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Abstract

This chapter will examine the impact which law's changing conception of corporeality has had on people with intersex bodies. Historically, in medieval and renaissance times, the law recognised three types of bodies as conferring legal status: male, female and hermaphrodite. Contemporaneous to increased specialisation in medical knowledge about hermaphroditic conditions during Victorian times, the laws governing the registration of persons were introduced: intersex is notable in its absence from these legal provisions. This coincidence of events is analysed and it is argued that it signals the beginning of the erosion of intersex from legal consciousness. Such a contention is further strengthened by an examination of the case law which has directly addressed the categorisation of bodies as either male or female. The results of this consideration reveal the disappearance of 'intersex' from legal consciousness.

The continuing importance of the dual role of the birth certificate as both a historical 'snapshot' of events at a particular moment and as a crucial and current identification document becomes apparent. It is argued that adherence to a binary understanding of gender actively discriminates against intersex people. Finally, the chapter considers the re-emergence of the historical paradigm of self-declaration of gender identity for intersex people.

Investigating Intersex

The question of how the legal gender of a person ought to be determined has received considerable attention over the past decade in Ireland. There have been two High Court decisions, a Declaration of Incompatibility with Ireland's obligations under the law of the European Convention on Human Rights (ECHR), an advisory group report to Government, two Private Members Bills introduced in the Oireachtas, and the publication of the general scheme of a Government sponsored piece of legislation which has been subjected to Joint Oireachtas Committee scrutiny prior to official drafting.¹ This analysis has revealed that, currently, the law categorises bodies as either male or female. Yet, the existence of intersex in the natural world is commonly accepted. There are many plant and animal species that exhibit intersex traits.² That there are also intersex people is unsurprising.³

As a term, 'intersex', is becoming more familiar yet it is often misconstrued as referring to ambiguous sexual orientation or the transition period between one gender and the other for transgender people. 'Intersex' describes those bodies that cannot be categorised as either male or female as their sexual or reproductive anatomy does not fit the typical definitions of those categories. It is not always immediately apparent when a body is intersex. Thus while some people are identified as intersex in early childhood due to ambiguous genitalia, others are recognised at a later stage in development. It is not unusual for intersex to become manifest at puberty, when seeking assistance with fertility difficulties or even on autopsy when intersex at a genetic level can become obvious.

When discussing intersex language becomes loaded. Therefore it is appropriate to pause to explain the linguistic choices taken in drafting this chapter. Historically the term 'hermaphrodite' was employed, however due to the associations with the myth of Hermaphroditus and consequent resonance of fantasy, this term has fallen out of favour. Thus 'intersex' was preferred.⁴ The linguistic difficulty with the term 'intersex' is that it

presupposes that there are two defining sexes and that this third category is a hybrid which exists between the two. This kind of assumption is limited and eschews recognising the complexity of sex, gender and identity. Since 2006, the term ‘disorder of sexual development’ (DSD) has been used in addition to or in place of ‘intersex’ for the very reasons outlined above.⁵ This latest term can be contested as it presumes an underlying disorder and that there is something intrinsically wrong with the intersex body requiring it to be fixed as either male or female.⁶ It can be argued that using this term perpetrates the medicalisation and problematisation of something which is not inherently medically problematic.⁷ Generally this chapter will use the term ‘intersex’ save where it is more appropriate, particularly in a historical context, to employ another term such as ‘hermaphrodite’.

Historical Hermaphrodites

Intersex is not a new or recent phenomenon. There have always been intersex individuals in human society. Through an exploration of how society, the law and the medical profession have interacted with intersex people throughout the ages the repositioning of hermaphrodites, largely unnoticed and unremarked in history, as, from the time of the Enlightenment, objects for close scrutiny will be highlighted. Increased interest caused hermaphrodites to be treated as curios both for the paying public at shows and fairs,⁸ as well as for the medical community.⁹ This visibility contrasts sharply with the virtual invisibility of intersex people in the twentieth century until the advent of the intersex advocacy movement in the mid-1990s. In relating the history of hermaphrodites and situating it within the context of the history of sexuality, the chapter will also attempt to tease out why these changes in visibility occurred.

