

# **Comments on Transsexualism in the Province of Quebec**

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**PLAN**

<b>INTRODUCTION</b> .....	169
<b>1 - The legality of conversive surgery</b> .....	174
(A) According to the Criminal law .....	174
(B) According to Quebec Civil law .....	177
<b>2 - The sexual status of the post-operative transsexual</b> .....	179
<b>CONCLUSION</b> .....	183

## INTRODUCTION

In March 1971, the *Centre Hospitalier Universitaire* of the *Université de Sherbrooke* issued a press *communiqué* announcing that a "change of sex" operation had been performed on a male transsexual<sup>1</sup>. On Wednesday, October the 17th 1973, Judge Gilles Lahaye of the Court of Sessions in Drummondville, was taken aback when Gérard Pelletier, previously found guilty of receiving stolen goods, reappeared in court for sentencing. The problem was that the accused was now "Mlle" Pelletier following surgery<sup>2</sup>. Obviously, legal problems relating to transsexualism have begun to crop up in the Province of Quebec, much to the dismay of jurists who are compelled to formulate opinions on the subject without the benefit of any direct legislative guidance.

Transsexualism may be defined as a psycho-sexual disorder in which a person has the unshakeable conviction of being a member of the opposite sex, or in other words, of being a man imprisoned in a woman's body or *vice versa*<sup>3</sup>.

- 1 *Liaison, Bulletin d'information de l'Université de Sherbrooke* April 1971, vol. 5, no. 28, p. 9.
- 2 *The Montreal Star*, Thursday October 18, 1973, Pelletier was sentenced to a day in jail, presumably thus avoiding the administrative problem as to where to incarcerate "her" i.e. with the men or with the women.
- 3 D.H. RUSSELL *The Sex Conversion Controversy*, (1968) 279 *New England Journal of Medicine* 535; Ira B. PAULY, *Adult Manifestations of Male Transsexualism* in R. Green and J. Money editors, *Transsexualism and Sex Reassignment* Baltimore, The Johns Hopkins Press, 1969, at p. 3. In addition to Green and Money's book, problems of transsexualism are discussed in H. BENJAMIN, *The Transsexual Phenomenon*, New York, The Julian Press Inc., 1966, and in Robert J. STOLLER's *Sex and Gender*, New York, Science House, 1968. For discussions of the legal aspects of transsexualism, one may recommend David MEYERS, *The Human Body and the Law*, Chicago, Aldine Publishing Co., 1970, pp. 48-69; Gail BRENT, *Some legal Problems of the Post-Operative Transsexual*, (1972-73) 12 *Journal of Family Law*, 405-422; ANONYMOUS, *Transsexuals in Limbo: The Search for a Legal Definition of Sex*, (1971) 31 *Maryland Law Review*, 236-254; John HOLLOWAY, *Transsexuals - Their Legal Sex*, (1968) 40 *U. of Colorado Law Review*, 282-295 (this article is reproduced with modifications in Green and Money, *supra*); Douglas SMITH, *Transsexualism, Sex Reassignment Surgery and the Law*, (1971) 56 *Cornell L. Rev.*, 963-1009; Ian KENNEDY, *Transsexualism and Single Sex Marriage*, (1973) 2 *The Anglo-American Law Rev.*, 112-137; K. MOORE, C. EDWARDS, *Recent Developments Concerning the Criteria of Sex and Possible Legal Implications*, (1959) 31 *Manitoba Bar News*, 104 (the gist of this article is reproduced under the title *Medico-Legal Aspects of Intersexuality: Criteria of Sex*, (1960) 83 *Can. Med. Ass. Journal*, 709-714 and 756-760); S.A. STRAUSS, *Transsexualism and the Law*, (1970) *Comp. and Int. L. J. of South Africa*, 348-359; J. ACCARD, J. BRETON, J. CHARBAUT, P. HIVERT, M. PHILBERT, S. SCHAUB and S. TROISIÈRE, *Problèmes médico-légaux et déontologiques de l'hermaphrodisme et du transsexualisme*, (1969) 2 *Méd. lég. et dommage corporel*, 342-352, (1970) 3 *Méd. Lég. et dommage corp.*, 123-159. Aside from Holloway's article mentioned above, Green and Money's book also contains the following contributions of particular interest to jurists: Robert SHERWIN,

In order to set this problem apart from homosexuality and transvestism, the term "transsexualism" was coined by Dr. Harry Benjamin, a noted New York endocrinologist who has had extensive experience in the field of gender identity problems<sup>4</sup>.

