 amending sections 22 and 23 of the principal Act. These amendments were implemented partially on the recommendation of the Wessels Commission of Inquiry, to reduce limitations and exclusions available to the authorised insurer. The effect is that all passengers are entitled to either limited or unlimited compensation, except for a select group, including the members of the household, or persons responsible in law for the maintenance of the driver of the insured vehicle.

51. Act 56 of 1972.

insurer is excluded entirely, if the passenger is a "member of the household of the driver". Therefore, under the Act, a spouse of the driver would be excluded from third party insurance.⁽⁵²⁾ The object of the provision is to prevent fraud and exploitation. However, what in fact constitutes a 'household' is unclear from the legislation. The stance could be taken that the spouse of a transsexual marriage would not be excluded from claiming from her 'husband's' insurer for example, because according to W v W she is not a legal spouse. However it is submitted that as in the case of maintaining the veracity of the intention of other legislative enactments - such as the Insolvency Act - an exception would have to be made yet again as to the legality of the marriage in order to protect third parties involved, thereby effectively ignoring the Nesdadt decision in the name of equity, but to the disadvantage of the transsexual.

To continue with the law of insurance, it is common cause that a person has an insurable interest in his own life to an unlimited extent and a husband/-wife has an insurable interest in the life of his/her spouse to an unlimited extent as well.⁽⁵³⁾ In these cases, the interest is presumed and no proof of its existence is necessary. However, if a person is not a legal spouse would an insurer have a justifiable interest in the former? It could be argued that as the marriage is invalid, the insurer has no legal relationship with the other person and therefore should not suffer any pecuniary loss as a result of his/her death. However it is submitted that the moral conviction of the community differs from this approach. The Government in fact encourages savings through life insurance, by allowing tax relief on premiums paid to insure the life of the tax payer or his/her spouse.⁽⁵⁴⁾ It would appear therefore that the perpetuation of the policy is in the best interests of society, so that its validity in the case of a transsexual's marriage would not be challenged, but instead, another exception to the W v W ruling would be effected.

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52. Delport v Mutual and Federal Insurance Co Ltd and Others 1984 (3) 191 (D). Here it was held that a wife had no claim against the insurer of her husband's motor cycle on which she was a passenger and injured, according to section 2(1)A of Act 23 of 1980.
53. Griffiths v Fleming 1909 KB. Under the Gambling Act of 1774 'insurable interest' is defined as pecuniary interest and is limited therefore to the interest capable of valuation in money. In other words, a person has an interest in anyone whose death will cause the insurer financial loss. See also the Insurance Act 27 of 1943 as amended. In Phillips v General Accident Insurance Co SA Ltd it was held that a husband also has an insurable interest in his wife's jewellery.
54. Ellison Khan and C. Forsyth (eds) Reader's Digest Family Guide to the Law in South Africa (1982) 45.

VII THE LAW OF DELICT

As corrective surgery is not recognised in the marital sphere, a 'spouse' with the necessary intention, could never be guilty of adultery. A person who has willingly and voluntarily entered into a marriage involving a post-operative transsexual, could - and has, as evidenced in W v W - have 'extra-marital' affairs with impunity and the aggrieved spouse would have no delictual action to recover for the harm perpetrated against him/her. After all a single person generally is at perfect liberty to have sexual relations with whomsoever he/she chooses and a person with no legal claim against him/her can do nothing about it.

"It is a rule of South African law, that neither spouse to a marriage which is valid according to South African law is entitled to an interdict prohibiting the other from committing adultery ... Adultery is a matrimonial offence which may ... provide the aggrieved spouse with grounds for divorce. This is her only remedy".⁽⁵⁵⁾

It would appear therefore, that the transsexual 'spouse' has no right of action even in delict for purported adultery and damages incurred - even though the court did find in W v W that adultery had been committed.

There is normally an action in delict against the co-respondent in adultery.⁽⁵⁶⁾ This action is a two-fold one:

1. for the payment of patrimonial damages arising out of the loss of consortium of the adulterous spouse; and
2. for the payment of solatium for the contumelia suffered by the plaintiff.⁽⁵⁷⁾

The amount of solatium recoverable is in the court's discretion and in assessing the amount of the patrimonial damage, the court should take the plaintiff's proven loss into account.⁽⁵⁸⁾ There is no justifiable reason to consider that a plaintiff in a transsexual marriage would suffer any less in the case of adultery than a plaintiff to a valid marriage. Yet it is certain that there can be no action in the case of an invalid marriage - even though the court in W v W managed this strange anomaly.

55. Osman v Osman 1983 (2) 706 (D & CLD) (my underlining).

56. Ex Parte AB 1910 TPD 1332; Rosenbaum v Margolis 1944 WLD 147 at 155.

57. Viviers v Kilian 1927 AD 449 at 455; Woodwiss v Woodwiss 1958 (3) SA 609 (D) at 618; Smit v Arthur 1976 (3) SA 378 (A) 386.

58. Smit v Arthur *supra* at 388.

It is submitted that for the purposes of recovery for the negligent causation of death of a spouse, a transsexual's marriage could be regarded as putative as it is in a customary union. In Fortuin v Commercial Union Insurance Co of South Africa ⁽⁵⁹⁾ it was held that a widow was entitled to damages for loss of support through the negligent death of her husband. This then is the case in a valid marriage, but does it hold true for a putative marriage? In Msomi NO v Nzusa and Another ⁽⁶⁰⁾ it was held that a widow to a customary union ⁽⁶¹⁾ - which is not a valid marriage according to South African law - is entitled to damages for the loss of support. On the basis of this, it is submitted that there should be no reason why a spouse in a transsexual marriage could not claim for loss of support in the event of her 'husband' dying, in spite of the fact that there is no legal tie. However, this would entail the giving of legal status to the transsexual's marriage yet again.

59. 1983(2) 444 (C).

60. 1983(3) 939 (D).

61. Blacks in South Africa can chose whether they wish to be married by customary union or common law. The former is not recognised as a legally valid marriage. The latter differs from the civil/Christian marriage contracted between whites as a result of the legislation governing it, to prevent Blacks from being taken unawares by legal consequences with which they might be unfamiliar. With Blacks then the automatic property régime is not one of community of property but such community of property and profit and loss is excluded automatically by the Black Administration Act 38 of 1927. This was introduced because there is no concept of community of property in Black customary law. A customary union creates a legal relationship between two people and two families and the woman remains a perpetual minor, either primarily under the guardianship of her father or subsequently under the guardianship of her husband. Except in Natal, a customary union can be dissolved without the parties going to court - the same as the transsexual marriage. It is submitted that as the customary union is not a valid marriage, the decision in W v W has no bearing upon the parties and therefore the change of status should be recognised as the legislation envisaged. Thus a female-male would no longer be a perpetual minor and the post-operative transsexual should be allowed to marry in the post-operative role in the case of a customary union. If this is so, it is ridiculous that a post-operative transsexual could qualify for a customary union in the post-operative role - albeit a putative marriage - but if the same parties were contemplating marriage according to civil/Christian law, they would be debarred from proceeding.

VIII THE LAW OF TAXATION

For revenue purposes, whilst the marriage of the post-operative transsexual and his/her partner was in existence - before the W v W judgment - the couple would have been taxed as married persons. This taxation differs from that of a single person⁽⁶²⁾ and therefore on discovery that the marriage has never been in existence, an amendment of the tax paid should be necessitated. A 'married' person - as defined by section 1 of the Income Tax Act⁽⁶³⁾ - is entitled to deduct a larger maximum for medical expenses,⁽⁶⁴⁾ or a larger standard deduction under section 24E and is also entitled to higher primary rebates.⁽⁶⁵⁾ As the marriage involving the post-operative transsexual is null and void ab initio the parties concerned have been taxed as single persons and therefore all taxation that has occurred in respect of them, would be erroneous and open to amendment. Such an upheaval would bode ill for the administration and consequently incur a great deal of unnecessary work for the Department of Inland Revenue.⁽⁶⁶⁾ It might be suggested that in such a case the spouses would be treated as having been divorced thereby bypassing the necessity of the amendments for the previous years in which they were taxed as married people. It is submitted that this not only would be unfair on the persons involved who cannot regard their marriage as valid and therefore should not have been taxed as married people, but regarding the annulment, as a 'divorce' would be saying that the marriage is once again exulted to the status of validity. It is submitted that it would be easier and more equitable simply to regard these marriages as valid.

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62. In terms of the Tax Table for provisional Tax Payers, a married couple in which both spouses are earning invariably will pay more income tax than two people separately, as single tax payers. Furthermore, rebates for single and married people differ as well.
63. Act 58 of 1962.
64. Section 8.87.
65. Section 109.
66. There is an onus upon the taxpayer to keep records for the previous five years and therefore should the department in fact consider affording the parties in question the necessary amendments in their income tax returns, this could only be considered for those five years, as all other records would, in all probability have long since been destroyed.

IX THE CRIMINAL LAW

The South African courts accepted at an early stage⁽⁶⁷⁾ that "in South Africa the English view of the essentials of the crime of bigamy has prevailed".⁽⁶⁸⁾

In English law⁽⁶⁹⁾ bigamy is committed by:

"Whosoever being married' shall marry any other person during the life of the former's husband or wife, whether the second marriage shall have taken place in England, Ireland or elsewhere...".

However, there is a proviso to the effect that the accused is not liable, where, at the date of the second marriage, the first has been dissolved by divorce or annulment.⁽⁷⁰⁾

The South African courts have followed their English counterparts on the first two essentials of the crime namely:

1. a valid marriage which subsists. If it is void or polygamous⁽⁷¹⁾ there is no crime.
2. The accused must have gone through the 'form and ceremony' of marriage with another person⁽⁷²⁾ which means a form of marriage known and recognised by the lex loci as capable of producing a valid marriage. If the form - though sufficient in principle - does not apply to the parties for some reason personal to themselves, it still suffices for the crime of bigamy.⁽⁷³⁾ Moreover, if the second marriage would have been invalid by reason of some essential (non-formal) defect⁽⁷⁴⁾ it is regarded as a second marriage for the purpose of the crime nevertheless.⁽⁷⁵⁾

The South African courts however, do not follow the English rules as regards mens rea.⁽⁷⁶⁾ Although there are early decisions requiring the mistake of

67. R v Mdiya Lutuli (1902) 23 NLR 253 at 255; R v McIntyre 1904 T 804 at 898; R v Jacobs 1926 OPD 184.

68. R v McIntyre supra at 808.

69. In terms of section 57 of the Offences Against the person Act of 1861.

70. Milton op cit 242.

71. R v Sarwan Singh 1962 (3) All ER 612.

72. R v Allen (1872) LR 1 CCR 367; R v Robinson (1938) 1 All ER 301.

73. R v Robinson supra; Milton op cit 243.

74. Such as a too-close relationship: R v Brown (1843) 1 Car and Kir 144; R v Allen supra.

75. Milton op cit 243; R v Allen supra.

76. Milton op cit 243

of the accused to be both bona fide and reasonable, Milton states that these are attributable to the objective approach to intent, which was employed then sometimes. Now that it is clear that the test is always subjective, it is plain that there cannot be the requirement of reasonableness.

The rationes underlying the crime of bigamy were stated by Cockburn CJ in R v Allen⁽⁷⁷⁾ as follows:

"It involves an outrage on public decency and morals, and creates a public scandal by the prostitution of a solemn ceremony which the law allows to be applied only to a legitimate union, to a marriage at best colorable and fictitious and which may be made, and too often is made by means of the most cruel and wicked deception."

Something of the same idea was expressed by some of the Roman-Dutch writers⁽⁷⁸⁾ who considered bigamy as a breach of trust in regard to the subsisting marriage and a profanation of the Christian marriage ceremony. It is submitted by Milton⁽⁷⁹⁾ that bigamy is punished in South Africa, partly as a crime against the community - in that it offends the principle of monogamy which is regarded as the corner-stone of our society⁽⁸⁰⁾ and it is also considered an abuse of a solemn and important ceremony⁽⁸¹⁾ - and partly a crime against the person - as it may lead to "the most cruel and wicked deceptions" and to highly objectionable consequences for any unfortunate children of the second (or even the first) marriage.⁽⁸²⁾

77. (1972) LR 1 CCR 367 at 374-5.

