Symposium on Psycholegal Aspects of Sexual Problems

February 1986

Second International Congress on Psychiatry, Law and Ethics Israel, February 12th—16th 1986

Chairman: Dr M.T. Haslam, York, England
Co-Chairman: Professor Hess, Israel

Introduction

The first International Congress held in Israel some two years previously having been a successful and enjoyable meeting, the Society for Medicine and Law in Israel commissioned a second Congress to take place in Tel Aviv in February of 1986. The first Congress had given a partial answer to a very strong need to deal with ethical and legal problems in the psychiatric profession.

Judge Amnon Carmi chaired the meeting, which was held under the auspices of the Israel Ministry of Health, Society of Medicine and Law in Israel, the Israel Medical Association, International Health Society, International Centre of Medicine and Law (UNIBO) and the Israeli Psychiatric and Child and Adolescent Psychiatric Associations. The general topics of the conference included psychiatry and law at the crossroads, definitions of mental illness, and aspects concerning consent, malpractice, the ethical aspects of suicide and psychiatric aspects of sexuality. A particularly interesting seminar was held on the holocaust, and the psychiatric implications, not only for victims but for those who became involved as perpetrators.

As part of this general symposium, we were requested to provide a seminar on the psycho-legal aspects of sexual problems. A group of internationally known writers and researchers in this area were recruited from the United Kingdom; five speakers, whose papers are presented in the following pages attended, formed the basis of the seminar. Dr Haslam as author of "Sexual Disorders", and a researcher in this area and clinician for many years chaired the meeting. Professor D J West from Cambridge spoke on the "Legal Aspects of Homosexuality", Mary Lorrigan from Newcastle spoke on the theme of the "Law and Female Sexuality" and Dr Roy Mottram spoke on the "Legal Aspects of Trans-sexualism".

Dr Willmott and Harry Brierley (both clinical psychologists working in the field in Great Britain) presented a paper on "Sex Change, the Dilemma", and Dr Richard Ekins, a sociologist in Northern Ireland involved with cases before the Court of Human Rights spoke on "Transsexualism and the Court of Human Rights".

Our seminar was shared by Dr Gunter Amin from West Germany, who spoke on bisexuality, and the co-chairman Dr J Hess from Israel spoke on "Problems of Trans-sexuality in Israel".

The conference, which was held at the Ramada Hotel, was well attended by an international field, and our symposium provoked much interesting discussion and enabled the contributors to meet other workers in similar fields. We have pleasure in presenting in the following pages our contribution, and must thank Schering Health Care Limited for their financial assistance in contributing towards the cost of attendance at this conference.

Theorising Sex-Changing: Some Medico-legal Formulations in Relation to the 'Solution' from Human Rights*

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Rees case in Strasbourg

This study considers the major competing medico-legal conceptualisations of sex-changing culminating in *Rees v. United Kingdom* in which the U.K. government has allegedly violated the European Convention on Human Rights in refusing to recognise the applicant's change of sex for the purposes of birth registration and marriage (9532/81 Report: 12th December 1984; Judgement: pending). It draws upon interviews, observational studies and case analysis to explain the disparate decisions in *Corbett v. Corbett* [1970]2 All E.R. 33 and *M.T. v. J.T.* 140 N.J. Super; 355 A. 2d 204. These two cases are contrasted with regard to: their conflicting standpoints on the inter-relations between sex, sexuality and gender; their opposing ideological positions on marriage, sexuality and the family; the differing alliances between biological, psychological and legal formulations of sex-changing that their judgements endorse. It is concluded that the view from human rights which enables a change of sex through recognition of altered civil status avoids adjudication on the precise medical and psychological status of sex-changing and is therefore unable logically to deny the right of transsexuals to marry in their newly recognised sex.