The one basic similarity between transsexualism and homosexuality is that victims of both these disorders are sexually drawn to members of their own sex. However, the transsexual views the relationship as essentially heterosexual because he sees himself (psychologically at least) as a member of the opposite sex. The transsexual is also transvestitic, objectively speaking, since he or she has a strong desire to cross-dress. The difference between the two reposes upon the fact that the transvestite is generally heterosexual, (except for the "drag-queen" or transvestitic homosexual whose cross-dressing is simply a device for attracting other homosexuals)<sup>5</sup>. For example the transvestite (almost always male), wears women's clothing in order to excite himself sexually as a man. His fantasies usually end in masturbation. As for the transsexual, the cross-dressing is nonsexual inasmuch as it is being done for personal comfort or peace of mind. Also, both male and female transsexuals cross-dress. Still another factor distinguishing the two is that the genuine transvestite does not seek a sex-change, being satisfied with his own sex<sup>6</sup>.

Transsexuals should also be distinguished from hermaphrodites or intersexes in that the former manifest congruent physical criteria regarding their sex, whereas hermaphrodites display contradictory physiological factors of sex. For instance, the true hermaphrodite may possess both testicular and ovarian tissue in the gonads; the male pseudo-hermaphrodite has testes but is more or less feminized and the female pseudo-transsexual has ovaries but is virilized<sup>7</sup>.

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*Legal Aspects of Male Transsexualism*, pp. 417-430; Thomas JAMES, *Legal Issues of Transsexualism in England*, pp. 441-451; Georg STURUP, *Legal Problems Related to Transsexualism and Sex Reassignment in Denmark*, pp. 453-460; Jan WALINDER, *Medicolegal Aspects of Transsexualism in Sweden*, pp. 461-465.

4 BENJAMIN, *ibid.*, pp. 16-17.

5 Ira PAULY, *The Current Status of the Change of Sex Operation*, (1968) 147 J. Nervous and Mental Disease, 460 at p. 463. The heterosexual proclivities of transvestites are perhaps illustrated by the tale of Abdullah the Hairdresser, which was recently reported by the Associated Press: A young lady named Victoria was arrested and placed in Beirut Lebanon's jail for women. After a few weeks the guards grew suspicious of all the fights which erupted among the women inmates in order to see who would be locked up for the night with Victoria. Following a physical examination, Victoria turned out to be Abdullah, a transvestite. According to last reports, prison officials were attempting to discover how many prisoners were pregnant.

6 L. KUBIE, J. MACKIE, *Critical Issues Raised by Operations for Gender Transmutation*, (1968) 147 J. Nervous and Mental Disease, 431 at p. 436.

7 P. BISHOP, *Intersexual States and Allied Conditions*, (1966) 1 British Med. Journal 1255; J. MONEY, *Sex Reassignment as Related to Hermaphroditism and Transsexualism*, in Green, Money, 91 *et seq.*

In the case of hermaphroditism, surgery is often performed in order to assign or affirm a sex while with transsexualism, the goal of the surgery is complete sex reassignment.

The etiology of transsexualism is unknown, although opinions range from a purely physiological basis such as an endocrinological imbalance, to psychological causes. It has been found for instance that the transsexual child usually comes from a broken or unhappy home with one of the parents absent or ineffectual in his or her role. Thus, a boy living with a divorced mother would not have a male figure upon which to model his own behavior. However, it should be stated that experts feel that the problem is perhaps mixed i.e. a combination of psychological conditioning coupled with physical conditions (e.g. genetic or endocrinological), which predispose the child to accepting a deviant behavior pattern. Otherwise, as they point out, all children brought up by one parent would be transsexual. It may also be surprising to note that many pre-operative transsexuals are or have been married and are often parents. It is generally felt that marriage is a last desperate attempt by transsexuals to adapt to their biological sex. As may be expected, these marriages end in failure<sup>8</sup>.

Transsexualism affects both sexes although the male to female ratio is generally placed at four males to every female transsexual. On a broader basis, it is estimated that there is one transsexual for every one hundred thousand population<sup>9</sup>. If we presume the population of Quebec to be six million five hundred thousand, then we may estimate that there are about sixty-five transsexuals in this Province, of whom about sixteen are female and forty nine are male - hardly imposing figures.

The decision to perform conversive surgery on transsexuals has arisen out of the failure of all types of psychotherapy to shake the convictions of the patient that he or she possesses the wrong body. Since transsexuals are often sufficiently desperate to resort to self-mutilation or suicide, medical opinion, for the most part, feels that perhaps the next best solution (other than doing nothing) is to adapt the body to satisfy the mind<sup>10</sup>.

Before undertaking conversive surgery, reputable institutions always prescribe hormone treatments which allow the transsexual to develop certain features of the opposite sex while repressing features of his or her own<sup>11</sup>. Male

8 W. POMEROY, *Transsexualism and Sexuality: Sexual Behavior of Pre- and Post-Operative Transsexuals*, in Green, Money, 183 at p. 186.

