Objectification and Transgender Jurisprudence: The Dictionary as Quasi-Statute

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This paper analyzes definitional issues raised by terms such as "man" and "woman" in transgender jurisprudence, focussing on the Court of First Instance decision in W v Registrar of Marriages. Courts frequently seek guidance on ordinary meaning in standard works of lexicography. But this objectifies the trans party by treating so-called "ordinary" meaning and the dictionary definition as determinative.

Introduction

In this paper I will examine issues that arise when legal interpretation and adjudication turn on the meanings of ordinary words, focussing on the definitional question at the heart of the recent Court of First Instance judgment delivered by Andrew Cheung J,[1] in which a transgender woman was denied the right to marry her male partner. The assumption has been widely made in the case law that what is at stake is the everyday meaning of words such as "man" or "male" and "woman" or "female". There has been frequent resort to dictionary definitions, as well as the evocation of "common usage" and "ordinary meaning". To consider why many judges find resort to the dictionary convenient or necessary, I will review the case law within which the recent Hong Kong decision is firmly embedded.[2]

Definition and law in transgender cases (the UK context)

For over three decades the leading common law case on the right of a transgender person to marry in their affirmed sex was the English decision

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[1] *W v Registrar of Marriages* [2010] 6 HKC 359.

[2] For discussion of Hong Kong context, see Robyn Emerton, "Neither Here nor There: The Current Status of Transsexual and Other Transgender Persons under Hong Kong Law", (2004) 34 HKLJ 245, and "Time for Change: A Call for the Legal Recognition of Transsexual and Other Transgender Persons in Hong Kong", (2004) 34 HKLJ 515. For an incisive survey, see A. Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (London: Cavendish, 2002).

in *Corbett v Corbett*.[3] The judge (Ormord J) determined the validity of the marriage on biological (or bio-medical) criteria, that is, the first three of the four criteria which he derived from expert medical opinion. These criteria were: (i) chromosomal factors; (ii) gonadal factors (i.e., presence or absence of testes or ovaries); (iii) genital factors (including internal sex organs); (iv) psychological factors. The congruence of the first three features (as had been the case with the respondent before the surgery) was determinative of sexual identity:

> The question then becomes, what is meant by the word "woman" in the context of a marriage, for I am not concerned to determine the "legal sex" of the respondent at large. Having regard to the essentially hetero-sexual character of the relationship which is called marriage, the criteria must, in my judgment, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage.[4]

No reference was made to dictionary definitions or popular understandings of the meaning of the terms "man" and "woman". It would however be misleading to say that the judgment was simply based on medical evidence. The judge abstracted a legal principle out of the medical evidence, and this has been applied in a wide range of cases, not of all of which have concerned marriage.[5]

By the time *Bellinger v Bellinger*[6] was decided by the House of Lords, there was clear recognition that the social, legal, medical and intellectual climate had changed, in particular the European Court of Human Rights judgment in *Goodwin v United Kingdom*.[7] In a dissenting judgment in the Court of Appeal, Thorpe LJ had rejected the *Corbett* criteria as outmoded both in terms of medical science and changes in social attitudes to sex/gender and marriage.[8] The discussion in the House of Lords remained oriented towards the submissions of medical experts, but that evidence included assertions that psychological sex might in part be a post-natal developmental process. Nonetheless ultimately the biological approach

[3] [1970] 2 WLR 1306.
[4] *Ibid.*, p 106.
[5] *R v Tan* [1983] 1 QB 1053.
[6] [2003] 2 AC 467.
[7] (2002) 35 EHRR 18. See also the "inter-sex" case of *W v W* [2001] WLR 674 which placed a limit on the applicability of the *Corbett* test.
[8] [2002] Fam 150, 185.

of *Corbett* remained unchallenged, with the distinction between male and female defined by Lord Nicholls in terms of the distinct roles played in reproduction: "A male produces sperm which fertilise the female's eggs".[9] This definition underlay the legal status conferred by sexual classification, and it was right that "society through its laws decides what objective biological criteria should be applied when categorising a person as male or female".[10] Self-perception or self-definition was not a factor that the law could recognise: "Individuals cannot choose for themselves whether they wish to be known or treated as male or female. Self-definition is not acceptable. That would make nonsense of the underlying biological basis of the distinction"[11] and involve an unauthorised extension or modification of word meaning: "Recognition of Mrs Bellinger as female for the purposes of s 11(c) of the Matrimonial Causes Act 1973 would necessitate giving the expressions 'male' and 'female' in that Act a novel, extended meaning: that a person may be born with one sex but later become, or become regarded as, a person of the opposite sex."[12]

Lord Nicholls denied that the case law had so far produced "objective, publicly available criteria by which gender reassignment is to be assessed".[13] This reasoning was echoed by Lord Hope of Craighead, who agreed that "the expressions 'male' and 'female' in s 11(c) of the Matrimonial Causes Act 1973 are not capable of being given the extended meaning that would be needed to accommodate her case",[14] given the "impossibility of changing completely the sex which individuals acquire when they are born".[15] As *Corbett* had made clear, "the words 'male' and 'female' should each be given a single, clear meaning that can be applied uniformly in all cases".[16]

The judgment looked at two Australian cases where the issue had been identified as the "common understandings" of the ordinary English words "male" and "female", *Secretary, Department of Social Security v State Rail Authority*[17] and *Re Kevin*.[18] In the latter case, Chisholm J had held that the "ordinary contemporary meaning" of the word "man" in the Australian context "included post-operative female to male

