Judicial uses of transsexuality

A SITE FOR POLITICAL CONTESTATION

Andrew Sharpe

Legal recognition of the post-operative transsexual.

In recent years, Australian judges have had occasion to decide the 'legal sex' of transsexual persons. In medico-legal discourse transsexuals are generally considered to be those people who possess a chromosomal, gonadal and genital structure which is congruent at birth, consider themselves to be men or women despite official designation to the contrary sex category and who have either undergone 'reassignment' surgery or have manifested a desire for such surgery. In departing from the landmark English decision of *Corbett v Corbett* [1970] 2 WLR 1306, the Australian courts have rejected the notion that 'sex is determined at birth' in favour of a story of 'psychological and anatomical harmony', whereby transsexual people who have undergone 'reassignment' surgery have been granted legal recognition.[1]

However, it is important to resist the temptation simply to characterise this Australian trend as progressive to be contrasted with a repressive English scenario,[2] for legal recognition of transsexual sex claims has proved possible only through the simultaneous production of a constitutive and abjected transsexual 'outside' — a domain of 'unintelligible bodies', 'impossible (trans)sexualities and 'incoherent' (trans)gender practices.[3] It would seem medicine and law posit these excluded differences as external to, and in opposition to the 'truth' of, transsexuality thereby reproducing the social system of gender as dichotomous.

'Unintelligible bodies'

The story of 'psychological and anatomical harmony' entered Australian legal discourse in the case of *R v Harris and McGuiness*[4] where the New South Wales Court of Criminal Appeal held that a male-to-female transsexual who had undergone full sex 'reassignment' to align her genital features with her psychological sex was to be regarded as female for the purposes of the criminal law.[5] Here, although chromosomes were viewed as irrelevant (at 192), and while birth was abandoned as the governing moment in determining 'legal sex', a judicial preoccupation with genital insignia is evident.

It is the centrality of genitalia in the reformulation of 'legal sex' which ensures that a dicotomous notion of gender is reproduced. While the biological and temporal specificities of *Corbett* are abandoned, the commonsensical and genito-centric notion that women are persons with vaginas and men are persons with penises is reaffirmed. In this way, sex, albeit in refashioned form, continues to provide a 'foundation' for, and to make sense of, the social system of gender. In other words, only one body per gendered subject is 'right'.[6]

Crucially, a judicial focus on genitalia serves to invalidate the lives of those people who contest sex categorisation yet are unwilling and/or unable to undergo genital surgery,[7] thereby clarifying their status as legal 'outsiders'. The more permissive judgment of Matthews J is particularly revealing in this respect. The submission that the court should treat biological factors as entirely secondary to psychological

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ones, made with the pre-surgical appellant Phillis McGuiness in mind,[8] provoked the following response:

> ... it would be vulnerable to abuse by people who were not *true* transsexuals at all. To this extent it could lead to a trivialisation of the difficulties *genuinely* faced by people with gender identification disharmony. [*Harris* 193, emphasis added]

This passage makes clear that psychological sex can only be established, for legal purposes, by surgical intervention, a theme to be pursued in later decisions.[9] Thus, in the case of Phillis McGuiness it was the 'wrongness' of her body which led to legal rejection of her 'sex' claims. The adoption by the court of a test of 'psychological and anatomical harmony' does not, therefore, involve a commitment to ascertain harmony per se, and certainly not any subjective kind of harmony. Rather, 'psychological and anatomical harmony' can exist in law only where it resides within one realm of a particular medico-legal binary division of sex. Therefore, recognition of the post-operative transsexual as legal subject excludes, and consigns to a realm of bodily 'unintelligibility', pre-operative transsexuals and those people who consider their psychology and anatomy to be harmonious even though, and precisely because, it is located outside either sphere of that division.[10]

In granting legal recognition to Lee Harris her once transgressive behaviour and body are forgotten (amnesia) and forgiven (amnesty).[11] Through prior submission to medical, including surgical, rites of passage she had confessed to her 'true' self and to the 'wrongness' of her former body. It is because legal recognition is made to depend on surgical intervention to 'correct' bodies that the possibility of, and for, a 'transgressive politics'[12] at the level of sex, one perhaps which uses psychological sex to challenge the genito-centricity of legal discourse and to subject 'legal sex' to radical rearticulation,[13] is eliminated as a discursive and/or political possibility.