9 PAULY, *The Current status of the Change of Sex Operation*, *loc. cit.*, p. 462.

10 BENJAMIN, *The Transsexual Phenomenon*, *op. cit.*, p. 91; R. GREEN, *Conclusion* in Green, Money, 467 at p. 470. Conversive surgery has been performed in the following countries: Morocco, U.S.A., Canada, England, West Germany, Denmark, South Africa, Ethiopia, Italy, Belgium, Norway, Sweden, Argentina, Japan and Mexico.

11 C. HAMBURGER, *Endocrine Treatment of Male and Female Transsexualism*, in Green, Money, 291; BENJAMIN, *The Transsexual Phenomenon*, *ibid.*, pp. 92-99.

transsexuals receiving female hormone (estrogen) develop enlarged breasts and a redistribution of subcutaneous fat, thus imparting to the body a more curvaceous appearance. The growth of scalp hair is increased but libido diminishes. Female transsexuals receiving male hormones stop menstruating, produce more body hair and develop a deeper voice, amongst other effects. During this period of hormone therapy, the patient is encouraged to cross-dress and generally to adopt his or her preferred sex role. In this manner, should the patient have a change of heart concerning conversion, the hormones are discontinued and the patient may revert to his or her former status<sup>12</sup>.

After a period of evaluation and hormone treatment, the male transsexual undergoes castration and removal of the penis. A cavity is made forward of the anus and an artificial vagina is created, generally by inverting the skin of the penis which has been denuded before amputation. Portions of the scrotum are fused to form labia<sup>13</sup>. In the case of a female transsexual, a mastectomy and hysterectomy with removal of the ovaries is performed. A penis of sorts is created by way of a skin graft (with or without a urinary function). A scrotum can also be added containing silastic prostheses<sup>14</sup>.

The surgery is generally more successful on males than it is on female transsexuals for the simple reason that converted males are given a sexually functional vagina (some even experience orgasm) whereas the female's new member is of no use sexually since it cannot erect<sup>15</sup>. Needless to say, both sexes are sterile after surgery. In addition, both are obliged to continue hormonal intake the rest of their lives.

Before discussing the legalities involved in this type of treatment, one must emphasize four facts which may be of particular interest to jurists: Firstly, the transsexual is not considered psychotic and apart from the question of gender identity, appears to function normally (if one makes allowance for a higher than average incidence of anti-social or criminal activity found in this class of people). Although one may encounter transsexuals who are obviously in a poor mental state, the "average" transsexual is sane and capable of furnishing a valid consent to surgery and treatment<sup>16</sup>.

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12 BENJAMIN, *ibid.*, p. 94.

13 H. JONES, *Operative Treatment of the Male Transsexual*, in Green, Money, 313 *et seq.*

14 J. HOOPES, *Operative Treatment of the Female Transsexual*, in Green, Money, 335 *et seq.*

15 Ira PAULY, *Adult Manifestations of Female Transsexualism*, in Green, Money, 59 at pp. 86-87.

16 STOLLER, *Sex and Gender*, *op. cit.*, pp. 248-251; KUBIE, MACKIE, *loc. cit.*, p. 434.

Secondly, one must remember that the post-operative transsexual does *not* change sex. A true change of sex, according to current medical opinion, is physically impossible. Thus the transsexual merely becomes (as the case may be) a neutered male or female with the superficial anatomy of the adopted sex<sup>17</sup>. Where confusion often arises is between the concept of sex, which is a biological notion, and that of gender or gender identity, which relates to a person's psychology<sup>18</sup>. Accordingly, the male transsexual is a biological male with a female gender identity, just as the female transsexual is a biological female with a male gender identity.

The third point one should retain is that the "change of sex" procedure is considered experimental in nature. After a period of evaluation with a sufficient sampling of "converted" transsexuals, it may eventually be revealed that the initial satisfaction they generally experience post-surgically turns into frustration with the knowledge that a true change of sex with a reproductive function can never be attained<sup>19</sup>. In any case, physicians are unable to predict long-term results and for this reason feel that extreme care should be exercised in selecting candidates for surgery.

Finally, several post-operative transsexuals have been known to regret their decision and to have reverted to their "original" sex. Admittedly, this has generally occurred in cases where the candidates for surgery have not been subjected to careful selection<sup>20</sup>.

There are two main aspects which warrant scrutiny in light of Quebec law: The first involves the legality of the operation itself, both from a criminal as well as from a civil law point of view, and the second deals with the rectification of the registers of civil status.

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17 BENJAMIN, *The Transsexual Phenomenon*, *op. cit.*, p. 46; MOORE, *Recent Developments Concerning the Criteria of Sex and Possible Legal Implications*, *loc. cit.*, p. 112; J. RANDELL, *Pre-operative and Post-operative Status of Male and Female Transsexuals*, in Green, Money, 355 at p. 367.

