

# Changing one's legal name: the transsexual issue

**Elizabeth Zambrano**

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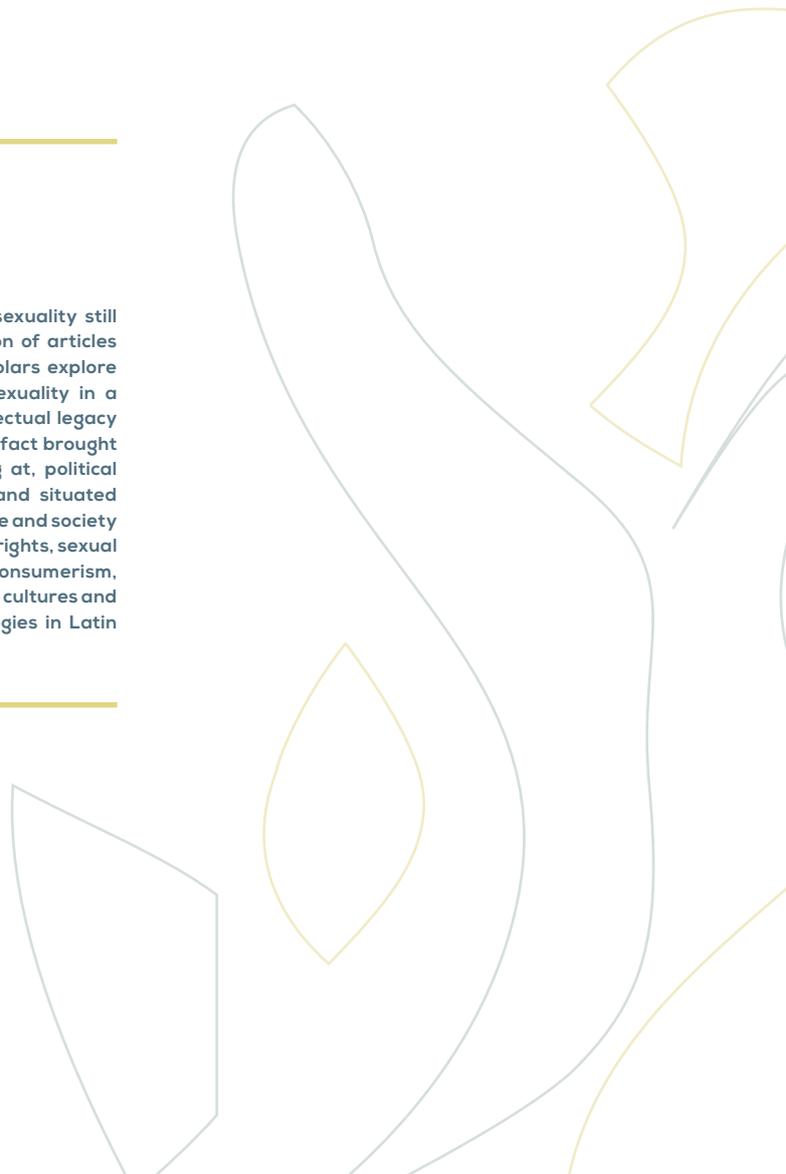
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## Sexuality, culture and politics A South American reader

Although mature and vibrant, Latin American scholarship on sexuality still remains largely invisible to a global readership. In this collection of articles translated from Portuguese and Spanish, South American scholars explore the values, practices, knowledge, moralities and politics of sexuality in a variety of local contexts. While conventionally read as an intellectual legacy of Modernity, Latin American social thinking and research has in fact brought singular forms of engagement with, and new ways of looking at, political processes. Contributors to this reader have produced fresh and situated understandings of the relations between gender, sexuality, culture and society across the region. Topics in this volume include sexual politics and rights, sexual identities and communities, eroticism, pornography and sexual consumerism, sexual health and well-being, intersectional approaches to sexual cultures and behavior, sexual knowledge, and sexuality research methodologies in Latin America.

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## Changing one's legal name: the transsexual issue\*

Elizabeth Zambrano \*\*

The right to live is the first right that comes to mind when considering human rights. Without it the others would not even exist. The right to live refers to the physical whole, but also moral integrity, privacy, intimacy, honor, dignity, and one's individual image. In other words, it is the right not to be treated in a degrading and dehumanizing fashion.