I wish to bring to your attention the case of *Mark Rees v. The United Kingdom* (Rees, 1985) which came before the European Court of Human Rights in March, 1986. It is a matter particularly well suited to an Internat onal Congress on Psychiatry, Law and Ethics, for its marks the culmination and convergence of two post-war developments; one fundamentally medico-legal—the making of the modern transsexual; and the other fundamentally ethico-legal—the constitution of the modern individual as the subject of individual rights in international law (Beddard, 1980). For Mr. Rees is a transsexual (a post-operative female-to-male transsexual) who alleges that his government is in violation of the European Convention on Human Rights in refusing to recognise his change of sex for the purposes of birth registration and marriage (Rees, 1984).

Now Mr. Rees has grounds for cautious optimism in the matter of the change of birth registration he desires. The European Commission of Human Rights, having reported on his application prior to referring it to the Court, are of the unanimous opinion that the United Kingdom (U.K.) government is, indeed, in breach of the Convention in refusing to alter his birth certificate. Specifically in their view the U.K. government's:

> "failure to contemplate measures which would make it possible to take account in the applicant's civil status of the changes which have lawfully occurred, amounts to a veritable failure to recognise the respect due to his private life within the meaning of Art. 8 (i) of the convention".[1] (Rees, 1984, para. 50).

(cf. also Van Oosterwijck, 1979; *Meissner v. Federal Republic of Germany,* No. 6699/74, Comm Report of 11.10.1979, DR 17, 21; Dec. No. 9420/81, 38 *Transsexuals v. Italy,* 5.10.1982, unpublished).

On the question of his right to marry in his new sex, however, Mr. Rees has grounds

* *The author gratefully acknowledges support from the McCrea Research Fund, S.H.A.F.T. and Schering Health Care Limited, and assistance from Mark Rees, David Burgess and Sir James Fawcett.*

for more concern. Although the Commissioners unanimously agreed that there had been no *separate* violation of the 'right to marry and found a family' article (art. 12),[2] they were split evenly on the fundamental issue as to marriage. Five of the Commissioners were favourable to Mr. Rees and took the view that once the breach of art. 8 (i) had been rectified there was "no reason to believe" that he could not now marry in his new sex, on the basis that his civil status would now be "as a man". The remaining five, however, took the view that it was permissible for national laws to require as part of the formal requirements of marriage the physical capacity to procreate. To these Commissioners the text of article 12 "Men and women of marriageable age have the right to marry" is "obviously intended to refer to the physical capacity to procreate", once regard was had to "the essential nature of marriage and its social purpose (finalité sociale)". It therefore followed that a member state "must be permitted to exclude from marriage persons whose sexual category itself implies a physical incapacity to procreate either absolutely (in the case of a transsexual) or in relation to the sexual category of the other spouse (in the case of individuals of the same sex)" (Rees, 1984, para 55 (ii)).

I do not wish to delve too deeply into matters of legal interpretation of the relevant articles, or into the social policy reasons for differing interpretations. It might be argued, for instance, that article 12 confers two separate rights—the right to marry *and* the right to found a family, and that they should not be taken together in the manner implied in the previous paragraph (Fawcett, 1969, p. 225; 1985). Again, it is not immediately apparent why the reference to "marriageable age" is "obviously intended to refer to the physical capacity to procreate". In Van Oosterwijck (1979) for instance, it was emphasised that marriage in contemporary European society is divorced from reproduction and is an aspect of the development of the personality. I wish rather to point to some of the difficulties that would emerge if the European Court was to endorse the Commissioners' 'civil status' and 'procreation' arguments as outlined.

In the first place, English law does not have a concept of civil status controlled by law in the manner implied by the Commissioners. In the U.K. identity cards are not used. A passport or driving licence is commonly used to establish identification, but they are not identity documents in themselves. As for the birth certificate, however it may be used in practice, in law it simply records facts at the time of birth. It is not a document of current identity. Accordingly, if the U.K. government were to permit Mr. Rees to change his birth registration and certificate (as they do his passport and driving licence), this would not in itself effect or recognise a change of sex for other purposes. Rather the European Commissioners seem to be asking for changes in English law which would in effect retrospectively grant Mr. Rees civil status as a woman prior to enabling him to change that civil status into that of a man, thereby enabling a change of legal sex.

