

# Based on the first legal sex change in Spain

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## *A propósito del primer cambio de sexo legal en España*

### Summary

The following study describes and analyzes the various factors that contributed, according to the author, to making Malaga, (in the south of Spain), the first Spanish city to carry out the first legal sex change in the late seventies. It must be stressed that acknowledgement of this new syndrome, i.e. transsexualism, received great interest from the medical setting in Malaga (notably the official College of Medicine and the Department of Psychiatry in the University of Malaga), followed by the media as a whole. On the other hand, the person who was biologically a man asking to have his sex changed in the registry, constituted a prototype of the syndrome, complying entirely with all the characteristics that defined transsexualism. And, lastly, those who intervened in this legal process, (lawyer, judge and magistrate), were shown to be profoundly human in the face of this medical and legal enigma. The legal decision assumed the predominance of gender (experiences, behavior) over biological elements (chromosomes, gonads, secondary sexual characteristics), considering the previous gender as a mistake which, therefore, would be rectified by it.

**Key words:** Legal sex change. Transsexualism. Sex reassignment. Gender dysphoria. Gender identity disorder.

### Resumen

En este estudio se describen y analizan los diversos factores que contribuyeron, según el autor, a que fuera concretamente Málaga la primera ciudad española donde se llevara a cabo el primer cambio legal de sexo a finales de la década de 1970. Primero, el conocimiento del nuevo síndrome, el transexualismo, despertó en los medios médicos malagueños (Colegio de Médicos y Cátedra de Psiquiatría) un gran interés, seguido de la consiguiente repercusión mediática. Por otra parte, la persona biológicamente hombre que pretendía el cambio registral de sexo constituía un prototipo del síndrome, cumpliendo todos los requisitos que definían el transexualismo. Y, por último, quienes intervinieron en el proceso legal (abogado, juez y fiscal) demostraron un positivo fondo humano ante este enigma médico y jurídico. La sentencia supuso el predominio del género (vivencias, comportamiento) sobre los elementos biológicos (cromosomas, gónadas, caracteres sexuales secundarios), considerando el sexo anterior como un error que de este modo se rectificaba.

**Palabras clave:** Cambio legal de sexo. Transexualismo. Reasignación de sexo. Disforia generica. Trastorno de identidad generica.

## INTRODUCTION

The first registry correction of gender of a person who is biologically a man and recorded as such in his birth certificate was performed by a sentence passed in the Court of First Instance in Malaga<sup>1</sup>. The factors that contributed to making this event occur, were, in a certain way, the following:

1. The definition at the beginning of the 1960's of a new defined syndrome, transsexualism, which was previously confused with others such as intersex, homosexuality and transvestic fetishism.
2. The scientific and mass media importance given to the subject in the USA in the later part of the

sixties, this extending to Spain and especially to Malaga, where many scientific meetings were held (Medical Associations, Psychiatric Departments) in the seventies with extensive repercussion in the national press.

3. The plaintiff, M.<sup>a</sup> del Carmen G. D., with a male biology, presented prototypically the manifestations of the recently defined syndrome, since, as we will explain later on, his identification, emotions, behavior and physical aspect were completely feminine.
4. All these conditions would not have been enough without the human factor of the Law: a skilled presentation of the case by the lawyer, the sensitivity of a judge who pronounced a legal decision and of a public prosecutor who, when faced with the reasons stated, decided to not appeal against the ruling.

It is interesting that Malaga had the first scientific meetings in the Medical Association and University, the first reports in the press, the first legal decision of registry change of sex and that the Malaga Hospital of Carlos

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Haya is the only one that has a public service of medical and surgical treatment for sex reassignment. Are these facts purely coincidental or is there any relationship between them?

## BACKGROUND

There are data that support the universality of the transsexual phenomenon<sup>2</sup>, although it is manifested in a different way in each sociocultural setting; thus, it should not be considered a symptom of the decadent Western culture as has been suggested by some authors.

In history, mention is made of Charles de Beaumont, Chevalier d'Eon (1728-1810), diplomatic agent of Luis XIV, who dressed up as a woman in his spying activities. The doubts about his gender were so great that an autopsy was performed when he died, confirming his masculine anatomic traits. The data which we have do not clarify if he was really a primary transsexual, homosexual or fetishist transvestite.