78. For example, Matthaeus 48.3.1.13;7.8.

79. Op cit 244.

80. Glanville-Williams (1945) 61 Law Quarterly Review 76, cited in Milton op cir.243.

81. Glanville-Williams however attacks this idea and states at 78 that "the crime of bigamy as it now stands ... does not make sense except on the supposition that the marriage ceremony is a magic form of words that has to be protected from profanation at almost any cost in human suffering".

82. As Glanville-Williams (op cit 78) states, this is often the case. There are also situations in which the other party is a socius and the ceremony is no more than a "pathetic attempt to give a veneer of respectability to what is in law, an adulterous association".

Bigamy in South Africa then is defined by Milton.⁽⁸³⁾

"Bigamy consists in unlawfully and intentionally entering into what purports to be a lawful marriage ceremony with one person while lawfully married to another."

Like all other common law crimes, bigamy requires mens rea. For this, the accused must intend to enter into a 'second' marriage: he must know, or at least foresee the possibility at the time of the 'second' marriage, that the 'first' marriage subsists, yet go ahead and marry again. If he bona fide believes that the 'first' marriage was null and void ab initio, he lacks mens rea.⁽⁸⁴⁾ The burden of proving mens rea rests upon the state.⁽⁸⁵⁾ If the state therefore leads evidence from which it may be inferred reasonably that the accused had mens rea, the latter may run the risk of conviction if he fails to adduce evidence of bona fide error.

If we take as our first marriage one such as that in W v W, which is invalid, a spouse in this marriage - who was aware of the Nesdadt ruling - escapes liability for the crime of bigamy⁽⁸⁶⁾ on subsequently marrying, even though his action would be heinous as regards his first spouse, who might believe in fact that his/her marriage was valid.⁽⁸⁷⁾ Bearing in mind that it is not necessary for the parties to go to court for a declaratory order, it is not impossible that one spouse at least, is unaware of the invalidity of his/her marriage. If in fact, the 'bigamist' is unaware of the invalidity as well, it is submitted that this would suffice as proof of mens rea. However, this

83. Op cit 245.

84. E v King (1964) 1 QB 285; (1963) 2 All ER 561.

85. Milton op cit 247.

86. The traditional reasoning in regard to bigamy is that if the 'first' marriage is void it is utterly ineffective in law and does not qualify as the 'first' marriage for the purposes of the crime: Milton op cit 248. In terms of the Criminal Procedure Act 51 of 1977, the onus of proving the invalidity of the 'first' marriage rests on the accused (section 237(1)).

87. S v De Blom 1977 (3) SA 513 AD.

is not the end of the matter, as the other elements of the crime will have to be proven also. As the requirement relating to the existence of a valid first marriage would not have been satisfied, a person with all the necessary intention and unlawfulness, would escape liability for what society believes - as has been mentioned above - to be morally reprehensible conduct, because the law will not consider that a crime has been committed in fact. Pace(88) - with whom this author agrees - suggests that a transsexual or his 'spouse' who contracts another marriage should be guilty of bigamy, although, according to law, the first marriage is void. Thus the view is expressed that the transsexual marriage - for moral purposes - should be given legal recognition in this regard, making yet another notable exception to the W v W ruling.

As has been stated above, for the crime of bigamy, it is immaterial whether the second marriage is open to attack for some personal reason as long as there are the prescribed formalities of marriage. In South Africa, this means a civil or Christian marriage.⁽⁸⁹⁾ Thus, should a person who is married, subsequently go through the prescribed formalities of marriage with a post-operative transsexual, such second marriage would be deemed a valid marriage for the purposes of bigamy and if all the other requirements are met, then the accused would be convicted.⁽⁹⁰⁾

It is submitted that it is totally ludicrous that a transsexual marriage will be recognised for the purposes of bigamy if it is the second marriage, but not if it is the first. How can one type of marriage be both valid and invalid at the same time, within the same crime? Thus, as the law stands, one spouse from the W v W case would not be convicted of bigamy if he/she entered into a subsequent marriage, but any married person who subsequently married the plaintiff 'W', would be convicted of bigamy.

88. P.C. Pace 'Sexual Identity and the Criminal Law' (May 1983) Criminal Law Review 317.

89. R v Shasha 1948 (2) SA 996 (O) at 998.

90. R v Jacobs 1926 OPD 184. Here, the second marriage was invalid on the grounds that the clergyman was not a solemnised officer in terms of Article 4 of Law 26 of 1899 (that is, the form was wrong) therefore there could be no crime of bigamy. Furthermore a bigamous marriage has been given the status of a putative marriage in order to legitimate the children: Ngubane v Ngubane 1983 (2) 770 (T).

As the law concerning bigamy relates to the present law on marriage in South Africa, the courts would be obliged to follow the W v W decision in deciding the validity of a marriage and therefore could not reach the equitable solution which would arise if the legislation were followed. As it stands the law concerning post-operative transsexuals and the crime of bigamy is extremely anomalous and unsatisfactory.

In Snyman v Snyman ⁽⁹¹⁾ the court held that an action for damages under the actio injuriarum for the impairment of dignity and reputation is available to a 'wife' who has been induced to enter into a void marriage with a man who, unbeknown to her, has committed bigamy and is a party to an existing marriage. This is the first case in which a claim for damages arising out of bigamy, has been filed. It is submitted that if the plaintiff were a transsexual spouse, she would succeed in her action as Mrs Snyman did, even though the marriage is void on personal grounds as well. However, it is submitted that no similar action would lie for the transsexual spouse of the 'first' marriage in the event of her husband deserting her and entering into another marriage, because under these circumstances, he would be at perfect liberty to marry as there would be no legal bond between him and the transsexual. It is submitted that the injuria which Mrs Snyman suffered would be no different from that which the transsexual spouse of the 'first' marriage would suffer. There is no justification in treating a transsexual woman as having any less feeling and sensitivity than a 'biological' woman - in fact, due to her special circumstances, she probably would be far more sensitive about the issue than any other woman.

In passing, it need be noted that a party to a marriage involving a post-operative transsexual in which there are children - whether by previous marriage, adoption or artificial insemination ⁽⁹²⁾ - could not be convicted of incest with such child because there would be no legally recognised degree of affinity, ⁽⁹³⁾ even though such action would be unacceptable on moral grounds and possibly detrimental to the child. ⁽⁹⁴⁾ The definition of incest offered by Milton is:

91. 1984 (4) 262 (W).

92. Vide the Canadian case of Anderson v Luoma 14 Dominion Law Report. 1985 747 supra.

93. For more details on the crime of incest, vide Milton op cit 257ff.

94. Obviously if the female child were under the legal age, the crime committed would be rape in this case, but if she is of age, and consents, there is no crime.

"Incest consists of unlawful and intentional sexual intercourse between two persons, who, on account of consanguinity, affinity or adoptive relationship may not marry one another". (95)

Thus, following the decision in W v W there would be no unlawfulness on the part of a person in a transsexual 'marriage' and therefore no legal restriction on having sexual intercourse with a child of that union.

X CUSTODY AND CHILD CARE

while discussing the marital status of the transsexual, it is necessary to deal with the transsexual as a parent. Strauss⁽⁹⁶⁾ believes that to sanction the operation for a pre-operative, married transsexual would be justified only if it were in the best interests of the children of that marriage and was necessary to avert any anti-social tendencies. There has been one case to date dealing with the issue of fitness of the transsexual as a parent. In Christian v Randall (97) a thirty-eight year old female-male transsexual underwent corrective surgery and married a woman. The transsexual's former husband petitioned for custody of his four teenage daughters, alleging that the mother was an unfit guardian because her change in sex adversely affected the emotional development of the children. The court of appeal held that there was no evidence to this effect and noted the girls' scholastic success and generally well-adjusted lives.

Morris too, relates her own personal experience with her children.(98)

"How to tell the children what was happening was the hardest of all our problems. That something was happening was very apparent. ... We were not too afraid of their own reactions: they were past the most vulnerable years of their childhood ... More distressing, we thought, was the danger that they might be teased or mocked at school ... Helped along the way by sensitive teachers they seemed to have escaped the miseries of school taunting, and the more feminine I became, the more closer to my own reality, the closer I felt to them too ... the process was infinitely

95. Milton op cit 257.

96. Strauss (3) op cit 215.

97. 33 Colo App 129 615 P 2d 132 (1973).

98. Morris op cit 150. After the operation, she had to devise a new overt relationship with her family and decided on being her wife's 'sister-in-law' in order that she might retain her kinship with the family, as an 'adoring aunt'.

slow and subtle and through it all anyway ... I remained my same affectionate self ... It was not such a terrible thing after all. They (the children) had not witnessed the collapse of love, the betrayal of parentage, desertion or dislike. What they had watched was a troubled soul achieving serenity, and I hoped that in time they would come to see ... my strange life as I had seen it ..."

It would appear that in all probability the occurrence of a parent undergoing corrective surgery would not affect the parent's ability to care for his/her child/children. In fact it is submitted that in being granted a release from a bondage would improve the well-being of the transsexual, which would affect beneficially, any relationship with others. The aim of an order of custody is to provide the child with its true needs, thus the main consideration in deciding the suitability or otherwise of the parent to be custodian is of course what would be in the child's best interests. Both at common law ⁽⁹⁹⁾ and under the Matrimonial Affairs Act ⁽¹⁰⁰⁾ the interests of the child are of paramount importance. Logically, a change of sex should make no difference to the competence or otherwise of a parent and it is submitted, that if any alteration in the relationship is recorded it will be a positive one in that the parent finally attained peace of mind.

Whether or not a post-operative transsexual can become a parent by adoption has not as yet, been the subject of litigation, but it is this author's submission that transsexualism per se should not be a bar to parental competency.

The Child Care Act ⁽¹⁰¹⁾ provides inter alia that a child may be adopted, "(b) with the consent of the Minister, by a widower or widow or unmarried or divorced person if the child is not born of him or her'.

This subsection effectively covers all single people and therefore is no direct bar against the transsexual. Section 4(a) of the Act provides further that the applicant/s must be possessed of adequate means to maintain and

99. Shawzin v Laufer 1968 (4) SA 657 (AD); Fletcher v Fletcher 1948 (1) SA 130 (AD).

100. Act 37 of 1953. Section 5(1) provides that the court may "(b) on the application of either parent of a minor whose parents are divorced or living apart, if it is proved that it would be in the interests of the minor to do so, grant either parent the sole guardianship ... or sole custody of the minor...".

101. Act 74 of 1983, chapter 4 section 17. The Child Care Act repealed the Childrens Act 33 of 1960, which in turn had repealed the Adoption of Children Act 25 of 1923.

educate the child and subsection (b) states that the applicant must be of good repute and a person fit and proper to be entrusted with the custody of the child and furthermore, that the proposed adoption will serve the interests and be conducive to the welfare of the child.

It is submitted therefore, that there is no reason why a person merely by virtue of his transsexualism, would not make a good parent. There are many 'normal' people in society who make appalling guardians and good parenthood is dependant on one's gender identity or sex in no way.

It is submitted in conclusion, that in all the areas of law covered in this chapter, there is no example which justifies the decision of Nesdadt J in W v W. On the contrary, there is such a maze of ridiculous and anomalous situations that the whole decision is rendered meaningless. Even if W v W was followed only for marital purposes, we would still be faced with the dilemma of a person having two sexes for different purposes, which would in effect, render life for the individual concerned, just as unbearable as life before the operative intervention. It is submitted further that it is inconceivable to this author how anyone - especially a person with the fate of others in his hands - could perpetrate such an inhuman and criminal action on an individual, for no justifiable reason.

C H A P T E R X
O T H E R A R E A S O F L A W

A. THE CRIMINAL LAW

I INTRODUCTION

"Life is a test and this world a place of trial. Always the problems - or it may be the same problem - will be presented to every generation in different forms".

(Winston Churchill).

Certain aspects of the criminal law are affected directly by the sex of an individual. It is the purpose of this chapter to deal with those areas and where possible to offer case studies on the particular topics.

