ACCIDENT OF BIRTH OR MATTER OF CHOICE: LEGAL RECOGNITION OF TRANSSEXUAL PEOPLE IN THE COMMON LAW

KEVIN K.S. TSO *

ABSTRACT

The purpose of the Article is to look at the recognition—or lack thereof—of transsexual people at common law in relation to the “proper” sex and gender with which they associate themselves. This Article will begin by addressing and defining transsexualism and how the medical community’s position on this topic has evolved over the years. It will then look at the historical foundations of transsexualism in the common law, especially at the Corbett decision that held sway in England and Wales for over thirty-five years and was followed internationally. The Article will then provide an overview of the current positions in different common law jurisdictions in light of modern developments, dividing them between the West—UK, Ireland, Australia, and New Zealand—and East—Malaysia, Singapore, and Hong Kong. This Part will also include an outline of the legislative measures undertaken by certain jurisdictions post-recognition to provide legal status to transsexuals in their “proper” sex and gender. A critique of the Corbett decision will then be undertaken to determine whether it should be followed in light of its inherent logical fallacies, the modern developments already discussed, and on human rights grounds.

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* LLM Candidate (Harvard), LLM (Cantab), PCLL (HKU), LLB (HKU). The author would like to thank Dr. Jens Scherpe, Professor Richard Cullen, Ms. Karen Grau and Ms. Catherine Tso for their advice, insight and support. I would also like to thank my family for their unconditional support.
INTRODUCTION

Of law’s many interactions with the individual, maybe none is more private and personal than the determination of sex and gender. In the English Court of Appeal’s decision of Bellinger v. Bellinger, Lord Justice Thorpe opined that: “[The family justice] system must always be sufficiently flexible to accommodate social change. It must also be humane and swift to recognize the right to human dignity and to freedom of choice in the individual’s private life.”\(^1\) However, achieving this flexibility would undoubtedly lead to tensions between the accepted practice and

\(^1\) Bellinger v. Bellinger, [2001] EWCA (Civ) 1140, [160] (Eng.).
progressive thinking, clashes between the old and the new, between the law being static or ambulatory. This tension is most obviously seen in cases concerning the legal recognition of transsexual people.

To the static viewer, this matter may appear settled over forty years ago at common law by Mr. Justice Ormrod in *Corbett v. Corbett.*\(^2\) *Corbett* has been described as a “landmark” decision, for not only was it the first case in England and Wales to determine a person’s sex for marriage that shaped the legal status of transsexual people in that jurisdiction for over thirty-five years but—more importantly—it established a stranglehold as the de facto precedent in overseas common law decisions.\(^3\) Yet, despite *Corbett*’s enormous sway, an increasing number of jurisdictions are starting to depart from it. Some, like Singapore, did it through legislative measures, while others, like the United Kingdom (“UK”), Ireland, and Hong Kong (“HK”) have used human rights instruments in achieving this goal. Most notable are Australia and New Zealand (“NZ”) who have chosen to depart from *Corbett* by rejecting its common law legal reasoning completely. This Article seeks to look at how and why these divergences from *Corbett* came to be, what the legal rationales for doing so are, and analyze whether *Corbett* should continue to hold such a grasp today in light of both legal and medical developments forty years after it was decided.

While the legal recognition of transsexuals encompasses many areas of law—from criminal to administrative\(^4\)—the focus of this Article will be the law of marriage because this is the area where the law appears most controversial and hesitant to depart from *Corbett*.

Part I will define transsexualism and how the medical community’s position on it has evolved over the years. Part II will begin by looking at the historical foundations of transsexualism in the common law with a focus on the *Corbett* decision. Then, it will outline the current positions in different common law jurisdictions in light of modern developments dividing them between the West—UK, Ireland, Australia, and NZ—and the East—Singapore, Malaysia, and HK. These jurisdictions were chosen because of their historical ties to the English family justice system.\(^5\) Parts III and IV will critique the *Corbett* decision to

\(^2\) *Corbett* v. *Corbett* (otherwise Ashley), [1970] P. 83 (Eng.).
\(^4\) E.g., sex on national identity cards, birth certificates, and passports.
determine whether it is obsolete in light of its inherent logical fallacies, modern developments, and on human rights grounds.

This Article is particularly relevant to common law jurisdictions that still follow Corbett’s holding on legal sex and gender for purposes of marriage. In Littleton v. Prange, the Texas Court of Appeals noted that Corbett “is routinely cited in later cases, including those cases from the United States.” It is also relevant in jurisdictions with revised marriage laws, where the legacy of Corbett might, nevertheless, linger on in other aspects of the law.

I. TRANSEXUALISM

A. Definitions

Before going into the body of the Article, it would be helpful to clarify the terminology regarding transpeople. While the difference in—legal—definition between transsexuals and intersexuals is stated above, the line between transsexualism and transgenderism is not so clear. The terms “transsex” and “transgender” have sometimes been used interchangeably but should not be considered synonymous as some transsexuals object to being classified as being transgendered. The sex and gender concept that biological sex was intrinsically related but not identical to gender expression was developed during the 1960’s to 1970’s and influenced by the work of Professor John Money.

While the author understands that a fixed consensus has yet to be established on the terminology, for the purposes of this Article, I will define transpeople as people legally of one sex but wishing to be another, transsexualism as describing those who have a strong desire to align their sex and gender through medical intervention and would have taken some step in achieving this alignment, and transgenderism as describing those who have no desire to undergo medical

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7 Littleton, 9 S.W.3d at 226 (the majority in Littleton also decided to adopt Corbett’s biological criteria as the test for sex/gender at common law).


11 John Mahoney is a professor of paediatrics and medical psychology at John Hopkins University. He is also a prominent sexologist and psychologist on transsexual and intersexual conditions.
intervention. I shall adopt the legal definition of intersexuals above for people who are physiologically ambiguous with both male and female characteristics.

B. Medical Classifications

While transsexuality has had a long history, surgical treatment was not developed until the 1930’s. The medical term “transsexual” was derived in 1949, while the sex and gender concept developed only in the 1960-70’s. During these early periods of medical development—when Corbett was decided—transsexuality was generally assumed a mental disorder. For example, in its Diagnostic and Statistic Manual of Mental Disorders (“DSM”), the American Psychiatric Association included “transexual” as a classification in the revised third edition (“DSM IIIR”) in 1980. Therefore, despite the predominant form of relief being surgical operation—i.e. “gender/sexual reassignment surgery”—medical doctors and surgeons generally viewed transsexualism not as a biological issue, but rather as one requiring psychiatric intervention.

In the fourth edition of the DSM (“DSM IV”) published in 1994, “transsexual” was replaced with the term “Gender Identity Disorder” but still included the term in the category of sexual disorders. Transsexualism is also classified as a Gender Identity Disorder by the World Health Organization, which defines it as:

A desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort with, or inappropriateness of, one’s anatomic sex, and a wish to have hormonal treatment and surgery to make one’s body as congruent as possible with one’s preferred sex.

