

Sex-reassignment surgeries and transsexual marriages: An ethical critique in the light of natural law

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Abstract

The apparent health dysfunction which Sex-reassignment surgeries seek to correct is 'gender dysphoria'. It relates to a condition of mind in which a person now, 'patient', suffers a hatred and scornful detestation of his or her anatomical sex. This condition is furthered by the corresponding desire of being a member of the opposite sex. Transsexual surgical interventions operate to alter, mutilate and/or change the natural sex organs (internal and external genitalia) to conform with the patients' disposition or choice. In this way a post-operative transsexual is ready to contract marriage with a person of his own anatomical sex. This paper makes an ethical critique of states' legislations which recognize such surgeries as valid and lawful and thus allow lawful marriages to be contracted by such a transsexuals. It examines the various positions, often parallel and contradictory, which courts across jurisdictions, have taken on the issue, and finally paves way for an objective normative standard in the light of the Natural Law. The method adopted in this investigation is the hermeneutics of law and ethics and contextual studies. It is the finding of this researcher that transsexual surgeries and marriages are contra legem naturam and thus not rationally

sustainable irrespective of the positive laws anchoring them. What is more, such surgeries and/or marriages cannot be successfully promoted and advanced to posterity by either logic or practice, as valid health interventions and relationship options respectively. All-in-all, it is the recommendation of this work that states and nations should revisit their existing laws on transsexual surgeries and marriages with the view to aligning such with the objective norm of morality in accord with the natural law.

Introduction

Some modern pieces of legislations, arguably, have been successfully criticized for being wanting in objective moral content. It is no surprise that the dawn of sexual revolution was to be regulated by legal systems which themselves are completely uninspired by ethics of a dependable kind. Marriage and Family are worse for it today. Medicine too, has been co-opted in that ‘conspiracy’ to further the process of transition to a libertine morality in socio –political contexts. Before now, sex and its related concepts are considered ‘sacred’ and laws served to reinforce the same. Paradigm change in this respect was to come when Kirkendall and Gravatt (1984) foresaw and declared that soon the family will progress beyond the traditional system to a more full human philosophy of life. Without doubt, this idea had already been prefigured by Meluhan and Leonard (1967) when they observed that:

Sex as we think of it may soon be dead.

Sexual concepts, ideals and practices

already are being altered beyond recognition....What it will mean to be a boy or a girl, man or woman, husband or wife, male or female may come as one of the greatest surprises the future holds for us.

The surprise has, no doubt, come. The ambition of eliminating the biological differences among humans by creating an express way in between, so as to facilitate free swinging across the threshold from one preferred sex to another, have been achieved by medicine and validated by law/policy. It is all about altering, muting or obliterating the unique reproductive functions and identities of men and women by surgical means.

The greatest impact of this medical technology is on marriage and family and, on women and children within marriage. An important question remains; can a sex reassignment Surgery actually change a man to a woman with all the full potentials of the preferred status? If yes, would nature have erred? If no, where would such interventions lead humanity? The gravamen of these queries are; is it ethically justified to undergo or perform such surgery and more importantly is it justifiable for a man or woman to contract marriage in the new sex status once altered?

Concept, practice and legality of sex reassignment surgeries

Sex Reassignment Surgery (SRS) refers to all surgical procedures by which a transgender person's physical appearance and function of their existing sexual characteristics

are altered to resemble that of their identified sex. Generally, persons who opt for such surgical procedures are referred to as *transsexuals* and/or *transgenders*, while those who have successfully undergone such processes are said to be transsexed. (Harris, 2013)

Further, the medical processes towards achieving sex reassignment are long, protracted and rigorous. More so, they invite very serious ethical/moral and legal questions. Sex reassignment among other things involves psychological counseling to confirm *dysphoria*, a clinical duration within which the patient is allowed to live as a member of the preferred sex, intermittent injection of masculinizing or feminizing hormones and only eventually, a series of sex reassignment surgical procedures necessary for ‘effective’ transition to the other/opposite sex (Carrol and Wolper, 1966). In the case of male-to-female transsexuals, the scrotum and the testicles including the penis are surgically removed. Thereafter, the penile skin and its sensitive nerve endings are used to construct the ‘vagina’ and silicone implants are used to create the breast (Carrol and Wolper, 1966). Coming to the issue of female-to-male transsexuals, surgical interventions involve the removal of the entire female internal sex organs. This having been done, a penis may be constructed from the abdominal skin and the scrotal sac made out from the labia into which are placed artificial testicles. These ‘penises’ look fairly real, but of course cannot achieve natural erection. To achieve artificial erection, penile implants of some kind are often used. Alternatively, the construction of the penis and its ‘appurtenances’ may be bypassed by the injection of the hormone testosterone which operates to produce enlarged

clitoris. It looks a penis-like projection and often suffices for some trans-males.

The World Professional Association for Transgender Health (WPATH) has pointed out that a medically assisted transition from one sex to another may over and above genital removal or reconstruction entail some of the non-genital surgical procedures.

