

***GENDER REASSIGNMENT SURGERY:
MEDICAL ISSUES AND LEGAL CONSEQUENCES***

A. DHAI

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DURBAN***

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CERTIFICATE

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ABSTRACT

Gender reassignment procedures are performed for the treatment of the gender dysphoria syndrome (transsexualism). Although this modality of treatment is therapeutic in nature and therefore not contra bonos mores, the legal status of the post-operative transsexual remains that of his/her previous sex. The purpose of the gender reassignment procedures is that of acceptance within the community as a person of the sex indicated by his/her changed appearance. Nothing will be achieved by the successful completion of treatment if the person's changed sexual appearance is not recognised by the law as a change in sexual status as well.

The law, by keeping aloof of the problem of the post-operative transsexual, has created a legal "vacuum" where there is social and judicial acceptance of reassignment procedures, but a refusal to give legal effect to the change in status that the transsexual obsessively desires and the operation simulates.

This work will analyse the medical issues associated with gender reassignment procedures. The legal status of the transsexual after reassignment procedures will be explored, and in doing so, the human rights violations with which such people have to contend, will be highlighted. The constitutionality of the lack of a legal recognition of the post-operative transsexual's sexual status will be examined. It will be shown that there are compelling reasons for legislation to be introduced as a matter of urgency to safeguard the fundamental rights of the post-operative transsexual.

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Prohibition of Disguises Act 16 of 1969.

Human Tissue Act 65 of 1983.

Child Care Act 74 of 1983.

Births and Deaths Registration Act 51 of 1992.

Road Accident's Fund Act 56 of 1996.

The Constitution of the Republic of South Africa, Act 108 of 1996.

Criminal Procedure Act 51 of 1997.

Promotion of Administrative Justice Act 3 of 2000.

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of
2000.

Human Fertilization and Embryo Act 1990 – (United Kingdom).

TABLE OF CASES

Amod v Multilateral Motor Vehicle Accident Fund 1997 (12) BCLR 1716 (D).

Allen v Est Bloch 1976 (2) SA 376 (C).

B v France (1992) 16 EHRR 1, [1992] 2 FLR 492.

Baker v Nelson 191 NW 2d 185 (Supreme Court of Minnesota 1971).

Bernstein and others v Bester and others NNO 1996 (2) SA 751, (CC), 1996 (4) BCLR 449 (C).

Bowers v Hardwick 478 US 186 (1985).

Castell v De Greef 1994 4 SA 408 (C).

Corbett v Corbett (otherwise Ashley) [1970] 2 All ER 33.

Cossey v United Kingdom (1990) 13 EHRR 622, [1991] 2 FLR 492.

Egan v Canada [1995] 2 SCR 513, (1995) 124 DLR (4TH) 609.

Fortuin v Commercial Union Ins. Co. 1983 (2) SA 444 (C).

Hugo v President of Republic of South Africa 1996 (4) SA 1012 (D).

I v United Kingdom (1997) 23 EHRR CD 66, EctHR.

In the Marriage of C and D (falsely called C) (1979) FLC 340.

Jones v Hallahan 501 SW 2d 588 (Court of Appeals at Kentucky 1973).

Langemaat v Minister of Safety and Security 1998 (3)SA 312 (T).

MT v JT 355 (A) (2d) 204 (1976).

National Coalition for Gay and Lesbian Equality v Minister of Justice 1998 (3) All SA 26 (W).

National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC).

Perez v Lippold 198 P 2d 17 (Supreme Court of California 1948).

Phillips v General Accident Ins. Co. of SA Ltd. 1983 (4) SA 653 (W).

Prinsloo v Van der Linde (1997) 6 BCLR 759 (CC).

R v Davies 1956 (3) SA 32 (A).

R v Registrar General, ex p and P and G [1996] 2 FCR 588.

R v Tan and Others [1983] QBD 1053 (CA).

Rees v United Kingdom (1986) 9 EHRR 56, [1993] 2 FCR 49, [1987] 2 FLR 111, [1987] Fam Law 157, EctHR.

Sheffield and Horsham v United Kingdom [1998] 3 FCR 141, [1998] 2 FLR 928, EctHR.

S v H 1995 (1) SA 120 (C).

S v Kampher 1997 (4) SA 460 (C).

Simms v Simms 1981 (4) SA 186 (D).

Steinke v Steinke 238 Pa Super 74 357 A LR (2d) 674 (1975).

SY v SY (otherwise W) [1963] P 37, [1962] 3 WLR 526.

Van Oostewijck v Belgium (1986) 3 EHRR 557.

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

X, Y and Z v United Kingdom (1997) 24 EHRR 143, (1998) 39 BMLR 128.

Zablocki v Redhail 434 US 374 (1978).

CHAPTER 1: AN OVERVIEW OF THE CONDITION OF TRANSSEXUALISM AND GENDER REASSIGNMENT PROCEDURES

1.1: INTRODUCTION

Medical sciences have advanced extensively during the previous century. The legal fraternity has likewise tried to keep abreast of these advancements and to respond to emerging challenges. However, in the case of transsexualism, (the gender dysphoria syndrome), the legal position of the patient post-reassignment procedures, is far from clear. In some areas of the law sex is of critical importance, and it is necessary to ask if the law should follow suit when advances in medical sciences disturb the traditional point of view.¹

Acceptance by society of transsexuals has been lagging and perhaps, there has been a deliberate attempt by the public to curb their presence and to

1. P.J. Thomas "Can The Lawyer Keep Up With The Doctor?" (1980) 97 SALJ 7.

coerce them into continuing their twilight zone existence. It is to this public that the architects of law belong. The nature of the legal system is such that judges and magistrates play an important role in determining the outcome of processes in which all citizens use the legal system to protect their rights. In a subtle way, the personalities of judges and magistrates, as well as their schooling, university education, professional experience, personal political beliefs and their backgrounds in general, influence the way in which they interpret legislation.²

The purpose of the surgical and medical treatment that a person undergoes to change his or her sex is that of acceptance within the community in which that person lives, as a person of the sex indicated by his or her changed appearance.³ Nothing will be achieved by the successful completion of

2. Tshwaranang Legal Advocacy Centre To End Violence Against Women National Legal Manual For Counsellors Of Raped And Battered Women (1999) 140.
3. South African Law Commission (hereafter SALC) Report On The Investigation Into The Legal Consequences Of Sexual Realignment And Related Matters Project 52 (1995) 1.

treatment if the person's changed sexual appearance is not recognized by the law as a change in sexual status as well.⁴ The transsexual has therefore to cope with the various resultant legal anomalies as a consequence of a lack of such recognition.

1.2: AIM OF THE DISSERTATION

The aim of this dissertation is to consider the legal status of the transsexual after reassignment procedures, and in doing so, to highlight the human rights violations with which such people have to contend.

The constitutionality of legislature pertaining to various legal aspects after treatment will be examined. In addition, medico-legal issues with respect to the hormonal and operative treatment of the transsexual will be discussed.

It is important to remember that prior to the demise of Apartheid and the introduction of a constitutional order, the South African legal system was

4. SALC (1995) op cit 1.

defined according to the values and interests of white, middle-class, middle-aged heterosexual males.⁵ The constitutional order has created a democratic, political, legal and intellectual climate for the exchange of ideas and for the challenging of cultural and ideological hegemony that could have been carried over from a legacy that ignored diversity and pluralism.⁶

Prior to any ethical or legal discussions, an appraisal of normal sexual differentiation and the definition of sex, together with the biological condition of transsexualism and its treatment are appropriate. The meanings of gender identity, and sexual orientation need to be understood. This will allow the reader to comprehend the differences between these terms and thereby enable her/him to distinguish the differences between the transsexual, transvestite, homosexual and hermaphrodite in order to avoid confusion and uncertainty with respect to these various states. This awareness is a vital prerequisite for the medical and surgical management of

5. T.L. Mosikatsana "The Definitional Exclusion Of Gays And Lesbians From Family Status" (1996) 12 SAJHR 549.

6. Mosikatsana op cit 554.

the transsexual, so as to avoid gross physical and psychological morbidity, which would be the consequence of a misdiagnosis of the patient's condition together with poor patient selection for the gender reassignment procedure.

Terminology with respect to the management of these patients requires clarification. The meanings of the terms sex change, gender reassignment, gender realignment, have to be evaluated as they are used interchangeably in both the legal and medical literature. Strictly speaking, these terms have differing implications and this may result in confusion amongst the respective professions. The most appropriate term will be advanced as a submission for future use.

1.3: SEXUAL DIFFERENTIATION

The gender identity of a person is defined as “whether an individual identifies as a male or a female.”⁷ It is the end result of genetic, hormonal and morphological sex as influenced by the environment of the individual.⁸ It includes all behaviour with any sexual connotation, such as body gestures and mannerisms, habits of speech, recreational preferences and content of dreams.⁹ Sexual expression, both homosexual and heterosexual, can be regarded as the result of all influences on the individual, both prenatal and postnatal.¹⁰

7. L. Speroff R.H. Glass N.G.Kase Clinical Gynecological Endocrinology And Infertility 5ed (1994) 322.

8. *ibid.*

9. *ibid.*

10. *ibid.*

Specifically, gender identity is the result of the following determinants:

1. Genetic sex.¹¹
2. Gonadal sex.¹²
3. The internal genitalia.¹³
4. The external genitalia.¹⁴
5. The secondary sexual characteristics that appear at puberty.¹⁵

11. J. Dewhurst in Whitfield C.R.(ed) "Normal And Abnormal Development Of The Genital Organs"

Dewhurst's Textbook Of Obstetrics And Gynaecology For Postgraduates 4ed (1986) 1. Genetic sex is equated to chromosomal sex. Sexual development depends initially on the arrangement of the sex chromosome. Normal men have an XY sex chromosome arrangement and normal women an XX one. Chromosomal sex is immutable.

12. *ibid.* Normally if a Y chromosome is present with one or more X chromosomes, testes will form in the early embryo. If two or more X chromosomes are present without a Y, ovaries will form.

13. *ibid.* If testes form in the early embryo, the individual will develop male genital organs. If testes do not form, the individual will develop female genital organs whether ovaries are present or not. The internal genitalia in the female are the fallopian tubes, uterus and upper two-thirds of the vagina and in the male are the epididymis, vas deferens and seminal vesicles.

14. Dewhurst *op cit* 3. In the female, these are the lower third of the vagina and the vulva (labia majora, labia minora and clitoris). External genitalia in the male are the scrotum and the penis.

15. Speroff, Glass and Kase *op cit* 366. Pubertal sequence in females is: accelerated growth, breast development, adrenarche (appearance of axillary and pubic hair). An adolescent girl's growth spurt occurs 2 years earlier than that of a boy, whose mean age of voice change is 13.5 years.

6. The role assigned by society in response to all these external manifestations of sex.¹⁶

Gender role is heavily influenced by the assignment of the sex of rearing followed by social interaction based upon genital appearance and the development of secondary sexual characteristics.¹⁷

Prenatally, sexual differentiation follows a specific sequence of events: firstly, the genetic sex is established, and secondly, under the control of the genetic sex, the gonads differentiate, determining the hormonal environment of the embryo, the differentiation of the internal duct systems and the formation of the external genitalia.¹⁸ It has become apparent that the

16. E. Kahn "The True Hermaphrodite – Of No Sex?" (1981) 98 SALJ 111. Assigned gender, i.e. the gender-psychosocial-style in which the child is brought up as a male or as a female by his/her parents based on the external genitalia results in the psychological factor. This is a conditioning of the tender mind of a child over a period of some (usually prepubertal) years to regard himself or herself as the assigned gender with clothes, lifestyle, friends, expectations etc. appropriate to the parental decision.

17. Speroff, Glass and Kase op cit 328.

18 J. Money, M. Schwartz, V.G. Lewis "Adult Heterosexual Status and Fetal Hormonal Masculinization and Demasculinization: 46, XX Congenital Virilizing Adrenal Hyperplasia and 46, XY Androgen Insensitivity Syndrome Compared" (1984) 9 Psychoneuroendocrinology 405.

embryonic brain is also sexually differentiated, possibly via a control mechanism similar to that which determines the sexual development of the external genitalia, and it has been suggested that the inductive influences of hormones on the central nervous system may have an effect on the patterns of hormone secretion and sexual behaviour in the adult.¹⁹

For the answer to the question as to what the sex of the individual is, the lawyer has to rely on the doctor.²⁰ Traditionally, the doctor examines the external genitalia of the neonate, and accordingly determines the sex, placing the child into the clearly male or clearly female category, which distinction the law follows.²¹

In Corbett v Corbett (otherwise Ashley)²² the “*Ormrod test*” was formulated

19. Money, Schwartz and Lewis op cit 405.

20. Thomas op cit 79.

21. *ibid.*

22. [1970] 2 All ER 33. The court here based its decision entirely on biological criteria. The applicant, a man who had married a transsexual who had undergone gender reassignment procedures, applied to court for a decree of nullity. He declared the marriage was void *ab initio* or on the grounds of non-consumation. The court held that the biological criteria and not the psychological factors were decisive. For the purpose of determining sex any operation should be ignored.

by the House of Lords to identify the plaintiff's sexual identity.²³ This is a purely biological test requiring the congruence of the person's chromosomes, gonads and genitalia at the time of the person's birth.

According to the evidence before the court, there was general agreement among all the medical witnesses on the basic principles and the scientific facts.²⁴ All the witnesses accepted there were at least four criteria for an assessment of an individual's sex: the first three being the Ormrod biological criteria,²⁵ and the fourth, psychological factors.²⁶

Hence, it can be seen that gender is the expression of one's sex within the social construct, and this is to an extent fashioned by the patient's psyche.

23. There has been much criticism of the decision in Corbett v Corbett (otherwise Ashley) supra and its attendant *Ormrod test* from both legal and medical quarters. See *inter alia* I.M.Kennedy, "Transsexual and Single Sex Marriage" (1973) 2 Anglo-American Law Review 112; G.Brent "Some Legal Problems of the Post-operative Transsexual" (1972-1973) 12 Journal of Family Law 405. Editorial "Transsexuals in Limbo" (1971) 31 Maryland Law Review 235; W.A.W. Walters "Transsexualism-Medical and Legal Aspects" (1983) 16 (2) Australian Journal of Forensic Science 65

24. S.A.Strauss Doctor, Patient and the Law 3ed (1991) 234.

25. Thomas op cit 79.

26. *ibid*.

It has been stated that transsexualism represents the ultimate in the assumption of a sexual identity.²⁷ It is a positive mental state. The individual wants to be of the opposite sex and actively seeks a coincidence between his/her physical and psychological sex.²⁸

Sexual orientation has been described as simply the way in which an individual prefers to practice his/her sexuality and accordingly, the choice of a male or female partner.²⁹ It does not play a part in the diagnosis of that person's sex.³⁰ Cameron defines sexual orientation as:

“... sexual orientation is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same sex. Potentially a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex..”³¹

27. J.K.Mason, R.A.McCall Smith Law and Medical Ethics 5 ed. (1999) 37.

28. Mason and McCall Smith op cit 39.

29. *ibid.*

30. *ibid.*

31. Cameron E. “Sexual Orientation and the Constitution: A Test Case for Human Rights” (1993) 110 SALJ 450.

It is clear, therefore, that gender identity and sexual orientation differ in definition from the biological sex of the individual. Where psychological factors are incompatible with the biological factors that are responsible for the determination of sex, the gender dysphoria syndrome, results.

There is no such phenomenon as a true sex change or sexual metamorphosis as the true biological criteria for sex are immutable and cannot change. It is submitted that standardized terminology need be adopted and “gender reassignment” employed in place of all the other terms that are presently utilized to describe this procedure.

It is not the lawyer’s task to go into the merits or details of these criteria, but the growing significance given to psychological factors has inclined an increasing number of doctors to the view that gender reassignment surgery should be accepted by the medical and legal fraternities alike.³²

32. Thomas op cit 79.

Transsexuals are often confused with other groups of individuals with minority sexual inclinations.³³ As already stated³⁴ it is vital that the medical practitioner performs reassignment procedures on the appropriate individual so as to avoid morbidity from performing surgery on the incorrectly chosen patient, not to mention the resultant criminal and civil liability that he/she may incur. Each of these conditions will be examined separately.

1.4: SEXUAL AND GENDER INCONGRUENCY STATES

The groups that require discussion are: transsexuals; transvestites; homosexuals and the intersex states. The position of the male child who has suffered penile amputation at an early age will also be considered.

33. J. Taitz "The Legal Consequences of a Sex Change Dilemma" (1980) 97 SALJ 65.

34. See above.

1.4.1: THE TRANSSEXUAL

Transsexualism, or gender dysphoria³⁵ syndrome³⁶, is a medically recognized psychological disorder that has been described as:

“a passionate, life-long conviction that one’s psychological gender – that indefinable feeling of maleness or femaleness – is opposite to one’s anatomic sex.”³⁷

This condition, to a transsexual is as real as the awareness and effect of any serious illness, incurable defect or physical malformation of the body, and the syndrome may manifest itself in various psychotic or neurotic forms, leading even to suicide in extreme cases.³⁸ A transsexual is usually obsessively disgusted by his/her sexual organs, which he/she may seek to conceal from him/herself, and other persons, as these identify him/her with

35. D. Thompson (ed) The Concise Oxford Dictionary 9ed (1995) 424. Dysphoria is defined as “a state of unease or mental discomfort”.

36. Thompson op cit 1413. Syndrome is defined as “a group of concurrent symptoms of a disease.”

37. M.M.Belli “Transsexual Surgery” (1978) 239 Journal of the American Medical Association 2143 at 2144; see also MT v JT 355 LR (2d) 204 (1976) at 207.

38. MT v JT *supra* at 206.

his/her abhorrent anatomical sex.³⁹ Transsexual males have been known to amputate their genitalia in an attempt to do so.⁴⁰

A transsexual's belief and conviction that he/she is really a member of the opposite sex imprisoned in the wrong body is constant and inflexible, and the transsexual's state of mind has been described as follows:

"... no true transsexual (has) yet been persuaded, bullied, drugged, analysed, shamed, ridiculed or electrically shocked into (the) acceptance of his physique. It is an immutable state...".⁴¹

39. WS Sahakian Psychopathology Today – The Current Status of Abnormal Psychology 2 ed (1979) 379.

See also Taitz op cit 67 – it is not uncommon for a transsexual to cover his genital area when he baths.