In the fifth and latest edition of the DSM, (“DSM V”), the term is replaced with “Gender Dysphoria” and was placed in its own individual chapter, in order to remove the stigma of association with a “disorder.” While the above changes indicate a more positive attitude towards transsexual people, the continued classification of their condition as a mental health problem indicates a persistent belief that it is a psychiatric rather than biological issue.

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14 WHITTLE, supra note 12, at 19-21.
15 Id. at 19.
16 Id. at 20.
19 WHITTLE, supra note 12, at 20.
However, recent research suggests this traditional view might no longer be accurate and that biology may play a key factor in the aetiology of transsexuality. As Dr. Rogers reports in the “The Lancet” Medical Journal, Professor Louis Gooren, endocrinologist at the Free University Hospital of Amsterdam and described as the world’s only professor of transsexualism, pointed out that there was research of subjects—albeit of a very limited number of three male-to-female transsexuals post-mortem—whose brains had “morphological differences in comparison with non-transsexual controls.” Furthermore, Professor Gooren noted additional research that showed “testing of brain function of transsexuals provided evidence of a cross-sex difference in their brains.”

More recent studies have shown that transpeoples’ brains more closely resemble the brains of those in their identified sex rather than their birth-assigned sex; and that transpeoples’ handedness, digit ratios and fingerprint patterns—markers for prenatal exposure to sex hormones—and performance in sex-differentiated cognitive tests more closely resemble people in their identified sex. This suggests that the biological “sex” of an individual may be determined by the brain—which cannot be ascertained at birth—but is expressed later in life. This argument would lend support to transsexualism as a kind of intersex condition—i.e. at birth the individual’s brain and genitals are not congruent, equivalent to a person whose gonads and genitals are not congruent. This view of transsexualism as an example of intersexuality has received support from the UK Home Office’s Report of the Interdepartmental Working Group on Transsexual People.

While there is no agreed upon cause or treatment for transsexuality, the primary relief is surgical operation, which is commonly referred to as a “sex-change” operation. The question then becomes whether an individual can, through operational intervention, medically change their “sex?” Dr. Richard Green responds by indicating, “[t]hat depends on one’s definition of sex,” and that medically there are a number of defining criteria: psychology, chromosome, hormonal, anatomic structure of internal reproduction organs and appearance of the external genitalia. When asked if he would consider a post-operative male-to-female anatomically female, he responded that while that individual’s chromosomes remained male, the external appearance of the genitals would be female, the psychology would be female and, if replacement hormones were used,

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24 WHITTLE, supra note 12, at 19.
then the hormones would also be female.\textsuperscript{25} This is seen as expressing a medical view that sex can be changed by surgery anatomically and hormonally. Further, Dr. Green has expressed that a review of medical world literature shows that at present, transsexuality is “untreatable by any form of psychotherapy” and that “the great majority of transsexuals studied have not appeared psychotic by the standard diagnostic criteria.”\textsuperscript{26} Quoting a surgeon, Dr. Green states that “[i]f the mind cannot be made to fit the body, then the body must be changed to fit the mind.”\textsuperscript{27} This medical perspective clearly reflects a dramatic departure from the early period when the accepted thinking was that the cure lay with psychiatric intervention. The new medical norm appears to be acceptance of the need for surgical operation so that the “body fits the mind” rather than vice versa.

II. LEGAL POSITIONS ON TRANSSEXUALISM

A. Historical Foundations

1. Pre-Corbett

(a) The Common Law Definition of Marriage

The starting point in defining marriage at common law begins with Lord Penzance’s judgment in \textit{Hyde v. Hyde and Woodmansee} where his Lordship stated: “I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.”\textsuperscript{28} While this statement has been widely cited and was accepted in \textit{Corbett} as the “classic” definition of marriage,\textsuperscript{29} the problem is Lord Penzance never substantively delves into what marriage entails and more specifically, what is meant by “man” and “woman” for marriage purposes.\textsuperscript{30}

In fact, Lord Chancellor Viscount Jowitt expressed in \textit{Baxter v. Baxter}, that “procreation of children” is not necessary for the “institution of marriage,” should not be understood as the “principal end” of marriage, and that a husband’s sterility or a wife’s barrenness should be irrelevant for marriage purposes.\textsuperscript{31}

\textsuperscript{25} \textit{RICHARD GREEN, SEXUAL SCIENCE AND THE LAW} 106 (1992).
\textsuperscript{27} \textit{Id.}
\textsuperscript{28} \textit{Hyde v. Hyde and Woodmansee} [1865-69] L.R. 1 P&D. 130, [133] (Eng.)
In *SY v. SY (orse. W.)*, the English Court of Appeal accepted that a wife who suffered from vagina astresia and required surgery to enlarge her vagina to allow for normal intercourse could still consummate her marriage. Lord Justice Willmer commented that even if the wife had no natural vagina, the construction of an artificial vagina would be sufficient to allow for *vera copula* for consummation. Interestingly, the counsel for the wife in *SY*— James Comyn Q.C.—was to be the leading counsel for April Ashley and would later rely on this authority for his arguments in *Corbett*.

(b) Legal Recognition of Transsexual People

While *Corbett* was the case of first impression in the English common law regarding transsexuals, there were nonetheless earlier authorities that dealt with the issue. In the 1957 Scottish case of *Re X*, the Scottish Tayside Sheriff Court declined the application of a male-to-female transsexual based on “skin and blood tests” which showed the petitioner had “not yet reached the deepest level of sex determination.” However, the judgment was brief and lacking in judicial reasoning.

In contrast, decided with greater authority and detail, was Lord Hunter’s 1967 opinion in the Scottish Court of Session Outer House in *In Petition of John Alexander Cumnock Forbes-Sempill and the Honourable Ewan Forbes-Sempill (“Forbes-Sempill”).* It concerned the inheritance of a baronetcy that descended to male heirs by Ewan Forbes-Sempill that was challenged by his cousin on the basis that Ewan was not male. Ewan was registered at birth as Elizabeth Forbes-Sempill, but felt he did not fit the female sex. Nevertheless he waited until he was forty years old before amending the sex on his birth register to male, legally changing his name to Ewan, and advertising his name-change in a newspaper.

