



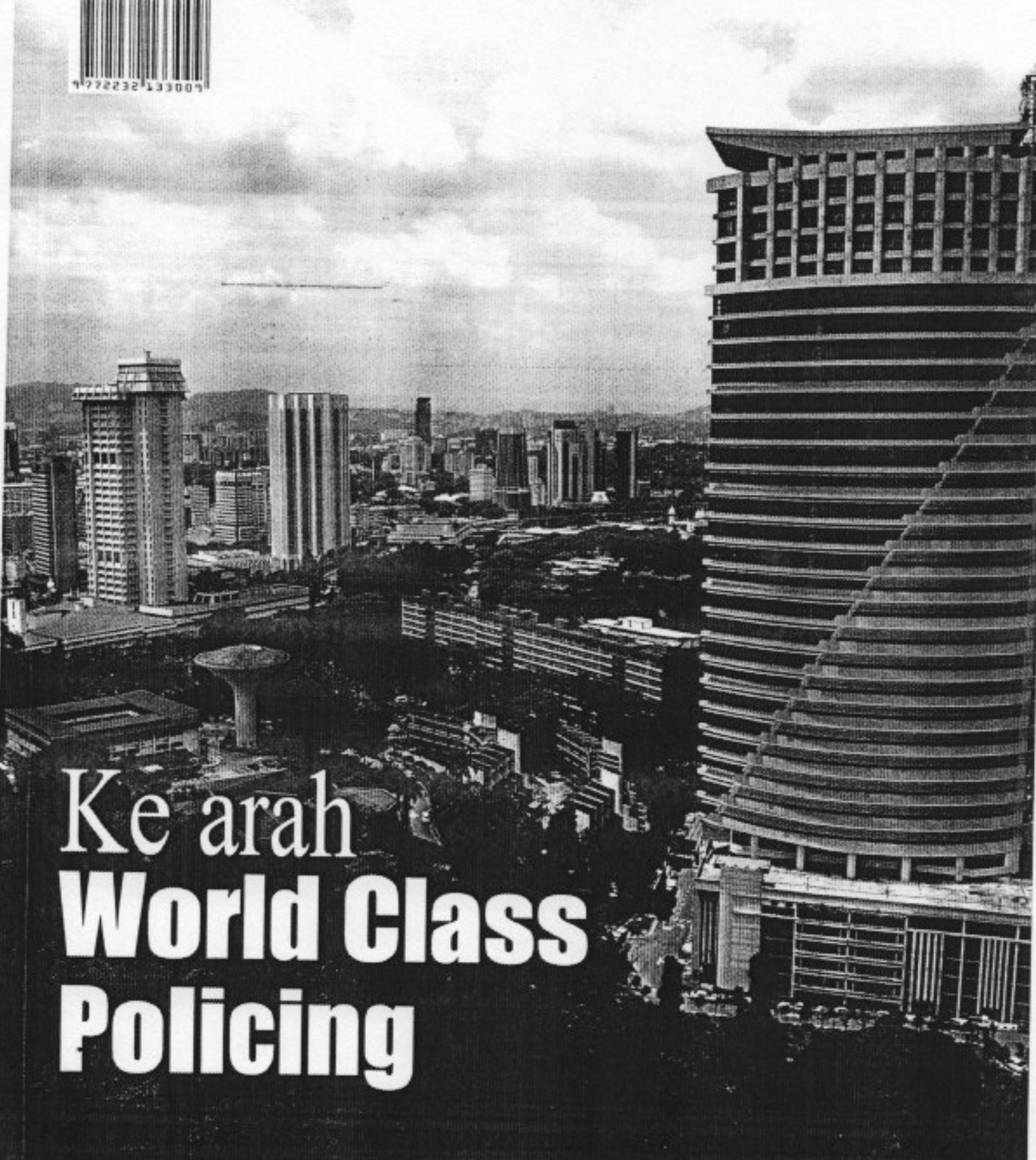
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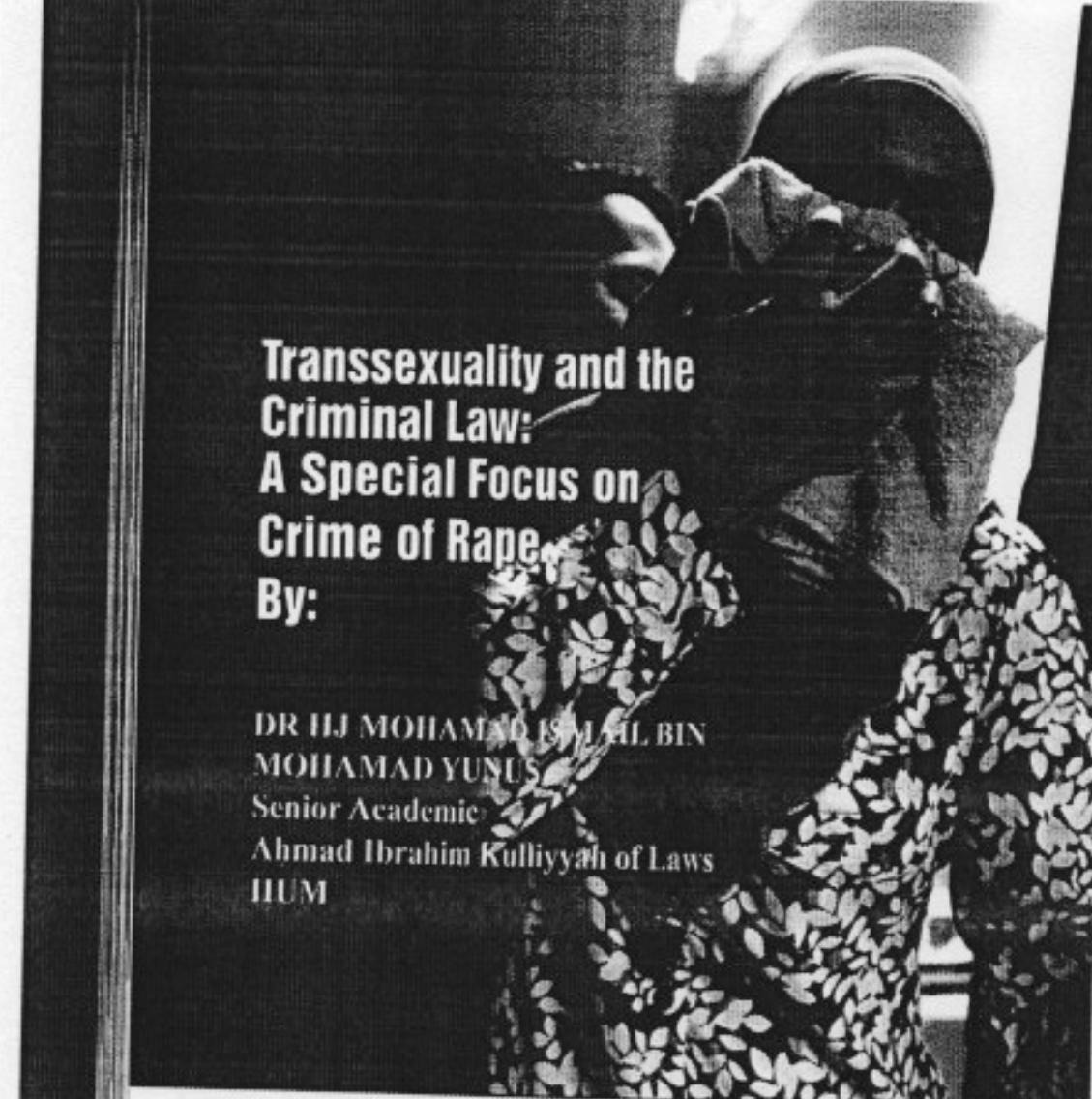
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## Transsexuality and the Criminal Law: A Special Focus on Crime of Rape By:

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### Synopsis

By virtue of section 375 of the Malaysian Penal Code (MPC), it is clearly stated that the offence of rape could only be committed by a man (as defined in section 10 MPC) as principal upon a woman as victim. This provision highlights that in Malaysia, the law of rape is entirely gender delineated. A question might arise, how about if a biological male who underwent the gender reassignment surgery or transsexual operation and consequently become a person with an artificial female genitalia and the issue is whether that person would remain as a male for the purposes of criminal law, and thus could not be the victim of the offence of rape?

In Malaysia, the offence of rape, which is provided under section 375 of the Penal Code, can only be committed by a man<sup>1</sup> being the principal upon a woman<sup>2</sup> as the victim.<sup>3</sup> Similarly, in England, prior to the Criminal Justice and Public Order Act 1994, the law of rape was entirely gender-delineated.

Consequently it is noted that a biological male who underwent gender reassignment surgery is a male for the purposes of the criminal law, and thus could not be the victim of the offence of rape.

In the celebrated English case of *Corbett v. Corbett*<sup>4</sup>, the petitioner, Arthur Cameron Corbett, prayed for a declaration that a ceremony of marriage which took place between himself and the respondent, then known as April Ashley, was null and void and of no effect, because the respondent, at the time

of the ceremony, was a person of the male sex. It was common ground that the respondent had been registered at birth as a male and prior to the purported marriage had undergone an operation for the removal of the testicles, most of the scrotum and the construction of an artificial vagina. Since that operation the respondent had lived as a woman.

In granting the petitioner a decree of nullity, Ormrod J. observed that marriage is essentially a relationship between man and woman, and that to determine the sex for the purposes of marriage the law should adopt biological criteria, that is chromosomal, gonadal and genital tests and if all three were congruent, determine sex accordingly, ignoring any operative intervention, and therefore, the respondent was not a woman for the purposes of marriage but was from birth and had remained at all times a biological male.

1. Section 10 of the Malaysian Penal Code provides that the word "man" denotes a male human being of any age.
2. Section 10 of the Malaysian Penal Code provides that the word "woman" denotes a female human being of any age.
3. Section 375 of the Malaysian Penal Code provides that a man is said to commit rape who has sexual intercourse with a woman...
4. [1970] 2 All ER 33, *Cossey v. UK* [1991] 2 FLR 492, the issue

in this case was whether the post-operative male-to-female transsexual which caused the plaintiff unable to obtain birth certificate showing her sex as female and to contract a valid marriage with a man has violated the Convention of Human Rights.



Thus it is noted that by analogy, the above decision clearly pointed out that a male-female transsexual cannot legally be the victim of rape<sup>5</sup> and it is not possible legally to change one's sex-born male, a man will always be male, and thus cannot be raped.

It is observed that the case of *Corbett v. Corbett* has received judicial approval in virtually every Commonwealth court which has been required to consider the legal status of transsexuals.

In the New Zealand case of *Re T*<sup>6</sup> *McMullin J.* held that the Supreme Court lacked jurisdiction to make a declaration as to the sex of a transsexual who was registered at birth as a male but had undergone sex reassignment surgery and now lived as a female. His Honour pointed out that such a declaration would not, in the absence of any statutory provision, bind people with whom the applicant would deal in the future and who were not parties to the proceedings, the court having no power to make a declaration in rem. He said, "It is for the legislature to say whether genuine transsexuals, of whom the applicant is undoubtedly one, should be given the opportunity, and if so, on what terms, to obtain legal recognition of a state which reflects both their own inborn psychological make-up and the medical and surgical changes which they have undergone to make that state more certain".<sup>7</sup>

In the course of recounting the difficulties facing the applicant as a transsexual, *McMullin J.* referred to *Corbett's* case in the following terms: "Even if the applicant were able to obtain a licence to marry and entered into a form of marriage, the person with whom the 'marriage' was contracted might petition for a degree of nullity. Such a decree was sought and obtained by the 'husband' under the United Kingdom legislation in *Corbett v. Corbett*."<sup>8</sup>

Similarly in the South African case of *W v. W*<sup>9</sup>, *Nestadt J.* followed *Corbett v. Corbett* in finding that a marriage was invalid where the wife was a post-operative male-to-female transsexual. The difference in that case was that the marriage had been consummated and the parties had normal sexual relations. The breakdown in the marriage was not attributable to the wife's transsexuality.