While the *Harris* decision has been followed in subsequent cases it is interesting to consider the decision of the Administrative Appeals Tribunal (O'Connor J, Barbour and Grimes) in *Secretary, Department of Social Security v SRA* [1992] 28 ALD 361; [1992] 69 *SSR* 991. While overturned on appeal by the Federal Court (Black CJ, Lockhart and Heerey JJ), which reaffirmed the Harris test of 'psychological and anatomical harmony', the Administrative Appeals Tribunal adopted a different test for determining 'legal sex'. The Tribunal, emphasising the beneficial character of social security legislation, which could therefore be interpreted more liberally, held that a pre-operative male-to-female transsexual was a woman for the purposes of s.37(1) of the *Social Security Act 1947* (Cth) and was, therefore, entitled to an age pension. The interpretation of 'woman' adopted was one which dispensed with anatomical considerations requiring only 'psychological, social and cultural harmony'.[14]

However, while the requirement for surgical intervention was dispensed with the judgment was nevertheless constructed in such a way that the gender dichotomy remained in place. Thus considerable emphasis was placed on the fact that SRA believed herself to be 'a female trapped in a male body' (*SRA* at 365) and had been approved for, but due to financial constraints had been unable to undergo, surgery.[15] Here willingness to undergo surgery supplanted the surgery itself as the appropriate criterion for determining 'legal sex'. While desire for surgery and actual surgery differ as criteria for determining 'legal sex' they both serve to reproduce gender as binary and polar through the construction of 'wrong body' stories.

Ultimately, legal recognition of SRA proved contingent on her acceptance of the medico-legal 'wrong body' story and the adoption of an apologetic stance toward her own 'wrong body'. Accordingly, the discursive production of SRA as female serves to clarify the 'unknowability' of the pre-surgical body even as it enables SRA to assume a presence within the law. What unites the 'psychological and anatomical harmony' and the 'psychological, social and cultural harmony' stories is that they both insist on the 'wrongness' of the pre-operative transsexual body and they both require the confession of this legal 'truth'. The process of confession complete, and the all important 'truth' about the 'correctness' of bodies established, the tribunal proved able to develop amnesia with regard to SRA's continued possession of a 'wrong', and therefore transgressive, body and granted legal absolution.

'Impossible' (trans)sexualities

The form of legal recognition granted in *Harris* has entailed the exclusion of (homo)sexual difference because it supposes the prior establishment of 'heterosexual' desire within the medical arena. This finds legal expression in the judicial assertion that transsexuals desire surgical assistance 'in order that they may enter into heterosexual relationships' (*HH* at 317). The exclusion of lesbian and gay (trans)sexualities in the production of a 'coherent' transsexual legal subject is effected through a medico-legal conceptualisation of transsexuality as being in opposition to homosexuality. It is this insistence on the mutual exclusivity of transsexuality and homosexuality which confronts a gay and lesbian politics. It serves to reproduce heterosexual hegemony within law and to clarify the status of homosexuals as 'outsiders' within legal culture.

In a medical and legal world in which 'reassignment' surgery and legal recognition are effectively prizes to be earned,[16] homosexuality is likely to considerably weaken, if not terminate, the prospects of people intent on these types of prize acquisition. Moreover, medical discourse, irrespective of epistemology, constructs (trans)sexuality in relation to psychological rather than biological sex. Accordingly, heterosexuality in the transsexual is considered to be the desire for same (biological) sex sexual relations.[17] By the same token, sexual relations which are considered in all other respects to be heterosexual become in the context of transsexuality homosexual and therefore problematic.