Lord Hunter held that while Ewan Forbes-Sempill’s chromosome type was XX female, this was the “least valuable of the available criteria” in sexual identification and found other evidence might show male sex predominance, such as gonadal sex ambiguity due to presence of testicular issue. Furthermore, Lord Hunter found that Ewan was overwhelmingly psychologically male and held that while a person’s psychological sex may not justify a person being legally of that sex if the physical

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33 Gilmore, supra note 3, at 51.
35 Gilmore, supra note 3, at 51.
38 Gilmore, supra note 3, at 60.
40 Gilmore, supra note 3, at 60-61.
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characteristics are clearly another, “the fact that the psychological sex is male is in my opinion an admixture of evidence of some importance.”41 This case was argued in chambers, with court officials and solicitor’s firms maintaining the strictest secrecy and was never reported. While Forbes-Sempill concerned someone with an inter-sex condition, it has been speculated whether the determination of Ewan Forbes-Sempill as male, Lord Hunter’s downplaying of chromosome sex, and his acknowledgement of psychological sex as a factor might have affected the ultimate outcome and the legal reasoning of Mr. Justice Ormrod in Corbett had he been aware of it.42

2. The Corbett Decision

(a) Background

The respondent was born George Jamieson but underwent gender reassignment surgery in 1960 and changed her name to April Ashley.43 Later in 1960, Ashley met Arthur Corbett, son of second Baron Rowallan. Corbett, already married with four children, had a longstanding interest in transvestism. Corbett and his wife divorced and in 1963, he married Ashley but the relationship quickly broke down after living together for less than fourteen days. Corbett began litigation proceedings in 1965 to have his second marriage declared null and void—and no relief be ordered—by alleging that the respondent was not a woman at time of marriage. This was in response to an earlier property claim for maintenance made against him by Ashley. Ashley responded by arguing that she suffered from the intersex condition Klinefelter’s syndrome and that in any case, a decree of nullity should be made instead of a declaration.44 The bizarre circumstances of Corbett were described by Mr. Justice Ormrod as an “essentially pathetic, but almost incredible, story.”45

Mr. Justice Ormrod’s unique background as both a medical physician and Fellow of the Royal College of Physicians as well as a judge meant he was dually qualified to hear the complex medical evidence.46 Further, he was assisted by nine distinguished medical expert witnesses who gave evidence on determining Ashley’s sex.47 These factors gave Corbett a strong medical, as well as legal, authority.48

41 Gilmore, supra note 3, at 62-63.
42 Gilmore, supra note 3, at 61-63, 72.
43 Gilmore, supra note 3, at 49.
44 Gilmore, supra note 3, at 50-51, 59. The difference between a decree of nullity and a declaration is that financial relief can be ordered ancillary to a decree but not a declaration. Id. at 50-51, 59.
45 Corbett v. Corbett (otherwise Ashley), [1970] P. 83, [92] (Eng.).
46 Gilmore, supra note 3, at 53.
47 SHARPE, supra note 37, at 40.
48 Gilmore, supra note 3, at 53.
Despite the differing opinions of the medical experts, Mr. Justice Ormrod was able to conclude that on an intellectual and scientific level there was “a very large measure of agreement between them on the present state of scientific knowledge on all relevant topics.”\textsuperscript{49} In particular, Mr. Justice Ormrod pointed out that:

All the medical witnesses accept that there are, at least, four criteria for assessing the sexual condition of an individual. These are:

i) Chromosomal factors;
ii) Gonadal factors (i.e. presence or absence of testes or ovaries);
iii) Genital factors (including internal sex organs); \footnote{\textsuperscript{49}Corbett, [1970] P. at [89].} and
iv) Psychological factors.

Some of the witnesses would add:

v) Hormonal factors or secondary sexual characteristics (such as distribution of hair, breast development, physique etc which are thought to reflect the balance between the male and female sex hormones in the body).\textsuperscript{50}

Mr. Justice Ormrod then devised the famous test in \textit{Corbett} by holding that:

The question then becomes, what is meant by the word “woman” in the context of a marriage. . . . Having regard to the essentially heterosexual character of the relationship which is called marriage, \textit{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. \textit{In other words, the law should adopt in the first place, the first three of the doctors’ criteria, i.e., the chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention.}\textsuperscript{51}

Mr. Justice Ormrod was quick to dismiss transsexualism as having a biological or organic basis, noting that experimental work that suggested sexual behavior of animals was influenced by certain sex hormones on the hypothalamus was “[at present] purely hypothetical and speculative” and had “nothing to contribute to . . . the present case.”\textsuperscript{52}

\textsuperscript{49}Corbett, [1970] P. at [89].
\textsuperscript{50}Id. at 100.
\textsuperscript{51}Id. at 106 (emphasis added).
\textsuperscript{52}Id. at 99-100.
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His Lordship also noted that “real difficulties . . . will occur if these three criteria are not congruent” but that this did not arise in the present case.\textsuperscript{53}

Applying the test to the facts in\textit{Corbett}, Mr. Justice Ormrod concluded that the true sex of Ashley was male, and the marriage was void \textit{ab initio}. However, in an ironic twist, Mr. Justice Ormrod held on the subsidiary issue that a decree of nullity—rather than a declaration—should be granted. In doing so, he defeated the substantive aim of Arthur Corbett’s petition.\textsuperscript{54}

(c) Impact of Corbett in the Law

The impact of\textit{Corbett} was felt both domestically and internationally. In England and Wales, it remained the law for over thirty-five years while internationally it formed the starting reference for other jurisdictions being common law’s case of first impression. Gilmore remarked that\textit{Corbett} was “clearly a landmark” for although it was a first instance decision and was never binding on any court, it came to be the “strong de facto precedent” domestically and overseas on transsexualism.\textsuperscript{55}

\textit{Corbett} held that for purposes of marriage, a person’s “sex” must be determined at birth with congruent biological references being (i) chromosomal factors, (ii) gonadal factors, and (iii) genital factors. All other factors, including psychology and operative intervention, were irrelevant if the three references were congruent.\textsuperscript{56}

\textit{Corbett} also determined, in the alternative, that sexual intercourse by post-operational male-to-female transsexuals would not amount to \textit{vera copula} or consummation for legal purposes. Mr. Justice Ormrod distinguished \textit{Sy} on the basis that it was in relation to incapacity, not the “true sex” of the respondent and held: “In any event . . . the respondent was physically incapable of consummating a marriage because I do not think that sexual intercourse, using the completely artificial cavity constructed . . . can possibly be described . . . as “ordinary and complete intercourse” or as “\textit{vera copula}-of the natural”.”\textsuperscript{57} As seen below, this less discussed alternative holding has led to problems when dealing with the law on transsexualism.\textsuperscript{58}

Mr. Justice Ormrod clearly stated in\textit{Corbett} that the holding should be confined only to the context of marriage, that he was “not concerned to determine the “legal sex” of the respondent at large,”\textsuperscript{59} and expressing extra-judicially that

\begin{itemize}
  \item \textsuperscript{53} \textit{Id}. at 106.
  \item \textsuperscript{54} Gilmore, \textit{supra} note 3, at 59.
  \item \textsuperscript{55} Gilmore, \textit{supra} note 3, at 71.
  \item \textsuperscript{56} \textit{Corbett v. Corbett} (otherwise Ashley), [1970] P. 83, [100], [106] (Eng.).
  \item \textsuperscript{57} \textit{Id}. at 105, 107.
  \item \textsuperscript{58} Ong, \textit{supra} note 8, at 170.
  \item \textsuperscript{59} \textit{Corbett}, [1970] P. at [106].
\end{itemize}
“the law can accommodate the transsexual in almost all of its other aspects.”