The Age of Antiquity

The word 'hermaphrodite' comes from the story of Hermaphroditus. This story was told by Ovid in his book *Metamorphoses*. When the nymph Salmacis saw Hermaphroditus, the son of the gods Hermes and Aphrodite, swimming in her lake she fell rapturously in love with him and implored the gods that they never be separated. The gods, with their usual sardonic sense of humour, took her at her word and their two bodies were fused into one. 'They two were two no more, nor man, nor woman – One body then that neither seemed and both.'¹⁰

Hermaphrodites were more than mere myths. Hippocrates, the father of western medicine held that a uterus had seven cells.¹¹ If a foetus gestated in one of the three cells on the left it would develop as a male. If it developed in one of the three cells on the right it would be a female. Finally, if it developed in the middle cell, it would be a hermaphrodite and combine traits of both males and females. Therefore Hippocrates considered that hermaphrodites were a third sex in a spectrum of sexes. Aristotle, by contrast, viewed males and females as polar opposites without any intermediate forms. His explanation for the existence of hermaphrodites was as follows; extra sexual organs, like extra fingers or toes, result from an excess of generative matter; too much for one embryo and not enough for two.¹²

Medieval and Renaissance Attitudes

In Medieval and Renaissance times being either a man or a woman affected one's legal status in society. Men were entitled to own property and to vote, women were not. On the issue of the hermaphrodite, Henry de Bracton wrote that mankind could be classified as male, female or hermaphrodite and that a hermaphrodite is classified with male or female according to the predominance of the sexual organs.¹³ This was still the

legal position during renaissance times when Lord Coke writing on succession laws noted: 'Every heire is either a male, or female or an hermaphrodite, that is both male and female. And an hermaphrodite (which is also called Androgynous) shall be heire, either as male or female, according to that kind of the sexe which doth prevaile.'¹⁴ Maimonides, a Jewish rabbi, doctor, theologian, lawyer, provides in his *The Book of Women* a detailed diagnostic procedure for determining whether a person was a man, woman or a hermaphrodite.¹⁵ According to Maimonides, a hermaphrodite could become betrothed to marry either a man or a woman. Such an engagement, being suspect, would require a judgment before the marriage could take place.

Although in theory this appears inclusive, as if it would enable a hermaphrodite to declare himself male, for example, and then to live his life without interruption from the State, the reality for hermaphrodites could be different. Daston and Park recount the tale of Marie/Marin from Renaissance France.¹⁶ Raised a female, in her late teens Marie changed her name to Marin, began living as a man and became engaged to marry a fellow maidservant Jeanne. Both Marin and Jeanne were charged with female sodomy, with having committed lesbian acts. Furthermore Marin was charged with usurping masculine name and dress. At the trial, in 1601, medical examiners testified that Marin had female genitalia and his employers further bore witness to his regular menstrual periods. Jeanne, however, who was widowed with two children, testified that Marin had satisfied her sexually as much if not better than her deceased husband. Marin too testified that he became erect when aroused, but he declined to demonstrate this to the court.

Both Jeanne and Marin were found guilty of unnatural acts. Marin was sentenced to be hanged and burned. Jeanne was sentenced to watch the execution, be whipped in public for three days, have her possessions confiscated and then be banished from Normandy. Following the trial one of the medical examiners examined Marin using a

different method. He became convinced Marin possessed a penis when, following extensive rubbing, thick masculine semen was ejaculated, from what had previously been considered a clitoris. The doctor reported his findings to the court. The original sentence was lifted from both Marin and Jeanne. Instead Marin was sentenced to dress as a woman and to refrain from sex with either men or women for four years. Ten years later, Marin was spotted wearing men's clothes and sporting a thick beard.¹⁷

If, as indicated by the dicta of de Bracton, Coke and Maimonides, hermaphroditism was accepted in society why was Marie/Marin brought before the court when s/he had chosen to marry in the male role and presumably intended to live in that role? Examining the alternative sentences handed down at the original trial and once the evidence of the post-trial examination had been adduced to court, sheds light on the matter. At the original trial, evidence of Marie's menstrual cycle was deemed sufficient to determine her sex as female. Thus the proposed marriage was between two women and hence sufficiently offensive to the law to mandate a death sentence. However, once the evidence of the post-trial examination was admitted to court, the fact of ejaculation was considered sufficient to call into question the sex of Marie/Marin and thus, potentially, the relationship between the accused persons was uncontroversial and heterosexual. Viewed from this perspective, it was Marie/Marin's suspected lesbianism and not the fact of her hermaphroditism which was the cause of societal concern. An alternative reading of the case could be to do with Marie/Marin's gender performance rather than her sexual orientation which was the cause for concern.¹⁸ Either way what is clear is that once the anxiety concerning gender/sexuality transgression was eliminated

Prior to the French Revolution, sodomy was a serious crime handled by the religious courts, but it was not outlawed by the civil law of the land.¹⁹ This was reflected in the codification of the law, as neither the Penal code of 1791 nor the Napoleonic Code of

1810, mentions or criminalises private sexual acts between consenting adults over 21 years of age. In England and Ireland, the civil law adopted this offence under canon law in 1533 when the first civil law outlawing sodomy, the statute 25 Hen. VIII c. 6, was enacted.²⁰ Under this statute acts considered sodomy were classed as felonies punishable by hanging. Prosecution under this Act was not solely confined to homosexual acts, but to anal intercourse in general as well as to acts of bestiality.²¹