For trans-men, these may include mastectomy (removal of the breast) and chest reconstruction (the shaping of male-contoured chest) or hysterectomy and bilateral salpingo-oophorectomy (removal of ovaries). For some trans-woman, facial feminization surgery, hair implants and breast augmentation are also aesthetics components of their surgical treatment (Wikipedia:Sex Reassignment Surgery 2015).

Typological and legal review of transsexualism

Convention and tradition all the way held that gender is coterminous with determined sex and that sex is determined through biological manifestations of the gonads, hormones and genitals. It is further the established case by ancient history, law and practice that a person marries to opposite sex (Graham, 1981). Hence marriage ought to be a heterogeneous relationship between a man and a woman. Transsexualism has most critically challenged the legal norm of heterogeneity in marriage in a way that is strictly atypical.

A transsexual is an anatomically normal male who believes from his earliest memory that he is a woman or vice versa. Such a male who feels feminine usually expresses his plight in these or similar words 'I am a woman trapped in a

man's body' (Graham, 1981). There are indeed about six degrees of transsexualism each with more or less disposition to act or change his/her sex into the opposite sex consistent with expressed gender. Harry Benjamin in his book , *The Transsexual Phenomenon* isolates the following typologies of transsexuals .*type i*: Pseudotransvestites, (among whom would be counted transvestic homosexuals) who arbitrarily accede to wearing women's clothes; *type ii*: Fetishistic transvestites who are sexually excited by wearing women's clothes, at least putting them on under their male attire; *type iii*: True transvestites who do not attain affective equilibrium except when exhibiting themselves dressed as women; *type iv*: Transsexuals for whom it is necessary to have estrogen therapy in order to imitate a feminine form, and for whom the wearing of female clothes in itself does not suffice, but who do not contemplate changing their genitalia surgically; *Type v*: Transsexuals who ardently desire 'conversion surgery' but who, when they cannot undergo surgery, can obtain a precarious psychic equilibrium with psychotherapy and estrogen therapy; *Type vi*: Transsexuals who urgently demand the so-called 'conversion operation', so much so that if it is not conceded to them, they are often led to self-mutilation and even suicide. (See Graham, 1981).

It does appear that cases of transvestism are those relevant for legal considerations mostly. Like all transsexuals, their problem is with gender disorientation. Their sexual identity is not in issue because they admit that they are either male or female anatomically. What is in issue is their gender which appears not to follow from their sex and for which they seek surgical intervention so as to synchronize gender with sex.

Accordingly, Belli asserts that ‘transsexualism is a passionate, lifelong conviction that one’s psychological gender – that indefinable feeling of maleness or femaleness – is opposite to one’s anatomic sex’(Belli, 1978).

Stroller (1975) in his erudite attempt to isolate a true transsexual, one which poses a challenge to conventional family law, observes that transsexualism relates to:

The most extreme form of femininity in anatomically intact males... a condition that manifests itself from the earliest years of life with the boy wishing he were a girl, even to having his sex reversed (which he then tries to accomplish later in life).

As a matter of fact, before a transsexual undergoes ‘sex reassignment surgery’, he or she is designated as a ‘pre-operative’ transsexual but thereafter he is termed a ‘post-operative’ transsexual. Paradigm change in family law is challenged more by the issues surrounding the later than the former. The dilemmas posed for the law of marriage include the questions of (a) defining a male or a female; (b) deciding what partners are legally acceptable for marriage; (c) assessing the best interest of children after divorce if marriage occur at all. (Green, 1994) In a more radical construction, one can aver that transsexualism poses two challenges to conventional legal logic. The first challenge is to the norm that one’s individual sex is fixed. The second challenge is to the norm that gender matches biological sex. There is no better way of demonstrating the legal tradition from which transsexualism is

departing than by construing the dicta in the Influential English case of *Corbett v Corbett* (1970) 2 ALL ER 33:

Having regard to the essentially heterosexual character of the relationship which is called marriage, the criteria [for determining sex] must, in my judgment, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage. In other words, the law should adopt, in the first place, the first three of the doctors' criteria, i.e. the chromosomal, gonadal and genital tests and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention'.

Two questions actually emerge for consideration in-view of the needed legal response to transsexualism in the modern times. For the pre-operative transsexual, the question for family law is 'Can a marriage between two people both of whom think of themselves to be women, for instance, really be called marriage?' Rotal Jurisprudence will answer in the negative according to the Canon law tradition and provisions. According to Pinto (1975) in the case of Renato, (34) and Margaret, (26), 'marriage would be null due to the incapacity of providing the essential object of consent if the parties who had appeared to be of different sexes were, in fact, of the same sex.' Second, and for the post-operative transsexual, who in fact, has undergone a 'Sex Reassignment Surgery', the question remains, can he marry in his new 'synchronized' sex?

All the two questions put into one become - can legal sex be changed?

Legislative and Judicial Contestations having raged around the globe in the legal landscape, a paradigm shift has commenced with the option of allowing post-operative transsexuals to marry in their 'surgical' (new) sex and thus, to change their legal sex by the amendment of birth certificates. Here lies the great challenge to marital heterogeneity which Lord Penzance does defend in his definition of marriage.