II COMPARATIVE LAW

1. The United Kingdom.

In England, as a result of the decision in R v Tan and Others,⁽¹⁾ the status of the post-operative transsexual has found no legal recognition in the criminal law, because the court saw fit to follow the decision arrived at in Corbett v Corbett.⁽²⁾ In the former case, the accused was one Gloria Greaves who had undergone corrective surgery and thereafter had lived as a woman. She appealed against a conviction for inter alia, living on immoral earnings, contrary to the provisions of the Sexual Offences Act.⁽³⁾ The appeal was based on the contention that the statutory provision expressly made the crime in question one capable of being committed by a male only; the effect of the operation had been to make 'him' a woman and thereby precluded conviction. The court of appeal unanimously rejected this argument by applying the judgment in the Corbett case. The court was of the opinion that,

"Common sense and the desirability of certainty and consistency demanded (that) Corbett should apply."

Therefore, despite operative intervention, Greaves remained a man and her present sex was no bar to conviction. It is interesting to note that Greaves however had been released from a woman's prison on bail, pending appeal. This action was totally inconsistent with the emphatic statement of the court that Greaves had never changed sex.

1. (1983) 3 WLR 361.
2. (1970) 2 All ER 33.
3. Of 1956, section 30.

The decision in Tan and Others will be followed in other laws relating to crime in which sex is a salient factor, and therefore it would appear that the post-operative transsexual can neither rape nor be raped.

2. Canada.

There are no direct cases in issue in Canada, but it would appear that if one gives due weight to the Criminal Code and subsequent cases such as Regina v Johns and Miller v Miller,⁽⁴⁾ on the definition of penetration therein, a post-operative transsexual could be regarded as qualifying as a victim for the crime of rape. In R v Ramos⁽⁵⁾ a man who had touched a woman's breasts and had kissed her in the nape of her neck was charged with sexual assault, contrary to section 246(1)(b) of the Criminal Code.

"... above all the courts should deal with common sense and basic societal values. Here, the accused's conduct amounted to a gender-based assault on a woman ... This was the kind of conduct that the legislature had sought to prohibit".⁽⁶⁾

It is submitted therefore that in terms of this wording, a post-operative woman would be considered as a woman for the purposes of rape because if the mere touching of the breast constitutes a sexual assault, the invasion of the body can be seen as "gender-based" too and obviously the type of conduct which "the legislature has sought to prohibit". Of course there is the danger that the Corbett decision might be followed here, but it is trusted that the Canadian courts will give more weight to the cases already decided in their jurisdiction and apply the same principles to the post-operative transsexual.

III SOUTH AFRICA

It is submitted that in South Africa, if an accused - who is charged with a sexual offence - attempts a defence that the victim was not of the required sex for the definition of that crime, but was in fact an intersex or a post-operative transsexual, the court could do one of three things:

4. (1947) OR 213 CA.

5. NNT Ct 370 45 (1985) Crim Repts 3rd series.

6. See also Carignan v Master Craft Publications Ltd (1984) 5 CH RPD 2282 (BC Brd of Inquiry); R v Dave BC Co Ct Cashman Co Ct J (24 May 1984).

1. it can follow the line of reasoning raised by the defence, thereby following the decision in *W v W* and ignoring operative intervention;
2. it may convict the accused of one of the lesser offences that may apply, such as gross indecency; or
3. it may convict the accused for the offence charged, thereby giving substance to the 1974 legislation and recognising the change and the operative intervention.

Let us take rape for instance. The crime of rape consists in intentional, unlawful, sexual intercourse with a woman without her consent.⁽⁷⁾ In general it is not unlawful for a man to force his wife to have intercourse with him. It follows that, if, by mistake of fact, X believes Y to be his wife, he does not foresee the possibility that his conduct may be unlawful.⁽⁸⁾

The rule that a husband cannot rape his wife was formulated in English law by Lord Hale and approved of and adopted by several English courts. It was also adopted by South African courts.⁽⁹⁾ Lord Hale stated that,

"The husband cannot be guilty of the rape committed by him upon his lawful wife, for by their mutual matrimonial consent the wife has given up herself in this kind unto her husband which she cannot retract".⁽¹⁰⁾

This dictum is not altogether satisfactory because a woman, in consenting to have sexual intercourse in marriage, does not consent to force or violence necessarily. Furthermore, a wife is entitled - under certain legal circumstances - to refuse to have sexual intercourse with her husband.⁽¹¹⁾ It is also possible that a husband may be convicted of assault in forcing his wife, even though not of actual rape, which is inconsistent to say the least.⁽¹²⁾

7. Milton op cit 435.

8. Milton op cit 437.

9. R v Mosago 1935 AD 32 at 24; R v Gumede 1946 (1) PHH 68 (N).

10. In Milton op cit 437.

11. For example, when he is suffering from contagious venereal disease: Ainsbury v Ainsbury 1929 AD 109 at 117-8.

12. R v Miller (1945) 2 QB 282 at 292; (1954) 2 All ER 529 at 533.

It is submitted therefore by Milton⁽¹³⁾ and others that this rule be abolished.⁽¹⁴⁾

For the crime of rape there must be penetration⁽¹⁵⁾ but it suffices if the male organ is, in the slightest degree, within the female's body.⁽¹⁶⁾ It is not necessary that the hymen should be ruptured in the case of a virgin,⁽¹⁷⁾ or that semen be emitted.⁽¹⁸⁾ A man cannot be raped and neither can a woman rape.⁽¹⁹⁾

Thus, on the ruling of *W v W* a post-operative male-female transsexual cannot be raped because she has not changed to the female sex, even though she may have undergone the bodily invasion necessary and the attendant psychological trauma.

As Taitz points out⁽²⁰⁾ there are other laws peculiar to South Africa for the protection of South African women, which involve sexual offences. Under the Immorality Act⁽²¹⁾ these provisions are against, inter alia:

"(a) the procuring of or attempting to procure any female to have unlawful carnal intercourse with any person other than the procurer, or in any way

13. Op cit 438.
14. In a case reported in the Jerusalem Post International Edition (28 September 1980), it was held that a man was guilty of the crime of rape against his wife. It was held further that the English common law in this regard, which treats the marriage relationship as conferring upon the husband the right to impose his sexual will on his wife, is inapplicable to Jewish residents in Israel. It was found that this doctrine of submission was sufficient to outrage human conscience and reason "in an enlightened country in our times": 'Current Topics' (1981) 55 Australian Law Journal 60.
15. *Van Leeuwen* CF 1.5.23.12; *R v Theron* 1924 EDL 204; *R v V* 1960 (1) SA 117 (T); *R v E* 1960 (2) SA 691 (FC) at 692.
16. *R v Lines* (1844) 1 C & K 39.
17. *S v K* 1972 (2) SA 898 (AD) at 900C.
18. Sexual Offences Act of 1956: "intercourse shall be deemed complete upon proof of penetration only".
19. Milton op cit 441.
20. J. Taitz 'Some Criminal Law Anomalies Brought about by a Sex Change' (February 1985) THRHR 97.
21. Act 23 of 1957.

assisting to bring about such intercourse;⁽²²⁾

(b) the inveigling or enticing of any female to a brothel for the purpose of unlawful carnal intercourse or prostitution, or the concealing in any house or place any female so inveigled or enticed;⁽²³⁾

(c) the procuring or attempting to procure any female to become a common prostitute or to become an inmate of a brothel."⁽²⁴⁾

It would appear that none of these provisions are available to the post-operative transsexual female. Following on this then, a post-operative transsexual can avoid prosecution for prostitution by assuming her 'legal' sex for the duration of the trial.⁽²⁵⁾

Prostitution - which is usually defined as 'the offering by a woman of her body for hire'⁽²⁶⁾ - is a form of sexual immorality which is partially prohibited by the criminal law.⁽²⁷⁾ As a profession it is tolerated, but if it involves solicitation then it becomes an offence.⁽²⁸⁾ In South Africa the accused must be proven to be a 'common' prostitute, which is one who habitually plies the trade of prostitution.⁽²⁹⁾ It is also an offence for any person to knowingly live off the earnings of prostitution.⁽³⁰⁾

22. Section 10(a) of the Immorality Act.

23. Section 10(b) of the Immorality Act.

24. Sections 10(c) and (d) of the Immorality Act.

25. The prosecution, it is submitted, could not enter an alternative charge of homosexual conduct because that and the crime of prostitution are mutually exclusive. It would be tantamount to declaring that a person is being prosecuted for being female, and failing that, in the alternative, for being male. This is clearly asinine.

26. R v De Munck (1918) 1 KB 635.

27. J.R. Milton South African Criminal Law and Procedure volume III (1971) 343.

28. Report of the Wolfenden Committee of Homosexual Offences and Prostitution (1957) para 247 at 257; Police Offences Act 1882 (Cape) and the Police Offences Ordinance No. 21 of 1902 (OFS).

29. R v Doingo 1944 EDC 161.

30. R v Kafakarotwe 1951 (2) PHH 96 (SR) 27.

B. INCARCERATION.

I INTRODUCTION.

There is the possible problem regarding the incarceration of the transsexual either during treatment or after surgery, in the event of a criminal conviction, if the change of sex is not recognised legally.

II COMPARATIVE LAW

1. The United States of America

There are a number of cases in this area, on the treatment in prison of both pre-operative and post-operative transsexuals. In Mostyn v State of Cali-⁽³¹⁾ the petitioner wished to be treated as a special case, as she claimed that her life would be in danger if housed with men. She obtained a preliminary injunction to be kept out of the general male population of any prison and the district Judge recommended that

"... she be kept in an administrative segregation unit in a hospital setting where she could continue her hormone treatments".

Similarly, an inmate of the all-male Penitentiary in Iowa is suing the State to obtain corrective surgery whilst in prison.⁽³²⁾ White alleges that it is "cruel and unusual punishment" for prison officials to deny this surgery.

A third instance, is the unreported case of one Rickie Bruce⁽³³⁾ who was sentenced to five years for theft. The judge concerned offered to recommend that the Department of Corrections "seriously consider" providing the prisoner with corrective surgery if he so requests. The judge added that he considered the funds for the operation would "be money well spent by the State of Illinois".

There has also been a case in which the transsexual did not receive such humane treatment as the above cases. Here a pre-operative transsexual - whose physique was so feminine that 'she' earned 'her' living as a topless dancer - was sentenced to twelve months imprisonment for robbery. 'She' was incarcerated in an all-male prison and consequently subjected to much sexual abuse.⁽³⁴⁾

31. Reported in UPI 14 April 1983.

32. White v State of Iowa UPI 4 April 1984 .

33. Reported by UPI Peoria, Illinois 24 June 1983.

34. Unreported case cited in McColl Kennedy op cit 123.

2. The United Kingdom.

In England, when faced with the dilemma of incarcerating a post-operative transsexual, the court adopted the sensible stance and gave effect to the post-operative status.⁽³⁵⁾ According to Morton⁽³⁶⁾ this was unusual practice because the transsexual in England is normally remanded to the prison of the original sex and may, at the discretion of the prison doctor, have the hormone treatment discontinued. In any event, this was a pyrrhic victory for the transsexual because as the judgment demonstrated, the post-operative status was ignored for the purposes of conviction as the court followed the decision in Corbett v Corbett.

III SOUTH AFRICA

South African authorities have been confronted also with the dilemma of the transsexual sentenced to imprisonment, but they neatly side-stepped the issue by granting bail in circumstances which would not warrant such procedure normally.⁽³⁷⁾

"In Germiston, a man undergoing a sex change operation was granted bail yesterday by a Germiston Regional Court magistrate because of the difficulty of holding him in custody. Because of his condition, Mr Lang was kept in isolation at the New Johannesburg Prison. He ate and exercised separately."

It must also be remembered that a female cannot be subjected to corporal punishment.⁽³⁸⁾ If the post-operative status were not recognised in this regard the transsexual would be distinguished from the biological woman and be subject to this harsh - and it is submitted, barbaric treatment - despite the fact that she would have attained full sexual identity as a female, through operative intervention.

35. R v Tan and Others (1983) 3 WLD 161, in which Gloria Greaves was imprisoned in a female prison pending bail.

36. op cit 621.

37. The Daily News (March 1984).

38. Section 37 of the Criminal Procedure Act 8 of 1959.

C. INSTANCES OF SEX DISCRIMINATION

I INTRODUCTION

There are several areas of law in which a person might be discriminated against - either beneficially or detrimentally - on account of his/her sex. It is important therefore to decide legally to which sex the post-operative transsexual belongs for these purposes.

