

**Centre for Medical Ethics and Law**

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# **Abstracts**

**(alphabetical by author)**

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## THE LEGAL STATUS OF TRANSEXUAL AND TRANSGENDER PERSONS TURKEY

*Yeşim Atamer*

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Prior to 1988 there were no legal regulations in Turkey concerning transsexuals. In 1988 the Turkish Parliament decided to make a change in the Turkish Civil Code (TCC) in order to regulate the status of transsexuals. According to the amended version of Article 29, a person able to submit a health council report certifying that he/she has undergone a sex reassignment surgery could apply to the court to order a change in the birth register. Should this person be married, the spouse would be given due notice of the application, and upon the court order allowing the application for change in the birth register, the marriage would *ipso facto* come to an end.

Although this regulation was clearly a step forward with regard to the legal situation of transsexuals in Turkey, it was strongly criticized in the legal doctrine. Main criticism was that Article 29 did not at all specify the pre-conditions for such an operation. Given the reality of widespread malpractice in the 1980s in Turkey, it was considered necessary to have stringent regulations for sex reassignment surgeries. It was hoped that medical practice would be controlled through strict laws.

The third phase started when the new Turkish Civil Code was put into force in 2002. Given the critics regarding its predecessor one cannot be surprised that with the new provision a harsh regime was introduced. Article 40, which is to be found among the regulations concerning the civil status registers, follows Article 39 on the need for a court decision to execute any change in the civil status registers and reads as follows:

*“A person who wants to change his/her sex has to apply to the court personally and ask for permission for a sex reassignment. For this permission to be given, the applicant must have completed the age of 18 and must be unmarried. Besides he/she must prove with an official health board report issued by an education and research hospital that he/she is of transsexual nature, that the sex reassignment is compulsory for his/her mental health and that he/she is permanently deprived of the capacity of reproduction.*

*If it is confirmed by an official health board report, that a sex reassignment operation was effected based on the permission given and in accordance with the purpose and medical methods, the court will decide for the necessary changes to be made in the civil status register.”*

According to Article 40 TCC there are now two stages to be completed before the sex change can be reflected in the civil status register. The first stage is prior to the operation, the second subsequent to the operation. The person of transsexual nature has to first apply to court to get permission for a sex reassignment surgery. The aim of this provision is obviously to bring sex reassignment surgeries under control. The court will ask for the opinion of a health board (today: *gender identity councils*), which are established in the university hospitals.

After evaluating the council's decision, the judge may give permission for a series of operations that will cause the transformation of sexual organs. Once the operations are completed, the person applies to the court again and asks for permission to change the birth register in accordance with its new gender. If it is confirmed by an official health council report that a sex

reassignment operation was effected based on the permission given and in accordance with the purpose and medical methods, the court will decide for the necessary changes to be made in the civil status register.

After the relevant changes in the birth register have been effected, birth certificates, passports and other personal documents will also be changed by the relevant authorities.

Article 40 TCC brings about several hurdles for a transsexual person. Certainly the most unintelligible one is the requirement of being permanently deprived of the capacity of reproduction. Given that a transsexual with normal genital organs and hormonal functions is naturally also fertile, this new regulation forces doctors to apply such treatment as is necessary to make a patient infertile, or even to take surgical steps to ensure this outcome. This constitutes an unnecessary burden for the transsexual. In fact, this requirement of the Turkish Civil Code was strongly criticized and meanwhile an application has been made to the European Court of Human Rights (No 14793/08, *Y.Y. v. Turkey* 6.3.2008). The ECHR decided that the application is admissible.<sup>1</sup> The pending case '*Y.Y. v. Turkey*', communicated on March 2010, is based on a refusal of the domestic courts to authorise the applicant to undergo gender reassignment surgery on the ground that she did not meet the statutory condition that required her to have been diagnosed as permanently infertile. She relies in particular on Article 8 of the European Convention on Human Rights.<sup>2</sup>

## **METAMORPHOSIS AND (TRANS)MIGRATIONS: SPIRITUAL ASPECTS OF GENDER TRANSITION**

**Christina Beardsley**

In this lecture I have chosen two images to explore some spiritual aspects of gender transition: metamorphosis and migration. Metamorphosis, because the term appears to encapsulate the external process of gender transition, and has both ancient and modern resonances; migration, because it is an established metaphor for the transition journey, but not necessarily for its spirituality, and I hope to rectify that here.

Although these are two relatively abstract concepts, I aim to illuminate the personal and both metaphors relate to the person I have chosen as the brief case study with which I conclude.

I will be following a biblical image when I turn to the concept of migration, but I begin with the myth of metamorphosis to counteract the almost exclusive emphasis on the Bible in contemporary Christian reflection on transsexualism – as on many other issues – a move that needs no apology. A Latin text like Ovid's *Metamorphoses* has been a familiar portmanteau of ancient myths for generations, and pagan art and imagination were incorporated into Christian culture, and have inhabited the unconscious as well as the consciousness of the West. The

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<sup>1</sup>

[http://hudoc.echr.coe.int/sites/fra/Pages/search.aspx#{%22sort%22:\[%22kdate%20Descending%22\],%22appno%22:\[%2214793/08%22\],%22itemid%22:\[%22001-114422%22\]}](http://hudoc.echr.coe.int/sites/fra/Pages/search.aspx#{%22sort%22:[%22kdate%20Descending%22],%22appno%22:[%2214793/08%22],%22itemid%22:[%22001-114422%22]})

<sup>2</sup> [http://www.echr.coe.int/Documents/FS\\_Gender\\_identity\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Gender_identity_ENG.pdf)

mythological concept of metamorphosis has immense potential for dialogue with Christian concepts of transformation, transfiguration and resurrection, as well as an evolutionary understanding of life, and offers an imaginative (and visual) starting point for reflecting on the spiritual aspects of gender transition.

Metamorphosis:

In this section of the lecture I use Ovid's text and, to a lesser extent, Kafka's *The Metamorphosis*, to illuminate negative spiritual themes relating to punishment, taboo, declension, even extinction, as well as positive ones like love, sexuality, and wisdom. The poem may even shed light on the vexed notion of 'being in the wrong body'. The Kafka text prompts reflections on the risks and losses of transition, its powerful energy and the contrasting archetypes of victim and warrior.

Migration:

My playful reference to (trans)migration is intended to emphasise that, for many trans people, transition is as much about the journey of the human soul as it is about human bodies in motion. The familiar analogy between migration and transition, with its language of borders, identity, belonging or alienation, resonates well with spirituality, especially the popular theme of the journey, and the discussion is earthed in the itinerary of the transition journey such as passports, and health tourism.

Case Study - Sonia Burgess:

In 2010 a passenger was pushed under an evening rush hour underground train at London Kings Cross. Initial reports said that a woman had died at the scene but her transgender status quickly emerged and was communicated disrespectfully by certain sections of the media. Eventually the deceased was revealed as the leading human rights lawyer, David Burgess. In his legal practice David had pushed the boundaries for others, handling landmark immigration cases and representing trans people at the European Court of Human Rights; but news of his 'metamorphosis' as Sonia came as a surprise to many who had known David, while most of Sonia's friends were unaware of David's career. However, when both groups gathered in Sonia's parish church, where she was much loved, names, labels, and gendered pronouns, did not seem to matter. Everyone was united by grief and in their preparations for the celebration of the life of a remarkable human being.