In 1945, a Swiss Court in *Re Leber Neuchatel Cantonal Court* concluded that psychological sex was the criterion for determining sex of the post-operative transsexual. Later, in the state of New Jersey, in 1976, the apex court held that marriage of a post-operative male-to-female transsexual was valid because the person was a female for the intent of marriage law. See *MT v JT* (1976) 355A. 2d, 204 (New Jersey Superior Court). In coming to this decision, the American court distinguished between 'sex' in the anatomical and genital sense and 'gender' as a psychological phenomenon. This being the case, a person's sex for marital purposes should encompass both the genital and the psychological realities. Accordingly, the court advanced the jurisprudence that 'for marital purposes, if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards'.

The argument is such that upon the accomplishment of the *Sex Reassignment Surgery*, the transsexuals' gender and genitalia are no longer discordant; they have become harmonized through medical treatment. *A fortiori*, the

transsexual becomes physically and psychologically united and fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy.

New Zealand in 1995, gave a judicial sanction to the marriage of transsexuals in their 'converted sex'. Of course, in *Attorney-General v Otaahuhu Family Court (1995) 1 NZLR 603* the High Court of New Zealand allowed post-operative transsexuals to marry members of their biological birth-sex. The Court however took notice of the fact that phalloplasty (the construction of an artificial penis) was often unsuccessful. It thus conceded that neither constructed sexual organ needed to be fully sexually functional; [since] there were many forms of sexual expression possible without penetrative sexual intercourse. Worthy of note is that the court in this case sternly expressed the 'logic' that sex goes deeper than biology. As Morris at page 26 observes, 'it concerned not my apparatus but myself'. This jurisprudence was further advanced by Bolin when he argued that men and women are disparate beings, above and beyond sex role dichotomies. A woman has 'an inner essence, a way of thinking, feeling and perceiving the world that is different from a male's quite apart from sex....'(Attorney-General v Otaahuhu Family Court, 1995)

Another ground breaking intervention in defense of the transsexuals' rights came up in the case of *Re-Kevin(2001) Fam CA 1074*. This relates to the Australian Family Court decision on the legal marriageability of the post-operative transsexual. The facts of the case are as follows. Kevin an 'affirmed' male married one Jennifer. He had before the marriage also regularized his birth certificate and sundry documents to comply with his new gender determined sex-

male. Suffice it to place on record that before, during and after his marriage, including the times material to the trial, Kevin had lived in the Australian culture and community as a male. Suddenly, the Attorney General for the Commonwealth of Australia advised the couple that their marriage was illegal and that they are likely to be prosecuted. At this, the couple commenced proceedings against the Attorney General in the family court of Australia. Their demand was that their marriage should be declared legally valid. Issues before the court for determination includes (a) Whether Kevin was a man for the purposes of the marriage law of Australia and; (b) Whether the marriage ceremony he had undertaken with Jennifer was a valid one.

In coming to judgment, Justice Richard Chisholm, faulted both the legal bases and internal logic of the decision in the English case of *Corbett v Corbett*— a worldwide *locus classicus* which isolated transsexualism as a pathology and held that sex affirmation/ or sex reassignment surgery, would not be recognized for purposes of marriage. It is the finding of Justice Chisholm that, on the balance of expert evidence both as represented in Re-Kevin and generally, in cases throughout the world dealing with the issue, transsexualism was an example of natural intersexual diversity in human sexual formation and not a psychological disorder or illness. Hence for the judge in Re Kevin (2001), to determine a person's sex for the purposes of marriage in Australia, all relevant matters ought to be considered including but not limited to:

...the person's biological and physical characteristics at birth (including gonads, genitals and chromosomes); the person's

life experiences, including the sex in which he or she is brought up and the person's self perception as a man or woman; the extent to which the person has functioned in society as a man or woman; any hormonal, surgical or other medical sex affirmation (including genital reassignment/rehabilitation) treatments the person has undergone, and the consequences of such treatment as well as the person's biological, psychological and physical characteristics at the time of the marriage, including (if they can be identified) any biological features of the person's brain that are associated with a particular sex.

Justice Chisholm held that everything having been considered, Kevin is a man within the ordinary everyday meaning of the word in Australia. He declared the marriage of Kevin and Jennifer to be valid. In the course of this judgment, the honorable Justice found opportunity to state that 'post-operative transsexuals will normally be members of their affirmed sex... that the sex of a person for the purposes of marriage is their sex at the time of marriage.' *Re Kevin* (2001)

On appeal, the full court upheld the decision of the court of first instance and added that the reasoning of the Family Division of the UK High Court in *W v W* was a correct statement of the law in Australia and that 'people with transsexualism, like others with intersex conditions, should be

able to choose their sex, affirm it and marry as a member of that sex' (Re Kevin 2001)

Currently, *Re-Kevin* has continued to be received with great approval in most world Jurisdiction and legal regimes. As a matter of fact, Wikipedia 'Legal Aspects of Transsexualism' stated:

Re-Kevin has been subsequently extensively quoted and relied upon in international jurisprudence (including in the United States of America and in the European court of Human Rights), concerning the civil and human rights of people who experience transsexualism; including young people with transsexualism who are still regularly deprived of their right to affirm their innate sex without being punished by family and cultures and to change their legal sex in order to make it intelligibly consistent with their affirmed sex

Paradigm shift in the issue of transsexualism in the African sub-regions cannot be discussed without reference to the report of the South African Law Commission on its 'Investigation into the legal Consequences of Sexual Reassignment and Related matters (Project 52, RP 32/1996) The law commission recommended the establishment of a legal framework that would operate to recognize post-operative transsexuals as members of their affirmed sex. Indeed, the recommended bill then allows:

...any person whose sex organs have been altered by surgical and medical treatment so that such person has the sex organs of the sex opposite to his or her biological sex [to] apply to the Director-General of Home Affairs for the alteration of the sex designation in his or her birth certificate.

