NOTES

TRANSSEXUALS, SEX CHANGE OPERATIONS AND THE CHROMOSOME TEST: *CORBETT V CORBETT* NOT FOLLOWED

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To our parents and grandparents the biblical statement: "male and female created He them" seemed a self-evident truism. Throughout recorded history, however, there have been men and women who failed to fall within the ordained dichotomy of the two sexes. They had to manage as best they could in the sex in which they were born and reared. Occasionally they disguised themselves and assumed the role of a member of the opposite sex. Thus until comparatively recently, the problem of "gender dysphoria" never became a legal problem.[1]

It was against this background of a stable, "god given" dichotomy of two sexes that Lord Penzance pronounced his classic definition of marriage as "the voluntary union of one man and one woman, for life to the exclusion of all others".[2]

The traditional equilibrium between the sexes was disturbed, however, when it became possible to change the essential sexual characteristics of a person by surgical intervention and hormonal treatment to those of the opposite sex and "reassign" him or her to the opposite sex.[3]

These technical developments eventually forced the law to con-

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1. For a detailed discussion of the aetiology of transsexualism, as well as of the legal position of transsexuals see H A Finlay and W A W Walters *Sex Change, Medical and Legal Aspects of Sex Reassignment* (Melbourne: Finlay, 1988).
2. *Hyde v Hyde and Woodmansee* (1866) LR 1 P & D 130.
3. See *Corbett v Corbett (Orse Ashley)* [1971] P 83.

front the question of recognition of sex reassignment. In Britain, the first recorded case in which this question was dealt with was the well-known decision of Ormrod J in *Corbett v Corbett (Orse Ashley)*.[4] This involved the marriage of a male, Arthur Corbett, to one "April Ashley", a postoperative male-to-female transsexual. April Ashley was born a man, but had undergone a series of operations in Casablanca. These involved the amputation of his penis and testicles and the construction of a cavity or pouch, described as an "artificial vagina", in the abdomen. Hormone treatment for breast augmentation was also administered. April Ashley assumed the personality of a woman, whose external characteristics she now possessed. A significant fact was that she was capable of successfully having sexual intercourse in the role of a woman, though of course incapable of conceiving and bearing children.

The "marriage" was not successful, and Mr Corbett wanted to have it set aside. He petitioned for a decree of nullity on the ground that the respondent was a male, and that according to *Hyde v Hyde and Woodmansee*[5] marriage was constituted by the union of a man and a woman.[6] After hearing medical evidence and considerable argument Ormrod J ruled that the respondent always had been, and remained, a male.

Ormrod J analysed the case strictly from the medical point of view. In the sexual makeup of each person, leaving aside the anomalous and rare case of the true hermaphrodite[7] there were four or five criteria. These were:[8]

(i) chromosomal,
(ii) gonadal (testes/ovaries),
(iii) genital (sex organs),
(iv) psychological, and possibly
(v) hormonal/secondary sexual characteristics.

4. Ibid.
5. Supra n 2.
6. No actual ground for dissolution (that the parties were not male and female respectively) existed in England at the time of *Corbett*. After *Corbett*, a new ground was created by the (UK) Matrimonial Causes Act 1973, s 11(c) "that the parties are not respectively male and female".
7. See *In the Marriage of C and D (falsely called C)* (1979) 35 FLR 340, discussed in H A Finlay "Sexual Identity and the Law of Nullity" (1980) 54 ALJ 115.
8. Supra n 3, 100.

Except in cases of hormonal abnormality, the normal person is born with a set of chromosomes inherited from both parents. Men have an X and a Y chromosome, women a pair of XX chromosomes. On conception, the embryo acquires a chromosome from each parent. The one inherited from the mother is inevitably an X chromosome, while the one from the father may be either an X or a Y chromosome. This chromosomal makeup then determines whether the embryo will grow into a male or a female human being.