[9] *Bellinger* (n 7 above), para 28.
[10] *Ibid.*, para 28.
[11] *Ibid.*, para 28.
[12] *Ibid.*, para 36.
[13] *Ibid.*, para 42.
[14] *Ibid.*, para 56.
[15] *Ibid.*, para 57.
[16] *Ibid.*, para 58.
[17] (1993) 118 ALR 467.
[18] (2001) 165 FLR 404.

transsexuals".[19] Lord Nicholls agreed with the assertion that the word "male" and "female" should be given their "ordinary, everyday meaning in the English language".[20] But he saw nothing in the materials before the court to suggest that the ordinary meaning included "post-operative transsexual persons".[21] The judge then cited the *New Shorter Oxford Dictionary* (1993) where the primary meaning of "male" when used as an adjective was "of, pertaining to, or designating the sex which can beget offspring".[22] He added: "No mention is made anywhere in the extended definition of the word of transsexual persons".[23] These definitions were in accord with the decision in *Corbett*: "The fact is that the ordinary meaning of the word 'male' is incapable, without more, of accommodating the transsexual person within its scope".[24] Even the Australian cases drew a distinction between the pre-operative and post-operative states: "Any attempt to enlarge its meaning would be bound to lead to difficulty, as there is no single agreed criterion by which it could be determined whether or not a transsexual was sufficiently 'male' for the purpose of entering into a valid marriage ceremony".[25]

Emphasizing once again the tradition relationship between marriage and sexual reproduction, the judge concluded that there was no way in his view that the words "male" and "female" in s 11(c) of the 1973 Act could be interpreted so as to include female to male and male to female transsexuals.[26] The European Court of Human Rights in *Goodwin v United Kingdom* had included a quotation from the United Kingdom's Interdepartmental Working Group on Transsexual People (April, 2000[27]) to the effect that "[m]any people revert to their biological sex after living for some time in the opposite sex and some alternate between the two sexes throughout their lives".[28] For Lord Hobhouse, this highlighted "the novelty of the idea of gender by choice".[29] The *Goodwin* decision represented a significant departure from previous understandings of what the words "respectively male and female" meant. However, given that decision, the Court issued a declaration of incompatibility with the United Kingdom's obligations under the ECHR.

[19] *Bellinger* (n 7 above), para 327.
[20] *Ibid.*, para 62.
[21] *Ibid.*, para 62.
[22] *Ibid.*, para 62.
[23] *Ibid.*, para 62.
[24] *Ibid.*, para 62.
[25] *Ibid.*, para 62.
[26] *Ibid.*, para 64.
[27] London: HMSO.
[28] (2002) 35 EHRR 18 (p 447), 463.
[29] *Bellinger* (n 7 above), para 76.

Australian case law

Most common law jurisdictions have faced questions of transgender rights, including the right to marry in the affirmed gender.[30] In this section the Australian case law will be discussed, as this has played the most significant role in the international common law discussions. *Secretary, Department of Social Security v State Rail Authority*[31] concerned an appeal against an order granting married benefit entitlement to a pre-operative MTF transgender woman who was the partner of an invalid pensioner. The Social Security Act (s 37(1) of 1947) did not define "woman" or "female" or "opposite sex", but defined "wife" as "a female married person". The provision included "de facto" spouses. The Tribunal had based its decision on "psychological sex" as the determining factor. In the appeal, Black CJ noted that terms at issue in the case were "of course ordinary English words",[32] adding that: "[i]n ordinary English usage words such as 'male' and 'female', 'man' and 'woman' and the word 'sex' relate to anatomical and physiological differences rather than to psychological ones".[33] Definitions from the *Oxford English Dictionary* and *Macquarie Dictionary* were cited in illustration of this in which "female" was defined in terms of bearing offspring, and "sex" in terms of reproductive anatomy and physiology. For Black CJ, it followed that:

> There is no occasion to depart in this case from the ordinary meaning of the words used in the Act and it would be going well beyond the ordinary meaning of the words in question to conclude that a pre-operative male to female transsexual, having male external genitalia, is a "woman" for the purposes of the Social Security Act and may be a "wife" as that expression is defined in the Act. I do not consider that the language used in the relevant parts of the Act allows primacy to be given to psychological factors and certainly not to the virtual exclusion of anatomical factors.[34]

However, the *Corbett* criteria were no longer appropriate, and recent case law gave "convincing reasons for rejecting the concept that when the law speaks of male or female persons it necessarily speaks on the footing that sex is unchangeable".[35] In the case of post-operative individuals, the law should recognise the new gender: "Whatever may once

[30] *See* Sharpe, *Transgender Jurisprudence* (n 3 above).
[31] *SRA* (n 18 above).
[32] *Ibid.*, p 301.
[33] *Ibid.*, pp 301–302.
[34] *Ibid.*, p 303.
[35] *Ibid.*, p 304.

have been the case, the English language does not now condemn post-operative male-to-female transsexuals to being described as being of the sex they profoundly believe they do not belong to and the external genitalia of which, as a result of irreversible surgery, they no longer have".[36] Where after medical intervention, "the genital features and the psychological sex are in harmony, that person may be said, according to ordinary English usage today, to have undergone a sex change". The terms "sex change" and "sex change operation" were widely understood, including the limitations of such procedures in relation to reproduction. Dictionaries recognised these terms, though they also used the term "apparent" in qualifying "change of sex". Medical experts and legal commentators used these expressions without quotation marks, and terms such as "sex conversion" and "sex reassignment surgery" were more current in these specialist discourses. At the same time there was "a growing awareness in the community of the position of transsexuals" and "a perception that a male-to-female transsexual who has had a 'sex change operation' or a 'sex change' may appropriately be described in ordinary English as female".[37] The words "woman" and "man" were used in the Act "as ordinary English words". It was a question of law "whether the evidence before the Tribunal reasonably admits of different conclusions as to whether the facts or circumstances fall within the ordinary meaning of those words".[38]