40. J. Randell in R. Green and J. Money (eds) "Preoperative and Postoperative Status of the Male and Female Transsexuals" Transsexualism and Sex Reassignment (1969) 355. Also see Taitz op cit 67-68 where he states that in the extreme case, a transsexual may attempt to castrate himself. He may suffer certain psychotic illnesses eg. depression, resulting from delusions of sexual guilt which manifest in an urge to mutilate the genital organs.

41. I. Morris Conundrum (1974) 50.

Taitz has suggested, that in order to arrive at a diagnosis of transsexualism, the following criteria have to be satisfied:⁴²

- “(a) the subject has the absolute conviction of being a member of the opposite sex;
- (b) he or she has a strong urge to dress and behave in the manner of a member of the opposite sex;
- (c) the belief of being a member of the sex has constantly persisted from a very early age, with the relevant corresponding interests and habits of the opposite sex during normal periods of development;
- (d) the urge to behave as a transsexual is not attributable to other causes, for instance psychosis, homosexuality and play-action.”

In the past, the incidence of transsexualism has been reported to be in the region of 1:100,000.⁴³ However, the SALC Report draws attention to the fact that the number of transsexuals is not as low as is generally believed, with the ratio being 1:37,000 of the general population⁴⁴ with male-to-

42. Taitz op cit 67.

43. Taitz op cit 66.

44. SALC (1995) op cit 8.

female transsexuals being three to four times greater in number than female-to-male transsexuals.⁴⁵ Extrapolating from this ratio, in 1995, the SALC reported that the number of transsexuals in South Africa was approximately in the region of 800, with there being 600 male-to-female and 200 female-to-male transsexuals.⁴⁶ The Report further stated that only a number of transsexuals approach the medical profession for relief, and not all of these are suitable subjects for reassignment surgery.⁴⁷ Physical and psychological factors, together with age contribute to exclusion from surgery⁴⁸.

Mason and McCall Smith state that some foreign national centres have a very high turnover of gender reassignment procedures – in the region of up to 800 per year, and over 2,000 total cases, including some 400 females, have been operated upon within the British National Health Service.⁴⁹

45. Sir M.Roth "Transsexualism and the Sex-change Operation: A Contemporary Medico-Legal and Social Problem" (1981) 49 Medico-Legal Journal 5.

46. SALC (1995) op cit 8.

47. SALC (1995) op cit 8

48. ibid – beyond a certain age surgery is not appropriate.

49. Mason and McCall Smith op cit 38.

In July 2000, the Mail and Guardian reported that there were 50 “sex-change” operations per year between 1971 and 1989 performed secretly by the South African Defense Force (hereafter SADF).⁵⁰ Accordingly, some 950 procedures would have been performed in that time period by the SADF.

It is submitted that in view of these recent revelations, the figures quoted by the SALC for the general population could possibly be an underestimation, and the number of transsexuals in the general population, more specifically those who have had reassignment procedures, could be considerably higher than the quoted figures.

1.4.2: TRANSVESTITES

A transvestite is an individual who dresses in the clothing of the opposite sex (cross-dressing)⁵¹ and includes *inter alia*:

- (a) Individuals with symptomatic transvestitism. These are costume

50. P.Kirk “Mutilation by the Military” Mail & Guardian July 28 to August 3 2000 pages 4-5.

51. *Inter alia*: H. Benjamin “Transvestitism and Transsexualism” (1953) 7 International Journal of Sexology 12; W.A.W. Walters “Transsexualism – Medical and Legal Aspects” (1983) 16(2) Australian Journal of Forensic Science 65 at 67.

fetishists who wear garments of the opposite sex, usually of an intimate nature for sexual arousal or as sex objects.

- (b) Drag artists – female impersonation entertainers.
- (c) Prostitutes, sado-masochists and others who wear clothing of the opposite sex for deviant purposes.
- (d) Criminals dressed in clothing of the opposite sex in order to effect criminal acts.

A frequently seen symptom of the gender dysphoria syndrome, is a preference for clothing worn by the opposite sex.⁵² The transsexual, in cross-dressing, seeks to identify with the sex that he/she believes he/she belongs to. In this sense, the transsexual may be a transvestite but not all transvestites are transsexuals.⁵³ Transsexuals do not show a preference to cross-dress, as their dress is correct for their gender.⁵⁴

52. SALC (1995) op cit 10.

53. Taitz op cit 66.

54. R.E.Hemphill "Costume and Sex" The Black Bag (1960) 7.

1.4.3: HOMOSEXUALS

Homosexuals are individuals who are sexually attracted to persons who they know are of the same biological sex as themselves.⁵⁵ They derive pleasure from their sexual organs and have no desire to do away with them; they are satisfied with their biological sex.⁵⁶ A transsexual cannot be a homosexual although he is attracted to members of his own sex, because by the very nature of the gender dysphoria syndrome, he genuinely regards such persons as being of the opposite sex to himself⁵⁷ i.e. a transsexual is attracted by persons whose sex is opposite to that which he/she believes is his/her own.

Morris states⁵⁸

“... the homosexual, by definition, prefers to make love with others of his own sort, and would only alienate himself and others 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 ever been disabused of it... .”

55. E.Slater, M.Roth Clinical Psychiatry 3ed (1977) 169.

56. Slater, Roth op cit 13-14.

57. SALC op cit 10.

58. Morris op cit 13-14.

1.4.4: INTERSEX STATES

The standard classification of individuals with intersexuality (hermaphroditism) proceeds according to gonadal morphology.⁵⁹ In this terminology, a *true hermaphrodite* possess both ovarian and testicular tissue.⁶⁰ A *male pseudohermaphrodite* has testes, but external and sometimes internal genitalia take on female phenotypic aspects.⁶¹ A *female pseudohermaphrodite* has ovaries, but genital development displays masculine characteristics.⁶²

As already indicated, transsexuals have the unequivocal biological bodies and functions of normal members of their biological sexes. Transsexuals are not hermaphrodites, nor are hermaphrodites transsexuals.⁶³

59. Speroff, Glass and Kase op cit 329.

60. *ibid.*

61. *ibid.*

62. *ibid.*

63. SALC (1995) op cit 11.

Problems associated with intersex states may be aggravated if, at birth, intersexuals are erroneously designated to the sex opposite to that of their psychological sex, and are raised as members of the incorrect psychological sex.⁶⁴ Consequently, sex alignment surgery may be required here in order to correct the anomalous situations in which they find themselves.⁶⁵

Depending on the actual type of intersexualism, and sex description given in the person's birth register, the legal consequences of sex alignment surgery may be synonymous with the legal consequences of the gender reassignment procedures undertaken by transsexuals.

64. SALC (1995) op cit 11.

65. *ibid.*

1.4.5: TOTAL PENILE DESTRUCTION IN THE MALE CHILD EARLY IN INFANCY

A little boy may lose his sexual organs by accident or through disease, and is then intentionally raised as a girl. Hormonal treatment, together with gender reassignment surgery if necessary, is commenced at puberty and is completed by the time the patient reaches twenty years of age.⁶⁶

The gender of assignment depends on only one judgement: can the remaining phallus ultimately develop into a penis adequate for intercourse?⁶⁷

The success of a penis is dependant upon erectile tissue, and the genitalia should not only be serviceable but also erotically sensitive.⁶⁸

Technically, the construction of female genitalia is easier, and therefore the physician must be convinced that a functional penis is possible.⁶⁹

66. J. Money, A.A.Ehrhardt Man and Woman : Boy and Girl (1980) 18 118-123, 162.

67. Speroff, Glass and Kase op cit 354.

68. ibid.

69. A.G.Coran, T.Z.Porley "Surgical Management of Ambiguous Genitalia in the Infant and Child."(1991)

26 Journal of Pediatric Surgery 812. Also see P.K.Donahue, D.M.Powell, M.K.Lee "Clinical Management of Intersex Abnormalities" (1992) 28 Current Problems in Surgery 515.

All decisions regarding the gender of rearing and the overall treatment program should be made early in life and if a case has been neglected, gender reassignments must be made according to the gender identity in which the child has developed.⁷⁰ Reassignment of gender can probably be made safely up to 18 months of age.⁷¹

Socialization and hormone therapy are important for gender identity and sexual function. Future gender role and identity can be in accord with the assigned gender if the following conditions are met.⁷²

1. The parents are comfortable in their ability to raise their child. The parents must have participated in this acceptance and adaptation, and they must have agreed to the gender reassignment decision.
2. Genital reconstruction should take place as early as possible, certainly well before 18 months. Thereafter gender reassignment is difficult and adjustment is impaired.

70. Speroff, Glass and Kase op cit 355.

71. *ibid.*

72. *ibid.*

3. Properly timed hormonal and/or additional surgical interventions must be provided at puberty.

Although penile destruction is unusual, as witnessed by the paucity of scientific literature pertaining to it, such cases have been reported by the South African media.⁷³ In 1992, the *Beeld* reported the case of an 18 month old Black boy who had been mutilated in this manner, presumably for muti. Both his thumbs and genitalia had been cut off. He underwent preliminary surgery at the then Baragwanath Hospital⁷⁴, and was to be brought up to be a girl.

The legal consequences of gender reassignment surgery in the little male child would be substantially the same as in the case of the transsexual,

73. *Beeld* Tuesday 21 July 1992. Also *People* 6 October 2000 vol 14 no 20 carries the story of a boy who 32 years ago, at the age of 8 months suffered iatrogenic trauma to the penis which was burnt off during circumcision in the United States of America. Dr. J Money of the John Hopkins University in Baltimore, Maryland, thereafter commenced gender reassignment surgery on him at the age of 22 months. He was then put onto long-term hormonal therapy and it was planned that he would have a surgically constructed vagina at puberty.

74. Now known as the Chris Hani Hospital.

should he have initially been registered as a male in the birth register.⁷⁵

1.5: GENDER REASSIGNMENT PROCECURES

The unfortunate blend of the vital components for a balanced personality, results in a deeply confused and unhappy person whose maladjustment gives rise to serious psychological problems.⁷⁶ The difference between physical reality of the body, and gender of the mind in these patients often leads to a lack of psychological wholeness and failure to socially integrate.⁷⁷

Psychiatric treatment of the fully-fledged syndrome is seldom effective⁷⁸ and is usually unable to overcome the conflict raging inside the transsexual. In many cases, surgery, which converts, and thereby unites the individual's outward sexual appearance to his/her psychological sex, is the only treatment that will enable him/her to find happiness and the semblance of a

75. SALC (1995) op cit 12.

76. S.A. Strauss Legal Handbook for Nurses and Health Personal (1981) C 1 17.

77. J.J. Hage "Medical Requirements and Consequences of Sex Reassignment Surgery" (1995) 35 Med. Sci. Law 1 17.

78. Mason and McCall Smith op cit 37.

normal life.⁷⁹ Although surgical and hormonal treatment, i.e. the gender reassignment procedure does not result in a true sexual metamorphosis, with proper deportment and voice training, it is almost impossible to detect a post-operative transsexual as having been a member of his/her former sex.⁸⁰ The gender reassignment procedure, not only gives the patient a realistic outward appearance of the opposite sex, but it also includes the creation of the apparent sexual organs of the opposite sex.⁸¹ Although neither post-operative males nor females are capable of procreation, they are able to have sexual intercourse with members of their former sex.⁸²

79. Morris op cit 115.

80. SALC op cit 4. Also see Corbett v Corbett (otherwise Ashley) where April Ashley was described as a "pin-up beauty" and paraphrasing Professor Dewhurst "the pastiche of femininity can be very convincing". In Cossey v United Kingdom (1990) 13 EHRR, [1991] 2 FLR 492 Caroline Cossey was described as a "Bond girl".

81. H.W.Jones "Operative Treatment of the Male Transsexual" and J.E.Hoopes "Operative Treatment of the Female Transsexual" in R.Green and J.Money (eds) Transsexualism and Sex Reassignment (1969) at 313 and 353 respectively.

82. J.Taitz "The Law Relating to The Consummation of Marriage Where One of the Spouses is a Post-operative Transsexual" (1986) 15 Anglo American Law Review 141.

Not all transsexuals are suitable subjects for gender reassignment surgery. This is because their physical and psychological make-up may preclude them as appropriate candidates for such, and beyond a certain age surgery is not advisable.⁸³

For the surgeon, the key issue prior to considering surgical reassignment is to establish beyond reasonable doubt that the gender dysphoria or the transsexual feeling is genuine.⁸⁴ That the patient is mentally and physically fit for surgery has to be assessed pre-operatively as well.⁸⁵

1.5.1: PREREQUISITES FOR SURGERY

Although diagnosing gender dysphoria and determining whether this warrants gender reassignment surgery, is primarily the task of the behavioural scientist, the surgeon remains responsible for any diagnosis on the basis of which he/she performs surgical interventions.⁸⁶ The surgeon

83. SALC (1995) op cit 8.

84. Hage op cit 18.

85. *ibid.*

86. *Ibid.*

should therefore participate in diagnosing the gender dysphoria of any case he/she wishes to treat.

It is advised that the behavioural scientist (psychologist or psychiatrist), must have had supervised training in this particular field of sex therapy and counseling and must be a member of a reputable gender team, preferably the same team as the surgeon.⁸⁷ He/she should know the patient via a diagnostic or therapeutic relationship for at least six months and should establish that the patient has had uninterrupted and unchangeable feelings of being in the wrong body for a period of over two years and has had a successful cross-living test over a one-year period; i.e. has undergone a reliable real-life test.⁸⁸

87. J.Money , R. Ambinder "Two-year, Real-life Diagnostic Test: Rehabilitation versus Cure" in J.P.Brady, H.K.H. Brody (eds) Controversy in Psychiatry (1978) 833-845.

88. Hage op cit 18, where it is stated that these pre-operative requirements are in compliance with the Harry Benjamin International Gender Dysphoria Association's Standards of Care. The Standards of Care contain criteria prerequisites for the diagnosis of gender dysphoria as accepted by the legal profession, third party insurance payers and the medical profession, as well as in the malpractice arena in the United States.

To determine whether the patient is physically fit for surgery, the surgeon may lean on the expertise of the endocrinologist with substantial personal experience in the field of hormonal treatment for the transsexual.⁸⁹

Only when these diagnostic pre-requisites are met, should the rearrangement of the body towards its new sexual appearance be performed.

1.5.2: GENDER REASSIGNMENT SURGERY

A distinction should be made between non-genital and genital gender reassignment surgery.

Transsexuals seek to adapt their bodies as optimally as possible to their gender.⁹⁰ Treatment here would include facial surgery, body contouring and voice adapting in the male to female transsexual, and body contouring in the female to male transsexual.⁹¹

89. Hage op cit 17.

90. Hage op cit 22.

91. Hage op cit 19.

Gender reassignment for male to female transsexuals may be completed in one operation, leading to acceptable cosmetic and functional results provided the surgery and post-operative treatment are performed with a high degree of expertise.⁹² Here, conversion involves the removal of the penis, testes and scrotum and the creation, by plastic surgery of an artificial vagina in the region of the identical place of the natural vagina by constructing a cavity between the prostate gland and the rectum.⁹³ Hormones are utilized for the formation of female-like breasts, which may also be constructed by plastic procedures.⁹⁴ Post-operative treatment with the female hormone oestrogen, will result in the reduction of body hair and in encouraging the growth of breasts and the rounding of hips.⁹⁵ A properly constructed artificial vagina can fully accept an erect male penis, and the post-operative female may have sexual intercourse in the same manner as a biological female.⁹⁶

92. Hage op cit 17.

93. S.S.Rathnam, S.M.Lim "Surgical Treatment of Transsexualism" in J.Studd (ed) Progress in Obstetrics and Gynecology (1982) 2 22.

94. N.T.Edgerton "Transsexualism – A Surgical Problem" (1978) 54 Plastic and Reconstructive Surgery 448.

95. H.Benjamin, C.Ihlenfeld "Transsexualism" (1973) 3 American Journal of Nursing 453.

96. SALC (1995) op cit 5.

Gender reassignment surgery in female to male transsexuals can seldom be achieved in one stage.⁹⁷ A mastectomy is necessary since testosterone treatment results only in a moderate reduction in breast size.⁹⁸ A hysterectomy, removal of the ovaries and the construction of a penis and scrotum by plastic procedures are surgically accomplished.⁹⁹ Testicular and penile prostheses are implanted.¹⁰⁰ Post-operative and biological males, who, as a result of injury or other reasons are unable to achieve an erection and have sexual intercourse, are able to do so with the help of medical appliances.¹⁰¹

In the day-to-day practice of plastic surgery, the indications for surgery are self-evident. However, this does not apply to the gross changes brought on by gender reassignment surgery, which is usually not reversible.¹⁰²

97. Hage op cit 17.

98. J. Raymond The Transsexual Empire (1979) 36.

99. Ratnam and Lim op cit 22.

100. J.J.Hage and M.S.Fayman "Masculinizing Surgery for Male Intersexes and Female to Male Transsexuals" (1994) 5 (3) Medical Sex Journal 5.

101. SALC (1995) op cit 5.

102. Hage op cit 17.

Therefore, this kind of surgery has met with resistance both within and outside the medical profession, including legal and ethical circles and whether surgery answers the needs of the transsexual has been questioned.¹⁰³

At the one end of the spectrum of opinion is the view that these procedures provide the only effective relief for transsexualism, while at the other end is the belief that psychotherapy is as equally effective.¹⁰⁴ It is argued that psychotherapy is not irreversible, nor as drastic as surgery, nor are the dangers that are inherent in surgical and hormonal treatment present in psychotherapy.¹⁰⁵

103. Hage op cit 23.

104. J.Taitz "A Transsexual's Nightmare: The Determination Of Sexual Identity In English Law" (1988)

2 International Journal Of Law And The Family 139. Also People op cit 33 carried the story of a victim of penile amputation who was managed with gender reassignment. He subsequently had reversal of surgery some years later. Independent Online on 19-6-2000, reports of a 25 year old Iranian man who underwent a "sex" change to become a woman a year ago. He now requests a reversal procedure.

105. Taitz op cit 143.

It is interesting to note that in August 1979, doctors at the John Hopkins Hospital in Baltimore, USA, announced that they were abandoning gender reassignment surgery for all but hermaphrodites. This was because a study had found no difference in the long-term adjustment between transsexuals that were treated surgically or with psychotherapy alone.¹⁰⁶

Mason and McCall Smith state that although psychiatric treatment is generally ineffective, in practice, a comparatively small number of applicants are, in fact, recommended for surgery.¹⁰⁷ This is because of the ethical problem of case selection. Stringent diagnostic prerequisites have to be satisfied unequivocally before gender reassignment procedures are performed.