Thus medical knowledge with regard to sex 'reassignment' deems males to be the appropriate sexual object choice for a male-to-female candidate as she regards herself as female. Indeed, the absence of sexual relations with a male is for a male-to-female candidate viewed by some as an adverse sign.[18] Here a woman is viewed as a 'lesbian' sexual object choice for a male-to-female candidate. More importantly, a 'lesbian' sexual object choice is considered to contraindicate surgery. Compared to the 'heterosexual', the 'lesbian', and indeed the bi-sexual, male-to-female candidate is considered a poor risk for surgery.[19] Indeed, the male-to-female candidate who considers herself to be lesbian is more likely to be considered a transvestite or a heterosexual with impotence problems.[20] Thus homosexuality emerges in opposition to the 'truth' of transsexuality, a 'truth' which implies a gendered relationship between sex identity and sexual preference.

While medicine and law have constructed 'heterosexuality' as a 'truth' of transsexuality, Bolin in her study of male to female transsexuals found only one of her population of 17 to be exclusively heterosexual while six were exclusively lesbian.[21] Similarly, Lewins in his study of male to female transsexuals found less than half to be heterosexual with 31% clearly identifying as lesbian.[22] While these findings might be viewed as casting doubt on the 'truth' of transsexuality in individual cases they might more persuasively be used to challenge the coupling of transsexuality and heterosexuality as 'truth'. In the meantime lesbian and gay transsexuals seeking 'reassignment' surgery and legal recognition must continue to pass as heterosexual before a medico-legal gaze.[23]

'Incoherent' (trans)gender practices

The form of legal recognition granted in *Harris* serves to reproduce a series of sexist assumptions which challenge a feminist politics. This is because it is dependent on surgery, and surgical intervention is dependent on prior medical rites of passage.[24] In other words, contentious assumptions are entailed in a form of legal recognition which serves to endorse a medical model with inbuilt notions of gender.[25]

As a candidate for surgical 'reassignment', the male-to-female transsexual is required to 'pass' as female before a medical gaze. In order to be accepted as suitable for surgical procedures she is required to do gender[26] successfully enough to convince, predominantly male, medical experts that she will blend into society post-surgically.[27] In the Foucauldian sense she is required to confess, that is to say, she is incited to produce a discourse of truth about herself which is capable of having effects on her.[28]

The successful accomplishment of gender would seem to require a presentation of self which, amongst other things, is feminine in physique, dress and demeanour, attractive, more concerned with giving than receiving sexual pleasure and, preferably, working in a 'suitable' occupation for a woman.[29] The further a candidate departs from this 'ideal' the less chance she has of obtaining 'reassignment' surgery or the longer she has to wait.[30] Here, because legal recognition supposes, and retrospectively legitimates, the prior successful accomplishment of gender, the discursive production of the male-to-female transsexual as female excludes alternative gender practices. While these medico-legal exclusions most directly affect the transsexual, they also serve, at the level of representation, to delimit the range and variation of possible gender performance for women generally.

Legal assumptions regarding female gender performance are not only implicit in the endorsement of the medical model but also find judicial expression. Thus, in *Secretary, Department of Social Security v HH* the Administrative Appeals Tribunal (O'Connor J and Muller) expressed the view that anatomy must be the overriding factor in sex determination if 'overwhelmingly contrary to the assumed sex role' (at 320). This contention that the female sex role can only be properly fulfilled with the 'right' anatomical parts, specifically a vagina, assumes that the role requires submission to penetrative sex. This phallocentric view of female gender performance finds further expression in the assertion that after 'reassignment' surgery the male-to-female transsexual is 'functionally' a member of her 'new' sex, a view shared by the Federal Court in the SRA case (at 493).