## VARIETIES OF DECISION-MAKING: REFLECTIONS ON DECIDING *RE KEVIN*

Richard Chisholm

*Re Kevin*<sup>(3)</sup> was the first Australian case requiring a decision about the validity of a marriage by a transgender person. 'Kevin' had been born apparently a female, but identified as a male and went through medical and other processes to become the male he had always considered himself to be. As a man, he went through a ceremony of marriage with a woman, and he and his wife applied for a declaration that their marriage was valid. The application came before me

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<sup>3</sup> *Re Kevin: Validity of Marriage of Transsexual* (2001) 28 Fam LR 158.

as a judge of the Family Court of Australia. The Attorney-General of the Commonwealth of Australia opposed the application, arguing that the English decision of *Corbett*<sup>(4)</sup> applied in Australia, and therefore as a matter of law Kevin was a woman and the marriage was not valid.

The case involved a great deal of medical evidence and wide-ranging legal argument. I held that *Corbett* did not represent Australian law and granted a declaration that the marriage was valid. The decision attracted some international attention and was later upheld on appeal by the Full Court.

This paper reflects on the decision, the issues involved, and some aspects of the decision-making process.

## THE LEGAL STATUS OF TRANSEXUAL AND TRANSGENDER PERSONS IN ITALY

**Maria Giovanna Cubeddu Wiedemann**

In Italy there is no comprehensive law regulating transsexual and transgender persons, but in 1982 a law on the reassignment of sex and change of name was put into place. This law does not regulate the status of transsexuals but merely the requirements for the change of legal gender. While this law fails to regulate some aspects of the procedure, it has to be understood as a necessary compromise to regularize the externalities appearance of gender change: the point in time of the adjustments of civil status acts and the prerequisites for a 'correction' of the documents.

The law has been criticised because its primary focus falls on the public interest of having the social and somatic identity be consistent instead of the recognition of the law of self-determination of the gender. This is also confirmed by the fact that in Italy when registering the birth of a person there always has a registration of gender and name consistent with the respective sex. In recent years a trend towards an increased recognition of the aspect of protection of health and social integration of transsexual/transgender persons has become more apparent. There now are various public hospitals specialised in sex change procedures. As a starting point it is in principle necessary that a change of sex should be approved by a Court first. But this is not common practice anymore because in reality most people ask the court's permission to change their legal status after they already have undergone the gender reassignment procedure. The reason for this is that requesting permission of the court for both procedures – the medical sex reassignment and the legal change of sex/gender – is quite expensive and time consuming. The most important prerequisite for the change of name is a completed modification of sexual characteristics, but whether a surgical operation has to have taken place is not clear. Modern case law favours a wider interpretation which does not consider surgical adjustments necessary but instead only requires a hormonal treatment.

The consequences of the change of legal gender are not really regulated in Italy. One of the most controversial topics in Italy at the moment is the effect on an already existing marriage. In regards to Labour Law there is a wide acknowledgement and application of anti-discrimination

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<sup>4</sup> *Corbett v Corbett (otherwise Ashley)* [1971] P. 83.

laws because of gender which includes change of sex/gender. Concerning the penal system and prisons, the most important problems are overcrowding and human conditions which affect all prisoners as well the lack of specialised medical treatment for transsexual or transgender people.

There is a proposed amendment to the law, aiming to making clear that genital reconstruction surgery should not be considered a condition for obtaining an amended birth certificate or other documents. Furthermore, the amendment seeks to simplify the administrative procedure.

## **TRANSSEXUALITY AND THE CHRISTIAN CHURCHES: AN OVERVIEW**

**Duncan Dormor**

This paper will provide an introduction to the ways in which Christian denominations and groupings have responded to transsexual people and SRS through a consideration of contemporary theological anthropology (i.e. Christian understandings of human nature and the meaning(s) of sexed differences) and of ethical method (how ethical decision-making occurs). It will particularly highlight the importance of the wider social, cultural and political contexts within which religious authority is exercised but also draw attention to the complex ways in which ecclesial judgements are made in practice within denominations. Two illustrative case studies will be considered: First, that of the Roman Catholic Church where denial of the reality of transsexuality as a phenomenon is an inevitable consequence of the Magisterium's wider assault on the concept of gender; and second, that of the Church of England, an Established Church marked by considerable internal plurality but one where individual religious leaders can have a direct impact upon UK legislation. In the first of these, brief consideration will be given to the intellectual genealogy of contemporary Roman Catholic theological anthropology (not least within the writing of Pope John Paul II); in the second the diversity of opinion within the Church of England is demonstrated through a consideration of the House of Lords' debate of the Gender Recognition Bill of 2003-2004.

The paper will conclude with the key observation: That despite assertive claims to represent the Christian tradition, conservative manifestations of contemporary Christianity articulate a theological anthropology deeply influenced by Enlightenment and nineteenth century cultural assumptions and scientific understandings. Insufficiently interrogated, these ideas are deployed to maintain a rigid binary understanding of man and woman as ontologically distinct yet complementary. This binary understanding forms an integral part of a distinctive and defensive cultural and religious identity which is galvanised by opposition to homosexuality and articulated in the face of what is perceived to be a threatening secularism.

## THE LEGAL STATUS OF TRANSSEXUAL AND TRANSGENDER PERSONS IN GERMANY

ANATOL DUTTA

Under German law, the sex of human beings is of relevance right from the beginning of their lives. Once a child is born, the civil status registrar will certify in the birth registry not only the child's name, the place, day, hour and minute of the birth and the parents' names but also the sex of the child, see § 21(1) no. 3 of the Personenstandsgesetz (PStG), the German Civil Status Act. The sex to be registered – which can only be female or male, although the wording of the Act actually is silent on that point – is necessarily determined by solely biological characteristics of the newborn and by the fact whether those characteristics meet the criteria of the female or male sex. Any personal gender identification is irrelevant and could anyhow not be verified right after birth. – Once documented by the registrar, the sex of a person is part of his or her civil status for the remaining legal biography, mainly with consequences in family law: The mother of a child can only be a *woman* who has given birth to a child, and the father of a child can only be a *man* who meets the conditions for his legal fatherhood, see §§ 1591 seq. of the Bürgerliches Gesetzbuch (BGB), the German Civil Code. Only a female and a male person can conclude a marriage, whereas only persons of the same legal sex can enter into a registered partnership (eingetragene Lebenspartnerschaft).