In *SRA*, Lockhart's judgment paid considerable attention to the fact/law question. The "threshold" decision as to whether words in a statute were used in their ordinary meaning, or in some other, more technical or scientific sense, was a question of law. If it was determined that the ordinary meaning was at stake, then that became a question of fact "as to the common understanding of the phrase".[39] But the next step was a question of law, that is, "whether or not the evidence before the Court reasonably admits of different conclusions as to whether certain facts or circumstances fall within the ordinary meaning of the relevant word or phrase". If different conclusions were "reasonably possible", then the decision as to which one was correct was a question of fact.[40] Lockhart J reached the same conclusion as Black CJ, namely that:

> In my opinion a woman or a female, as those terms are generally understood in Australia today, includes a person who, following surgery, has harmonised

[36] *Ibid.*, p 304.
[37] *Ibid.*, p 306.
[38] *Ibid.*, pp 312–313.
[39] *Ibid.*, p 312.
[40] *Ibid.*, p 312.

> psychological and anatomical sex. A male-to-female transsexual, following reassignment surgery, is a woman and a female. A female-to-male transsexual, following such surgery, is a man and a male.[41]

However the court regretfully had to reach the conclusion that: "Where the anatomical sex and the psychological sex have not harmonised I cannot accept that such a person falls within the ordinary meaning of the words 'woman' or 'female'."[42] This same principle had been applied by the majority in *R v Harris*,[43] where the issue was the definition of "male person" under an offence which related to acts or procurements of acts of indecency between males:

> The law could not countenance a definition of male or female which depends on how a particular person views his or her own gender. The consequence of such an approach would be that a person could change sex from year to year despite the fact that the person's chromosomes are immutable.[44]

The conviction of the pre-operative (or better, "non-post operative") transgender defendant was upheld.

In *Re Kevin*[45] Chisholm J followed the *SRA* judgment. It was a question of law "what criteria should be applied in determining whether a person is a man or a woman for the purpose of the law of marriage," and a question of fact "whether the criteria exist in a particular case".[46] He rejected the proposition put forward in *R v Cogley*[47] that the sexual identity of an individual was a question of fact not law. Further, Chisholm criticised the judgment in *Corbett* for eliding the distinction between "biological sexual constitution" and "true sex". The proposition that the appropriate "true sex", thus defined, was a legal requirement for a valid marriage, was presented as a legal conclusion but it had been "merely assumed".[48] There was no appeal to explicit legal authority or principle, merely "a definitional sleight of hand", exploiting the notion of "true sex".[49] There was no rule of construction that ordinary words should be given the meaning they had at the time of the legislation; rather, he found general support for the proposition that ordinary words are generally to be given their

41 *Ibid.*, p 325.
42 *Ibid.*, p 327.
43 (1988) 17 NSWLR 158.
44 *Ibid.*, p 170.
45 *Re Kevin* (n 19, above).
46 *Ibid.*, p 418.
47 [1989] VR 799, pp 803–806.
48 *Re Kevin* (n 19 above), p 418.
49 *Ibid.*, p 420.

ordinary contemporary meaning.[50] There was no reason to presume that the legislation passed in 1961 had in contemplation the approach to the definition of "man" found in *Corbett*. *Corbett* did not in fact engage with earlier meanings of the word "man", but rather drew on medical opinion.[51] The contemporary meaning was the relevant one, and this could be drawn from "the context of the legislation, the body of case law on the meaning of 'man' and similar words, the purpose of the legislation, and the current legal, social and medical environment".[52]

The judgment took as relevant to varying degrees the meaning of "man" in relation to the status of post-operative individuals the decisions in *SRA* and *R v Smith*, a series of statutes concerned with birth registration, sexual reassignment, anti-discrimination, criminal law, passports where the meaning of sex-specific terms includes those of transgender status, the behavior of the medical authorities in relation to Kevin's medical treatment and participation as a father in the artificial insemination programme,[53] and a wide range of expert opinion in law and medicine:

> it seems to me quite orthodox, rather than radical, to apply to marriage the ordinary meaning of the terms "man" and "woman", as set out in the Australian authorities and thereby ensure that the law of marriage is not out of alignment with other laws and social practices, and the most informed medical practice. That ordinary meaning would not include a woman who simply announced that she was a man, or anything of the sort. It includes only individuals who are post-operative transsexuals.[54]

The marriage was upheld as valid. In the appeal, *A-G for the Commonwealth v Kevin*,[55] the court agreed that question of whether the words such as "man" and "marriage" were used in a technical or ordinary sense was indeed a question of law:[56]

> we take the view that the words "marriage" and "man" are not technical terms and should be given their ordinary contemporary meaning in the context of the Marriage Act. In our view, it thus becomes a question of fact as to what the contemporary, everyday meanings of the words "marriage" and "man" are respectively. It then is a question of law for this Court to

[50] *Ibid.*, p 429.
[51] *Ibid.*, p 431.
[52] *Ibid.*, p 431.
[53] *Ibid.*, p 439.
[54] *Ibid.*, pp 467–468.
[55] (2003) 172 FLR 300.
[56] *Ibid.*, p 323.

> determine whether, on the facts found by the trial judge, it was open to him to reach the conclusion that he did, namely that at the relevant time, Kevin was a man and that the marriage was therefore valid.

