

Transsexualism and the Law

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Until relatively recent times the law, like the community in general, has tended to accept the sex of an individual without question, unconsciously making basic assumptions about the sexual identity of any particular individual based upon observed non-verbal and verbal cues, particularly external appearance. Yet the accuracy of these assumptions can be of vital importance, because in certain instances the gravity of an offense, or even whether the actions of the accused constitute an offense at all, depends upon the sex of the accused. The law, in seeking to reflect the attitudes, morals, and conscience of the community, has like the community developed expectations, to a large extent culturally determined, of acceptable gender roles: expectations of what is acceptable and proper behavior for females and of what is proper and acceptable behavior for males. Thus inevitably sexual discrimination of varying types and degrees has been ever present in some aspects of criminal law. For example, as a reflection of the community's moral and religious taboos in relation to homosexuality, the law has in general tended to deem homosexual behavior more offensive than approximately equivalent heterosexual behavior. Although recently in many countries, as a reflection of changing community attitudes, there has been a trend towards the removal of legal prohibition of homosexual activities, this elimination of discrimination has tended to apply mainly to "consenting adults" situations, *i.e.*, the equivalent of legally acceptable heterosexual activities, and in situations in which both heterosexual and approximately equivalent homosexual activities are illegal, the latter tend to incur harsher penalties.

As has been occurring with the homosexual population, transsexuals have been emerging overtly into the community in increasing numbers, and gender reassignment, utilizing techniques such as role training, hormone administration and surgery, including genital reconstruction, cosmetic surgery, and laryngeal surgery, has become more readily available. Although statistics about the transsexual population remain uncertain, in 1976 reported estimates indicated that probably there were approximately ten thousand transsexuals in the United States, two thousand having undergone gender reassignment surgery.¹ The appearance of transsexuals in both civil and criminal litigation has highlighted the need for legal definition of sex, and focused attention upon sexual discrimination in the law.

One generally accepted definition of transsexualism is that transsexualists possess sustained cross gender identity combined with a wish that their

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bodies were of the opposite sex.² For the purposes of this paper I propose to define transsexuals as, prior to any intervention, having chromosomal, gonadal and genital characteristics of one sex, congruent and within normal limits, and a heterosexual psyche with an identity of the opposite sex. This somewhat more rigid and limiting definition is designed to exclude other abnormalities of sexual identity such as those arising from chromosomal and hormonal abnormalities, including hermaphroditism, adrenogenital syndromes, Turner's syndrome, Klinefelter's syndrome and testicular feminization, disorders to which the term intersex might be more appropriately applied. However, increasing knowledge of the nature of transsexualism resulting from research could render this definition obsolete. For example, although chromosomal studies of transsexualism thus far seem to have been inconclusive and sometimes contradictory, reports have appeared of significant mosaicism. Thus, in at least a proportion of transsexuals, it is possible that the chromosomal characteristic is not within normal limits, and not entirely congruent with the gonadal and genital factors.

In general the legal system discussed in this paper is that of Victoria, Australia, a system following quite closely in definition and precedent the British legal system. Definition of sex is found to be implied in widely varying aspects of the civil and criminal law. It is to be found even in the law relating to slander, which decrees that it is slanderous to cast aspersions upon the chastity of a woman, but not upon that of a man! In this paper attention is directed particularly to transsexualism in relation to criminal law.

The role of the law in punishing behavior which is deemed to be offensive to the community can be divided into four components, definition of the offense, determination of whether or not the offense has been committed (*i.e.*, guilt or innocence), selection of appropriate punishment, and provision of that punishment. To varying degrees transsexualism creates difficulties in each of these facets of the legal process.