This recommendation has so much legal significance in the rethink on sex-gender relationship as well as male-female polarity in Africa and the wider-world. Even before the rise of controversy on transsexuality, some cultures challenge our notions and even have a gender category that is called neither male nor female – a third gender. In traditional native America, there were a category of not-men/not-women known as *berdache*. The *berdache* was usually (but not always) a biological male who was effeminate in behavior and who took on the social roles of females. There were also female *berdaches*. Other cultures have similar roles. In the Persian Gulf there are the *Xanith* (males who assume female roles). In India, there are the *hijra* (males who dress like women). In Thailand there are the *Kathoey* (similar to *Xanith*). In Haawii there are the *aikane* and in Taliti, the *Mahu*. The belief in these societies that it is neither obvious nor natural that there are only two genders have made researchers to carefully embark on reconsideration of conventional assumptions about sex and gender. (Carroll and Wolpe, 1996)

More still, exponents of the transsexuals' rights to marry in their affirmed sex, especially the feminists have levied formidable criticisms on the reasoning behind most courts'

decisions denying the above right to transsexuals. Such decisions include but are not limited to the English case of *Corbett v Corbett*, Australia case of *C v D* (1979) FLC 90 and the South African case of *W v W*.(1976) 2 SA 308. These cases were decided with the traditional conservative emphasis of the jurisprudence that sex is coterminous with anatomical and therefore biological criteria. Hence, the various decisions hold that a post-operative transsexual will not be legally allowed to marry in his or her reassigned sex.

For instance, in *Corbett's case*, the English courts have held a very restrictive view on the meaning of male and female within the universe of meaning in Family Law. The facts of the case are as follows: In 1970, Corbett sought a declaration that his marriage to April Ashley was null and void. The basis of the application was an argument that marriage is an institution open only to a union of a male and a female, and that Corbett's partner, April Ashley, who was a post-operative male-female transsexual, should still be considered male and therefore unable to marry Corbett. Ormrod J regarded the following criteria in determining an individual's sex namely: Chromosomal factors, gonadal factors, psychological factors and hormonal/secondary sexual characteristics. As it were, holding exclusively to the biological factors, Ormrod J. held that Ashley could not alter his sex as assigned at birth and was therefore a man for the purposes of the law of marriage. The marriage was annulled. The Court's decision in this case and similar cases has been criticized by transsexual advocates for 'a complete elimination of other sociological concepts of gender and their import in the determination of who a male or a female is for the purpose of marriage. (Umobi and Umobi,

2009) *Ipsa facto*, the Australian case of *C v D* falls under the same weight of criticism when it held that ‘no degree of transsexualism through surgery can make a sociological male a female and vice versa.’ Equally, the South African case of *W v W* is likewise criticized. These criticisms were oriented towards opening the floodgate of transsexualism in marriage. In that case, a male-to-female transsexual had purported to marry a man. Nestadt J. (1997) (as he then was) held that the marriage was invalid as the transsexual’s sex operation had not altered the male biological sex he had been born with so that the purported marriage was a same-sex marriage. According to the law lord:

The issue is not whether, after the operation, the plaintiff was an effective male, nor whether she looked like a female (which she does), nor whether society has accepted her as a female nor whether she is capable of having sex with a male; the issue is whether the plaintiff at the time of the marriage was a woman.

Implicit in this decision is that sex is unalterably biological and it is not neutral. As expected, one of the standard criticisms of *W v W* is its exclusion of psychological sex from the compass of sex and its consequent failure to allow a transsexual’s strong feeling that he or she belongs to a sex different from the one he or she was born in, to influence his or her sex category (Lupton 1976). Currently, much legislative and judicial advocacy is going on in order to perfect and sustain the paradigm change in course.

Natural law critique of sex-change surgery and marriages predicated thereof

Of essence, natural law relates to that jurisprudential view which cements the moral and legal order, with the nature of man (Blackburn, 1996). The rationale behind this view remains the understanding that Law is made for man and should therefore comply and/or apply to the moral nature of man. It is the consideration that if law fails to consider the nature of the subject to which it applies, in this case, the human nature, it ceases to be law for man. As it were, the teleology of the human nature and that of human positive law must meet at the venue of actions performed by man or those received/suffered by man.