In conclusion, the legal recognition of the post-operative transsexual is a welcome legal development. The intention here is not to denigrate that recognition, but rather its prerequisite medico-legal conditions. It is not legal recognition of the transsexual which is called into question, but rather the exclusion of bodily, (homo)sexual and gender difference which that recognition has entailed. It is the judicial uses of transsexuality which call for attention and which make it imperative that legal discourse and practice with regard to transsexuality be viewed, not as an esoteric subject for legal study but, as a locus or site[31] for political contestation where, perhaps, the anatomical, sexual and gender specificity of the legally recognised transsexual might be subjected to disruption and radical rearticulation.[32]

References

1. *R v Harris and McGuiness* 17 NSWLR 158, [1989] 35 A Crim R 146; *Secretary, Department of Social Security v HH* [1991] 14 AAR 314, [1991] 23 ALD 58, 61 *SSR* 838; *Secretary, Department of Social Security v SRA* [1993] 118 ALR 467.
2. See Foucault, M., *The History of Sexuality: An Introduction,* Vol. 1 of the *History of Sexuality* (trans. Robert Hurley), Penguin Books, 1981.
3. See Butler, J., *Bodies That Matter: On the Discursive Limits of 'Sex'*, Routledge, 1993.
4. Above, ref. 1. The story of 'psychological and anatomical harmony' has its legal origins in United States decisions. See *Re Anonymous* 293 NYS 2d 834 [1968]; *MT v JT* 355 A 2d 204 [1976].
5. For previous discussion of the case see Bailey-Harris, R., 'Sex Change in the Criminal Law and Beyond', (1989) 13 *Criminal Law Journal* 353-67; Finlay, H., 'Transsexuals, Sex Change Operations and the Chromosome Test: Corbett v Corbett [1971] not followed', (1989) 19 *University of Western Australia Law Review* 152-57; Otlowski, M., 'The Legal Status of a Sexually Re-assigned Transsexual: R v Harris and McGuiness and beyond', (1990) 64 *Australian Law Journal* 67-74.
6. Stone, S., 'The Empire Strikes Back: A Posttranssexual Manifesto' in J. Epstein and K. Straub (eds), *Body Guards,* Routledge, 1991, pp.280-304, p.297.
7. See Prince, V., *Transvestia,* Vol. 100, Chevalier Publications,1980; Shapiro, J., 'Transsexualism: Reflections on the Persistence of Gender and the Mutability of Sex' in J. Epstein and K. Straub (eds), above, pp.248-79, p.251; King, D., *The Transvestite and the Transsexual,* Avebury, 1993, p.158; Transgender Liberation Coalition, (1994) 1 *Tranys With Attitude,* The Newsletter of the Transgender Liberation Coalition Inc., June, Kings Cross, Sydney, p.1.
8. In her judgment Matthews J makes clear that Phillis McGuiness proposed to undergo sex reassignment surgery, above, ref.1 at 173.
9. *Secretary, DSS v HH,* above, ref. 1 at 321 per *O'Connor J and Muller; Secretary, DSS v SRA,* above, ref. 1, at 494.
10. See Prince, V., 'Transsexuals and Pseudotranssexuals', (1978) 7 *Archives of Sexual Behavio,* 263; Perkins, R., *The 'Drag Queen' Scene: Transsexuals in Kings Cross,* George Allen & Unwin, 1983; Hooley, J., 'What is this Thing Called 'Gender Dysphoria'? (1994) 2 *Tranys With Attitude,* The Newsletter of the Transgender Liberation Coalition Inc., Sept, pp.6-11.
11. Fraser, D., 'Father Knows Best: Transgressive Sexualities (?) and the Rule of Law' (1995) 7(1) *Current Issues in Criminal Justice* 82-87.
12. Fraser, D., above.
13. Butler, J., above, ref. 3.
14. *SRA,* above, ref. 1, at 366. The test of 'psychological, social and cultural harmony' first received judicial articulation in the lone judgment of Brennan in *Secretary, DSS v HH,* above ref. 1 at 324.
15. *SRA,* above, ref.1, at 367. At the hearing SRA had stated that if she had $10,000 she would spend it on reassignment surgery.
16. King, D., above, ref. 7, p.85.
17. See Benjamin, H., *The Transsexual Phenomenon,* The Julian Press, NY, 1966; Kando, T., *Sex Change: The Achievement of Gender Identity among Feminised Transsexuals,* Charles C. Thomas Publishers, Springfield, Illinois, 1973 ; Pomeroy, W.B., 'The Diagnosis and Treatment of Transvestites and Transsexuals', (1975) 1(3) *Journal of Sex and Marital Therapy* 215-24; Walinder, J., Lundstrom, B. and Thuwe, I., 'Prognostic Factors in the Assessment of Male Transsexuals for Sex Reassignment', (1978) 132 *British Journal of Psychiatry* 16-20; Raymond, J.G., *The Transsexual Empire: The Making of a She-Male,* Beacon Press, Boston, 1979; Bolin, A., *In Search of Eve: Transsexual Rites of Passage,* Bergin & Garvey Publishers Inc., Massachusetts, 1988, p.55.