Michel Foucault offers as an explanation for this sudden interest in regulating sexuality the contention that changes made to the sacrament of penance by the Council of Trent (1545 – 1563), lead to increasing discourse on sexuality and hence that which had previously been confined to the private realm, became publicised.²² The increase in discourse about sex and sexuality became evident in the eighteenth century: the study of demographics began as a means of regulating the population. The sex lives of citizens became an important object of public scrutiny, as statistics regarding birth rates, fertility rates, illegitimate births, and so on became important for public use.²³ Thus, sexuality became a matter of public interest: sex became something to be studied rationally, to be analysed, classified and understood as a statistical phenomenon. Laws prohibiting certain kinds of sex became tighter,²⁴ studies of sex became more frequent, and the general awareness of sexuality was heightened leading to even more talk about sex.²⁵

Nineteenth Century and the Age of Gonads

The publication of Charles Darwin's *The Origin of the Species* greatly perturbed society in the nineteenth century.²⁶ His theory of evolution held that males and females existed purely for procreative purposes, and were naturally selected to ensure the survival of the fittest and the continuation of the species. Thus the polarisation of males and females is the foundation on which life itself was based. The heterosexual male and

female were prioritised by society as the highest form of humanity as, uniquely, they were in a position to ensure the survival of the species through procreation.²⁷ It can be argued that the prioritisation of a binary gender paradigm in an organised and intentional manner dates from this time.²⁸ It was during the Victorian era that the recording of statistics relating to the births, marriages and deaths of the population was put on a statutory footing,²⁹ the first definition of marriage as something exclusively the preserve of heterosexual men and women was handed down by a court,³⁰ the law outlawing sodomy was restated afresh and reinterpreted as a prohibition on homosexuality and, although the death penalty was removed as a punishment, the crime was punishable by up to life imprisonment.³¹ Furthermore, the erasure of the hermaphrodite from both recognised civil society and from the public consciousness began.

Foucault argues that the attempt to regulate sexuality and to eliminate degeneracy through natural selection, resulted in society becoming concerned with the instability of political-sexual identities: hence the increase in prosecutions for homosexuality.³² Simultaneously, doctors were beginning to specialise, and gynaecology, which previously had the almost exclusively the preserve of the midwife, was becoming a specialisation in its own right.³³ Doctors began to discover and report in medical journals a number of physically hermaphroditic subjects. This can partly be attributed to the rise of gynaecology and as Dreger argues: ‘anxiety of sex roles probably also contributed to the rapid rise in medical reports of hermaphrodites by making physicians sensitive to their patients’ sexual identities, anatomies and practices.’³⁴

In an attempt to curtail hermaphroditism lest it amplify the social sexual confusion, biomedical experts sought a stable definition of male and female. In 1896, Blacker and Lawrence published an article in which they argued that it is the gonadal tissue, revealed as either testicular or ovarian upon microscopic examination, which is the true indicator

of an individual's sex, regardless of any other anatomical factor.³⁵ This argument received widespread acceptance by the medical community.³⁶ Consequently a person who possessed testes would be labelled a male-pseudo-hermaphrodite regardless of how feminine they might be. This led to some cases of extreme social nonsense, such as that of L.S., a Parisian fashion model with testes, who was described as 'frankly homosexual' by doctors because she exclusively sexually desired men.³⁷

Therefore all people could be labelled as male or female even if 'apparently and falsely' hermaphroditic. It was only upon microscopic inspection of the gonads by many teams of experts that an individual could be declared a 'true hermaphrodite'. Given that biopsies and exploratory surgery were extremely rare occurrences, in practice the only true hermaphrodite tended to be the dead and autopsied hermaphrodite.³⁸ As a result of this new test, far fewer people met the criteria for diagnosis as a hermaphrodite regardless of what other 'apparently' hermaphroditic traits they might possess. Thus the erasure of the hermaphrodite from society began.

Surgical Solutions

With the advent of live biopsies in the early twentieth century it was no longer sustainable to adopt a gonadal definition of sex. William Blair Bell advanced the idea that when determining the sex of an apparent hermaphrodite, each case should be considered as a whole and the focus should not be exclusively on the gonads.³⁹ He also suggested that in addition to determining the sex of an individual with ambiguous biology, doctors should help that diagnosis along: '[S]urgical procedures should in these special cases be carried out to establish more completely the obvious sex of the individual.'⁴⁰