In the second place, English law has never sought to prevent persons from marrying on the grounds of incapacity to procreate. (cf. inability or refusal to consummate a marriage rendering a valid marriage voidable (Thomson, 1980, p. 93)). In particular, under English law transsexuals are not permitted to marry in their new sex not because they cannot procreate, nor because they are transsexuals *per se,* but rather because they remain in their original biological sex for the purposes of marriage and cannot marry a person of the same biological sex (*Corbett v. Corbett* [1970] 2 All E.R. 33).

Now, on the 'procreation' argument advanced by the Commissioners, English law would still be able to exclude Mr. Rees from marriage in his new sex. Would this, however, be because *Corbett v. Corbett* still stood and he remained his original sex for the purposes of marriage? Or would it be because it was permissible within the European Convention to exclude transsexuals from marriage because of incapacity to procreate? It could hardly be the former as Mr. Rees would now have the civil status of a man. But if it was the latter, might he not then argue that he was being discriminated against solely on the basis of his status as a transsexual? In this case, Mr. Rees might well argue that the U.K. Government was in violation of article 14 of the Convention[3] (the non-discrimination article).

The difficulties stem, I think, from the fact that the Commissioners, while enabling a change of sex through recognition of altered civil status, have avoided adjudication on the precise medical and psychological status of sex-changing. It is therefore unclear what precisely the recognition of change of status is marking. Is it simply a recognition of the *de facto* sex reassignment procedures that have taken place? Or is it an endorsement of the view that the surgical procedures undergone, in themselves had the effect of changing the applicant's sex? For the same reasons the Commissioners lack firm founda-

tions either to exclude transsexuals from marriage, or to enable us to ascertain precisely when or why a change of sex through altered status is possible. It is to this unaddressed hiatus that I will now turn.

On the Impossibility of Medico-Legal Sex-Changing

The clearest statement on the impossibility of sex-changing is set forth in the English decision *Corbett v. Corbett* [1970] 2 All E.R. 33. It is this case which provides the U.K. government with its basic position, and it is the case which has been followed in England to determine the sex of transsexuals both in criminal law (R v. Tan and Others [1983] 3 WLR 361) and under the Sex Discrimination Act, 1975 (*E A White v. British Sugar Corporation* [1977] IRLR 121). Its line of reasoning has been followed in case law in other jurisdictions (e.g., The South African case of *W v. W* (1976) 2 A.A.L.R. 308). It represents a widely accepted view and one which according to at least one eminent expert reconsidering the matter in 1982 must still be regarded as "correct for the reasons which Mr. Justice Ormrod set out". (Dewhurst, 1982, p. 231).

In *Corbett v. Corbett,* Arthur Corbett, who had gone through a ceremony of marriage with the post-operative male-to-female transsexual April Ashley, petitioned for a decree of nullity on the basis that his wife was in fact male; or alternatively for a decree of nullity on the ground of non-consummation of the marriage. The major problems posed for Ormrod, J. who heard the case were essentially these: in the first place, could a transsexual effect a valid marriage in his, or her, new sex; and, in the second place, if such a marriage were valid could consummation of the marriage take place using the constructed vagina of a male-to-female transsexual?

Ormrod, J. took the view that where chromosomal, gonadal and genital sex were congruent before surgery (as he held them to be in Miss Ashley's case) then "psychological factors" or "psychologically to be a transsexual" was of no significance in the matter of determination of sex for the purposes of marriage. His view was "that the biological sexual constitution of an individual is fixed at birth (at latest), and cannot be changed, either by natural development of organs of the opposite sex, or by medical or surgical means". No so-called 'sex-change' operation could affect "true sex" in these circumstances, "the only cases where the term 'change of sex' is appropriate (being) those in which a mistake as to sex is made at birth and subsequently revealed by further medical investigation. A valid marriage had not taken place, therefore, because marriage being essentially a relationship between a man and a woman and one "which depends on sex", could not be effected by two biological males whatever changes had taken place in one of them.