But what happens if, after the birth of a child, the sex of child cannot be determined because the child's body shows biological characteristics of both sexes? In the past, the parents, doctors and midwives had – often prematurely – to decide on the male or female sex of their child. This situation will now change. Since the end of 2013, the new § 22(3) PStG allows the sex of a child not to be certified in the birth registry if the child cannot be attributed to the female or male sex. That newly created civil status of an uncertain sex can persist until the death of the person. The person can, however, at any time notify to the registrar that he or she wants to register his or her gender as male or female; that sex has then to be certified subsequently in the birth certificate, as a new § 27(3) no. 4 PStG stipulates in its first alternative. Although the new civil status of a person having an uncertain sex gives rise to many legal questions (Can such a person conclude a marriage or register a partnership? Can such a person be legally the mother or the father of a child?), the German legislator at least opens the possibility that a person and the parents can decide on the sex without time pressure after birth – a fact which might help to at least partly avoid the conflict to be discussed at the present conference, the conflict that the sex or gender of a person is not in conformity with the civil status and, therefore, the question of changing the legal sex arises.

Yet the introduction of the new civil status of an uncertain sex does, of course, not avoid all cases in which a person's legal sex and his or her personal gender identification diverge. Such a person could have been, at his or her birth, biologically perfectly attributable to one of the certain sexes; in such a case the new civil status is not an option. Or the person might have been born long before the new civil status was available. In order to allow a person to change the legal sex, the German legislator in 1980 – after earlier decisions of the German Bundesverfassungsgericht, the Federal Constitutional Court, allowing such a change on constitutional grounds – adopted the Transsexuellengesetz (TSG), the Transsexuals Act, a statutory basis for the change of the (male or female) first name and the sex in certain situations. The story of the Transsexuellengesetz is, however, the story of its initially harsh conditions for a change of the sex step by step being overturned by the Bundesverfassungsgericht. The legislator in the original version of the Act had required the applicant not to be married (old § 8(1) no. 2 TSG), to be sterile (old § 8(1) no. 3 TSG) and to assimilate his or her secondary sexual characteristics by surgical measures to the other sex –

requirements which have been declared to be unconstitutional by the Bundesverfassungsgericht in several decisions over the years. The Court left only some substantive requirements untouched; these are laid down in § 8(1) no. 1, § 1(1) no. 1 & 2 TSG: The applicant must show (1) that he or she feels him- or herself belonging not to the current legal sex but to the other sex, (2) that he or she is has 'lived as if belonging to the other sex' for at least three years , and (3) that there is a high chance that his or her orientation to the other sex will not change.

## **THE LEGAL STATUS OF TRANSSEXUAL AND TRANSGENDER PERSONS SPANISH NATIONAL REPORT**

**Josep FERRER RIBA / Albert LAMARCA MARQUÈS**

1. Since 2007 Spain has specific legal rules dealing with the civil status of transsexual persons. Act 3/2007, of 15 March, *regulating the rectification of register entries relating to a person's sex*, allows transsexual persons to apply for a rectification of their Civil Registry records concerning sex, when said records do not reflect the individual's true gender identity. The rectification of the sex entry involves also the change of the given name in order to avoid an inconsistency with the new Registry entry.

2. Act 3/2007 was adopted in the context of major reforms in the law of persons and family law pushed forward by the Spanish socialist government, including the legalization of same-sex marriage, the regulation of the right to free divorce (both in 2005), the recognition of lesbian's couples right to joint maternity (introduced by the same Act 3/2007), and the introduction of comprehensive protection measures against gender-based violence (2004).

3. Prior to 2007, in the absence of statutory rules, Spanish courts allowed the change of legal sex on a piecemeal basis. Under case law dating back to 1987, the change required a judicial decision and presupposed that the applicant had undergone sex reassignment full surgery (which had ceased to qualify as a punishable bodily injury in 1983). Nevertheless, the change of legal sex did not extend to the possibility of marrying persons of one's own chromosomal sex. This situation became heavily contested in the decade preceding the 2007 Act, and some administrative and judicial decisions from lower courts began to challenge and overcome this restriction on marriage.

4. Although the 3/2007 Act was praised as a hallmark for recognition of gender identity and was based on the constitutional rights to dignity and the free development of personality, it is not a comprehensive law on the rights of transsexuals. Its scope is limited to the two aspects mentioned, i. e. the rectification of the entries of sex and given name, encompassing "all rights inherently associated to the new legal condition".

5. The main features of the 3/2007 Act are:

a) Legal procedure:

- Proceedings are administrative in nature and are handled by the officer in charge of the Civil Registry.
- The decision is subject to appeal before a court of law.



b) Legal requirements:

- The applicant must have Spanish nationality, be of legal age (over 18) and enjoy sufficient capacity.
- The applicant must show that:
  - (i) it has been diagnosed with gender dysphoria;
  - (ii) it has followed medical treatment for a minimum period of two years in order to accommodate its physical appearance to its perceived gender identity.
- There is no need to have undergone sex reassignment surgery.
- The requirement of medical treatment may be dispensed with on account of health or age reasons which prevent to follow it, if this is attested by a medical certificate.

c) Official documents:

- Concerning the diagnosis of gender dysphoria: a report from a physician or a clinical psychologist registered in Spain or possessing a title recognized or authorized in Spain.

The report must show that:

- (i) the person experiences a “dissonance between the morphological sex or physiological gender and the gender identity or psychosocial sex”;
  - (ii) the dissonance is stable and persistent;
  - (iii) there are no personality disorders which might decisively bear an influence on the existence of the dissonance.
- Concerning the medical treatment: a report from the physician under whose direction the treatment has been carried out, or, failing this, a report from a forensic doctor.

d) Legal consequences:

- The decision to grant the rectification has constitutive effects, which are produced from the date of its recording. However, the transsexual person may request the issuance of a new birth certificate including its new legal sex.
- The change of legal sex and given name does not alter the rights and duties accrued to the applicant before the recording.
- The change of legal sex will allow the transsexual person to exercise all rights incumbent on its new condition. The law does not distinguish particular rights, which has to be understood as a general entitlement to hold and exercise all type of rights incumbent on its new legal sex, unless otherwise specified by a legal rule.

6. The 3/2007 Act does not refer to the costs arising from medical treatment. They are not assumed by the National Health Service. Some regions have decided to bear the costs of sex reassignment surgery, which is practiced in four referral hospitals.

7. Although there are no reliable statistics on the absolute numbers, it is estimated that there are in Spain around 3,000-4,000 transsexual persons. From the enactment of the 2007 Act to mid-2013, official statistics by the Ministry of Justice show that 1.089 persons had successfully changed their legal sex in Spain.

# THE LEGAL STATUS OF TRANSSEXUAL AND TRANSGENDER PERSONS IN SWEDEN

Jameson Garland

## I. Legal Framework and Statistics

Since 1972, Sweden has authorized changes in legal sex for two classes of persons: (1) those who, for a long time since youth, have identified with a sex other than the one assigned at birth, and (2) those with differences in sex development, principally those with physiological characteristics atypical for their genetic sex or otherwise deemed to have mixed physiological sex traits. The two separate grounds are set forth, respectively, in § 1 and § 2 of Sweden's sex classification law (*könstillhörighetslagen*). Individuals whose sex has been reclassified once under § 2 are also eligible for reversal of that classification subject to the conditions set forth under § 1. This proviso was designed primarily to correct errors made in sex reclassification of infants and very young children born with atypical sex development.