Thus surgeons began to 'disappear' intersex individuals from society by surgically altering their physical appearance such that it more closely resembled the appearances of

males or females. Advances in medicine, particularly surgical techniques and hormonal treatments, made it possible to eradicate the external evidence of intersexuality and to ‘make’ an individual either male or female. The most prolific proponent of this approach was Dr. John Money, who specialised in the psychology of sex at the Gender Identity Clinic of Johns Hopkins Hospital in Baltimore, Maryland. He believed that in the nature versus nurture debate, the latter is paramount. Therefore, sexual identity is not a matter of biology, but rather a learned process. Any child can be taught to have a male or female identity, regardless of biological ‘fact’. So when treating an intersexed child, the assignment of sex is inconsequential, so long as the child is raised clearly and unequivocally as either male or female.⁴¹ Surprisingly his argument was, to a large extent, based on the study of one individual known as the John/Joan case.⁴²

John was one of a set of identical twins born in 1965. At eight months old his penis was severely burned and completely lost during a routine circumcision. With little hope that it could be repaired, his parents ultimately turned to Dr Money who suggested a gender change. In July 1967, John underwent gender re-assignment surgery and was sent home as Joan. Her parents were under strict instruction from Money and the treatment team to keep her original sex a secret and to constantly reaffirm her feminine identity. The twins were cared for by a local psychiatric team under Money’s direction and were brought to Baltimore annually to be evaluated.⁴³ Money reported that although she did exhibit some tomboyish traits, Joan’s parents were now successfully raising her as a typical girl.⁴⁴ The John/Joan case was proclaimed a triumph, conclusive proof of the supremacy of nurture over nature. The existence of John’s twin, a genetically identical control who was a typical boy, convinced doctors that gender was a fiction of society. Intersex children could be raised as either male or female, providing the sex was assigned

before the crucial gender identity gate was reached. Thus genital normalisation and sexual assignment surgery became the standard treatment for intersex individuals.

Following the US example, other countries also began to practise routine gender assignment surgery on intersexed infants. The reconstruction of these children as either male or female contributed to the disappearance of intersex from the social consciousness. For decades the success of the John/Joan case was unquestioned despite the lack of any other corroborative research.⁴⁵ No follow-up studies were ever done on adult intersex individuals who underwent such surgery as children.⁴⁶ In the late 1990s, researchers attempting to challenge Money's theories began to search for Joan, whom Money had reported was 'lost to research'. The boy who was raised as a girl was now living as a man. Diamond and Sigmundson published an article in 1997 refuting the results of Money's famous research.⁴⁷ It was the publication of the eventual outcome of the John/Joan story that caused some practitioners to begin to reconsider the approach to the medical management of intersexuality they had been following.⁴⁸

Intersex in Modern Ireland

Intersex has been the subject of very little official discussion since the creation of the Irish State. In fact prior to 2009 there was no mention of either intersex or hermaphrodite in any official text or sources from any public body. Where intersex has been mentioned the consideration thereof has been cursory at best. The first mention of intersex was in a case before the High Court *S v An Bord Uchtála* in 2009.⁴⁹ The case concerned a child born with an intersex condition who was the subject of a foreign adoption order and consequently noted in the Register of Foreign Adoptions as female. Upon closer medical examination when the child was brought to Ireland it was determined that he would most likely identify as male and thus his family decided to raise him as a boy. In support of this

decision they sought to have the gender marker on the Register of Foreign Adoption amended as the certificate therefrom would operate as a foundational identification document for their son especially as regards registration for school etc. An Bord Uchtála was of the opinion that, given the historical importance of the register, to change the record was beyond their power and refused to do so resulting in judicial review proceedings. The Court issued a ruling ordering the requested change be made. While this was the desired outcome for the individual litigants it is unsatisfactory for intersex individuals in general. The lack of a carefully considered judgment reduced the precedential value of the S case. Thus it is uncertain whether the legal recognition afforded to S would extend to another intersex person and it is less clear whether it might encompass someone who identifies outside the binary male/female gender paradigm.

The only legal cases to consider the parameters of legal gender identity in Ireland have occurred in the context of a transgender woman reeking to have her birth certificate altered to reflect her preferred identity as female.⁵⁰ Dr Lydia Foy lost her first case in 2002, the Court emphasising the importance of the register of births as a historical record: a ‘snapshot’ of a moment in time.⁵¹ Subsequent to a unanimous decision from the European Court of Human Rights, in the case of *Goodwin v UK*, that the persistent failure of English law to recognise the preferred gender identity of a transwoman amounted to a violation of her right to respect for her private and family life under Article 8 of the ECHR, Dr Foy brought fresh proceedings.⁵² Although she lost on the domestic legal points, Dr Foy won her argument that based on *Goodwin* Irish law violated her Convention right to respect for her private life. The ruling of the Court was historic as it was the first time that an Irish Court had issued a Declaration of Incompatibility between Irish law and the State’s legal obligations flowing from the ECHR under the European Convention on Human Rights Act, 2003.⁵³