II COMPARATIVE LAW

1. The United States of America.

The majority of recent court decisions have rules that title VII of the Civil Rights Act of 1964 as amended which prohibits discrimination on the basis of sex, does not apply to the transsexual. In Voyles v Davies Medical Center,⁽³⁹⁾ a female transsexual who planned to undergo corrective surgery was dismissed from her employment as a technician at the Medical Centre. The employer conceded that her dismissal was grounded on the fact that she wished to be transsexed and stated that such change might have an adverse effect on patients and co-workers. The plaintiff claimed that she was the object of sex discrimination, based on her transsexualism, and that this discrimination was prohibited by civil right. The court felt at a loss for a remedy.

"Situations involving transsexuals ... were simply not considered, and from the void the court is not permitted to fashion its own judicial interdictions".

Another case involving equal protection arguments in the context of employment discrimination is that of In Re Tenure Hearing of Grossman⁽⁴⁰⁾ which considered as well, the issue of the effect of transsexualism on young children. Paula Grossman was a male-female transsexual who had taught music as a male at an elementary school for fourteen years. While in his fifties, he underwent corrective surgery. Afterwards, she was summarily dismissed on the grounds of "her incapacity" to continue teaching. The New York Superior Court upheld the dismissal, reasoning that it was not her unfitness to engage in the teaching profession which constituted her incapacity, but rather it was her inability to present an acceptable psychological model to elementary students at the school because of the knowledge of her change of sex. It was held that Miss Grossman's presence would have an adverse mental effect upon the ten year old students. Miss Grossman was however offered another post at another school in her new sex role. However, it would appear that the civil rights protection clauses have been of little if no avail to the transsexual.

39. 403 F Supp 456 (N D Cal 1975).

40. 127 N J Super 13, 316 A 2d 39 (1974).

2. The United Kingdom.

In England, the Equal Pay Act of 1970 and the Sex Discrimination Act of 1975 prohibit discrimination on the grounds of sex in inter alia the employment sphere.⁽⁴¹⁾ The statutes employ the terms 'a man' and 'a woman' and the question has arisen as to how these words are to be defined. In White v British Sugar Corporation⁽⁴²⁾ a female transsexual who had not undergone full surgery had obtained employment with a corporation which was under the impression that she was a man. When her male colleagues discovered that she was female they lodged a complaint with their employer who felt compelled to dismiss her. White brought an action under the Sex Discrimination Act stating that the employer was treating her "less favourably" than he would a man. The employer in his turn contended that inter alia the Act in question was inapplicable because the plaintiff was a man. The industrial tribunal rejected the defence and held that the biological test as enunciated in the Corbett decision should be used to define 'a man' and 'a woman' for the purposes of the Act. Therefore, although the plaintiff regarded herself as male, dressed as a male and had been treated by the relevant authorities as a male she was a biological female and therefore a woman for the purposes of the Act. The ambit of the statute was applicable therefore, and the tribunal had jurisdiction. However, the tribunal went on to hold that the transsexual had not been dismissed because of her sex, but because of the fact that she had misrepresented herself to her employer. It is submitted that the rationes in respect to the misrepresentation was correct in so far as the transsexual had perpetrated a fraud upon the employer, but it is submitted further that should have made no effect, because whether the transsexual was male or female should have made no difference to her obtaining the job. If it did then there is clearly a case of discrimination.

Mason⁽⁴³⁾ reports of another instance of sex discrimination in the vocational field. Since the law does not recognise him in his post-operative role as a male, the established Church will recognise him in this way only and therefore will not permit him to offer himself for Ordination as a priest. At the same time, because of his masculine appearance, the possibility of him becoming a deaconess, is remote.⁽⁴⁴⁾

41. Armstrong op cit 94.

42. 1977 1 RLR 121.

43. Op cit 88.

44. Ibid.

"this is especially galling when colleagues go on to theological colleges whilst I remain an unemployed graduate ... Whilst being grateful for the love shown me by people, I am totally disillusioned with the Anglican Church as an institution".⁽⁴⁵⁾

Unlike potential women priests, he cannot make a fuss about the refusal to ordain women and he is accepted as a male server in the cathedrals - which is most incongruous to say the least.⁽⁴⁶⁾ Furthermore, as a legal woman he is entitled to retire at sixty which it is submitted would be unfair to other males as Mason regards himself as much a male as any biological male.

3. Canada.

Generally, the law of delict does not distinguish between males and females, but in certain cases this has occurred in Canada. In personal injury awards occasionally men have received higher damages than women for similar injuries. In Du Bocquet v Caron⁽⁴⁷⁾ \$12 000 was awarded to a male for a fractured tibia and fibula, while in Therrien et al v White⁽⁴⁸⁾ only \$4 400 was awarded to a female for fractures to the lower leg and collarbone, which in addition had caused bad scarring which necessitated further surgery. Since courts normally accept persons on their external appearances for the purposes of delictual matters, it would appear that the post-operative transsexual would be treated in the post-operative role. However, it is submitted that where it would be to the advantage of the transsexual to claim that she is in fact a man on the grounds of her chromosomal constitution the court would ignore this contention in this case, even though the post-operative transsexual would in all probability not be afforded legal recognition in other spheres such as the marital sphere.

III SOUTH AFRICA

Under the Black (Urban Areas) Consolidation Act⁽⁴⁹⁾ movement of Blacks is restricted. Section 10(1) states that

"No black shall remain for more than 72 hours in a prescribed area unless he produces proof in the manner pre-

45. There would appear to be no ethical preventative to the recognition of the post-operative role when taking into consideration the fact that many men of the cloth have condoned the corrective surgery: Smith op cit 976.

46. Mason op cit 88.

47. (1975) 12 NBR (2d) 283 (NBQ).

48. (1975) 12 NBR (2d) 541 (NBSC).

49. Act 25 of 1945 as amended.

scribed that ... (b) he has worked continuously in such area for one employer for the period of not less than 10 years or has lawfully resided continuously in such area for a period of not less than 15 years".⁽⁵⁰⁾

Therefore, not only does the Act specifically preclude females from being in the area - except for those mentioned in subsection (c), being the wife or unmarried daughter of the aforementioned black,⁽⁵¹⁾ but even if it did extend to females it could be argued that a post-operative transsexual female now has a new identity and therefore does not satisfy the requirements of subsection (b) as the time period would be broken by the change of sex. There has in fact been such a case. A Zulu waiter in a Durban hotel underwent corrective surgery and afterwards wished to remain employed in the said hotel in her capacity as a waitress. The hotel management was prepared to oblige, but the transsexual fell foul of section 10 as the post-operative role was recognised and as a woman, the transsexual could no longer remain in the prescribed area. This is one instance in which operative intervention was recognised, but it is submitted, possibly because it was to the detriment of the post-operative transsexual.⁽⁵²⁾

In South Africa too, there is compulsory conscription for military service in the case of males but not in the case of females. If, in the instance of a post-operative female, W v W were followed, then this female would be obliged to undergo military training as a man. Either she would be sent to an ordinary military camp - and therefore subject to similar harrassment as in the case of incarceration, or she would be sent to an all-female camp to avoid this problem. Not only would the latter course of action be a contradiction in terms because this would in effect be giving recognition to the female status, but at the moment at least there is no compulsory conscription for females so why should a female transsexual be obligated to undergo training? It is submitted that the decision in W v W would not be followed for the purposes of military training, but only on the ground that a post-operative male - who chose to be male - should suffer the liabilities of that sex, as well as reap its benefits, another instance of doing what is in the least interest of the transsexual.

50. Subsection (b) was substituted by section 3 of Act 97 of 1978.

51. Amended by section 6 of Act 16 of 1979.

52. This information was supplied to this author by an Influx Control Officer of the Kwa Mashu Administration Board.

IV CRITICAL EVALUATION

As far as the post-operative transsexual's stance in the criminal law goes, it is evident that whatever function the crime of rape may have fulfilled in earlier times, its modern function is understood to be that of protecting women from sexual abuse. In other words, it is not so much the fact that rape involves unlawful sexual intercourse as the fact that it involves an invasion of the integrity of a woman's person and an invasion of her personal dignitas which renders the act punishable.⁽⁵³⁾ If one were to ignore operative intervention on the part of the post-operative transsexual, it is submitted that this would be a blatant disregard of the object of the crime of rape. It is submitted further that the psychological - and now also the physical - woman has just as much entitlement to the protection afforded by the law in this regard, as does a biological woman. Not to recognise this protection is to deny the fact that the transsexual is a human being, since - regardless of her post-operative appearance and her 'life long conviction' - the law ignores her sexual identity and her bodily integrity and privacy are open to gross violation with no real relief for the physical abuse and mental anguish.⁽⁵⁴⁾ Granted, the abuse of the body could be regarded as an assault but this does not detract from the fact that the transsexual had been violated sexually. The assault could not even amount to sodomy as intercourse involving an artificial vagina in no way could be regarded as anal intercourse. It is submitted that a charge under the lesser crime of assault hardly assuages the victim's suffering and a transsexual should not have to be grateful for 'small mercies' and forced to settle for second best.

"It makes no sense at all to tell an attractive transsexual employed as a secretary, possessed of all the necessary documentation of her sex change, and all the physical attributes of her new sex: breasts, female figure, and vagina (albeit a constructed one) that she can pass as a woman but cannot be raped because she is a man".⁽⁵⁵⁾

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53. As rape is a species of assault, it is classified as a crime against bodily security rather than a crime against morality such as incest, bigamy and sodomy: Milton op cit 434.
54. There are the lesser charges of assault or gross indecency, but all elements must be proven: if a person has the intention to rape he has not necessarily the requisite intention to assault.
55. McColl Kennedy op cit 123.

A corollary to the above premise of course is that a post-operative male - who manages to penetrate a woman without her consent - would escape criminal liability for rape in that, on following W v W 'he' was still a woman and as such could not commit rape. It is submitted that this is totally objectionable and contra bonos mores. It is easy to imagine the added psychological shock of a victim when told that in fact she had not been raped according to the law, but at most, has been assaulted only.

"in any system of criminal law, the problem is likely to arise of how best to reconcile the importance of enforcing proper standards, regarded objectively, with the importance of treating the individual fairly".⁽⁵⁶⁾

It is submitted that there is no fairness in disregarding operative intervention because in doing so, one is disregarding the individual's psyche which could be damaged irreparably. The transsexual should not be denied that peace of mind and the protection which biological females claim as a right. As the Wolfenden Report stated,

" the function of the criminal law is to preserve order and decency, to protect citizens from what is offensive or injurious...".

Milton⁽⁵⁷⁾ has stated that save for a wife, "there are no women in respect of whom rape cannot in law be committed", but in following the decision in W v W a whole category of women is created who are barred from protection.

It would appear from the cases on sex discrimination, that where it is to the detriment of the transsexual to be discriminated against, this has occurred. Although it is of course essential for courts to strike a balance between the interests of the transsexual and other parties who might be affected - and it would be illogical to advocate that the transsexual's personal interests should always prevail - it is submitted that where the other party is an adult, no averse discrimination should be made against the transsexual and that it is for the adult society to be more tolerant and less bigoted. Furthermore, despite the fact that young children may be affected adversely by confrontation with transsexualism - as was held in the case of Grossman - it has not always been seen this way - as Christian v Randell demonstrated - and furthermore the child should be made aware of the phenomenon as early as possible and not be hidden from reality. It is submitted that

56. R v Krull 1959 (3) AD, per Schreiner JA.

57. Op cit 441.

to bring the child within the ambit of the problem will be to make for a more compassionate adult which is necessary to break down convention.

Transsexualism is not an evil: it is a fact of life and the sooner this is realised, the better for all. It is submitted that the heavy reliance on the chromosomal test - as the above cases have indicated - is a medical inaccuracy and therefore a legal sine qua non. The type of chromosomal constitution which a person possesses has no relation to the ability to perform in and contribute to, society.

V SUGGESTED SOLUTIONS.