The absence of a statutory definition of the words "man" and "marriage" negated any attempt to argue that the Marriage Act was a code tied to specific definitions. The court had jurisdiction to determine the meanings of key terms in the statute, and this had not taken the court into the realm of "judicial legislation".[57]

The United States

The *Corbett* decision has an important place in the history of United States jurisprudence, so much so that "it came to be viewed as integral to US case law on the subject".[58] In its review of case law, the court in *Re Estate of Marshall G Gardiner*[59] noted that the earliest decision in US law was *Re Matter of Anonymous v Weiner*,[60] which issued a finding that a birth certificate could not be altered to reflect an affirmed gender. However in *MJ v JT*.[61] the court took the (MTF) post-operative status of the plaintiff as decisive in upholding the validity of the marriage and the claim for maintenance. But *Corbett* had been followed in *Re Ladrach*[62] and *Littleton v Prange*.[63] The majority opinion in *Littleton* began with the question: "When is a man a man, and when is a woman a woman?", continuing: "The deeper philosophical (and now legal) question is: can a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth?"[64] The majority judgment did not cite linguistic definitions or refer directly to popular usages, though it did note that "transsexual" was "a term not often heard on the streets of Texas, nor in its courtrooms".[65]

The Kansas Court of Appeals (*Re Estate of Marshall G Gardiner*[66]) applied a multifaceted test, on the basis that the sex at time of marriage was a complex matter of fact. Relevant criteria were taken from an

[57] *Ibid.*, p 363.
[58] Anthony S. Winer, "Assimilation, Resistance, and Recent Transsexual Marriage Cases", (2003) 1(3), *Seattle Journal for Social Justice* 653, 662.
[59] 22 P.3d 1086 (Kan Ct. App. 2001), at 1100.
[60] 50 Misc.2d 380, 270 N.Y.S.2d 319 (1966).
[61] 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).
[62] 513 NE2d 828 (Ohio Prob. 1987).
[63] 9 SW3d 223 (Tex. Civ. App. 1999).
[64] *Ibid.*, p 223.
[65] *Ibid.*, p 225.
[66] 22 P.3d 1086 (Kan Ct. App. 2001).

academic article, namely gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity.[67] The court followed the decision in *MT* in recognizing the acquired identity where the anatomy and the gender had been harmonised. In reversing the lower court verdict it concluded that "Marshall knew of the transsexual nature of J'Noel, approved, married, and enjoyed a consummated marriage relationship with her", and also cited a medical academic who had argued, in relation to the gender assignment of inter-sex children: "[i]n the end it is only the children themselves who can and must identify who and what they are. It is for us as clinicians and researchers to listen and to learn".[68]

The Kansas Supreme Court reversed, relying on principles of statutory interpretation and a set of related assertions about linguistic meaning. The court rejected the relevance of the amended Wisconsin birth certificate and driver's licence: "We view the issue in this appeal to be one of law and not fact. … The interpretation of a statute is a question of law, and this court has unlimited appellate review". It was the intent of the legislature that should govern, and the rule that "[w]ords in common usage are to be given their natural and ordinary meaning".[69] The determination that the question was one of law actually devolved the question onto ordinary linguistic usage, and away from the particular factual circumstances of the individual at the heart of the case: "The words 'sex', 'male', and 'female' are words in common usage and understood by the general population."[70] The court cited *Black's Law Dictionary* which defined sex as the "sum of the peculiarities of structure and function that distinguish a male from a female organism; the character of being male or female", and this definition from *Webster's New Twentieth Century Dictionary*: "either of the two divisions of organisms distinguished as male or female; males or females (especially men or women) collectively". In the same source "male" is defined as "designating or of the sex that fertilises the ovum and begets offspring: opposed to female". "Female" is defined as "designating or of the sex that produces ova and bears offspring: opposed to male". These definitions are applied to the case at hand in the following fashion:

> The words "sex", "male", and "female" in everyday understanding do not encompass transsexuals. The plain, ordinary meaning of "persons of the

[67] *Ibid.*, at p 1094, citing Julie A. Greenberg, "Defining Male and Female: Intersexuality and the Collision between Law and Biology", (1999) 41 *Arizona Law Review* 265.

[68] William Reiner, "To Be Male or Female-That is the Question", (1997) 151(3) *Archives Pediatrics & Adolescent Medicine* 224, 225.

[69] 273 Kan. 191 (2002), p 212.

[70] *Ibid.*, p 212.

> opposite sex" contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria. A male-to-female post-operative transsexual does not fit the definition of a female. The male organs have been removed, but the ability to "produce ova and bear offspring" does not and never did exist. There is no womb, cervix, or ovaries, nor is there any change in his chromosomes. … J'Noel does not fit the common meaning of female.[71]

This *Corbett*-influenced line of cases continued with *Re A Marriage License for Nash*,[72] where the court concluded that "a marriage between a post-operative female-to-male transsexual and a biological female is void [in Ohio] as against public policy".[73] A dissenting opinion by Judith A Christley J noted the dire history of such public policy arguments, in their assumptions about gender characteristics and roles, race, slavery, and homosexuality, where "[w]ithout exception, the continuation of those prejudices was defended in the name of natural law, the God-given order of things, and because it had always been that way. Then, as today, the defenders of the status quo always seemed to have God's lips to their ears".[74] In *Kantaras v Kantaras* the Second District Court of Appeal of Florida concluded: "We agree with the Kansas, Ohio, and Texas courts in their understanding of the common meaning of male and female, as those terms are used statutorily, to refer to immutable traits determined at birth."[75]

W's case (2010): a question of definition

Following a survey of the background to the case, Andrew Cheung J concluded:

> Thus analysed, it is immediately apparent that what a person's sex is, whether a person is "male" or "female", and whether such a person, in adulthood, should be described as a "man" or "woman", are ultimately questions of definition. Put another way, the crucial issue is: whose definition?[76]