What is interesting about the Foy case is that it adopted into Irish law the decision of the English High Court as to how legal gender ought to be determined. In *Corbett v Corbett* (1970) it was held that the legal gender of an individual was determined by the congruence of the chromosomes, gonads and genitals at birth.⁵⁴ Thus the test has both biological and temporal aspects. In cases where this congruence is not present at birth the judge held that the genital sex ought to be determinative.⁵⁵ However, given the importance of the birth moment in determining legal gender such a preference for genital appearance is reductive as it may restrict the gender category available to an intersex person whose condition is only discovered later in life or who does not identify with the gender the genital appearance might suggest. Consequently, in *W v W* (2000) the English High Court was willing to develop the Corbett test to find that advances in medical technology would enable Mrs W to be accepted as female in modern times and given she had asserted a female identity since the time she was able to choose her gender that this ought to be acknowledged.⁵⁶ The Irish court in the Foy cases was silent on whether this variation on the Corbett test might be applicable in the context of Irish intersex individuals, although, given the practical resolution of the S case, it is reasonable to presume it would be persuasive if advanced in legal argument.⁵⁷

The first mention of intersex from an official source in Ireland, not a court report, was contained in the Report of the Gender Recognition Advisory Group (GRAG) published in 2011.⁵⁸ The Group had been convened to advise the Minister for Social Protection as to how best to introduce gender recognition legislation to Ireland. The Group declined to recommend that space to acknowledge intersex lived experience be created within any proposed legislative scheme as to do so was both beyond its remit and required more research and medical expertise than was available to it.⁵⁹ Thus the report amounts to a knowing refusal to engage with the complex challenge intersex poses for

the law. The various legislative proposals currently before the Oireachtas make that more meaningful engagement. Both the private members bills, the Gender Recognition Bill 2013 and the Legal Recognition of Gender Bill 2013,⁶⁰ adopt a self-declaration model where individuals inform the State as to their preferred gender of legal recognition where that differs from that registered on the birth certificate. No additional proof is needed to ground an application for recognition. In this these bills propose a return to the historical method of self-declaration as evidence in the writings of Coke. Such a self-declaration model is in accordance with best practice in international human rights discourse as evidenced in the Argentinian law on gender recognition.⁶¹

Contrastingly, the General Scheme for the Gender Recognition Bill 2013 proposed by the Minister for Social Protection would require applicants (who must be at least 18 years of age) to provide a supporting statement from their primary treating physician confirming that they have transitioned or are transitioning to their ‘acquired gender.’⁶² In restricting the ambit of the recognition rights to those over 18, the Government’s proposed scheme would exclude intersex children from amending their official identification documentation, which was the very defect the S case was brought to address. On a related note, the language of ‘transition’ strongly implies that the rights in the legislation will be framed in a binary context and those seeking recognition outside this paradigm will be unsuccessful. It was the lacuna leaving intersex children out of the ambit of the potential rights under the proposed legislative scheme outlined by the Government that prompted most discussion on intersex inclusion therein. The Report of the Joint Oireachtas Committee on their examination of the scheme identifies these concerns repeatedly.⁶³ In particular it notes the concerns raised by the Ombudsman for Children’s Office (OCO) in its report to the committee.⁶⁴ The OCO report detailed the State’s obligations under

international human rights law in this regard and concluded that any right to recognition enjoyed by an adult under Article 8 ECHR extended equally to children.⁶⁵

As a result of these investigations the Committee recommended that the age limit for applicants be reduced to 16 years with provisions to address the day-to-day concerns of those under that age. It also recommended that the criterion concerning evidence of transition be reconsidered in order to ensure that it does not stigmatise applicants.⁶⁶ Although the recommendations of the Committee do not specifically address intersex, read together with the discussions contained in their report, they do suggest a more inclusive acknowledgment of the lived reality of intersex lives than has existed in previous Government sponsored discourse. Whether these recommendations will become part of the final draft legislation remains to be seen.

Conclusion

This chapter has traced the evolving response of law to the existence of intersex individuals. It demonstrates that, historically, law acknowledged the legitimacy of hermaphrodites. The chapter has argued that as medical knowledge and interest in regulating bodies and sexuality increased, intersex identity was rendered illegitimate. The requirement in birth registration legislation that all children be declared to the State as being either male or female shortly after birth caused the law to be complicit in the erasure of intersex from legal and social consciousness. Cases such as S and W demonstrate that a practical and pragmatic approach by the courts can alleviate the difficulties of a system of gender recognition stymied by the prioritisation of the moment of birth as definitive in the determination of a person's legal gender. Nonetheless, it is in legislation that the true transformative potential of the law lies. Intersex identity was delegitimized by the

introduction of birth registration legislation and it is through the introduction of rights realising gender recognition legislation that intersex identity can be re-legitimised.