Even though other courts of law are not obliged to follow the Nesdadt decision in other fields of law, in South Africa, it is submitted that this will, in all probability occur, as it did in England, with the criminal case of Tan following the civil one of Corbett. It is submitted however, that the only equitable solution for the transsexual would be to ignore the W v W judgment and accord the post-operative transsexual full recognition in the legal sphere in his desired role. If this occurs then it is evident that a post-operative female will be capable of being raped, and as a woman, will be afforded the full protection of the criminal law, as all other women are. It is submitted therefore that if a post-operative transsexual is capable of being raped, she is surely capable of being a woman for the purposes of marriage. In the Canadian case of Miller v Miller,⁽⁵⁸⁾ it was held that penetration for consummation was less than that required for rape. It is patently idiotic therefore to consider a transsexual as capable of being raped - which action is a crime - but incapable of marrying - which action is a private, consensual matter. The ludicrousness of the situation is demonstrated by the following quote:

"Thus, if penetration is necessary and sufficient condition for carrying out the act, whether for the purpose of consummation, adultery or rape, the act may be accomplished provided only that the necessary organs are possessed by both parties, and if the parties do possess such organs then it may be taken that there is a sufficient degree of sexual differentiation for that particular purpose".⁽⁵⁹⁾

It is submitted that the decision in W v W should not be accorded any recognition in other fields of law, and that the post-operative transsexual should be recognised legally in the desired role. To ensure this the legislature should

58. 1947 OR 213 (CA).

59. Finlay op cit 125.

provide for complete legal coverage in the new role, as has been done in West Germany. The ultimate goal of the post-operative transsexual is total acceptance in society as a member of the new sex and, it is submitted that this is a basic right which should not be denied him.

THE CONCLUSION

"And I went on amateurishly to sketch a plan of the soul so that in each of us two powers preside, one male; and in the man's brain the man predominates over the woman and in the woman's brain the woman predominates over the man. The normal and comfortable state of being is when the two live in harmony together, spiritually co-operating. If one is a man, still the woman part of the brain must have effect; and a woman must also have intercourse with the man in her. Coleridge perhaps meant this when he said that a great mind is androgenous ... It is when this fusion takes place that the mind is fully fertilised and uses all its faculties."

(Virginia Woolf: A Room of one's Own)

All in all, the law regarding transsexualism as a whole is unsatisfactory to say the least. This author wishes to offer a few suggested solutions which may facilitate a unified and therefore, equitable view of the dilemma.

The term 'sex' is a very nebulous one and the law only recognises the polarities of male and female. As each of us is a combination of both - so much so that in order to produce testosterone, one must have present the female hormones, initially - it is strictly inaccurate to claim that we are one to the exclusion of the other. However, most 'normal' people show a marked preponderance for the one, with the other manifesting itself in a less noticeable way. Thus, for all intents and purposes, we appear by our actions, thoughts, behaviours and anatomies - to be either male or female. But it must not be forgotten that there are those people in whom this dominance by the one 'sex type' is not so marked and in fact, is in fluctuation, or those people whose dominant sex is not the apparent, physical one. In these cases, it is ludicrous to try and classify the individual by visual biological means, into male or female. There should in fact be a third category of intersex, but at this moment in time, when the law only recognises male and female one must slot these people who do not conform, into the sex-typing most suited to their needs.

The basis on which the sex of an infant is determined is, it is submitted, also unsatisfactory. The chromosomal test must be regarded as the least

important and the visual genitalia test as far from infallible. It is submitted, however, that in the absence of evidence to the contrary, the physical sex of the infant should be used as a temporary determinant of the individual's sex. This necessarily indicates that the birth certificate of a person should be a temporary document, subject to later alteration. In the event of contradictory manifestation of sexual identity at a later developmental stage, the birth certificate should be altered and at this instance in which the sexual identity of the individual is now certain, should then be made a permanent legal document. Obviously, if a test is found which is as infallible as human error permits, for determining the sex of the individual at birth or before - as the H_Y antigen or gene probe tests may prove - then such temporary measures could be dispensed with. With the temporary birth certificate system, once the transsexual has been diagnosed, his temporary birth certificate can be amended to reflect the true position and the document will then become a permanent one. If the corrective surgery is required, then it should be performed as soon as feasible to allow the individual to live in his desired role from as early an age as possible. The operation cannot be seen as a change of sex in this case. The true sex is merely re-affirmed. It is not a case of the creation of a new individual, but rather the process of metamorphosis: the life of the pre-operative transsexual is a cacooned one and on emergence therefrom - through the aid of the surgery - the real, self-contained individual is revealed.

If however, the suggestion of the temporary birth certificate - which will dispense with all legal problems relating to transsexuals in their post-operative roles - is not acceptable then it remains to be stated that in this controversial area the law must follow the guidance of the medical profession. Not only is sex a medical term - nowhere is it legally defined; the law speaks of man and woman, but cannot agree as to what these terms really mean - but the classification of sex-types - including the phenomenon of gender dysphoria - are necessarily medical issues. There is no strict bipolarity of sex in medicine as there is in law: intersex plays a very large part in medicine: it has no part in law. Regarding transsexualism, it is not surprising that there is so little correlation between medical advancement and legal judgments. As Strauss puts it,

"... there is a certain amount of legal suspicion between the science of law and psychiatry".⁽¹⁾

1. Strauss (2) op cit 79

Courts have at times - probably through ignorance - shown a certain amount of scepticism towards expert psychiatric evidence. In R v Von Zell⁽²⁾ Vanden Heever JA referred to psychiatry as,

"... an empirical and speculative science with rather elastic notation and terminology which is usually wise after the event."

Jurists in turn, have been accused by psychiatrists of over-simplification and being unscientific. The latter sentiment is one with which this author concurs: we have seen how judges tenaciously hold onto the chromosomal test for sex, despite the fact that medical science has long since proved its ineptness.

"To disregard modern, scientific knowledge in the reform and practice of law would be altogether shortsighted and unjustifiable. If this is done, the law would run the risk of degenerating into some kind of intellectual game unrelated to the realities of life."⁽³⁾

It is more than obvious that gender dysphoria is here to stay - and has, in all probability, been with us since time immemorial, but has not been classified as such. The battle between the physical and the mental is no new one either, which is not surprising as every human being is a duality of both. To this author, the ultimate attainment of the enlightened human being is a state of spirituality - a oneness with the whole creation. But until such time as this goal can be reached feasibly, we are living here and now on the physical plane of this earth. We have been endowed with mental capabilities and by reason of this, are supposedly superior to animals, who live by instinct and physicality alone. Thus, it is logical to assume that the mental state is superior to the physical state: the mind dominant over the body. With this tenet no one can argue. Therefore, it is submitted that there is no reason why the mind should not continue its dominance in the case of the transsexual. Why should transsexualism be viewed as the 'healthy body v the obsessed mind'? Why is the mind not the healthy element and the body the mistake? There are of course, many cases of wrong diagnosis, but so too, are there many cases of true transsexuals. In such cases as the latter, the mind should be afforded

2. 1953(3) SA 301 (A) at 311.

3. Strauss (2) op cit 102.

its rightful precedence and the subservient body altered accordingly, if so desired. Simply because surgical procedures are not as yet fully advanced is no reason to state that alignment of the body to the mind, is wrong. If we all had to wait for things to be perfect before we considered them, there would be lamentably little progress anywhere. This is not to say that doctors may experiment unrestrainedly. The transsexual makes the ultimate decision to undergo surgery, with the full knowledge that such procedures are as yet imperfect, but also with the knowledge that he was perhaps taking a momentous move in the right direction.

One major drawback at the moment, is the lack of regulatory procedure for the operation. Pre-operative screening is vital in order to eliminate possible mistakes and incorrect diagnoses. At present, there is no extensive evaluation in South Africa, as there is in the reputable clinics in the United States.

"I think many people who've had corrective surgery, really only needed good psychology to get them right. At the moment it is far too easy to have corrective surgery performed in South Africa. All you basically need is a report from a psychiatrist and psychologist, and a gynaecologist will perform the operation. In a country like Britain you have to wait for years ... the lengthy process whittles down all but the most determined patients - and even then about 60% are turned down"⁽⁴⁾.

The procedures adopted should be designed to ensure that the patient is transsexual; that recourse to the surgery is the only beneficial treatment available; that the patient is completely aware of the possibilities and limitations inherent in the procedure and that the surgery has a strong probability of improving the patient's condition.⁽⁵⁾

Furthermore, in order for clinical guidelines to be effective, one would have to ensure that surgery was performed by skilled surgeons only, in

4. Scope Magazine (1 June 1984) 40.

5. Smith op cit 974

highly select clinics which could provide follow-up. It is clear that the current abuse comes from the wide-spread availability of the surgery. Another important factor insisted on by most clinics, is the unmarried status of the transsexual, which obviates all the legal difficulties that would ensue, should the transsexual be married. The observance of cautious pre-operative procedures also creates a strong presumption that the operation is performed for therapeutic purposes. The results of the surgery are too severe and too permanent to allow its unfettered use, therefore strict evaluation measured by the standards of the Harry Benjamin International Gender Dysphoria Association and others, should be the legal prerequisite and those doctors who do not follow such procedures, should be answerable in either criminal or civil proceedings. In this way, the possibility of error and regret must be minimised and the jurist will feel secure in the knowledge that such drastic surgery is available only to those who have been adjudged thoroughly, to warrant it.⁽⁶⁾ This author strongly recommends therefore that such procedures as outlined above, be enforced by legislation and only when they have been satisfied, should the qualifying patient be permitted to proceed with the irreversible surgery.

But this choice on the part of the transsexual would be meaningless, if legal effect was not given to it. The law governs most actions of an individual in society and as such, has the power to give life to, or take life away from him. This, the author means in the literal sense and also in the sense of enabling a person simply to exist as himself without being pressured to live as another person. The law therefore, has a very real duty to the citizens within its legal system, to allow them to live peaceably and without harassment. It is therefore imperative that the law remove the shackles of conservatism and give full legal effect to the post-operative status of the transsexual. Half-hearted legal effect is just as injurious as none at all, because the individual is still compelled to live a schizophrenic existence. Logic demands that the state accept a person as belonging to one sex for all purposes. But the law to date, has not felt obliged to follow such rational simplicity.

It has been tendered, that one could compare the position of the post-operative transsexual in society, to the treatment of minors, in terms

6. Smith op cit 975.

of their limited legal capacity to engage in sundry activities.⁽⁷⁾ The author regards this comparison as deficient in insight. Not only is a minor's capitus diminutio a temporary drawback - whereas the transsexual's position is permanent - but at least a minor is at liberty to obtain consent or ratification from some source - be it guardian or court - for any activity in which he may wish to participate. The transsexual, on the other hand, is not so fortunate as to have a benevolent 'godfather' to facilitate his ability to engage in those activities legally denied him. This approach to the transsexual's dilemma cannot be countenanced. It is essential for all practical purposes that a balance between medicine and law is found and it is lamentable that this has as yet, not been the case. The law has atrophied in its view of transsexualism and has entrenched - in South Africa at least - an attitude of dogmatic, impractical non-realism, by such decisions as W v W.

It is therefore fervently entreated that in the absence of enlightened judicial decisions in South Africa, the Legislature step in and complete the laudible work it commenced and extend the provisions of section 7B, to include all spheres of law, thereby allowing the post-operative transsexual recognition for all purposes in his assumed sex role.

On a wide front, the law has been lagging behind positive morality and progress in other fields. This is partly due to its inherent conservatism.

"The endeavour of the law to impart a certain amount of continuity and stability to the social order, gives it, to some extent, the anti-dynamic property of inertia".⁽⁸⁾

However, there have been instances of legal involvement to alleviate injustice and rectify anachronistic principles. We have evidenced such an instance with the Matrimonial Property Act of 1984. It is submitted that there is no reason why the same progressive attitude could not be adopted in another sphere of private law, namely the status of the post-operative transsexual. The over-ruling of the common law is not a rare

7. McColl Kennedy op cit 112.

8. Bodenheimer cited in Hahlo and Khan The South African Legal System and its background (2nd ed. 1973) 10.

phenomenon. With the requisite legislative intervention, the education of the general public is made more possible, which is necessary, because the awareness of the community is a very important factor in social adaptation and acceptance. The law, however, should set the pace so that legal acceptance and social mores are not at different ends of the rope.