With respect to the first component, the sex of an individual can be directly or by implication included in the definition of an offense. Ormrod J. (now L.J.) points out in the judgment in the case of *Corbett v. Corbett*, 1970,³ that in different areas of the law and in various situations the sex of the individual concerned can be irrelevant, relevant, or an essential determinant in the case, for example being irrelevant to most contractual or tortious rights and obligations and the greater part of the criminal law, relevant in some contractual relationships such as life assurance and pension schemes, or some aspects of the law regulating conditions of employment, and an essential determinant in marriage and in some criminal offenses, such as adultery, rape and gross indecency, in which, by definition, the sex of the participants is an essential determinant.

When definition of a criminal offense includes as an essential determinant the sex of the participants, definition and determination of the legal sex of the participants, for example of both the accused and the victim (when one exists), are of prime importance. When seeking to establish the criteria, the courts require information about each aspect of sexual identity, chromosomal, gonadal, genital and psychological, and it tends to become the lot of the forensic psychiatrist to provide expert evidence on the latter. This

requires an understanding of the current state of knowledge of gender identity, particularly adult gender identity, and of how this is developed. Gender identity has been described as the "sameness, unity and persistence of one's individuality as male, female, or ambivalent in greater or lesser degree, especially as it is experienced in self awareness and behavior."⁴ Its formation perhaps can be regarded as commencing with the prenatal differentiation of centers in the hypothalamus, and its subsequent individual development is the combined product of many internal and external influences, including parental responses and cultural factors.

The appearance of transsexuals in court has necessitated not only definition of legal sex, but also a determination of whether or not the legal sex of an individual can be changed. At present the precedent generally accepted by the courts in Victoria is the case of *Corbett v. Corbett* mentioned earlier. The judgment includes the comment that "it appears to be the first occasion on which a court in England has been called upon to decide the sex of an individual." The case involved a petition for annulment of the marriage of a male transvestite, the petitioner, to a transsexual who had undergone gender reassignment, including vaginoplasty. Annulment was sought on the grounds that the respondent at the time of the ceremony was a person of the male sex, or alternatively, that the marriage was never consummated owing to the incapacity or wilful refusal of the respondent to do so. These claims were denied by the respondent, who cross-petitioned for a decree of nullity on the grounds of either the petitioner's incapacity or his wilful refusal to consummate his marriage. A long judgment included an outline of the extraordinary events which culminated in the petition for annulment, and detailed examination of the medical evidence presented.

The respondent was reared as a boy, and it was not suggested at any time that there was any mistake over the sex of the child. At the age of sixteen years he joined the Navy, but soon an overdose led to a period of psychiatric treatment, during which under the influence of small doses of amyltal or ether he expressed an intense desire to be a woman, a desire which, he said, he had experienced since he was a child. While visiting the South of France he met the members of a well known troupe of female impersonators normally based at the Carousel night club in Paris, and subsequently became a member of the troupe. At this time the respondent was taking estrogen. After four years at the night club, he consulted a doctor in Casablanca, who in 1960 carried out genital reconstruction, including orchidectomy and vaginoplasty involving inversion of the skin of the penis.

Nine doctors gave evidence. Two medical inspectors to the court, Mr. Leslie Williams, F.R.C.S., F.R.C.O.C. and Miss Josephine Barnes, D.M., F.R.C.S., F.R.C.O.G., reported on their physical examination of the respondent, and an investigation of the respondent's "chromosomal sex" was carried out by Professor F.P.G. Hayhoe of Cambridge, who reported that all the cells which he examined were of the male type. The expert witnesses called by the petitioner were Professor C.J. Dewhurst, F.R.C.S.E., F.R.C.O.G., Professor of Obstetrics and Gynecology at Queen Charlotte's Hospital, Professor Dent, M.D., F.R.S., F.R.C.P., Professor of Human Metabolism at University College Hospital, and Dr. J.D. Randell, M.D., F.R.C.P., D.P.M., Consultant Psychiatrist at Charing Cross Hospital. The

experts called by the respondent were Dr. Armstrong, M.D., F.R.C.P., Consultant Physician at Newcastle Royal Infirmary, Professor Ivor Mills, F.R.C.P., Professor of Medicine at Cambridge, and Professor Sir Martin Roth, Professor of Psychiatry at the University of Newcastle-On-Tyne.

