Left in Legal Limbo:

Transsexual Identity

and the Law

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Introduction

Can a transsexual male who has begun hormone treatments and developed female breasts be sent to a male prison? What if he is raped while imprisoned?[1] At what point is an individual's sex "changed"? With the removal of the original genitalia or with the construction of the new genitalia?[2] Can one possess latent transsexual tendencies?[3]

Transsexuals pose a dilemma in the law both in their pre-operative and post-operative states. Even in the terminology of their label, they fail to belong entirely in either sex and are consequently left in a state of limbo, not yet accepted as a member of their new sex but no longer truly belonging to their original sex. Remedying this situation requires far-reaching changes in social perceptions and understandings. The law has the ability to both mirror and construct social norms. By reflecting the vision of a transsexual as an anomaly, requiring special analysis in differing circumstances, the law perpetuates the social exclusion of these individuals.

The courts and the legislature must acknowledge their powers to either cement the transsexual's marginalized standing between either sex or develop a new process of sexual identification that would remove the transsexual from the current state of legal limbo. However, simply re-assigning a sex identity poses its own set of problems regarding how sexual identity should be seen in the law and begs the question of whether sexual identity should hold any legal relevance. The purposes of this paper are three-fold: to explore the various ways in which the courts have attempted to determine the 'sex' of transsexuals and the accompanying difficulties with these approaches; to present alternative approaches and analyze the ambiguities that remain; and finally, to suggest a new means of perceiving sexual identity. This paper emphasizes the significant role of the law in the

[1] See *Farmer* v. *Brennan* 511 U.S. 825 at 837 (1994), where a pre-operative transsexual was sent to prison where he was raped.

[2] See *B.* v. *A.* (1990), 29 R.F.L. (3rd) 258 (Ont. S.C. T.D.) [hereinafter *B.* v. *A.*]; C(L) v. C(C) (1992), 10 O.R. (3d) 254 [1992] O.J. No.1830 [hereinafter C(L) v. C(C)] in each case a woman received both a mastectomy and hysterectomy but had not yet received a constructed penis.

[3] See *M.* v. *M.(A.)*. (1984), 42 R.F.L. (2d) 55 (P.E.I. S.C.) where a husband received a decree of nullity on his marriage because his wife determined herself to be a transsexual and initiated hormone treatments after the marriage had dissolved. The judge found that her latent transsexualism had prevented her from being capable of marriage.

construction of social perceptions of sexual identity and suggests that the law must move away from a binary view of gender as either male or female. Opposite this prevailing view, I propose to move sexual identity towards a "gender spectrum" where identity is not sexually classified.[4]

Defining Sexual Identity

Medical professionals have achieved a degree of consensus in considering transsexualism as a psychological disorder in which the subject believes he or she was born into the body of the wrong sex.[5] Transsexuals therefore differ from transvestites, that is, individuals who choose to dress in the clothing of the opposite sex; hermaphrodites, who biologically possess reproductive organs of both sexes; and homosexuals, who are attracted to members of the same sex.[6] The recognized "treatment" for transsexuals is sex-reassignment surgery, a process lasting several months and resulting in the outward appearance of the reassigned sex through a combination of hormone treatment and surgically constructed genitalia. Sexual intercourse is possible but the reassigned transsexual is incapable of having children.

The most common legal issue surrounding transsexuals to come before the courts concerns the validity of marriages.[7] Here, as a reflection of general legal ambiguity surrounding sexual identity issues, the law has taken two different approaches to determining sexual identity; significantly, the implications of these approaches extended beyond the intended scope of marriage cases. The traditional "biological" approach examines the genetic characteristics of the transsexual, and argues that the inalterability of chromosomes prevents the possibility of a complete "sex-change." The opposite view is a "psychological" approach focusing on the cumulative socio-psychological factors involved in the construction of a sexual identity.

[4] Although this paper limits its scope to the issue of transsexualism, it should be noted that the following considerations and assertions can apply to analogous sexual identity issues.

[5] Lori Johnson "The Legal Status of Post-operative Transsexuals" (1994) 2 Alta. Health L.J. 159 at 159.