106. Strauss op cit 238 at footnote 33, in quoting Time magazine, 27 August 1979.

107. Mason and McCall Smith op cit 38.

1.6: GENDER REASSIGNMENT PROCEDURES:

CONCLUSION

The nature of gender reassignment procedures has been examined and the following points need to be noted:

1. The phenomenon of true sex change or sexual metamorphosis does not exist. Treatment here should correctly be called a gender reassignment procedure.
2. After undergoing a gender reassignment procedure, the transsexual takes on the realistic form and appearance of his/her post-operative sex.
3. Although post-operative transsexuals are capable of having sexual intercourse with members of their now opposite sex, they are incapable of procreation.
4. Gender reassignment procedures are usually irreversible and carry a high risk factor to the patient's life and health.
5. Gender reassignment procedures are indicated in transsexuals, intersexuals and little boys who have suffered penile destruction at an early age.
6. The legal consequences of gender reassignment for intersexuals and little boys with penile amputations, are often identical to the legal

consequences resulting from a “change of sex” for transsexuals.

As already discussed¹⁰⁸ there is no unanimity of medical opinion as to the therapeutic value of these procedures, neither is there legislation directly appertaining to this subject. Consequently an exploration of the medico-legal and legal aspects of gender reassignment procedures is essential in order to determine whether this treatment is “legal” or “illegal”.

108. See above.

CHAPTER 2: MEDICO-LEGAL ASPECTS OF GENDER REASSIGNMENT PROCEDURES

The medical solution, when faced with a conflict of evidence, is to assign a person to the sex that he/she is most likely to be able to support in society.

The function of the chromosomal sex is then relegated to that of an indicator of the direction in which to steer an infant's upbringing.¹⁰⁹ Later in life, the one characteristic of sex or gender that is not apparent to anyone, including the principal, is the state of a person's chromosomes.¹¹⁰

An examination of the medico-legal aspects of gender reassignment surgery necessitates an appraisal of the legality of the surgery, consent and the medical skills required for the entire treatment package. Surgery of this nature is only justified if the therapeutic objective aimed at in the light of present day knowledge of the gender dysphoria syndrome is satisfied. As already discussed¹¹¹ it is claimed that surgery is undertaken to restore the patient's psychological equilibrium and to facilitate socialization and social

109. Mason and McCall Smith op cit 39.

110. *ibid.*

111. See above

reacceptance. It is submitted that on this basis, gender reassignment surgery would be justifiable.

2.1: LEGALITY OF THE SURGERY

The legality of gender reassignment surgery can be described as languishing in limbo – it has neither been prohibited nor has the surgery received any official sanction in South Africa.¹¹² Consequently, as this type of surgery is not considered as *contra bonos mores*, it cannot be regarded as a violation of the criminal law. In the absence of any specific authority, therefore, one can only apply the general principles of the law.

General principles governing the validity of gender reassignment surgery require to be examined for an assessment of its current legal status.¹¹³ The facts are that surgery of this nature is radical, dangerous and generally irreversible. What needs to be satisfied is the justification of the contention that this type of surgery is indeed therapeutic. The rationale used for this justification is that a genuine transsexual is seriously disturbed

112. S.A.Strauss Doctor, Patient and the Law 3ed (1991) 228, 229, 235.

113. M.L.Lupton in I Schafer (ed) Family Law Service (1995) J 4.

psychologically and that psychotherapy has little curative value for the patient's abnormal relationships and suicidal tendencies.¹¹⁴ In many instances the only remedy for the turmoil raging in the patient is to convert his/her external sexual appearance, which he/she rejects so as to align this with his/her psychological sexual orientation, finally to achieve the equilibrium he/she so desperately seeks.¹¹⁵

Although Strauss has reported conflicting views of South African doctors, the general overall expert opinion on the question of gender reassignment is

114. M.L.Lupton in I Schafer (ed) Family Law Service (1995) J 4.

115. N.T.Edgerton "Transsexualism – A Surgical Problem" (1978) 54 Plastic and Reconstructive Surgery 448.

that the therapeutic objective it strives to achieve is sufficient justification for this surgery despite the doubts still voiced about its efficacy.¹¹⁶

116. Strauss op cit 238 , reports on his discussion with Pretoria gynaecologist, Dr. Meredith Botes which concerned the 1979 decision by the John Hopkin's Hospital to abandon surgery on the basis that it only served as a palliative measure (see above). Dr. Botes who had treated many transsexuals and had developed a special interest in the syndrome could not agree with the outlook of the John Hopkin's decision as he regarded his success rate as high. However, in 1981, Professor Max Feldman of Johannesburg expressed scepticism about gender reassignment surgery and was of the view that in the case of gender change in person's not of intersex, the abandonment of surgery was to be welcomed. Also, reported by Strauss was the opinion of the French team that equated this type of surgery to fraud.

Hage and Fayman op cit 7 reported in 1994 that over the previous 20 years the gender team of the Free University Hospital (Amsterdam) had registered over 1,200 transsexuals of whom approximately 50% were referred for surgery. The Johannesburg Medical Forum for Treatment of Transsexuals had started working in close co-operation with the Amsterdam team. The basic principle of these teams was that the pre-operative requirements had to be met in each individual case.

Current public policy with regard to cosmetic operations while risking danger to the patient's life and health, requires to be evaluated and the opinion on gender change operations designed to overcome severe psychoneurotic problems cannot be considered as *contra bonos mores*.¹¹⁷ In principle, any drastic operation of a non-therapeutic nature is unlawful, unless a legally justifiable purpose is sought to be attained by it (e.g. a cosmetic improvement which will not substantially endanger the life or health of the patient, or the removal of tissue or an organ from a healthy person for the purposes of transplantation).¹¹⁸ Justification for this type of surgery lies in the fact that its true nature is therapeutic and in the best interests of the patient.

As South Africa has not legislated to prohibit this type of surgery, doctors are free to perform it according to the dictates of their consciences, and in line with accepted medical practice.¹¹⁹

117. D.J.McQuoid-Mason and S.A.Strauss (revised by D.J.McQuoid-Mason) "Medicine, Dentistry, Pharmacy and other Health Professions" W.A.Joubert ed (1999) vol 17 The Law of South Africa at 220.

118. Strauss op cit 228.

119. Lupton op cit J4.

It is to be noted that the repealed 1974 amendments to the Births, Marriages and Deaths Registration Act¹²⁰ in making provision for the formal alteration of a person's officially registered sex must have envisaged gender reassignment procedures being performed through surgical means and was tantamount to endorsing it. This provision was subsequently repealed as it was not interpreted by the courts as assisting in solving the legal dilemmas of the transsexual.¹²¹

An operation performed on an individual who is biologically of the intersex state to enable the person to be compatible with one sex or the other, is lawful, provided the requisite consent is obtained.¹²² It is submitted that the same policy should apply to the little boy child who, at an early age, is the victim of penile amputation as a result of whatever cause.

120. Act 51 of 1974, which inserted section 7B into the Births, Marriages and Deaths Registration Act 81 of 1963.

121. McQuoid-Mason and Strauss LAWSA vol 17 166 at 220.

122. *ibid.*

Notwithstanding the acceptable therapeutic indication for surgery, the skill with which these procedures are performed and the aesthetic results achieved, it is to be determined whether the consent of the patient *per se* affords justification for the procedure. As gender reassignment procedures are not *contra bonos mores*, consent *per se* does afford justification for the surgery.

2.2: CONSENT

The surgeon intending to perform the operation must obtain an informed consent from his/her patient.¹²³ The question in respect of consent by transsexuals is whether they are so psychologically ill as to be mentally incompetent to give an informed consent.

In medical cases, for informed consent to be valid,¹²⁴ the patient must:

- (a) have knowledge of the nature of the harm or risk involved;
- (a) appreciate and understand the nature of the harm or risk;
- (b) consent to the harm or assumed risk;

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

124. McQuoid-Mason and Strauss LAWSA vol 17 146 at 196, in citing *Castell v De Greef* 1994 (4) SA 408 (C) 425.

- (c) have given a comprehensive consent, i.e. a consent that extends to the entire transaction, inclusive of its consequences;
- (d) be legally capable of giving consent;¹²⁵ and
- (e) have the mental capacity to consent.

It has to be determined whether the above prerequisites can be satisfied in the transsexual so as to allow for validity of consent. The doctor must be satisfied that the transsexual's mind has not been so affected as to render him/her incapable of understanding the nature and consequences of the proposed gender reassignment and that he/she agrees to the entire procedure, including its risks and consequences.¹²⁶ The determination of the mental capacity of the transsexual is the task of the behavioral scientist as previously mentioned¹²⁷. In view of the stringent pre-operative counseling

125. For instance, in terms of the Child Care Act 74 of 1983 s 39 (4) (a) – everyone over 18 years of age is competent to consent without assistance of parent or guardian to the performance of any operation upon themselves. s 39 (4) (b) allows everyone over 14 years to consent without assistance from their parent or guardian to any medical treatment for themselves or their children.

126. J.P.Holloway "Transsexuals – Some Further Legal Considerations." (1972) 5 CILSA 71.

127. See above

and treatment of the patient over a protracted period of time, it is submitted that all the above prerequisites will have been satisfied and the consent given by the transsexual for the gender reassignment surgery will have been properly informed and valid.

Consent, however, is valid only if the act consented to is in accordance with public policy (i.e. not *contra bonos mores*).¹²⁸ For instance, consent to reckless, mutilating surgery would not render a practitioner's conduct lawful. In the case of the transsexual, however, as has already been pointed out¹²⁹ gender reassignment surgery, done in good faith is regarded as not being contrary to public policy.

The validity of consent applies to both unmarried and married persons. The Bill of Rights of the Constitution,¹³⁰ assures everyone of the right to bodily

128. Strauss and Strydom op cit 182.

129. See above.

130. Constitution of the Republic of South Africa, Act 108 of 1996 s 12 (2) (b).

and psychological integrity including the right to security in and control over their bodies. Accordingly, it is not necessary for one spouse to obtain the consent of the other spouse when undergoing gender reassignment procedures.

It is submitted that informed consent for gender reassignment surgery in transsexuals is valid for all purposes of the law if the above criteria are satisfied. These include the recognition by the patient that:

- (a) he/she will no longer be able to function sexually or procreatively as a member of his/her anatomical sex;
- (b) the procedure will not change or alter his/her biological sex; and
- (c) he/she is requesting and consenting to the procedure to prevent the deterioration of the his/her mental health.

2.3: MEDICAL SKILLS

Behavioral scientists, plastic surgeons, gynaecologists, urologists, and endocrinologists are the specialists whose skills will be required at various

stages in the treatment of transsexuals.¹³¹

The treatment package includes:

- (1) an evaluation of the patient's motives for requesting surgery¹³² – done by a behavioral scientist over a period of counseling for at least 6 months;¹³³
- (2) an evaluation of the patient's understanding of the problems and practicalities involved in undergoing gender reassignment¹³⁴ by both the surgeons and the behavioral scientists;
- (3) the implementation of a pre-operative trial period¹³⁵ by the team; and,
- (4) for those who undergo the surgery, a period of post-operative adjustment¹³⁶ which would include long-term counseling and hormonal treatment.

131. Morris op cit 102.

132. Lupton in Schafer Family Law Service (1995) J6.

133. Hage op cit 18.

134. Green and Money op cit 132.

135. Benjamin and Ihlenfeld op cit 454.

136. H.Benjamin The Transsexual Phenomenon (1966) 128.

Management of these patients with the correct medical skills is of medico-legal significance as a misdiagnosis and inappropriate treatment will lead to great distress and suffering by the individual and a possible law suit against the medical team. In addition it has to be pointed out to the patient that although it is hoped that the desired long-term psychological results will be brought about, this cannot be guaranteed.

2.4: MEDICO-LEGAL ASPECTS – CONCLUSION

The legal position in South Africa regarding gender reassignment procedures for gender dysphoria syndrome is as follows:

- (1) Gender reassignment procedures are not *contra bonos mores*.
- (2) Gender reassignment operations are nearly everywhere justified as therapeutic procedures under the doctrine of “necessity” or “genuine medical treatment.”
- (3) The legality of consent to gender reassignment depends upon the requisites for informed consent to be satisfied.
- (4) Reassignment surgery cannot be regarded as unlawful where the legal and medical criteria for the procedures have been met.
- (5) Desired long-term psychological results cannot be guaranteed as a certain sequel of a gender reassignment operation.

Although the performance of gender reassignment surgery upon transsexuals, subject to certain conditions is lawful, not all juristic problems connected with transsexualism are solved. The problem here is not whether the surgery is lawful or not, but with the impact of the operation on the legal status of the individual after surgery.

CHAPTER 3: THE LEGAL CONSEQUENCES OF GENDER REASSIGNMENT SURGERY – DOCUMENTARY AMENDMENTS

The legal position of the post-operative transsexual presents a challenge to lawyers and jurists. Although the medical profession has made the notion of gender reassignment, and hence gender change a reality, it is the lawyers and the courts that have been presented with the medical *fait accompli*. The courts have been required to place the post-operative individual within the limitations of the existing law which has, up to 1996, prior to the passing of the Constitution¹³⁷ recognized only biological males and females.¹³⁸

The rights of transsexuals are governed by the status conferred upon them by common law, state¹³⁹ and the Constitution. Basic legal concepts such as

137. Act 108 of 1996 s 9(3).

138. The court which decided W v W 1976 2 SA 308 (W) had no legislation, local common law or local earlier cases to turn to for guidance. As a consequence it based its judgement on the case of Corbett v Corbett *supra* using the Ormrod biological criteria that places individuals into the distinctly male or female category depending on the chromosomal, gonadal and genital sex.

139. J. Taitz "A Transsexual's Nightmare: The Determination Of Sexual Identity In English Law"

(1988) 2 International Journal Of Law and the Family 143.

sanity, solvency, majority, sex, marital status, divorce and insolvency are included in status.¹⁴⁰ Where the common law does not sufficiently protect status, the legislature should intervene to ensure that the law is consistent with the Constitution. It follows that gender reassignment surgery and the legal consequences that follow, including the determination of sexual identity, should be matters of great interest to the state.

Our common law was developed on the premise that there are two immutable sexes.¹⁴¹ It did not recognize the phenomenon of transsexualism or lend any support to the notion of gender reassignment.¹⁴² Nevertheless, for the post-operative transsexual, the next logical step after completion of surgery, is that of having all his/her documents altered accordingly.¹⁴³ A prerequisite for this is to have his/her previous gender erased and his/her new gender recorded in the official register¹⁴⁴

140. *ibid.*

141. Lupton in Schafer Family Law Service J7.

142. H R Hahlo The South African Law of Husband and Wife 5ed (1985) 67-68; W v W 1976 (2) SA 308 (W).

143. Strauss Legal Handbook op cit C 1 18.

144. *ibid.*

3.1: LEGISLATIVE ENACTMENT

Although Parliament had previously made provision to allow for the change of the sex description of a post-operative transsexual in such person's birth register, there was no legislation unequivocally recognizing such person's post-operative sex for all purposes of the law.¹⁴⁵ The legislative enactment¹⁴⁶ concerning the change of sex description of a post-operative transsexual, provided that:

“The Secretary (for the Interior) 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 the purpose call for such medical reports and institute such investigation as he may deem necessary.”¹⁴⁷

145. SALC op cit 14.

146. The Births, Marriages and Deaths Registration Act 81 of 1963.

147. Act 81 of 1963 s 7B. When introducing the Bill regarding s 7B the then Deputy Minister of Interior informed Parliament *inter alia* : “For the past few years the Department of Interior has, on request altered a person's sex description in his or her birth register after such person has undergone a change of sex as a result of medical treatment ... The Government law advisers have confirmed that no provision exists in the Act in terms of which the sex description of a person who has undergone a change of sex may be altered in his birth register ... It is consequently being proposed, firstly, that the Secretary for the Interior be vested with power to alter in a person's birth register the sex description of a person who has undergone a change of sex on the recommendation of the Secretary of Health ...

Accordingly, the state recognized gender reassignment surgery as lawful medical treatment and did not consider it to be *contra bonos mores*. By inference, it is possible that Parliament intended the transsexual's post-operative sex, to be recognized for all purposes of the law in South Africa.

Although section 7B had a minimal effect on the general way of life, and full integration into society of post-operative transsexuals, the enactment enabled the latter to obtain official documents e.g. an identity document, indicating their post-operative sex, with no reference to their former sex – hence there was no discrepancy between their apparent sex and their registered sex.¹⁴⁸

Where social and commercial practices required the production of a birth certificate, the post-operative transsexual was not placed in the humiliating position of having to explain his/her predicament.¹⁴⁹ Furthermore, by being

and, secondly, that the alteration of sex descriptions of persons who have undergone a change of sex, which have already been effected in the birth registers, shall be deemed to have been effected legally.”

From House of Assembly Debates Vol 51 cols 4441-2, 4 October 1974.

148. SALC (1995) op cit 15.

149. *ibid*.

able to obtain an identity document indicating his/her post-operative sex, a transsexual:¹⁵⁰

- (a) could not be convicted of contravening the Prohibition of Disguises Act ¹⁵¹ or of impersonating a member of the opposite sex in contravention of any ordinance or by-law; and
- (b) had little difficulty in obtaining a passport in his/her post-operative name and sex.¹⁵²

However, in the case of W v W¹⁵³ the leading case in South Africa, concerning the determination of the sexual identity of a post-operative female in a divorce case¹⁵⁴, the courts did not interpret the provision made by section 7B in the former Births, Marriages and Deaths Registration Act¹⁵⁵ as assisting in solving the dilemma of the transsexual.¹⁵⁶

150. SALC op cit 15.

151. Act No. 16 of 1969.

152. SALC (1995) op cit 15 at footnote 41 – The change of the first name could be accomplished by a simple application to the Registrar of Births Marriages and Deaths.