In his classical work *Psychopathia sexualis*, Kraft-Ebing<sup>3</sup> reports the secrets and suffering of a 46 year old Hungarian physician who felt totally foreign in his masculine gender and had feelings of being a woman. Cauldwell<sup>4</sup> had created the term in his work *Psychopathia transsexualis*.

## RECOGNITION OF A NEW SYNDROME. CLINICAL INTEREST

The creation of the concept was basically due to Harris Benjamin<sup>5</sup>. The transsexual person deeply and unforgettably feels the he/she belongs to the opposite gender to that which corresponds to his/her anatomy (genitals, chromosomes, shape), craves a change in appearance and civil status, since this person feels strange in his/her own body. He/she adopts the speech, gestures and behavior of the sex identified with. In fact, the transsexual person believes that he/she is a victim of an error of nature, as he/she is aware of being in the wrong gender.

The new syndrome was distinguished from other abnormalities such as the following:

1. The observations indicated that it was not a variety of sexual orientation towards persons of the same biological gender. However, the transsexual person can respond erotically to a certain gender or to both; the difference with the homosexual is found in that one feels he/she is the opposite gender of his/her morphology, and not to sexual orientation. The effeminate homosexual sometimes increases gestures and feminine behaviors to make himself more attractive to those of his own gender, but does not question his masculine gender identity.
2. The transsexual person also presented clear differences with the fetishist transvestite. In this way, if the biologically male wears feminine clothes, it is not to become sexually excited as the transves-

tite man but rather in order to feel like a woman. Furthermore, the fetishist transvestite subject has not shown the behavior of the other gender since childhood.

3. Transsexual persons are not psychotics with somatic delusional ideas (growth of breast, decrease in penis) or ideas of belonging to another gender. Nothing within the psychopathological context (duration, other psychotic manifestations) leads to the idea that the transsexual was delirious.
4. In certain personalities, when faced with stressing situations (loss of a significant relationship), passing appearance (not permanently and from childhood as the transsexual period) of new identities, including the gender, had been observed. These manifestations were one of the criteria that defined the personality borderline disorder in the DSM III (1980).
5. On the other hand, it was also not another form of intersexuality (Turner Klinefelter, androgen insensitivity syndrome), since the most complete studies had not androgen insensitivity syndrome detected chromosomal, gonadal, genital or hormonal abnormalities.

The ICD 9 includes the alterations of gender identity in the section of sexual deviations and the DSM III in the psychosexual disorders. However, after, these two international classifications introduced changes: the ICD 10 moves them to the personality and adult behavior disorders and the DSM IV creates a section for the alterations of the gender identity, as, for example, are the anxious disorders. This group means, according to my criterion, a very correct idea since it separates these disorders from the identity of the paraphilias.

Due to its various meanings, the term sex tends, to my understanding, to be correctly substituted by that of gender, although these terms are sometimes exchanged in the literature as if they were synonymous. This semantic hue facilitates the description of the transsexuality phenomenon since sex is more applied to the biological features (female, male) while gender (masculine, feminine) includes characteristics of experiences and behavior that surpass the purely biological; thus, words such as gender dysphoria, gender identity disorders, «transgenerism.» So, gender identity refers to the feeling of oneself as a man or as a woman.

The term transsexual is restricted to those persons with gender dysphoria who have followed a treatment to modify their biological sex. In general, biological sex, identity and gender behavior are in agreement; however, a small proportion show disagreements of different intensity, causing gender dysphoria and sometimes the desire to change their anatomy.

## MEDICAL AND SOCIAL IMPORTANCE OF THE SUBJECT

In 1952, George Jorgensen, american sailor whose origins were danish, underwent surgery to give him the

appearance of a woman. The danish surgeon Dahl-Iversen performed the operation on the initiative of doctors Hamburger (endocrinologist) and Stürup (psychiatrist), and his name was changed to Christine. There had been other operations previously, one of the best known being that of the artist Einar Wegener<sup>6</sup>. However, these cases were carried out with discretion remote to the media publicity.

The mentioned Harris Benjamin, american endocrinologist (who died at 101 years of age in 1986) contributed extensively to the knowledge of the syndrome and to making both physicians as well as the society aware of the specific problems suffered by transsexuals. He carried out his work basically in the first half of the 1960's, giving lectures and publishing the first text for professionals<sup>5</sup>. Benjamin's interest for the subject began, it seems, due to his friendship with Otto Spengler who was a known transvestite. This artist had explained his case in the New York Society for Jurisprudence on December 8, 1913, a presentation that was reproduced by the *New York Medical Journal* on February 21, 1914.