[6] While pre-operative transsexuals often engage in relations with the same sex, it is not the same as a homosexual relationship as the transsexual sees himself/herself as a member of the opposite sex.

[7] In Canada there is no federal legislation preventing same-sex marriages; however, under the *Civil Code* in Quebec and the common law in the rest of Canada, courts have long ruled that marriage is restricted to between a man and a woman. Most recently, on January 14, 2001 Elaine and Anne Vautour and Kevin Bourassa and Joe Varnell were married in two same-sex wedding ceremonies in Toronto's Metropolitan Community Church under the authority of a section of Ontario's Marriage Act permitting any adult to obtain a licence and be married after "publication of banns". They are now pursuing a case against the Government of Ontario claiming that the refusal to recognize and register these marriages is a violation of their *Charter* rights.

This approach accepts that surgery and hormone treatments transform the post-operative transsexual into a member of their reassigned sex.

The Biological Approach

The leading English law and one of the first major cases in the area is *Corbett* v. *Corbett*, where a man married a male to female post-operative transsexual.[8] Ormond J. held that biologically, as shown through a chromosome test, sexual identity is fixed at birth and cannot be altered. Thus, the transsexual was still legally male and the marriage was a nullity. While Ormond J. did state "I am not concerned to determine the 'legal sex' of the respondent at large," adding that he was only determining the sex for the purposes of marriage, it seems both problematic – in a legal and moral sense – that there should be different methods of sex determination for various legal purposes.[9]

Indeed, *Corbett's* influence did extend beyond the scope of marriage. In *R.* v. *Tan*, the English Court of Appeal upheld the conviction of a male to female post-operative transsexual for being a male living off the earnings of prostitution despite the fact that the accused was now female.[10] The Court found that "common sense and the desirability of certainty and consistency demand that the decision in *Corbett* should apply for the purpose not only of marriage but also for a charge under s. 30 of the Sexual Offences Act."[11] While this reference to "certainty and consistency" illustrates the court's recognition of the need for a stable definition, it is also a re-enforcement of the court's strict denial of an altered sexual identity and therefore offers no promise for the transsexual.

The Psychological Approach

While still the law in England,[12] both American and Australian courts have moved away from *Corbett*'s preoccupation with biological identity. In *M.T.* v. *J.T.* the New Jersey court stressed that psychological factors must play a role in sexual identity:

> a person's sex or sexuality embraces an individual's gender, that is, one's self-image, the deep psychological or emotional sense of sexual identity and character. Indeed, it has been observed that the "psychological sex of an individual," while not serviceable for all purposes, is "practical, realistic and humane."[13]

Likewise, in *R.* v. *Cogley*, the Australian Court of Appeal affirmed the statement from the trial judge that: "[T]he law should regard as a woman a male to female transsexual where core identity is established [i.e. the psychological personality or character of the person concerned] and where sexual reassignment surgery has taken place."[14] Such an approach exhibits sensitivity to the individual transsexual, as opposed to the biological

[8] [1970] 2 All. E.R. 33 (P.B.D.) [hereinafter *Corbett*].

[9] *Ibid.* at 48.

[10] [1983] Q.B. 1053 (C.A.) [hereinafter *Tan*]. Although beyond the scope of this paper, the question arises in this case as to whether it is appropriate to have laws that apply differently to men and women.

[11] *Tan*, *ibid.* at 1064.

[12] See *R.* v. *Registrar General of Births, Deaths and Marriages for England and Wales*, [1996] 2 F.L.R. 90 (Q.B.D.).

[13] 355 A. 2d 204 (N.J. Sup. App. Div. 1976) at 209.

[14] [1989] 41 A Crim R 198 (Vic. Ct. of Cr. App.) at 201-202.

approach that uses science to deny the transsexual identity. While a definite improvement, the psychological approach appears to require a ruling on the "psychological sex" and therefore fails to provide the transsexual with any certainty as to their perceived legal identity.