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selves become meaningless, because they 'talk past' the very kernel of what affirmative action is about; namely, taking account of the multiple levels of individuals' situatedness.

Nevertheless, as affirmative action programs falter under the USA's Gingrich-led backlash and its 'relaxed and comfortable' Australian equivalents, the task of developing a philosophical justification for affirmative action is as urgent as it has ever been. To succeed, any justification has to be able, while preserving liberal gains, to take account of the specificities of lived experience, including bodily difference, which affirmative action law has begun to recognise.

References

1. If the traditional reason given for discriminating against married women in employment was that they might become pregnant at any time (backed up by the ideology of the man as breadwinner), then the sections of the Act which forbid discrimination on the basis of marital status should also be interpreted as also being part of the prohibition of discrimination on the basis of potential pregnancy.
2. This is distinct from USA law, in which affirmative action includes ethnicity as well as sex; and North American philosophical analysis tends to concentrate on ethnicity rather than sex. The author discussed in this paper, Richard Wasserstrom, is an exception in this regard.
3. For example, Rosenfeld, Michael, *Affirmative Action and Justice: A Philosophical and Constitutional Inquiry,* Yale UP, 1991; 'Affirmative Action and the Myth of Merit' in Iris Marion Young (ed.) *Justice and the Politics of Difference,* Princeton UP, 1990, pp.192-225.
4. Wasserstrom, Richard, 'Racism and Sexism' and 'Preferential Treatment', both in *Philosophy and Social Issues,* Notre Dame UP, 1980.
5. 'Racism and Sexism', p.47, n 25.
6. This is an analogy which does not completely exclude difference — eye colour, after all is not a totally neutral phenomenon in the culture we have now. The association of green eyes with jealousy and quick temper, brown eyes with peaceful disposition, blue eyes with merriment ('twinkling blue eyes') and grey eyes with thoughtfulness is a common literary device. Wasserstrom could plausibly claim that he is not arguing for the eradication of all cultural ascriptions of difference. However, these literary associations probably do not have great impact on the actual lives of green-eyed, blue-eyed, grey-eyed or brown-eyed people; Wasserstrom is arguing for a much lower level of recognised difference based on bodily experience than is now the case.
7. 'Preferential Treatment', p.56.
8. 'Racism and Sexism', p.12.
9. 'Racism and Sexism', p.11.
10. For example, Wolf, Eric, *Europe and the People Without History,* Berkeley: University of California Press, 1982. Wolf attributes his development of the model to 'the intellectual reassessments that marked the late 1960s' (p.x). The movement involving studies 'from below' owes much to the Frankfurt-inspired South American-based theorists such as Freire, Illich and Gutierrez, who formulated their approaches during this period.
11. For a survey and analysis of this tradition of feminist scholarship see, for example, Harding, Sandra, *The Science Question in Feminism,* Cornell UP, 1986; Duran, Jane, *Toward a Feminist Epistemology,* Savage, Rowman & Littlefield, Maryland, c1991.
12. See Gatens, Moira, 'A Critique of the Sex/Gender Distinction', in Judith Allen and Paul Patton (eds), *Beyond Marxism: Interventions after Marx,* Intervention, Sydney, 1988.
13. On the possibilities and dangers of the incorporation of difference into the liberal academy, see Champagne, John, *The Ethics of Marginality: A New Approach To Gay Studies,* University of Minnesota Press, Minneapolis, 1995; also the critical foreword to Champagne's book, by Donald E. Pease. See also related arguments in Poiner, Gretchen and Wills, Sue, *The Gifthorse: A Critical Look at Equal Employment Opportunity in Australia,* Allen and Unwin Sydney, 1991, p.98.
14. 'Preferential Treatment', p.60.
15. 'Preferential Treatment', p.57.
16. 'Preferential Treatment', note 22, p.81.

