Transsexualism: a legal perspective

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Author's abstract

This paper begins with a discussion of the current legal definition of sex laid down in Corbett v Corbett. The implications of this test for three areas of the law, marriage, birth certificates and employment are then examined. Solutions from the United States of America and West Germany are studied and the suitability of similar solutions being transplanted into British law discussed.

The legal difficulties experienced by Nicholas Mason are the result of the way in which a person's 'legal sex' is determined in English law. In the leading case of *Corbett v Corbett*,¹ Ormrod J had to decide whether or not the respondent, a male transsexual who had undergone sex reassignment surgery, was a woman for the purpose of marriage. The learned judge held that biological criteria should determine this issue. These criteria consisted of three factors:

- a) chromosomal *ie* the presence of the XY (male) chromosome or XX (female) chromosome,
- b) gonadal *ie* the presence or absence of testes or ovaries and,
- c) genital *ie* the presence or absence of male or female external and internal sex organs.

He rejected the contention that sex for this purpose should be determined by a person's psychological sexual nature (gender) or secondary sexual characteristics. The medical evidence showed that the respondent had the XY chromosome and had had testicles and male external genitalia prior to the operation but that psychologically he was a transsexual. Thus, applying the biological criteria, Ormrod J held that he was male at birth. Since it was accepted that the biological sexual constitution of a person is fixed at birth and cannot be changed, it followed that the respondent remained male and was therefore not a woman for the purpose of marriage even although he psychologically regarded himself as a woman, had undergone medical treatment so that in his external physical appearance he resembled a woman and was living as, and passing as, a woman in the community.

It is important to bear in mind what *Corbett v. Corbett* did not decide. On the facts of the case, the three biological criteria were congruent and Ormrod J did not have to consider the acute problems which would arise when this was not so. However,

he observed that greater weight would probably be given to the genital criterion than to the others. But in spite of this dictum, the case has been regarded by some commentators² as authority for the primacy of the chromosomal test in determining a person's biological sex. The reason for the attraction of the chromosomal test is, of course, its certainty in that, at present, a person's chromosomal pattern – unlike gonadal and genital factors – cannot successfully be altered.³ Thus although *Corbett* did decide that sex should be determined by biological criteria, Ormrod J was quite aware that it could still be difficult to determine biological sex in cases of physical inter-sex. However, since the biological sex of most pre-operative transsexuals will be quite certain, the effect of applying the *Corbett* test will be that their 'legal sex' for the purpose of marriage is also clear: it is the biological sex to which they belong at birth – and this will, *ex hypothesi*, be the opposite to that which they psychologically regard themselves as belonging, which they may socially live and which they may physically resemble as a result of successful medical treatment.

It must be emphasised that throughout his judgment Ormrod J stressed that he was seeking a test to determine sex for one purpose only, namely the capacity to enter into marriage: he was not attempting to formulate a test for determining a person's 'legal sex' at large. In those areas of the law where sex was not an essential determinant of a legal relationship, he held that there was nothing to prevent the parties from agreeing that a male transsexual should be treated as a woman and a female transsexual as a man. And, indeed, it remains true, as Nicholas Mason discovered, that most authorities are 'discreet and tactful' in changing documentation. Thus, if it has been agreed that a female transsexual should be treated as a man for national insurance purposes then it should follow that she would be regarded as male in any question of benefit or pension entitlement. However, there is little room for complacency. The transsexual has no legal right so to be treated. Moreover, as we shall see, the biological test has been adopted in other areas of the law in spite of Ormrod J's argument in *Corbett* that it was to be restricted to the purpose before him in that case. It is, therefore, possible that it could be used to challenge the legality of agreements made between transsexuals and authorities.

It is now proposed to examine the implications of the biological test of sex in three important areas of the law – a) marriage, b) birth certificates and c) employment.