Canadian Inconsistency

Most recently, Canadian cases have tended to produce indeterminate rulings that suggest a confusing fluctuation between the predominant approaches to sexual identity determination. In two Canadian cases, *B.* v. *A.* and *C(L)* v. *C(C)*, the court ruled that an individual who had received both a hysterectomy and a mastectomy but who had not yet received a surgically constructed penis was still to be regarded as a woman.[15] The court reasoned that if the hormone treatments were abandoned the individual would revert to her female self and therefore could not be legally recognized as a man. This was not an espousal of the biological view that sexual reassignment is impossible because of the inalterability of chromosomes, but neither was it a recognition of the psychological aspects of sexual identity. The suggestion appears to be that there must be a degree of irreversibility to a sex change before it will be recognized by the law. The cases therefore ignore the fundamental essence of sex reassignment, namely, the possibility of altering sexual identity. Further, it seems absurd to use a constructed penis as the benchmark of maleness. The individual in both cases no longer had either breasts or a uterus, having made a conscious decision to rid herself of these indications of femaleness, and yet the absence of the male equivalent prevented her from attaining the status of being male. By way of argument, if a man who loses his genitalia through an accident remains legally recognized as male, why then does the requirement of a penis only apply to transsexuals?

In *L.A.C.* v. *C.C.C.*, the court, citing insufficient evidence, refused to render a decision involving an application for a marriage annulment where the husband was a pre-operative transsexual.[16] Had the court been content with the biological test under which sexual identity is unalterable, as established in *Corbett*, it would not have been necessary to require further evidence regarding the individual transsexual as no sex change could ever be recognized. However, under the psychological approach requiring sex reassignment surgery to harmonize the physical and psychological aspects of human sex, the legal determination is equally predictable as the case involves a pre-operative transsexual lacking physical and psychological harmony. Therefore, the individual cannot yet be regarded as a member of the other sex. It is unclear what further evidence the court would require to reach a decision. While this may indicate an even greater sensitivity by the court to the precarious position of the transsexual, it again leaves the situation highly ambiguous as to what constitutes a sex change in the law.

[15] *Supra* note 2.

[16] [1986] B.C.J. No. 2817, online: QL (BCJR)

The British Columbia Supreme Court most recently issued a ruling in June 2000 on whether the prohibition against discrimination on the basis of sex under the *British Columbia Human Rights Code*, R.S.B.C. 1996, c. 210 extends protection from such discrimination to transsexuals.[17] The case involved the refusal to permit a post-operative transsexual, Ms. Nixon, to work as a rape relief counselor because she had not been a woman since birth. Due to the nature of the work, the Vancouver Rape Relief Society had applied under the *British Columbia Human Rights Code*, S.B.C. 1973, c. 119 for approval of a women only hiring policy. At issue was the question of the Human Rights Tribunal's jurisdiction to hear Ms. Nixon's complaint. The particulars of the case involve detailed, and largely irrelevant for the purposes of this paper, issues of administrative law. However, to determine jurisdiction, the court had to rule on whether the allegation of discrimination could be characterized as a complaint of discrimination by any women based upon appearance. This required a ruling on whether to regard Ms. Nixon as a woman.

Davies J. referred to s. 27(1) of the *Vital Statistics Act*, R.S.B.C. 1996, c. 479 which provides:

> If a person in respect of whom trans-sexual surgery has been performed is unmarried on the date the person applies under this section, the director must, on application made to the director in accordance with subsection (2), change the sex designation on the registration of birth of the person in such a manner that the sex designation is consistent with the intended results of the trans-sexual surgery.[18]

This provision was originally enacted in 1973 – the same time that the *Human Rights Code* was enacted. Thus, Davies J. states that the legislative intent was for post-operative transsexuals to possess the same legal status as the members of their reassigned sex. Accordingly, Ms. Nixon's case could be "characterized as an allegation of discrimination against her as a woman."[19] The transsexual is therefore granted legal acceptance into the reassigned sex.