By means of its institutions the Modern State—as the guardian of the right to live—must seek ways to protect the individual, since people pay taxes and obey laws, leading them to believe they deserve protection. This protection extended to everyone, including those who are part of minority groups, such as transsexuals. For members of this group, being individually and socially integrated means to change one's legal name, and this is determined by a radical form of surgery.

I address matters relating to sex, sexuality and transsexual rights have created interdependence and tension between medicine and law, as well as the social construction of the mandatory male and female roles supported by biological sex and the efforts to improve the social condition that have been offered up by the law.<sup>1</sup>

### The Regulation of Sex and Sexuality

In our society sex has been historically regulated by the institutions of church, law and medicine, which have determined the existence of:

1. Two sexes, male and female.
2. Two genders, masculine and feminine.
3. A “correct” way for these categories to relate to each other: heterosexuality.

In this way sex, gender, sexual orientation and sexual practices have been established according to a certain “normal standard” directed mainly at the perpetuation of the

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\*\* PhD. MD. Psychoanalyst. Associate researcher at the Center for the Study, Care and Research on Childhood and Adolescence.

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<sup>1</sup> The data presented here is based on research done in 2001 and 2002 (Zambrano, 2003).

human species through procreation. Deviations from this standard have historically been perceived as “sin”, “crime”, or “illness” according to the institutions in charge of regulating social discourse. This understanding is usually approved by common sense. This means that people who have sex with people of the same sex, people who dress and behave as if they are of the opposite sex, and people who feel they belong to the sex that is not their biological one have traditionally transgressed social norms, being perceived as “sinners”, “sick”, or “criminals”. This has been the case for homosexuals, *travestis*<sup>2</sup> and transsexuals. The emerging problem has thus been how to deal with differences running up against concepts which are so embedded in our culture as the dichotomous classification of sex and gender and the social commandment towards heterosexuality.

These “truths” regarding the normal and the pathological are at the core of medical and legal reflections regarding transsexuals and they support solutions presented by these fields in order to “improve” transsexuals’ quality of life.

## Transsexualism and Surgery

Transsexualism is a new category, not only for science, but even for the individuals who identify themselves or are identified as transsexuals. This new category of individual assumes the existence of a new technology and positions taken by doctors, law makers, and the individuals themselves, regarding the possibility for a “sex change”. Sex change surgery thus appears, against this backdrop, being widely understood as creating a “sex change” in fact, despite medical discourses emphasizing that what really occurs in surgeries of this nature is a sex reassignment. In this way, Brazilian health care system offers transsexuals new hormonal technologies and “sex change” or “sex reassignment” surgeries. Medicine defines the “true transsexual” by constructing a diagnosis which differs from other cases and pathologies, in order to assure the correct therapeutic approach. But what once appeared to be a simple matter of diagnosis revealed theoretical and ideological positions not yet resolved in the medical field. For example, does performing surgery mean mutilating normal genitals in favor of psychopathology? Or is this sort of surgery really therapeutic, fixing a biological error in order to favor an imposed psychosocial reality?

These questions are reproduced in legal discourses. The definition of being a man or a woman relies on the medical model which is, in turn, based on biology and which offers a definition for transsexualism. Law experts and doctors argue about transsexuals’ “true

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<sup>2</sup> Translator’s note: *Travesti* is the current Brazilian category for a biological male engaging in female gender performance. The English “transvestite” is not an appropriate translation, as in English it refers to a non-permanent or semi-permanent gender performance, while a *travesti* generally lives as female permanently, and typically engages in some form of permanent body modification.

sex", who is a "true transsexual", if "sex change" surgery is correcting or mutilating, if individual have the right to amputate parts of their own body, and what they are "really" transformed into when doing so.

Sometimes the two discourses enter in conflict, as when medicine performs sex change surgery and the law denies the sex and name changes in legal documents, sometimes leaving a transsexual person in a worse condition than the one they were previously in. Only those surgeries performed according to the standards of the Brazilian Federal Counsel of Medicine can reduce the risk of a legal denial for name/sex change on one's documents. Those transsexuals who do not go through the "official" process are at risk of not being able to change their names. Famous Brazilian transsexual Roberta Close encountered this problem, having undergone surgery in Europe and then not being allowed to change her documents in Brazil.