Marriage

In English law, marriage is essentially a relationship between a man and a woman. As we have seen, *Corbett v. Corbett* decided that sex for the purpose of marriage was to be determined by using biological criteria only. Consequently, transsexuals lack the capacity to marry persons whom they regard as being of the opposite sex to themselves. For example, a male transsexual will regard a biological and psychological male as a member of the opposite sex: but the transsexual lacks the capacity to marry him, because the law treats both as having the same legal sex, *ie* both are considered to be men. Consequently, any purported marriage will be void. By section 11 of the Matrimonial Causes Act 1973 it is expressly stated that a marriage shall be void on the ground 'that the parties are not respectively male and female'.⁴ It is thought that in interpreting the words, 'male' and 'females', the courts will simply endorse the biological test formulated by Ormrod J in *Corbett*.

It should be noticed that the effect of these rules is to render the marriage void. Although it is not necessary to do so, either party to such a marriage may seek a decree of nullity from the courts. This is important because the court has the same powers to make financial provision and property adjustments when a decree of nullity is granted as they have on granting a decree of divorce.⁵ Thus, although the 'marriage' of the male transsexual and the man in my example would be void, if a decree of nullity was obtained the court has the same powers to settle any property or maintenance issues between the couple as it would have if they had been validly married and sought a divorce. These powers could be very useful if the couple's relationship had lasted for a considerable time. On the other hand, the exercise of these powers is discretionary: and it is clear that the way in which a judge views such a relationship will influence his decision whether, and if so how, he will exercise his discretion.

Even if the legal test of sex was widened to include psychological and social criteria and consequently transsexuals were held to have the legal capacity to marry, there is another formidable obstacle to the validity of the marriage. By section 12 (a) of the Matrimonial Causes Act 1973 a marriage is voidable if it has not been consummated owing to the incapacity of either party to consummate it.⁶ Consummation is defined as 'ordinary and complete intercourse', between a man and a woman. In *Corbett v. Corbett* Ormrod J held that a male transsexual who had undergone sex-reassign-

ment surgery lacked the capacity to have such intercourse. Although the surgeon had created 'a cavity which opened on to the perineum' which was large enough to admit a normal and erect penis, the learned judge held that sexual intercourse using such a completely artificial cavity was 'the reverse of ordinary, and in no sense natural'.⁸ Similarly, a female transsexual who undergoes sex-reassignment surgery will lack the capacity to consummate because, even if an artificial penis has been constructed, it will be unable to become sufficiently erect to penetrate a woman in the normal way.

However, incapacity to consummate renders a marriage *voidable* not void. In other words, the marriage is valid unless and until either party obtains a decree of nullity. In the present writer's view, it seems just that a party to a marriage who has not been informed before the marriage that the other spouse is a transsexual should be able to have the marriage avoided on this ground.

On the other hand, where a transsexual has made the position perfectly plain to the other spouse before the marriage takes place, then although the other spouse could theoretically still bring nullity proceedings, he is unlikely to be successful as the transsexual will be able to rely on section 13 (1) of the Matrimonial Causes Act 1973 whereby it is a defence if the petitioner with knowledge that it was open to him to have the marriage avoided so conducted himself as to lead the respondent reasonably to believe that he would not seek to do so and it would in all the circumstances be unjust to the respondent to grant the decree.⁹

In *Corbett v. Corbett*, Ormrod J attempted to justify his decision as follows: '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'. (italics added).

With the greatest respect, these sentiments have a dated ring. Apart from her roles in sexual intercourse and childbirth, it is difficult to discover the obligations which a female partner in a marriage is more naturally capable of performing than a man: the 'traditional' role of a woman in marriage is a result of cultural not biological conditioning. And, it need hardly be emphasised, the cultural assumptions on which this role has been based are currently under attack from women's liberation movements. Moreover, the legal significance of marriage has decreased in the twentieth century. As a general rule the law now treats spouses as though they were unmarried for the purposes of contract, torts and property – thus responding to the demand that spouses be treated as equal.¹⁰ Further, the law has