The judgment included the following comment.

Since marriage is essentially a relationship between man and woman, validity of the marriage in this case depends, in my judgment, upon whether the respondent is or is not a woman. . . . The question then becomes, what is meant by the word "woman" in the context of a marriage, for I am not concerned to determine the "legal sex" of the respondent at large. [However, courts have considered that elsewhere the judgment implied that the decision could apply also to sex related offenses in criminal law.] Having regard to the essentially heterosexual character of the relationship which is called marriage, the criteria must, in my judgment, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia, cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage. In other words, the law should adopt in the first place, the first three of the doctors' criteria, *i.e.*, the chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention.

Turning to the second facet of the legal process, deciding the guilt or innocence of the accused, a significant factor in defining criminal conduct is the concept of *mens rea*, using that term in its widest jurisprudential meaning, and the transsexual can present anomalies in relation to this concept. For example, can this type of *mens rea* exist in accused transsexuals genuinely regarding themselves as female, when the particular offense by definition can be committed only by a male?

The relevance of transsexualism to the third facet of the legal process, the selection of appropriate punishment, is in part an extrapolation of its relevance to the second facet. If a particular act is deemed to merit greater punishment if it is committed by a male, should a psychologically female transsexual offender deserve the harsher penalty? There is also the issue of whether upon conviction the fact of transsexualism should be taken into account when the sentence is being determined.

The problems which have been confronting the courts are illustrated by a small series of trials in the County Court of Victoria, Australia, in which male-to-female transsexuals who have not had genital reconstruction have been apprehended soliciting in the streets, but when their transsexualism was discovered charges of soliciting for prostitution were replaced with much more serious charges, such as gross indecency. Whereas the former charge is a summary offense, usually resulting in the imposition of a relatively small fine in the local Magistrates Court, the latter charges are indictable offenses, tried in the County Court and often leading to substantial terms of imprisonment. In this series the psychological sex of the accused was raised as the main

issue by the defense, this defense resting upon the definition of the offenses and the claimed absence of *mens rea*. In some cases the prosecution in rebuttal argued that the accused should be regarded as a male disguised as a female in order to commit homosexual acts.

Case 1. C.C. Aged nineteen, C.C. was born in a country town. Father, a full blood aboriginal, was an alcoholic, and mother, a quarter-caste aboriginal, was a pensioner. C.C. was the youngest of seven siblings, the divorce of one sister being the only major problem among them. When C.C. was three years of age her parents separated, the children being reared by mother. An average scholar, C.C. began truanting from school to avoid "masculine" activities, such as woodwork and boys' sports. Being part bred, C.C. was rejected at school by both aboriginal and white students. A hairdressing apprenticeship was abandoned after six months, at the time gender role was changed. Subsequent income was derived mainly from prostitution, in massage parlors and on the streets, and partly from stage performance in "female impersonation" shows. Drug abuse from the age of fifteen years consisted mainly of Methaqualone and spasmodic use of heroin. C.C. claimed to have thought of herself as female as long as she could remember, cross dressed from an early age and assumed a full time female role at the age of sixteen years. Stilboestrol produced moderate breast development.

Case 2. N.O. Aged twenty-seven, N.O. was born in New Zealand. Father, a full blood Maori, was an alcoholic, and mother, a quarter-caste Maori, was "a very religious person." N.O. was the youngest of ten siblings, and among them there was a strong history of personal instability, particularly marital problems. An average scholar, at school N.O. was teased, bullied, and called a sissy. Frequent truanting occurred from the age of thirteen years, when regular cross dressing began. After a brief period of factory work, assumption of a full time female role was followed by striptease and dancing, which continued for several years until arrival in Melbourne, where unavailability of stage work led to prostitution, in massage parlors, and on the streets. Prostitution was accompanied by drug abuse, Methaqualone and intermittent heroin. A six-year *de facto* relationship with a heterosexual male ended because he wanted children. What was described as a good sexual relationship consisted mainly of N.O. performing fellatio. From the age of five N.O. thought of herself as being "different," and regarded herself as female from the time of puberty. She began taking Stilboestrol at fifteen, underwent surgical breast augmentation, and hopes soon to have vaginoplasty.