The applicant argued that on the proper interpretation of s 40(2) of the Marriage Ordinance, the words "man" and "woman" included a post-operative transsexual individual in his or her acquired or affirmed sex,

[71] *Ibid.*, p 213.
[72] 2003 WL 23097095 (Ohio App. 11 Dist.).
[73] *Ibid.*, p 9.
[74] *Ibid.*, p 10.
[75] 884 So.2d 155 (2004), 161.
[76] *W v Registrar of Marriages* (n 2 above), para 15.

and that the same was true for the words "male" and "female" in s 21 of the Marriage Ordinance and in s 20(1)(d) of the Matrimonial Causes Ordinances. The judge noted that the terms "man", "woman", "male" or "female" were defined neither in the Marriage Ordinance, nor the Matrimonial Causes Ordinance, concluding that the matter was "left to the interpretation of the court".[77] Lord Hope's discussion of this issue in *Bellinger* was cited at length, including his conclusion based on dictionary definitions that "the fact is that the ordinary meaning of the word 'male' is incapable, without more, of accommodating the transsexual person within its scope".[78] The judgment noted that courts in Hong Kong are instructed to take a purposive approach to the interpretation of statutes, taking into account "context and purpose" of statutory provisions, but without going so far as to "distort or even ignore the plain meanings of the text".[79]

Against a background set of assumptions that shaped Hong Kong law in the colonial era, the idea of "natural heterosexual Christian marriage" was evidenced by the use of gender-specific terms. Thus under s 20(1)(d) of the Matrimonial Causes Ordinance a marriage shall be void if the parties are not "respectively male and female", a subsection which is traced from *Corbett* via s 1(c) of the Nullity of Marriage Act 1971 and s 11(c) of the Matrimonial Causes Act 1973. *Corbett*, along with its assumptions about the nature of marriage, thus represented the *status quo* as far as Hong Kong law is concerned.[80] There was however a degree of latitude to interpret the law in the light of "developing circumstances"[81] so long as this did not lead the court "to alter the meanings of the words originally used in ways which do not fall within the principles originally envisaged by the enactment".[82] The court could to take account of "contemporary meaning and usage",[83] a factor which the judgment noted played a significant role in *Re Kevin* and *Bellinger v Bellinger*, albeit with the courts coming to opposite conclusions. The judgment then drew on statements about "common usage" from *Re Gardiner* and *Re Nash*, and dictionary definitions (from *Webster's II New College Dictionary*) cited in *Re Nash*, as well as the *Shorter Oxford English Dictionary* (6ed. 2007) where "woman" designates "an adult female person", and "female" is defined as "of,

[77] *Ibid.*, para 54.
[78] *Ibid.*, para 92.
[79] *Ibid.*, para 107.
[80] *Ibid.*, para 125.
[81] *Ibid.*, para 127.
[82] *Ibid.*, para 127.
[83] *Ibid.*, para 134.

pertaining to, or designating the sex which can beget offspring or produce eggs".

As far as the Hong Kong context was concerned, the judgment argued that no evidence had been produced to negate "the Court's own understanding" that "post-operative transsexual people in Hong Kong are still, in ordinary, every day usage and understanding, referred to as such",[84] i.e. in Chinese terms that translate literally as "sex change person", "sex change man", "sex change woman" (i.e. 變性人, 變性男人, 變性女人):

> Whilst it is quite true that a sex reassignment surgery is colloquially referred to as a "sex change operation" (變性手術), so far as the Court observes, the reference to "sex change" (變性) in the ordinary usage does not, or does not yet, represent a *general* understanding or acceptance that the person's "sex" (whatever one understands the word to mean) has really been "changed". I am therefore of the view that so far as the plain meaning of the text, or the plain and ordinary meaning of the relevant words, is concerned, the applicant has not established a case that the relevant words, according to their ordinary, everyday usage in Hong Kong nowadays, encompass post-operative transsexuals in their assigned sex.[85]

The judgment pointed to difficulties in identifying where the line should be drawn along a continuum from the case of a transgender individual who has undertaken no role change or medical intervention to someone who "undergoes complete reconstructive surgery".[86] These were questions that the court "when embarking on a construction exercise in interpreting the everyday words 'man' and 'woman' cannot answer".[87] There was also the question of the legal situation in respect of those wishing to reverse some aspect of the reassignment process[88] and allowing the post-operative transsexual to marry "would be tantamount to sanctioning same sex marriage".[89] Case law showed a range of responses to the relevance and status of the ability to perform the sexual role of the assigned gender within the marriage.[90] These were policy matters beyond the limits of acceptable statutory interpretation, and more properly a matter for comprehensive legislation. The requirement that courts give an interpretation which was fundamentally rights-compatible did not

[84] *Ibid.*, para 140.
[85] *Ibid.*, para 140.
[86] *Ibid.*, para 143.
[87] *Ibid.*, para 144.
[88] *Ibid.*, para 147.
[89] *Ibid.*, para 148.
[90] *Ibid.*, paras 151–153.

sanction a departure from the principle laid down in *Corbett* that, for the purpose of marriage, sex "is and continues to be determined according to … biological sex at birth".[91] This anticipated the conclusion drawn in the second part of the judgment, where it was further asserted that "the meaning of the words 'man' and 'woman' and therefore the meaning of the word 'marriage' as used by the drafters of the Basic Law when it was promulgated in 1990 cannot be seriously in doubt".[92] This was before fundamental changes in European jurisprudence and the decision in *Goodwin*. This must *a fortiori* be the case for the Joint Declaration Annex I,[93] and the International Covenant on Civil and Political Rights.[94] Given that marriage was "both a legal institution and a social one", constitutional rights should not go beyond "societal consensus". The fact that medical opinion had shifted to a degree, so that the view that sex was an immutable characteristic had been challenged, was worthy of note, but "the law's definition of a person's sex serves a purpose that is not necessarily identical to that served by a medical definition".[95] Sexual identity as understood in the context of marriage in its historical essence reflected the idea that "the ability to reproduce one's own kind still lies at the heart of all creation, and the single characteristic which invariably distinguishes the adult male from the adult female throughout the animal kingdom is the part which each sex plays in the act of reproduction", especially in the context of a "predominantly Chinese society like Hong Kong".[96] The required social consensus was absent.