His Honour said:

"I do not think I am adopting too technical an approach when I say that the plaintiff's evidence does not show that the operation converted her into a female. What it did was to artificially supply her with

certain of the attributes of a woman, namely breast and a vagina-like cavity. This, however, so it was argued taking into account the fact that the plaintiff was (always) a transsexual and thus psychologically a woman, was sufficient; that in her post-operative state, and, in particular, because of her ability to have sex with the defendant, she was capable of fulfilling the essential role of a woman in marriage (and this, despite her inability to procreate) and that it would be anomalous to classify the plaintiff as male when she had the physical and psychological attributes of a female and was socially accepted as, and looked like, a woman."<sup>10</sup>

It is noted that his Honour went on to discuss and dismiss certain criticisms of *Corbett's* case. He concluded:

"Imitation cannot be equated with actual transformation. If what I may call this pseudo-type of woman is, for the purposes of marriage, properly to be regarded as a female, then, in the absence of medical evidence justifying such finding, the intervention of the Legislature would be necessary."<sup>11</sup>

It is also observed that the biological definition of sex as laid down in *Corbett v. Corbett* has been followed by the English and Australian courts and tribunals on a number of occasions and for purposes other than marriage.

In *White v. British Sugar Corporation Ltd.*<sup>12</sup> a case before an Industrial Tribunal, a female-to-male transsexual, who had not undergone any sex-change treatment, was treated as a female by the tribunal for the purposes of the Sex Discrimination Act 1975; the woman in question had sought and received employment in a position reserved for men under the Factories Act, but was dismissed after discovery of her biological gender.<sup>13</sup>

In *R. v. Tan and Others*<sup>14</sup>, the English Court of Appeal considered the sex of a transsexual within the context of the criminal law. In this case one Gloria Greaves had been convicted of being a man living on the earnings of prostitution. Brian Greaves had been convicted of living on the earnings of prostitution of another man, namely Gloria Greaves. Each appealed upon the ground, inter alia, that Gloria Greaves was not a man. The evidence revealed that Gloria Greaves had been born male, but had been psychologically and socially living as a female for almost 20 years. She had undergone both hormone treatment and reassignment surgery. The Court of Appeal rejected the appellant's submission that the

5. Due to the law of rape only recognised biological woman to be a victim.

6. (1975) 2 NZLR 449.

7. Ibid. 453.

8. Ibid. 451.

9. (1976) 2 SALR 308.

10. Ibid. 313.

11. Ibid. 314.

12. [1977] IRLR 121.

13. In this case *Corbett v. Corbett* was not referred by the Tribunal, however, by recourse to the dictionary definition of "male" and "female" the Tribunal arrived at much the same conclusion; namely that the existence of male or female reproductive organs was essentially determinant of a person's sex.

14. (1983) 76 Cr. App. R. 300, where *Corbett v. Corbett* was referred and applied.

Corbett's principles should be restricted to the field of family law.

Parker J. delivering the judgment of the court said:

"In our judgment both common sense and the desirability of certainty and consistency demand that the decision in *Corbett v. Corbett* should apply for the purpose not only of marriage but also for a charge under the Sexual Offences Act 1956 (UK). The same test would apply also if a man had indulged in buggery with another biological man. That *Corbett v. Corbett* would apply in such a case was accepted on behalf of the appellant. It would, in our view, create an unacceptable situation if the law were such that a marriage between Gloria Greaves and another man was a nullity, on the ground that Gloria Greaves was a man; that buggery to which she consented with such other person was not an offence for the same reason; but that Gloria Greaves could live on the earnings of a female prostitute without offending against the Sexual Offences Act 1956 because for that purpose he/she was not a man and that the like position would arise in the case of someone charged with living on his earnings as a male prostitute."<sup>15</sup>

On the other hand, the principle in *Corbett v. Corbett* was not followed in New Zealand and Canada. In *A.G. v. Otahuhu Family Court*<sup>16</sup>, the court held that in determining the essential role of a man and a woman in marriage the ability to procreate or to have sexual intercourse are not essential. The law in New Zealand had changed to recognise a shift away from sexual activity and more emphasis is being placed on psychological and social aspects of sex.

In the Canadian case of *R. v. Owen*<sup>17</sup>, the biological male respondent had never undergone transsexual surgery, he had lived for over 40 years as a woman. Following the death of his male companion, the review committee appointed under the Old Age Security Act awarded respondent the Widowed Spouse's Allowance.