While the other criteria are to a greater or lesser extent susceptible of being influenced or altered by hormonal, surgical[9] or psychiatric treatment, the chromosomal makeup of a person is immutable. It is suggested that it was this immutability that influenced Ormrod J in his evaluation of the various factors that go to make up a person. In effect, the chromosomal factor is placed in an overriding position. Since, moreover, psychiatrists agree that it is not possible to influence or change a true transsexual's conviction of having been born into the wrong sex, the psychological aspect of human personality was in effect relegated to a subordinate position.

The question of sex reassignment did not, until 1988, arise for decision in any superior Australian court. Because of this absence of any binding authority, the decision in *Corbett* was generally regarded among Australian lawyers as the leading authority on the law relating to transsexuals which, more likely than not, would be followed by an Australian court.[10] Critics of it were not wanting, however,[11] both in Australia,[12] and in North America contending for a different conclusion.[13] Some of these took the view that the

9. For example, by castration, amputation, hysterectomy, mastectomy.
10. See the approval of *Corbett* in *In the Marriage of C and D (falsely called C)* (1979) 35 FLR 340, which is discussed critically in Finlay (1980) supra, n 7 and note A Dickey *Family Law* (Sydney: Law Book Co, 1985) 115.
11. For academic criticisms, compare eg DK Smith "Transsexualism, Sex Reassignment Surgery and the Law" (1971) 56 Cornell L Rev 963; "Transsexuals in Limbo: The Search for a Legal Definition of Sex" (1971) 31 Md L Rev 236 (Anon); S Davis "The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma" (1975) 7 Conn L Rev 288. Other commentaries are listed and discussed in Finlay and Walters, supra n 1, 66.
12. See eg G Samuels "Transsexualism" (1983) 16 AJFS 57; R Wilson "Life and Law: The Impact of Human Rights on Experimenting with Life" (1985) 17 AJFS 61, 78-81; M D Kirby, "Medical Technology and New Frontiers in Family Law" (1987) 1 AJFL 196.
13. See the decisions in *MT v JT* 355 A 2d 204 (1976) in the Appellate Division of the Superior Court of New Jersey, *In the Matter of Anonymous* 57 Misc 2d 813, 293 NYS 2d 834 (1968) and other decisions referred to by Mathews J in *R v Harris, R v McGuinness*, infra.

psychological factor was of decisive significance in the determination of human personality. The other factors, apart from the chromosomal one, could be influenced, for example, by amputation or hormonal treatment. The last mentioned, however, had no observable effect on human personality. There have also been some cases involving transsexuals decided by the European Commission of Human Rights and the European Court of Human Rights, but the issues there concerned mainly questions of privacy.[14]

The significance of *Corbett* in Australian law is now no longer unchallenged. In quick succession, the Victorian Supreme Court and the New South Wales Court of Appeal have had to deal with transsexualism. Both decisions, as yet unreported, have declined to follow *Corbett*. It should be noted, however, that they were concerned with the criminal law, whereas *Corbett* involved the law of marriage and no other aspect of law.[15]

The first case was *R v Cogley*.[16] The accused was charged before the Supreme Court of Victoria with a number of offences, two of which were relevant to the present discussion. Count 4 involved an assault with attempt to rape with aggravating circumstances, in that the accused had with him an offensive weapon, namely a knuckleduster. The assault referred to was an assault with intent to insert a man's penis into a woman's vagina without her consent. Count 5, in the alternative, charged him with indecent assault with aggravating circumstances.

As in *Corbett*, the complainant was a post-operative transsexual, who had undergone similar treatment, with similar result. Before a jury had been empanelled, counsel for the defence argued on the voir dire that Counts 4 and 5 could not lie because, following *Corbett*, the complainant was a male and not a female.