Sexing the dictionary

There has been considerable discussion in the case law as to whether the definition of the statutory terms "man" and "woman" is a question of law, of fact, or of some combination of the two. The question has been described as a "Catch-22" for transgender plaintiffs.[97] For the Kansas Supreme Court, those cases that had found for transgender plaintiffs (*MT* and *Re Kevin*) treated the question as one of fact, whereas the line of cases from *Corbett* to *Littleton* had treated the question of a person's

[91] *Ibid.*, para 162.
[92] *Ibid.*, para 184.
[93] JD Ref 150–151 adopted in 1984.
[94] adopted 1966, date of applicability 1976.
[95] *W v Registrar of Marriages* (n 2 above), para 201.
[96] *Ibid.*, para 206.
[97] Susan Frelich Appleton, "Contesting Gender in Popular Culture and Family Law: *Middlesex* and Other Transgender Tales", (2005) 80 *Indiana Law Journal* 392, 431.

sex as a matter of law. In general, "law" based approaches have relied on an interlocking combination of medical orthodoxy, gender essentialism, and ordinary meaning, including dictionary definitions, whereas "fact" based approaches have drawn on reformist medical opinion, and social changes as evidenced by official policy on birth certificates, funding for gender reassignment/reaffirmation therapy, and other indicators. This distinction has also been framed as one between legal formalism, an approach which "relies on formal relationships dictated by law", and factual functionalism, which looks at the "functions or attributes or 'realities' that are deemed to be operative".[98] The reformist-functionalist judgments have however recognised self-perception only to the extent that it has been validated through medical intervention, especially surgery, to produce a normative harmony between psychological identity and sexual anatomy. While these judgments reject the notion that assigned birth sex is immutable, they have required a determinate post-operative gender outcome in terms of heterosexual orientation and/or sexual function, body presentation/aesthetics, etc.[99] On the question of presentation rather than actual sexual function, the court in the New Zealand case of *Attorney-General v Otahuhu Family Court* stated: "Where two persons present themselves as having the apparent genitals of a man and a woman, they should not have to establish that each can function sexually."[100] The judgment in W's case followed the first "law" model, and strongly echoed the judgment in *Bellinger*.

In the case law on transgender questions discussed above, there was no direct definitional guidance from statute, and little or no relevant policy discussion from the respective legislatures.[101] In jurisprudential discussion, dictionary definitions are often presented merely a means of aiding the judge's memory[102] or providing "potential meanings from which the Court would select based on statutory, legislative intent, common sense, or some other contextual argument".[103] However,

[98] Ruthann Robson, "Reinscribing Normality? The Law and Politics of Transgender Marriage", in Paisley Currah, Richard M. Juang, Shannon Price Minter (eds.), *Transgender Rights* (Minneapolis: University of Minnesota Press, 2006), 299–309, 301.

[99] *See* Robson, *ibid.*, Sharpe, *Transgender Jurisprudence* (n 3 above).

[100] [1995] 1 NZLR 603, 613–614, discussed in Sharpe, *Transgender Jurisprudence* (n 3 above), p 127.

[101] Glanville Williams, "Language and the Law", (1945) 61 *Law Quarterly Review* 71, 82–3; *Cabell v Markham* 326 U.S. 404 (1945) 739, per Judge Learned Hand.

[102] *Nix v Hedden* 149 U.S. 304 (1893), at 306–7: "dictionaries are admitted not as evidence, but only as aids to the memory and understanding of the court."

[103] See Kevin Werbach, "Looking it Up: Dictionaries and Statutory Interpretation", (1994) 107 *Harvard Law Review* 1437, 1439–1440. For discussion of the role of the dictionary in US jurisprudence and the new textualism, see Samuel L. Thumma, and Jeffrey Kirchmeier, J. "The Lexicon has become a Fortress: the United States Supreme Court's Use of Dictionaries", (1999) 47 *Buffalo Law Review* 227.

lacking definitional guidance, courts in transgender cases have applied a "dictionary approach",[104] behaving as if "dictionaries provide perfect category boundaries" and applying those boundaries "to contexts never considered by the authors of dictionaries".[105] Ironically, the question of transgender "law" has required orientation points that lie beyond law in the social realm, in the guise of "current usage" or "ordinary meaning" as represented in dictionaries.