begin to recognise the rights of a person's natural family as well as legal family. Thus, for example, illegitimate as well as legitimate children can succeed to a parent's estate if he or she should die intestate: indeed the Law Commission's Working Paper on Illegitimacy has recommended the abolition of the status of illegitimacy – and, as a corollary, legitimacy. Thus, it is the present writer's contention that the only really important legal consequence of marriage is that only married couples have the right to seek the aid of the courts to settle the financial and other problems which arise when their relationship breaks down. But, surely, the parties to any type of relationship, heterosexual or homosexual, which can be shown to have been stable for a reasonable time, for example, six months or a year, should be able to have recourse to the courts when it breaks down. In our increasingly secular society, is it too radical to suggest that we should recognise these factors and, accordingly, no longer recognise marriage – as opposed to a couple's cohabitation – as having any legal consequences?¹¹ It would, of course, continue as a religious institution for those who desired it. The current legal incapacity of a transsexual to marry a person of the same legal sex would thus become irrelevant as the mere fact of their living together for a set period would entitle them to exactly the same legal rights and duties as heterosexual couples.¹² Whether or not transsexuals could marry would then be a religious matter only.

Birth certificates

A major legal problem encountered by Nicholas Mason was that he was unable to get his sex altered on his birth certificate. The Registrar General has the power to order a complete entry to be altered when he is satisfied that there has been an error of fact or substance in relation to the birth.¹³ However, it would seem that the error of fact or substance must exist at the time of the entry, *ie* at the time of the child's birth. The entry is a record of the facts at the time of the birth, not a narrative of future events. Accordingly, so long as a transsexual's sex is determined by biological criteria only, there will rarely have been a mistake in relation to the child's sex at the time of entry, and therefore the Registrar General does not have the power to make an alteration.¹⁴

On the other hand, if the Registrar General was to take the view that psychological factors should be taken into account in determining a person's sex, then it could be argued that if it later appears that a person is a transsexual then there was an error in relation to his or her sex at the time of birth and therefore the entry should be altered. As the present writer has emphasised throughout this paper, in *Corbett v. Corbett* Ormrod J was attempting a legal definition of sex only for the purpose of

capacity to marry: there is therefore no legal obligation on the Registrar General to use the biological test to determine sex for registration purposes.

However, it could be argued that the determination of a child's sex at birth must be based on biological criteria only since the child's psychological perception of his sexuality does not develop until later. If this be accepted then, of course, there is no error and the Registrar has no power under existing law to alter the birth certificate. Some new procedure would have to be devised whereby the transsexual could apply to a court for a declaration of change of apparent sex and, if granted, the change of sex could be recorded and an altered certificate obtained.¹⁵ But this presupposes a consensus in society that legal sex should be determined by psychological as well as biological criteria.

Employment

The Equal Pay Act 1970 and the Sex Discrimination Act 1975 prohibit discrimination on the grounds of sex in *inter alia* the employment sphere. The statutes use the expressions, 'a man' and 'a woman' and the question has arisen how these words are to be defined. In *White v. British Sugar Corporation*,¹⁶ a female transsexual who had not undergone sex reassignment surgery obtained a job with the Corporation which was under the impression she was a man. When her male colleagues, with whom she shared changing and toilet facilities, discovered she was female they complained to their employer who dismissed her. The female transsexual brought a complaint under the Sex Discrimination Act 1975 that the employer had unlawfully discriminated against her on the grounds of sex, *ie* had treated her less favourably than he would have treated a man. The employer contended, *inter alia*, that the Sex Discrimination Act 1975 was inapplicable as she was a man. The industrial tribunal rejected this defence. It held that the biological test laid down in *Corbett v. Corbett* should be used to define 'a man' and 'a woman' for the purposes of the Sex Discrimination Act 1975. Although the female transsexual regarded herself as male, dressed as a male and had been treated by the relevant authorities as a man for national insurance purposes, she was biologically female and was thus a woman for the purpose of the Act. The statute was therefore applicable and the tribunal had jurisdiction to hear the complaint. However, this proved a pyrrhic victory for the complainant because the tribunal held that she had not been dismissed on account of her sex but because she had lied to her employer that she was a man! She had therefore not been discriminated against on the grounds of sex.