In June 1988, after hearing expert evidence, Cummins J gave an oral ruling in which he declined to follow *Corbett* and held that the complainant was a woman and had a vagina. He also indicated

14. Compare eg *van Oosterwijck v Belgium* (1980) 3 EHRR 557; *Rees v United Kingdom* (1984) 7 EHRR 42, (1986) 9 EHRR 56. See the discussion in *R v Harris, R v McGuinness*, infra, n 17, Finlay and Walters, supra n 1, 84-93.
15. Compare the statement of Ormrod J in *Corbett*: "I am not concerned to determine the 'legal sex' of the respondent at large", supra n 3, 106.
16. Unreported ruling, Cummins J, Supreme Court of Victoria, 20 February 1989.

from the exercise, by that foreign state, of powers which are peculiar to government. Hence a foreign penal statute will still be unenforceable, but now as a manifestation of the broader principle stated in the majority judgment. A further consequence is that what were previously termed "public" laws of a foreign state can be seen as another manifestation of the broader principle and, therefore, are unenforceable. The statement of this broader principle which can be seen as having underpinned the previous non-enforcement of foreign penal and revenue laws is the central importance of the *Spycatcher* decision.

Background to the High Court decision

Peter Wright spent over 20 years as an Officer of MI5, working in counter espionage for 12 of those years. During that time he was privy to highly classified information and during his last years at MI5 he was on the personal staff of the Director General of the British Security Service. After retiring, Wright left England, settled in Tasmania, and became an Australian citizen. While living in Tasmania, Wright was approached by Heinemann Publishers Australia Pty Ltd, to write his memoirs.[11]

Apart from certain autobiographical details, the bulk of *Spycatcher* dealt with four areas:

1 Technology employed by the British Security Service for the purposes of electronic surveillance and interception;

2 Operations of the Service using electronic surveillance and interception which breached British and International law;

3 Investigations with respect to Soviet penetration of the Service prior to 1971; and

4 Wright's service as personal consultant to the Service's Director General.

It was admitted that these parts of the book had been written with knowledge gained by Wright during his time as an officer of MI5.

11. Heinemann Publishers was the Defendant, and then the Respondent to the action taken by the United Kingdom Government. It was agreed throughout that Heinemann Publishers would be restrained from publishing *Spycatcher* if the United Kingdom's claim against Wright was successful.

The book did not receive rave judicial reviews as can be seen from the above quoted remarks of Powell J, and Kirby P's description of *Spycatcher* as "nothing more than one rather cantankerous old man's perspective of things notorious or description of technology long outdated, people long since dead and controversies tirelessly worked over by the numberless writers ... who have already ploughed the particular field."[12]

Despite this, the United Kingdom Government launched an unprecedented campaign to prevent the book's publication in the United Kingdom, New Zealand and Australia, the details of which are set out in Kirby P's judgment.[13] The *Spycatcher* case came to the High Court from the New South Wales Court of Appeal[14] which had, by a majority, affirmed the first instance decision of Powell J[15] to refuse the United Kingdom Government's claim to restrain the publication of *Spycatcher* in Australia.

The High Court decision

The High Court unanimously, in two judgments, affirmed the decision of the New South Wales Court of Appeal and so dismissed the appeal of the United Kingdom Government. The first judgment was a joint judgment of all the judges, except Brennan J, who, characteristically, preferred to express himself separately.

The United Kingdom Government's case before the High Court was much as it had been in the Courts below and was based on three alternate limbs. These were that "the proposed publication of *Spycatcher* amounted to a breach of fiduciary duty, a breach of the equitable duty of confidence or, alternatively, a breach of the contractual obligation of confidence on Mr Wright's part ..."[16]

Powell J at first instance considered each of these heads of claim, as did all three judges in the New South Wales Court of Appeal. However, in the Court of Appeal Street CJ[17] and Kirby P,[18] in

12. *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86, 166.
13. Ibid, 130-135.
14. (1987) 10 NSWLR 86.
15. (1987) 8 NSWLR 341.
16. Supra n 3, 344.
17. Supra n 14, 99-101.
18. Ibid, 140.