18 This distinction is the central theme of Stoller's book *Sex and Gender*, *op. cit.*

19 JAMES, in Green, Money, *loc. cit.*, pp. 449 and 451; R. STOLLER, *A biased View of "Sex Transformation" Operations*, (1969) *Journal of Nervous and Mental Disease*, 312 at p. 316.

20 RANDELL, *loc. cit.*, p. 373; BENJAMIN, *The Transsexual Phenomenon*, *op. cit.*, pp. 124 and 158.

## 1 - THE LEGALITY OF CONVERSIVE SURGERY

### (A) According to the criminal law

The Canadian *Criminal Code* makes no mention of any direct prohibition with regards to conversive surgery and the courts have never had occasion to decide the legality of this type of operation. Consequently, the question whether a surgeon would be immune from criminal prosecution following a "change of sex" operation is far from settled. If a surgeon operated on a transsexual with reasonable skill and competence following an informed consent, the only provision one could possibly attempt to invoke against him would be sec. 228 of the *Criminal Code* dealing with the crime of causing bodily harm with intent:

"Everyone who, with intent (a) to wound, maim or disfigure any person, (b) to endanger the life of any person, or (c) to prevent the arrest of any person discharges a firearm, or gun or air pistol at or causes bodily harm in any way to any person, whether or not that person is the one mentioned in paragraph (a), (b) or (c) is guilty of an indictable offence and is liable to imprisonment for fourteen years".

The important terms in this section are "wound", "maim", "disfigure" and "bodily harm". "Wound" and "disfigure" are somewhat self-evident. "Bodily harm" refers more particularly to any injury or hurt which interferes with the health or comfort of a person<sup>21</sup>. "Maim" relates to the old common law crime of mayhem defined by Blackstone as:

"... the violently depriving another of the use of such of his members as may render him the less able in fighting either to defend himself or to annoy his adversary. And (include) therefore, the cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts the loss of which in all animals abates their courage ..."<sup>22</sup>

This law respecting mayhem sought to prevent the mutilation of men eligible to be called to arms in case of need in order to fight for the King<sup>23</sup>. Obviously, castration was considered a means of committing this type of crime<sup>24</sup>. As we may note, the use of the general term "maim" in our *Criminal Code* would imply that unlawful castration forms part and parcel of causing bodily harm with intent. Although one must admit that castration in the traditional sense would apply only to males (since only they were subject to

21 I. LAGARDE, *Droit pénal canadien*, Montréal, Wilson & Lafleur Ltée., 1962, p. 332.

22 Sir William BLACKSTONE, *Commentaries on the Laws of England* by W. N. Welsby, New York, Harper and Bros., 1847, at p. 213.

23 Examples of prosecutions for mayhem are given by Denning, L. J., in the case of *Bravery v. Bravery*, (1954) 3 All. E.R. 59 at p. 67.

24 BLACKSTONE, *op. cit.*, p. 206.

compulsory military service), women exposed to conversive surgery would be equally covered by sec. 228 Cr. C., under the expressions "wound", "disfigure" and "bodily harm"<sup>25</sup>.

A surgeon prosecuted under sec. 228 Cr. C. would probably attempt to invoke a defence based on the consent of the victim, or else he would seek the protection of sec. 45 Cr. C.

Concerning the first defence, Lagarde is of the opinion that:

"Les dispositions du présent article sont-elles assez larges pour couvrir les cas de mutilations volontaires, c'est-à-dire les cas où une personne se mutile elle-même ou permet à une autre de la mutiler? En Angleterre, on a décidé qu'en vertu du 'common law' une personne commet un acte criminel ('indictable offence') lorsqu'elle se mutile elle-même. Au Canada, depuis le présent code, le 'common law' n'est plus générateur d'infractions. Une mutilation est produite par des voies de fait (art. 244 C.cr.). Or il ne peut - en droit - y avoir 'voies de fait' si la victime ou le 'patient' y consent, les autorise ou les réclame"<sup>26</sup>.

In other words, Lagarde felt that the English case of *R. v. Donovan*<sup>27</sup> would not be authoritative in Canadian law. In the *Donovan* affair, the accused was found guilty of both common and indecent assault upon the person of a seventeen year-old girl. It appears that he convinced the victim to allow herself to be flagellated for purposes of his own sexual gratification. Donovan appealed on grounds of misdirection to the jury and the whole debate revolved around the question whether consent would furnish a valid defence to an accusation of causing bodily harm. In allowing the appeal, the Court of Criminal Appeal held, per Swift J., that:

"If an act is unlawful in the sense of being in itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it is done consents to it. No person can licence another to commit a crime. So far as the criminal law is concerned, therefore, where the act charged is in itself unlawful, it can never be necessary to prove absence of consent on the part of the person wronged in order to obtain the conviction of the wrongdoer. There are, however, many acts in themselves harmless and lawful which become unlawful only if they are done without the consent of the person affected"<sup>28</sup>.