Legal sex reclassification in Sweden is substantially integrated with medical treatments to support gender identity. The public health care system subsidizes hormonal treatments and gender surgery for those who are qualified medically for such treatments. As such, treatments must not only follow the rules for all subsidized health care but must also conform to special conditions imposed by the sex classification law. Thus, a patient is not entitled to receive financing for all desired surgeries (such as refined feminizing or masculinizing treatments). Genital and gonadal surgery generally must also be approved in connection with the application for legal sex reclassification. In practice, where legal sex reclassification is not required, as for those persons who otherwise might be covered by § 2, cosmetic gender surgery and other treatments may be subsidized under the auspices of correction for congenital anomalies.

Current estimates indicate that approximately 500 sex reclassifications or more have been granted in Sweden since 1972, with male-to-female reclassifications constituting approximately 60% of those classifications over time. Since 2007, applications for sex reclassification appear to have fallen more evenly along gender lines. It should be noted, however, that it is unclear if these statistics reflect all sex reassignment surgery in Sweden, precisely because pediatric surgical practice permits sex reassignment and gender surgery on very young children with atypical sex development – both to conform to legal sex already assigned or, for newborns, to assign a legal sex in anticipation of surgery and preclude further legal processing. As such, legal sex reclassifications under § 2 appear to be rare, often no more than one per year, if at all.

## II. Changing Legal Sex or Gender – Procedure and Requirements

### 1. Legal Procedure (Overview)

Legal and medical procedures for sex reclassification in Sweden are available to any person whose identity is formally listed in the national population registry. This includes legal residents. The National Board of Health and Welfare oversees both the legal and medical procedures associated with sex reclassification. The Board's Legal Council processes all applications for sex reclassification. The Council consists of a forensic psychiatrist, three physicians, a behavioral scientist, and one additional staff member. Any adverse action by the Board or Council regarding an application may be appealed to an administrative court, with further appeals in the judicial system in accord with ordinary rules for such appeals.

## **2. Official Documents**

Each individual's legal identity in Sweden, including an approved name, is registered in the population register under a gendered identification number (with the ninth digit designated an odd number for males or even for females). Once a sex reclassification is granted, a new number is issued. The first name is usually changed at the request of the applicant. Other legal documents are changed accordingly as part of the process, with public information in the register identifying the former gender redacted and protected under privacy law. Disclosure of the reclassification by any person involved in the process is illegal and subject to criminal penalties.

## **3. Legal Requirements**

For applications for legal sex reclassification under §1, the primary requirement is that the applicant identifies, since youth, with a sex other than the one currently registered. In practice, persons who became aware of a discordant gender identity at a later age are not, per se, precluded from medical care or applying for sex reclassification. A person must be 18 years old to apply for the legal sex reclassification, though that individual may have received some medical treatment before that age. Sex reassignment surgery, particularly genital and gonadal surgery, generally cannot be performed in Sweden apart from the application process. A person seeking removal of the gonads for the purpose of sex reclassification must be 23 years old, though permission may be granted for such surgery in exceptional circumstances.

Pursuant to § 1, applicants who are not already in care for gender identity matters are expected to contact their health care provider for referral to a psychiatrist with expertise in such matters. The psychiatrist will oversee medical suitability determinations for treatment and documentation of the gender identity required by § 1. Government guidelines provide that applicants should expect the first year of treatment to consist of psychiatric and physical examinations, followed by a year of hormone therapy and other cosmetic therapies to enable the applicant to live for a year in the gender role with which the applicant identifies. The applicant may then apply to the Board for legal sex change. The application must be accompanied by a medical report summarizing the medical care set forth above. The Board will authorize sex reassignment surgery at the earliest after two and a half years from the start of the medical process. Of note, the Board is currently investigating measures to ensure uniform quality in medical care throughout Sweden. Financing for health care in Sweden is provided by county councils, triggering concerns have that less populous counties with lesser resources may not be able to provide standard or complete care. A reform proposal in this regard is expected in 2014.

For applications under § 2, no age limit exists, other than providing that if the application is made for a person age twelve or older, that person must consent to it. The current statutory text requires that the applicant must have a congenital anomaly in sex development to proceed under § 2. The requested sex must also be compatible with the applicant's gender identity and physical condition. The most recent government report on this provision has acknowledged that much scientific controversy remains as to how these assessments are made, particularly for children who do not consent to medical treatment. The government has also confirmed that some individuals whose legal sex has been changed under § 2 have applied for a second reclassification under §1, on the grounds of error from the first change. For children under age twelve, the law currently requires all legal decisions to be made in consideration of the child's wishes – in accord with the child's age and maturity, if possible. All of these requirements are activated only if legal sex reclassification is needed for sex reassignment and gender surgery.

### **III. Consequences of the Change of Legal Sex or Legal Gender**

After reclassification, the applicant is legally treated according to the newly registered sex for all purposes, to the extent required. Discrimination against an applicant in disregard of that sex is illegal under Swedish law, with few exceptions. Persons classified as male and female may receive different health care according to gender factors if medically indicated, and additional measures may be taken to protect individuals from gender discrimination. Discrimination on the basis of nonconforming gender expression or identity is also illegal. Marriage is gender neutral, such that sex reclassification does not require any change of marital status or restrict future marriages on gendered grounds.

Legal parentage is gendered in the population register, with the parent giving birth listed as the mother, and the mother's spouse or biological father listed as the father. Following sex reclassification, the former name and identification number of the parent is removed to protect the applicant's privacy. Sterilization is not required for sex reclassification, as of 1 July 2013, but no rules are currently in place to determine how the parent will be listed in the event that a person reclassified as male gives birth or a person reclassified as female contributes sperm to fertilization. These decisions are currently left to future administrative decisions.

### **IV. Legal Challenges of the Existing Rules**

In December 2012, the Court of Appeals in Stockholm declared forced sterilization surgery of applicants for sex reclassification to be a violation of the Swedish Constitution and the European Convention of Human Rights. The government did not appeal the decision, which held that the surgery has no relation to one's gender identity and that forced surgery violates the right to bodily integrity and security. Litigation in Sweden is underway for compensation for a class of persons who were required to undergo sterilization under a former provision requiring such a procedure for sex reclassification under § 1. While genital surgery for persons seeking sex reclassification under § 1 is now considered permissive (if approved by the government), it remains unclear whether the government can deny a person with atypical sex development an application for sex reclassification on the grounds that his or her genitals do not appear typical for the sex identity sought. The government has indicated that future investigations should be forthcoming in this regard.