Several cases of transsexual persons who have changed their biological sex to harmonize it with their gender identification are mentioned in the media, and the article dedicated to the different features of transsexualism in the influential newspapers *New York Times* (1966) especially stands out.

In relationship with Malaga, at the beginning of the 1960's, I collaborated with doctor Ricardo Garcés to prepare a meeting in the Medical Association on transsexualism in which american specialists participated. A few years later (1976), I organized a debate on the subject between professors, students and persons affected within the activities of the Psychiatry Department (of whose teaching I was in charge of at that time), and it had wide coverage in the national press.

## CHARACTERISTICS OF THE PLAINTIFF

M.<sup>a</sup> del Carmen G. D., 28 years of age, expressed a natural femininity in his gestures, the way he sat, walked, high-pitched tone of the voice and hair style. That is, his physical appearance was far from being a bad copy of a woman as frequently occurs in other persons with a gender identify problem after sex reassignment. Although he was accessible during the interview, he often blushed, above all when dealing with certain subjects such as loving and erotic activity and emotions. This natural appearance of a woman makes it easy to spontaneously speak with words of the feminine gender during the interview, without needing to force one's attention to not make a mistake. There were other features that called one's attention regarding his identification with the feminine gender:

1. In childhood, when no feminine clothes were available, he resorted to imitating them with towels and scarfs, preferred dolls, «doll houses», playing the mother instead of playing with cars,

soldiers or other entertainments in which force was present on the first level. On the other hand, he had a permanent repulsion for the genital parts (penis and testicles).

2. The girls in the school and neighborhood accepted him without any mistrust as one more. He joined them and strangely, he did not express any traumatic memory during childhood of having been rejected, harassed or wounded with comments by the children. The scarce real or subjectively felt importance of childhood stressful experiences would have contributed, unquestionably, to the simple and mature personality of M. C. and that he does not express social resentment.
3. In 1974, he went to work in London, in order to have enough money to undergo medical and surgical treatments that would make his appearance agree with his desired sexual identity, eliminating the characteristics of the original biological male sex and, on the other hand, forming those of a woman. The feminization process was carried out in the Hospital Charing-Cross\* in 1997.
4. In England, he was taking care of the small children of a high ranking government employee during his biological sex change process. This family, who knew his biological sex, must have been happy with his work and with him, since they gave him great support on a personal level. This circumstance indicates the trust of the family and the conviction that the nanny was really a woman.
5. This person had a heterosexual boyfriend (that is, he was attracted to women). He was very excited, had his apartment and trousseau prepared for the projected religious wedding in a known Málaga parish (in his clinical history, I still have the invitation for the ceremony that he sent his lawyer José Manuel Pérez Estrada and me).
6. In the examination, it was observed that the hormone treatments and surgical intervention had not only achieved an acceptable anatomy of the organs (vagina), sexual characters (enlarged breasts) and a greater accumulation of fat in the waist and hips, but also that her\*\* pelvis, hands and features had a woman's morphology, even though the effect of androgen hormones produces morphological transformations in these parts that are irreversible.

In my report, I emphasized the M.<sup>a</sup> del Carmen clearly corresponded to the recently described syndrome, her experiential gender being female.

\*This Hospital of Charing Cross created a specialized service in the medical and surgical treatment of transsexualism in the middle of the 1960's, almost at the same time as was done in the U.S.A. in the Hospital John Hopkin of the USA and the University of Minnesota.

\*\*Translator's note: From here on, I will refer to him as her.

## THE LEGAL DECISION

### Legal precedents

Prior to the definition of the new transsexualism syndrome, there are two very interesting legal contributions:

1. Angel Ossorio<sup>7</sup> in his project draft of the Bolivian Civil Code (1943) includes the following text in his art. 15: «When during the course of the life of a person, there is a change in gender from that which the person was entered at birth, it will be possible to extend, by his/her request or that of his/her legal representatives, a judicial dossier to define his/her situation. If the Courts admit the sex change, the legal decision along with the birth certification will be entered in the civil registry.»
2. A Swiss judge of first instance wrote in 1945: «It is not only the body that determines gender but also the soul.» This country, among all the European ones, and even in the world, has been the one in which persons with these problems have had the least difficulties<sup>7</sup>.