Similarly, in *MT v. JT*<sup>18</sup>, the Appellate Division of the Superior Court of New Jersey held that post-operative transsexual male to female persons have been able to marry, or precisely that their marriages to a male husband were not void.

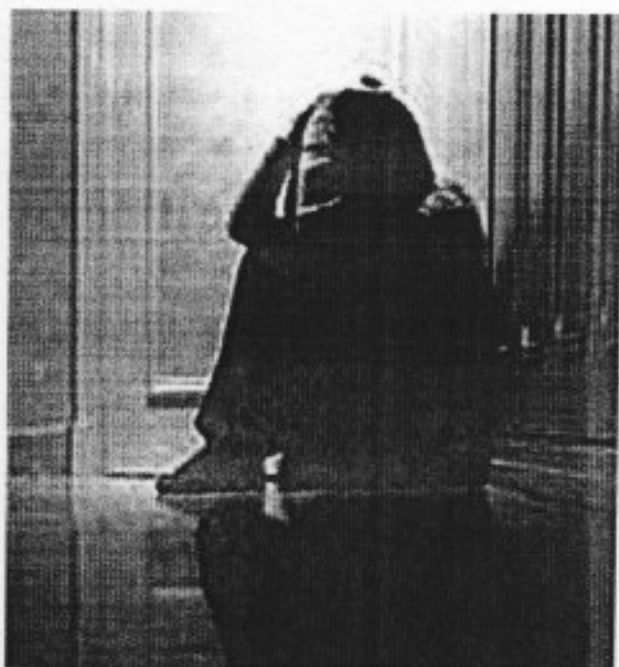
According to Morgan, Taylor and Rumney<sup>19</sup>, with reference to section 142 of the Criminal Justice and Public Order Act (UK) 1994 which created a

new section 1 to the Sexual Offences Act 1956<sup>20</sup> stated that by expanding the legal definition of rape so that the gender of the victim is irrelevant, the law has closed the transsexual/hermaphrodite loophole.<sup>21</sup>

Similarly, it is submitted that the male-female transsexual provided an exception to the 1994 Act's intention to make the gender of the victim irrelevant in rape.<sup>22</sup>

In the Australian case of *R. v. Cogley*<sup>23</sup>, the accused was convicted of assault to commit rape upon the complainant who had been born male, but had undergone a male to female sex re-assignment operation. The operation involved the surgical removal of the penis and testes and the creation of a vaginal cavity. Following the operation the victim lived the life of a woman. By applying *Corbett v. Corbett*, the trial judge ruled that the complainant was still a man.<sup>24</sup>

The Supreme Court of Victoria held that whether the victim was a man or a woman or a person who had the physical appearance or physical attributes of a man or a woman is not relevant in determining whether in such circumstances a crime has been committed. In relation to the crime of assault with intent to rape, the intent is with respect to a real and not an imaginary crime and the fact that the person assaulted was not a woman with a vagina,



15. *Ibid.* 307. See also *R. v. Lee Harris* (1988) 35 A Crim R 146.

16. [1995] 1 NZLR 603. Cp. *Re T* (1975) 2 NZLR 449.

17. (1993) 70 F.T.R. 308. Cp. *M. v. M. (A)* (1984) 42 R.F.L. (2d) 267.

18. 355 A.2d 204 (1976).

19. "A Male Perspective on Rape" (1994) 144 NLJ 1490.

20. By section (1) of the 1956 Act it is now an offence for a man to rape a woman or another man. Subsection (2) provides that a man commits rape if (a) he has sexual intercourse with a person (whether vaginal or anal) who at the time of the intercourse does not consent to it.

21. A transsexual has been described as "a person anatomically of one sex who invincibly believes that he or she is of the other sex. The strength of the belief amounts to an obsession to have the body, appearance and social status revised to conform with that of the individual's 'proper' gender: see P.J. Pace, "Sexual Identity and the Criminal Law" [1983] Crim. L.R. 317.

22. See also Andrew Neville Sharpe, "The Failure to Degenderise the Law of Rape: The Criminal Justice and Public Order Act and the Transsexual Victim" (1995) 53 The Criminal Lawyer 7.