# THE LEGAL STATUS OF TRANSEXUAL AND TRANSGENDER PERSONS IN THE UNITED STATES

Jameson Garland

## I. Legal Framework and Statistics

In the United States, the division of power between the federal government and the individual states means that each citizen or resident may have multiple legally registered identities. The fifty states and the District of Columbia register births on birth certificates, and all of these jurisdictions use a gender marker in that registration. These certificates have substantial legal significance primarily under state law and are used to obtain other legal documents. They are not, however, otherwise conclusive of legal gender identity or used in daily life. The federal government maintains a separate registry for purposes of federal taxes and benefits under the Social Security Act. Its numeric identification, known as the Social Security Number, is used in all federal and state government transactions and even by most private commercial entities as an identification mechanism. The federal government and the states also administer separate forms of tangible identification documents. Passports are issued by the federal government, while other identification cards, such as drivers' licenses or non-drivers' identification cards, are issued by the states where individuals reside. As a result, persons who change one gendered registration, but not all, may have gender markers that may not match in all government records.

Access to health care is effectively required to have a legal sex reclassification in any United States jurisdiction but varies substantially throughout the country. Approximately one-third of the population receives publicly financed health care of some kind. These programs do not finance surgery to support gender identity, though they may approve hormone treatments as medically necessary in some circumstances. For the remainder of the population, approximately 16% have no medical insurance, 9% insure themselves privately, and the rest are insured solely through their employers, either through group-based private plans or public employee plans. Increasingly, private insurers are removing restrictions for financing sex reassignment surgery and hormone therapy, though often they do not expressly cover such treatments. A few public employee plans formally now cover these treatments as well. All private insurance plans, however, do not cover all health care related to gender transition, while even supportive plans may have "medical necessity" clauses that allow restrictions on procedures deemed non-essential for treatment of gender identity disorder.

Few laws in the United States expressly address transsexual or transgender persons. Federal law only does so negatively, withdrawing disability law protection and authorizing separation from military service for persons who identify as transsexual or transgender. Only seventeen states and the District of Columbia protect individuals from discrimination on the basis of gender identity. Most states allow amendment to birth records, but only twenty-eight do so by statute. The federal government and nineteen states administratively allow for changes to sex classifications, while three states allow for no corrections to gender markers on birth records at all. Under these conditions, many persons have avoided registration of changed gender altogether. It is, therefore, unsurprising that there are no national statistics for persons who have changed legal sex. All estimates in this regard are highly unreliable.

## **II. Changing Legal Sex or Gender – Procedure and Requirements**

### **1. Legal Procedure (Overview)**

The legal procedures for changing legal sex in the United States are complex and vary according to the controlling authorities. Regardless of where a person resides, that person's birth records are controlled by the jurisdiction in which the person was born. In most states, birth certificates are issued under the auspices of state law, typically through branches of each state's office of vital statistics or health department. The most notable exception in this regard is New York, which gives separate authority to New York City to register births within its jurisdiction. In sharp contrast, a person's driver's license or state identification card is issued by the jurisdiction in which the person resides, through that state's department of motor vehicles. Finally, the federal government issues Social Security Numbers through the Social Security Administration, with passports issued by the Department of State. As government actors, these authorities are subject to challenge administratively and in court on the basis of an adverse action. As administrative agencies, however, they are often granted considerable deference by courts reviewing their actions, and their liability for damages is limited.

### **2. Official Documents and Legal Requirements**

With multiple registration schemes in the United States, legal requirements for sex reclassifications are not uniform. This is particularly true for the laws of the individual states and the District of Columbia. For birth certificates, for example, of the forty-seven jurisdictions that permit changes of gender markers, twenty-nine states and the District of Columbia require court orders, but only four of these affirmatively require a doctor's letter or affidavit submitted to obtain those orders. Fifteen states require a court order to change gender markers on a driver's license, but only twelve of these jurisdictions require the same procedure to change a birth certificate. Thus, a person in Illinois, Iowa, and South Carolina would be required to obtain a court order to change a driver's license or other government-issued identification card, but not to change the birth certificate. The outcomes are equally diverse. In many states, a new birth certificate will be issued without removing or altering the prior certificate, which remains on the public records, while other jurisdictions change the original certificate or issue a new one while shielding prior certificates from public view altogether.

For medical requirements, the jurisdictions equally lack uniformity. Most states require proof of sex assignment surgery of some kind to change birth certificates, but most do not specify the surgery in detail. Only five states expressly allow other forms of treatment to suffice. For drivers' licenses and identification cards, however, eleven additional states permit gender markers to be changed without surgery. When surgery is required, courts or administrators typically require affidavits or testimony from physicians, but the degree to which such evidence is scrutinized cannot be confirmed. An affirmation from a physician or surgeon that the applicant has received the standard medical care for transition may suffice. In other states, the burdens of proof are higher. At the most extreme, New York State and New York City require submission of multiple, post-operative medical records for review by medical panels. Several states require that the surgery be "complete", including gonadectomy and genital surgery.

The current federal process for sex reclassification starkly contrasts with procedures in most states. For adults seeking a change of the gender marker on a passport or in Social Security registration, the applicant must (1) appear in person at the nearest office for the federal agency, (2) apply for the reclassification of gender on former documents, and (3) submit proof of

clinically appropriate treatment. Surgery is not required. The Department of State issues a new passport and returns the former passport to the applicant, as in all applications for new passports. The Social Security card and number do not contain gender markers, so the Social Security Administration changes the information associated with the number in its database, which is generally unavailable to the public. These changes have been made by the Obama Administration, not legislatively, and are subject to changes by future administrations.

### **III. Consequences of the Change of Legal Sex or Legal Gender**

For most legal identity matters, the effect of reclassification of sex identity is confined to the document itself, with the exception of the birth certificate in a majority of states. Six states require a change of the birth certificate to change other legal documents, such as a driver's license or government ID. In thirty-one states, though, same-gender marriages are not legally recognized. Thus, the status of marriages may be contested in some way where a sex reclassification of one spouse in a formerly male-female pairing results in both spouses having the same legal gender under state law. Two state supreme courts have also refused to recognize a marriage of persons with two different legal genders where one person had a sex reclassification. Those courts invoked the original birth classifications of the couples to deem the marriages same-gender marriages. In five other states, where same-sex couples are granted spousal rights under other forms, the most likely outcome is that the marriage, if not dissolved, should at least be respected as a civil union or domestic partnership. Only seventeen states protect individuals from discrimination on the basis of gender identity in matters such as health care, employment, and familial relations. As a result, a change of legal gender for many persons may still leave many such persons subject to legal uncertainty.

In other matters, the structure of the American legal system and availability of the right to travel among the states may afford significant protections. Forced divorce or restrictions on the right to preserve gametes for procreation are presumptively illegal under federal constitutional law. The Equal Employment Opportunity Commission now considers discrimination on the basis of sex reassignment surgery or gender identity a form of gender discrimination under federal law, while federal regulations also prohibit such discrimination in health care in most hospitals and any federally funded health care program. The right to move from state to state is constitutionally protected, enabling many individuals to circumvent restrictions in their state of birth in many instances. For example, an individual born in Tennessee – which refuses to amend birth certificates – could obtain a passport, social security number, and driver's license with the desired gender marker (or change the former marker), moving to a state with substantial legal protections. For many individuals, however – particularly those who are post-operative or in transition, or those without the resources to move or without understanding of the law – the sheer complexity of the federal-state identity registration system may be too difficult to navigate.

