

Definition in Law: Transgender Identities and Marriage

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Abstract—This paper looks at transgender identities and the law in the context of marriage. It particularly focuses on the role of language and definition in classifying transgendered individuals into a legal category. Two lines of cases in transgender jurisprudence are examined. The former cases decided the definition of ‘man’ and ‘woman’ on the basis of biological criteria while the latter cases held that biological factors should not be the sole criterion for defining a man or a woman. Three categories were found to classify transgender people, namely male, female and "monstrous". Since transgender people challenge the core gender distinction that the law stresses, they are often regarded as problematic and monstrous which caused them to be subjected to severe legal consequences. This paper discusses these issues by analyzing and comparing different cases in transgender jurisprudence as well as examining how these issues play out in contemporary Hong Kong.

Keywords—Transgender, Monstrousness, Categorization, Definition.

I. INTRODUCTION

THIS paper focuses on the role of language, classification and definition in determining the legal status of transgender people. It is suggested that three categories can be identified when examining transgender cases in the context of marriage. A transgender person may be classified as man, women or as a “legal monster”. “Monstrousness” is a concept that was brought up by Michel Foucault and elaborated by Sharpe in the context of transgender rights and the law [1]. Transgender people's “monstrousness” arises from lack of a category in law. Due to the binary gender distinction that the law maintains and stresses, transgender individuals are often classified as something in between man and woman, or even in effect as neither man nor woman. Transgender individuals pose a threat to the legal order since their identity challenges the core legal distinction between man and woman. It is also the unnatural and abnormal features that are held to constitute their transsexuality and therefore “monstrousness” from the courts' point of view. Due to the monstrousness that law attributes to them, transgender people have often unsuccessfully fought for the right to marry.

II. MOSTROUSNESS AND MONSTROSITY

The terms “monster”, “monstrosity” and “monstrousness” are often used interchangeably and without distinction [1]. Foucault notes that the monster represents “the transgression

of natural limits” and that “this is actually what is involved in monstrosity” [1]. In addition, the monster cannot be accommodated within the legal order since “monstrosity, is the kind of irregularity that calls law into question and disables it” [1]. In order to constitute the monster, both a breach of the law and breach/ confusion of nature are required. The notion of monstrousness is crucial and indeed problematic to law since it causes important legal questions to remain uncertain, undecidable and challenges the categorical structure of law which is supposed not to be challenged [1]. When viewing transgender individuals, it is found that they possess the essential elements that are required for constituting monstrousness. First of all, transgender people represent a breach of nature in some people's, and indeed judges' eyes. They represent an example of “nature gone awry” due to their desire for bodily transformation [1]. Secondly, they are a breach of law since they challenge legal certitude as well as taxonomy [1]. Hence, since transgender individuals embrace the double breach of nature and law, it is not surprising that they have often been classified as something alien to the legal dyad and indeed as monstrousness.

The monstrousness of transgender people is in fact defined by a lack of category in law. Their non-normative sexual and gender identities reveal the absence of an appropriate legal category. Law for many purposes only accepts people who are either women or men. Due to this reason, transgender people were often assigned to a special category that could only accommodate irregularities and impossibilities. Since transgender people normally do not have a place in law, they are unable to enjoy the rights that ordinary people enjoy and are viewed in effect as less human by the law. In addition, they are often regarded as responsible for their transsexuality.

III. UNITED KINGDOM CASE LAW: *CORBETT V. CORBETT* (1971)

A. Adopting the "Biological Sex" Approach to Determining who is Male, Female and Monstrous in Marriage Law

The following case *Corbett v. Corbett*¹ concern whether a male-to-female transgender person could marry a biological man in her reaffirmed sex. It has long been regarded as one of the most significant common law cases concerning the right of a transgender person to marry in his/her reaffirmed sex. There is also no statutory definition regarding the words “man” and “woman”, “male” and “female” under the marriage law which

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¹ *Corbett v Corbett* [1971] P 83 (HL)

led the judges to be responsible for interpreting those terms. The judge (Ormrod J) in Corbett stressed that "sex is determined at birth" and biological sex should be treated as the sole criterion in deciding what was meant by the word 'woman' in the context of marriage.² The court also concluded that the sex reassignment surgery that the transgender person underwent would never turn her into a legal woman by holding that "the respondent's operation ... cannot affect her true sex".³ The judge stated explicitly that:

[F]or 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

The judge described the male-to-female transgender respondent (April Ashley)'s vagina as an "artificial cavity" that made her physically incapable of consummating a marriage.⁵ This is because by using that "artificial cavity", her sexual intercourse would never be deemed as an "ordinary and complete intercourse".⁶ This also constitutes her monstrosity given that she was regarded as a breach of nature and therefore a breach of law. It is obvious that what constitutes a monstrosity from the court's view is April Ashley's surgically altered body [1]. Hence, her transformation caused her to be deemed as something that goes against nature which also challenged the binary gender distinction that the law maintains. The monstrous category that the court assigned to her caused her not to enjoy the right to marry in her reaffirmed sex heterosexually given that she would never be able to convince the court that her vagina was not unnatural and that she could perform the "essential role of a woman in marriage".⁷ This also suggests that she in fact had to take the responsibility for her own sexual transition.