153. W v W 1976 (2) SA 308 (W) at 314 F et seq.

154. See below.

155. Act 81 of 1963.

156. McQuoid-Mason and Strauss LAWSA vol 17 op cit 166.

The effect of W v W negated the possibility of post-operative transsexuals being recognized in South African law as members of their post-operative sex.¹⁵⁷ It also served to negate the possibility of section 7B becoming the cornerstone for the recognition of a transsexual's post-operative sex.¹⁵⁸ The provision was subsequently repealed by the new Births and Deaths Registration Act.¹⁵⁹ The justification for this step was stated as follows during the second Parliamentary session reading in 1992:

“... I just want to issue a final word of warning to those hon members who have nevertheless considered undergoing a sex change operation that the good old days when a man could become a woman after a sex change operation, and a woman a man, no longer exist as a result of court judgements in that regard.”¹⁶⁰

The new Act, which was implemented on 1 August 1992, made no provision for the alteration of the description of the sex of any person who had undergone a change of sex. The provisions of section 7B of the repealed Act

157. Simms v Simms 1981 (4) SA 186 (D).

158. SALC (1995) op cit 18.

159. Act 51 of 1992.

160. Minister of Interior: Hansard House of Assembly Debates col 2356 19 March 1992.

have not been enacted in the new Act. As a consequence it is not possible for any person who has undergone a gender reassignment procedure to alter his/her sex description in his/her birth register.

The Births and Deaths Registration Act ¹⁶¹ was, however, amended during the 1993 Parliamentary session by the addition of the following subsection to section 33:¹⁶²

- (c) A person who was in the process of undergoing a change of sex before the commencement of this Act, may on completion of the said process apply in terms of section 7B of the Births, Marriages and Deaths Registration Act, 1963, for the alteration of his sex description in his birth register.

This subsection came into effect on 1 September 1993 ¹⁶³ and offered some respite to persons who were already in the process of undergoing gender reassignment procedures. It does not, however, assist persons who wish to undergo gender reassignment procedures but were not undergoing the procedure at the time that the Births and Deaths Registration Act

161. Act 51 of 1992.

162. SALC op cit 19.

163. *ibid.*

commenced. The failure to recognise the status of transsexuals who now undergo gender reassignment procedures may well be unconstitutional.

3.2: THE CONSTITUTION: SECTION 33

Section 33 of the Constitution of the Republic of South Africa¹⁶⁴ on just administrative action states as follows:

(1) Everyone has the right to just administrative action that is lawful, reasonable and procedurally fair.

The Promotion of Administrative Justice Act,¹⁶⁵ was enacted to give effect *inter alia* to this right.

As surgery for gender reassignment is not considered *contra bonos mores*; and as South Africa has not legislated to prohibit this type of surgery, it is submitted that South African surgeons will continue to perform this surgery according to the dictates of their consciences and in line with acceptable medical practice. However, for the post-operative transsexual, there is no legal provision for the next logical step, which is to have all his/her

164. Act 108 of 1996.

165. Act No. 3 of 2000.

documents altered accordingly. It is submitted that this is a direct infringement of the rights afforded to these individuals by section 33 of the Constitution and the Promotion of Administrative Justice Act of 2000.

As has been previously stated,¹⁶⁶ with successful gender reassignment surgery and proper medical treatment, the post-operative transsexual possesses the full capacity to function sexually as male or female. It follows that there should be no legal barrier, social taboo or reason grounded in public policy to prevent such a person's identity from coinciding with his/her new gender.¹⁶⁷

166. See above

167. “ ‘ She’s a Man,’ says Home Affairs” Mail & Guardian February 25 to March 2 2000 – reporting on an apparent mishap by the Department of Home Affairs 9 years ago when Georgia Kinghorn was registered as a male instead of a female after relocating to South Africa from England. Kinghorn’s ID number indicated that her gender is male, (the system encodes particulars of gender in numerical form only) and this was picked up by an official at the local licensing office who informed her that she could not have her vehicle licensed as the computer system indicated that she was a man. The Home Affairs mistake affected Kinghorn financially. With a new job, she had applied for a cheque account and a credit card, but the bank could not process her application until her “gender problem” had been sorted out with the department. From a social point of view, she was immobilised because she could not drive her vehicle without the necessary license to be on the road. Although Kinghorn’s problem apparently was a consequence of a mishap at the Department, this situation raises the various legal and ethical issues and in a way demonstrates the human rights violations imposed on transsexuals who have had gender reassignment procedures, but are refused recognition by the law.

CHAPTER 4: THE LEGAL CONSEQUENCES OF GENDER REASSIGNMENT SURGERY - MARRIAGE AND MATTERS ANCILLARY THERE TO

4.1: MARRIAGE – DEFINITION AND HISTORICAL PERSPECTIVE

According to our common law, marriage is the union of a man and a woman, and two persons of the same sex cannot marry.¹⁶⁸ Closely allied to this definition is the fact that marriage is limited to persons of the opposite sex¹⁶⁹ which means that same sex marriages are not recognised by the law. Proscriptions against same sex marriages has ancient roots – Roman law, Judaeo-Christian moral and ethical standards, old English law, and the laws of the various American states.¹⁷⁰

168. W v W 1976 (2) SA 308 (W) at 310D-E, relying on Corbett v Corbett (1970) 2 All ER 33.

169. Jones v Hallahan 501 SW 2d 588 (Court of Appeals at Kentucky 1973) at 589; Baker v Nelson 191 NW 2d 185 (Supreme Court of Minnesota 1971) at 186.

170. Bowers v Hardwick 478 US 186 (1985) at 192, 196-197.

The historical perspective necessitates a consideration of same sex marriages because transsexuals relationships have been viewed as same sex relationships by our courts.¹⁷¹ Oliver Wendell Holmes, in response to the historical argument states:

“It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”¹⁷²

The works of American historian, John Boswell,¹⁷³ show clearly how historical arguments distort history:

“Roman society, at least in its urban centres, did not for the most part distinguish gay people from others and regarded homosexual interest and practice as an ordinary part of the range of human eroticism.”

171. W v W 1976 (2) SA 308 (W).

172. O.W.Holmes “The Path of Law” (1987) 10 Harvard LR 457 at 469.

173. J.Boswell Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe From the Beginning of the Christian Era to the Fourteenth Century (1980) 333.

Intolerance against same sex relationships began in the latter half of the twelfth century, probably because of an increase of intolerance of minority groups such as non-Christians especially Jews. This led to an intolerance of deviation from the standards of the majority, enforceable for the first time in the newly emerging corporate states of the High Middle Ages.¹⁷⁴

Boswell states that same sex unions were widespread in the ancient world, where heterosexual matrimony was viewed as a dynastic or business arrangement and love in such relationships, when it did occur, arose following the coupling. Feelings that the twentieth century would call romantic now, were invested by ordinary men and women in same sex relationships then, either as passionate friendships, or more structured and institutionalized unions.¹⁷⁵ It is interesting to note that until the fourteenth century in Europe, the Christian church solemnized same sex unions.¹⁷⁶

174. Boswell op cit 334.

175. J.Boswell The Marriage of Likeness: Same-Sex Unions in Pre-Modern Europe (1996) 280.

176. Boswell (1996) op cit appendices.

Western Europe was not the only area where same-sex unions were allowed to flourish. Native American, African (including South Africa¹⁷⁷) and Asian¹⁷⁸ cultures bore witness to similar relationships.

The importance of this history is to serve as a warning against the tendency to move from history into myth.¹⁷⁹ Conceptions regarding marriage and attitudes to same-sex relationships vary across time and cultures. This is highlighted by historical and anthropological research.¹⁸⁰ The research demonstrates that marriage is constructed by society and society is dynamic.¹⁸¹

The traditional legal definition of marriage in heterogeneous South Africa, as stated by Sinclair: “has become outmoded and unacceptable to a large proportion of the population.”¹⁸² The legal tradition of marriage is viewed as

177. W.N.Eskridge A History of Same-Sex Marriage (1993) 79.

178. Eskridge op cit 1435-84.

179. A.Pantazis “An Argument for the Legal Recognition of Gay and Lesbian Marriage” (1997) 114 SALJ 561.

180. R.D.Mohr Gays/Justice: A Study of Ethics Society and Law (1988) 32.

181. Eskridge op cit 1434.

182. J.D.Sinclair The Law of Marriage 1ed (1996) 169.

an ideal and less of a marriage as is actually experienced. This is because, in spite of there being no coherent tradition of long-term, monogamous, procreation-oriented marriage among heterosexuals, same sex couples are measured against this ideal which is found wanting and they are thereby denied entry into marriage.¹⁸³

The understanding that historical ill treatment is a reason for protecting rights underpins South Africa's Constitution as a whole. In the case of same-sex marriages, historical ill treatment is the reason for protecting the rights of same-sex couples. This is the reason that unfair discrimination on the grounds of sexual orientation is prohibited.¹⁸⁴

4.2: THE CASE OF WvW 1976 2 SA 308 (W)

The only reported case in South African law dealing with the marital status of a post-operative transsexual is that of W v W.¹⁸⁵ The essential issue before the court here, was the determination of the sexual identity of a

183. S.K.Homer "Against Marriage" (1994) 29 Harvard Civil Rights – Civil Liberties LR 505 at 521.

184. Pantazis op cit 562 ; Act 108 of 1996 section 9 (3).

185. W v W 1976 (2) SA 308 (W) at 310-D-E, relying on Corbett v Corbett (1970) 2 All ER 33.

post-operative transsexual female in a divorce case. The plaintiff, who had been born and registered as a male, had been diagnosed as a transsexual and had undergone gender reassignment surgery on psychiatric advice. After the reassignment procedure, the plaintiff changed her first names and had her sex description in her birth register altered. At the time that the parties married, the defendant was aware of the plaintiff's change of gender. According to the evidence, the marriage was consummated and the parties enjoyed normal sexual relations.¹⁸⁶ The plaintiff sought a divorce on the basis of her husband's adultery. Accepting the basic premise of our law, that a valid marriage could only be contracted between two persons of the opposite sex, the court ruled that the vital question to be decided concerned the true sex of the plaintiff prior to marriage.¹⁸⁷ No medical evidence was led to support the plaintiff's claim that the corrective surgery "she" had undergone had changed her sex from male to female.

The court thus accepted the medical evidence led in the earlier English case

186. W v W at 310 A.

187. W v W at 310 H.

of Corbett v Corbett¹⁸⁸ and applied the *Ormrod test* which requires that a person's sex is determined by a congruence of purely biological factors (chromosomes, gonads and genitalia).¹⁸⁹ The *Ormrod test* indicated that at birth she was a biological male and that the sex surgery did not make her a biological female. As a marriage is a union between people of the opposite biological sexes, the plaintiff's purported marriage was held to be a nullity. The surgically created vagina was referred to as an artificial one and hence it was declared that on this basis, the marriage could never have been consummated.¹⁹⁰

188. Corbett v Corbett (1970) 2 All ER 33.

189. See above.

190. M.L.Lupton "The Validity of Post-operative Transsexual Marriages" (1976) 87 SALJ 389-

390. The court decision is strongly criticized by Lupton who states: "If the plaintiff is not a woman, what is she? It is inhuman and impracticable to consider her merely as a castrated male." He argues that there was an over-technical interpretation of the law leading to disadvantages, inhumanity and inequity and this far outweighs the scant benefit of upholding a principle which is infringed only if viewed from the vantage-point of society in general. He criticizes the court for accepting the situation that the man professed to love her, enjoyed her sexual comfort, companionship and loyalty, accepted a financial contribution from her from her joint income, and when he decided to have sexual intercourse with another person, had the marriage annulled and escaped a maintenance order being made against him. By having sanctioned the defendant's behaviour so as to uphold a medical technicality the law was guilty of perpetrating a greater injustice. The law must have foreseen the possibility of a post-surgical transsexual contracting a marriage when the legislature allowed a person to re-register his/her

The effect of the decision in W v W is that it effectively prevents the post-operative transsexual from marrying at all. Practical and psychological reasons prevented him from marrying in his original gender role while the court legally invalidated his marriage (and all) others in his new gender role.¹⁹¹

A humanistic, rather than a legalistic approach to marriage between two biological males, one of whom had undergone a female gender reassignment procedure, was taken by the New Jersey court in MT v JT.¹⁹² The court's decision to uphold the marriage, differed diametrically from the approach in Corbett v Corbett¹⁹³ and W v W.¹⁹⁴ The court was of the opinion that the reassignment surgery had harmonized the wife's gender and genitalia in such a way that she became fully capable of sexual activity as a woman. This resulted in the transsexual becoming a member of the female

sex (section 7B of Act 81 of 1963).

191. J.Taitz "The Legal Consequences of a Sex Change – A Judicial Dilemma" (1980) 97 SALJ 65.

192. MT v JT 355 (A) (2d) 204 (1976).

193. Corbett v Corbett (1970) 2 All ER 33.

194. W v W 1976 (2) SA 308 (W)

sex for marital purposes. Her subsequent marriage to a male was therefore valid.¹⁹⁵

The principle applied by the New Jersey court was not applied by the English courts after the Corbett case. In 1983, the Court of Appeal in R v Tan and Others¹⁹⁶ reaffirmed the Corbett decision, when it extended the legal determination of sexual identity to criminal law. The case involved a criminal charge against a Ms G for living on the earnings of prostitution. This was an offence that could only be committed by a male. In her defense, G alleged that she was a post-operative female. The Court applied the *Ormrod test* holding that surgery cannot change a person's sex, which is determined by chromosomal structure. G thus remained a male despite her reconstructed genitalia.

There can be little doubt that a party to a marriage may successfully seek a divorce on the grounds of irretrievable breakdown of marriage because the spouses would no longer be able to have normal sexual relationships should

195. Lupton op cit in Schafer Family Law Service J8.

196. R v Tan [1983] 2 All ER 12 (CA); J Taitz "The Legal Determination of the Sexual Identity of a Post-operative Transsexual seen as a Human Rights Issue" (1989) 7 Med Law 467, 470.

the other spouse undergo gender reassignment procedures during the subsistence of the marriage.¹⁹⁷ A spouse undergoing gender reassignment procedures must be seen as bringing the existing marriage to an end.

4.3: THE LEGALITY OF TRANSSEXUAL MARRIAGES IN POST-APARTHEID SOUTH AFRICA

As yet, our courts have not had an opportunity to pronounce on the constitutionality of the common law prohibition of same-sex marriages. This prohibition is not in keeping with the democratic values of the post-apartheid South Africa. Although the basic norm of legal authority has changed from parliamentary sovereignty to constitutional supremacy, non-violation of the basic rights of the transsexual will be viewed both in light of the Constitution¹⁹⁸ and The Promotion of Equality and Prevention of Unfair Discrimination Act.¹⁹⁹

197. Steinke v Steinke 238 Pa Super 74 357 A LR (2d) 674 (1975).

198. Act 108 of 1996.

199. Act 4 of 2000.

4.3.1: TRANSSEXUAL MARRIAGES AND THE CONSTITUTION

The South African Constitution is widely recognized as one of the most progressive and liberal constitutions in the world.²⁰⁰ The Constitution commences as follows:²⁰¹

“The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.”

Section 7 of the Constitution provides:

- “7 (1) This Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
- (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.”

200. J.A.Singh “Freedom of Expression: The Constitutionality of a Ban on Human Cloning in the Context of a Scientist’s Guaranteed Right to Freedom of Scientific Research.” (1999) 62 THRHR 579.

201. Section 1.

Although there is no hierarchy of basic rights, from a human rights perspective, probably the most fundamental of the entrenched rights are the rights to equality, respect, dignity, privacy and freedom as they are interwoven into the fabric of every person's life and existence.²⁰² It follows therefore, that the government should refrain from interfering in the personal and intimate affairs of an individual's life, except where such interference would be necessary to safeguard the rights of others and the interest of the community as a whole.²⁰³ As sexual relationships touch an extremely sensitive aspect of the right to privacy²⁰⁴ the state would only be entitled to interfere with a person's private sexual activity if it can establish that such interference is reasonably justified in terms of the limitation clause.²⁰⁵ The South African legal system, however, continually interferes with and denies, what it considers minority sexual inclinations, namely, sexual preferences of transsexuals, gays and transvestites.²⁰⁶

202. D.Singh "The Refusal to Recognise Same-Sex Marriages – A Pandora's Box of Inequalities." (1999) 32 (1) *De Jure* 29.

203. Such interference would be an invasion of privacy – see s 14 of the Constitution.

204. Act 108 of 1996 s 14.

205. Act 108 of 1996 s 36.

206. D.Singh op cit 29.

Until as recently as 1998, sodomy, (consensual and private acts included) remained a crime in South Africa, despite the Constitution repudiating discrimination on the grounds of sexual orientation.²⁰⁷

The argument for the recognition of a post-surgical transsexual's marriage to a member of his/her previous sex can be located in the Constitution in the rights to equality and privacy.²⁰⁸

Section 9 of the Constitution grants to every person the right to equal benefit of the law without unfair discrimination on various grounds, including *inter alia*, belief and sexual orientation.²⁰⁹

207. S v H 1995 1 SA 120 (C) – the accused who had engaged in a voluntary sexual relationship with another man, was convicted of the offense of sodomy. On review before Ackermann J, the court recognized the changing public attitudes to homosexual relationships and keeping the conviction set aside the sentence and replaced it with one of a caution and a discharge. S v Kampher 1997 4 SA 460 (C) – also involving an act of sodomy questioned the constitutionality of such a crime. National Coalition for Gay and Lesbian Equality v Minister of Justice 1998 (2) SACR 102 (W) (1998 (6) BCLR 726): declaration of invalidity of sodomy as a crime confirmed 1999 (1) SA 6 (CC).

208. Section 9 and 14 respectively.

209. Section 9 (3).

Sexual orientation is described as the “individual’s choice of male or female sexual partner”²¹⁰ i.e. the way in which an individual prefers to practice his/her sexuality. In the Kampher case, Judges Farlam and Ngcobo held that section 9(3) of the Constitution, with its specific reference to sexual orientation as a proscribed ground of unfair discrimination, clearly evinced an intention on the part of the framers of the Constitution to expand the grounds of tolerance and understanding so that sexual activity between consenting adults of minority sexual inclinations is no longer subject to criminal sanction.²¹¹

In the case of the National Coalition For Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC) Ackermann stated that the concept of sexual orientation as used in s 9(3) of the 1996 Constitution had to be given a generous interpretation of which it was linguistically and textually fully

210. Pantazis op cit 568.

211. S v Kampher 1997 4 SA 460 (C); also Egan v Canada [1995] 2 SCR 513, (1995) 124 DLR (4th) 609 – the Canadian Supreme Court has read sexual orientation as a prohibited ground of discrimination into the guarantee of equality in the Canadian Charter of Rights and Freedoms (sections 1 and 15(1)) on the basis, in part, of gays’ and lesbians’ membership of a historically disadvantaged group.

capable of bearing. This applied equally to the orientation of persons who were bi-sexual, or transsexual.²¹²

Sachs stated that s 9 was unambiguous in that discrimination on the grounds of being a member of a group with minority sexual inclinations was presumptively unfair and a violation of fundamental rights. Homosexual erotic activity had to be treated on an equal basis with that of heterosexual erotic activity i.e. the same-sex quality of the conduct should not be a consideration in determining where and how the law should intervene.²¹³

The right to equality is a universally accepted right and is recognised by most bills of rights around the world.²¹⁴ Article 7 of the Universal

Declaration of Human Rights provides that:

“All men are equal before the law and are entitled without discrimination to equal protection before the law. All are entitled to equal protection against any discrimination in violation of this declaration and against any incitement to such discrimination.”

