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Gender issues in Jewish law

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Marriage After a Sex-Change Operation

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Marriage After a Sex-Change Operation

American Reform Responsa, New York, 1983, #137

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QUESTION: May a rabbi officiate at a marriage of two Jews, one of whom has undergone a surgical operation which has changed his/her sex?

ANSWER: Our responsum will deal with an individual who has undergone an operation for sexual change for physical or psychological reasons. We will presume (a) that the operation is done for valid, serious reasons, and not frivolously; (b) that the best available medical tests (chromosome analysis, etc.) will be utilized as aids; and (c) that this in no way constitutes a homosexual marriage.

There is some discussion in traditional literature about the propriety of this kind of operation. In addition, we must recall that tradition sought to avoid any operation which would seriously endanger life (*Shulhan Arukh Yoreh Deah* 116; *Hul.*10a). The *Mishnah* dealt with the problem of individuals whose sex was undetermined. It divided them into two separate categories, *tumtum* and *androginos*. A *tumtum* is a person whose genitals are hidden or undeveloped and whose sex, therefore, is unknown. R. Ammi recorded an operation on one such individual who was found to be male and who then fathered seven children (*Yev.* 83b). Solomon B. Freehof has discussed such operations most recently; he permits such an operation for a *tumtum*, but not for an *androginos* (*Modern Reform Responsa*, pp. 128ff). The *androginos* is a hermaphrodite and clearly carries characteristics of both sexes (*M. Bik.* IV.5). The former was a condition which could be corrected and the latter, as far as the ancients were concerned, could not, so the *Mishnah* and later tradition treated the *androginos* sometimes as a male, sometimes as a female, and sometimes as a separate category. However, with regard to marriage, the *Mishnah* (*Bik.* IV.2) states unequivocally: "He can take a wife, but

not be taken as a wife. If married, they were free from the obligation of bearing children (*Yad, Hil. Yibum Vahalitzah* 6.2), but some doubted the validity of their marriages (*Yev.* 81a; *Yad, Hil. Ishut* 411, also *Shulkhan Aruk Even Ha-ezer* 44.6). The Talmud has also dealt with *aillonit*, a masculine woman, who was barren (*Yad, Hil. Ishut* 2.4; *Nid.* 47b; *Yev.* 80b). If she married and her husband was aware of her condition, then this was a valid marriage (*Yad, Hil. Ishut* 4.11); although the ancient authorities felt that such a marriage would only be permitted if the prospective husband had children by a previous marriage, otherwise, he could divorce her in order to have children (*Yev.* 61a; *M. Yev.* 24.1). Later authorities would simply permit such a marriage to stand.

We, however, are dealing either with a situation in which the lack of sexual development has been corrected and the individual has been provided with a sexual identity, or with a situation in which the psychological makeup of the individual clashed with the physical characteristics, and this was corrected through surgery. In other words, our question deals with an individual who now possesses definite physical characteristics of a man or a woman, but has obtained them through surgical procedure, and whose status is recognized by the civil government. The problem before us is that such an individual is sterile, and the question is whether under such circumstances he or she may be married. Our question, therefore, must deal with the nature of marriage for such individuals. Can a Jewish marriage be conducted under these circumstances.

There is no doubt that both procreation and sexual satisfaction are basic elements of marriage as seen by Jewish tradition. Procreation was considered essential, as is already stated in the *Mishnah*: "A man may not desist from the duty of procreation unless he already has children." The *gemara* to this concluded that he may marry a barren woman if he has fulfilled this *mitzvah*; in any case, he should not remain unmarried (*Yev.* 61b). There was a difference between the Schools of Hillel and Shammai about what was required to fulfill the *mitzvah* of procreation. Tradition followed Hillel, who minimally required a son and a daughter, yet the codes all emphasize the need to produce children beyond that number (*Tos., Yev.* 8; *Yad, Hil. Ishut* 15.16, etc.). The sources also clearly indicate that this *mitzvah* is only incumbent upon the male