### Foreign laws

Once the transsexualism syndrome was defined, specific laws arise in the USA (Illinois, 1961; Arizona, 1967; Louisiana, 1968), Canada (British Colombia, 1973; Saskatchewan, 1975; Quebec, 1977) and in Europe (Sweden, 1972; Germany, 1980).

### European Commission

The European Commission of Human Rights<sup>8</sup> adopted a fundamental right of the person regarding their gender identity for the first time and unanimously on March 1, 1979. The Commission disapproved of the Belgium state for having «rejected the recognition of an essential element of the personality: sexual identity due to a change in physical form, in psychic constitution and in social functions. In this way, the effects of the legal medical treatment aimed at making an agreement between physical and psychic gender is not taken into consideration.

In the opinion of the Commission .... Belgium does not show the due respect to private life according to the meaning of art. 8, paragraph 1, of the Convention: «Each person has the right for their private and family life to be respected.» It also infringes article 12 whose content is: «Men and women having adequate age have the right to marry and form a family according to the national laws that govern the exercise of the right.»

However, in 1980, the Plenary Court of the European Court of Human Rights decided to not treat the case of this person regarding his rights as a transsexual, since all the available solutions in his own state (Belgium) had

not been used up. The person that appealed, Van Oosterwijck, also a jurist of the Commission of the European Community in Brussels, had been treated and operated on to be reassigned from the masculine sex, as she was biologically a woman.

### Legal decision (Court of 1st Instance number 3 of Málaga, legal decision 114 /1979).

We transcribe its most important extracts.

*Result:* [...] it was ordered to present the original judicial records to the representation of the plaintiff, the summary of the evidence to be written within a period of twenty days, that was done [...] requesting that a legal decision be dictated, declaring that the plaintiff belongs to the feminine gender, that the circumstance of the masculine gender that appears on the birth certificate is null as it is contradictory with reality, and that it should be corrected in the sense that is of the interest of the plaintiff and thus, this sentence being binding and in implementation of it, it proceeds that the prerogative order be given to the corresponding Civil Registry to comply with the resolution in each and every one of its terms.

*Considering:* that although the supposition of the judicial records is not gathered in our legislation, and consequently, apparently it is difficult to change the gender assignment that appears on the birth certificate in our Civil Registry, this is not so, from the moment in which the Law of the Civil Registry and Regulations is regulated by a governmental dossier for the correction of the error on the assignment of gender, so that with more reason, rectification of the gender assignment on the birth certificate registry can be agreed upon in the major declaratory action, since it can be considered that her inscription as a male was an error [...], when gender is defined by medical-surgical performance, and this in agreement with paragraph 1 of art. 92 of the Civil Registry Law.

*Considering:* that in virtue of all that previously explained, it proceeds to verify the feminine gender of the plaintiff, ordering the corresponding correction in the Civil Registry where her birth certificate is recorded.

Judge in penal law, his honorary José Luis Suárez de Bárcena de Llera.

The legal decision simply corrects the birth certificate in regards to gender; in this way, this person can enter into a civil and religious marriage.

## CONCLUSIÓN

Besides the definition of the new syndrome, of the social importance of the problem in the western world, especially in Málaga, of transsexual persons and the existence of a prototypic person who requests a legal change of gender, the participation of competent and creative persons was necessary: a skilled lawyer in explaining the reasons («masculine gender that is stated in the birth certification is null due to contradiction with reality»), a sensible judge who is capable of pronouncing a new legal decision on a complex subject («the suppositions of judicial records is not gathered in our legislation», the

correction of the assignment of gender in the birth certificate can be agreed upon in the major declaratory proceedings, since inscription as a male can be considered an error ... and a judge who considered the sentence fair and did not recur to further appeals.

The legal decision means the predominance of experienced and behavioral sex (gender) over the biological one, since it does not argue the rights of the person as the European Commission of Human Rights and the later legal decisions of the Supreme Court. Its essentials are simpler, such as the recorded sex is null, as it contradicts with reality.

After that, for a certain time, all the legal decisions were appealed to the Supreme Court of the Ministry of Law. The influence of the first sentence in the legal reasonings on those of the High Court was considerable, although these have also based their arguments on art. 10.1, 14 and 32 of the Spanish Constitution.

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