

# Conversion and Marriage after Transsexual Surgery 5750.8

## *She'elah*

An applicant for conversion, X, received extensive therapy at a recognized psychiatric institution which offers a sex-change psycho-therapy program. Subsequently he underwent surgery; his male genitalia were removed and a cosmetic vagina was constructed. However, this having taken place, he had a change of heart and no longer desired to be a woman. Since he had never declared himself publicly or legally as a woman, he continued his status as a man and was later married in a civil ceremony to his fiancée, a Jewish woman who is satisfied to live with him permanently, despite his mutilated condition. She supports his desire to become a Jew. The couple have been attending Shabbat services regularly. (Rabbi's name withheld, in order to prevent identification of X.)

Two questions:

1. Should we admit the 29-year old person to the Jewish information course established jointly by the Reform congregations in our city, holding out the likelihood that in the end there would be religious conversion?
2. If X is converted, should the rabbi sanctify the civil marriage through a religious ceremony (*kidclusbin*)?

## *Teshuvab*

### Traditional Considerations

1. The question of conversion. Deut. 23:2 states: "No one whose testes are crushed or whose member is cut off shall be admitted into the Congregation of the Eternal." This would appear to exclude X from membership in the Jewish people, but already Isaiah (56:3 ff.) mitigated the application of this rule when he spoke of God having special regard for the eunuchs. Subsequently, rabbinic tradition understood the intent of "No one whose testes are crushed..." to be that such a man should not marry an Israelite woman, while his status as a Jew was not affected.<sup>1</sup>

There is therefore no objection in principle to the conversion of a person whose genitalia are mutilated or missing altogether, even when he is a *seris adam*, one whose mutilation was effected by human hand and not by birth or illness (*seris chammah*). In these cases, immersion alone suffices for *giyur*, religious conversion. We see no reason to depart from this view and therefore hold that X's desire to become a convert has to be treated on its own merits.

The question then arises whether X, with his history of identity problems, is qualified as a prospective convert. Should we not have some concern about the mental stability of a person who, having undergone this radical and irreversible operation, now desires to be a man after all?

The Rambam deals with a convert who had been admitted without proper examination or instruction in the mitzvot.<sup>3</sup> But since the error has been made, he says, his conversion is deemed valid *ex post facto* (*be-di'avad*) though one should be troubled about the person until his sincerity is fully established. Once conversion has taken place, the presumption is in favor of the convert.<sup>4</sup> But before the event (*lechatchilah*) it is different, for the fitness of the prospective convert should be most carefully considered.

Rabbi Walter Jacob issued a *teshuvah* on the question how the mental competency of a convert might be assessed, and cautioned that "we cannot accept individuals who do not meet these prerequisites [of mental competency]." <sup>5</sup>

In the case before us, when could it be said that X has shown that his intention to become a Jew is firm and not likely subject to reversal? As a minimum we suggest a cautionary waiting period, like the traditional cycle of three Pilgrimage Festivals (which waiting period applies in other cases).<sup>6</sup> Since the conversion program in X's city lasts for eight months, let him enter the course but let him also be informed that, upon conclusion of the program, there would be a further time span, say a year, after which the rabbinic court would rule on his admissibility to conversion.

(While this is the majority opinion of the Responsa Committee, some members disagree and would not admit X to the program at all. They would consider X as a person who has already shown his instability in a matter which fundamentally affects his physical identity. They would not wish conversion to

be another stage of the person's psychiatric meandering. The majority, as indicated, would leave the matter to the discretion of the *beit din*.)

2. Should the rabbi officiate at X's marriage? The question of admissibility to religious marriage is different from that of admissibility to conversion. In the latter, it is not necessary to deal with a presumption of X's maleness (*chezkat zachar*), because in the Reform context which treats men and women as religious equals we convert X as a human being and not as either a male or a female. But in marriage, differential gender has been the precondition.

First of all, let us look briefly at the admissibility of sex change altogether. Since the Halachah regards the mitzvah of procreation as a chief purpose of marriage, the Rabbis forbade the removal of male genitalia in the hermaphrodite (*androgynos*), the person who possesses both male and female genitalia. Even more so would they forbid the removal of genitalia from an otherwise normally formed man who wishes to be a woman.<sup>8</sup>

Exceptions were made only occasionally. Thus, Rabbi Eliezer Waldenberg permitted transsexual surgery (from male to female) in the borderline case of an infant whose external genitalia were those of a female, though chromosome analysis and the presence of a testicle showed that the gender might be male.<sup>9</sup> According to Rabbi Waldenberg, the general rule is that the "visible, external organs" determine sexual identity, and in the case of X he would therefore not have allowed the surgery.

The issue before us is, however, not the permissibility of the surgery but rather, since it has already taken place, whether *kiddushin*, religiously sanctioned union, may now be celebrated.

There is a good deal of halachic discussion of the question whether the marriage of a transsexual is still a marriage and whether—if it is contracted—religious divorce (*gittin*) is necessary or redundant. When the operation has already taken place, most follow Rabbenu Asher who says that a man whose genitalia have been removed is no longer able to contract a valid marriage—even though his sexual identity may not be affected and he is still considered a man.<sup>10</sup> The prohibition stated in Deut. 23:2, as interpreted by Tradition, is deemed decisive.