Nonetheless, the determination of sex at birth aspect has been adopted in cases involving birth certificates, sex discrimination, unfair dismissal, equal pay, and—in *R v. Tan*—even the criminal law. In light of its acceptance by the House of Lords in *Bellinger*, *Corbett* would also come to overshadow *Baxter* and become the common law authority on the incapacity of post-operative male-to-female transsexuals. Mr. Justice Ormrod’s description of “the essential role of a woman in marriage” would also set the tone for later cases, with some construing that to mean “procreation” even though the word was never used in *Corbett*.

### B. Modern Developments

This section will look at the different common law jurisdictions position on recognizing transsexual persons in light of the *Corbett* decision. While this part can only modestly summarize the various legal positions, it will try to provide as comprehensive an overview of the Western jurisdictions and Asian jurisdictions as possible.

#### 1. Western Jurisdictions

(a) The UK

As noted above, *Corbett*’s common law position has remained unchanged in the UK for over thirty-five years. In *S-T (formerly J) v. J* concerning the marriage of a female-to-male transsexual man (“J”) who had undergone bilateral mastectomy, received hormone injections and had been married to a woman (“S-T”) for seventeen years, Lord Justice Ward in the English Court of Appeal expressed that he was “unable lightly to dismiss” developments in overseas jurisdictions departing from *Corbett* and that “[t]aken with the new insight into the aetiology of transsexualism, it may be that *Corbett* v. *Corbett* would bear re-examination at some appropriate time.” However, Lord Justice Ward thought the
time had not yet come and it was “neither necessary nor appropriate in [the present case] to rule or even to speculate” overturning Corbett.68

In 2003, the validity of Corbett was reaffirmed unanimously by the House of Lords in Bellinger.69 Bellinger concerned an application by Elizabeth Ann Bellinger (“Mrs. Bellinger), a post-operative male-to-female transsexual person, for a declaration that her 1981 marriage to her husband—who prior to marriage, had been aware and supportive of her background—was valid and remained subsisting. In Bellinger, Lord Nicholls held Corbett reflected the “present state of English law regarding the sex of transsexual people” and repeated Mr. Justice Ormrod’s test that “the law should adopt the chromosomal, gonadal and genital tests. If all three are congruent, that should determine a person’s sex for the purpose of marriage. . . . The biological sexual constitution of an individual is fixed at birth, at the latest.”70 Despite acknowledging the criticisms made against Corbett, Lord Nicholls held that recognition of Mrs. Bellinger as female would require giving the expressions of “male” and “female” in section 11(c) of the Matrimonial Causes Act 1973 “a novel, extended meaning” which would be a “major change in the law, having far reaching ramifications.”71 His Lordship believed this issue was “ill-suited for determination by courts” and instead “preeminently a matter for Parliament”—Parliament at the time having indicated it was going to introduce primary legislation on this issue.72

Lord Hope, agreeing with Lord Nicholls, further remarked that:

[M]edical science . . . . cannot turn a man into a woman or turn a woman into a man. . . . The surgery, however extensive and elaborate, cannot supply all the equipment that would be needed for . . . having children.

. . . .

There is [also] much to be said for the view that the words “male” and “female” should each be given a single, clear meaning that can be applied uniformly in all cases. That was achieved by the decision in Corbett. . . .73

The entrenchment of Corbett in the common law meant post-operative transsexuals had to rely on another route in order to obtain legal recognition and they attempted to do so through the European Convention on Human Rights (“ECHR”). The 1986 case of Rees v. United Kingdom was brought by a post-operative female-to-male transsexual who had been refused alteration of his birth

68 Id. at 465.
69 Bellinger v. Bellinger [2003] UKHL 21 (Eng.).
70 Id.
71 Id. at 36-37.
72 Id. at 37.
73 Id. at 57-58.
certificate and challenged that such a refusal was a violation of ECHR Article 8 and Article 12. These ECHR articles provide:

[Article 8 – Right to respect for private and family life]
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

. . . .

[Article 12 – Right to marry]
Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

In Rees, the European Court of Human of Human Rights ("ECtHR") by majority concluded that there was no breach of ECHR Article 8 for refusing to amend the birth certificate because:

The introduction of such a system [. . . would have important administrative consequences . . . . The governing authorities in the United Kingdom are fully entitled, in the exercise of their margin of appreciation, to take account of the requirements of the situation pertaining there in determining what measures to adopt.]

As for ECHR Article 12, the court unanimously found that: “the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex.” The ECtHR’s decision in Rees was also influenced by a “[lack of] common ground between the Contracting States” leading it to conclude that the law was in a “transitional stage” which afforded member states a wide margin of appreciation.

Four years later in Cossey v. United Kingdom, a case involving a post-operative male-to-female transsexual, the majority in the ECtHR, while pointing out that it could depart from an earlier judgment if there were “cogent reasons” for doing so, nevertheless decided to hold that ECHR Articles 8 and 12 had not been breached. The majority in Cossey found the points made by the majority in Rees on ECHR Article 8 were still “equally cogent.” As for ECHR Article 12, the court held that “Although some Contracting States would now regard as valid a

75 Id. at 66.
76 Id. at 68.
77 Id. at 64.
79 Id. at 639-42.
marriage between a person in Miss Cossey’s situation and a man, the developments . . . cannot be said to evidence any general abandonment of the traditional concept of marriage . . . . [This] provides sufficient reason for the continued adoption of [the] biological criteria . . . .

The majority further found that no separate issue arose under ECHR Article 14 as it arose in conjunction with ECHR Article 8. However, there was a strong dissent in Cossey by Judge Martens who warned that: “States do not enjoy a margin of appreciation as a matter of right, but as a matter of judicial self-restraint” and that “the Convention remains a living instrument to be interpreted so as to reflect societal changes and to remain in line with present day conditions.” Judge Martens found that if a post-operative transsexual had undergone “long, dangerous and painful medical treatment to have his sexual organs, as far as is humanly feasible, adapted to the sex he is convinced he belongs to” and asks the law to “recognize the fait accompli,” to be “treated by the law as a member of the sex he has won” then “such a refusal can only be qualified as cruel.”

In Sheffield and Horsham v. United Kingdom, a challenge brought by two post-operative male-to-female transsexuals, the ECtHR once again reiterated there was not yet indication of a “common approach” and hence was “not persuaded” that it should depart from Rees and Cossey. However, the ECtHR echoed the majority in Rees and Cossey, “the importance of keeping the need for appropriate legal measures in this area under review having regard in particular to scientific and societal developments,” and observed that the UK has “not taken any steps to do so.”