212. National Coalition For Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC) 21.

213. National Coalition For Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC) 133.

214. Govender K. “The Impact of the Equality Provisions of the Constitution” 1997 18 2 Obiter 258.

Cameron maintains that sexual orientation is – or should be a matter of indifference morally and constitutionally and consequently any discrimination on the grounds of minority sexual inclinations would be indefensible.²¹⁵ McQuoid-Mason explains that as the Constitution prohibits unfair discrimination on the grounds of *inter alia* “sexual orientation”, it could be argued that this could cover marriages between transsexuals and members of their biological sex.²¹⁶

It is submitted that should groups with minority sexual inclinations be denied the opportunity to enter into a legal marriage on the basis of their sexual orientation, the equality clause of the Constitution would be violated. This is because the state imposes a burden on or denies a benefit to them as a result of their sexual orientation. Accordingly, members of a constitutionally protected class are discriminated against without sufficient justification for

215. E.Cameron “Sexual Orientation and the Constitution: A Test Case for Human Rights” (1993) 110 SALJ 40.

216. McQuoid-Mason and Strauss op cit LAWSA vol 17 166.

the discrimination.²¹⁷

The prohibition of marriage between people with minority sexual inclinations is also inconsistent with section 14 of the Constitution, which protects the right to privacy.

McQuoid-Mason states that the right to privacy is essential for the preservation of an individual's human dignity including his physical psychological and spiritual well being.²¹⁸

According to Devenish privacy is a basic human need which is essential for the development and maintenance of both a free society and a mature and stable personality for the human being.²¹⁹ He states that it is profoundly

217. S v Kampher where Farlam J stated: "It is difficult to see how any discrimination which has already been stigmatised as "unfair" (which is what I consider the present discrimination to be) can ever be regarded as permissible to the extent that it is reasonable and justifiable in an open and democratic society based on freedom and equality." See also National Coalition For Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC).

218. D.J.McQuoid-Mason The Law of Privacy in South Africa (1978) 1.

219. G.E.Devenish A Commentary on the South African Bill of Rights (1999) 135.

cherished as a right by persons, both in relation to intrusion by the state and as far as other people in the community are concerned and it is a right which is inextricably intertwined with human dignity.²²⁰ Therefore the right to privacy is based on human dignity and has as its objective the preservation for each individual of the “choice of when and how much he or she will allow others to know about his or her mind, or body or private activities.”²²¹

The concepts of privacy and constitutionalism are closely related and result in the notion of personal autonomy which allows individuals the right to choose how, within the parameters of the law, to live their lives and to make crucial decisions about the conduct of their lives without interference from the state.²²² The right to privacy is important because autonomy nurtures personhood and individuality.²²³ The right to marry should be regarded as falling under the right to privacy as has been the case in the United States of America.²²⁴

220. Devenish op cit 135.

221. *ibid.*

222. Devenish op cit 136.

223. Bernstein and others v Bester and others NNO 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) at para 65.

224. Zablocki v Redhail 434 US 374 (1978) at 384-385.

The attributes of marriage have been described as, *inter alia*, those of creating a *consortium omnis vitae*, i.e. a physical, moral and spiritual community of life.²²⁵ Lupton describes these components as consisting of sexual cohabitation, loyalty, fidelity, and mutual assistance and support.²²⁶ These attributes which promote the notion of autonomy, personhood and individuality, are equally applicable to same-sex as to opposite-sex couples.²²⁷

The prohibition against marriage by a post-operative transsexual to a person of his/her previous sex is not rescued by section 36 of the Constitution, which provides that rights may only be limited where :

“the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant

225. H.R.Hahlo The South African Law of Husband and Wife 4ed (1975) 109.

226. Lupton op cit 387.

227. W.M.Hohengarten “Same-sex Marriage and the Right to Privacy” (1994) 103 Yale LJ 152. An aspect of the right to privacy that same sex marriage brings out is the importance of choice in matters of intimate association. The individual has a right to define his/her own identity and not have an identity imposed by the state on him/her.

factors ,including -

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

The nature of the rights and the purpose of the limitation are fundamental to the limitation of rights.²²⁸ Although there is no express right to marry in the Constitution, natural law recognises that freedom to marry is a basic civil right.²²⁹ Furthermore, the right of all individuals to marry is affirmed in the Universal Declaration of Human Rights.²³⁰ The right to marry is the right of individuals and not of the sexes – the essence of the right to marry is the freedom to join in marriage with the person of one’s choice.²³¹

228. B.Grant “Comments and Cases on Same-Sex Marriage” (1996) 12 SAJHR 571.

229. Pantazis op cit 124 at 575.

230. Universal Declaration of Human Rights, Article 16(1).

231. Perez v Lippold 198 P 2d 17 (Supreme Court of California 1948); James Trosino “American Wedding: Same-Sex Marriage and the Miscegenation Analogy (1993) 73 Boston University LR 93 at 104.

It is submitted that there is a stringent burden on the courts, in particular, the Constitutional Court to safeguard the right to marry for the following reasons

- (a) The marriage laws are based on stereotypes and prejudices, which are contrary to human dignity;²³²
- (b) The purpose of the equality section of the Constitution is to prevent serious infringements of human dignity;²³³
- (c) The nature of the rights seeking to be protected are equality, privacy, freedom and human dignity;²³⁴ and
- (d) These rights of equality, human dignity, freedom and privacy are fundamental to our Constitution and our rights-based legal order.²³⁵

232. National Coalition for Gay and Lesbian Equality v Minister of Justice (1998) 3 All SA 26 (W) – ruled by Heher J: “Constitutionally we have reached a stage of maturity in which recognition of the dignity and innate worth of every member of society is not a matter of reluctant concession, but is one of easy acceptance ... The Constitution enjoins equal treatment before the law of persons entitled to its protection. That excludes individual or class discrimination.”

233. Prinsloo v Van der Linde (1997) 6 BCLR 759 (CC); Hugo v President of Republic of South Africa (1996) 4 SA 1012 (D).

234. National Coalition For Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC).

235. Act 108 of 1996 s 7 and s 14.

It is submitted that a change in the laws to reflect the aspirations of equality, dignity and respect should not evolve incrementally through the case law but that these aspirations require adopting and sanctioning by the legislature.

The Roman-Dutch common law of marriage, which was influenced by Christianity, was imposed on South Africa in 1652 as a result of Dutch colonialism.²³⁶ Though the South African common law of marriage has changed over time, it has consistently retained the characteristic features of heterosexuality.²³⁷

The Constitution is committed to the notion of an inclusive society and the designated groups in section 9(3)²³⁸ who may not be unfairly discriminated against can no longer be considered outsiders. It is submitted that when the law recognises heterosexual marriages and not the marriages of groups with minority sexual inclinations, it is unfairly discriminating against them.

236. P De Vos "On the Legal Construction of Gay and Lesbian Identity and South Africa's Transitional Constitution" (1996) 12 SAJHR 274 – 275.

237. T.L.Mosikatsana "The Definitional Exclusion of Gays and Lesbians From Family Status" (1996) 12 SAJHR 555.

238. Section 9(3) of the Constitution.

This creates the perception that they are inferior members of our society. In introducing the Constitution, the Preamble states that it is the supreme law of the country, and seeks to establish a society based on democratic values, social justice and fundamental human rights. It further states that the law will equally protect every citizen. The state, through the Constitution, will strive to improve the lives of all citizens and free the potential of each person.

It is submitted that the Preamble and sections 1 and 9 of the Bill of Rights in the Constitution, repeatedly affirm the need for the state to provide equal rights for the post-operative transsexual. This would reassure the citizens of South Africa that our country belongs to all the people that live in it, united in our diversity. This most certainly includes groups with minority sexual inclinations. The prohibition against marriages by post-surgical transsexuals with persons of their pre-operative sex, is not justified by section 36 of the Constitution. Accordingly, it is submitted that courts should recognise the legality of the post-surgical transsexual marriage. Not to do so amounts to unfair discrimination in contravention of s 9 of the Constitution.²³⁹

239. Pantazis op cit 571- same-sex marriages have all the attributes of heterosexual marriages – i.e.

cohabitation, permanence and formality, psychological support and emotional involvement in long-

4.3.2: THE IMPACT OF “THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT NO. 4 OF 2000” ON TRANSSEXUAL MARRIAGES

The Promotion of Equality and Prevention of Unfair Discrimination Act²⁴⁰ was passed to give effect to section 9 of the Constitution²⁴¹ so as to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith.²⁴² This Act reinforces the values of human dignity, equality, freedom and social justice. The Act “endeavours to facilitate the transition to a democratic society, united in its diversity marked by human relations that are *caring and compassionate*,²⁴³ and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.”²⁴⁴

standing, intimate relationships. Conception is not a requisite of marriage as infertility is not recognised as legitimate grounds for divorce.

240. Act No.4 of 2000.

241. Act No 108 of 1996.

242. Act No. 4 of 2000 – Preamble.

243. My emphasis.

244. Act No. 4 of 2000 – Preamble.

The Act defines “marital status” as including *inter alia* being in a relationship “whether with a person of the same or opposite sex, involving a commitment to reciprocal support in a relationship.”²⁴⁵ The Concise Oxford Dictionary definition of marital is “of marriage”.²⁴⁶ It is submitted that by inclusion of same-sex couples in the definition of marital status the state has recognised marriages of same-sex couples and accordingly, the same should apply to marriages of post-operative transsexuals to members of their biological sex.

The Act includes sexual orientation in the definition of “prohibited grounds” of discrimination.²⁴⁷ It is submitted that as the Act protects same-sex couples against unfair discrimination on the basis of sexual orientation, this implies a statutory recognition of their rights including the right to marry of individuals with minority sexual inclinations, such as the post-operative transsexual.

245. Act No. 4 of 2000 section 1 (xv).

246. Thomas D. (ed) The Concise Oxford Dictionary 9ed (1995) 833.

247. Act No. 4 of 2000 section 1 (xxii).

4.3.3: LEGAL CONSEQUENCES: MATTERS

ANCILLARY TO MARRIAGE

The decision in W v W²⁴⁸ effectively held that post-operative transsexuals remain members of their initial or former sex. This was despite the relative irreversible nature of gender reassignment procedures and the fact that transsexuals would for the rest of their lives retain the appearance of members of their post-operative sex. The subsequent repeal of section 7B of the former Births, Marriages, and Deaths Registration Act,²⁴⁹ together with the decision in W v W have led to specific legal consequences for the post-operative transsexual. These various legal situations require consideration. Many of them could be declared unconstitutional.

4.3.3.1: PROPRIETARY CONSEQUENCES OF MARRIAGE

At present, a marriage contracted between a post-operative transsexual and a person of the opposite sex is invalid and void *ab initio*.²⁵⁰ The nullity of a void marriage is absolute and produces none of the legal incidents of

248. W v W 1976 (2) SA 308 (W).

249. Act 81 of 1963.

250. W v W 1976 (2) SA 308 (W).

marriage – no obligations are placed on either party concerning maintenance and the normal division of proprietary rights, as is the case with the dissolution of a valid marriage.²⁵¹ This may be unconstitutional.

4.3.3.2: MARRIAGE BY ANTENUPTIAL CONTRACT

The validity of an antenuptial contract hinges on the contracting parties entering into a valid marriage.²⁵² When the transsexual and the other spouse separate, the intention to keep their respective estates separate as clearly expressed in the antenuptial contract needs to be respected.²⁵³ If an antenuptial contract becomes invalid for whatever reason, the proprietary consequences of the spouses marriage would revert to that of the community.²⁵⁴ This option is not available in a union involving a transsexual because the marriage is void *ab initio*,²⁵⁵ although an application could be made to declare their relationship a universal partnership.²⁵⁶

251. SALC (1995) op cit 24.

252. H.R.Hahlo The South African Law of Husband and Wife 5ed (1985) 257.

253. P.M.Gilson “Gender Dysphoria Syndrome : Medical Aspects and Legal Consequences” (1985) (LLM Thesis University of Natal) 218-219.

254. Hahlo op cit 266-267.

255. Hahlo op cit 104; W v W 1976 (2) SA 1 (A).

256. J.J.Henning, H.J.Delport “Partnership” in W.A.Joubert (ed) (1999) vol 19 LAWSA 183 at 266.

4.3.3.3: ACCRUAL REGIME

The accrual regime effects separation of the respective spouses' estates *stante matrimonio* and a sharing of the accrual of assets during their marriage subject to dissolution of the marriage by death or divorce.²⁵⁷ The sharing of the accrual which the couple contemplated cannot be effected because it is subject to the dissolution of a marriage by death or divorce. Because the transsexual's marriage is void *ab initio*, this consequence of their antenuptial contract cannot be effected.²⁵⁸

4.3.3.4: COMMUNITY OF PROPERTY

Where parties are married in community of property, each spouse's separate property is vested in a common pool as soon as the marriage takes place thereby creating the community. As soon as the marriage is concluded, each spouse becomes the owner of an un-divided half-share of the communal estate.²⁵⁹ Because the marriage between a post-operative transsexual and a person of the opposite sex is deemed to be void *ab initio*, no community is

257. J.Sinclair The Matrimonial Property Act(1984) 41.

258. Lupton in Schafer Family Law Service (1995) J11.

259. Hahlo op cit 161.

created, and each spouse is entitled to claim from the common pool what he/she contributed to it. The respective proportion each party may claim will be a question of fact.²⁶⁰ The division of the estate would be as difficult as the settling of assets of an invalid partnership.²⁶¹

4.3.3.5: THE ADOPTION OF CHILDREN

Section 17 of the Child Care Act²⁶² states that a child may be adopted –

- “(a) by a husband and his wife jointly;
- (b) by a widower or widow or unmarried or divorced person;
- (e) by a married person whose spouse is the parent of the child.”

According to the Law Commission²⁶³ if two persons, one of whom is a post-operative transsexual, contracts a purported marriage, no marriage comes into being and they do not qualify as husband and wife to adopt a child. This may be viewed as unconstitutional as adoption is only possible to them as unmarried or divorced persons.

260. Hahlo op cit 103.

261. SALC (1995) op cit 24.

262. Act No. 74 of 1983.

263. SALC (1995) op cit 25.

4.3.3.6: CONCEPTION OF A CHILD BY ARTIFICIAL INSEMINATION OF THE DONOR (AID)

Regulations within the Human Tissue Act²⁶⁴ require that the recipient of artificial insemination be validly married.²⁶⁵ Consequently, a woman who is married to a post-operative transsexual male, is not entitled to the privileges of AID and therefore, the artificial insemination of the woman would be illegal. Even if the action took place in the *bona fide* belief that the marriage is valid, any child born would be illegitimate with all the attendant adverse consequences.

The Law Commission gives the example of where the female in such a marriage previously gave birth to a child by AID.²⁶⁶ The infertility unit that she attended was unaware at the time that her marriage was invalid. When she subsequently returned to the unit to receive artificial insemination for a second time, she was refused the procedure because the unit had since learned of the invalidity of her marriage.

264. Act No. 65 of 1983.

265. Regulation 8(1) of the Regulations regarding the Artificial Insemination of Persons, and Related Matters, Government Notice No. R.1182 dated 20 June 1986.

266. SALC (1995) op cit 25.

Section 12(2) of the Constitution²⁶⁷ states that everyone has the right to psychological and bodily integrity, including the right to make decisions concerning reproduction and the right to security in and control over their body. It is submitted it would no longer be illegal for an unmarried person to be fertilized by AID and the female partner of a post-operative transsexual male cannot be denied AID as such denial would be unconstitutional.

It is interesting to note that in the United Kingdom section 28(3) of the Human Fertilization and Embryo Act 1990 allows for conception through AID when a woman and a man are living together in a stable relationship. Marriage is not a prerequisite. Where conception is the result of mutually consensual AID, the man will be regarded for all purposes as the father of the child.²⁶⁸

The case of X, Y and Z v United Kingdom²⁶⁹ concerned a female to male transsexual who had been in a stable relationship with a woman for 15 years, and had had three children by AID. When X applied to the Registrar

267. Act 108 of 1996.

268. Mason and McCall-Smith op cit 48.

269. X, Y and Z v United Kingdom (1997) 24 EHRR 143, (1998) 39 BMLR 128.

General to be recognised as the father of the eldest child for the purposes of registering her birth, his application was refused as the Registrar was of the opinion that only a biological man could be regarded as father for the purpose of registration. This decision was upheld by the European Court of Human Rights which reasoned that as there was no clear consensus among member states it could not make an exception in a national law of this type as this could lead to inconsistencies and confusion in family law.²⁷⁰ The Court, therefore side-stepped the real issue – the recognition of the transsexual's post-operative sex. It, however, agreed that the application raised problems with respect to the granting of parental rights to transsexuals and the manner in which a social relationship between a child conceived by AID and the person acting in the role of the father should be defined by the law. The decision of the European Court of Human Rights contradicts the objectives of the Universal Declaration of Human Rights, which affirms *inter alia* that member states have pledged themselves to achieve the promotion of universal respect for the observance of human rights and fundamental freedoms.²⁷¹

270. Mason and McCall-Smith op cit 48.

271. Universal Declaration of Human Rights, Preamble.

4.3.3.7: THE ACTUAL MARRIAGE CEREMONY

The Law Commission states that research has shown that a post-operative transsexual, who is in possession of an amended birth certificate, has no difficulty in marrying a biological person of the apparent opposite sex.²⁷²

No questions are asked by the marriage officers officiating at these marriages as they may be unaware of the reassignment surgery or the decision of W v W.²⁷³

4.3.3.8: COMPENSATION FOR INJURY

In many areas of the law, the dependant of an injured party, is protected and entitled to compensatory reward for harm suffered by the latter.²⁷⁴ A widow is entitled to recover damages for loss of support from the person whose negligent actions caused her husband's death.²⁷⁵ The *sine qua non* for this action is a valid marriage, a fact which would preclude a transsexual's "wife" from successfully instituting a claim on this ground.²⁷⁶ This may well be regarded as unconstitutional.