If the Legislature cannot see its way clear to a general enactment sanctioning the post-operative status of the transsexual - and there would appear to be no bar to this as the legislation in West Germany has proved⁽⁹⁾ - then it must take the only alternative open to it and prohibit the corrective surgery. There can be no justification for allowing a person to undergo the surgery, only to pretend it never occurred. We have seen in South Africa and other jurisdictions, the anomalous situations which arise when the operation is permitted, but little effect given thereto. This inconsistency is clearly unacceptable and undermines the veracity and plausibility of the legal system.

Unfortunately, if the Legislature were to adopt this alternative measure, it would be retrogressing and would be totally out of consonance with the field of medicine.

"I do not believe that we as lawyers should be trying to have law that sabotages the work which surgeons and psychiatrists are doing to enable a person happily to become more reconciled to her fate ..."⁽¹⁰⁾

However, out of this Hobson's choice it is submitted that it would be preferable to be denied the surgery - and therefore know exactly what one's legal position is - than to undergo the painful and expensive operation and be plunged into an abyss in which one legally is neither male nor female and furthermore, denied the right to marry: in effect, a non-person. As it is, instability - with its consequent personal and social price - haunts the lives of the socially 'abnormal'.

The pressures and prejudices which attend their activities only exacerbate their insecurity. To offer a means of amelioration is more than justified

9. Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in Besonderen Fällen (Transsexuellengesetz - TSG)
Nr 56 Tag der Ausgabe: Bonn den 16 Sep. 1980 vorm 10.

10. Per Abse MP: Hansard Col 1842, commenting on Corbett v Corbett.

for the invaluable service as it will be affording this 'socially ill' person and hence society itself.

This author therefore earnestly entreats that our Legislature re-inforce a good example and follow in the wake of the 1980 enactment in West Germany,⁽¹¹⁾ and accord the post-operative transsexual full legal status in his desired role.

11. For a detailed account of this legislation, vide chapter seven supra.

BIBLIOGRAPHY

A. Books

- BECK, J.: How to Raise a Brighter Child. (1976, Pocket Books, London).
- BENJAMIN, H.: The Transsexual Phenomenon. (1966, Julian Press, New York).
- CURTIS, H.: Biology. (2nd ed) (1976, Worth Publishers Inc., New York).
- FALLOWELL, D. and ASHLEY, A.: April Ashley's Odyssey. (1982, Arrow Books, London).
- FOWLER and FOWLER, (eds): The Concise Oxford Dictionary.
- GARRATT, J.: The Human Body. (1972, Hamlyn, London).
- GIBSON, J.T.R., (ed): Willes Principles of South African Law. (7th ed) (1977, Juta and Co., Johannesburg).
- GREEN, J.: Basic Clinical Psychology. (1969, Oxford University Press, London).
- GREEN, R. and MONEY, J. (eds): Transsexualism and Reassignment Surgery. (1969, Johns Hopkins University Press, Baltimore).
- HAHLO, H.R.: The South African Law of Husband and Wife. (4th ed) (1975, Juta and Co., Johannesburg).
- HAHLO, H.R. and KHAN, E.: The South African Legal System and its Background. (2nd ed) (1973 Juta and Co., Cape Town).
- HIEMSTRA, V.G.: Introduction to the Law of Criminal Procedure. (1977, Butterworth and Co., Pretoria).
- HILLIER, M.D.: Medical Ethics and the Law (1981, Bellinger Publishing Co., Cambridge).
- HOFFMANN, L.H.: South African Law of Evidence. (3rd ed) (1981, Butterworths, Durban.)

- HONORE, T.: Sex Law. (1978, Duckworth, London).
- JORGENSEN, C.: A Personal Autobiography. (1968, New York).
- KANONITZ, L.: Sex Roles in Law and Society. (1973, University of New Mexico Press, Albuquerque).
- KHAN, E. and FORSYTH, C. (eds): Reader's Digest Family Guide to the Law in South Africa. (1982, Reader's Digest Assoc., Cape Town).
- KING JAMES VERSION OF THE BIBLE. (Collins, London).
- LEE and HONORE: Family Things and Succession. (2nd ed) (1983, Butterworths, Pretoria).
- LLEWELLYN-JONES, D.: Fundamentals of Obstetrics and Gynaecology Volume I: Obstetrics. (2nd ed) (1977, Faber and Faber Ltd., London).
- McKERRON, R.C.: The Law of Delict. (7th ed) (1971, Juta and Co., Cape Town).
- MERTON, R. and NISBET, R. (eds): Contemporary Social Problems. (4th ed) (1976, Harcourt Brace Jaranovich, Inc., U.S.A.).
- MILTON, J.R. (ed): South African Criminal Law and Procedure Volume II. (2nd ed) (1982, Juta and Co., Cape Town).
- MILTON, J.R.L.: South African Criminal Law and Procedure Volume III. (1971, Juta and Co., Cape Town).
- MORRIS, J.: Conundrum. (1974, Faber and Faber, London).
- OLIVIER, P.J.J.: The South African Law of Persons and Family Law. (2nd ed) (1980 Butterworths, Durban).
- PROSSER, W.: Handbook of the Law of Torts (3rd ed. 1964) (4th ed 1971, West Publishing Co., Minnesota).
- RAYMOND, J.: The Transsexual Empire. (1979, Beacon Press, Boston).
- SALMOND: On the Law of Torts (17th ed. 1977 by R.F. Heuston) (Sweet and Maxwell, London).

- SAUNDERS, J.B.: Words and Phrases Legally Defined. (2nd ed) (1969, Butterworths, London).
- SCHWARTZ and SCHWARTZ: Vulnerable Infants: A Psychological Dilemma. (1977, U.S.A.).
- SMITH, J.C. and HOGAN, B.: Criminal Law (1st ed 1965) (4th ed 1978, Butterworths, London).
- STRAUSS, S.A.: (Strauss (1)). Toestemming tot Benadering as Verweer in Die Strafreë en Die Delikterëë (1961, University of South Africa Press, Pretoria).
- STRAUSS, S.A.: (Strauss (2)). Doctor, Patient and The Law. (1980, Butterworths, Cape Town).
- STRAUSS, S.A. and STRYDOM: Die Suid-Afrikaanse Geneeskundige Reg (1967).
- THOMPSON, W.: Blacks' Medical Dictionary (33rd ed) (1981, Adam and Charles Black, London.)
- VAN DER WALT, J.P.: Delict Principles and Cases. (1981, Butterworths, Durban).
- WINFIELD, P.H.: On Tort. (6th ed 1954 U.K.) (11th ed 1979, Sweet and Maxwell, London.)

B. Enactments

I. South Africa

1. Births, Marriages and Deaths Registration Act 81 of 1963.
2. Births, Marriages and Deaths Registration Amendment Act 51 of 1974.
3. Births, Marriages and Deaths Registration Amendment Act 35 of 1982.
4. Black Administration Act 38 of 1927.
5. Black (Urban Areas) Consolidation Act 25 of 1945.
6. Child Care Act 14 of 1983.
7. Childrens Act 33 of 1960.
8. Civil Proceedings Evidence Act 25 of 1965.
9. Compulsory Motor Vehicle Insurance Act 56 of 1972.

10. Compulsory Motor Vehicle Insurance Amendment Act 23 of 1980.
11. Criminal Procedure Act 8 of 1959.
12. Criminal Procedure Act 51 of 1977.
13. Divorce Act 70 of 1970.
14. Immorality Act 23 of 1957.
15. Insolvency Act 24 of 1936.
16. Insurance Act 27 of 1943.
17. Maintenance Act 23 of 1963.
18. Maintenance Amendment Act 19 of 1967.
19. Maintenance Amendment Act 39 of 1970.
20. Marriage Act 25 of 1961.
21. Matrimonial Affairs Act 37 of 1953.
22. Matrimonial Property Act 88 of 1984.
23. Post Mortem Examinations and Removal of Human Tissues Act 30 of 1952.
24. Succession Act 13 of 1934.
25. Succession Amendment Act 44 of 1982.

II. United Kingdom

1. Births and Deaths Registration Act of 1953.
2. Births, Deaths and Marriages Act (Scotland) of 1854.
Divorce Act of 1929.
Equal Pay Act of 1970.
Gambling Act of 1774
Law 26 of 1899.
Matrimonial Causes Act of 1959.
Nullity of Marriages Amendment Act of 1971.
Offences Against the Person Act of 1861.
Sex Discrimination Act of 1975.
Sexual Offences Act of 1956.

III. Australia

Family Relations Act R.S.B.C. 1979

IV. Canada

Divorce Act R.S.C. 1970.

Canadian Criminal Code (Martin 1970).

V. United States of America

Ariz Rev Stat Ann (West 1974)

Cal Civ Code (West 1970)

Conn Gen Stat Ann (1972)

Del Code (1953)

Ill Ann Stat (Smith-Hurd 1966)

La Rev Stat (West 1976)

New York Code Criminal Procedure (McKinley 1958)

New York Penal Law (McKinley 1967)

Ohio Rev Code (Baldwin 1976)

Vital Records Act (Ill Rev Stat 1977)

VI. West Germany

Gesetz über die Änderung der Vornamen und der Feststellung der Geschlechtszugehörigkeit in besonderen Fällen (Transsexuellengesetz - TSG) Nr 56

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C. Journals

ABRAHAM, F.: 'Genitalumwandlung an Zwei männlichen Transvestiten' (1931) 18 Zeitschrift Für Sexualwissenschaft 223.

ARMSTRONG, C.M.: 'Transsexualism: A Medical Perspective' (1980) 6 Journal of Medical Ethics 90.

BAILEY, R: 'Recent Cases' (1979) 53 Australian Law Journal, 659.

BARTHOLOMEW, G.W.: 'Hermaphrodites and the Law' (1960) 2 Malaya Law Review 83.

BATES, F.: 'The Enforcement of Marriage Revisited' (1977) 6 Anglo-American Law Review 173.

BEECHER, H.K.: 'Consent in Clinical Experimentation - Myth and Reality' (3 January 1966) 195 Journal of American Medical Association 34.

BELLI, M.M: 'Transsexual Surgery: A New Tort?' (1978) Journal of Family Law 487.

- BENJAMIN, H. and IHLENFELD, C.: 'Transsexualism' (1973) 73 American Journal of Nursing 453.
- BLOCK, N. and TESSLER, A.: 'Transsexualism and Surgical Procedures' (March 1971) Surgery, Gynaecology and Obstetrics 132.
- BRODY, B.A.: 'Marriage, Morality and Sex Change' (August 1981) 11 Hastings Centre Report 8.
- BROMWELL, D.K.: 'Mt v JT: An Enlightened Perspective on Transsexualism' (1977) 6 Capital University Law Review 403.
- COWIE, V.: 'The Shape of Things to Come' (1979) 149 Nursing Mirror No. 21 16.
- CROVITZ, E.: 'Treatment of the Transsexual and Medico-Legal Issues' (1976) 1 Forensic Science 1.
- EDGERTON, M.T.: 'A New Male-Female Surgical Technique (Stanford University Medical Centre 1973) 51 Proceedings of Second Interdisciplinary Symposium on Gender Dysphoria Syndrome 139 ('Edgerton (1)').
- EDGERTON, N.T.: 'Transsexualism - A surgical Problem' (October 1978) 54 Plastic and Re-Constructive Surgery 448 ('Edgerton (2)').
- FAGOT, B.: 'Sex Differences in Toddlers' Behaviour and Parental Reaction' (1974) Developmental Psychology 10.
- FLEMING, M., JENKINS, S.R. and BUGARIN, G.: 'Questioning Current Definitions of Gender Identity' (1980) 9(1) Archives of Sexual Behaviour 13 ('Fleming (1)').
- FLEMING, M., COHEN, D., SALT, P., ROBINSON, L. and SPITZ, J.: 'The Use of Animal Drawing Test (AODT) in the Assessment and Disposition of the Transsexual' (1982) 38 Journal of Clinical Psychology 1 ('Fleming (2)').
- FLEMING, M.: 'Preliminary Results' (April 1982) 38 Journal of Clinical Psychology 408 ('Fleming (3)').
- FINLAY, H.A.: 'Sexual Identity and the Law of Nullity' (1980) 54 Australian Law Journal 115.