Dictionaries are conservative in a number of senses. Dictionaries aspire to depict in neutral terms a language as an object of description in which linguistic forms are paired with meanings. In so doing, dictionaries reify or normalise meanings as stable entities. There is a significant time-lag between the lexicographic work and the publication of the dictionary, since no large-scale project can constantly review all of its entries for present relevance, and in any case dictionary-makers look for settled patterns rather than record idiosyncratic usage which may or may not become stabilised. In areas of socio-cultural change, and scientific or medical developments, dictionaries are a poor guide to the current debate or the state of the art. The distinction often made between prescriptive and descriptive dictionaries is at best relative and at worst highly misleading, as all dictionaries undertake complex processes of abstraction and normalisation, and in consequence are widely perceived to entrench authoritative information about language. Given the unbounded array of potential sources, contexts and sub-cultures for lexicographers to draw on, the choices made must inevitably fall dramatically short of comprehensiveness and representatively of the language as a whole, entrenching socio-cultural or other biases. Reader expectations and market demand create requirements that dictionary-makers must meet in order to remain profitable. Dictionaries build on previous editions (and also other dictionaries), so there is often a layered effect as new meanings are added onto existing ones. This temporal sequencing also creates a core-margin continuum, as older or original meanings are frequently understood as foundational. Dictionaries register or affirm metaphysical orderings, from the concrete to the abstract for example, or the biological to the social. This has both a temporal dimension, in that concrete meanings are assumed to precede abstract ones, and a metaphysical dimension, in that categories that refer to physical or biological entities are deemed to be prior to those that refer to social, metaphorical or abstract meanings. Dictionaries present meanings as independent of context and speaker,

[104] Anne C. DeCleene, "The Reality of Gender Ambiguity: A Road toward Transgender Health Care Inclusion", (2007) 16 *Law & Sexuality* 123, 130.
[105] Werbach, "Looking it Up" (n 104 above), p 1452.

and in that sense definitional meaning is reified so as to lie beyond the agency and control of the individual speaker. Yet in transgender jurisprudence, agency, self-definition, self-ascription and personal autonomy (whose definition?) are of fundamental concern.

Furthermore, dictionaries generally fail to include large numbers of words in current use, either because these are used by sub-groups whose texts or discourses are beyond the ken of mainstream lexicography, or given the lexicographers' desire to ensure that a particular term or usage has stablised and generalized – a requirement that entrenches normative views about what is and is not part of "the language". Rejecting the linear model of gender identity, Vade lists the following roles or positions in what he terms the "gender galaxy": "trans, tranny boy, tranny girl, transsexual, transgender, Shinjuku boy, boi, grrl, boy-girl, girl-boy-girl, papi, third gender, fourth gender, no gender, bi-spirit, butch, dyke-fag, fairy, elf girl, glitterboy, transman, transwoman – just to name a few". He cites the following self-definition from a response to a San Francisco Human Rights Commission Survey: "Hormonally enhanced, pre-op, trans, genderqueer, butch-dyke with recurring femme moments! I'm just your average boy-girl-boy, really".[106] It is hard to see what mainstream lexicography has to contribute here.[107]

In *SRA* the court made the statement that "[w]hatever may once have been the case, the English language does not now condemn postoperative male-to-female transsexuals to being described as being of the sex they profoundly believe they do not belong to and the external genitalia of which, as a result of irreversible surgery, they no longer have".[108] In *Re Kevin* it was affirmed that in Australian English the "ordinary contemporary meaning" of the word "man" included "post-operative female to male transsexuals".[109] While these judgments were reformist in the context of the previous case law (though open to criticism for reifying one particular form of transgender identity as recognisable at law), it would have been preferable to insist that the "English language" has never taken – and could never take – a position on this matter. It has been

[106] Dylan Vade, "Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is More Inclusive of Transgender People", 11 (2004–5) *Michigan Journal of Gender and Law* 253, 266.

[107] On linguistic creativity and transgender identities, Don Kulik, "Transgender and Language: A Review of the Literature and Suggestions for the Future", (1999) 5 *GLQ: A Journal of Lesbian and Gay Studies* 605. For some further terminology, see Raven Usher, *North American Lexicon of Transgender Terms* (San Francisco: GLB Publishers, 2006), and the discussion in Susan Stryker, *Transgender History* (Berkeley: Seal Press, 2008), 7–24. On the political status of the term "transgender" itself, see Paisley Currah, "Gender Pluralisms", in Currah et al (eds.), *Transgender Rights* (n 99 above), 3–31.

[108] *SRA* (n 18 above), p 304.

[109] *Ibid.*, para 327.

judges who have interpreted linguistic usage so as to nullify statements of self-definition and gender affirmation.

Neither dictionaries, nor any class of expert on language (e.g. academic linguists), nor any presumptions about linguistic usage or social consensus as to meaning, are in a position to offer authoritative definitions of terms such as "male" and "female". The idea that each word can be reduced to a definition (or set of definitions) is a fiction both of law, lexicography and mainstream academic linguistics. It is a product of particular linguistic assumptions inculcated through formal education, and an artifact of the availability of linguistic intuitions about meaning as an abstract and definable entity.[110] The resort to the dictionary involves a forgetting of the process of selection, abstraction and normalisation that has been undertaken, a process which leaves the definition at many removes from the unfolding linguistic-behavioural social world. Further, the distinction between consulting a dictionary to refresh one's memory as to a meaning, and integrating a dictionary definition decisively into one's reasoning processes, is impossible to sustain. Meaning is not fixed in the mind or in memory, and in any case the act of refreshing one's memory as to meaning takes place in a particular context where two or more contested meanings have already been introduced into the legal argument: In reaching for the dictionary, there is a danger of judges forgetting "their individual responsibility for determining the meaning of words":[111] "dictionaries tend to deal in standard or established usage and definitions, rather than contentious, border-line or emergent ones that become critical in legal actions".[112]

The issue at the heart of W's case is one of self-definition. It is not about the definition of a class of objects, but of a human being endowed with reflexivity. Individuals have the uncontested right to label, name, categorise and attribute qualities to themselves in all domains beyond the reach of law, and this should be the starting-point for law itself.[113] To attribute authority to dictionary definitions over the domain of linguistic

[110] Roy Harris and Christopher Hutton, *Definition in Meaning and Practice: Language, Lexicography and the Law* (London: Continuum, 2007).