272. SALC (1995) op cit 25.

273. W v W 1976 (2) SA 308 (W).

274. D.Singh op cit 38.

275. Fortuin v Commercial Union Ins. Co. 1983 (2) SA 444 (C).

276. W v W 1976 (2) SA 308 (W).

Section 17(1) of the Road Accident's Fund Act²⁷⁷ provides for compensation by the Fund where "any person" has suffered loss of support and maintenance and loss of services arising from a motor vehicle collision.

"Any person" is not an open-ended description and the claim will only be considered where there was a legal duty on the deceased to provide support to the claimant.²⁷⁸ Examples of such relationships include the widow and children of the deceased, customary unions and husbands and wives.²⁷⁹

In Amod v MMVAF²⁸⁰ dealing with the claim from a widow married in terms of religious law, Meskin A.J. held:

"It is, and has long been, the law that the duty of support which grounds the liability which a woman situated as the plaintiff in this case seeks to enforce is a legal duty of support, the existence of which depends on the existence of a lawful marriage between such woman and deceased."

As a marriage between a post-operative transsexual and a member of his/her biological sex is regarded as invalid by the law, the "spouse" of such a marriage would not be allowed compensation in terms of the Road

277. Act 56 of 1996.

278. D.Singh op cit 39.

279. *ibid.*

280. Amod v Multilateral Motor Vehicle Accident Fund 1997 (12) BCLR 1716 (D).

Accidents Fund.

The decision of Roux J in Langemaat v Minister of Safety and Security²⁸¹ is relevant at this stage. In Langemaat, a policewoman who had been in a protracted lesbian relationship sought to have her lover included as her “dependant” under her medical aid scheme. The court held :

“parties to a same-sex union, which have existed for years in a common home, must surely owe a duty of support, in all senses to each other” and that:

“section 36 offered the respondents no basis for opposition.”

It directed the PolMed Medical Aid Fund to register the lover as a “dependant.”

After taking an apparently progressive stand, the court added that the decision in the Langamaat case was not a general recognition in respect of

281. Langemaat v Minister of Safety and Security 1998 (3) SA 312 (T) 317.

all relationships:

“The Third Respondent [Polmed] will consider every application and make an appropriate decision on its merits.”

It is submitted, however, that in view of the Langemaat decision, a similar judgement would have been reached had the respondents been parties to a marriage where one partner was a post-operative transsexual.

4.3.3.9: LAW OF EVIDENCE

Under South African law, in criminal proceedings, a spouse may not be compelled to disclose any communications which the other made to him/her during the marriage.²⁸² A similar privilege exists also between ex-spouses in respect of communications during the subsistence of the marriage relationship. Hoffman and Zeffert maintain that the rationale for the privilege is to protect the special trust and confidence that is deemed to exist between spouses.²⁸³

282. Criminal Procedure Act 51 of 1997 section 198.

283. L.H.Hoffman and D.T.Zeffert The South African Law of Evidence 4ed (1988) 244-245.

Spouses to a (putative) marriage, where one of the parties is a post-operative transsexual, do not enjoy the above privileges afforded to the spouses of a valid marriage by the law of evidence as such a marriage is void *ab initio*.

4.3.3.10: THE LAW OF SUCCESSION

In terms of the Succession Act²⁸⁴ only the surviving spouse of a (valid) marriage in or out of community of property, is entitled to succeed by intestacy to a share of his/her deceased spouse's estate. Consequently, a spouse to a putative marriage, where one of the parties is a post-operative transsexual, cannot succeed by intestacy. Generally, if the surviving spouse is the only heir, he/she is entitled to the entire inheritance.²⁸⁵

In so far as testate succession is concerned, if the testator bequeathed property to his/her wife/husband, then this bequest will be interpreted to mean the person whom he/ she believed to be his/her wife/husband at the time of execution, even if it was subsequently discovered that the marriage was void.²⁸⁶ Where specific bequests are concerned, if an heir is described

284. Act No 13 of 1934 section 1.

285. Lupton in Schafer Family Law Service op cit J14.

286. Allen v Est Bloch 1976 (2) SA 376 (C).

solely by sex, e.g. where a parent or grandparent has left his/her estate exclusively to unmarried “sons or grandsons”, a post-operative transsexual male might find himself disinherited as legally he remains a member of his biological sex and will not qualify as “son or grandson.”²⁸⁷ Conversely a male transsexual heir, (who has undergone gender reassignment procedures resulting in a post-operative female), may still inherit as a male. An equally anomalous situation would apply in a case where a testator bequeaths property to his/her heirs in different share ratios according to their sexes.²⁸⁸

4.3.3.11: INSURANCE

Institutional insurance schemes like group life insurance, do not generally cover cohabitants with minority sexual inclinations.²⁸⁹ Such policies are usually fairly strict and where there is a discretion in respect of parties living together, the trend has been to recognise heterosexual cohabitation.²⁹⁰ This

287. SALC (1995) op cit 32.

288. *ibid*

289. D.Singh op cit 41.

290. *ibid*.

would be commensurate with unfair discrimination and therefore unconstitutional. Certain institutions have sought specific amendments to the insurance policies but this remains the exception rather than the norm.²⁹¹

A person has an insurable interest in his/her own life to an unlimited extent, while a husband/wife has an insurable interest in the life of his/her spouse to an unlimited extent as well.²⁹² In these cases the interest is presumed and no proof of its existence is necessary beyond the existence of a valid marriage.²⁹³ If the marriage is void, the insurer has no legal relationship with the surviving “spouse” and should not therefore suffer any pecuniary loss as a result of his/her death.²⁹⁴ The surviving “spouse” would therefore lose out on any claims as he/she would not legally be a beneficiary to the insurance policy. This could be perceived as unconstitutional unfair discrimination.

291. D. Singh op cit 41.

292. *ibid.*

293. Phillips v General Accident Ins Co of SA Ltd 1983 (4) SA 653 (W).

294. Gilson op cit 228.

4.4 CRIMINAL LAW

As previously discussed,²⁹⁵ the gender reassignment procedure undertaken by a male to female transsexual includes the construction in her of a vagina.

The post-operative female is, as indicated above, capable of having sexual intercourse in the same physical manner as a normal biological female.

Similarly, a post-operative male is capable of having sexual intercourse with a woman. As the law in South Africa does not recognise a post-operative transsexual's sex, a number of anomalous criminal situations may arise.

4.4.1: INCEST

Incest is defined as the “unlawful and intentional sexual intercourse between male and female persons who are prohibited from marrying each other because they are related within the prohibited degrees of consanguinity, affinity or adoptive relationships.”²⁹⁶

A party to a marriage involving a post-operative transsexual in which there

295. See above.

296. C.R.Snyman Criminal Law 3ed (1995) 335.

are children, whether by a previous marriage, adoption or artificial insemination, cannot be convicted of committing the crime of incest with a such a child.²⁹⁷ The reasons for this are, firstly, because the marriage is void no legally recognised degree of affinity is created between the offending spouse and the child, and, secondly, the criterion of unlawfulness required by the definition, of incest would not be fulfilled.²⁹⁸ Therefore there would be no legal restriction barring the offender from having sexual intercourse with a child of that union.²⁹⁹

4.4.2: BIGAMY

Bigamy is defined as “unlawfully and intentionally entering into what purports to be a lawful marriage ceremony with one person while lawfully married to another.”³⁰⁰ Thus a person may be convicted of bigamy only where he or she is a party to a subsisting legally valid marriage. This means that neither spouse of a marriage, where one of the parties is a post-operative

297. J.R.Milton South African Criminal Law and Procedure 2ed vol 2 (1982) 257.

298. *ibid.*

299. J. Taitz “Some Criminal Anomalies Brought About by Sex-Change” (1985) 48 THRHR 97.

If the child were underage the person could be convicted of indecent assault.

300. Milton *op cit* 245.

transsexual, can be convicted of bigamy should either or both spouses enter into second marriages with another person or persons. Furthermore, a party to an existing valid marriage cannot be convicted of bigamy should such a party enter into a second marriage where the other spouse is a post-operative transsexual.

If, however, the bigamous spouse was not aware that the existing or subsequent marriage with a post-operative transsexual was void *ab initio*, the bigamous spouse may be considered within the rule of R v Davies³⁰¹ and may be convicted of attempted bigamy by attempting to commit the impossible.

4.4.3: RAPE

The definition of rape, specifying as it does intentional unlawful sexual intercourse by a man with a woman without her consent³⁰² means that sexual

301. R v Davies 1956 (3) SA 32 (A).

302. Milton op cit 257.

intercourse with a surgically formed female transsexual does not constitute the crime of rape.³⁰³ A post-operative female may be raped with all the horror, pain and indignity that would be experienced by a biological female, but the rapist cannot be convicted of rape so long as the victim is not regarded in law as a woman. Although the accused may be convicted of indecent assault, or assault with intent to commit rape or attempted rape, these offenses are generally not as serious as rape *per se*.³⁰⁴ Likewise, even though it would be physically possible for a post-operative man to rape a woman, since the “man” is legally protected as a woman, he would not be guilty of rape but at most he would be guilty of indecent assault.³⁰⁵

In the 1962 English case of SY v SY (otherwise W)³⁰⁶ a woman who had had vaginal atresia³⁰⁷ had undergone surgery for the construction of an

303. W v W 1976 (2) SA 308 (W) - held that a male who is surgically transformed into a female remains a member of the male sex.

304. SALC (1995) op cit 26.

305. SALC (1995) op cit 26.

306. SY v SY (otherwise W) [1963] P 37, [1962] 3 WLR 526.

307. SY v SY (otherwise W) [1963] P 37, [1962] 3 WLR 526. A consultant obstetrician at the Addenbrook's Hospital, Cambridge found the individual concerned to have “no or virtually no vagina and no uterus.” with the possibility that she could have had an intersex state.

an artificial vagina and the court made the following observation:

“ If it is to be held that a wife with an artificial vagina is incapable of consummating her marriage, it can only be on the basis that such woman is incapable of taking part in true sexual intercourse ... such a woman might be to a considerable extent beyond the protection of the criminal law, for it would seem to follow that she would be incapable in law of being a victim of rape.”³⁰⁸

It was held that this conclusion would be “bordering on the fantastic” by Wilmer J, the dissenting judge who accordingly decided that sexual intercourse with a woman who had an artificial vagina is ordinary and natural sexual intercourse (*vera copula*).³⁰⁹ She could therefore be raped and the perpetrator accordingly, convicted for the crime of rape.

308. SY v SY (otherwise)W [1963] P at 60.

309. SY v SY (otherwise) W [1963] P at 60 – 1.

The proposed South African Sexual Offenses Bill³¹⁰ defines vagina as:

“the whole of the female sexual organ and includes a surgically constructed vagina.”

Should this bill be adopted by Parliament it would afford greater protection to the post-operative transsexual even though she is not recognised by law as a woman.

4.4.4: PROSTITUTION AND SOLICITING

Prostitution is defined as:

“the offering by a woman of her body to indiscriminate lewdness for hire.”³¹¹

Consequently, a post-operative female who commits acts of prostitution cannot be convicted of the offense if the law does not regard her as a woman, notwithstanding the blameworthiness of her behaviour.³¹² “She”

310. South African Law Commission Report Sexual Offences: The Substantive Law Project 107 Discussion Paper 85 (1999) 269.

311. J.R.Milton and N.M.Fuller “Statutory Offences” in South African Criminal Law and Procedure vol 111 (1982) 435.

312. SALC (1995) op cit 27.

could, presumably, avoid prosecution for prostitution by assuming her legal sex, that is, the male sex, for the duration of the trial.³¹³

The same anomalous situation would apply to a post-operative female charged with soliciting. A “common prostitute or night walker” may only commit this crime,³¹⁴ a calling that may only be practiced by a woman.

Additionally, sections 10(a)-(e) of the Sexual Offenses Act³¹⁵ which has as its objective the protection of the chastity of women in South Africa are not

313. Gilson op cit 244.

314. Milton and Fuller op cit 435.

315. Act 23 of 1957 – according to which, the following are unlawful:

- (a) Procuring or attempting to procure any female to have unlawful carnal intercourse with any person other than the procurer, or in any way assisting in bringing about such intercourse – s10(a).
- (b) Enticing any female to a brothel for the purpose of unlawful carnal intercourse or prostitution or concealing in any house or place any female so enticed – s10(b).
- (c) Procuring or attempting to procure any female to become a common prostitute or inmate of a brothel – s10(c), and s10(d).
- (d) Applying or administering to any female, any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower her so as thereby to enable any person other than the procurer to have unlawful carnal intercourse with such female – s10(e).

applicable to the post-transsexual female and this may be seen as being unconstitutional.

The English case of R v Tan³¹⁶ concerned criminal charges relating to prostitution. One of the accused, Gloria Greaves, a post-operative female transsexual, was charged *inter alia* with contravening the Sexual Offenses Act³¹⁷ which provided that it was an offense for a man knowingly to live wholly or in part on the earnings of prostitution.³¹⁸ This offense could not be committed by a female which Gloria Greaves and others had considered her to be for the previous twenty years. She had gone through a marriage ceremony with a biological male, Brian Greaves who at all times regarded her as a female.

However, in applying the *Ormrod test*³¹⁹ Parker J held that:

“... both common sense and the desirability of certainty and consistency demand that the decision in Corbett v Corbett should apply not only for marriage but also for a charge under S.30 of the Sexual Offences Act...”

316. R v Tan and Others [1983] QBD 1053 (CA).

317. The Sexual Offenses Act 1957.

318. The Sexual Offenses Act 1957 Section 30(1).

319. Corbett v Corbett (otherwise Ashley) (1970) 2 ALL ER 33.

Gloria Greaves was convicted and fined 10,000 pounds. Her petition to the House of Lords for leave to appeal was rejected. Taitz states that while “certainty and consistency” may be a convenient tag, it is no substitute for justice and compassion.³²⁰

320. J Taitz “A Transsexual’s Nightmare: The Determination of Sexual Identity in English Law” (1988) 2 International Journal of Law and the Family 148.

4.5: THE LEGAL CONSEQUENCES OF GENDER REASSIGNMENT PROCEDURES IN SOUTH AFRICA – CONCLUSION

Although gender reassignment operations are not *contra bonos mores* and are performed where medically indicated, our law fails to recognise a transsexual's post-operative sex.

The various legal consequences, outlined above illustrate the anomalous and sometimes bizarre effect of this failing in our law. The essential legal consequence of gender reassignment procedures, however, is the determination of the sexual identity in the post-operative transsexual. In every situation in which the law recognises a distinction between males and females, for whatever reason, a party who has undergone gender reassignment is placed in an anomalous and often unjust situation.

The legal consequences of gender reassignment for intersexuals and little boys who have suffered penile destruction at an early age are often identical to the legal consequences resulting from a reassignment of gender for transsexuals.

It should be remembered, that a post-operative transsexual takes on the appearance of a member of the post-operative sex and the actual surgery is usually irreversible. Because of the decision in W v W³²¹ a post-operative transsexual remains a member of his/her original sex, even though he/she may be in possession of an amended birth certificate in terms of section 7B of the Births, Marriages and Deaths Registration Act.³²²

Section 9(3) of the Constitution, and the Promotion of Equality and Prevention of Unfair Discrimination Act,³²³ prohibit unfair discrimination on the grounds of *inter alia* “sexual orientation,” and section 14 of the Constitution affirms the “privacy” rights of individuals. Moreover, the individual’s right to “just administrative action” is guaranteed in section 33 of the Constitution. It is submitted that these provisions could be used to clarify the law concerning the consequences of sex change procedures and thereby assist in resolving the legal anomalies that arise as a result of such medical management – management that is in accordance with, and does not go against, public policy.

321. W v W 1976 (2) SA 308 (W).

322. Act 81 Of 1963.

323. Act 4 of 2000.

CHAPTER 5: THE RECOGNITION OF A TRANSSEXUAL'S POST-OPERATIVE SEX – COMPARATIVE LAW

The determination of the sexual identity of the post-operative transsexual is the principle legal consequence of gender reassignment procedures. A review of the comparative law highlights three distinct legal approaches:³²⁴

- (a) Some countries³²⁵ have resolved the situation by introducing legislation recognising the transsexual's post-operative sex for all legal purposes including the law of marriage.
- (b) In a few countries³²⁶, the issue has been determined solely through administrative processes and a court order may be requisite to institute the necessary change.
- (c) In certain countries³²⁷, sexual identity has been determined on an *ad hoc* basis by the courts.

324. SALC (1995) op cit 34, which refers to the decisions of the European Court of Human Rights above information; Rees v United Kingdom (1986) 9 EHRR 56, [1993] 2 FCR 49, [1987] 2 FLR 111, [1987] Fam Law 157, EctHR.

325. For example, Germany, Finland, Sweden, Greece, Italy, Switzerland, and The Netherlands.

326. For example, Norway, Portugal and Poland.

327. For example, United Kingdom, United States of America, Australia and South Africa.

5.1: RECOGNITION OF THE POST-OPERATIVE SEX OF A TRANSEXUAL BY THE LEGISLATIVE PROCESS

In a number of countries, legislation has been passed recognising the transsexual's post-operative sex for all purposes of the law, including the right to marry a member of his/her former sex.³²⁸ Although the legislative and administrative requirements for recognition vary from country to country, in all these countries, medical documentation verifying completion of treatment is a requisite accompaniment to the application for legal recognition of a sex change.³²⁹

German law requires that the transsexual must be not less than 25 years of age; the gender reassignment surgery and medical procedures must be completed; and the transsexual must have lived as a member of his/her post-operative sex for at least three years.³³⁰

328. Rees v United Kingdom European Court HR Rees judgement 17 October 1986 Series A No 106.

329. Rees v United Kingdom European Court HR Rees judgement 17 October 1986 Series A No 106.

330. Rees v United Kingdom European Court HR Rees judgement 17 October 1986 Series A No 106 at 16.

See the German legislation on transsexuals of 10 September 1980, BG B1 1980, 1, p1654.