25 It is interesting to note that in the United States, it has been decided on occasion that maiming would apply to the mutilation of the sex organs of women. Cf. *Kitchens v. State*, (1888) 7 S.E. 209 (Georgia).

26 LAGARDE, *op. cit.*, p. 332.

27 (1934) 2 K.B. 498.

28 *Ibid.*, p. 507. Critiques of this case are contained in Glanville WILLIAMS, *Consent and Public Policy*, (1962) Crim. L. R. 74 at pp. 155 and 156; and in WILLIAMS' book, *The Sanctity of Life and the Criminal Law*, New York, Alfred A. KNOPF, 1970, pp. 105-107.

Lagarde's opinion to the effect that a patient consenting to a mutilation would not be able to rely on *R. v. Donovan* is based on the premise that a mutilation presupposes an assault, and therefore under the terms of sec. 244 Cr. C., assault would take place only in the absence of consent by the victim<sup>29</sup>. Yet, this assumption is open to criticism since the causing of bodily harm is much more than a simple assault, both in its actual physical consequences as well as in the eyes of the Canadian legislator. Indeed, Parliament felt that while, simple assault could be sanctioned only by summary conviction or by a two-year imprisonment sentence (if charged as an indictable offence)<sup>30</sup>; causing bodily harm with intent, on the other hand, would carry a maximum punishment of fourteen years<sup>31</sup>. In addition, it is very unwise to proceed by analogy in the area of criminal law. Consequently, a means of defence expressly mentioned in the *Code* with regards to one crime would not necessarily apply to other crimes more or less similar in nature. As a final point, we could also point out that since crimes involve public order, the consent of an individual would not suffice to eradicate this public interest unless the *Criminal Code* allowed otherwise.

As mentioned earlier, another likely defence may be founded upon sec. 45 Cr. C. which provides:

"Everyone is protected from criminal responsibility for performing a surgical operation upon any person for the benefit of that person if,

(a) the operation is performed with reasonable care and skill and,

(b) it is reasonable to perform the operation, having regard to the state of health of the person at the time of the operation is performed and to all the circumstances of the case".

Now the question may be asked, is a "change of sex" operation which destroys healthy tissue and which terminates the reproductive capacities of an otherwise physically healthy individual, something which is performed "for the benefit of that person"? From a strictly somatic point of view, the answer is definitely no - quite the contrary. On the other hand, if one takes into consideration, the broader notion of psychological or emotional contentment, then one must reply in the affirmative, especially since a large porportion of untreated transsexuals are pushed to self-mutilation or suicide. Of course, the most diffi-

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29 Sec. 244 Cr. C. reads as follows: "A person commits an assault when, without the consent of another person or with consent, where it is obtained by fraud (a) he applies force intentionally to the person of the other, directly or indirectly, or (b) he attempts or threatens, by an act or gesture, to apply force to the person of the other, if he has or causes the other to believe upon reasonable grounds that he has present ability to effect his purpose".

30 Sec. 245 Cr. C.

31 Sec. 228 Cr. C.

cult idea to accept is that conversive surgery does not cure, it is merely palliative -the pre- or post-operative transsexual remains a deviate. However do we not regard surgery destined to destroy healthy nerve tissues of suffering cancer patients an act of humanity?

Concerning the question whether it is reasonable to perform the operation, "having regard to the state of health of the person, . . . and to all the circumstances of the case", one must immediately have recourse to medical opinion, primarily in order to determine whether this radical type of surgery is warranted in cases of transsexualism and if so, then whether, in the case at hand, it should have been performed on the patient. Practically speaking, the validity of conversive surgery would have to be accepted by the medical profession at large before it could be invoked with success before the courts. Then one would have to demonstrate that in the particular case in question, careful psychiatric evaluation has indicated that surgery could be carried out. Consequently, a surgeon performing "changes of sex" on a cash and carry basis with no questions asked would be very hard put to defend the reasonableness of his decision to operate. This at least would help to deter charlatans and quacks.

In summary therefore, conversive surgery completed after stringent screening does not appear to be contrary to our criminal law provided that there is no other less radical form of treatment which can offer equivalent substantial relief to the transsexual.

**(B) The legality of conversive surgery with regards to Quebec Civil law**

As in France, Quebec adheres to the general rule that "the human person is inviolable"<sup>32</sup>. Unlike the French however, Quebec jurisprudence has never launched into a debate as to whether this rule of public order would permit surgery to be performed upon purely psychological grounds. Since this question was eventually settled by the French courts in favour of the proposition that psychiatric indications could serve as a basis for surgery provided that the risk involved was proportional to the advantage to be attained, one would have thought that France would assume a liberal attitude towards "change of sex"<sup>33</sup>.