From a subjective viewpoint, sex change surgery offers transsexuals the opportunity to fully enjoy the feeling of belonging to one gender and not to the other, making gender identity compatible with sexual identity. But along with the biological issues, civil issues arise following surgery, such as changes in name, gender, affiliation, marital status, legal rights and duties. These also need to be dealt with.

In order to have access to surgery, transsexuals need to be evaluated by a medical board. Therefore, they seek a hospital in order to achieve the necessary transsexual diagnosis, which will allow them to be accepted in a surgery preparation program. After two years in said program, they will be allowed to have the surgery and obtain a "complete" transformation with regards to their gender identity.

From the medical perspective, body changes, the use of a social identity that differs from the biological gender, and requests for sex change through surgery are key elements in a diagnosis of an individual as transsexual. With this diagnosis, one can be considered a "true transsexual". This may or may not make it easier for the individual to enter into a preparation program which will qualify them for surgery, however.<sup>3</sup>

In order to be diagnosed with transsexual syndrome (classified in DSM-IV<sup>4</sup> as *gender identity disorder*) an individual must show an unshakable belief that they belong to a gender different from their biological one and demonstrate that they had feelings of inadequacy regarding their biological sex in early childhood. They also must express a desire to go through sex change surgery.

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<sup>3</sup> I am using the expression "true transsexual" with the intent of relativizing this mostly medical concept (and unquestioned among lay people). The term "true transsexual" was first used by Stoller (1982) and can be compared to the concept of the "primary transsexual", as used by Person and Ovesey (1974). For the different terms used to define transexuality, see Chiland (1999).

<sup>4</sup> The American Psychiatric Association's mental disorders manual, used as a reference in many countries.

Another criterion for a diagnosis of transexualism is non-use of genitals for erotic purposes, which excludes *travestis* who use their genitals in intercourse from this diagnosis. According to my data, individuals who consider themselves to be transsexuals can manipulate this medical discourse for their own ends. Although they may not fulfill completely the diagnostic criteria (by using their genitals for erotic purposes, for example) they can fake behavior in order to meet medical expectations and receive authorization for surgery.

Most transsexuals I interviewed consider sex change surgery to be the final solution to the problem of how to accommodate their biological sex with the one they feel they belong to. A belief that the form of one's genitals is the defining component of one's gender is implied here, and the desired procedure is often understood as "sex change" surgery instead of "sex reassignment."

Sex change surgeries were not legal in Brazil until 1997. Before that, transsexuals had to go to other countries and pay a high physical and economic price for inadequate medical care. Many report horrible pain and unsatisfactory results. As one of my informant's explains: "I heard many old stories about Colombia. That people used to go to Colombia to be operated on. When the time came for them to take out the [vaginal] mold, they'd find that their skin had stuck to it and as they were pulling it out they were also tearing at the skin..." Those who had more money were going to Casablanca, pioneers in this kind of procedure, or to European countries.

The legalization of sex reassignment surgery in Brazil marks the beginning of social identity transformation for many of my informants since, up until then, they did not feel they fit into the *travesti* or homosexual identities. This can be seen in the statements of several of the transsexuals I spoke to:

I first heard about transexualism about three years ago when a doctor talked about it on television. Before then, I thought I was a *travesti*, even though it did not feel right, since they don't want to have the surgery and my dream was to become a true woman.

Until then I thought I was a homosexual.

Before knowing about transsexuals, I didn't know what I was, I just knew I was different.

Some doctors consider surgery to be the proper therapeutic approach to "harmonizing gender and the brain", in spite of the risks involved in any surgical procedure.

Most transsexuals I interviewed agree with the doctors, believing that surgery solves the problem of corporal inadequacy.; and they list the social and subjective components

benefits of the process as well. Conversely, when some surgical problem happens or the aesthetic results are not good, transsexuals usually hold onto the belief that somewhere in the world there is a perfect sex change procedure available. One might hear, for example, that "The surgery results are perfect in Thailand." This indicates transsexual's insistence that changes in the body define gender.

Despite the fact that sex change surgery appears to be liberal and innovative, it ends up efficiently masking the construction of mandatory male and female roles based upon biological sex in our society, given that it is the only way individuals can be diagnosed as transsexual. This hidden problem is also present in the legal sphere.