Finally, in the 2002 case Goodwin v. United Kingdom, a complaint brought by a post-operative male-to-female transsexual, the ECtHR unanimously ruled that the UK position was incompatible with the ECHR. In relation to ECHR Article 8 “Right to respect for private and family life,” the ECtHR held that: “[i]n the twenty first century . . . the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable,” that “the conclusion [is] that the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant,” and as such “the [UK]
Government can no longer claim that the matter falls within their margin of appreciation.”

While the Court noted there might be administrative “inconvenience” in implementing this new system—alluded to in Rees—it held that society should tolerate it in order to “enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.” Further, the ECtHR was reassured by the observations made by Lord Justice Thorpe in the Court of Appeal in Bellinger, who asserted: “we can surely take some comfort from the knowledge that within wider Europe many states have recognized the transsexual’s right to marry in the acquired gender.”

In relation to ECHR Article 12, the ECtHR in Goodwin held firstly that: “Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as per se removing their right to enjoy [this right].” It then addressed the biological focus established by Corbett and, in line with giving the ECHR a “living” interpretation, held it was:

not persuaded that at the date of this case it can still be assumed that these terms must refer to a determination of gender by purely biological criteria. . . . There have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality. The Court has found above, under Article 8 . . . that a test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual. There are other important factors—the acceptance of the condition of gender identity disorder by the medical professions and health authorities. . . ., the provision of treatment including surgery to assimilate the individual as closely as possible to the gender in which they perceive that they properly belong and the assumption by the transsexual of the social role of the assigned gender.

The Court further held that “[t]he applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court’s view, she may therefore claim that the very

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89 Id. at 90, 93 (emphasis added).
90 Id. at 91.
91 Bellinger v. Bellinger, [2001] EWCA (Civ) 1140, [152] (Eng.).
93 Id. at 100 (emphasis added).
The essence of her right to marry has been infringed.\textsuperscript{94} The reasoning in \textit{Goodwin} was affirmed in \textit{I v. United Kingdom},\textsuperscript{95} a decision handed down on the same day.

The ruling in \textit{Goodwin} was accepted by the House of Lords in \textit{Bellinger}. Lord Nicholls held that while as a matter of statutory interpretation the \textit{Corbett} biological criteria remained determinative, it was incompatible with ECHR Articles 8 and 12, and “formally record that the present state of statute law is incompatible” by issuing a declaration of incompatibility against it.\textsuperscript{96} However, this ruling in \textit{Bellinger} means that \textit{Corbett} remains good law, as validated by the highest court in the UK, and it is only because of ECHR Articles 8 and 12 that the state of the law had to change. In essence, instead of leaving open the possibility of re-examination at some appropriate time through an inconclusive result, the House of Lords has preserved and enshrined \textit{Corbett} in English common law.

The UK Parliament eventually passed the Gender Recognition Act 2004 (“GRA”), which created a mechanism for transpeople to obtain legal recognition through a Gender Recognition Certificate granted by the Gender Recognition Panel. The GRA provides:

Section 2: Determination of applications

(1) . . . [T]he Panel must grant the application if satisfied that the applicant—

(a) has or has had gender dysphoria,

(b) has lived in the acquired gender throughout the period of two years ending with the date on which the application is made,

(c) intends to continue to live in the acquired gender until death, and

(d) complies with the requirements imposed by and under section 3.

The application must be accompanied by two reports from appropriately qualified persons one of whom (either as a registered medical practitioner or chartered psychologist) must practic[e] in the field of gender dysphoria . . . [. ] a statutory declaration that the conditions in [GRA Section] 2(1)(b) and 2(1)(c) are met, and a declaration regarding . . . marital or civil partnership status.\textsuperscript{97}

Applicants are, however, not required to have had any gender reassignment surgery.\textsuperscript{98}

\footnotetext[94]{\textit{Id.} at 101.}
\footnotetext[96]{\textit{Bellinger v. Bellinger} [2003] UKHL 21, [11], [55].}
\footnotetext[97]{\textit{HARRIS-SHORT}, supra note 13, at 36.}
\footnotetext[98]{\textit{Id.}}
While the Hyde definition of marriage is “inherent in Irish law,”99 the legal status of transsexuals was not explored until 2002 in Foy v. An t-Ard Chláraitheoir (Foy (No.1)).100 The plaintiff, Dr. Lydia Foy, was born with male genital, gonadal, and chromosomal features, but from an early age, strongly identified herself as female, and in 1992 underwent successful male-to-female gender reassignment surgery. However, her request to the An t-Ard Chláraitheoir—the office for registration of births, deaths and marriages in Ireland—to change her birth certificate was rejected and she initiated court proceedings.101

In Foy (No.1), Mr. Justice McKechnie adopted the Corbett biological criteria test by holding that “notwithstanding the differences in the legislative codes between [England and Ireland], the decision of Judge Ormrod on the [determination of sex] is and remains highly material.”102 Mr. Justice McKechnie then went on to consider whether developments in the study of “brain differentiation,” which had been dismissed by Mr. Justice Ormrod in Corbett, might affect the biological criteria, but found that “evidence to date is insufficient to establish the existence of brain differentiation as a marker of sex and accordingly [did not believe the Court] could give to it the legal recognition . . . sought.”103 However, his Lordship left open the possibility that “at some future occasion, there may well be sufficient evidence available which would enable the court to legally recognise the existence of brain differentiation, [but] that evidence to the level required is not, as of now, so available.”104 Therefore, Mr. Justice McKechnie accepted the Corbett biological criteria as authoritative and dismissed Dr. Foy’s petition.105

However, in an ironic twist of fate, the ECtHR handed down its Goodwin and I decisions only two days after the Foy (No.1) judgment was delivered. When Dr. Foy’s new application post-Goodwin for a change in her birth certificate was rejected, she commenced new legal proceedings, which were again heard before Mr. Justice McKechnie, who delivered his judgment in 2007 in Foy v. An t-Ard Chláraitheoir (Foy (No.2)).106 In Foy (No.2) Mr. Justice McKechnie noted three significant legal changes prior to the new proceedings: firstly, the ECtHR’s

100 Foy v. An t-Ard Chláraitheoir & Ors, [2002] IEHC 116 (H. Ct.) (Ir.).
103 Id. at 121.
104 Id. at 122.
105 Id. at 121.
decisions in Goodwin and I; secondly, the enactment by the Irish Parliament ("the Oireachtas") of the European Convention of Human Rights Act 2003 which incorporated ECHR rights into Irish domestic law; and thirdly, the Oireachtas’ enactment of a new marriage law being the Civil Registration Act 2004 ("CRA").