Case 3. K.N. Aged thirty, K.N. was born in New Zealand, her father, a farmer, being half Maori and her mother of European parentage. K.N. was the fourth of eight siblings, one sister being homosexual, with personal instability, and a fourteen year old brother having required psychiatric treatment. An above average scholar, K.N.'s education was uneventful and followed by two and a half years as sales assistant. The only physical abnormality was bilateral undescended testes. Since adoption of a female role K.N. has worked mainly in striptease. A two year course in computer programming was abandoned when K.N. came to Australia after her *de facto* died in a motor accident. In Melbourne prostitution in massage parlors

has been the main source of income. K.N. had two *de facto* relationships with heterosexual males and a brief relationship with an unstable drifter, a drug user, who she thought might have been homosexual. K.N. claimed to remember an initial self-awareness as female at the age of eight or nine years; cross dressing began at that time, and a full time female role was assumed at eighteen. Breast development resulted from estrogen administration. K.N. has been attending a clinic, and is about to undergo genital reconstruction.

In each case charges arose mainly from acts of fellatio, although K.N. claims to have learned a technique of crural intercourse such that the client was unaware that there was no vaginal penetration. In the first trial, acceptance that the accused's transsexualism rendered the charges inappropriate led to acquittal. In the second, the court elected to follow the judgment in *Corbett v. Corbett*; N.O. was regarded as male and the charges appropriate. Subsequently, however, N.O. was acquitted for lack of evidence, as the Record of Interview with the Police was ruled inadmissible, because of the degree to which N.O. was affected by drugs and alcohol at the time of the interview. In the case of K.N., as yet committal proceedings only have taken place.

These cases were referred consecutively by different Solicitors for pre-trial psychiatric assessment. Some striking similarities will be noted in the histories, but of course the number of cases permit no reliable conclusions to be drawn from these. Nevertheless, it is suggested that probably only a minority group of transsexuals, whose personal problems arise not only from their transsexualism, tend to encounter criminal charges. The histories in relation to transsexualism seem unremarkable and reasonably typical, consistent with clinical features displayed by a group of transsexuals studied in Australia, of whom 62% continuously dressed as women, 83% felt like a woman (when nude) and 100% sought gender reassignment surgery.⁵

It is generally accepted that when punishment of behavior is being considered, the mind which controlled and directed the behavior and the state of that mind are of prime importance. It is the author's contention that when an act is treated differentially by the law depending upon the sex of the perpetrator, it is the sex of the mind which directed the act which should be of relevance, taking precedence over other gender characteristics. This contention is more likely to be accepted if it can be demonstrated that the psychological sex of an individual or a diagnosis of transsexualism can be determined reliably, based upon valid and preferably objective criteria. Studies of transsexualism have been making this determination increasingly possible.

The case of a female-to-male transsexualist convicted of armed robbery of a bank illustrates the possible relevance of transsexualism to the third and fourth facets of the legal process, the selection and provision of appropriate punishment.

Aged thirty-two, H.E. was born anatomically female, but will be referred to here in his gender of choice (male). He related his unhappy childhood to his parents' marital conflict, his father's heavy drinking and violence and his mother's chronic neurotic depression. He was the eldest of four siblings, and his three sisters had stable histories. He contracted encephalitis at the age of eighteen months, and infectious mononucleosis at the age of fifteen years.