Furthermore, on the matter of consummation, Ormrod, J. held April Ashley to be incapable of "ordinary and complete intercourse", it being impossible to consummate a marriage using the completely artificially constructed cavity of the respondent. For the purposes of marriage, therefore, April Ashley remained the male she was held to be born. Sex-changing for marital purposes was impossible.

On the Possibility of Medico-Legal Sex Changing

It is instructive to contrast the decision in *Corbett v. Corbett* with that in the New Jersey (U.S.A.) case of *M.T. v. J.T.* 140 N.J. Super; 355 A. 2d 204, of 1976. For just as Ormrod, J.'s judgement in *Corbett v. Corbett* came to provide the bench mark for the view which sees medico-legal sex-changing as impossible for the purposes of marriage, so it is Judge Handler's view in *M.T. v. J.T.* which has provided the base line for the opposite view. Subsequent to this decision, for instance, has emerged a Stateswide case-law development which does enable medico-legal sex-changing for the purposes of marriage (Burgess and Ekins, 1986, p. 2).

In *M.T. v. J.T.* Judge Handler, of the Superior Court of New Jersey Appellate Division, was faced with substantially the same problem as Ormrod, J. Here the wife filed a complaint for support and maintenance, and the husband interposed the defence that his wife was a male and that therefore their marriage was void.

J.A.D. Handler, like Ormrod, J., emphasised the fact that the parties to a marriage had to be of the opposite sex, but he rejected Ormrod, J.'s reasoning. For J.A.D. Handler "sex" for marital purposes was to be ascertained by "the dual tests of anatomy and gender". He ruled that "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".

On the matter of consummation, expert evidence testified that after the operation the plaintiff "had a vagina and labia which were 'adequate for sexual intercourse' and could function as any female vagina, that is, for 'traditional penile/vaginal intercourse' ". And

J.A.D. Handler effectively incorporated this view into his decision in stating that implicit in his reasoning was the acceptance that "for the purposes of marriage under the circumstances of this case, it is the sexual capacity of the individual which must be scrutinised. Sexual capacity or sexuality in this frame of reference requires the coalescence of both the physical ability and the psychological and emotional orientation to engage in sexual intercourse as either a male or a female". For the purposes of marriage, therefore, M.T. was a male and now she is female. Sex-changing for marital purposes was possible.

Making Sense of Corbett v. Corbett and M.T. v. J.T.

What then are we to make of these disparate decisions? Are they the more or less sophisticated reflections of the prejudices of individual judges, of shifting social attitudes, or of the differing jurisdictions? To some extent, no doubt. Do they demonstrate more or less 'correct' readings of the state of medical knowledge concerning a discovered 'transsexual' condition, and can they be assessed accordingly? I think not. Rather each is a particular and competing medico-legal formulation of sex-changing itself constitutive of the transsexual phenomenon. More specifically, each formulation endorses a particular social construction of the transsexual; a conflicting standpoint on sex, sexuality and gender and their inter-relations; opposing ideological positions on marriage, sexuality and the family; and differing alliances between biology, psychology and the law. These need explicating if the nature and significance of the rival formulations is to be grasped.

Corbett v. Corbett on Sex, Sexuality and Gender

The entire decision in *Corbett v. Corbett* can only be understood if it is seen as revolving around the pivot of the primacy of sex construed as fixed biological constitution. It is this which gives it both its logic and its persuasiveness. Thus, before considering the question of Miss Ashley's legal sex for the purposes of marriage, Ormrod, J. has already endorsed the particular medical formulation which asserts that "The purpose of these operations is, of course, to help to relieve the patient's symptoms ... it is not to change [the] patient's sex". It is clear that for Ormrod, J., given the congruity of chromosomal, gonadal and genital sex, then Miss Ashley's "true sex" is male and cannot be altered.