The implications of *White v. British Sugar Corporation* are very serious for transsexuals. Consider, for example, a male transsexual who has undergone sex-reassignment surgery and appears

to all the world to be a woman. If she is discriminated against on the grounds that she is a woman, the legislation cannot apply as she is *not* biologically female and therefore not a woman for the purposes of the statutes. On the other hand, if it is discovered that she is a male transsexual then, since it is likely that any discrimination by the employer will be on the ground that the complainant is a transsexual rather than because she is biologically a male, the Sex Discrimination Act will not apply because it only outlaws discrimination on the grounds of a person's sex, not his or her sexual orientation. Moreover, if discrimination takes the form of sacking the transsexual, it is unlikely that a complaint under the general law of unfair dismissal would succeed. This is because the industrial tribunals have generally been quick to find that where an employer has dismissed an employee whose sexuality differs from the norm, the circumstances were such that the employer has acted reasonably in doing so. Thus, for example, an employer has been held to have fairly dismissed a lesbian on the grounds that he had acted reasonably in treating her refusal to remove her gay liberation badge as sufficient reason for her dismissal.¹⁷ In the case of transsexuals it is likely that tribunals would follow *White v. British Sugar Corporation* and hold that the employee had been dismissed for deceit and the employer had acted reasonably in treating the deception as sufficient reason for the dismissal.

It is the present writer's contention that the biological test for determining sex is quite inappropriate in this context. Although Ormrod J's arguments in *Corbett v. Corbett* have been criticised, there is still some force in his view that marriage is fundamentally heterosexual and therefore the criteria for determining sex should be biological. However, the purpose of the Equal Pay Act 1970 and the Sex Discrimination Act 1975 is to prevent discrimination on the grounds of sex in the employment and other *social* spheres: accordingly, it should be the sex which persons socially live that should be regarded as relevant, not their biological sex. *White v. British Sugar Corporation* is only the decision of an industrial tribunal and it is hoped that it will be over-ruled by the Employment Appeals Tribunal when a case involving a transsexual complainant again arises. But, although this would enable transsexuals to use the Equal Pay Act 1970 and the Sex Discrimination Act 1975, new legislation outlawing discrimination against persons on the grounds of their sexual orientation is surely desirable.

Many of the transsexual's problems would, of course, disappear if a person's psychological sex were regarded by the law as the most important element in determining his or her sex. Even if this were accepted, however, it is unlikely that a transsexual would be treated as being a member of the sex with which he or she is psychologically identi-

fied, unless and until there had been sex reassignment surgery. In the New Jersey case of *M.T. v. J.T.*,¹⁸ for instance, J A D Handler held that a transsexual who was born with the physical characteristics of a male was to be treated as a woman for the purposes of marriage because he had undergone sex reassignment surgery. J A D Handler maintained that the effect of the sex reassignment surgery had been to harmonise the male transsexual's gender and genitalia so that he had become psychologically and physically unified as a female, fully capable of sexual activity as a woman. In this case, the artificial cavity had 'a good cosmetic appearance' and was 'the same as a normal female vagina after a hysterectomy'. In other words, the judge assumed that the sex reassignment surgery had externally, at least, successfully effected an anatomical change from male to female. Accordingly, he felt,¹⁹ 'impelled to the conclusion that for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards'. The operation had made the transsexual fully capable of functioning sexually as a female and he could perceive 'no legal barrier, cognisable social taboo, or reason grounded in public policy to prevent that person's identification at least for the purposes of marriage to the sex generally indicated'.²⁰

This case, of course, provides a striking contrast with Ormrod J's approach in *Corbett v. Corbett*. However, it does make the assumption – which is debateable – that sex reassignment surgery does effectively change a person's anatomical sex. Secondly, it is not clear how convinced J A D Handler was by the logic of his own arguments. He takes pains to emphasise that there was no element of fraud in this case. The couple had lived together before the operation and they had married a year after it had been performed: accordingly, the husband had known that his wife had been a male transsexual. But if J A D Handler were correct in his contention that after successful sex reassignment surgery a male transsexual is a woman, it is difficult to see how there is any room for the operation of the doctrine of fraud if, for example, a post-operative male transsexual went through a ceremony of marriage without informing her husband of her medical history, since *ex hypothesi* she is legally the sex she represents herself to be! Thirdly, it appears essential that the effect of the surgery must be to enable a male transsexual to function sexually as a woman and a female transsexual to function sexually as a man. Thus the 'liberal' test of sex in *M.T. v. J.T.*, even if accepted in Great Britain, would not help a person such as Nicholas Mason since the phalloplasty proposed for him is not at present viable and therefore he still cannot function sexually as a man.