Given the basic assumption of the natural law school that human nature is universal and objective, an assumption totally admitted by this paper, any human positive law capable of regulating man's active and permissible passive transactions, must relate to those objective norms discoverable by the light of reason. Only such objective principles/norms which provide conditions for human flourishing can completely evaluate such surgical interventions and marriages as the ones under review. Accordingly, only the natural law of the Thomistic tradition can provide the needed propositions

Propositions for the Critique

There is no better way to initiate the critique than by citing O' Donnell's brilliant articulation on the issue, thus:

The moral questions involved in these cases arise from even deeper and more fundamental philosophical questions

regarding the very nature of a human being. If we take transsexual surgery in its literal meaning, the philosophical questions of “can it be done?” precedes the moral question of “should it be done?”(O’Donnell, 2002)

The answers to the above questions are critical for the next threshold of this investigation namely: Is transsexual marriage proper and moral, and so to be legalized?

To answer the first of O’ Donnell’s questions above, “can it be done?” one needs to expand the material implications of the question itself. As a matter of fact, this first question operates to find out, *what sex is* and *whether the sex of a person can be changed*. Put a little differently, the question remains whether the anatomical and hormonal maneuvers of the paraphernalia of sex amounts to sex-change. Indeed it is about “whether the anatomical substitutions, plastic redesign plus the synthetic hormonal reinforcement of congruent sex characteristics actually change the sex of the individual (O’ Donnell, 2002). From a purely natural law metaphysics, the answer to the prevailing question is, no. The reason for the negative is that; the internal and external sex and gender morphologies not excluding the chromosomal bio-enumerations and the permutations and combinations therefore, are only but ‘signs’ not ‘determinants’ of an intangible essence of the human sexuality – a reality which is not detachable from the human person itself. That the ‘morphologies’ are merely signs without more is arguable, because man is an atypical being in which every part of him is

for a purpose, and the sum of the purposes is minded to the perfection of his unique nature. In that nature, there is no discrimination and/or partitioning into; sexual nature, moral nature, mental nature, social nature, etc. No. It is an undivided indivisible unity. Hence, whatever part, organ or system, like a sign post, points to same-self and unique essence. By cutting off the voice-box, man remains a being that speaks; by turning man into a cripple, he is not changed from a being that walks; and by amputating him, he is not by that changed from being, a being that works or that manufactures (*manu-facere*, to make with the hand).

It is the thinking behind sex-change that the human person can be divided into its parts/powers. Underlying this pretention of divisibility of human person into its constituent parts is the philosophical error of dualism of mind and body popularized by the French thinker Rene Descartes (Edward, 1997). In furtherance of the legal-moral diatribe, Descartes has argued that the human body is of a different essence, and the human mind, another essence/entity altogether. Hence in his thinking, the human being is a mind attached to a body, the way an automobile engine is fixed to the body of a car (Edward, 1997). This proposition called Cartesian dualism has long been dismissed for numerous inconsistencies and incongruities. For instance and for the avoidance of doubt, the concept of a woman in a man's body and vice versa is rooted in the binary thinking sponsored by dualism and it collapses alongside all dualistic error under the weight of the cogency of arguments against the same. The ridiculous dimension of most dualistic thinking has been criticized sternly viz:

If the mind is active and unextended thinking and the body is passive unthinking extension, how can these essentially unlike and independently existing substances interact causally and how can mental ideas represent material things? How in other words, can the mind know and influence the body and how can the body affect the mind? (Audi, 1999)

Suffice it to observe that it is only this kind of dualistic thinking which has been shown to be odious that can support, albeit ridiculously a female mind in a male body and vice versa. In the words of O'Donnell and this work agrees, a Cartesian dualism of mind and body must be rejected.

In contrast to the odium and over simplification of the Cartesian type dualism, natural law advocates and holds out the metaphysics of unity of body and soul, as the essence of the human person. It emphasizes a teleological worldview which sees the universe as purposeful. Accordingly, an organism has sight for seeing because of its "form", and a snake has the potential to slither. Still because of its unique form in the same vein, a man has his/her genitals because of his or her form and it is in the furtherance of the use of those genitals as naturally constituted that he/she achieves his/her natural purposes (entelechy). Little wonder Aristotle further argued that human being has certain abilities, orchestrated in his morphologies, and that his purpose in life is to exercise those abilities as well and fully. As a matter of fact, the natural law perfection of the unity and purpose argument came with

St. Thomas Aquinas who noted that in man there is only one substantial form albeit intangible namely the spiritual soul and to this is configured the body, its morphologies, its abilities, powers, e.g. sexual, by way of circumincession, that is, – compenetration. Indeed:

...there is one entity absolutely speaking whenever there is a being having one act of existence, even if the being in question is composed of several parts.... Body and soul, as distinguished in the exclusive senses of these terms, have the same unique act of substantial existence, namely life of a living body; therefore, body and soul are one being, one entity, as absolutely speaking not two entities. (Klima, 1997)

Consequently, man exists as a unified whole in spite of his complexity. The unity is particularly fortified by the fact that the spiritual soul is also the principle of the existence of man's vegetative and sensible activities and together with the body forms one existent. (Lots, 1972)