When Ormrod, J. then turns to the task of determining Miss Ashley's legal sex for the purposes of marriage, he can build upon the "true sex" foundation, for it is to him (biological) sex that is the essential determinant of the relationship called marriage, marriage being recognised as the "union of man and woman". Because of the "essentially heterosexual character" of the relationship of marriage the criteria of 'woman' must 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".

What then of what others might call psychological sex and social sex? "Psychological factors" can be ignored where chromosomal, gonadal and genital sex are congruent; this follows from the primacy afforded biology at the outset. As to others treating the male transsexual as if he were a woman, that to Ormrod, J. is a matter of "gender", not sex. Thus if the male transsexual is treated as a woman for purposes of national insurance that is a matter for agreement between the parties, sex not being an essential determinant of the relationship. Again, the transsexual's so-called 'sex-change' surgery may be construed in similar vein. It alters gender, not sex for Ormrod. It constitutes a "pastiche of feminity". The sensations, the sexuality of the constructed vagina can be ignored. Its status in a male for the purposes of consummation is nil. "When such a cavity has been constructed in a male, the difference between sexual intercourse using it, and anal or intracrural intercourse is to be measured in centimetres".

Corbett v. Corbett on Marriage, Sexuality and the Family

As we have seen, for Ormrod, J. "it is the relationship of marriage which makes the determination of sex essential in law, marriage being essentially a relationship between a man and a woman". But what is the nature of this marriage relationship for Ormrod, J.? Again, the argument from biology prevails. "It is the institution on which the family is built, and in which the capacity for natural heterosexual intercourse is an essential element". Thus with beguiling circularity sex is organised in law, as biology, with relation to marriage as procreative union.

In short, his judgement endorses a particular biological and legal alliance—a biological essentialism ratified by law; a particular medico-legal formulation of sex-changing which renders sex-changing impossible in either medical science or law. The transsexual is not, therefore, a 'sex change',

rather an "elegant pastiche" (Ormrod, 1972, p. 88).

M.T. v. J.T. on Sex, Sexuality and Gender

There seems little doubt that the personal and professional biographies of Ormrod, J. and April Ashley disposed Ormrod, J. towards his ruling. Sir Roger Ormrod, BM, BCh, FRCP (Ormrod, 1972, p. 78) had been a doctor before the war (Fallowell and Ashley, 1982, p. 210) and was hence steeped in biology. April Ashley had lived a chequered life, a one-time transvestite at the notorious Le Carrousel, before becoming a model with society connections. In court, Ormrod found her "increasingly reminiscent of the accomplished female impersonator".

In contrast, the plaintiff M.T. in *M.T. v. J.T.* could hardly have presented a more different picture. She had had a longstanding and stable relationship with J.T. prior to operative intervention. She had lived with him after telling him about her feelings about being a woman. A year after the operation the couple went through a ceremonial marriage, and lived as husband and wife and had intercourse. On the facts as presented "She had no real adjustment to make because throughout her life she had always felt that she was female". Moreover the medical evidence was presented quite differently. In *Corbett v. Corbett* experts called by both petitioner and respondent alike rarely left the domain of biology. Much time was spent considering the possibility of physical intersex in Miss Ashley. By contrast, in *M.T. v. J.T.* the discourse had changed almost entirely. The stress was now on "gender identity", transsexualism being defined in terms of "a conflict between physical anatomy and psychological identity or psychological sex". Evidence testified to the fact that there was "very little disagreement" that gender identity is established "very firmly, almost immediately, by the age of 3 to 4 years", making "the actual facts of the anatomy ... really secondary". Three of the four expert witnesses cited in M.T. testified that M.T. variously "was a female", "would be considered a female", "would characterize that person as a female". Furthermore her constructed vagina and labia were portrayed as "not really different from a natural vagina".