Unfortunately, in a judgment dated the 18 th of January 1965, the *Tribunal de Grande Instance* not only refused the modification of a birth certificate requested by a post-operative transsexual, it also took advantage of the occasion to declare such operations illicit<sup>34</sup>. Understandably, this point of view

32 Art. 19 C.C.

33 Lyon 27 mai 1936, D. 1936.465; Paris 20 juin 1960, G.P. 1960.2.169; Paris 13 jan. 1959, J.C.P. 1959.11.11142 (note R. Savatier). See also R. SAVATIER, J. SAVATIER, J. AUBY, H. PEQUIGNOT, *Traité de droit médical*, Paris, Librairies Techniques, 1956, no. 274, p. 248; A. DECOCQ, *Essai d'une théorie générale des droits sur la personne*, Paris, Librairie Générale de Droit et de Jurisprudence, 1960, no. 458, pp. 317-318.

34 Seine 18 jan. 1965, J.C.P. 1965.11.14421 (Conclusions Fabre).

appears to be in total agreement with attitudes of the French medical profession since:

“Le Conseil de l'ordre des médecins a rappelé, au moment où les tribunaux prononçaient le changement d'état civil de transsexuels opérés à l'étranger, qu'il ne peut que condamner toute intervention mutilante qui aurait pour objet de transformer un sexe bien défini” (séance du 12 janvier 1962)<sup>35</sup>.

Therefore it is apparently safe to say that until this outlook is substantially modified, conversive surgery will remain illegal in France<sup>36</sup>.

Is the French point of view valid under Quebec law? Since no formal declarations have been made either one way or another by Quebec's College of Physicians, we cannot categorically approve or disapprove of this type of procedure. However, in light of the serious research made in this field by highly reputable institutions such as Johns Hopkins and the Universities of Minnesota, Stanford, NorthWestern, Arkansas, Michigan, Kentucky, Virginia and California, just to name a few<sup>37</sup>, there is apparently a strong presumption that conversive surgery may be considered a valid form of treatment. In the final analysis, our courts will lean in the same direction as the medical profession, provided the latter reaches some form of consensus regarding “sex changes”. Otherwise said tribunals will simply reiterate their refusal to be drawn into scientific debates<sup>38</sup>, with the result that since exceptions must always be viewed restrictively, the basic rule of inviolability of the human body will be reaffirmed.

Even if one arrives at the conclusion that conversive surgery is not *per se* contrary to public order, the problem is not yet settled. Due to the experimental nature of this procedure, the patient may submit to it provided that the risk assumed is not disproportionate to the benefit anticipated<sup>39</sup>. Would the risks (as well as the mutilations) involved in this type of therapeutic experimentation be adequately counterbalanced by the emotional satisfaction sought by the transsexual? In light of present knowledge, the answer is probably yes, since not only will a desperate person be diverted from self-injury, suicide or other antisocial behavior<sup>40</sup>, the patient will also be able to function adequately in the

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35 ACCARD, BRETON, et al. *loc. cit.*, p. 348.

36 R. NERSON, *Rectification de l'acte de naissance: changement de sexe*, (1966) *Revue trimestrielle de droit civil*, 74 at p. 76.

37 *Time Magazine*, Jan. 21st, 1974, vol. 103, no. 3, p. 65.

38 See A. BERNARDOT, *La responsabilité médicale*, Sherbrooke, La Revue de Droit de l'Université de Sherbrooke, 1973 at pp. 17-19 and jurisprudence therein cited.

39 Art. 20 C.C. For a more detailed discussion of experimentation in Quebec, see W.F. BOWKER, *Experimentation on Humans and Gifts of Tissue: Arts. 20-23 of the Civil Code*, (1973) 19 McGill L.J. 161 et seq.

40 For example theft, prostitution, alcoholism, drug addiction, etc.

desired gender-role, and thus become more useful to, instead of a burden on, society. We see no reason why happiness or contentment cannot be considered a sufficient benefit or goal provided no one, aside from the transsexual himself, is exposed to the risks or inconveniences involved in the surgery<sup>41</sup>.

## 2 - THE SEXUAL STATUS OF THE POST-OPERATIVE TRANSEXUAL

The legality of conversive surgery is but one of the two basic hurdles separating the transsexual from his or her "new" sexual status. Of course, the second burden involves legal acknowledgement that the patient's sex has been changed. Once this desired goal can be attained, then the modification of all other forms of documentation will naturally follow without much difficulty (e.g. drivers' permits, passports, diplomas, social insurance cards, etc.).

In Quebec, the Civil Code provides that "any error or omission in an act or register of civil status may be rectified . . ."<sup>42</sup> by means of a motion before the Superior Court<sup>43</sup>. Up until now, there have been no reported cases which deal with this particular aspect of transsexualism in this Province. However, in France and in the United States, this issue has been subjected to judicial appreciation<sup>44</sup>.