(*Tos., Yev. 8*), although some later authorities would include women in the obligation, perhaps in a secondary sense (*Arukh Hashulhan, Even Ha-ezer 1.4; Hatam Sofer, Even Ha-ezer, #20*). Abraham Hirsh (*Noam, Vol. 16, pp. 152ff*) has recently discussed the matter of granting a divorce when one spouse has had a transsexual operation. Aside from opposing the operation generally, he also states that no essential biological changes have taken place and that the operation therefore, was akin to sterilization (which is prohibited) and cosmetic surgery. Hirsh also mentions a case related to our situation. A male in the time of R. Hananel added an orifice to his body, and R. Hananel decided that a male having intercourse with this individual has committed a homosexual act. This statement is quoted by Ibn Ezra in his commentary on Lev. 18:22. We, however, are not dealing with this kind of situation, but with a complete sexual change operation.

Despite the strong emphasis on procreation, companionship and joy also played a major role in the Jewish concept of marriage. Thus, the seven marriage blessings deal with joy, companionship, the unity of family, restoration of Zion, etc., as well as with children (*Ket. 8a*). These same blessings were to be recited for those beyond child-bearing age, or those who were sterile (*Abudarham, Birkhot Erusin 98a*).

Most traditional authorities who discussed childless marriages were considering a marriage already in existence (*bediavad*) and not the entrance into such a union. Under such circumstances the marriage would be considered valid and need not result in divorce for the sake of procreation, although that possibility existed (*Shulhan Arukh Even Ha-ezer 23; see Isserles note on 154.10*). This was the only alternative solution, since bigamy was no longer even theoretically possible after the decree of Rabbenu Gershom in the 11th century in those countries where this decree was accepted (oriental Jews did not accept the *Herem* of Rabbenu Gershom). Maimonides considered such a marriage valid under any circumstances (*Yad, Hil. Ishut 4.10*), whether this individual was born sterile or was sterilized later. The commentator, Abraham di Boton, emphasized the validity of such a marriage if sterility has been caused by an accident or surgery (*Lehem Mishneh to Yad, Hil. Ishut 4.10*). Yair Hayyim Bacharach stated that as long as the prospective wife realized that her prospective hus-

band was infertile though sexually potent, and had agreed to the marriage, it was valid and acceptable (*Havat Yair*, #221). Traditional *halakhah*, which makes a distinction between the obligations of men and women (a distinction not accepted by Reform Judaism) would allow a woman to marry a sterile male, since the obligation of procreation did not affect her (as mentioned earlier).

There was some difference of opinion when a change of status in the male member of a wedded couple had taken place. R. Asher discussed this, but came to no conclusion, though he felt that a male whose sexual organs had been removed could not contract a valid marriage (*Besamim Rosh*, #340—attributed to R. Asher). The contemporary Orthodox R. Waldenberg assumed that a sexual change has occurred and terminated the marriage without a divorce (*Tzitz Eli-ezer* X, 1125). Joseph Pellagi came to a similar conclusion earlier (*Ahav et Yosef* 3.5).

Perhaps the clearest statement about entering into such a marriage was made by Isaac bar Sheshet, who felt that the couple was permitted to marry and then be left alone, although they entered the marriage with full awareness of the situation (*Ribash*, #15; *Shulhan Arukh Even Ha-ezer*, 1.3; see Isserles note). Similarly, traditional authorities who usually oppose contraception permitted it to a couple if one partner was in ill health. The permission was granted so that the couple could remain happily married, a solution favored over abstinence (Moses Feinstein, *Igerot Mosheh, Even Ha-ezer*, #63 and #67, where he permits marriage under these circumstances).

Our discussion clearly indicates that individuals whose sex has been changed by a surgical procedure and who are now sterile may be married according to Jewish tradition. We agree with this conclusion. Both partners should be aware of each other's condition. The ceremony need not be changed in any way for the sake of these individuals.