And so, in the light of a metaphysics of human unity postulated by the natural law jurisprudence, it is arguably not possible to change the sex of an individual by any manner of morphological engineering, plastic or hormonal. What this means is that the sex of an individual is fixed and cannot be changed merely by removing the external sex organs of one sex and constructing a reasonable facsimile of the sex organs of the opposite sex and by trying to complement the surgery by

substituting hormonal adjustment. Such procedure though rigorous and complex does not actually change the sex of an individual (O' Donnell, 2002)

Having discharged the burden of answering the first question vide: Can it be done, the next question logically follows. It relates to the moral propriety of attempting the purported sex-change surgery for the purpose of assisting an individual to adjust to a psychological situation of gender dysphoria. Thus to that question should it be done, this paper answers in the negative. Such procedure is adjudged morally/ethically unacceptable, indeed unjustified by the reasons that follow:

Principally, sex-change is not more than a palliative for a condition which may later be amenable to cure. Though presently no cure has been found for gender dysphoria, psychiatrists have not given up hope and expertise. No. They strongly express the hope of rising above it knowing that they have not reached their professional limits to the extent that the door is closed to any further advance in knowledge and technique in that regard. (Lots, 1972)

Moreover, transsexual surgery procedure does more harm than good to the patient. It levies an irreversible damage to the sex organs and abandons its victim to a condition that precludes marriage. This is true because the natural law understanding of marriage goes beyond the consent of two persons to be united but includes openness to fertility and

procreation so as to perpetuate the human species. Victims of sex-change surgeries have been shown to be unable to do exactly that. Actually, the legality of the marriage of the victims of the said surgical procedures has long remained a matter for conjectures in almost all the jurisdictions. Indeed, a New York court, in refusing to order a new sex designation to appear on a transsexual's birth certificate, called sex reversal "an experimental form of psychotherapy by which mutilating surgery is conducted on a person with the intent of setting his mind at ease". (Lots, 1972) That court considered the surgery no better than mutilation and disapproved of resolving a person's unhealthy mental state by drastic physical means.

Indeed, the position/view of the court as cited above is received and/or adopted by this paper with the greatest approval. Sex-change surgery is nothing short of mutilation, it is considered strictly as "a criminal mayhem for which the patient is legally incapable of giving valid consent. (Lots, 1972) This view is on all fours with the natural law provision.

Sex-change surgery as an exercise in mutilation

According to Fagothey, mutilation is "an action by which some part of the body is injured, destroyed or separated from the rest of the body" (Gonsalves, 1989) in such a way that an organic function or definite use of members is directly diminished. Thus, surgical operations pursued with the intension to suppress an organ as in this case-genitals, are mutilations in nature. Precisely because sex-change surgery operates to suppress the genitals and/or replace them with entirely different and artificial ones, it qualifies as an exercise in mutilation. More still, by that procedure, loss of bodily

integrity is occasioned in one way or another and the natural sexual procreational capacity is constrained in an obvious way. Hence, consequent upon the sex-change procedure, the body and/or its functioning cannot be said to be complete again. This loss of integrity cannot be justified by the principle of double effect (Hardon, 1980) as thought by some thinkers especially of the humanist tradition. Indeed, for the reason that the principle of double effect contemplates an act which has two effects, one good and one bad and given that sex-change surgery has two effects both essentially bad, the said principle is inapplicable. What is supposed to be the good effect of the surgery is the cure of “dysphoria”, but given that it is a wrong diagnosis, the said cure is never provided. Hence, there is no good effect available to be weighed against an obvious bad effect namely: loss of bodily integrity. What is more, the principle of double effect requires that “the directly intended object of an act, in this case, to turn a man into a woman and vice versa, must not be intrinsically contradictory to one’s fundamental commitment to himself/herself and the neighbor too.” (Ashley and Rourke, 1986) This criterion is obviously vitiated given that turning oneself to what it is not, is arguably a challenge to self-identity and an affront to social complementarity.

It cannot also be argued that sex-change surgery is an example of indirect mutilation and for that reason morally licit. No, it is not. Mutilation is indirect when one places a cause whose proper effect is not destruction of the part of the body but something else, although from the cause it is foreseen that destruction of a part of the body will follow, though not really intended, but only permitted....(Pazhayampallil, 2004) If

anything, the proper, direct and intended effect of sex-change surgery is the destruction of the genital organs. Hence it is mutilation *simpliciter*.

The natural law thinking underlying these ethical propositions against sex-change surgery is the idea that man's body is not entirely his own. He is but a steward over his body and so is merely a usufruct in which case, he cannot *suo motu* decide to dispense with any part of his body or faculty/function of his person (*Catechism of the Catholic Church* (CCC) No. 2280; 2288; 2297). Granted, that it might be legitimate to so dispense of a part of the whole for obvious health reasons of the entire person, sex-change surgery does not bring any cure in the present state of medical science, at best it is an irreversible palliative. (O' Donnell, 2002) If it is merely a palliative, it has only a status of experiment on the human body; indeed one which exposes the subject's physical integrity to disproportionate or avoidable risk. In this way it is morally reprehensible and illegitimate on the standard of natural moral law. (CCC 2295) What is more, given that the natural law assumes an anterior and superior legal/moral order over statutory and/or constitutional laws, no privacy right argument could justify the freedom to indulge in such mutilatory surgery. Indeed, no human positive law could command such organ dispensation, for mere psychological reason, without risking its legitimacy and right to obedience. (Omogbe, 1994) This is for the reason that any act which distorts the human nature is generally condemned as bad. (Harris 1990) In particular, Bernard Haring in his *Ethics of Manipulation*, isolated "sex-change" and similar manipulatory alterations of man's nature as evil. (Omogbe, 1994)