## ENGLAND AND WALES

### Stephen Gilmore

In England and Wales (indeed in the United Kingdom) the legally recognised gender of a transgender person is regulated by the Gender Recognition Act 2004, as prospectively amended by the Marriage (Same Sex Couples) Act 2013. The Act permits a person to apply to a Gender Recognition Panel for a Gender Recognition Certificate (GRC), recognising in the case of person suffering from gender dysphoria an ‘acquired gender’ in which the person is living, or to which the person has changed under the (approved) law of a country or territory outside the United Kingdom. Of particular note is the fact that there is no requirement to undergo gender realignment surgery before a person becomes legally recognised as of an ‘acquired gender’. Subject to provisions of the Gender Recognition Act 2004, and of other enactments, upon obtaining a GRC, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman). In the absence of a GRC, the gender of an individual is determined according to the common law ‘test’ set out in *Corbett v Corbett* (as apparently endorsed by the House of Lords in *Bellinger v Bellinger*), which focuses on the biological indicia of sex of an individual at birth.

The 2004 Act has attracted little judicial attention, but the law as set out in statute raises several interesting and controversial issues. This presentation will outline the background to the 2004 Act and its provisions, and will highlight two issues regarding the impact of an acquired gender upon other relationships, which English law has encountered: (1) the impact of the acquired gender upon an existing marriage or legally recognised same-sex partnership; and (2) its impact upon legal parenthood. The latter particularly raises some interesting issues given the lack of any requirement for surgery mentioned above, and laws on assisted conception.

Case law in England and Wales has tended to address discrimination issues relating to transgender persons, which are regulated, inter alia, by the Equality Act 2010. The presentation will briefly touch on the relevant law, and will also highlight the UK Government's recently expressed commitment to a transgender equality action plan following consultation with the transgender community (see HM Government, *Advancing transgender equality: a plan for action*, December 2011).

## IN THE DOCTORS' HANDS – BEING TRANSGENDER IN THE CZECH REPUBLIC

### Barbara Havelková

The paper argues that although the legal recognition of transsexuality – such as the possibility of a name-change and birth-record change – came early in the Czech Republic, transgender people continue to face legal problems.

One issue is that the legal change of sex is fully dependent on a medical diagnosis, on operative sex-change and on sterilization. This puts transgender people fully in the doctors' hands, and since the binary ideas of sex/gender prevail, it can require and impose identities and states of being which are not fully autonomously chosen. Through the biologisation and medicalization of the discourse, only transsexual rather than transgender issues are recognized.



Furthermore, the implementation of the rules, such as the possibility of name-change, continues to be dependent on discretion of individual officials. This leads to great legal uncertainty and highlights the doubtful nature of these rules as individual rights.

Finally, prejudice against transsexuals as parents prevails, and although research is largely unavailable on the issue of treatment of transsexuals by the social services and family courts, the anecdotal evidence suggests that although formally legally equal, the parental rights of transgender parents are in practice being curbed and violated.

## **TRANSGENDER AND TRANSSEXUAL ISSUES, GENDER IDENTITY AND LAW IN SINGAPORE**

**Terry S.H. Kaan**

In the Asian context, Singapore was an early pioneer in allowing and legalizing gender reassignment procedures, with the first such male-to-female operation performed in Singapore by Professor S. Shan Ratnam in July 1971, and the first female-to-male operation in October 1974. From the time of these earliest procedures, gender reassignment surgery appears to have been generally uncontroversial in Singapore, both approached and viewed alike by the public and the medical authorities in Singapore as a primarily medical issue, where restorative medical therapy was sought by the patient for the correction of a biological condition. The legal status of persons who had undergone such surgical gender reassignment procedures was greatly helped from the very start by the willingness of the Singapore government to change the gender classification on their National Registration Identity Card (the universal identity card carried by all Singaporeans and residents). Despite this early start, there has been legal hiccups along the way.

Although it was assumed from the start that persons who had undergone surgical gender reassignment (referred to as 'transgender' persons in this paper) assumed in all respects the rights (as well as statutory liabilities and obligations, which is further discussed below) of their chosen gender, this assumption was put to the test in divorce proceedings in the case of *Lim Ying v Hiok Kian Ming Eric* [1991] SGHC 135 in which the wife petitioner filed for a declaration that there had never been a marriage because her husband had been a woman until he had gender reassignment surgery in 1987. This was not made known to the wife until after the marriage. The application was filed by the wife after repeated failed attempts at consummation of the marriage.

In a landmark judgement, the High Court held that the old English common law, as exemplified by *Corbett v Corbett* [1971] P 83 was to be applied. The High Court held that under the relevant statutory provisions (the Interpretation Act, and the Women's Charter), the marriage had to be "a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage" as defined by the Interpretation Act, and that this necessarily "implied a legal impediment to the marriage of persons who are not of opposite biological sex is implied in the statutory definition of the monogamous marriage". The fact that the National Registration Office had accepted the amendment to husband's gender status in its records did not "make her [the husband] a male in law for purposes of marriage". Following this decision, the law relating to marriages involving transgender persons was thrown into confusion. It was

not until 1996 that the Singapore Parliament passed an amendment to the Women's Charter, making it clear that transgender persons were entitled to contract a marriage in accordance with their assigned and self-identified gender.

But other thorny issues remain. The body of statutory law in Singapore remain unclear in many areas impacting on the transgender person, particularly a female-to-male transgender person. Under Singapore law, all Singaporean males are compulsorily required (exemption being available only on medical grounds) to served up to two years of national service in the military or other national forces, and thereafter are subject to annual reserve service. The law is silent on the exact legal obligations of surgically reassigned transgender persons, although anecdotal evidence is that transgender persons are treated according to their reassigned and self-identified gender. Greater difficulties and uncertainties attend those who have not completed (or do not wish to undertake) surgical assignment: in this in-between land, what is the impact of the law?

There are considerable areas of legal concern especially for persons who identify in whole or in part with the opposite gender from that assigned social or officially to them at birth, or do not wish or cannot identify themselves as wholly being of one gender identity or another (referred to as 'transsexual' in this paper), and who do not want to undertake surgical reassignment. One central issue is that homosexual relations continues to be a criminal offence punishable by a term of imprisonment in Singapore under Section 377A of the Singapore Penal Code, which provides:

#### **Outrages on decency**

**377A.** Any *male* person who, in *public or private*, commits, or abets the commission of, or procures or attempts to procure the commission by any *male* person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years. [italics mine]

As is obvious, this is a gender-specific (and arguably, discriminatory) penal provision. In recent years, proposals for the abolition of this law has stirred much impassioned debate and controversy in Singapore. For now, the provision remains on the books, with the authorities stating that they will not 'proactively' prosecute on the provision, but the use of Section 377A in several prosecution involving minors show that this provision is not yet a dead letter. Homosexual and lesbian rights remain, unlike 'medicalized' surgical gender reassignment, a socially and politically live and controversial issue in Singapore.