## Sex and the Law

The law approaches the issue of transsexualism through two different themes:

1. Authorization for surgery
2. Authorization for changing one's legal name

The juridical system's lack of clarity in regulating the claims of transsexuals before and after surgery has created much controversy in the legal field. Part of this is because the definition of sex has never before been subject to legal definition. Legal codes always treated differences between men and women as based on medical definitions, protecting the fundamentally dichotomous classification maintained by all known legal systems on the planet.

Although sex has not been the subject of any legal definition, when addressing issues of sex and *sexuality* legal authors agree that biological and psychosocial factors interact in order to construct someone's sex. Legal experts use highly complex medical definitions. Law books currently accept a multidimensional definition of sex that embraces biological (morphologic, genetic, chromosomic, gonadic, neural), psychological (self perception) and social (legal sex and the sex in which the individual was raised) factors.<sup>5</sup> Because of the multitude of factors defining 'sex', law experts question the effectiveness of sex change surgery in transforming a woman into a man and vice versa, since all decisions and consequences related to the sex change surgery depend upon this definition.

There are two alternatives to this problem:

1. *To accept sex as defined by the morphology of the genitals, as is still practiced for the purposes of civil registration.* In this case, surgery can result in sex change by

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<sup>5</sup> A detailed explanation of what is accepted by law makers in terms of the several components used to define 'sex' can be found in Perez (2001:65-89).

transforming the appearance of the genitalia and even making it functional.

2. *If the morphologic classification is not accepted as sufficient for determining sex, as it currently stands, then psychosocial sex can be considered as more important in defining a person's sex.* In this case, surgery would be irrelevant and not needed, since psychological sex would be determinant. The transsexual's declaration that they belong to one sex and not to the other would suffice and the legal sex would be the one declared by the person.

Since the second option does not occur in practice, one can infer, in this case, the role of medicine is to help impose the dichotomous social acceptance of sex by deciding which of the two sexes a person belongs to, based solely on biological morphology. This situation can be seen in those contexts where transsexuals want to change their documents: the change occurs without obstacles if a person has undergone sex change surgery. With a transformed anatomy, the requirement for sex reclassification is fulfilled. Thus, the only thing being considered at the present to determine sex in juridical terms is genital morphology. This practice, however, does not take into consideration the existence of transsexuals already transformed by hormones, breast removal or implantation, other implants, permanent hair removal, and who do not want to undergo surgery. These individuals—who match almost all diagnostic criteria for transexualism except for the desire to have sexual reassignment surgery—are not able to change their documents.

## Medicine and the Law

Cultural, social and historic conditions produce the medical facts and classifications influencing legal programs; which will, in return, affect cultural and social conditions. The Brazilian legal system currently relies on medical classifications and, in analyzing the various legal issues regarding sex and established social relations, follows the medical field's understandings and its transformations regarding normal sex and appropriate sexuality. In this way, issues affecting homosexuals, *travestis* and transsexuals are considered, each according to their specificities, following the different diagnoses established by doctors.

Issues related to transsexuals encompass situations that are more complex than those related to homosexuals, however. For both groups, there are issues of rights and sexual orientation, but transsexuals also confront the particular question of surgery. Here is where the interdependency between law and medicine and the non-solved tensions between them appear.

Up until now, the concept of “a mistake of Nature” has been crucial for sex change surgery. The correction of this “mistake” allows a change in an individual's documents

and name. In other words, the biomedical model of two sexes and the need to be suitable to only one of them is itself a pre-condition which makes the desired changes possible.

Individuals mentally at odds with their biological sex have no other option but to go through surgery in order to win the right to change their legal documents. This is the basis of the law, because the anatomical difference between sexes is one of the paradigms for civil rights.

If the reason to perform the surgery and/or legal name change followed the fundamental principle of equality, enshrined in human rights, surgical changes could be optional and document changes could happen even when the individual did not want surgery. In this case, however, medical science could not justify the surgery as *correctional* and the doctor who performed it would risk being accused of mutilation. SUS<sup>6</sup> would not be obliged to pay for the surgery since it would no longer correct a mistake of nature. If the biomedical perspective is kept, SUS can pay for the surgery and the surgeon will not be penalized, but transsexuals will be forced to undergo the procedure in order to change their documents.

This is the paradox between the medical and legal positions regarding sex change. The medical position prescribes sexual and social identity transformation before surgery in order to have a better evaluation and follow up; the law only allows document changes after the procedure. During their participation in the programs preparing for surgery (and which last a minimum of two years), transsexuals suffer the embarrassment of having legal documents that do not match their social lives and experience a type of “false representation.”