In Finland, after completion of the gender reassignment procedures, the post-operative transsexual is obliged to satisfy a rigorous state-controlled psychological test. Thereafter, all documents, including details of surgery are furnished to the Finish Medical Court, which then decides whether the transsexual's post-operative sex should be recognised by the state.³³¹

Sweden accords legal recognition to the post-operative sex of the transsexual for all purposes except for marriage, after an application supported by relevant medical documents is made to a specific administrative authority. Should the post-operative transsexual wish to marry it is necessary for him/her to obtain a specific court order.³³²

In Greece, it is required that before being recognised as a member of his/her post-operative sex, the transsexual must obtain an order of the Supreme

331. Rees v United Kingdom European Court HR Rees judgement 17 October 1986 Series A No 106 at 15.

332. Swedish Act of 21 April 1972 – Lag om fastställande av konstillhörighet i vissa fall – SFS 1972:119; cf Rees v United Kingdom European Court HR Rees judgement 17 October 1986 Series A No 106 at 20.

Court following an application setting out full details of the particular case supported by medical evidence.³³³

Other countries that have passed legislation recognising the transsexual's post-operative sex for all purposes of the law including marriage are Switzerland,³³⁴ The Netherlands,³³⁵ Czechoslovakia³³⁶ and Italy.³³⁷

333. Rees v United Kingdom European Court HR Rees judgement 17 October 1986 Series A No 106 at 16.

334. Documents in Rees v United Kingdom European Court HR Rees judgement 17 October 1986 Series A No 106 at 20; see also M.R. Will Geburt Eines Menschenrechts, Geschlechtsidentität in Europarecht Und Staatenintegration (1983) at 911.

335. Rees v United Kingdom European Court HR Rees judgement 17 October 1986 Series A No 106 at 16.

336. Rees v United Kingdom European Court HR Rees judgement 17 October 1986 Series A No 106 at 14.

337. Rees v United Kingdom European Court HR Rees judgement 17 October 1986 Series A No 106 at 17; see also the Italian Act of 4 May 1982 on the correction of sexual status – Norme in Materia de Rettificazione Di Attribuzione Di Sesso legge 14 April 1982 – S.Patti and M.R. Will La Rettificazione Di Attribuzione Di Sesso: Prime Considerazioni (1982).

5.2: RECOGNITION OF THE POST-OPERATIVE SEX OF A TRANSEXUAL BY THE ADMINISTRATIVE PROCESS

In certain countries, there is no specific legislation regarding the determination of the sexual identity of the post-operative transsexual and recognition here is solely through the administrative process.³³⁸ Policy decisions by the respective administrative authorities determine the sexual identity of post-operative transsexuals. These policy decisions vary between the different countries and are as follows:

In Norway,³³⁹ the administrative procedure must be confirmed by executive ministerial approval. The Central Bureau of Statistics changes the person's registration number and sex status once medical confirmation of the completed gender reassignment procedure is furnished to it. A post-operative transsexual may marry a member of his/ her former sex if such a person is aware of the reassignment procedure.

338. SALC (1995) op cit 37.

339. Rees v United Kingdom European Court HR Rees judgement 17 October 1986 Series A No 106 at 18.

There is no specific legislation in Portugal where once gender reassignment is completed a post-operative transsexual's identity documents are amended upon production of a court order. He/she may then marry a member of his/her biological sex.³⁴⁰

Gender reassignment is regarded as a purely medical matter in Poland. A transsexual is required to obtain a court order indicating that he/she is a genuine transsexual and that the medical procedures have been completed to enable him/her to become registered as a member of his/her post-operative sex. The individual is then free to marry a member of his/her biological sex.³⁴¹

340. Rees v United Kingdom European Court HR Rees judgement 17 October 1986 Series A No 106 at 18.

341. Rees v United Kingdom European Court HR Rees judgement 17 October 1986 Series A No 106 at 18.

5.3: RECOGNITION OF THE POST-OPERATIVE SEX OF A TRANSEXUAL BY JUDICIAL DETERMINATION

The United Kingdom, the United States of America and Australia are similar to South Africa in that no legislative or administrative processes are available to deal with the legal recognition of gender reassignment.³⁴² The courts have been required to determine the sexual identity of a post-operative transsexual on an *ad hoc* basis and, in most situations the courts have refused to acknowledge the validity of the gender reassignment.³⁴³

This is possibly because the courts feel bound by long-established legal and social definitions of what previously appeared to be immutable conditions, such as description of marriage.³⁴⁴ The subjective view of judges towards transsexualism and homosexuality, and the fear that the recognition of the transsexual's post-operative sex may possibly open the floodgates to a tide of single-sex marriages, has probably influenced judicial decisions.

342. SALC (1995) op cit 38.

343. SALC (1995) op cit 38.

344. I.M.Kennedy "Transsexualism and Single-Sex Marriage" (1973) 2 Anglo-American Law Review

112 at 130 et seq: Gail Brent, "Some Legal Problems of the Post-operative Transsexual" (1972-1973)

12 Journal of Family Law 405 at 421.

5.3.1: UNITED KINGDOM

In the United Kingdom, the leading case of Corbett v Corbett (otherwise Ashley)³⁴⁵ which concerned the validity of the marriage in which one of the partners was a post-operative transsexual has already been discussed.³⁴⁶ In its alternative judgement, the court held that the marriage was a nullity because proper consummation between the spouses was not possible.³⁴⁷ The court did not consider the absolute consensus of medical evidence that psychological sex (gender) had to be taken into account when determining sexual identity. The Law Commission comments that the state erred in first considering the spouses to be of the same sex before considering the subject of consummation.³⁴⁸ It goes on further to add that there is no doubt that post-operative transsexuals of either sex are capable of physically consummating a marriage.³⁴⁹

345. Corbett v Corbett (otherwise Ashley) [1970] 2 ALL ER 33.

346. See above.

347. Corbett v Corbett (otherwise Ashley) [1970] 2 ALL ER 33 at 107 F.

348. SALC (1995) op cit 39-40 , a discussion of the Corbett case at 107B and 107G.

349. SALC (1995) op cit 40 footnote 115; in addition, the impact of the Corbett decision on R v Tan and others [1983] QBD 1053 (CA) has already been discussed above. The simple expediency of the chromosomal test has led to some unfortunate consequences and demonstrates the dangers of extrapolating a judicial decision from its true ambience.

5.3.2: EUROPEAN COURT OF HUMAN RIGHTS

The case of Rees v United Kingdom,³⁵⁰ had the following facts: The applicant Rees a post-operative male alleged that the refusal by the authorities in the United Kingdom to amend his sex description in the birth register, violated the European Convention of Human Rights, in particular, Article 8 (the right to privacy) and Article 12 (the right to marry). Although on the particular facts of the case, the European Court of Human Rights found that the United Kingdom had not violated the European Convention, the Court added that it:

“... is conscious of the seriousness of the problems affecting ... (transsexuals) and the distress they suffer... The need for appropriate legal measures should be kept under review...”³⁵¹

It is of significance that the European Commission of Human Rights³⁵² in its initial examination of the case found it necessary to refer to the case of Van

350. Rees v United Kingdom (1986) 9 EHRR 56, [1993] 2 FCR 49, [1987] 2 FLR 111, [1987] Fam Law 157, EctHR.

351. As quoted by the SALC (1995) op cit 41.

352. Allegations of violations of the European Convention of Human Rights are considered first by the European Commission of Human Rights and may then be referred to the European Court of Human Rights by the Commission. (see page 41 of SALC (1995) Report).

Oostewijck v Belgium³⁵³ by stating that Belgium, in refusing to acknowledge Van Oostewijck's post-operative sex had violated Article 8 of the European Convention of Human Rights, that is, respect for private and family life. Belgium had refused:

“... to recognise an essential element of his personality: his sexual identity resulting from his changed physical form, his physical makeup and his social role. In doing so, it (Belgium) treats him as an ambiguous being, an “appearance”, disregarding in particular the effects of lawful medical treatment aimed at bringing the physical sex and psychical sex into accord with each other ... it restricts an applicant to a sex which now can scarcely be regarded as his own.”³⁵⁴

In 1990 in Cossey v United Kingdom³⁵⁵ the European Court of Human Rights was effectively asked to overturn the Rees decision. Although it did

353. Van Oostewijck v Belgium (1986) 3 EHRR 557. This case was not referred to the European Court of Human Rights for a decision as the applicant had not exhausted his domestic remedies. However this case is similar to the Rees case where Van Oostewijck, a post-operative male, had been refused by authorities in Belgium to have his sex description in his birth register altered.

354. Van Oostewijck v Belgium 3 EHRR 557 at 584.

355. Cossey v United Kingdom (1990) 13 EHRR 622, [1991] 2 FLR 492; Cossey, a male to female conversion's application to the ECHR that the United Kingdom had violated her rights to privacy and marriage, although not upheld was viewed more sympathetically than the Rees application.

not do so, this time the court engaged a more compassionate approach to the difficulties experienced by Cossey. The fundamental reasons for this shift in opinion are to be found probably in the dissenting opinions of Martins J. who based his opinion largely on the changing societal attitudes to activities that are essentially private and the fact that the court in Rees had left the door open to accommodate scientific and societal changes in the future.³⁵⁶ He suggested that the treatment of the syndrome was incomplete without full recognition of the new status.

Again, in Sheffield and Horsham v United Kingdom³⁵⁷ the European Court of Human Rights decided in favour of the United Kingdom in relation to a violation of Article 8. The applicant, who had been married as a man and had a daughter by that marriage was a pilot and was unable to obtain employment in her new sex. However, the court declared that there had been no new developments in the field that would induce them to overturn Cossey. The United Kingdom was, nevertheless, strongly criticized for not having kept its legal measures in this area under review.

356. Mason and McCall-Smith op cit 43.

357. Sheffield and Horsham v United Kingdom [1998] 3 FCR 141, [1998] 2 FLR 928, ECHR.

A further application has been upheld by the European Commission. The case concerns I v United Kingdom.³⁵⁸ Here, the applicant, a male to female conversion contended that the failure to supply a replacement certificate of current gender placed her at risk *inter alia* of being unable to re-register as a nurse and of being placed in a male hospital ward or male prison. She also maintained that she could marry neither a woman nor a man.

The European Court of Human Rights is to be criticized for not taking a firm conclusive stand in earlier cases and finality on the legality of acknowledgement and acceptance of a post-operative transsexual's sex is awaited.

B v France³⁵⁹ concerned an appeal to the European Court of Human Rights against a refusal of the Cour de Cassation, first to declare that following surgery, B, a former male was now of female sex and, second, to alter her documentation accordingly. The refusal was largely based on the grounds that she was still biologically male. Mason and McCall-Smith notes that the

358. I v United Kingdom (1997) 23 EHRR CD 66, ECHR.

359. B v France (1992) 16 EHRR 1, [1992] 2 FLR 492.

regulation of reassignment operations is stricter in France than in the United Kingdom.³⁶⁰

B's appeal was upheld on the grounds that Article 8 (the right to privacy) had been violated largely because in the French system, a person's sex is constantly publicized by way of his/her social security number and that, as a result, B found herself in a position that was incompatible with the respect due to her private life.

5.3.3: UNITED STATES OF AMERICA

The United States of America is one of the countries where *ad hoc* decisions are taken by the courts with respect to the determination of the transsexual's post-operative sex. In their decisions regarding marriages, the US courts appear to have shown a greater understanding of the transsexual problem than their counterparts in England.³⁶¹ In the case of MT v JT³⁶² the Court rejected the decision in Corbett v Corbett and the attendant *Ormrod test*.

360. Mason and McCall-Smith op cit 43.

361. Mason and McCall-Smith op cit 42.

362. MT v JT 355 (A) LR (2d) 204 (1976).

It held that a post-operative transsexual may in law be recognised as a member of his post-operative sex where the anatomical and genital features were made to conform to that person's gender, psyche or psychological sex, i.e. sexual identity was governed by a congruence of those standards.³⁶³ The following statement by the court demonstrates the rationale of the decision:

“A transsexual in a proper case can be treated medically by certain supportive measures and through surgery to remove and replace existing genitalia with sex organs which coincide with the person's gender. If such sex reassignment surgery is successful and the post-operative transsexual is, by virtue of medical treatment thereby possessed of the full capacity to function as a male or female, as the case may be, we perceive no legal barrier, recognizable social taboo or reason grounded in public policy to prevent the person's identification at least for the purpose of marriage to the sex finally indicated.”³⁶⁴

363. MT v JT 355 (A) LR (2d) 204 (1976) at 209.

364. MT v JT 355 (A) LR (2d) 204 (1976) at 210.

5.3.4: AUSTRALIA

The decision of the courts in the Australian case of In the Marriage of C and D (falsely called C)³⁶⁵ was that the marriage of Mr. C, an intersexual who had corrective sexual alignment surgery resulting in the male phenotype, was not valid because Mr. C was neither a man nor a woman. In refusing to regard Mr. C as either male or female, in spite of the medical procedures, the Australian court indicated once again, the dangers of leaving the determination of sexual identity to *ad hoc* decisions by the court.

365. In the Marriage of C and D (falsely called C) 3 EHRR 557 at 584.

5.4: THE RECOGNITION OF A TRANSSEXUAL'S POST- OPERATIVE SEX – COMPARATIVE LAW:

CONCLUSION

From the above study of comparative law with respect to the determination of the sexual identity of the post-operative transsexual, it is clear that in countries where legislation has been passed regarding the recognition of the transsexual's or intersexual's post-operative sex, the difficulties and unjust anomalies regarding the legal consequences have been satisfactorily removed. This also applies to those countries where the sexual identity of the post-operative transsexual is determined by the administrative process.

The greatest impediments to the recognition of the post-operative sex of the transsexual appear where the legal status of the individual is left to the court to decide on an *ad hoc* basis. Here judges and magistrates play an important role in determining legal outcome. It is important to remember that their personalities, schooling, university education, professional experience, personal political beliefs and their background in general influence the way in which they interpret legislation.³⁶⁶

366. Tshwaranang Legal Advocacy Centre To End Violence Against Women National Legal Manual For Counsellors Of Raped And Battered Women (1999) 140.

CHAPTER 6: CONCLUSION: THE NEED FOR A LEGAL RECOGNITION OF THE TRANSSEXUAL'S POST-OPERATIVE STATUS

Medical science has progressed and continues to do so at a rapid pace.

Medical men and women have succeeded in carrying out gender reassignment procedures for the therapeutic benefit of their patients. The law, however, by keeping aloof of the transsexual's problem, has created a legal "vacuum" where there is social and judicial acceptance of reassignment procedures but a refusal to give legal effect to the change in status that the transsexual obsessively desires and the operation simulates. A legal recognition of the change in sex is essential for the post-operative transsexual to be totally assimilated into society and to avoid being constantly harmed by traumatic experiences.

The South African Law Commission conducted an investigation into the legal consequences of sexual realignment and related matters. This investigation, together with the recommendations and proposed legislation, the aim of which was to alleviate the resultant difficulties and legal anomalies faced by the post-operative transsexual was submitted to the then

Minister of Justice, for consideration in 1995.³⁶⁷ The Commission's recommended legislation is as follows:³⁶⁸

“1.(1) Any person whose sex organs have been altered by surgical and medical treatment so that such person has the sex organs of the sex opposite to his or her biological sex may apply to the Director-General of Home Affairs for the alteration of his or her sex description in the birth register in order to bring it into line with his or her altered sex organs.”

The amendment of a person's sex description in the birth register would be an administrative process that would be handled by the Director-General of Home Affairs and not left to the *ad hoc* decisions by the courts. Legal certainty with respect to such alteration would thereby be affirmed.

“1.(2) An application contemplated in subsection (1) shall be accompanied by –

- (a) the birth certificate of the applicant;
- (b) reports from the medical practitioners who carried out the processes and applied the treatment to alter the sex organs of the applicant, stating the nature of those processes and treatment and the results thereof ; and

367. SALC (1995) op cit i.

368. SALC (1995) op cit 76-78.

- (c) a report concerning the present sex appearance of the applicant by a medical practitioner who did not take part in any of the processes or the treatment of the applicant to alter his or her sex appearance, but who has medically examined the applicant in order to establish his or her sex appearance.”

This would serve as adequate evidence that the process was necessary and has been completed. As the diagnosis and treatment of the gender dysphoria syndrome is a medical matter, it would be the task of the medical team to decide on whom and under what circumstances the gender reassignment surgery would be performed. Having to furnish the necessary reports to the Director-General of Home Affairs with the application would act as a safeguard to ensure that the management decision would not be taken lightly.

“1.(3) The Director-General of Home Affairs must, if he refuses to alter the sex description of the applicant in the birth register, furnish reasons for the decision in writing to the applicant unless the reasons have been made public.”

The Director-General would need to justify his/her decision for declining the

application (eg. incomplete or inadequate reports or inconsistent medical reports from the medical practitioners). This would be in keeping with section 33³⁶⁹ of the Constitution.

“1.(4) If an application contemplated in subsection (1) is refused by the Director-General, the applicant may apply to the magistrate of the district in which he or she resides for an order directing the change of his or her sex description.”

This would provide for a review of the administrative action by the magistrate and would be in accord with the applicant’s constitutional rights.³⁷⁰ It is trite that it is much cheaper to make an application in a magistrate’s court than in the high court.

“1.(5) An application contemplated in subsection (4) shall be accompanied by the documents mentioned in subsection (2) and the reasons why the Director-General refuses to amend the sex description in the birth register.”

369. Act 108 of 1996 s 33 (2) – “Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.”

370. Act 108 of 1996 s 33 (3)(a) – National legislation must “provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;”. The Promotion of Administrative Justice Act 3 of 2000 has now been passed to give effect to this constitutional right.

The magistrate would not be able to make an appropriate decision without all the necessary documents and the reasons for the refusal from the Director-General. The grounds for a reversal of the Director- General's decision could be eg. a misinterpretation of the information in the documents – hence the need for all the necessary documents and information from the Director-General.

“1.(6) The applicant shall on the date and at the time determined by the magistrate appear in person before the magistrate in chambers and shall at the request of the magistrate furnish the additional information and proof which the magistrate requires.”