Making distinctions, testing criteria and setting standards founded on the natural law

It is trite that no part of the human body is a mistake or mere surplusage/appendage. All, in very irreducible ways contribute to the integrity of the human person. Thus as a general rule none is to be sacrificed for another or others. However, where a part of the body develops in obviously ambiguous form, like where a child is born a hermaphrodite (having ambiguous genitalia) natural law thinking prescribes the best function rule. This requires raising the child in that sex which is most prominent or predominant and in which it is most likely to function best. In the event of such circumstance surgical intervention which enhances the normal development/function of the predominant sex is not objectionable by the standard of natural law. (Ashley ad Rourke, 1986) The rationale behind this criterion is that a person must live according to nature as far as it is humanly possible and knowable. Notice that this procedure is potentially inapplicable to victims of transsexualism for the reason that there is no sexual ambiguity in their persons. Their sex is well defined and in most cases they can successfully marry and beget children. Law and morals must look elsewhere for the applicable rule in transsexualism but obviously not in sex-change surgical procedure. Hence, according to Pazhayampallil (2004), “operations to alter the sex are immoral. It cannot be justified in anyway. To destroy wholly healthy organs in the body is direct mutilation”. It does appear *prima facie*, that the *principle of totality* can apply to justify such procedure, but nay.

In what follows, it is to be demonstrated that the *principle of totality* cannot operate to justify sex-change surgery.

The said principle is concretely predicated on the natural teleology of members of the human body/person. A preferred rendition of the principle goes thus:

To promote the human dignity in community, every person must develop, use, care for, and preserve all of his or her natural physical and psychic functions in such a way that:

- a. Lower functions are never sacrificed except for the better functioning of the whole person and even then with an effort to compensate for this sacrifice.
 - b. The basic capacities that define human personhood are never sacrificed unless this is necessary to preserve life.
- (Ashley and Rourke, 1986)

A critical look at the presupposition of this principle discloses the truism that the different organs of the body do not act for their own good but for the good of the whole. They (the organs plus other functions and capacities) are connected and interconnected to achieve a system—the human person. If therefore the whole is the ‘end’ of the parts, it seems legitimate to excise a part in order to save the whole. But the excision of the genitalia and the consequent plastic reconstruction does not salvage the person even from the dysphoria. If anything, it makes the person more vulnerable to more complicated degeneracy. Yet, assuming but not conceding that the surgery brings any remedy, it will still fall short of the qualifying criteria that can justify sacrificing the organs. Indeed, great natural law moralists like Thomas Aquinas has prescribed the conditions for such sacrifice namely; better functioning of the

whole person not merely the whole body; where the part is diseased such that it becomes a threat to the whole person (e.g. malignant prostrate) where there can be no better way of providing for the welfare of the body/person as a whole (Pius XI, 1930); serious change to the whole person (Pius XII, 1953). In his address to the Italian Medical – Biological Union of St. Luke, Pius XII, emphasized the point that the parts and organs of the body have been properly designed and aligned with special functions and use. He insisted that man/woman cannot rearrange them in such a way that these organs and/or parts function in a manner “contrary to the original intrinsic functioning.” (Pius XII, 1944). In making this observation in terms of rearrangement of organs and functioning in manners contrary to the intrinsic teleology, the Pontiff seems to have targeted sex-change surgery.

A review of the above conditions for a justifiable mutilation discloses necessities of exceptional kinds – a high degree danger of disintegration or functional collapse of the whole person or body. But from data of science and allied experiences of victims, transsexualism does not by any calculation pose such a monumental risk as described above. It therefore stands outside the venue of applicability of the principle of totality. Suffice it to underscore that:

The great importance of this principle for medical ethics is that it establishes a norm for setting priorities when one human value must be subordinate to another The spiritual and social values have higher priority than the psychological and biological values, but such priority must

not be understood dualistically as if the lower can simply be sacrificed to the higher values. (Ashley and Rourke, 1986)

Yet in transsexualism, it does appear that there is no occasion necessitating subordination to higher values. All the more, assuming but not conceding that gender dysphoria is a biological depravity, a community reading of the principles of double effect and of totality will operate to ‘unjustify’ the sex-change procedures.

Arguing the major positions of this paper

At the present stage of scientific revolution, no clue has been gotten to ground the hypothesis of biological causation of gender dysphoria as to warrant surgical intervention for a remedy. It remains mere suspicion and/or conjecture perhaps with possible biological predispositions. (Ashley and Rourke, 1986) Indeed, whether a single case of reversal of core gender identities has ever crystallized is in doubt. What is commonplace in transsexual patients are secondary gender dysphoria “resulting from failure of other gender identity adaptations like transvestism and effeminate homosexuality.” (Ashley and Rourke, 1986) In the light of the above consideration, transsexualism requires no surgical intervention but psycho-therapeutic support and enhancement.