Of further significance is Davies J.'s *obiter dicta* on whether the meaning of "discrimination on the basis of sex" as an enumerated ground under the *Human Rights Act*, S.B.C. 1984 c. 22 [1984 Act] and the present code, includes discrimination based on gender identity, a category encompassing transsexualism.[20] He states that it would too greatly narrow the limit upon the purpose and intent of the 1984 Act and the present *Code* to contain discrimination on the basis of sex to male/female issues. It would be wrong to interpret the prohibition against discrimination on the basis of sex "as not also prohibiting discrimination against an individual merely because that person or group is not readily identifiable as being either male or female."[21] He acknowledges that "sex or gender issues may factually include more than purely male or female possibilities and characteristics."[22]

17 *Vancouver Rape Relief Society* v. *British Columbia (Human Rights Commission)*, [2000] B.C.J. No. 1143, 2000 BCSC 889 Vancouver Registry No. A993201, online: QL (BCJR) [hereinafter *Nixon*].

18 *Ibid.* at para. 40.

19 *Ibid.* at para. 42.

20 The present code was created on January 1, 1997 when the *Human Rights Amendment Act*, S.B.C. 1995, c. 42 came into force [hereinafter present code]. There were no substantive changes to the relevant sections of the code.

21 *Supra* note 17 at paras. 56-57.

22 *Ibid.* at para. 58.

Sexual Identity – Binary or Spectrum?

Examination of the *Nixon* decision shifts the discourse on transsexual identity away from both the biological and psychological approaches towards a new means of not just defining transsexual identity but of perceiving sexual identity more generally. While recognizing transsexual rights with a higher degree of sensitivity to their position than had been seen in past cases, the *Nixon* case suggests two alternative modes of recognition, neither of which seems entirely satisfactory. In the first part of the judgement Davies J. determines Ms. Nixon to be recognized as a woman, but he later goes on to state she may not be readily identifiable as either sex. Ultimately, the case regards sex as both binary male-female categories and as a spectrum along which sexual identity has an infinite number of variations.

The concept of a dichotomy is reinforced in the first part of the case and maintains the male-female binary as central to our perception of social ordering. Thus, the transsexual is required to assume a specific sexual identity in which they can never entirely or properly belong. This is evident in that while jurisdiction has been established, it remains to be seen how the Human Rights Tribunal will decide on Ms. Nixon's complaint.[23] The Rape Relief Society's argument that only those who have been born as women and raised as women possess the requisite understanding of the female identity to properly counsel may still be found to be valid. Ms. Nixon would then be left as a woman who is not as much a woman as other women, but clearly not a male.

The inadequacies of the binary approach are revealed insofar as even the determination of present sex does not end the legal dilemmas. Such an outcome would also fail to consider the possibility of a male-to-female transsexual requiring rape relief counseling and, in effect, leaves the transsexual marginalized. Responding to the concern that the traditional victim will feel uncomfortable with a counselor who is not a "woman" within the victim's perception, the only reply is that if the law begins to better recognize the transsexual's new identity then this recognition will seep into society's consciousness. If the law remains considerate of public impressions and public impressions are guided by the law, no space is left for forward movement.

And yet, the sexual spectrum approach is likewise problematic as dealt with by the court system presently. The foundational premise of transsexualism is the notion that there are two distinct sexes and the individual is trapped in the body of the wrong sex. To use transsexualism as a tool to argue for the eradication of the male-female binaries is therefore somewhat inappropriate. For Davies J. to state that Ms. Nixon "is not readily identifiable as being either male or female"[24] is to deny her recognition of the entire process of sex-reassignment. The implication is that Ms. Nixon's

[23] At the time this article was published, the Tribunal had not yet decided this case.

[24] *Supra* note 17 at para. 57.

comfort with her newly assigned identity is not shared by others with whom she interacts. Identity perception cannot be limited to the individual but must encompass social impressions. Otherwise the transsexual remains in the periphery – having exchanged social belonging in the "wrong" body for exclusion from society in the "right" body.

New Perceptions

Thus, while destruction of the binary is problematic, focus on a strict binary should be deflected. The notion that the male-female dichotomy is crucial to social functioning is the source of antagonism against anything diverging from this divide. Homosexual relationships fail to fit the binary mode any better than the hermaphrodite, the transvestite or the transsexual. One must ask what, if any, benefit arises from a continued legal emphasis on sexual definition. The law's struggle to define the transsexual serves as the ideal illustration of why the male-female focus is no longer appropriate. Rather, this paper proposes a gender identity spectrum where the existence of male and female definitions on alternate ends does not preclude a wide range of other identity options.