¹ *Foy v AntArdChláraitheoir (No 1)* (2002) IEHC 166 and *Foy v An tArdChláraitheoir (No 2)* (2007) IEHC 470; the first Declaration of Incompatibility between Irish Law and Ireland's obligations under the ECHR was handed down in *Foy (No 2)*, this was the first such Declaration to be issued under the *European Convention on Human Rights Act, 2003; Report of the Gender Recognition Advisory Group* (Dublin: Department of Social Protection, 2011); The *Gender Recognition Bill, 2013* was introduced in the Dáil by Aengus Ó Snodaigh, TD on 23 May 2013 and the *Legal Recognition of Gender Bill, 2013* was introduced by Senator Katherine Zappone in the Seanad on 27 June 2013; *General Scheme of the Gender Recognition Bill 2013* Available online at <https://www.welfare.ie/en/downloads/Gender-Recognition-Bill-2013.pdf> (last accessed 11.02.14), Joint Committee on Education and Social Protection *Report on the General Scheme of the Gender Recognition Bill 2013* (Dublin: House of the Oireachtas, 2014) Available online at <https://www.welfare.ie/en/downloads/Gender-Recognition-Bill-2013.pdf> (last accessed 11.02.14).

² P.E. Howard, & D. E. Bjorling, 'The Intersexual Animal. Associated Problems', *Problems in Veterinary Medicine*, 1, 1 (January – March 1989), pp.74-84; A. Spivey, 'Prelude to Intersex in Fish: Identifying a Sensitive Period for Feminization', *Environmental Health Perspectives*, 113, 10 (October 2005), A686.

³ W.P. Bemis, & G.B. Wilson, 'A New Hypothesis Explaining the Genetics of Sex Determination', *Journal of Heredity*, 44, 3(1953), pp.91-95.

⁴ R. Goldschmidt, 'Intersexuality and the Endocrine Aspect of Sex', *Endocrinology*, 1, 4 (October 1917), pp.433-456.

⁵ C.P. Houk, I.A. Hughes, P.A. Lee, & S.F. Ahmed, in collaboration with the participants in the International Consensus Conference on Intersex organized by the Lawson Wilkins Endocrine Society and the European Society for Paediatric Endocrinology, 'Consensus Statement on the Management of Intersex Conditions', *Pediatrics*, 118, 2 (August 2006), pp.753-757. See also S. Groveman Morris, '*DSD But Intersex Too: Shifting Paradigms Without Abandoning Roots.*' Available online at <http://www.isna.org/node/1067> (last accessed 11.02.14).

⁶ M. Diamond, & H. Beh, '*Variations of Sex Development Instead of Disorders of Sex Development*' Letter to the Editor in response to Houk et al 'Consensus Statement' available online at <http://adc.bmj.com/cgi/eletters/91/7/554> (last accessed 15/07/13). See also E. Reis, 'Divergence or Disorder: The Politics of Naming Intersex', *Perspectives in Biology and Medicine*, 50, 4 (Autumn 2007), pp.535-543.

⁷ G. Boulos, '*The DSD*' Letter to the Editor in response to Houk et al 'Consensus Statement' available online at <http://adc.bmj.com/cgi/eletters/91/7/554> (last accessed 15/07/13) See further all the Letters to the Editor regarding this publication. See also A.D. Dreger, & A.M. Herndon, 'Progress and Politics in the Intersex Rights Movement:

Feminist Theory in Action’, *GLQ: A Journal of Lesbian and Gay Studies*, 15, 2 (2009) pp. 199-224.

⁸ ‘The Bearded Lady’ of circus sideshow fame is an example of this.

⁹ In 1888, Fancourt Barnes famously presented his ‘living specimen of hermaphroditism’ at a meeting of the British Gynaecological Society. See further A.D. Dreger, *Hermaphrodites and the Medical Invention of Sex* (Cambridge, Mass.: Harvard University Press, 1998), p.59.

¹⁰ Ovid, *Metamorphoses*, translated by A.D. Melville (Oxford: Oxford University Press, 1986) at 85.

¹¹ G.E.R. Lloyd, *Science, Folklore and Ideology: Studies in the Life Sciences in Ancient Greece*, (Cambridge: Cambridge University Press, 1983) at 176.

¹² Aristotle, *On the Generation of Animals* (trans. A.L. Peck) (Cambridge, Mass.: Loeb Classical Library, Harvard University Press, 1979).

¹³ H. de Bracton, *On the Laws and Customs of England* (1268) (Cambridge, Mass.: Harvard University Press, 1968).

¹⁴ Sir E. Coke, *The First Part of the Institutes of the Law of England* (Philadelphia, Penn.: Robert H. Smith, 1853) at 225.

¹⁵ Maimonides, *The Code of Maimonides, Book 4 The Book of Women* (New Haven, Conn.: Yale University Press, 1972).

¹⁶ L. Datson, &K. Park, ‘Hermaphrodites in Renaissance France’, *Critical Matrix* 1, 5 (1985) 1-19.