Furthermore, it is the case that most transsexual patients, who *ab-initio* opted for sex-change surgery, decide against it after a good counseling process. They eventually respond gradually to psychotherapy. (Ashley and Rourke, 1986) In the light of this finding coupled with the common experience that

this surgery offers no advantage over psychotherapy, most research institutions like John Hopkins University have suspended research in furtherance of sex-change procedures.

Yet, from a theological point of view it is indubitable that: ... surgery does not really solve these person's existential problem, since it does not enable them to achieve sexual normality and be able to enter into a valid marriage or have children. Since many of these individuals are somewhat asexual, their problem is not primarily sexual satisfaction but the relief of the burden of anxiety, which can usually be at least considerably lightened by psychotherapy. Hence, studies so far reported by no means give assurance that sexual reassignment solves the more general character problem from which most of these persons suffer. (Ashley and Rourke, 1986) Sex-change surgery in the present state of science is an exercise in futility. It has a wrong object and is unable to achieve that object as is expected. As Farraher observes, "the male who has the operation is still a male, no matter what he would like to be or what he thinks he is or what he feels like, he has not become a woman". (Farraher, 1979) As a matter of fact, if the cause of his anxiety is the tension existing between his preferences/desires or expectations and his biological sex, "the operation is no solution." (Farraher, 1979) Hence, since the law of parsimony holds that, "*entianonsuntmultiplicandasinenecessitate*" (things are not multiplied without necessity), it is proper to use Ochams razor to cut off whatever is of no value, not to talk of one that is of destructive importance. A legislative ban on sex-change procedure is hereby advocated for in all jurisdictions. This paper aligns with the spirit of the decisions in *Corbett v*

Corbett; C v D and *W v W*. It faults the courts decisions that depart from the norm defended in earlier decisions.

If as elaborated before now, transsexual surgery does not make nature's order of marriage possible by making the patient capable of and open to heterosexual copulatory act of procreational type, state legislators should place a ban on the marriage of post-operative transsexuals. All such indulgence should indeed be criminalized just like Nigeria did regarding same-sex marriage - Same Sex Marriage (Prohibition) Act.

Conclusion

Without doubt, natural law subscribes to a strict commitment to the order of nature as the motive and originating drive of all human actions. It sounds very diminutive of artificialities, especially as they relates to unreasonable maneuvers of the human person – body, mind, capacities and functioning - were appropriate, considered departures from nature's way of operation may be accommodated but only within reasonable limits of the types suggested and encapsulated in the principles of totality and necessity. Hence, for the good of the whole person, any particular function/capacity can be diminished at the instance of necessity for wholeness. Sex-change surgery, *prima facie*, appears to have credibility/propriety under these rules/principles but at a stricter construction, it discloses to be a remedy directed to a false diagnosis. In this sense, it contributes nothing more than a placebo to the psychological condition or set of conditions to which the transsexual is subjected.

Gender dysphoria which calls for sex-change surgery albeit wrongly is apparently related to some degree of

imbalance in the hormonal dynamics of the body or to the nurture of a child in a completely opposite sex world. (Puthenkandam, 1974) Whichever way, it requires “treatment of a psychological or psychiatric nature.” (Fadden, 1967)

In furtherance of the above conclusion, the natural law epistemology has set out metaphysics of unity in man such that the sex of a person is not distinguishable from him or her essentially. Accordingly a surgical engineering of the external genitalia can at best incident a change in appearance (existential) not in reality (essential). Yet the order of nature is of the essential not existential. It is the position of this paper therefore that sex is fixed into the human nature by strict intervolution, and merely ‘sacramentalized’ by the genitalia and hormonal dispositions. A change in the later is inconsequential for the former. Thus any procedure that purports to tinker with substance through the accidents, fails from the onset. Sex-change surgery is of that character. It is hereby adjudged unnecessary, unremitting and canonically be an exercise in mutilation which portends misfortune for marriage and family.

Marriage, in its natural law definition is best exemplified in the Christian marriage. It is a contract made in *humana modo*, having its natural teleology in the preservation/continuation of human species. Precisely as a heterosexual reality, marriage is oriented to the conjugal act of the type open to procreation. To predicate marriage on a surgical maneuver that consciously precludes child bearing is on a natural law criteriology a blemish. A victim of transsexual surgery who contracts marriage lapses into a homosexual union as his/her sexual identity remains unchanged. More still,

sex-change surgery, as mutilation, is a moral/ethical infraction upon which a second order good cannot be superimposed without error. This is because it is morally reprehensible to build a second order good on a first order evil. To graft marriage on the bases of mutilation treats the human person as a means instead of an end.

All-in-all, this work warns that “based on the present state of knowledge, this type of surgery is unethical.” (Ashley and Rourke, 1986) Of course, laws of states have a great responsibility of preserving the moral order as much as possible, as closely as possible, and as far as knowable. Laws that lend credence to sex-change surgery and/or predicates marriage on same, are by the above considerations unjust laws.

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