Mr. Justice McKechnie held that, given the adoption of ECHR rights into Irish law, the Irish position and the UK position pre-Goodwin being "virtually identical," and the "strikingly similar" circumstances between Christine Goodwin and Dr. Foy, the ECHR’s decision in Goodwin was "highly influential in the Irish context" and “now reflects the current legal position in [Ireland].” Mr. Justice McKechnie further held that the Irish government had “responsibility of appropriately responding to Goodwin, [and it] has failed or declined to produce evidence of any movement, even at an initiating, debating or investigative level, on the plight of transsexual persons in this country.” Mr. Justice McKechniex chastised the “silence of the [Irish] Government,” especially its failure to address this issue in the CRA which was “a legislative vehicle most suitable for this purpose,” which led him to conclude that the government has “taken no steps of any significance to redress the undoubted difficulties which continue to exist” and question whether “the State has deliberately refrained” from doing so. His Lordship therefore concluded that the government’s margin of appreciation “has been thoroughly exhausted save as regards [to legislating on] the appropriate means of [recognizing Dr. Foy’s ECHR Article 8 rights]” and issued the declaration of incompatibility sought.

(c) New Zealand (NZ)

The 1991 decision of M v. M by Judge Aubin was one of the first common law decisions allowing post-operative transsexuals to marry in their post-operative sex. However, the outcome was challenged by the Attorney General in Attorney General v. Otahuhu Family Court.

In Otahuhu Family Court, Justice Ellis turned to the English decision of Corbett and found that the “criticisms” made against it were "difficult, indeed impossible, to answer satisfactorily." Justice Ellis then undertook an analysis of

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107 Id. at 2, 33.
108 Id. at 95-96.
109 Id. at 100.
110 Id.
111 Id. at 102, 115.
115 Id. at 606.
the Corbett criteria and pointed out the following flaws: (1) Mr. Justice Ormrod’s statement that marriage depends on sex and not gender is made baldly without justification, (2) Mr. Justice Ormrod’s reference to woman’s “essential role in marriage” begs the question of what this “essential role” is, and (3) the ability to procreate was never a requirement in common law or ecclesiastic law.\footnote{116}

Justice Ellis noted that in the “inter-sex” case “the psychological factors should be determinative of the sex to be assigned to that individual” and opined “surely the same reasoning should be used in the case of a post-operative transsexual.”\footnote{117} In coming to this conclusion, his Honour placed heavy emphasis on the fourth factor—psychology—in playing an important role in determination of sex and commented that “relying solely on the physical factors” would be “disregarding the social and psychological factors which are highly relevant.”\footnote{118} Justice Ellis argued that the Court should instead look at the practical effects of the reassignment surgery and that if recognition was not given then it would leave post-operative transsexuals in “a legal and social limbo . . . not acquired legal status [of their] chosen sex but in every other way must operate socially and psychologically [in] that chosen sex.”\footnote{119}

Justice Ellis also rejected the assertion that allowing transsexuals to marry in their “chosen sex” was equivalent to allowing “homosexual marriage.” His Honor countered this argument by pointing out that:

If the law insists that genetic sex is the predeterminant for entry into a valid marriage, then a male to female transsexual can contract a valid marriage with a woman and a female to male transsexual can contract a valid marriage with a man. To all outward appearances, such would be same sex marriages.”\footnote{120}

In coming to his ruling, Justice Ellis relied on the decision of the New Jersey Superior Court’s Appellate Division in \textit{M.T. v. J.T.}\footnote{121} which held a post-operative male-to-female transsexual was able to legally marry in her post-operative sex. In \textit{M.T.}, Judge Handler held:

Our departure from the \textit{Corbett} . . . stems from a fundamentally different understanding of what is meant by “sex” for marital purposes. . . . The evidence and authority which we have examined . . . show that a person’s sex or sexuality embraces an individual’s gender, that is, one’s self-image, the deep psychological or emotional sense of sexual identity and character. Indeed, it has been observed that the “psychological sex of an individual,”

\footnotetext[116]{Id. at 606, 611-12.}
\footnotetext[117]{Id. at 610-11.}
\footnotetext[118]{Id. (emphasis added).}
\footnotetext[119]{Id. at 611.}
\footnotetext[120]{Id. at 607, 615.}
while not serviceable for all purposes, is “practical, realistic and humane.”122

Judge Handler observed that the English/Corbett position was “rooted in the premises that “true sex” was [ascertainable] by biological criteria” but he disagreed with these premises for “according to the expert testimony presented here, the dual tests of anatomy and gender are more significant.”123 The Appellate Division in M.T. therefore concluded that: “If such sex reassignment surgery is successful and the postoperative transsexual is . . . possessed of the full capacity to function sexually as a male or female . . . we perceive no legal barrier, cognizable social taboo, or reason grounded in public policy to prevent that person’s identification at least for purposes of marriage to the sex finally indicated.”124

Justice Ellis concludes by holding that “[t]here is no social advantage in the law not recognising the validity of the marriage of a transsexual in the sex of reassignment. It would merely confirm the factual reality” and declared that under NZ’s Marriage Act 1955 a person who has undergone surgical and medical procedures may marry in their post-operative sex.125

(d) Australia

The Corbett test was initially cited with approval by Justice Bell in the Australian decision of Re Marriage of C and D (falsely called C).126 However, C and D was heavily criticized for misapplying Corbett because it involved a person with an “inter-sexed” condition (“C”) rather than a transsexual.127 Instead, Justice Bell held C was neither a man nor a woman and was not able to marry anyone.128 In light of recent case developments—below—it is unlikely C and D will be followed.129

In Re Harris and McGuiness,130 a criminal case concerning two transpeople—one of them a male-to-female post-operative transsexual—the New

122 Id. at 86 (emphasis added).
123 Id.
124 Id. at 89.
126 Re Marriage of C and D (falsely called C) [1979] 35 FLR 340 (Austl.). The court referred to it as “falsely called C” because the marriage was held to be void ab initio so the intersexed person (D) was falsely referred to as C when they were purportedly married.
127 ANTHONY DICKEY, FAMILY LAW 136-37 (1997); Margaret Otlowski, What is the harm in it anyway?: Re Kevin and the recognition of transsexual marriage, AUSTL. J. OF FAM. L. 146, 146-47 (2002). An intersexed person is someone who is born with incongruent sexual characteristics (e.g. male (XY) chromosome, male genital but female gonads). A transsexual is traditionally defined as someone with congruent sexual characteristics (e.g. male (XY) chromosome, genitalia, and gonads) but has a very strong feeling that they should belong to the opposite sex (e.g. female).
130 Re Harris and McGuiness [1988] 17 NSWLR 158.
South Wales Court of Appeal held that post-operative transsexuals should be treated as their reassigned sex for criminal law purposes. Justice Mathews rejected the Corbett test and held “[the] conclusion (that biological constitution is fixed at birth) seems to flow not so much from the medical evidence [given in the case] as from [Mr. Justice Ormrod’s] own findings that certain biological features should be determinant of a person’s sex. . . . How can the law sensibly ignore the state of those genitalia at the time of the alleged offence, simply because they were artificially created or were not the same as at birth?”131 Chief Justice Street went further and expressed hope that the test of sexual identity in Re Harris and McGuinness would be extended to cases of marriage.132 This approach was followed for social security purposes in Secretary, Department of Social Security v. SRA.133