23. [1989] VR 799.

24. The accused appealed against conviction and sentence.



if that were the fact, was irrelevant.

Similarly, in *R. v. Matthews (John)*, the accused in this case was charged on an indictment containing two counts, namely rape, contrary to section 1 of the Sexual Offences Act 1956 (as amended) and indecent assault on a male person, contrary to section 15 of the same Act.

The accused had visited the complainant, in her flat where he had allegedly removed her clothing, touched her genital area, and forced his penis into her "vagina".

The complainant was born a biological male in 1958 and underwent gender reassignment surgery in 1994. This surgery produced a well constructed, cosmetically acceptable, artificial vagina and a natural vagina. Nevertheless, this surgery enabled the complainant to live in the female role, including having sexual relations. Indeed, the complainant had been working as a prostitute when she met the accused, and they had enjoyed consensual sex on a number of occasions. Despite this, the Crown admitted that, applying *R. v. Tan*<sup>27</sup>, the complainant remained a biological and legal male.

The first argument put forward by the defence was that the CJPOA 1994 only extended the offence of rape to include anal rape of a man or woman. The Crown argued that the construction of the new subsection, in particular with reference to word "person", was clear; thus section 142 of the CJPOA 1994 had actually extended the offence of rape to include "vagina" rape of a male also.

The defence in *Matthews* went on to submit that "natural sexual intercourse" consists only of sexual intercourse per vaginam. In order to constitute such intercourse, both the penis and the vagina should be as provided by nature. Thus, intercourse with the complainant's artificial vagina does not come within this definition. "Unnatural sexual intercourse", as mentioned in section 44 of the Sexual Offences Act 1956, has been defined to mean "buggery, which offence includes bestiality". The defence submitted that "unnatural sexual intercourse" was therefore intercourse per anum by man with man, or in the same manner by man with woman, or by man or woman in any manner with the beast.<sup>28</sup> "Vaginal" sexual intercourse with a male-female transsexual does not fall within any of these definitions.

The court pointed out that sexual intercourse means penile penetration of the vagina or anus. There was no reason to limit the expression "sexual intercourse" only to include heterosexual vaginal intercourse (natural sexual intercourse) and heterosexual or homosexual anal intercourse and bestiality (unnatural sexual intercourse).<sup>29</sup>

The court observed that penile penetration of a "natural vagina which is anatomically irregular as a result of a birth defect, an operation or an accident" would constitute rape. Such ruling is in accordance with the judgment of Willmer L.J. in *S. v. S. (otherwise W) (No. 2)*<sup>30</sup>, a woman who had a malformed vagina, too short to permit full penetration. Surgery was capable of artificially enlarging the cavity so as to allow full intercourse. It was held that sexual acts place after surgery could amount to consummation of the marriage, notwithstanding the fact that the cavity of the vagina was, for the most part, artificial. While delivering the judgment, Willmer L.J. made a number of observations concerning the hypothetical situation of a wife with a wholly artificial vagina. He stated that if such a woman were held to be incapable of consummating her marriage because she was incapable of taking part in true sexual intercourse:

"The strangest results would follow. It would involve, for instance, that such a woman might be to a considerable extent beyond the protection of the criminal law, for it would seem to follow that she would be incapable in law of being the victim of a rape."<sup>31</sup>

Hooper J. followed the dicta of Willmer L.J. and confirmed the protection of the criminal law for

25. *Cp. R. v. Harris* (1988) 35 A. Crim. R. 146, it was held that a person who had undergone full male to female sex reassignment surgery and who was psychologically a woman was not a "male person" for the purpose of the offence of being a male attempting to procure the commission by a male of an act of indecency; a psychological role change in itself, however, was not sufficient: the change must also be physiological. See further P.J. Pace, "Sexual Identity and the Criminal Law" [1983] Criminal Law Review 317.

26. Unreported, October 1996, cited at [1997] Crim. L. R. 565.

27. See above note 15.

28. 1 Hale 669.

29. [1997] Crim. L. R. 565, 568.

30. [1962] 3 All ER 55.

31. *Ibid.* 63C.