### Reform Perspectives

Are there reasons why Reform Judaism might reach a different conclusion? There might be, for it would likely view the biblical passage differently. It would see it as a time-bound response to a particular situation, namely the use of castrated men (*sarisim*) in society, and this original purpose of the law has fallen away.<sup>11</sup>

In addition, Reform also would accept the findings of modern science, which holds that external genitalia may not reflect the true identity of the individual. Thus, analysts have distinguished five categories which can be said to identify biological sex. They are: chromosomal configuration; gonadal sex (presence of ovaries or testes); sex-based hormones (androgen or estrogen dominance); internal reproductive structure; and external genitalia.<sup>12</sup> Rabbi Solomon B. Freehof was therefore ambivalent and suggested that the rabbi be guided by the attitude of the community: if the state issues a license to a transsexual it may be assumed that his/her change has the recognition of the law and therefore *kiddushin* may take place.<sup>13</sup> Subsequently, a CCAR Responsa Committee which dealt with the matter in some detail also allowed sex change as a permissible procedure and did not object to *kiddushin*.<sup>14</sup>

Despite these precedents in our movement, we remain troubled about the matter. The questioner notes that X received the best available scientific and psychological advice before his transsexual surgery was effected. Should we therefore not assume that medical evidence showed X to possess a sufficient measure of the aforementioned female characteristics? In some institutions which deal with persons like him there is a period during which the patient receives hormonal treatment and lives for a while as a woman. Only when the results of this trial period are conclusive is the surgery performed.

Was this done in X's case and was his preference for femaleness physiologically founded? The answer is not available to us and may not be available to the rabbi either. Still, we have to believe that no reputable institution would have proceeded with the surgery had there not been sufficient indications that strong female characteristics were in evidence. We would therefore consider the presumption of X's maleness to have been seriously weakened, and X to fall into the category of *safek zachar, safek nekevah*, meaning that

his/her sexual identity is in doubt.<sup>15</sup> We would consequently advise the rabbi not to proceed with *kiddushin* in case X is converted to Judaism.

Of course, for those Reform rabbis who sanctify same-sex marriages, this part of our discussion is irrelevant. They will say: Here are two individuals who care for each other and who want a ceremony that recognizes their intent as holy. However, while individual rabbis have taken this position, the Reform movement as represented by the CCAR has refused to do so.

In any case, even though no religious wedding will be performed, we assume that X will be treated with all the compassion and concern which such a tormented individual desperately requires.

## NOTES

1 See Rashi and Ibn Ezra on Dent. 23:2. The prohibition against Ammonites and Moabites was applied only to men, while their women (like Ruth) were allowed to marry Israelite men. The matter is discussed in M. Yevamot 8:2, and BT Yevamot 76a and following.

2 Rosh, Yevamot 4:1 3; *Sh.A.*, YD 268:1.

3 *Yad*, Issurei Bi'ah 13:17.

4 The Mishnah (Gift. 3:3) speaks of a man who desires to divorce his wife but, being old or ill, sends a messenger to represent him. The man is presumed alive at the time of *gittin* until the opposite is established (*bechezkat sbe-hu kayyam*). The same principle applies to an animal to be slaughtered. While alive it has the status of a forbidden object, for an ever *min ha-chay* may not be eaten; but once slaughtered, the presumption is that the *shechilah* was kosher until the opposite is established (*harei hee bechezkat hetteir*; BT Hullin 9a).

5 *American Reform Responsa*, ed. Walter Jacob (New York: CCAR, 1983), no. 67, pp. 215-216. The Rambam left the decision to the presiding judge; *Yad*, Edut 9:9, and Sanh. 2:1.

6 Such as the establishment of ownership of a lost object; see the Maggid Mishneh on the *Yad*, Issurei Bi'ah 13:17, who finds the case a confirmation of the uncomplimentary saying that "Converts are for Israel like a rash" (*sapachat*, Lev. 13:2). See also M. Bava Metsi'a 2:6 and commentaries.

7 Based on Lev. 22:24; BT Shabbat 1 10b; Rambam. *ibid.* 16:10. See further the study by Moshe Steinberg in 'Assiya, vol. 1, pp. 142-145, and R. Gedaliah Felder's discussion of the way an *androgynos* and *tumtum* are to be converted (*She'elal Yeshurun*, no. 23), both with extensive notes and a listing of the traditional decisors.

8 See Rabbi J. David Bleich, "Transsexual Surgery," in Fred Rosner and J. David Bleich, *Jewish Bioethics* (New York: Hebrew Publishing Company, 1983), p. 191, citing Lev. 22:24. Rabbi Solomon Freehof also says: "There seems to be no way in which Jewish tradition can permit it" [i.e., transsexual surgery, if people are born with normal genitalia]; see *MRR*, no. 22, pp. 128-133.

9 *Tzitz Eliezer*, vol. 2, no. 78.

10 *So Besamim Rosh*, no. 340. (The work is ascribed to R. Asher ben Yechiel, known as the Rosh, but was probably not authored by him.)

11 This opinion is supported by *Yalkut Me'am Lo'ez*, Devarim 866,

12 See John Money et al. in *Bulletin of the Johns Hopkins Hospital* 91 (1955), pp. 284-300; and

the article "Sexual Identity" in the *Encyclopedia of Bioethics*, vol. 3.

13 *RRT*, no. . 42, pp. 196-200.

14 See *ARR*, no. 37, pp. 416-419, and *CARR*, no. 199, pp. 293-296, both with extensive citations of source materials.

15 That uncertainty is repeatedly treated in the tradition; see *She'elat Yeshurun*, l.c.