An above average scholar (verbal IQ 107, non-verbal IQ 120, full scale IQ 113), at sixteen his secondary education was terminated by admission to a psychiatric hospital; then after a year, his study for an Arts Diploma was terminated by a second admission to hospital. Numerous jobs ranged from "pick and shovel work" to a year teaching retarded children and a year teaching art and craft. In 1975 he resumed his education, studying simultaneously a final year of secondary education and some other subjects at university. Bouts of very heavy drinking continued until contact with Alcoholics Anonymous was followed by total abstinence for the latter three years. Drug use was confined to occasional marijuana. He remembered that during childhood he would have preferred to have been a boy, and from the time of puberty he regarded himself as male. During adolescence he dressed in a unisex manner, then adopted a full time male role. High doses of androgen resulted in deepening of the voice and growth of a beard. He had several brief *de facto* relationships with females, and for nine months lived in a *de facto* relationship with a heterosexual female school teacher.

He describes episodes of a churning sensation in the epigastrium, followed by difficulty with speech, a feeling of tension, and falling to the ground. There were some outbursts of uncontrolled destructiveness. He admitted to occasional auditory hallucinations, and revealed some ideas of reference and paranoid ideation. He made numerous suicide attempts, and had been admitted to psychiatric hospitals many times, once as a recommended (*i.e.*, "certified") patient.

When his student allowance check failed to arrive, he became agitated, and immediately walked into a bank, armed with a knife, and handed the teller a note demanding money. When he was convicted of armed robbery, psychiatric evidence was presented to the court, including a diagnosis of transsexualism and a provisional diagnosis of temporal lobe epilepsy, at that time unconfirmed by electroencephalogram; and the possibility of emerging schizophrenia was raised, although it was pointed out to the court that there was insufficient clinical evidence to establish the latter diagnosis. It was suggested that further investigation and treatment be undertaken, and that H.E. would be unable to tolerate confinement in a female prison, with the consequent high risk of suicide attempt.

At the time of the court hearing an unusually high incidence of armed bank robberies had provoked the media into strong demands for harsher penalties, and when a seven-year sentence of imprisonment was imposed, with a minimum period of five years, it was indicated that deterrence had been granted priority over the psychiatric considerations. H.E. was placed in custody, and soon after made two determined attempts at suicide.

During an appeal to the Full Court, H.E. had a temporal lobe seizure in the dock, observed closely by the author and the Prison Psychiatric Superintendent. The Full Court decided that in sentencing due weight had not been given to the psychiatric evidence with respect to both the circumstances of the offense and the likely effects of incarceration in a female prison. The prison sentence was replaced by probation for a period of five years, with a condition that H.E. undergo treatment, supervised by the author.

To construct separate jails for offenders displaying sexual dysphoria or

other sexual abnormalities would be impractical, but imprisonment of transsexual offenders can give rise to difficulties and anomalies, both in theory and in practice. For example, the problems entailed in confining in a male prison a male-to-female transsexual who has undergone gender reassignment are obvious, yet is it logical or consistent to send a person to a female prison as punishment for an offense which, by definition, can be committed only by a male? The criteria for allotting a prisoner to a female or male jail have not been clearly defined, but in Victoria the presence or absence of a penis has in practice been the deciding factor. The problem has been a source of concern to prison authorities, and transsexuals often have been confined to the prison hospital.

Despite the prolonged and severe psychological and social stresses usually encountered by the transsexual, the author is aware of no evidence to suggest that as a group they tend to transgress the law any more than the community at large. However, those who have appeared on criminal charges appear to have served a useful function by provoking examination of some aspects of the law, testing definitions, and highlighting discriminations in the criminal law. Thus far only one country appears to have introduced comprehensive legislation to rationalize the legal status of the transsexual. In Sweden a national board has been empowered to grant sex reassignment to an applicant, after reference to three councils, representing psychiatry, endocrinology and jurisprudence.⁶ It is to be hoped that endeavors such as this become more widespread, to assist the social adjustment of a minority group whose rights have tended to be overlooked.

References

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