## The Resolution by the Brazilian Federal Council of Medicine

Only recently has permission to perform sex change surgery been granted. This option was established by Resolution 1482/97 by the Federal Council of Medicine, authorizing and standardizing sex change procedures in Brazil.<sup>7</sup> Authorization is limited to university or public hospitals connected to research and the surgery is performed at no cost to the patient.

Even after the Federal Council of Medicine<sup>8</sup> changed its position and decided in favor of sex change surgery, there was no consensus among law makers regarding the

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<sup>6</sup> Unified Health System, the Brazilian federal program offering medical care free of charge.

<sup>7</sup> This type of surgery had already been performed in Brazil, in spite of its having been forbidden. The case of Roberto Farina, a doctor and a professor, is well known. He was criminally denounced for operating on Waldir Nogueira and was initially judged and condemned, being found not guilty on appeal (Case # 799/76, São Paulo 17<sup>th</sup> Criminal Court).

<sup>8</sup> Previous approaches held that a physician performing sex change surgery was committing an ethically problematic and illicit act, since this was seen as mutilation: a grave offense against the integrity of the body (PERES, 2001, p. 189, note 313.)

issue, and the need to create new laws remains. The legal implications of law makers' acceptance of medical definitions can be seen not only in cases related to sex and name change, but also in cases regarding marriage, inheritance, children, adoption, civil rights, and other obligations.

The state of Rio Grande do Sul is currently a reference for decisions which changed the traditional focus of the law. Authors from that region (Cf. Dias, 2001; Giorgis, 2002; Silveira, 1995; Rios, 2001; 2002) have distinguished themselves by interpreting law, providing reflections and making decisions on sexual rights. Gay and feminist movements struggling against discrimination are also gaining ground and are demanding changes regarding minority rights.

Although this scenario can be recognized as progressive, it coexists within the context of the paradoxical positions discussed above. Legally, this may not be a unique situation when dealing with sexual rights. When dealing with transsexuals, however, a tension remains between psychological concepts and biological sex, with serious consequences in terms of individual rights.

## Personal Documents

The birth certificate is the first personal identity document a person receives in Brazil. Besides other information, it establishes a newborn's name and sex. It is a basic document used as reference for all the others to come, defining sex for the rest of an individual's life. When children are registered and their sex stated, this is accepted *a priori*, without double checking or confirmation. It is surprising how difficult it is to change the record later on in life (as transsexuals desire), since this registry of birth is based upon the legal principle of the inalienability of personhood.

This same principle also applies to the date and time of birth; ones parents' names, last names (optional) and civil status; and the child's name and gender. The principle states that none of these elements were chosen by the child and therefore the record cannot be altered at will. The reasons cited for this include the fact that one's name is linked to matters of public order and that the birth certificate is proof of a person's existence and their entrance into the legal realm.

Even though the sex change surgery could be considered mutilation, if we allow sex change surgeries without allowing the document change, we are guilty of allowing mutilation under the premise that we are doing so to improve transsexuals' quality of life. At the same time, we would be prohibiting an individual's access to documents matching a condition which is essential to improve the quality of their life.

This change in documents is extremely important. It is only through proper documentation matching their social identity that transsexual individuals are able to avoid all kinds of humiliations and embarrassments.

There are many stories of vexatious situations transsexuals undergo in public places because of issues regarding their identification documents. On one hand, lack of documents can block access to certain public places. On the other, possessing documents that do not match one's gender and sex performance creates several problems, such as questions regarding the documents' validity, leading to potential social humiliation.

## Marriage and Parentage

Other aspects of transsexual demands are dealt with in the arena of civil law, because that is where sexual reassignment becomes more complex. Marriage, for example, legally regulates reproduction and is defined as a sexual union between two persons of the opposite sex for the purposes of building a legitimate family. Same sex marriage in Brazil is still not possible.

According to Szaniawski (1999), the idea that the basis for marriage is a legal union between men and woman for sex and procreation has not yet completely changed. There is no regulation against the marriage of transsexuals once the person has changed the sex in their documents, however. This is why those who have already gone through surgery and have not changed their names are not allowed to marry someone of their original sex: the law does not allow marriages between same sex individuals. Interestingly, the law reinforces the idea of psychological over biological sex in regarding whether or not a person can marry. Therefore, a transsexual could get married to someone of the opposite sex, but only after surgery and a name change. (Szaniawski, 1999)

There is a clear contradiction between the general predominance of the psychological sex concept and the demand for morphological genital transformation as a pre-requisite of marriage. Marriage directly depends on a name change which will only occur after sex change surgery. Because of this, only the operated transsexual can get married to a person of their original sex.