The decision to alter the sex description in the birth register would be taken only after scrupulous review and scrutiny of the application by the magistrate. It is significant that the applicant appear in person before the magistrate as it might be necessary for the magistrate to observe the physical changes in the post-operative transsexual in order to ascertain that the procedure has been completed. Where the submitted medical reports are not consistent or where the magistrate is in doubt with respect to the medical results, it may be necessary for an independent medical practitioner appointed by the court to examine the applicant. It is suggested that section

1(6) make provision for the inclusion of the independent medical practitioner. That the alteration of the sex description is to be allowed would be beyond any doubt.

“1.(7) If the application is granted the magistrate shall issue an order directing the Director-General to alter, in accordance with the order, the sex description in the birth register of the person named in the order.”

This section ensures that the applicant’s right to administrative action that is lawful, reasonable and procedurally fair would be respected.³⁷¹

“1.(8) An applicant may on his or her appearance before the magistrate be assisted by a legal representative.”

This would ensure that any substantial injustice that might otherwise result as a consequence of the applicant’s lack of knowledge of the legal processes would be avoided. Where the applicant cannot afford to employ the services of a private lawyer, he/she could apply to legal aid for assistance.

371. Act 108 Of 1996 s 33 (1).

“2.(1) If the Director-General of Home Affairs grants an application contemplated in section 1(1) or receives an order from a magistrate as contemplated in section 1(4), he or she shall in accordance with the provisions of section 24A of the Births and Death Registration Act, 1992 (Act No. 51 of 1992), have the sex description of the person concerned altered and such person shall from the date of the recording of such alteration be legally deemed for all purposes to be a person of the sex description so ordered.”

The post-operative transsexual would no longer be subjected to repeated humiliating explanations in an attempt to resolve uncertainty, as there would now be legal certainty. He/she would be fully integrated into society as a member of his/her post-operative sex. Hence there would be no discrepancy between his/her apparent sex and his/her registered sex.

This section, however, makes no provision for the retrospective alteration of the sex description of the post-operative transsexual who has had surgery subsequent to the repeal of section 7 B of the Births, Marriages and Deaths Registration Act.³⁷² The individual may, at present, be in a purported marriage. It is suggested that this section be altered so as to include these individuals.

372. Act 81 of 1963.

“2.(2) Rights and obligations that have been acquired by or accrued to the said person before the alteration of his or her sex description or the date of the order shall not be abolished by the alteration or by the order.”

An annulment of the rights and obligations obtained during his/her previous sex would be perceived as unfair discrimination and hence be unconstitutional,³⁷³ eg. where the individual has inherited as a member of his/her previous sex, the right to inheritance would prevail. However, this section requires clarification as eg. the right to marry a member of his/her previous sex, is at present denied the post-operative transsexual. Section 2(2) may in effect not assist in the retrospective achievement of all rights due to the post-operative transsexual.

“3. The Births and Deaths Registration Act, 1992 (Act No. 51 of 1992), is hereby amended by the insertion of the following section after section 24:

‘24A Alteration of sex description

The Director-General may in terms of section 2 of the Alteration of Sex

373. Act 108 of 1996 s 9.

Description and Sex Status Act, 19 ... (Act No. ... of 19 ...), order that the sex description of a person be altered in the birth register. An alteration so recorded shall be dated and after the recording of the said alteration the person concerned shall be entitled to be issued with an amended birth certificate.’’

Gender reassignment procedures are not considered as *contra bonos mores* by the state. The state already implicitly recognises that such procedures are accepted medical treatment, although not a priority. Post-operative transsexuals should be able to obtain official documents indicating their post-operative sex with no reference to their former sex. Where social and commercial practices require the production of a birth certificate, the post-operative transsexual should not be placed in the humiliating situation of having to explain his/her predicament. The recommendations of the Law Commission attempt to achieve this.

Although these recommendations were submitted to the Minister of Justice in 1995, five years later, the South African legal system has remained indifferent to the Law Commission's recommendations and no legal response has, as yet, been forthcoming. This is probably because legislative issues of greater import have been given priority during the transformation process in post-apartheid South Africa. However, more than four years have

elapsed since the adoption of the final Constitution.³⁷⁴ It is essential that the constitutional rights of all citizens are protected and that legislative measures designed to safeguard the rights of the post-operative transsexual are enacted.

The recommendations of the Law Commission together with the suggestions of the present author ensure that the determination of a post-operative transsexual's identity is not left to *ad hoc* decisions by the courts, but are resolved by legislation. The question of who undergoes the gender reassignment procedure is a medical concern, and the determination of sexual identity is a medical problem. These are complex scientific issues, not suitable for *ad hoc* judicial decisions. The latter are neither in the interest of the public nor the transsexual. The refusal by the courts to recognise the new status of the individual after gender reassignment surgery has done little to solve this modern medical and sociological problem.

In South Africa, the number of transsexuals finding themselves in this legal limbo after surgery may be greater than actually recorded. This was revealed

374. Act 108 of 1996.

in a recent report by the Mail and Guardian.³⁷⁵ The law should not disregard reality. The reality is that:

- (a) there are transsexuals (both pre-operative and post-operative) in our society;
- (b) it is possible to change their physical appearance so that they can be accepted as members of their changed sex; and
- (c) such persons are prepared to undergo these procedures even though they cost more than R100 000,³⁷⁶ are extremely dangerous³⁷⁷ and are not recognised by the law.

Accordingly, not only is the legal position no longer in keeping with reality, but a refusal of its legal recognition and its consequences, undermines the purpose of the operation and its therapeutic aims.

375. P.Kirk "Mutilation by the Military" Mail and Guardian July 28 to August 3 2000 4 – 5.

376. Kirk op cit at 5 states: "In civilian life, such operations cost more than R100 000 and are not performed in state hospitals."

377. Kirk op cit at 5 states that the operations are extremely dangerous and the program at one provincial hospital was halted after a number of patients died from complications.

Transsexuals undergo dangerous and mutilating surgery for therapeutic purposes in the hope that they will become integrated and responsible members of society. At the conclusion of this treatment, however, they find that they are not recognised by law as members of their new sex.

Green³⁷⁸ has asked the following questions:

“What does it comfort any of us to insist that an individual shall be a man, when for all purposes of the ordinary life that individual can only be, and be recognised, as a woman? What pride can there be for a law which vetoes the attitudes dictated by ordinary humanity?”

It is a blatant act of unconstitutional discrimination against such individuals if the law continues to refrain from recognising their gender change.

Constitutional safeguards of the individual's rights³⁷⁹ together with the protection afforded to the individual by the Promotion of Equality and Prevention of Unfair Discrimination Act,³⁸⁰ make it unlikely that the common law decision in W v W would be upheld in present day, post-

378. D.A.R. Green “Transsexuals and Marriage” (1970) 120 New Law Journal 210.

379. Act 108 of 1996 s 9 (equality), s 10 (human dignity), s 12(2) (bodily and psychological integrity), s 14 (privacy), s 33 (just administrative action).

380. Act 4 of 2000.

apartheid South Africa. Although medico-legal and morality issues have addressed the treatment of the transsexual it is now necessary for the judiciary to address social policy issues involved in advancing the post-operative transsexual's basic human rights.

Where there is no legislation to guide their decisions concerning the most modern, sophisticated medical procedures, the courts are placed in an invidious position of having to seek guidance in definitions and descriptions that were established during ancient law periods when the only criteria were humankind's personal experience concerning biological phenomena.

Certainty and consistency may be comfortable criteria on which to base judgements. However, in doing so, in respect of the post-operative transsexual, the law alienates itself from compassion and justice.

The legislation recommended by the Law Commission, together with the suggestions of the present writer, should be introduced as a matter of urgency to secure the fundamental rights of post-operative transsexuals. Such legislation would protect not only the transsexual who has had gender reassignment procedures but also the intersexual who has had gender

assignment surgery and the little boy who has had penile amputation at an early age.

It is recommended that the legislature should take immediate steps to ensure that the results of reassignment procedures of a therapeutic nature that are legally performed are legally recognised.

BIBLIOGRAPHY

1. Benjamin H. The Transsexual Phenomeon (1966).
2. Boswell J. Christianity, Social Tolerance and Homosexuality: Gay People in Western Europe From the Beginning of the Christian Era to the Fourteenth Century (1980).
3. Boswell J. The Marriage of Likeness: Same-Sex Unions in Pre-Modern Europe (1996).
4. Devenish G.E. A Commentary on the South African Bill of Rights (1999).
5. Dewhurst J. in Whitfield C.R. (ed) "Normal and Abnormal Development of the Genital Organs" in Dewhurst's Textbook of Obstetrics and Gynaecology for Postgraduates 4ed (1986).
6. Eskridge W.N. A History of Same-Sex Marriage (1993).
7. Hahlo H.R. The South African Law of Husband and Wife 4ed (1975).
8. Hahlo H.R. The South African Law of Husband and Wife 5ed (1985).
9. Hemphill R.E. "Costume and Sex" The Black Bag (1960).

10. Henning J.J. and Delpont H.J. in Joubert W.A. (ed.) "Partnership" The Law of South Africa vol 19 (1999).
11. Hoffman L.H. and Zeffert D.T. The South African Law of Evidence 4ed (1988).
12. Hoopes J.E. in Green R. and Money J. (eds.) "Operative Treatment of the Female Transsexual" in Transsexualism and Sex Reassignment (1969).
13. Jones H.W. in Green R. and Money J. (eds.) "Operative Treatment of the Male Transsexual" in Transsexualism and Sex Reassignment (1969).
14. Lupton M.L. in Schafer I. (ed.) Family Law Service (1995).
15. Mason J.K. and McCall Smith R.A. Law and Medical Ethics 5ed (1997).
16. McQuoid-Mason D.J. The Law of Privacy in South Africa (1978).
17. McQuoid-Mason D.J. and Strauss S.A. (revised by McQuoid-Mason D.J.) in Joubert W.A. (ed.) "Medicine, Dentistry, Pharmacy and other Health Professions" The Law of South Africa vol 17 (1999).
18. Milton J.R. South African Criminal Law and Procedure 2ed. vol 2 (1982).

19. Milton J.R. and Fuller N.M. "Statutory Offenses" in South African Criminal Law and Procedure vol 111 (1982).
20. Mohr R.D. Gays/Justice: A Study of Ethics Society and Law (1988).
21. Money J. and Ehrhardt A.A. Man and Woman : Boy and Girl (1980).
22. Money J. and Ambinder R. in Brady J.P. and Brody H.K.H. (eds.) "Two-year, Real-life Diagnostic Test: Rehabilitation versus Cure" in Controversy in Psychiatry (1978).
23. Morris I. Conundrum (1974).
24. Randell J. in Green R. and Money J. (eds.) "Pre-operative and Post-operative Status of the Male and Female Transsexuals." in Transsexualism and Sex Reassignment (1969).
25. Rathnam S.S. and Lim S.M. in Studd J. (ed.) "Surgical Treatment of Transsexualism" in Progress in Obstetrics and Gynaecology vol 2 (1982).
26. Raymond J. The Transsexual Empire (1979).

27. Sahakian W.S. Psychopathology Today – The Current Status of Abnormal Psychology 2ed (1979).
28. Sinclair J.D. The Law of Marriage (1996).
29. Sinclair J. The Matrimonial Property Act (1984).
30. Slater E. and Roth M. Clinical Psychiatry 3ed. (1977).
31. Snyman C.R. Criminal Law 3ed. (1995).
32. Speroff L., Glass R.H. and Kase N.G. Clinical Gynaecological Endocrinology and Infertility 5ed (1994).
33. Strauss S.A. Legal Handbook for Nurses and Health Personnel (1981).
34. Strauss S.A. Doctor, Patient and the Law 3ed (1991).
35. Strauss S.A. and Strydom M.J. Die Suid-Afrikaanse Geneeskundige Reg (1967).
36. Thompson D. (ed.) The Concise Oxford Dictionary 9ed (1995).

ARTICLES

1. Benjamin H., Ihlenfeld C. "Transsexualism" (1973) 3 American Journal of Nursing 453.
2. Benjamin H. "Transvestitism and Transsexualism" (1953) 7 International Journal of Sexology 12.
3. Belli M.M. "Transsexual Surgery" (1978) 239 Journal of the American Medical Association 2143.
4. Brent G. "Some Legal Problems of the Post-operative Transsexual" (1972-1973) 12 Journal of Family Law 405.
5. Cameron E. "Sexual Orientation and the Constitution: A Test Case for Human Rights" (1993) 110 SALJ 450.
6. Coran A.G., Porley T.Z. "Surgical Management of Ambiguous Genitalia in the Infant and Child." (1991) 26 Journal of Paediatric Surgery 812.
7. De Vos P. "On the Legal Construction of Gay and Lesbian Identity and South Africa's Transitional Constitution" (1996) 12 SAJHR 274.

8. Donahue P.K., Powell D.M., Lee M.K. "Clinical Management of Intersex Abnormalities" (1992) 28 Current Problems in Surgery 515.
9. Edgerton N.T. "Transsexualism – A Surgical Problem" (1978) 54 Plastic and Reconstructive Surgery 448.
10. Govender K. "The Impact of the Equality Provisions of the Constitution" (1997) 18 2 Obiter 258.
11. Grant B. "Comments and Cases on Same-Sex Marriage" (1996) 12 SAJHR 571.
12. Green D.A.R. "Transsexualism and Marriage" (1970) 120 New Law Journal 210.
13. Hage J.J. "Medical Requirements and Consequences of Sex Reassignment Surgery" (1995) 35:1 Med. Sci. Law 17.
14. Hage J.J., Fayman M.S. "Masculinizing Surgery for Male Intersexes and Female to Male Transsexuals" (1994) 5 (3) Medical Sex Journal 5.
15. Hohengarten W.M. "Same-sex Marriage and the Right to Privacy" (1994) 103 Yale LJ 152.
16. Holmes O.W. "The Path of Law" (1987) 10 Harvard LR 457.

17. Holloway J.P. "Transsexuals – Some Further Legal Considerations." (1972) 5 CILSA 71.

18. Homer S.K. "Against Marriage" (1994) 29 Harvard Civil Rights – Civil Liberties LR 505.

19. Kahn E. "The True Hermaphrodite – of No Sex?" (1981) 98 SALJ 111.

20. Kennedy I.M. "Transsexualism and Single-Sex Marriage"(1973) 2 Anglo-American Law Review 112.

21. Lupton M.L. "The Validity of Post-operative Transsexual Marriages" (1976) 87 SALJ 385.

22. Money J., Schwartz M., Lewis V.G. "Adult Heterosexual Status and Fetal Hormonal Masculinization and Demasculinization: 46, XX Congenital Virilizing Adrenal Hyperplasia and 46, XY Androgen Insensitivity Syndrome Compared." (1984) 9 Psychoneuroendocrinology 405.

23. Mosikatsana T.L. "The Definitional Exclusion of Gays and Lesbians From Family Status" (1996) 12 SAJHR 549.

24. Pantazis A. "An Argument for the Legal Recognition of Gay and Lesbian Marriage"
(1997)114 SALJ 556.

25. Roth M. Sir "Transsexualism and the Sex-Change Operation: A Contemporary
Medico-legal and Social Problem." (1981) 49 Medico-Legal Journal 5.

26. Singh D. "The Refusal to Recognise Same-Sex Marriages – A Pandora's Box of
Inequalities."(1999) 32 (1) De Jure 29

27. Singh J.A. "Freedom of Expression: The Constitutionality of a Ban on Human
Cloning in the Context of a Scientist's Guaranteed Right to Freedom of Scientific
Research."(1999) 62 THRHR 579.

28. Taitz J. "The Legal Consequences of a Sex Change – A Judicial Dilemma." (1980)
97 SALJ 65.

29. Taitz J. "A Transsexual's Nightmare: The Determination of Sexual Identity in
English Law." (1988) 2 International Journal of Law and the Family 139.

30. Taitz J. "The Legal Determination of the Sexual Identity of a Post-operative
Transsexual seen as a Human Rights Issue" (1989) 7 Med Law 467.

31. Taitz J. "Some Criminal Anomalies Brought About by Sex-Change." (1985) 48 THRHR 97.
32. Thomas P.J. "Can The Lawyer Keep Up With The Doctor?" (1980) 97 SALJ 7.
33. Trosino J. "American Wedding: Same-Sex Marriage and the Miscegenation Analogy (1993) 73 Boston University LR 93.
34. Walters W.A.W. "Transsexualism – Medical and Legal Aspects (1983) 16 (2) Australian Journal of Forensic Science 65.

OTHER DOCUMENTS

Beeld Tuesday 21 July 1992.

German Legislation on Transsexuals of 10 September 1980, BG B1 1980, 1, p1654.

Gilson P.M., "Gender Dysphoria Syndrome : Medical Aspects and Legal Consequences"

LLM Thesis, University of Natal (1985).

Hansard House of Assembly Debates cols 4441-2, 4 October 1974.

Hansard House of Assembly Debates cols 2356, 19 March 1992.

"Womanhood's Hell, I want my Penis Back" Independant on Line

19-06-2000.

Italian Act of 4 May 1982 on the Correction of Sexual Status – Norme in Materia de

Rettificazione Di Attribuzione Di Sesso legge 14 April 1982.

" 'She's a Man,' says Home Affairs." Mail and Guardian February 25 to March 2 2000.

"Mutilation by the Military" Mail and Guardian July 28 to August 3 2000.

“Transsexuals in Limbo” Editorial (1971) 31 Maryland Law Review 235.

Patti S. and Will M.R. La Rettificazione Di Attribuzione Di Sesso: Prime Considerazioni (1982).

“Born a Boy, Raised a Girl, Now a Man” People 6 October, 2000, vol 14 no. 20.

Singh J.A. “The Impact of ‘The Promotion of Equality and the Prevention of Unfair Discrimination Act No. 4 of 2000’ on Medical Aid Schemes and the Insurance Industry.”
- unpublished paper.

South African Law Commission Report on the Investigation Into the Legal Consequences of Sexual Realignment and Related Matters Project 52 (1995)

South African Law Commission Report Sexual Offenses: The Substantive Law Project 107 Discussion Paper 85 (1999).

Swedish Act of 21 April 1972 – Lag om fastallande av konstillhorighet i vissa fall – SFS 1972 119.

Tshwaranang Legal Advocacy Centre to End Violence Against Women National Legal Manual For Counsellors of Raped and Battered Women (1999).

Universal Declaration of Human Rights adopted and proclaimed by Resolution 217A(111) on 10 December 1948 by the General Assembly of the United Nations.

Will M.R. Geburt Eines Menschenrechts, Geschlechtsidentität in Europarecht und Staatenintegration (1983) at 911.