Chief Justice Street’s hopes were realized in 2001 by Judge Chisholm’s ruling in Re Kevin (Validity of Marriage of a Transsexual).134 Re Kevin was brought by a couple, Kevin and Jennifer, regarding the validity of their marriage. “Kevin” was a post-operative female-to-male transsexual, who had undergone hormone treatment, breast reduction surgery, and a total hysterectomy with bilateral oophorectomy resulting in his body being no longer able to function as a female for reproduction and sexual intercourse.135 Evidence was also presented to show at the time of marriage, Kevin’s appearance and behavior was male, he was socially accepted by colleagues and friends as a man, and as a husband and father, and psychiatric evidence adduced showed his “brain sex or mental sex” was male and was “psychologically male and that [was] the situation all his life.”136

Judge Chisholm was very critical of Mr. Justice Ormrod’s reasoning when devising the Corbett test. As His Honor summarized, the logical reasoning in Corbett is as follows:137

1. The biological sexual constitution of all individuals is fixed at birth and cannot be changed (major premise).
2. Ms. Ashley’s biological sexual constitution at birth was male (minor premise).
3. Therefore, Ms. Ashley’s biological sexual constitution remains male (conclusion).
4. Therefore, Ms. Ashley’s true sex is male.

131 Id. at 192-93.
132 Id. at 160-62.
133 Secretary, Department of Social Security v. SRA [1993] 43 FCR 299.
134 Re Kevin (Validity of Marriage of a Transsexual) [2001] FamCA 1074 (Austl.).
135 BELINDA FEHLBERG & JULIET BEHRENS, AUSTRALIA FAMILY LAW: THE CONTEMPORARY CONTEXT 130 (2008); also: McConvill & Mills, supra note 5, at 262-63.
136 McConvill & Mills, supra note 5, at 263.
137 Re Kevin (Validity of Marriage of a Transsexual) [2001] FamCA 1074, [77] (Austl.).
5. The validity of the marriage depends on Ms. Ashley’s “true sex.”

6. Therefore, the other party being a man, the marriage is invalid.

However, Judge Chisholm pointed out that while the first three statements had an “impeccable classical logic” it was the fourth statement that was problematic because “biological sexual constitution’ is treated as equivalent to [Ashley’s] “true sex.” Judge Chisholm notes, “[t]his apparently subtle shift in terminology is significant” because “[the] key issue was whether social and psychological matters were relevant in determining whether April Ashley was a man or a woman.” However, in “[t]reating biological sexual constitution as equivalent to true sex excludes these matters, but does so by way of definition: no reason is given for excluding them.”

Judge Chisholm makes a further point that Step 5, which appears to be a statement of law, faces a similar problem because the “asserted legal proposition, that ‘true sex’ is the test for the validity of marriage, is true only if ‘true sex’ is the sole criterion of determining whether a person is a man or a woman. . . . [Corbett] again exploits a subtle shift in terminology which gives the impression that an argument has been made, when in fact the proposition to be established is merely assumed.”

On the same vein, Judge Chisholm observed that Corbett’s “essential role of a woman in marriage’ argument suffers from a similar fallacy. There are two assertions in this argument: (1) marriage is the union of man and woman and (2) sex is an essential determinant in that relationship. However, this is true “only if ‘sex’ refers simply to a person’s identity as a man or a woman. Ormrod J, however, uses it to mean biological sex. . . . [he] treats a person’s (biological) sex as equivalent to the person’s status as a man or a woman, without any reasons.

Judge Chisholm also relied on the Re Harris and McGuiness and SRA decisions to note the shifts in law and in society of greater awareness for transpeople, especially Black CJ’s observation in SRA of the growing “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.”

Judge Chisholm also gave greater significance to “brain sex” evidence for transsexuals holding that “it can now be said that brain sex, manifested in the person’s self-image, is ultimately the sole or true indicator of the person’s true sex. . . . I agree that the medical evidence shows that there is a biological difference, associated with the brain, between transsexuals and other people.” However, his

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138 Id. at 78 (emphasis added).
139 Id. at 79.
140 Id. at 87-88.
141 Secretary, Department of Social Security v. SRA [1993] 43 FCR 299, [22-23].
142 Re Kevin (Validity of Marriage of a Transsexual) [2001] FamCA 1074, [273] (Austl.).
Honor did not base his final ruling on this evidence of “brain sex” being a decisive determinant.

Instead, much emphasis was also placed on Kevin’s social acceptance by friends, family, and society as male (see above). Judge Chisholm argued that this showed Kevin “not [as] an object of anatomical curiosity” but “as a person . . . a human being living a life, as we do among others, as a part of society.”

Judge Chisholm held, contrary to Corbett, that the question of whether a person is a man or a woman should not be determined at birth, but instead, is to be determined as of the date of the marriage and found Kevin and Jennifer’s marriage to be valid.

Judge Chisholm’s ruling was unanimously upheld and affirmed on appeal in Attorney-General (Cth) v. Kevin and Jennifer by the Full Court of the Family Court of Australia (Nicholson CJ, Ellis and Brown JJ). The Full Court held that “The concept of marriage . . . cannot . . . be correctly said to be one that is or ever was frozen in time” and “the words “marriage” and “man” are not technical terms and should be given their ordinary contemporary meaning.” It also rejected the argument that procreation is one of the principal purposes of marriage.

2. Eastern/Asian Jurisdictions

a. Singapore

The first Singapore case on the validity of marriage for transsexuals was Lim Ying v. Hiok Kian Ming Eric. Lim Ying involved a post-operative female-to-male transsexual respondent (Eric), whose Singapore identity card reflected his post-operative sex at the time of his marriage. However, this case was different because the applicant had no knowledge of the gender and sex reassignment surgery until after their marriage, and indicated she would not have went through with the surgery if she had known. Firstly, Rajah JC held that Singapore’s legislation governing marriage, the Women’s Charter, adopted the Hyde definition of marriage and that “[reassignment] surgery does not result in the acquisition of all the biological characteristics of the other sex.” Second, he held that “[an] identity card standing alone is not sufficient evidence.” Thirdly, his Honor held

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144 Re Kevin (Validity of Marriage of a Transsexual) [2001] FamCA 1074, [68] (Austl).
145 Id. at 330.
147 Id. at 87, 110.
148 Id. at 153.
152 Id.
alternatively that as the applicant would not have consented if she knew about Eric’s circumstances, she did not freely consent to the marriage. Rajah JC, therefore, issued a decree of nullity.  