IV. AUSTRALIAN CASE LAW: *DEPARTMENT OF SOCIAL SECURITY V SRA* (1993) AND *RE KEVIN* (2001)

The following cases *Secretary, Department of Social Security v SRA*⁸ (1993) and *Re Kevin*⁹ (2001) also concern issues regarding the definition of a person's sex. Unlike the court in Corbett, these two courts both held that a post-operative transsexual should be recognized in his/her reaffirmed sex. They both indicated that to a large extent, the "sex change surgery" or "sex reassignment surgery" had successfully changed a person's sex. These two courts also brought in linguistic factors which suggested that the ordinary meaning of the words "woman" and "man", "female" and

"male" should include a post-operative transsexual but not a pre-operative transsexual.

A. Adopting a More Extensive Approach that Concerned Transgender People's Self Perception and Roles in Society

The legal question in SRA is whether a pre-operative male-to-female transgender person was eligible for receiving a wife's pension as the wife of an invalid pensioner.¹⁰ *Re Kevin* concerns whether a post-operative female-to-male transgender person was a man at the date of marriage and whether his marriage with a biological woman could be declared valid.¹¹ Instead of stressing the importance of biological sex, the two courts concluded that other factors should be considered as well and that the approach in Corbett should not be adopted. The court in SRA suggested that it was not necessary for the law to view sex as unchangeable when considering male or female persons.¹² The growth of sophisticated surgical procedures and medical techniques in the field of sexual reassignment as well as the indications of changing social attitudes towards transsexuals together led the court to reject the legal status of transsexuals for which Corbett was the leading authority.¹³ The court in *Re Kevin* also suggested that:

[T]here is no formulaic solution to determining the sex of an individual for the purpose of the law of marriage ... it is wrong to say that a person's sex depends on any single factor, such as chromosomes or genital sex; or some limited range of factors.¹⁴

The two courts indicated that the whole issue regarding a person's sex in fact was not that simple since it was way more complicated than what was suggested by the Corbett court. A person's sex should not only be defined biologically since the courts had to take account of other criteria and factors when defining a male or female person.

In addition to rejecting Corbett court's biological sex approach, what has been found in the Australian cases, especially in *Re Kevin*, was the court's concern over the transgender person's humanity and feelings. The *Re Kevin* court stated that the law had to "give an answer to a practical human problem" but not to search for some mysterious entity, such as the person's "true sex".¹⁵ Since what the court was facing was "a practical human problem", it was also important for the court not to be indifferent to the feelings of the transgender person involved.¹⁶ Since the Australian courts had decided to view legal issues regarding transgender people from a different perspective, it is noted that the court in *Re Kevin* approached the issues regarding a person's sex in a more extensive way. First of all, the judge in *Re Kevin* paid attention to non-medical evidence of 39 witnesses regarding

⁹ *Re Kevin* [2001] 165 FLR 404

¹⁰ *Secretary, Department of Social Security v SRA* (1993) 43 FCR 299

¹¹ *Re Kevin* [2001] 165 FLR 404

¹² *Secretary, Department of Social Security v SRA* (1993) 43 FCR 299, para 304

¹³ *Ibid.* para 325

¹⁴ *Re Kevin* [2001] 165 FLR 404, para 328

¹⁵ *Ibid.* para 109

¹⁶ *Ibid.* para 98

² *Ibid.* p.100

³ *Ibid.* p. 104

⁴ *Ibid.* p. 106

⁵ *Ibid.* p. 107

⁶ *Ibid.* p. 107

⁷ *Ibid.* p. 106

⁸ *Secretary, Department of Social Security v SRA* (1993) 43 FCR 299

how they perceived and supported Kevin, a post-operative female-to-male transgender person, as a male.¹⁷ Even though the judge said that the evidence was not decisive, it did "show [Kevin] as a person: not an object of anatomical curiosity but a human being living a life, as we do, among others, as a part of society".¹⁸ It is important to note that the court stressed the notion of treating transgender people as human beings but not as objects that could simply be defined and categorized according to the abstract and mysterious chromosomes and other biological factors. Moreover, it was crucial to the court that the transgender person did have a position and a role in the society which could be widely recognized and accepted by his family, his colleagues and the community.