- GREEN, D.A.R.: 'Transsexualism and Marriage' (1970) 120 New Law Journal 210.
- GUNTER, G.: 'The Supreme Court 1971 Term' (1972-3) 86 Harvard Law Review 1.
- HABERMAN, M.A.: 'Auto-Castration in Transsexuals' (1979) 136 American Journal of Psychiatry 347.
- HALLE, E., SCHMIDT, C. and MEYER, J.: 'The Role of Grandmothers in Transsexualism' (4 April 1980) 137 American Journal of Psychiatry 497.
- HAWLEY, D.L.: 'Legal Problems of Sex Determination' (1977) XV Alberta Law Review 122.
- HOENIG, J., KENNA, J. AND YOUD, A.: 'Surgical Treatment for Transsexualism' (1971) 47 ACTA Psychiatria Scandinavia 106.
- HUNT, D.D.: 'Follow up on 17 Biologic Male Transsexuals' (1980) 137 American Journal of Psychiatry 432.
- KHAN, E.: 'The True Hermaphrodite - Of No Sex?' (1981) 98 South African Law Journal 111.
- KOPKA, S.L.: 'Legal Status of the Post-Operative Transsexual' (September 1983) 29 Medical Trial Technical Quarterly 456.
- LANSDOWN A.V.: 'Guinea Pigs of Hippocrates and the Criminal Law' (1960) 77 South African Law Journal 117.
- LEFF, D.N.: 'Genes, Gender and Genital Reversal' (1977) 18 Medical World News 45.
- LOTHSTEIN, L.M.: 'Sex Reassignment Surgery' Historical, Bioethical and Theoretical Issues' (April 1982) 113 American Journal of Psychiatry 417 ('Lothstein (1)').
- LOTHSTEIN, L.M.: 'The Post-Surgical Transsexual: Empirical and Theoretic Considerations' (1980) 9 Archives of Sexual Behaviour 547 ('Lothstein (2)').

- LUKIANOVICZ, N.: 'Survey of Various Aspects of Transvestism in the Light of our Present Knowledge' (1959) 128 Journal of Nervous and Mental Disorders 458.
- LUPTON, M.L.: 'The Validity of Post-Operative Transsexual Marriages' 93 South African Law Journal 385.
- MASON, N.: 'The Transsexual Dilemma: Being a Transsexual' (1980) 6 Journal of Medical Ethics 85.
- McCOLL KENNEDY, I.: 'Transsexualism and Single-Sex Marriage' (1973) Anglo-American Law Review 112.
- MONEY, J.: 'Sex Reassignment' (1970) 9 International Journal of Psychiatry 249.
- MONEY, J. and BRENNAN, J.: 'Sexual Dimorphism in the Psychology of the Female Transsexual' (1968) 147 Journal of Nervous and Mental Disorders 487.
- MORTON, J.: 'The Transsexual and the Law' (27 July 1984) New Law Journal 621.
- NOTE: 'Current Topics' (February 1981) 55 Australian Law Journal, 60.
- NOTE: 'Informed Consent and the Dying Patient' (1974) 83 Yale Law Journal 1632.
- O'DONOVAN, O.: 'Transsexualism and Christian Marriage' (1983) XVI Journal of Religious Ethics 135.
- ORMROD, R.: 'Medico-Legal Aspects of Sex Determination' (1972) Medical-Legal Journal 78.
- OVERSEY, L. and PERSON, E.: 'Gender Identity and Sexual Psychopathy in Men: A Psychodynamic Analysis of Homosexuality, Transsexualism and Transvestism' (1973) 1 Journal of American Academy of Psycho Analysis 54.
- PACE, P.J.: 'Sexual Identity and Criminal Law' (May 1983) Criminal Law Review 317.

- PARSCHIN-RYBKIN, T.: 'Notes' (1972) 5 Ottawa Law Review 583.
- PAULY, I.: 'The Current Status of the Change of Sex Operation' (1960) Journal of Nervous and Mental Disease 460.
- REKERS, G.A. et al.: 'Family Correlates of Male Childhood Gender Disturbances' (March 1983) 142 Journal of Genetic Psychology 31.
- SCOTT, S.: 'Thrice the Brindled Cat Hath mewed' (1965) 11 McGill Law Journal No. 4 356.
- SCOTT COLE, W.: 'Transsexuals in Search of Legal Acceptance: The Constitutionality of the Chromosome Test' (1978) 15 San Diego Law Review 331.
- SMIT, P.C.: 'Juridiese Bepaling van Geslag' (1977) Tydskrif vir Regwetenskap 106.
- SMITH, D.K.: 'Transsexualism: Sex Reassignment Surgery and the Law' (1971) 56 Cornell Law Review 963.
- STRAUSS, S.A.: ('Strauss (3)'); 'The Sex Change Operation: Two Interesting Decisions' (1967) 84 South African Law Journal 214.
- STRAUSS, S.A.: ('Strauss (4)'); 'Bodily Injury and the Defence of Consent' (1964) 81 South African Law Journal 179.
- STRAUSS, S.A. ('Strauss (5)'); 'Transsexualism and the Law' (1970) 3 Comparative and International Law Journal of South Africa 348.
- TAITZ, J.: 'The Legal Consequences of Sex Change: A Judicial Dilemma' (1980) 97 South African Law Journal 65.
- TAITZ, J.: ('Taitz (2)'); 'Some Criminal Law Anomalies brought about by a Sex Change' (February 1985) Tydskrif vir Romeins-Hollandse Reg 99.
- THOMAS, J.: 'Can the Lawyer Keep up with the Doctor?' (1980) 97 South African Law Journal 77.

THOMAS, J.: 'Transsexualism: A Legal Perspective' (1980) 6 Journal of Medical Ethics 92

TWARDY, S.: 'Medico-Legal Aspects of Transsexualism' (1980) Medical Trial Technique Quarterly 249.

VAN NIEKERK, B v D.: 'Sex Change Operations and the Law' (1970) 87 South African Law Journal 239.

ZEFFERET, D.: 'Confidentiality and the Courts' 91 South African Law Journal 432.

D. Newspapers, Magazines, Reports.

DAILY NEWS: (25 September 1951) 'They don't Choose to be Homosexual'.

LIVING AND LOVING SUPPLEMENT: (August 1980) 'All about Pregnancy'.

NATAL WITNESS: (17 August 1978) 'Plea for end of Gay Repression'.

NATAL WITNESS: (16 June 1984) 'Sex Change for War Pilot (70)'

NATAL WITNESS: (21 July 1984), 31 July 1984) 'Siamese Twins Gender Problem'

NATAL WITNESS: (8 August 1984) 'Canadian Grandma Wants the Gold she Lost to a Man'.

SCOPE MAGAZINE: (1 June 1984) 'Beautiful Lauren was Born a Boy' 35.

REPORT ON WOLFENDEN COMMITTEE FOR HOMOSEXUAL OFFENCES AND PROSTITUTION (1957).

WALL STREET JOURNAL: (28 January 1977).

IRISH TIMES: (23 April 1983) 'Homosexuality'.

E. Old Authorities

DE GROOT <u>INLEIDING</u>	3.21.1. 3.35.8.
DIGEST	9.2.11 pr. 24.1.1.3. 44.7.3.2. 47.10.1.5. 50.16.12.9.
MATTHAEUS	prol. 2.14. 13.7.8. 24.1.1. 48.3.1.
VAN LEEUWEN	CF 1.5.23.12.
VOET <u>COMMENTARIUS</u>	2.14.2. 9.2.24 17.2.1. 23.2.5. 23.2.68. 23.4.16. 24.2.2. 41.1.1. 47.10.4.

F. CasesArgentina

DR FRANCISCO DE FAZIO: 138 LE LEY 592 (C.N. Crim y Correc Argen 1969).

DR RICARDO SAN MARTIN: 123 LE LEY 605 (C.N. Crim y Correc Argen 1966).

Australia

THE MARRIAGE OF C AND D (FALSELY CALLED C): 1979 35 FLR 340; FLC 90 (CCH)

Canada

ANDERSON v LUOMO (14 L.R. 1985) 747.

ANDREWS v PARKER (1973) QD R 933

C v C (1971) 1 R.F.L. (N.B.Q.R.).

COUNTWAY v COUNTWAY (1968) 70 D.L.R. (2d) 73 (N.S. Div. Court Canada)

DU BOCQUET v CARAN (1975) 12 N.B.R. (2d) 283.

INSURANCE COMMISSION v JOYCE 77 C.L.R. 39 (1948)

KNOLL v KNOLL 1970 10. D.L.R. (3d) 199.

M v M (1972) 24 D.L.R. (2d) 114 (P.E.I.S.C.).

MILLER v MILLER 1947 OR 213 (CA)

R v DAVE B.C. Co Ct. Cashman Co Ct J. 24 May 1984.

R v RAMOS NNT Ct 370 42 (1985) Crim Rpt (3d)

THERRIEN ET AL v WHITE (1975) 12 N.B.R. (2d) 541 (N.B.S.C.).

SAAD v SAAD 14 D.L.R. (4th) 1985.

United Kingdom

BOWATER v ROWLEY REGIS BOROUGH CORP (1944) 1 KB 476.

BRAVERY v BRAVERY (1954) 2 All ER 59.

CORBETT v CORBETT (1970) 2 All ER 33

D v A 163 ENG Rep 1039 (Ecct Ct 1845)

DONN v HAMILTON (1939) 1 KB 509

GRIFFITHS v FLEMING 1909 KB 3.

HEYDON'S CASE (1584) 3 CO Rep 7A.

H.M. ADVOCATE v H.D. 1953 S.C. (Scotland)

HYDE v HYDE AND WOODMANSEE (1866) L.R.P.D. 130.

IMPERIAL CHEEN INDUSTRIES v SHATWELL 1965 AC 656.

LAUDER v LAUDER (1949) 1 All ER 76.

LINDO v BELISARIO (1795) 1 HAG CON 215

MIDLAND BANK TRUST CO v GREEN (No 3) (1981) 2 All ER 744

R v ALLEN (1872) LR 1 CCR 367

R v ASHWELL (1885) 16 COX CC 1 14.

R v BROWN (1843) 1 CAR and KIR 144

R v CLARENCE (1888) 16 COX CC 511.

R v DEE 15 COX CC379

R v DONOVAN (1934) 2 KB 498

R v KING (1964) 1 Q B. 285; (1963) 2 All ER 561.

R v LINES (1844) 1 C and K 39.

R v MILLER (1954) 1 Q B 282; (1954) 1 All ER 529.

R v ROBINSON (1938) 1 All ER 301.

R v SARMAN SINGH 1962 (3) All ER 612.

R v TAN AND OTHERS (1983) 3 WLR 361.

RUMPLING v DPP (1962) 3 All ER 256.

RUSS v RUSS (1962) 1 All ER 151

S v S (No 2) 3 All ER 55

SHANTON v TYLER (1934) 1 All ER (AC) 10.

THOMAS v QUARTERMAINE (1887) 18 Q.B.D 658.

WINCHESTER COURT LTD v MILLER (1944) K B. 134.

WHITE v BRITISH SUGAR CORP. (1977) 2 RLR 121.

X PETITIONER (1957) SLT 61 (Scotland)

YARMOOUTH v FRANCE (1887) 19 Q.B.D 647

United States of America

ANONYMOUS v ANONYMOUS (1971) 67 MISC 2d 982, 325 NYS 2d 499, 63 ALR 3d 1196.

ANONYMOUS v MELLON 91 MISC 2d 375, 398 NYS 3d 99 (1977).

ANONYMOUS v WEINER 50 MISC 2d 380, 390 NYS 2d 319 (1966).

ARIZONA v BATEMAN (2976) 429 US 1302, 50 L ED 2d 32, 97 S CT 1.

B v LACKNER 1978 (1st Dist) 80 CAL APP 3d 64.

BAKER v NELSON (1971) 291 MINN 310 191 NW 2d 195, 63 ALR 3d 1195.

BARR v BARR 232 PA SUPER 9 331 A 2d 774 (1974).

BERKELEY v ANDERSON 1 CAL APP 3d 790 82 CAL RPTR 67. (CT APP 1970).

BOYER v BOYER 193 PA SUPER 260 130 A 2d 265 (1957).

BROWN v MERLO (1973) 8 CAC 3d 855, 106 CAL: RPTR 388.

CARIGNAN v MASTER CRAFT PUBLICATIONS LTD (1984) 4 C.H.R.R D1 2282 (B.C.
Board of Inquiry)

CHICAGO v WILSON 75 ILL 2d 525 12 ALR (4th) 1251

CHRISTIAN v RANDALL 33 COLO APP 129, 615 P 2d 132 (1973).