¹⁷ For a discussion of interpretation of masculinity in the Marie/Marin case amongst others see C. McClive, ‘Masculinity on Trial: Penises, Hermaphrodites and the Uncertain Male Body in Early Modern France’, *History Workshop Journal*, 68, 1 (2009) 45-68.

¹⁸ See P. Simmons, *The Sex of Men in Premodern Europe: A Cultural History* (Cambridge: Cambridge University Press, 2011); M. Schaus (ed), *Women and Gender in Medieval Europe: An Encyclopedia* (New York: Routledge, 2006).

¹⁹ See further G. Ferguson, *Queer (Re)readings in the French Renaissance: Homosexuality, Gender, Culture* (Farnham, UK: Ashgate Publishing, 2008), at 271. Ferguson argues that in Renaissance France, penetration was not central to the offence of female sodomy rather it was a synecdoche for gender transgression and for the usurpation by women of prerogatives reserved for men.

²⁰ This Act is also known as the *Buggery Act of 1533*. Until the passing of this Act, the only sexual behaviour between consenting adults which attracted the attention of the civil law was adultery. The Act was briefly repealed during the reign of Queen Mary, but was re-instated by Queen Elizabeth I in 1563. The first person to be executed under the 1533 Act was Walter Hungerford, the First Baron Hungerford of Heytesbury.

²¹ *King v. Wiseman* [1718] 92 Eng. Rep. 774

²² M. Foucault, *The History of Sexuality: Volume 1 The Will to Knowledge*. (trans R. Hurley) (London: Penguin Books, 1998), Part II Chapter 1.

²³ Foucault, *The History of Sexuality*, at 24 – 27.

²⁴ In the UK the punishment for sodomy of the death penalty was altered to life imprisonment by the *Offences Against the Person Act, 1861*. The *Criminal Law (Amendment) Act, 1885* raised the age of consent, and delineated the penalties for sexual offences against women and minors, and strengthened the legislation prohibiting prostitution.

²⁵ Foucault, *The History of Sexuality*, p. 31 – 32.

²⁶ C. Darwin, *The Origin of the Species*, (1859)

²⁷ For a discussion of homosexuality and Darwin see J.H. Barkow, *Darwin, Sex, and Status: Biological Approaches to Mind and Culture* (Toronto: University of Toronto

Press, 1989); J. McKnight, *Straight Science?: Homosexuality, Evolution and Adaptation* (London: Routledge, 1997)

²⁸ See further M. Foucault *The History of Sexuality 1: The Will to Knowledge* (Trans. R. Hurley) (London: Penguin Books, 1978)

²⁹ *The Registration of Births and Deaths Acts 1863*

³⁰ *Hyde v Hyde*[1866] LR 1 P & D 130.

³¹ *Offences Against the Person Act, 1861 and Criminal Law (Amendment) Act, 1885.*

³² Foucault, *The History of Sexuality*, p. 30, 44 – 45, and 105. See also M. Cook, *London and the Culture of Homosexuality, 1885–1914* (Cambridge: Cambridge University Press, 2003); N.M. Goldsmith, *Worst of Crimes: Homosexuality and the Law in Eighteenth-Century London* (Farnham: Ashgate, 1998)

³³ The Obstetrical Society of London was founded in 1854, the break-away society the British Gynaecological Society was founded in 1884. Eventually these two societies merged in 1929 to form the British College of Obstetricians and Gynaecologists. The College was granted the title ‘Royal’ in 1938, but did not receive its royal charter until 1947, after World War II.

³⁴ A.D. Dreger, ‘A History of Intersex: From the Age of Gonads to the Age of Consent’ in A.D. Dreger (ed) *Intersex in the Age of Ethics* (Hagerstown, Md: University Publishing Group, 1999), p.p. 5-22, p. 6.

³⁵ G.F. Blacker, & T.W.P. Lawrence, ‘A Case of True Unilateral Hermaphroditism with Ovotesis Occuring in Man, with a Summary and Criticism of the Recorded Cases of True Hermaphroditism.’ *Transaction of the Obstetrical Society of London*, 38 (1896) pp. 265.

³⁶ The growing interest in laboratory based medicine and the influence of eminent German pathologists like Theodor Klebs, are two possible explanations for the scale of the acceptance. See further A.D. Dreger, *Hermaphrodites and the Medical Invention of Sex* (Cambridge, Mass: Harvard University Press, 1998), pp. 151-154.

³⁷ Dreger, *Hermaphrodites and the Medical Invention of Sex*, at 7-9.

³⁸ Dreger, 'A History of Intersex: From the Age of Gonads to the Age of Consent', at 9.

³⁹ W.B. Bell, 'Hermaphroditism' (1915) 35 *Liverpool Medico-Chirurgical Journal*, 35 (1915) 272-292, at 291.