Finally, is it at all clear that in the context of our current mores, it is generally believed that the post-operative transsexual ought to be treated as a member of the sex to which he or she psychologically identifies? As Nicholas Mason's experience demonstrates, transsexualism is still regarded by some as a form of mental illness. Similarly, there are religious and ethical problems in accepting the right of a transsexual to marry, or have sexual relations outside that institution. If, as the present writer believes, it is the role of law to reflect a society's mores,²¹ then changes in the current legal definition of sex should only take place once it is clear that this is desired by society as a whole. And indeed, it has been a theme of this paper that the legal problems facing transsexuals must not be over exaggerated. Many difficulties disappear, if, as Ormrod J intended, the biological test in *Corbett v. Corbett* is restricted to the issue raised in that case and is not extended to, for example, the employment sphere. Moreover, although the transsexual still lacks the legal capacity to marry a person of the same legal sex, it has been argued that as the legal consequences of marriage have declined and continue to do so, it will soon be necessary to find a new basis for family law. This it is hoped will simply be the de facto stable relationship – regardless of the sex of its parties – and, in so far as marriage would no longer be a legal, as opposed to religious, institution, the incapacity of a transsexual would disappear as a legal issue.

On the other hand, the present writer accepts that many people believe that law ought to be used in an attempt to change society's mores when these appear immoral, irrational or unfair. According to this view, the law should respond to our increased understanding of the transsexual's dilemma, by abandoning the biological test of legal sex, and developing a new test so that a transsexual can fully enter into life as a member of his or her true sex. Accordingly, a transsexual should, for example, have the capacity to marry.²² If this is to be done, however, it is desirable that it be achieved by legislation after full public debate, and not by well-intentioned judicial creativity which, as *M.T. v. J.T.* illustrates, can give rise to further anomalies and possible injustices.

The recent West German legislation could well provide a model.²³ It provides that a transsexual may apply for a judicial declaration that he or she belongs to the other sex. To obtain the declaration the transsexual must:

- a) be over 21,
- b) usually have had successful sex reassignment surgery (but if for medical reasons this is not possible, it is enough if the treatment has been sufficient to render it impossible for the transsexual to revert to his or her biological sex. (cf. the test in *M.T. v. J.T.*)) and

- c) be no longer capable of procreation.

There is no definition of transsexual as it was felt that there was no difficulty in distinguishing transsexualism from transvestism or homosexuality. Nor need the applicant be unmarried but, once the declaration is made, any existing marriage is void. However, the transsexual retains his or her original sex in relation to any children, so that maintenance obligations remain unaltered. This West German law shows how simply this difficult problem can be met. But the question remains whether our society is prepared for similar legislation to be enacted in the United Kingdom.