CINCINATI v ADAMS (1974) 42 CHIO MISC 48 71 12 ALR (4th) 1250.

COBBS v GRANT 502 P 2d:1093, 1106 (KAN 1960).

COLUMBUS v ROGERS (1975) 41 OHIO ST 2d 161 12 ALR (4th) 1250.

COLUMBUS v ZANDERS (1970) 25 OHIO MISC 144 54 OHIO 2d 142 266 NE 2d 602; 12
ALR (4th) 125.

COMMONWEALTH v FARRELL 322 MASS 606, 78 NE 2d 697 (1949).

CRISSMAN v CRISSMAN 220 PA SUPER 387, 281 A 2d 719 (1971).

DARNELL v LLOYD 395 F SUPP 1210 (D. CONN 1975).

DOE v McCONN (1980) 5D TEX 489 F SUPP 76 12 ALR (4th) 1251.

DOE v STATE DEPT OF PUBLIC WELFARE (1977): MINN 257 NW 2d 816, (SUP CT MINN).

DOUGHERTY v DOUGHERTY 235 PA SUPER 122, 339 A 2d 81 (1975).

FRANCES B v MARK B 78 MISC 2d 112, 355 NYS 2d. 712 (1974) 63 ALR (3d) 1197.

HALLER SIGN WORKS v PHYSICAL CULTURE TRAINING SCHOOL (1911) 249 ILL 436, 94
NE 920.

HARTIN v DIRECTOR OF BUREAU OF RECORDS 75 MISC 2d, 229 347 NYS 2d 515 (SUP CT
1973).

IN RE ANONYMOUS 57 MISC 2d 813, 293 NYS 2d 834 (1968).

IN RE ANONYMOUS 64 MISC 2d 309 314 NYS 2d 668 (1970).

JESSIN v COUNTY OF SHASTA 274 CAL APP 2D 737, 79 CAL RPTR 359 (1969).

JONES v HALLAHAN (1973 KY) 501 SW 2d 588, 63 ALR 3d 1195.

K v DEPT OF HUMAN RESOURCES 2601 APP 311 316 552 P 2d 840 (1976).

KAUFMAN v ISRAEL ZION HOSPITAL 183 MISC 714 51 NYS 2d 412 (SUP CT 1944).

KELLY v JOHNSON (1976) 425 US 238 96 S CT 1440 12 ALR (4th) 1251.

LOVING v VIRGINIA (1967) 388 US 1 12.

MATTER OF GROSSMAN 157 NJ SUPER 165, 384 A 2d 855 (1978).
MATTHEWS v LUCAS 427 US 495 (1976).
MOHR v WILLIAMS 95 MINN 261 (1905).
MOSTYN v STATE OF CALIFORNIA (UPI 14 April 1983).
MT v JT 140 NJ SUPER 77 355 A 20 304 (1976) 63 ALR (3d) 1197).
NATALSON v KINE 360 P 2d 1093, 1106 (KAN 1960).
NICHOLSON v NICHOLSON (1982 2d Dept) 87 APP DIV 2d 645, 449 NYS 2d 4.
P v P (1972) 121 NJ SUPER 368, 297 A 2d.
PEOPLE v SAMUELS 250 (CAL APP) 2d 501 58 CAL RPT 439 (1967).
REYNOLDS v US 98 US 145 (1978).
RICKIE BRUCE (Unreported case UPI Peoria ILL 24 June 1983).
RICHARDS v US TENNIS ASSOC. 93 MISC 2d 713, 400 NYS 2d 267 (1977) NYS 2d 721.
ROE v WADE 410 US 113 (1973).
RUSH v PARHAM 1977 ND GA 440 F SUPP 383.
S v FRANSUA 85 N.M 173, 510 P 2d 106 (CT APP 1973)
SAUCIER v SAUCIER (1978 CA APP) 358 50 2d 1378.
SAUADOFF v WARDA 125 CAL APP 2d 656, 270 P 2d 140 (Dist CT APP 1954).
SINGER v HARA (1974) 11 WASH APP 247 522 P 2d 2287 63 ALR 3d 1197.
STEINKE v STEINKE (1975) 238 PA SUPER 74 387 A 2d 674 82 ALR 3d 705.
US v COOK 462 F 2d 301 (D.C. CR 1972).
WHITE v STATE OF IOWA (U.P.1 4 April 1984).

South Africa

ADMINISTRATOR, NATAL v TRUST BANK 1979(3) SA 824 (AD).
AINSBURY v AINSBURY 1929 AD 109.
ALBERTS v ENGELBRECHT 1961 (2) SA 644 (T).
ALLEN N.O v ESTATE BLOCH 1970 (2) SA 376 (C).
ADMIN v EBRAHIM 1926 NPD 1.
ANDERSON v ANDERSON 1942 WLD 86.
BRITS AND ANOTHER v TSATSOVOLAKIS 1976 (2) SA 891 (T).
BURNETT AND TAYLOR v DE BEERS CONS MINES (1895) 8 H.C 65.
CASSERLY v STUBBS 1916 TPD 310.
CHAPLIN N.O v GREGORY 1950 SA (C).
CONRAD v CONRAD'S TRUSTEE 1930 NLR.
COOMBS v MASON 1931 NPD 105.
CURRIE v RHODESIA RAILWAYS LTD 1928 512 91.
DELPORT v MUTUAL AND FERERAL INS CO AND OTHERS 1984 (3) 191 (D).
EDGECOMBE v HODGSON 1902 19 SC 226.
ESSA v DIVARIS 1947 (1) SA 753 (A).

ESTERHUYSEN v ADMINISTRATOR, TRANSVAAL.1957 (3) SA 710 (T).
EX PARTE AB 1910 TPD 1332.
EX PARTE DIXIE 1950 (4) SA 748 (W).
EX PARTE MARAIS 1942 CPD 242.
EX PARTE OXTON 1948 (1) SA 1011 (C).
EX PARTE SADIE 1940 AD 26.
EX PARTE STRACHAN 1964 NPD 592.
FLETCHER v FLETCHER 1948 (1) SA 130 AD.
FOOT N.O v VOSTER 1983 (3) 179 (O).
FORTUIN v COMMERCIAL UNION ASS CO OF SA 1982 (2) 444 (C).
GEORGE v FAIRMEAD (PTY) LTD. 1958 (2) SA 463 (A).
GORDON'S BAY ESTATES v SMUTS 1923 AD 160.
GREEN v FITZGERALD 1914 AD 88.
HARRIS v LAW SOCIETY OF GOOD HOPE 1917 CPD 951.
HERSCHEL v MRUPE 1954 (3) SA 464 (A).
HLEKA v JOHANNESBURG CITY COUNCIL 1941 (1) SA 842 (A).
JAMESON'S MINORS v C.S.A.R. 1908 T.S 575.
KILBURN v ESTATE KILBURN 1931 AD 501.
LAMPERT v HEFER 1955 (2) 507 (A).
LAUGHLIN v LAUGHLIN (1903) 24 NLR 230.
LEVINE v LEVINE 1939 CPD 246.
MANDELBAUM v BECKER 1927 CPD 375.
MESKIN v ANGLO-AMERICAN CORP 1968 (4) SA 793 (W).
MIDDLETON v CARR 1949 (2) SA 374 (A).
MINISTER OF JUSTICE: IN RE R v GEZA, R v DE JONGH 1959 (1) SA 234 (A).
MINISTER VAN POLISIE v EWELS 1975 (3) SA 590 (AD).
MITCHELL v DIXON 1914 AD 519.
MOOLA AND OTHERS v AULSBROOK N.O 1983 (1) 687 (N).
MORDT N.O v UNION GOVT 1938 TPD 589.
MORRISON v ANGLO-DEEP GOLD MINES LTD 1905 TS 775.
MSOMI N.O v NZUSA AND ANOTHER 1983 (3) 939 (D).
MÜHLMANN v MÜHLMANN 1984 (3) 102 (A).
NAICKER v NAIDOO 1959 (3) SA 768 (D).
NATIONAL MEAT SUPPLIERS (PTY LTD v CAPETOWN CITY COUNCIL 1938 CPD 498.
NETHERLANDS INSURANCE CO LTD v VORSTER 1973 (4) SA 764 (A).
NGUBANE v NGUBANE 1983 (2) 770 (T).
●CHBERG v OCHBERG'S ESTATE 1941 CPD 15.
OSMAN v OSMAN 1983 (2) 706 (D).
PHILLIPS v GENERAL ACCIDENT INS CO LTD 1983 (4) 652 (W).
PLATT v COMMISSIONER OF INLAND REVENUE 1922 AD 6.

R v E 1960 (2) SA 691.
R v GUMEDE 1946 (1) PHH 68 (N).
R v JACOBS 1926 OPD 184.
R v KRULL 1959 (3) AD
R v M 1947 (2) 489 (N).
R v McCOY 1953 (2) SA 4 (SR).
R v McINTYRE 1904 T 804.
R v MDIYA MTULI (1902) 23 NLR 253.
R v MOSAGO 1935 AD 32.
R v OOSTHUIZEN 1954 (1) P.H.H 70 (A)
R v S 1951 (1) SA 209 (K).
R v SHASHA 1948 (2) SA 996 (O).
R v SWIGGELAAR 1949 (4) SA 235 (C).
R v TAYLOR 1927 CPD 11.
R v THERON 1924 EDC 204.
R v V 1960 (1) SA 117 (T).
R v VON ZEIL 1953 (3) SA 301 (A).
R v Z 1960 (1) SA 739 (A).
REGAL v AFRICAN SUPERSLATE (PTY) LTD. 1963 (1) SA 102 (AD).
RHODESIAN RAILWAYS v COMMISSIONER OF TAXES 1925 AD 465.
RICHTER AND ANOTHER v HAMMON'S ESTATE 1976 (3) SA 226 (C).
ROBERTSON v ROBERTSON'S EXECUTORS 1914 AD 503.
ROSENBAUM v MARGOLIS 1944 WLD 147.
ROSENBERG v DRY'S EXECUTORS 1911 AD 688.
ROSSEAU v VILJOEN 1970 (3) SA 410 (C).
ROUX v SANTAM 1977 (3) SA 261 (T).
S v COLLETT 1978 (3) SA 206 (RAD).
S v DE BLOM 1977 (3) SA 513 (AD).
S v K 1972 (2) SA 898 (AD).
SANTAM INSURANCE CO LTD v VORSTER 1973 (4) SA 764 (A).
SAR v CRUYWAGEN 1938 TPD 219.
SHANZIN v LAUFER 1968 (4) SA 657 (AD).
SIMMS v SIMMS 1977 (4) SA 186 (D).
SMIT v ARTHUR 1976 (3) SA 378 (A).
SMITH v SMITH 1961 (3) SA 359 (SR).
SNYMAN v SNYMAN 1984 (4) SA 262 (W).
STANDER v STANDER 1929 AD 349.
STOFFBERG v ELLIOT 1923 CPD 148.
STOLZENBERG v LURIE 1959 (2) SA 69.

UNIVERSITEIT VAN PRETORIA v TOMMY MEYER FILMS (EDMS) BPK 1977 (4) SA 376 (T).

UNION GOVERNMENT v MATTHEE 1917 AD 688.

VAN NIEKERK v VAN NIEKERK 1959 (4) SA 658 (W).

VAN WYK v LEWIS 1924 AD 438.

VATHER v SEEDAT 1973 (3) SA 389 (N).

VENTER v VENTER 1949 (4) SA 123 (W).

VERHOOF v MEYER TPD (Unreported September 1975).

VIVIERS v KILIAN 1927 AD 449.

W v W 1976 (2) SA 308 (W).

WEATHERLEY v WEATHERLEY (1879) Kotze 66.

WELLS v DEAN WILLCOCKS 1924 CPD 89.

WHITTAKER v ROOS AND BATEMAN, MORANT v ROOS AND BATEMAN 1912 AD 92.

WIENSTRAUB v WIENSTRAUB 1921 CPD 595.

WITTEKIND v WITTEKIND 1948 (1) SA 826 (W).

WOODWISS v WOODWISS 1958 (3) SA 609 (D).