The legal labyrinth that faces the transsexual

OUT OF COURT

Linda Avery

THE bizarre outcome of the Gloria Greaves case last week produced the ususal popular headlines. The Daily Star reported a "Prison Riddle Over Sex-Change Gloria". Greaves, once a man, now a woman, was sent to Holloway prison for women after being found guilty of committing an offence — living off immoral earnings — that only a man can commit. At the same time, Greaves's husband was sent to gaol for a year for living off the immoral earnings of another man — his wife. Sensationalism aside, the case has focused public attention to the anomalous legal position of all post-operative transsexuals.

Estimates vary, but a recent survey suggests that one in thirty of the adult population in Britain experiences some degree of gender confusion; something in the region of four hundren transsexuals pass through British gender identity clinics every year — in the United States, the figure runs into thousands.

In his book, The Transsexual Phenomenon, Harry Benjamin defines transsexuals as those who have the inner certainty of belonging to that sex which is not given to them physically. Modern speculation as to the precise nature of transsexualism — or transidentification as it is sometimes termed — has ranged from possible hormonal imbalance, learned gender roles, and erotic narcissism, to explanations related to reincarnation. Whatever the cause, the result manifests itself in that state of gender dysphoria in which the individual becomes totally alienated from his or her body. The only way doctors can help is by aiding the transsexual to adapt to the life of the gender with which he or she identifies. Thus, hormone therapy, sex reassignment herapy, and sex reassignment surgery, are all available from the National Health Service.

Yet whether pre- or post-operative, the transsexual must overcome major obstacles, particularly when faced with the relevant laws of this country. Here, even when a transsexual has undergone full sex reassignment surgery, for most purposes he or she will still be officially recognised as belonging to his or her original biological sex. There are two main causes of this state of counfusion. In the vast majority of births, a superficial examination in the delivery theatre will reliably establish the sex of the child; but in some cases this determination may be indicated by all other factors save the psychological.

Yet the law states that, in the absence of a fundamental error being made at the time it is issued, an individual's birth certificate cannot later be amended. There is no statutory definition of sex: the basis of legal controversy lies in the decision of Ormerod J, from the well known case Corbett v Corbett (1971) involving April Ashley. It was held in that case that an individual's sex was fixed, at the latest, at birth, and could not later be altered by surgical intervention. In reaching this decision Ormerod J stressed that he was attempting to devise a test purely for the purpose of determining capacity for marriage: nevertheless, the decision has become an authority in many other areas. Thus, whilst Ms Ashley had obtained a National Insurance card which described her as a woman, she was still denied an amended birth certificate — and the capacity to marry a man.

What of the trans-homosexual? This is a condition identified by Dorothy Clair (London Hospital) whereby, for example, a female to male transsexual will, both before and after sex reassignment surgery, prefer homosexual relationships. Whilst homosexual acts between consenting adults in private are no longer illegal, anal intercourse between a man and a woman is still a criminal offence. Since a female to male transsexual — homosexual or otherwise — is still, according to the Corbett decision, biologically female, he and, in this case, his male partner, technically run the risk of prosecution. In a similar vein, a male to female post-operative transsexual can never enjoy the protection of our rape laws since, apparently still male, she can never be the victim of a heterosexual rape — at worst, the rapist may be charged with indecent assault.

The pre-operative male to female transsexual constantly runs the risk of commiting a public order offence relating to cross dressing, yet she will be required to live full-time in her new role for at least a year, often two, as a precondition for access to surgery. Her former gender identity may be disclosed in open court and if convicted and sentenced to imprisonment the problem then arises as to which prison is applicable, male or female.

In this respect it can be said that Greaves has been sympathetically treated, for operative transsexual may in many cases even a post-find herself in a male prison where she can be denied access to the vitally necessary continuing hormone treatment.

Other difficulties experienced by transsexuals include dealing with an unsympathetic bureaucracy with regard to income tax, unemployment and sickness benefits, passport controls and so forth. Finding employment in the new role can be a major problem — although the recent re-instatement of a transsexual engineer after being supported by 2,000 of her colleagues, suggests that public attitudes are changing. However, a male to female post-operative transsexual may, through company rules, be required to retire at 60; unfortunately, the National Insurance Commissioners consider themselves to be bound by the Corbett decision, so that a state retirement pension is not payable until the woman reaches the age of 65.

The trend in medical thinking has moved towards the view that sex reassignment surgery is a valid form of treatment — in a sense, the transsexual is seen simply as one born with a disability, the nature of which justifies corrective surgery. Both Sweden and West Germany have recently passed legislation recognising a post operative transsexual's right to be legally reassigned.

The legal strait-jacket created by the Corbett decision has remained something of a domestic and international precedent for more than ten years and has created more problems than it has solved. That some realistic and humane resolution to the difficulties outlined here is required, is surely without doubt. The question of whether an English transsexual has the right to an amended birth certificate is currently under consideration by the European Court of Human Rights.

If modern scientific findings show that a person's sex can be decided fundamentally by factors which may not be recognised at birth, perhaps it is time that both our laws and our society accepted, and adjusted to, those findings.

Linda Avery is a lecturer in law at the Polytechnic of North London.