References and notes

- ¹[1971] P. 83. For an earlier case but where the issues were not explored in any depth, see *Talbot v. Talbot* (1967), *Sol Jo*, 213.
- ²See e.g. Wayne Scott Cole, *Transsexuals in Search of Legal Acceptance: The Constitutionality of the Chromosome Test*, 15 *San Diego law review*, 265, 1978.
- ³But the chromosomal test would lead to classifying as male a person suffering from androgen insensitivity and thus physically developing as a female in spite of having an XY chromosome pattern. If Ormrod's dictum was followed, and more weight was given to the genital factor, this person would be classified as female. Note, too, the problem of the 'pure' hermaphrodite.
- ⁴Section 11(d). The Act only applies to marriages celebrated after 31 July 1971. Marriages celebrated before 1 August 1971 will be governed by the common law, that is by the principles laid down in *Corbett*. The results in both cases will be the same.
- ⁵See Part II of the Matrimonial Causes Act 1973.
- ⁶Again Section 12 only applies to marriages celebrated after 31 July 1971. But the common law rules were identical and these govern marriages celebrated before 1 August 1971.
- ⁷*Dr Lushington in D-E v. A-G* (1845), 1 *Rob. Eccl.*, 279.
- ⁸Ormrod J distinguished this situation from that in *S v. S (otherwise W)* (No. 2) [1963] P. 37 where a person who was biologically female with functioning ovaries had an artificial vagina made in order to accommodate a normal sized penis: she was held by the Court of Appeal to have the capacity to consummate marriage.
- ⁹This paper is primarily concerned with English law. However, it is thought that Scots law is substantively the same on both the transsexual's capacity to marry and his capacity to consummate, if the law were changed to allow him or her to marry. See Clive and Wilson, *The law of husband and wife* (W. Green and Son, 1974) pp. 34, 44 ff.
- ¹⁰For a full discussion of these issues, see *The reform of family law in Europe* (ed Chloros) (Kluwer 1976) Ch. 3.
- ¹¹A parallel – but less radical – example is the English Law Commission's recommendation that Church of England banns should no longer be a valid legal preliminary to marriage; they would only continue

as religious phenomena. See Law Commission No. 53. This is already the case in Scots Law in relation to banns.

¹³It should also be noted that at present because of the biological test, a transsexual and a person of the same legal sex would not be treated as 'a man and woman living with each other in the same household as husband and wife' for the purposes of the Domestic Violence and Matrimonial Proceedings Act 1976. The statute provides, *inter alia*, that a partner to a *de facto* heterosexual relationship may seek an injunction in the county court against the other cohabitee if he or she is violent and, if necessary, the violent cohabitee can be expelled from the home. See *Davis v. Johnson* [1978] 2 WLR 553. Moreover, because a male transsexual remains legally male, he cannot be the victim of rape, as opposed to indecent assault.

¹⁴Section 29(3) of the Births and Deaths Registration Act 1953. Regulation 75 of the Registration of Births, Deaths and Marriage Regulations 1968. S.I. 1968 No. 2049. Two qualified informants state the nature of the error and the true facts of the case. The position in Scots law is similar.

¹⁵See the Scottish decision of *X Petitioner* 1957 SLT (Sh. Ct.) 61.

¹⁶It has been suggested that this is the position in Scots law and that a transsexual could petition the nobile officium of the Court of Session for such a declarator. See Walker D M, *Principles of Scots Law* (2nd ed. 1975 Oxford) Vol. 1, 221 ff.

¹⁷[1977] IRLR 121.

¹⁸*Boychuk v. Symons Holdings Ltd.* [1977] 1 RLR 395. See, also, for example, *Nottinghamshire C.C. v. Bowly* [1978] IRLR 253 (male schoolteacher fairly

dismissed for having been convicted of gross indecency with another man over 21 in a public place although no evidence that he ever had sexual relations with male pupils); *Saunders v. Scottish Camp Association* (unreported) (male homosexual fairly dismissed in spite of recognition of change in public opinion towards homosexuals, because 'there is undoubtedly a considerable proportion of employers who could take the view that the employment of a homosexual should be restricted, particularly when required to work in proximity and contact with children'). But contrast *Bell v. The Devon and Cornwall police authority* [1978] IRLR 283. (Homosexual canteen worker unfairly dismissed because he had not lied to the employer about his sexual inclinations since the employer had not asked him about them and evidence was insufficient to establish that customers would be upset if knew he was a homosexual).

¹⁹355 A 2d 204.

²⁰*Ibid* at 209.

²¹*Ibid* at 211.

²²Lord Devlin *The enforcement of morals*, (Oxford, 1965), cf Hart, H L A, *Law liberty and morality* (Oxford, 1963).

²³For an excellent example of this type of approach, see Kennedy, I M, *Transsexualism and Single Sex Marriage* (1973) *Anglo American law review*, 112. Mr Kennedy takes a much less sceptical view of the function of marriage in contemporary society than the present writer: this *inter alia* accounts for the differences in our approach to the problem.

²⁴Horton, *The Law and Transsexualism in West Germany* (1978), *Family law*, 191.