Also, the range of statutory punishments available to the administration of criminal law system in Singapore extend to caning, a corporal punishment administered with a cane. Under Singapore law, only men below a certain age may be caned – the question of course is then whether a person may escape (or correspondingly, incur) such liability through gender reassignment.

This paper rounds off with a survey as to governmental attitudes towards 'non-traditional' gender and sexual orientation in Singapore, the general thrust of public policy towards issues such as homosexuality and lesbianism in the media, cultural as well as religious sensitivities in Singapore. Some attempts will be made in drawing some comparisons from the situation obtaining in neighbouring Malaysia, which with country Singapore shares a common constitutional and colonial history, but with a now very different society and culture.

## **THE LEGAL STATUS OF TRANSSEXUAL AND TRANSGENDER PERSONS IN HONG KONG**

**Athena Liu**

The Court of Final Appeal in its landmark decision of *W v Registrar of Marriages* upheld a post-operative transsexual person's constitutional right to marry. It held that the Corbett criteria (the sex of a person for the purpose of marriage is to be determined using biological criteria fixed at birth) are inconsistent with the right to marry in that they ignore not only the psychological and social aspects of a person's sexual identity, they also ignore the medical reality of sex reassignment surgery. In deciding whether Ms W qualifies as "a woman", so as to be entitled to marry a man, the law ought in principle to consider all the circumstances – biological, psychological, medical and social – relevant to assessing that individual's sexual identity at the time of the proposed marriage.

My paper discusses some of the legal consequences of this landmark ruling

## **THE LEGAL STATUS OF TRANSSEXUAL AND TRANSGENDER PERSONS IN AOTEAROA NEW ZEALAND**

**Elisabeth McDonald**

The final report of the New Zealand Human Rights Commission's Transgender Inquiry released in early 2008, *To Be Who I Am*, identified a number of areas in which New Zealand law and practice discriminates against those who identify as trans\* or intersex. Recently some of the difficulties faced by members of those communities, especially with regard to medical and legal requirements that must be undertaken before changes to identity documents can be made, have been addressed. It is now possible for individuals to have the sex details on their passport (M, F or X) or the driver's license register (male, female or indeterminate) altered by a declaration of self-identification, or for a citizenship or evidentiary certificate to contain different sex or gender details than the person's birth certificate on the presentation of a statutory declaration from the individual themselves.

In order for a person to amend the sex classification on their birth certificate however, an application must currently be made to the Family Court who may grant a declaration on the grounds that the applicant "[h]as undergone such medical treatment as is usually regarded by medical experts as desirable to enable persons of the genetic and physical conformation of the applicant at birth to acquire a physical conformation that accords with the gender identity of a person of the nominated sex" (s 28(3)(c)(i)(B) of the Births, Deaths, Marriages and Relationships Recognition Act 1995 (NZ)). This usually requires the person to have received both hormone and surgical treatment and then apply to the court for the declaration. Both these processes are expensive and, with regard to the medical requirement, not always desirable or necessary. As a consequence, a Private Member's Bill has recently been drafted to allow a

person's nominated sex or gender identity to be changed following the presentation of a statutory declaration. The options that can then be recorded on the birth certificate will be governed by regulation, in consultation with the relevant communities.

The recent amendment to the Marriage Act 1955 (NZ) – which took effect on 19 August, provides that two people can marry, regardless of their sex, sexual orientation or gender identity. This definition is significant as it allows the marriage of any two people, without the need for either person to define themselves as either the same or different sex as their partner. The definition allows a trans\* man to legally marry a cis woman without having to first establish his legal gender. A married person who wishes to transition to a different gender will now be permitted to remain married.

My paper will examine these and other recent or proposed changes to law and practice which impact on the legal status of trans\* people in Aotearoa New Zealand.

## **THE LEGAL STATUS OF TRANSSEXUAL AND TRANSGENDER PERSONS IN JAPAN**

**YUKO NISHITANI**

Japan has a unique transgender subculture. There are often mystic bisexual figures in mythology and shamanism. During the period of feudalism, cross-dressing or transcending gender was not unusual, for example in kabuki theaters, where female roles generally were played by male actors. Notwithstanding the modernization and westernization since the mid-19th century, transgender subculture has remained in kabuki, nō or even in pop music.

Despite this tradition, institutionalizing medical and legal measures for transsexualism or gender identity disorder (GID) was a long process. After the 1969 blue boys case, in which a doctor providing transsexual surgery was convicted for violating the Eugenic Protection Act, the first gender reassignment surgery was undertaken only in 1998, following societal recognition of GID since the mid-1990s. While Family Courts generally allowed transsexual persons to change their names, they were reluctant to allow changing their legal sex in the family register. It was not until the GID act was enacted on 16 July 2003 (coming into force one year later) that transsexual persons were finally entitled to change their legal sex (2,996 cases so far).

Pursuant to the GID act, changing of legal sex requires a Family Court decree, which is subject to appeal to High Court and Supreme Court. The person must be an adult (at least 20 years old), unmarried and have undergone surgery to be infertile and have the appearance of the other sex. The requirement of childlessness in the 2003 act was criticized heavily, and the requirement was amended to the absence of minor children in 2008. Whether a person suffers from GID and is eligible to surgery is decided by specialist panels pursuant to guidelines of the Japanese Society of Psychiatry and Neurology. The person can get married on the basis of the changed legal sex. Still, a child born out of marriage between an FtM and a woman by way of artificial insemination is treated as an illegitimate child.

Although the GID act brought about significant advantages, it had some serious drawbacks as well. First, the condition of being unwed has sometimes forced transsexual persons to divorce and abandon their family to realize their gender identity. Second, the requested kind of surgery causes serious physical burden and prohibitive cost in the absence of available health

insurance (approx. US\$ 15,000 for MtF and US\$ 45,000 for FtM). Third, the GID act presupposes a sharp division between male and female sex, and disregards other transsexual/transgender conditions. Due to these drawbacks of the GID act, a number of transsexual/transgender persons cannot afford or do not want to change their legal sex and, as a result, suffer from discrimination. It remains a challenge how to achieve tolerance and true diversity in Japanese society.

## **THE MEDICAL AND PSYCHOLOGICAL VIEWS**

### **Friedemann Pfäfflin**

The first clinical significant report of what we now call transsexualism, or transgenderism respectively, dates back to the year 1870 and was published in a German psychiatric journal. The first sex reassignment surgery was performed in 1912 in Germany on a female-to-male, so more than a hundred years ago. Both events occurred at the time of the birth of sexology in Germany, long before the terms transsexualism and transgenderism were coined. At the beginning of the 20<sup>th</sup> century, sex research rapidly spread across European countries, but it was only after the World War II (1939-1945), that it turned into a worldwide movement, established itself academically and gained momentum in changing life conditions.