Other aspects of interpersonal relationships are also codified in the laws concerning transsexuals. For example, regarding the relationship between transsexual parents and their children, there is no law stating that transsexuals are inadequate parents. The children's legal status is not affected by their father or mother's reassignment. This does not mean that transsexual, homosexual, or bisexual parenthood cannot be legally challenged, as in the well known case of the son of singer Cassia Eller, whose custody

was claimed by both her father and her partner after her death.<sup>9</sup>

Family law is thus another area where transsexual demands become an issue, in cases of custody claims, adoption, or in the use of new reproductive technologies. The desire to have children is also present among transsexuals, although this should not be surprising, since parenthood is highly valued in Brazilian society (Victora, 1991;1996).

While surgery makes transsexuals “truly” men or women, it also makes it impossible for them to use their reproductive organs for procreation. This problem can be solved, however, using new reproductive technologies which allow one to deposit sperm or ovules in a clinic for later use with a surrogate mother who will receive one or the other in order to bear a child. Note that the existence of this technological alternative does not create social acceptance of the situation. In fact, the situation becomes complicated by many layers of problems associated with it, especially those related to Brazil's cultural emphasis on the biological links of parenthood.

It can be noticed that the lack of clear and specific legislation for different transsexual demands and the lack of different perspectives on this issue in the legal system itself are responsible for several challenges faced by those transsexuals who wish to live as citizens with full rights.

## Final Considerations

Transsexuals' demands for surgery as well as medical and legal concepts are based on the supposition that a natural “sexual reality” is an “essence” determining a person's true sexual identity. Although paradoxical, it is considered to be possible to change gender by changing biological components of one's body, even though gender is “essentially” psychological.

Transsexuals embrace medical discourses, trying to be classified in a way that will make them eligible for sex change surgery, allowing them to change their name and distancing them from the stigma of “moral deviation” applied to homosexuals and *traces*. As one interviewee stated: “Saying that you are transsexual sounds more ‘scientific.’” There is an supposition of “moral innocence” regarding transsexual demands, since the problem is supposedly related to an innate disharmony between one's mind and one's body.

From the biological perspective, one can argue that surgery does not produce sex change because other aspects of biological sex, such as chromosomes, neural patterns, and the endocrinal system remain intact. At the same, post-operation transsexuals

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<sup>9</sup> This issue was covered in the *Folha de São Paulo* newspaper article, *Tendências/Debates, Is it correct to give child custody to a homosexual spouse after the death of their counterpart?*, 12/02/2002. Opinião, A3.

cannot be classified as *travestis* any longer because of the morphological changes in their genitals, which are the most important determinants of belonging to a specific sex. For the same reason, transsexuals no longer belong to the sex to which they were born, although they do not entirely belong to the other sex, either. The medical community continues to classify them as transsexuals, emphasizing the fact they will always be transsexuals and never men or women. Nevertheless, those who went through the surgical process are usually proud about achieving a new identity and feel their efforts and suffering were not in vain.

**Regarding this context, law makers have three possible positions:**

- a) *One based on the biomedical model.* They accept the diagnosis of *transexualism* as reason enough for surgery and subsequent changing of one's name.
- b) *Another one based on the biomedical model.* They accept the diagnosis of *transexualism*, but since they do not believe that sex can be changed, they do not agree to surgery and the subsequent changing of one's name.
- c) *One based on the constitutional right of equality.* They consider that people have rights to privacy and to the construction of a personality. In this way, they broaden the chances to find other alternatives for transsexual demands and new legislation on these issues.

If this last alternative is adopted, I believe that permission to change one's name should be granted without the requirement of surgery. In this way, the most pressing problem of transsexuals' lives would be solved and the demand for surgery would also be reduced. The law can thus improve transsexuals' social condition by making the name change easier and without requiring sex change surgery for those who have a social identity different from their biological one. Hopefully, this paper will contribute to an anthropological perspective in support of a dialogue between the medical system and the law regarding transsexuals.

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