Deviation from the binary focus has strong repercussions, all of which this author argues are positive. If sex is a fluid concept, then the ability to differentiate between same-sex and opposite-sex relationships dissolves and simply "relationships" remain. Most of the cases examined focussed on marriage and hinged on the legal refusal to accept same-sex marriages. As sex begins to be seen on a spectrum as opposed to a binary, the notions of "same" and "opposite" become unclear and impossible to uphold. Likewise, laws, such as in *Tan*, where the offence required the accused to be male could no longer be plausible. For equality to be achieved there must be equal recognition by the law and not differentiation based on sex.

Some feminist authors will argue that subsuming the binary into a spectral analysis leaves women in a precarious position in the law. Particularly in the criminal sphere, there is concern that there needs to be a heightened acknowledgement of the differences between men and women and their reactions in certain circumstances. As Christine Boyle notes, traditional criminal law research "embodies a male perspective on the world masquerading as an objective non-gendered perspective."[25] This reveals itself most obviously in criminal law defences that lean toward male reactions and are therefore biased against women. Yet, one must be careful as this neither represents the spectrum nor the binary; rather it is an assertion of a solitary identity. It is not the spectrum that concerns feminists but conversely the failure to recognize any difference in identity.

Furthermore, the feminist counter demand for recognition of the binary raises concerns regarding female stereotyping. In self-defence cases,

25 "Criminal Law and Procedure: Who Needs Tenure?" (1985) 23 Osgoode Hall L.J. 427 at 428.

critics warn that justifying the reasonableness of battered women's action with evidence of "learned helplessness" is problematic as it works against women who do not fit this stereotype of passivity.[26] Again, the spectrum approach offers the most acceptable solution as the admission of a range of identity options leads to the acceptance of a range of reactions recognized by the law.

Conclusion

With regards to the transsexual, to date, the law has only made decisions applicable to specific situations, choosing to remain silent on the more general issue of formulating consistent treatment of transsexual identity. The decisions pertain to how the transsexual is viewed by society and what types of interaction are permitted. The underlying assertion is that a transsexual is too much a deviation from societal norms to find unqualified acceptance. The unfairness of such a conclusion only serves to further the original cause of rejection. Before society is capable of accepting a transsexual's participation in public interaction, in areas such as marriage and volunteering, such participation must be permitted. The law has the power to issue such permission. At the moment, the first step is to acknowledge the inescapable reality of the law's power of construction. Harlon Dalton points out:

> [I]t is worth underscoring that our sensibilities change. Some changes are relatively small. I have nearly gotten to the point where I can eat everything at my local sushi bar without gagging. But the big stuff changes as well – how we approach sex and sexuality, race, gender, God, country, our bodies, our planet – and that is true for societies as well as for individuals, over periods briefer than a human lifetime.[27]

We are in a period of changing perceptions of sexual identity. The spectrum approach offers the best option in its promotion of equality, understanding and acceptance of all people while incorporating the traditional male-female binary. The law can chose to either lead this change or to be the resisting force against it. For most of us, our sexual identity is secure and therefore a non-issue. Yet, think for a moment what you would do if the law threatened to deny you this identity? An individual deserves the respect and freedom to make the personal decision on their sexual identity. The law must grant them this right.

[26] See Isabel Grant "The Syndromization of Women's Experience" in Grant, Boyle, MacCrimmon, and Martison, "A Forum on *Lavallee* v. *R*: Women and Self-Defence" (1991) 25 U.B.C. L. Rev. 23 at 51.

[27] Harlon Dalton, "'Disgust' and Punishment", 96 Yale L.J. 881 at 903, as quoted in Kate Sutherland, "Legal Rites: Abjection and the Criminal Regualtion of Consensual Sex" (2000), 63 Sask. L. Rev. 119-144 at para. 73.