When determining a person's sex for the purpose of the law of marriage, the court held that extensive evidence relating to his self perception, appearance, medical history, and functioning in society should be considered by the court.¹⁹ It was obvious to the court that Kevin "had always perceived himself to be a male" and "at the time of the marriage, in appearance, characteristics and behaviour he was perceived as a man, and accepted as a man, by his family, friends and work colleagues".²⁰ Concerning Kevin's medical history, the court's view was that since he had undergone the sex reassignment surgery, "it would be contrary to the most informed and authoritative medical practice" if the law had to insist on treating him as a woman.²¹ Through acknowledging the sex reassignment surgery, the court also believed that transgender individuals could be assisted in integrating into society.²² It was also clear to the court that Kevin had been functioning in society as a male, a husband and a son-in-law on the basis that they had known his full transsexual background.²³ Furthermore, Australian authorities held that the ordinary meaning of the word "man" did include a post-operative transsexual such as Kevin.²⁴ By analyzing how the court in *Re Kevin* grappled with how to define a person's sex, it is found that this court had taken different factors into consideration, including the ordinary meaning of the word "man" and "woman", the transgender person Kevin's self perception and how the society perceived him. This provides the courts who are concerned with transgender legal issues with another angle of investigating the notions of a person's sex, an angle which perceives transgender people as true human beings.

B. Sex Reassignment Surgery Determines whether a Transgender Person could Find a Legal Position that He/She Desires

The two courts explicitly stated that a post-operative transgender person could be categorized in his/her reaffirmed sex while a pre-operative transgender person had to be

categorized in his/her biological sex. The fact that the two courts placed emphasis on the sex reassignment surgery caused the pre-operative transgender person in *SRA* not to be categorized as a legal woman while the post-operative transgender person in *Re Kevin* to be categorized as in his reaffirmed sex. The sex reassignment surgery was crucial to the court since it could harmonize transgender person's psychological sex with his/her biological sex and naturalize the transsexuality. It was suggested that the Australian courts have intended to overcome the notion that the transgender people represents a breach of nature through emphasizing the sex reassignment surgery [1]. Through undergoing the sex reassignment surgery, the degree of monstrousness that lay behind a transgender person could therefore be lessened.

Although a process of demonsterization is attributed to the post-operative transsexual body, the monster concept remains relevant for our understanding of transsexuals [1]. It was suggested that the Australian courts "have recognized 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" [2]. This shows that the notion of monstrousness in transgender people has never completely disappeared since the monstrousness is lurking in transgender individuals who chose not to harmonize his/her psychological sex with biological sex. If a transgender person chose not to carry out the surgery, he/she would then challenge the binary gender category that the law stresses. The court in *SRA* stated that:

[W]hilst a preoperative male-to-female transsexual cannot come within the category of eligibility for a wife's pension under the Act, the respondent in this case would have come within that category had she successful undergone the surgery that has been recommended for her.²⁵

It was evident that only through undergoing the sex reassignment surgery, the transgender woman could be legally recognized as a woman and be eligible for a wife's pension. Since the transgender person in *SRA* did not carry out the surgery as required by the court, she therefore had to bear the legal consequences for her decision.

V. HONG KONG CASE LAW: *W V REGISTRAR OF MARRIAGES* (2010) & (2011)

A. Adopting Corbett Court's Biological Sex Approach to Determining a Person's Sex

Following *Corbett*, *W v Registrar of Marriages* is the Hong Kong Court of First Instance judgment that concerns the transgender people's right to marry.²⁶ It raised the basic question regarding whose definition in fact can or should determine a person's sex.²⁷ The judge adopted *Corbett* court's

¹⁷ *Ibid.* para 47-69

¹⁸ *Ibid.* para 68

¹⁹ *Ibid.* para 309

²⁰ *Ibid.* para 330

²¹ *Ibid.* para 313

²² *Ibid.* para 320

²³ *Ibid.* para 60

²⁴ *Ibid.* para 311

²⁵ *Ibid.* para 305

²⁶ *W v Registrar of Marriages* [2010] 6 HKC 359 & *W v Registrar of Marriages* [2011] CACV266/2010

²⁷ *Ibid.* para 15

"biological sex" approach and claimed that the terms "man" and "woman", "male" and "female" in fact "do not cover a post-operative transsexual man and woman respectively".²⁸ The judge in Corbett did not pay attention to the role of language. However the judge in W, following closely the reasoning of the House of Lords in *Bellinger* (2002)²⁹, did make reference to dictionary definitions and was concerned with the ordinary meaning of the word "woman". In contrast to the Australian case law, however, this was in order to support the argument that a person's sex is and continues to be determined according to their biological sex at birth for the purposes of the provision.³⁰ The judge clearly differentiated transgender men/women from biological men/women in the context of Hong Kong:

[T]he Court's own understanding is that post-operative transsexual people in Hong Kong are still, in ordinary, everyday usage and understanding, referred to as such. In other words, in Hong Kong, a post-operative transsexual individual is still generally referred to as such either in the English language or in the Chinese language (ie "變性人", "變性男人" or "變性女人"), rather than simply as a "man" ("男人") or a "woman" ("女人") in accordance with the post-operative gender acquired.³¹

The judge held that the meaning of words "man" and "woman" did not change to include a post-operative transgender person. His reasoning also shows that it was the term "變性" (transgender) that labeled them as something different, something that could not be accommodated by the law. In addition, concerning the "sex change operation" ("變性手術"), the judge said that the term "sex change" ("變性") "does not, or does not yet, represent a general understanding or acceptance that the person's 'sex' ... has really been 'changed'".³² This indicated that transgender people would not be legally classified as their reaffirmed sex even though they have undergone the sex change operation. The court held that Ms W, a male-to-female transgender person, was still a male biologically. However, this evokes the notion of monstrousness, given that the court assigned Ms W to a category into which she could never fit and which she had put every effort into evading.

B. Assigning Ms W to a Monstrous Category

One of the arguments that the applicant raised was that the relevant provision in the Marriage Ordinance were inconsistent with Article 37 of the Basic Law and Article

19(2) of the Hong Kong Bill of Rights which guarantee Hong Kong residents the freedom of marriage.³³ By concluding that the Marriage Ordinance did not infringe the right to marry, the judge also suggested that "the form of transsexual marriage fought for by the applicant in the present case is a form of same sex marriage".³⁴ The judge also indicated that Ms W, a male-to-female transgender person, should be able to marry a biological female since this would only be regarded as a form of same sex marriage by "an uninformed observer" but a form of heterosexual marriage by "an informed observer". This shows that the judge emphasized biological sex and implied that W could actually fulfill the criteria of being a man in the context of marriage as required by the law. However, since the judge adopted Corbett's approach in defining sex/gender, it is noted that one of the crucial factors that Ormrod J suggested in defining sex was to "perform the essential role of a woman (or a man) in marriage".³⁵ This essential role, from Ormrod J's perspective, should be to consummate heterosexually, that is, "naturally". However, if a marriage between a male-to-female transgender person and a biological male should be declared void due to the fact that the transgender person could not "perform the essential role of a woman", then how could a marriage between a male-to-female transgender person and a biological female be deemed as valid given that the transgender person still could not "perform the essential role of a man" because of the sex reassignment surgery that had removed her natural sexual organ? This suggests that the applicant could not marry anyone on the basis of what the judges have suggested in Corbett and W and that Ms W was assigned to a monstrous category since she could never "perform the essential role" in either sex. This also suggested that it was the sex reassignment surgery itself that turned transgender people into non-persons that are incapable of consummating a marriage and getting married in either sex.

VI. CONCLUSION

The above cases concerned whether a transgender person could be categorized in his/her reaffirmed sex. Three categories were found to classify transgender people, namely male, female and monstrous. In Corbett and W, it was the sex reassignment surgery that turned them into monstrous since post-operative transgender people could never perform the essential role in either sex and marry in his/her reaffirmed sex. In SRA and Re Kevin, it was also the sex reassignment

³³ *Ibid.* para 163, 168-169. Article 37 of the Basic Law reads: "The freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law" while Article 19(2) of the Hong Kong Bill of Rights which is based on article 23 of the ICCPR reads: "Rights in respect of marriage and family" (1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. (2) The right of men and women of marriageable age to marry and to found a family shall be recognized. (3) No marriage shall be entered into without the free and full consent of the intending spouses. (4) Spouses shall have equal rights and responsibilities as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."

³⁴ *Ibid.* para 251

³⁵ *Corbett v Corbett* [1971] P 83 (HL), p. 106

²⁸ *Ibid.* para 162

²⁹ *Bellinger v Bellinger* [2002] Fam. 150

³⁰ *Ibid.* para 138, 141 & 162

³¹ *Ibid.* para 140

³² *Ibid.*

surgery that determined whether the transgender person could be assigned to a legal position that he/she desired. The above cases together demonstrate how law in fact retains ultimate control over classification and how judges are able to choose the kinds of information deemed relevant and select the sources of authority that they wish to appeal to. Sharpe's critique of the more progressive Australian judgments offers a challenge to us to define a legal order in which monstrosity plays no part.

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