The presentation will outline the different medical and psychological views that developed during the last century with respect to transgenderism. They are closely interwoven with legal concepts of the nature of an individual, of the integrity of that individual, and of the limits of the legitimacy of medical interventions.

Initially, transsexual persons were viewed as severely mentally handicapped persons who needed care in secure psychiatric hospitals. When persons who we now call male-to-female transsexuals, or transgender people respectively, engaged in intimate partnerships, they often were sentenced to imprisonment for violating anti-homosexual laws. Similarly, surgeons offering sex reassignment surgery risked to be sentenced for afflicting grievous bodily harm to somatically healthy persons.

In the 1920s, a number of sex reassignment surgeries were performed in Berlin (Germany) and Prague (then Czechoslovakia). With some exceptions, they drew rather little public attention. This changed after World War II in the 1950s, when cases involving famous persons were published on a larger scale. It was only then that the public discussion heated up, mixing medical and theological views and declaring, „the medical doctor is not God“ and thus is not allowed to change the sex of a person.

Starting in the 1960s, access to hormonal and surgical sex reassignment became easier and more people applied for it, thus stimulating the medical as well as the legal discussion about sex change. Many issues had to be resolved, e.g. if a post-transition person was to be recognized in her new sex and gender role, and under which conditions health insurances were obliged to pay for sex reassignment.

During the last decade, the debate on sex and gender change went far beyond medical issues, demanding and achieving acknowledgement of legal sex change increasingly without a requirement to receive medical treatment.

## **THE LEGAL STATUS OF TRANSEXUAL PERSONS IN BELGIAN AND DUTCH LAW**

### **Walter Pintens**

Until 2007 Belgian law did not provide specific rules for a change of legal gender, but a change was possible by court practice. The law of 10 May 2007 introduced an administrative procedure before the registrar of civil status. The applicant has to prove that he or she has the constant and irreversible conviction of belonging to the sex opposite to the one stated on the birth certificate by presenting a statement from a psychiatrist and a surgeon; that he or she has undergone gender reassignment surgery, if this is possible and justifiable from a medical standpoint; and that he or she is not capable of producing children in accordance with his or her previous gender.

In the Netherlands the Supreme Court took a restrictive position and focused on the morphological characteristics at birth and excluded a rectification of the birth certificate. The law of 24 April 1985 introduced a judicial procedure. Every person who is convinced that he or she is of another gender than registered on the birth certificate, who is definitely incapable of procreation and is physically adjusted to the desired gender insofar this is possible and acceptable from a medical and psychological point of view, may request the District Court to order a change of gender.

The list of requirements indicates that in principle in both legal systems a physical adaption to the new gender by surgery or hormonal treatment is necessary. This requirement is not in accordance with the Jogjakarta Principles. But both legal systems have also introduced an exception, a kind of escape clause. The adaption is only prescribed insofar as 'possible and justifiable from a medical point of view'. In Dutch law an adaption is also not necessary in case of psychological objections. However, the requirement of infertility is absolute in both legal systems and therefore contrary to the Jogjakarta Principles.

Recently, the Dutch government introduced a proposal taking into account the Jogjakarta Principles and simplifying the procedure. The proposed bill introduces an administrative procedure before the registrar of civil status. The bill passed the Second Chamber and is now pending before the First Chamber. Likewise, in Belgium several proposals were made.

## **THE LEGAL STATUS OF TRANSSEXUAL AND TRANSGENDER PERSONS IN IRELAND**

**Brian Sloan**

There is no comprehensive mechanism through which one can change one's legal gender in Irish Law. This is in spite of the fact that in 2007, Ireland's own High Court unsurprisingly declared it to be in breach of the European Convention on Human Rights because of its failure to provide such a means of legal gender change. It took until 2011 for a Gender Recognition Advisory Group composed entirely of representatives from Government Departments to make recommendations on gender recognition. Legislation based upon the Group's proposals is still awaited, and the proposals themselves could be criticised for their conservatism.

That said, 2013 has seen a number of significant developments towards the introduction of legal gender change. Two Private Members' Bills seeking to bring about a scheme were propagated, and in July the Government eventually published the General Scheme (or 'heads') of its expected Gender Recognition Bill. Although it is more cautious than either of the Private Members' Bills, the General Scheme did not slavishly follow the recommendations of the Advisory Group. For example, the Scheme would allow applications for a gender recognition certificate to be made directly to the Minister for Social Protection and negate the need for a Gender Recognition Panel, it contains medical criteria that are intended to bring intersexual people within its scope, and it would not impose a requirement that an applicant has previously lived in his or her acquired gender for a fixed period.

This presentation will outline the limited extent to which a person's acquired gender is currently recognised by the Irish state. It will then examine the proposals in the Government's General Scheme, comparing it to both of the Private Members' Bills as well as the original recommendations of the Gender Recognition Advisory Group. The presentation will criticise aspects of the General Scheme, in particular its requirement that an applicant for a gender recognition certificate be single and its consequent failure even to use the mechanism of interim certificates for applicants in a subsisting marriage or same-sex civil partnership. The Scheme's lack of clarity in dealing with a transgender person's relationships with children will also be highlighted, as will the possible consequences of its medical criteria. While other elements of the Scheme are more encouraging, the presentation serves as a reminder that Ireland remains one of the few places in Europe where a person's legal gender is largely fixed at birth.

**THE LEGAL STATUS OF TRANSSEXUAL AND TRANSGENDER PERSONS IN AUSTRALIA  
2013 – A CONTEMPORARY REPORT ON DIVERSITY IN HUMAN SEXUAL FORMATION  
AND GENDER EXPRESSION IN AUSTRALIAN LAW**

***Rachael Wallbank***

This presentation will take the form of a brief report on the law of Australia as it affects the legal and human rights of people who experience diversity in sexual formation and gender expression; being people variously described as experiencing transsexualism, trans/pan-gender and intersex.

The presentation will indicate and comment on the various legal regimes for determining Legal Sex and Legal Gender, including those based upon genital reassignment and other physically rehabilitative medical treatments, compliance with cultural gender expression expectations and self determination applied through either legislative tests or hybrid legislation/panel assessment methods as found in the six State and two Territorial jurisdictions within Australia.

The presentation will consider the recent landmark decisions of the High Court of Australia in *AB & AH v The State of Western Australia* [2011] HCA 42 and *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145 determining the interpretation of State legislation, competing methodologies and ideologies associated with the views of "other" and "self" and the various attempts by cultures to fit a biologically diverse humanity into a limited number of categories of Legal Sex and Legal Gender.

The presentation will provide an update on the unique role of Australian Family Law in restricting access to hormonal Sex Affirmation Treatment for adolescents with reference to the recent decisions of the Family Court of Australia in *Re: Lucy (Gender Dysphoria)* [2013] FamCA 518 - 12/07/2013 and by the Full Court of that court in *Re: Jamie* [2013] FamCAFC 110 (31 July 2013)

Finally, if time permits, the presentation will venture some brief reflections arising out of the presenter's conduct of the *Re Kevin and Jennifer* proceedings at trial and on appeal.