In the French case, for instance, a male transsexual sought rectification of his act of birth following surgery performed in Casablanca<sup>45</sup>. The court decided that in order to have reversed the presumption of veracity which protects acts of civil status, the plaintiff would have had to:

"... rapporter la double preuve qu'il n'était pas, lors de la déclaration de naissance, véritablement de sexe masculin, et qu'il présente bien à l'heure actuelle les attributs essentiels et naturels de l'autre sexe; ... (le tribunal doit) refuser de prendre en considération des modifications corporelles artificielles, obtenues par des procédés dont certains pourraient même tomber sous le coup de la loi pénale, et qui en tous cas auraient eu pour effet de dénaturer le sexe normal et primitif d'un individu, sans lui conférer pour autant véritablement le sexe opposé"<sup>46</sup>.

41 For example dependants such as minor children.

42 Art. 75 C.C.

43 Arts. 864, 865 C.C.P.

44 Other jurisdictions such as West Germany, Switzerland, Scotland etc. have also examined this kind of situation. Cf. MEYER, *op. cit.*, pp. 54 *et seq.*; SMITH, *loc. cit.*, p. 992 *et seq.*; STRAUSS, *loc. cit.*, pp. 358-359; STURUP, *loc. cit.*, p. 458 *et seq.*; WALINDER, *loc. cit.*, p. 463 *et seq.*

45 Seine, 18 jan. 1965, J.C.P. 1965.11.14421 (Conc. Fabre). For those who are interested, a complete clinical report of this case may be found in J. DUBOIS, J. MARCEL, *Un cas de transsexualisme opéré: considérations psychologiques et juridiques*, (1969) 1 *Annales Médico-Psychologiques*, 677 *et seq.*

46 *Ibid.*

Hence, rectification was refused. It should be noted however, that in other cases dealing with hermaphrodites, the French courts have more readily granted rectification on the grounds that an error as to sex was made at the time of completion of the act of civil status<sup>47</sup>.

In circumstances quite similar to the above described case, a male American post-operative transsexual (also an alumnus of Casablanca) requested a change of name and of sex designation on his birth certificate. Although such requests had been granted in the past by the Department of Health of New York, it was decided to refer the matter to a committee of the New York Academy of Medicine. Said committee, composed of medical specialists as well as a jurist, arrived at the conclusion that male to female transsexuals remained chromosomally male although ostensibly female, and that it was questionable whether the modification of records should be employed as a means of helping psychologically-ill persons in their social adaptation. In light of the recommendation by the committee that sex changes on birth certificates not be granted, and before the formal provisions of the *New York Health Code* (sec. 207.01 (c)) only permitting rectification of errors made at the time of filing of said documents, the Director of the Bureau of Records refused the requested change. In order to reverse this refusal, the transsexual then initiated proceedings in the nature of mandamus<sup>48</sup>. However, the Supreme Court of New York (Sarafite, J.) refused to interfere with what was essentially an administrative decision since the Director of the Bureau of Records had not "acted in an arbitrary, capricious or otherwise illegal manner . . ."<sup>49</sup>.

In another American case brought before the Civil Court of New York<sup>50</sup>, another transsexual likewise sought a change of name as well as of gender on his birth certificate. The Court (Pecora, J.) granted the name change but denied any other modification of the birth certificate since this could only be granted by the State Supreme Court. Nevertheless, the judge took the opportunity of expressing his opinion of the findings in the *Anonymous v. Weiner* case and proposed that psychological factors should play a leading role in sex determination.

"This Court is in complete disagreement with the conclusion reached by the learned committee. A male transsexual who submits to a sex-reassignment

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47 Chateau-Thierry, 26 jan. 1940, D. 1940.123; Soissons 25 juillet 1945, G.P. 1945.2. 141; Paris 31 mai 1966, J.C.P. 1966.11.14723; Paris 8 déc. 1967, J.C.P.1968. 11.15518 bis. For additional comments on this topic, see R. NERSON, *Influence de la biologie et de la médecine modernes sur le droit civil*, 33 Etudes de Droit Contemporain (nouvelle série) 67 at pp. 68-70. Nerson also suggests that the proper procedure would be an *action d'état* rather than a simple application for rectification. cf. *Rectification de l'Acte de naissance: changement de sexe. loc. cit.*, p. 77.

48 *Anonymous v. Weiner*, (1966) 270 N.Y. Sup. (2d) 319.

49 *Ibid.*, p. 323.

50 *In Re Anonymous*, (1968) 293 N.Y. Sup. (2d) 834.

is anatomically and psychologically a female in fact. This individual dresses, acts, and comports himself as a member of the opposite sex"<sup>51</sup>.

As a result he suggested as a formula that:

"Where there is disharmony between the psychological sex and the anatomical sex, the social sex or gender of the individual will be determined by the anatomical sex. Where, however, with or without medical intervention, the psychological sex and the anatomical sex are harmonized, then the social sex or gender of the individual should be made to conform to the harmonized status of the individual and if such conformity requires changes of a statistical nature, then such changes should be made"<sup>52</sup>.