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18. Koranyi, E.K., *Transsexuality in the Male: The Spectrum of Gender Dysphoria,* Charles C. Thomas Publishers, 1980, p.31.
19. Bolin, A., above, ref. 17, p.63.
20. Koranyi, E.K., above, ref. 18, p.89.
21. Bolin, A., above, ref. 17, p.63.
22. Lewins, F., *Transsexualism in Society: A Sociology of Male-to-Female Transsexuals,* Macmillan, 1995, p.95.
23. Lewins, F., above, p.94.
24. Bolin, A., above, ref. 17, p.63.
25. King, D., above, ref. 7, p.185.
26. West, C. and Zimmerman, D.H., 'Doing Gender' in J. Lorber and S.A. Farrell (eds), *The Social Construction of Gender,* Sage Publications, 1991, pp.13-37.
27. Kessler, S.J. and McKenna, W., *Gender: An Ethnomethodological Approach,* John Wiley & Sons, NY, 1978.
28. Foucault, M., 'The Confession of the Flesh' in C. Gordon (ed.), *Power/Knowledge: Selected Interviews and other Writings, 1972-1977,* Harvester Wheatsheaf, 1980, pp.194-228 at 215-6.
29. See Koranyi, E.K., above, ref. 3, pp.27, 84; Billings, D.B. and Urban, T., 'The Socio-Medical Construction of Transsexualism: An Interpretation and Critique', (1982) 29 *Social Problems* 266-82 at 275; Bolin, A., above, ref. 22, pp.107-8; King, D., above, ref. 9, p.85; Lewins, F., above, ref. 27, p.103, 116. However, what counts as feminine may be indicative of a middle-class as well as a male medical gaze. For as Tyler points out 'it is only from a middle-class point of view that Dolly Parton looks like a female impersonator; from a working-class point of view she could be the epitome of genuine womanliness' (Tyler, C.A., 'Boys Will be Girls: The Politics of Gay Drag' in D. Fuss (ed.), *Inside/Out: Lesbian Theories, Gay Theories,* pp.32-70, Routledge, 1991). Indeed, it may be that a successful gender performance and the degree of that success implicates multiple relations.
30. King, D., above, ref. 7, p.85.
31. Foucault, M., *The Archaeology of Knowledge,* Tavistock, London,1972, pp.51-2.
32. Butler, J., above, ref. 3.

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29. Leiber, James, 'A Piece of Yourself in the World', (1989) *Atlantic Monthly,* June, p.76.
30. NSWLRC, *In Vitro Fertilization,* Report No. 58, 1988, Recommendation No. 39.
31. The report in *Estate of K* does not state the age of the wife.
32. i.e. the sole child of the relationship plus three children of the father from a previous marriage.
33. *Todd v Sandridge Construction Company* 341 F2d 75, 77 (4th Cir, 1964) per Bryan J.
34. Feliciano, Tanya, 'Davis v Davis: What About Future Disputes', (1993) 26 *Conn L Rev* 305 fn 6.
35. See *Artificial Conception Act 1984* (NSW) ss.5-6; *Artificial Conception Act 1985* (ACT) ss.5-7; *Artificial Conception Act 1985* (WA) ss.6-7; *Status of Children Act 1979* (NT) ss.5A-5F; *Status of Children Act 1978* (Qld) ss.15-18; *Family Relationships Act 1975* (SA) ss.10c-10e.
36. Nor have Australian courts been faced with disputes about whether embryos are property or may be left in a will, or may be the subject of a custody dispute as have several American courts: *Davis v Davis* 842 SW2d 588 (Tenn SC, 1982) *Hect v Superior Court* 20 Cal Rptr 2d 275 (Cal App 2 Dist, 1993).