[111] James Weis, "Jurisprudence by Webster's: The Role of the Dictionary in Legal Thought", (1987) 39 *Mercer Law Review* 961, 976.

[112] Michael Toolan, "The Language Myth and the Law", in Roy Harris (ed.), *The Language Myth in Western Culture* (London: Curzon, 2002), 159–182, 176.

[113] See the Yogyakarta Principles (2006), for example Principle Three: "Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom". Available at www.yogyakartaprinciples.org.

facts is to treat the lexicographer as a kind of linguistic legislator. The legislator produces quasi-statutes in the form of definitions which are then used as general statements which "prescribe meaning"[114] and are to be applied to particular fact patterns. This is objectification through definition. In transgender cases, courts have applied the dictionary as "black letter law" or quasi-statutes, implying onto everyday language a false categorical rigidity. The definitions in question "serve to further exclude and isolate the transgender community",[115] with courts behaving when faced with the definition of social institutions such as marriage "as though the dictionary represented the full universe of definitional options".[116]

Linguists may argue that "dictionaries are a crude and frequently unreliable aid to word meaning and usage", but the fundamental methodological and ethical objections to reliance on dictionaries in cases of reflexive self-definition and human identity apply no less to analysis of current usage by linguists.[117] Most linguistic approaches to meaning are concerned with capturing underlying definitional essences, and their idealisations leave no space for the complexities of gender. Mainstream models in academic linguistics, such as those that seek to map out linguistic universals, reproduce, indeed drastically sharpen, normative definitional boundaries.[118]

In an aside, Ormord J in *Corbett* noted that the question was "what is meant by the word 'woman' in the context of marriage" and he was not "concerned to determine the 'legal sex' of the respondent at large".[119] This might be read as a concession, but *Corbett* has in fact been applied in this way. One might debate the question of whether there is a form of legal status corresponding to "legal sex at large". But what is clear is there is no such concept as the true meaning of the words "man" or "woman" at large, otherwise law and lexicography would between them smother every social interaction and act of self-definition. Lexicography has no special rights in this domain, and cannot operate as a guide to law

[114] Ellen P. Aprill, "The Law of the Word: Dictionary Shopping in the Supreme Court", (1998) 30 *Arizona State Law Journal* 275, 334.
[115] DeCleene, "The Reality of Gender Ambiguity" (n 105 above), p 130.
[116] Susanne B. Goldberg, "Sticky Intuitions and the Future of Sexual Orientation Discrimination," (2010) 57 *UCLA Law Review* 1375, 1387.
[117] Clark Cunningham, Judith Levi, Georgia Green, and Jeffrey Kaplan, "Plain Meaning and Hard Cases", (1994) 103 *Yale Law Journal* 1561, 1563.
[118] *See* Cliff Goddard and Anna Wierzbicka, "Men, Women and Children: The Conceptual Semantics of Basic Social Categories". Available at http://www.colorado.edu/ling/courses (accessed 2 January 2011).
[119] *W v Registrar of Marriages* (n 2 above), para 106, citing *Corbett* (n 4 above), p 106.

about the proper use of social labels such as "man" and "woman". The dictionary operates within law at the behest of law, and it is misleading to distinguish in this context between questions of law and questions of fact. What is presented as a question of "law" becomes an indeterminate mix of bio-medical, historical, theological, socio-cultural and linguistic-lexicographic presumptions.

The dictionary and dictionary-style definition might well offer a useful (but not determinative) resource for certain purposes. For example, dictionaries might have a role in cases that concern the classification of commercial objects for tax purposes,[120] where the boundary drawing exercise is often arbitrary, but their use in cases where the classifications at stake are those of fundamental importance to individual identity and reflexive personhood, even under the guise of an aide to memory, raises serious ethical questions. "[I]nappropriate resort to the dictionary"[121] undermines the legitimacy of judicial argumentation, in that it completes the act of objectification and marginalisation which law has begun. In reaching for the dictionary courts are not applying the law, but rather rejecting self-identification as relevant to legal sex.[122]

Conclusion

If the question at stake in W's case is indeed the ordinary meanings of the terms "man" and "woman", then the division in the judgment between statutory interpretation and constitutional interpretation undercuts the constitutional claim in advance. The "law" in relation to transgender identity is interpreted by reference to definitional "fact" and everyday usage. Once the interpretative task has been defined in this way, the conclusion in W's case becomes inevitable, since clearly a court is not in a position to change facts that are held to exist "out there" in the domain of linguistic definition, nor can any court alter the presumed social consensus as to the true meanings of the terms "man" and "woman". In her dissenting judgment in *Littleton*, Alma L López J argued that there was neither fact nor law to be found in the judgment. The case had been determined without reference to any facts (since a summary judgment

[120] In *Rocknel Fastener, Inc. v United States*, 118 F. Supp. 2d 1238 (Ct. Int'l Trade 2000), 8–9.
[121] Lawrence Solan, "When Judges Use the Dictionary", (1993) 68 *American Speech* 50, 56.
[122] Julie A. Greenberg, "The Roads Less Traveled: The Problem with Binary Sex Categories", in Currah et al (eds.), *Transgender Rights* (n 99 above), 51–73, 66.

had been given) and in the absence of applicable law: "the majority has determined that there are no significant facts that need to be determined and concluded that Christie is a male as a matter of law. Despite this conclusion, there is no law to serve as the basis of this conclusion".[123] At the heart of the problematics of transgender jurisprudence is a flawed and unethical theory of definition.

[123] *Littleton* (n 64 above), p 232.