On the 16th of December 1971 the Board of Health decided to amend the New York Health Code by adding a provision allowing for issuance of a new birth certificate when a post-operative transsexual has obtained a change of name pursuant to court order. (Sec. 207.05 (a) (5) New York Health Code). However, a patient seeking a new certificate was startled to discover that this new certificate did not make any allusion at all to the sex of the person which it was supposed to identify. Accordingly, the transsexual sought judicial review of this decision<sup>53</sup>.

In refusing to interfere with the administrative decision, Helman J. of the Supreme Court emphasized the Board of Health's findings that surgery could not change the sex of the patient since his male chromosomes remained sexually unaltered. In addition, the Board also viewed conversive surgery as "... an experimental form of psychotherapy..."<sup>54</sup>. Consequently, the judge felt that the issuance of the birth certificate without disclosure of gender was not illegal or arbitrary.

In the final analysis, the most accurate statement as to the true physical status of the post-operative transsexual was that made by Ormrod J. in the case of *Corbett v. Corbett (Orse Ashley)*<sup>55</sup> dealing with the validity of a marriage between a normal male and a transformed male transsexual:

"It is common ground between all the medical witnesses that the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means. The respondent's operation, therefore cannot affect her true sex. The only cases where the term 'change of sex' is appropriate are those in which a mistake as to sex is made at birth and subsequently revealed by further medical investigation"<sup>56</sup>.

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51 *Ibid.*, p. 838.

52 *Ibid.*, p. 837.

53 *Hartin v. Director of the Bureau of Records et al.* (1973) 347 N.Y. Sup. (2d) 515.

54 *Ibid.*, p. 518

55 (1970) 2 W.L.R. 1306.

56 *Ibid.*, p. 1323.

Therefore, in the Province of Quebec, a post-surgical transsexual cannot be granted a legal change of sex in light of the present law since to do so would constitute a type of judicial *largesse* exceeding the powers of the court. Article 54 C.C. requires that the act of birth mention the sex of the child, and sex (as opposed to gender or gender identity) is settled only by objective or purely biological determinants<sup>56a</sup>. Consequently, in the absence of new legislation it would appear that the present salvation of Quebec transsexuals would lie in recourse to private bills declaring a change of sex, even though "it is a fundamental principle . . . that Parliament can do everything but make a woman a man and a man a woman"<sup>57</sup>.

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56a It should also be observed that if the courts were disposed to grant a change of sex, such a change would have to be requested by *an action d'état* rather than by simple motion for rectification under Art. 75 C.C. see *Vachon et Martin et Al*, (1968) P.R. 283, Specially at p. 285; *C. v. R.* (1970) P.R. 337; Louis Baudouin, *La Personne humaine au centre du droit québécois*, (1966) 26 R. du B. 66 at p. 101.

57 DE LOLME, quoted in A. V. DICEY, *Introduction to the Study of the Law of the Constitution*, 10th ed., London, MacMillan and Co. Ltd., 1961, at. p. 43.

## CONCLUSION

As we may see, this article is admittedly a superficial treatment of a complex problem - indeed, no mention is made of other difficulties faced by transsexuals such as pre- and/or post-operative marriage, the presence of children engendered before the change of sex-role, the possibility of adopting children in the new sex-role. On a more material level, how would conversion affect life insurance contracts or the working conditions of the patient (e.g. labour legislation serving to protect women)? Even in the area of recreation, one could contest the right of a converted male transsexual to participate in organized sports for women. The list could go on indefinitely.

Nevertheless, our goal was to emphasize that transsexuals in Quebec face a dilemma - they are able to obtain conversive surgery either in Canada, the United States or abroad, and yet they cannot obtain legal certification of their apparent metamorphosis unless they can afford the time and expense involved in obtaining the passage of a special law in each particular case. (Even here there is no assurance since the Private Bills Committee may refuse to approve this type of measure). On the other hand, it seems unwarranted to recommend modifications to the Civil Code provisions regarding acts of birth or their rectification in order to accommodate .00001 per cent of the population<sup>58</sup>. Perhaps a median course may be traced by new legislation or by amending the present *Change of Name Act*<sup>59</sup> to include changes of sex.

In any case, in opening this topic to discussion, we offer one final thought. In the absence of injustice or harm to society as a whole, legal dogmatism should yield to the happiness and welfare of the individual. The worth of a society may be determined by the manner in which it treats its members, especially those who are unfortunately afflicted.

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58 MEYERS, *op. cit.*, pp. 67-69.

59 (1965) Statutes of Quebec, 13-14 El. II, ch. 77. This solution is also proposed by BRENT, *Loc. cit.*, pp. 410-411.