⁴⁰ Bell, 'Hermaphroditism', at 292.

⁴¹ J. Money, & A.A. Ehrhardt, *Man and Woman, Boy and Girl: Differentiation and Dimorphism of Gender* (Baltimore: Johns Hopkins University Press, 1973.); J. Money, *Sex Errors of the Body and Related Syndromes: A Guide to Counselling Children* 2nd Revised Ed. (Baltimore: Brooks Publishing, 1994).

⁴² John/Joan is the pseudonym given to David Reimer by M. Diamond & K. Sigmundson in their 1997 follow up article 'Sex Reassignment at Birth; Long-term Review and Clinical Implications', *Archive of Pediatric & Adolescent Medicine* 151, (1997) p. 298-304. Although his biography by Colapinto identifies John as David Reimer, born Bruce, whose name was changed to Brenda, and then David, to avoid confusion he shall be referred to throughout this article as John when male and Joan when female. See J. Colapinto, *As Nature Made Him; The Boy Who was Raised as a Girl* (New York, New York: Perennial, 2001).

⁴³ Colapinto, *As Nature Made Him*, p. 79

⁴⁴ Colapinto, *As Nature Made Him*, p. 68.

⁴⁵ Colapinto, *As Nature Made Him*, Chapter 4, A. Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* (New York: Basic Books, 2000) pp. 66-71.

⁴⁶ Constitutional Court of Colombia in its case No.SU-337/99. Available online at www.isna.org/node/116 (last accessed 11.02.14).

⁴⁷ Diamond & Sigmundson, 'Sex Reassignment at Birth'.

⁴⁸ For an introduction to various methods of medical management of intersex see T. Ní Mhuirthile, ‘Realising Gender Recognition: Rendering the Vulnerable Visible or Further Vulnerabilising the Invisible?’ *UCD Working Papers in Law, Criminology and Socio-Legal Studies Research Paper No 41/2010*. Available online at http://papers.ssrn.com/soI3/papers.cfm?abstract_id=1680899

⁴⁹ *S v An Bord Uchtála* (unreported High Court, December 2009)

⁵⁰ *Foy v An tArd Chlaraitheoir (No 1)* and *Foy v An tArd Chlaraitheoir (No 2)* *supra* nError! Bookmark not defined..

⁵¹ *Foy (No 1)*, *supra* nError! Bookmark not defined., at para 170.

⁵² *Goodwin v UK* [2002] EHRR 588

⁵³ Under the European Convention on Human Rights Act 2003, Irish courts are for the first time obliged to be cogniscent of the decision made by the Strasbourg court. Thus the judge in *Foy* was obliged to follow the ruling in *Goodwin* that to refuse to recognise *Foy*’s preferred gender identity was to violate her right to privacy as guaranteed by Article 8 of the Convention. The Declaration of Incompatibility was intended to ensure that notice of this dissonance between domestic law and the States international legal obligation was brought to the attention of the legislature. The Declaration obliged the Taoiseach to read the court order into the Oireachtas records within 21 working days of it being made. This should then prompt the Oireachtas to rectify the incompatibility. It has been of limited practical use in Ireland and as of the time of publication, a Heads of Bill, or a mere outline for how such recognition might be achieved was finally introduced before the cabinet in July 2013 but no draft legislation has yet been forthcoming.

⁵⁴ *Corbett v Corbett* [1970] 1 All ER 33

⁵⁵ *Corbett v Corbett*, p. 48.

⁵⁶ *W v W* [2001] 1 FLR 324.

⁵⁷ For a more in-depth discussion on the *Foy* cases and the introduction of gender recognition legislation to Ireland see T. Ní Mhuirthile, ‘Legal Recognition of Preferred Gender Identity in Ireland: An Analysis of Proposed Legislation’ in M. Leane and E.

Keily, (eds) *Sexualities and Irish Society: A Reader* (Dublin: Orpen Press, 2014), pp.127-148.

⁵⁸ *Report of the Gender Recognition Advisory Group* (Dublin: Department of Social Protection, 2011).

⁵⁹ *Report of the Gender Recognition Advisory Group*, p.35.

⁶⁰ *Gender Recognition Bill, 2013 and the Legal Recognition of Gender Bill, 2013*.

⁶¹ *Gender Identity Law, 2012* (Argentina) available online from <http://globaltransaction.files.wordpress.com/2012/05/argentina-gender-identity-law.pdf>

⁶² *General Scheme of the Gender Recognition Bill 2013*, at Head 6(vi).

⁶³ *Report on the General Scheme of the Gender Recognition Bill 2013*, p. 30-31.

⁶⁴ *Report on the General Scheme of the Gender Recognition Bill 2013*, at 25.

⁶⁵ *Ibid.*

⁶⁶ *Report on the General Scheme of the Gender Recognition Bill 2013*, at 37.