Faced with such "facts" it was hardly surprising that J.A.D. Handler refused to follow the reasoning in *Corbett*. Rather, he affirmed the decision of the lower Court that M.T. "was of the psychic gender all her life and that her anatomical change through surgery required the conclusion that she was a female at the time of the marriage ceremony".

Thus now gender identity has primacy, once the necessary anatomical congruence has been effected. A psychological essentialism has replace the biological essentialism of *Corbett v. Corbett*.

M.T. v. J.T. on Marriage, Sexuality and the Family

What then of marriage, sexuality and the family in *M.T. v. J.T.*? With "gender identity" or psychological sex established as the new pivot, the importance of procreative union can be dispensed with entirely. It now becomes 'sexuality' that is important for marriage, specifically a sexuality construed in terms of the physical ability and psychological orientation to engage in intercourse. In short, the alliance between biology and law has been replaced by one primarily between psychology and law. And on this formulation 'sex-changing' is possible, for prior to the anatomical congruence M.T. was male, but subsequent to satisfactory operative procedures she becomes female. Far from being an "elegant pastiche", M.T. the man has become M.T. the woman.

Competing formulations and the view from Human Rights: Towards a Conclusion

In both *Corbett v. Corbett* and *M.T. v. J.T.* the respective judges had the task of determining legal sex for the purposes of marriage. In doing so they provided more or less precise—albeit competing—conceptualisations of sex, gender and sexuality; and more or less precise formulations of 'sex-changing' having regard to the medical and psychological evidence at hand. No such sophisticated distinctions had to be made in *Rees v. the U.K.*, because the Commissioners were not being asked to determine Mr. Rees's sex for this or that purpose. Indeed the Commission specifically stated in Van Oosterwijck (1979) that it was not its "role to pass judgement on the diagnosis (of transsexualism) nor finally to decide the effects of the treatment administered in so far as these points may be disputed" (para. 16).

The task rather is to determine human rights under the convention. And on the questions of birth registration there can be little doubt. It cannot be justifiable for the U.K. government to recognise Mr. Rees's 'condition' for purpose after purpose—even granting him "free medical assistance for the medical treatment necessary to adapt his appearance to his psychological sex"—and then to treat him "as an ambiguous being" (para 48) by refusing to consider an entry in the birth register reflecting what has lawfully taken place. Thus, in law, this alteration must

be acknowledged. His new status must be recognised. In terms of civil status he must be allowed to change sex.

However, to change birth registration is one thing. To be granted the right to marry in his new sex is a rather more serious matter. Clearly, for five of the Commissioners the requirements for marriage should be tighter. Under article 12 this right is only exercisable "according to the national laws" and if the U.K. government wishes to exclude transsexuals from marrying in their new sex they should be allowed to do so. The problem, however, is to find the logical grounds for the exclusion. It cannot be on the grounds that transsexuals remain in their original sex for the purposes of marriage, because under the ruling on article 8 they are to be recognised in their new sex. Furthermore, as the Commissioners have avoided adjudication on the matter of the precise medical and psychological status of sex-changing they would seem to have denied themselves the possibility of finding any firm foundation from which to argue the exclusion. The only possible ground left would seem to be the 'procreation' argument actually advanced. But this argument is, I think, too weak to be taken very seriously. Indeed, the Commissioners themselves in Van Oosterwijck (1979) had determined that there was "nothing to support the conclusion that the capacity to procreate is an essential condition of marriage or even that procreation is an essential part of marriage" (para 59). The conclusion must surely be this: the view from human rights which enables a change of sex through recognition of altered civil status cannot then logically deny the right of the transsexual to marry. I wish Mr. Rees well in Strasbourg.

Notes

1. Under *Article* 8 of the European Convention on Human Rights of which the U.K. is a signatory:
   a. Everyone has the right to respect for his private and family life, his home and his correspondence.
   b. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
2. Under *Article* 12
   Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercise of this right.
3. Under *Article* 14:
   The enjoyment of the rights and freedom set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, associated with a national minority, property, birth or other status.

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