While consistent with the Corbett approach, Lim Ying has come under substantive criticism for its reasoning. Firstly, there was a lack of articulation on why the Corbett approach was adopted—i.e. why the criteria ought to be biological. It should not be enough for Rajah JC to rely on the Hyde definition of marriage being a voluntary union between one man and one woman; for the real question is as which “sex” should a post-operative transsexual person be legally classified. By failing to delve into this, there was no analysis of the competing policy reasons in relation to the Corbett approach, but instead results in the blind following of Corbett. Secondly, in the case of C v. C concerning lack of consent involving a woman marrying a man because she was fraudulently induced to believing he was a well-known boxer, Michael Miller; it was held that the marriage was not invalidated because she intended to marry the person opposite her on the altar and whether he was Michael Miller was accidental. This approach was inconsistent with the alternative ruling in Lim Ying because the applicant intended to marry Eric and his gender and sex reassignment surgery may be said to only be accidental.  

After the decision, the Singapore Parliament intervened on practical and humane grounds to reverse the effects of Lim Ying by passing the Women’s Charter (Amendment) Act 1996 with retrospective effect, thereby validating all marriages entered into by post-operative transsexuals in their chosen sex—save for those already invalidated. Under the amended Women’s Charter, Section 12 provides:

(3) For the purposes of this section—

(a) the sex of any party to a marriage as stated at the time of the marriage in his or her identity card . . . shall be prima facie evidence of the sex of the party; and

(b) a person who has undergone a sex reassignment procedure shall be identified as being of the sex to which the person has been re-assigned.

This provision reverses the Lim Ying decision by making the identity card prima facie—and usually sufficient—evidence of sex for purposes of marriage, and

154 Id. at 512-13.
156 Tan, supra note 153, at 514-15.
explicitly states that a post-operative transsexual should be recognized in his or her post-operative sex. However, an important aspect not addressed in Lim Ying or expressly by the Women’s Charter (Amendment) Act 1996 is Corbett’s alternative ruling that intercourse by post-operative transsexuals would not amount to consummation. Under the current Women’s Charter Section 106(a), a marriage is still voidable for non-consummation and since Section 12 applies only “for the purposes of [Section 12],” this might mean that every marriage by a transsexual in his or her post-operative sex can be open to challenge on the non-consummation ground. However, even if Section 106(a) was to have this effect, its impact—provided the applicant had knowledge of the gender/sex reassignment surgery—might to a large degree be mitigated by Section 107(1) which bars a voidable marriage being voided if (a) the applicant with knowledge conducted himself as to create a reasonable belief in the defendant he would not seek to do so and (b) it would be unjust to the defendant to grant a judgment of nullity. Nevertheless, it is still unclear whether lack of knowledge of the surgery by the applicant, as in Lim Ying’s case, constitutes vitiation of consent.

b. Malaysia

A dual system of family law exists in Malaysia. It is provided in the Malaysian Constitution that civil courts, which apply English legal principles, have no jurisdiction over matters within the jurisdiction of the Shari’ah courts, including marriages between Muslims or contracted under Islamic law. This section will only focus on the law pertaining to non-Muslim transsexuals under the jurisdiction of the civil courts.

In Wong Chiou Yong v. Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara, the applicant—Wong—was a female-to-male post-operative transsexual who sought an amendment of gender on his birth certificate and Malaysian identity card. Justice Singham, citing Corbett and Bellinger and distinguishing Re Kevin, held that:

Biological sexual constitution of an individual is fixed at birth. Therefore, the decisive significance in the determination of this application on the identity of the applicant is not the physiological test but the biological test when she was born...
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He concluded that “[a] person who has undergone a sex change operation cannot be regarded as belonging to the sex for which reassignment surgery was undertaken for . . . reassignment surgery . . . does not affect the true gender status for the purpose of the birth certificate and the national registration identity card” and dismissed the application. Justice Singham stressed that any changes to the current law should be made by Parliament and that the court should not usurp this function. This, however, seems very unlikely for when an MP called for that in October 2005, the Malaysian Home Minister’s response was “[t]he power is here [in Parliament], when everyone agrees to it . . . but from what I heard, you will have a tough time.”

However, in the subsequent decision of JG v. Pengarah Jabatan Pendaftaran Negara, concerning a post-operative male-to-female transsexual (“JG”) seeking to amend her identity card, Justice Foong held that the applicant’s sex should be female and granted the application. In reaching his decision, Justice Foong noted that, in the approaches of Corbett, Bellinger and Wong Chiou Yong, “the garnet is thrown back at the legislative body to make the necessary laws” but opined that when it came to formulating such laws “the legislative body would depend on medical opinions.” Justice Foong gave great weight to medical opinions in determining sex and, apparently favoring the approach in Re Kevin, held that in the present case “the medical men have spoken: the plaintiff is FEMALE. . . . She feels like a woman, lives like one, behaves as one, has her physical body attuned to one, and most important of all, her psychological thinking is that of a woman.”

As neither Wong Chiou Yong nor JG have been expressly overturned, the current law in Malaysia is unclear. In 2012, the Malaysian Court of Appeal in Kristie Chan v. Ketua Pengarah Jabatan Pendaftaran Negara, cited with approval the “biological test” adopted in Corbett, Bellinger, and Wong Chiou Yong in determining sex and appeared to favor this approach. However, it ultimately dismissed the application on the procedural ground that the medical evidence was not from experts in Malaysia so the burden of proof was not satisfied. This leaves open the possible adoption of JG’s approach, provided that the medical opinions were from Malaysian doctors.

164 Id. at 564.
165 Id. at 573-74.
168 Id. at 94-95.
169 Id. at 95.
171 Id.
The issue of marriage for transpeople first arose in HK in *W v. Registrar of Marriages*. Cheung J, at first instance, examined the international common law approach and held that “[g]iven the close resemblance between Hong Kong and the United Kingdom in terms of the law of marriage, and the close link between the common law in Hong Kong and the common law in England . . . it is unrealistic to suggest that *Corbett* did not represent the state of Hong Kong law.” Justice Cheung further affirmed *Corbett’s* premise that the union of marriage was “for the procreation and nurture of children” and “the ability to engage in natural heterosexual intercourse is an essential feature of marriage,” with infertility and past child-bearing age being exceptions to this general rule. His Lordship then turned to the question of constitutional/human rights and held that, given insufficient evidence to show a “shift [in] societal consensus” in HK in allowing post-operative transsexuals to marry, there was no infringement. While this decision was upheld by the HK Court of Appeals, it was overturned at the highest appellate level by the HK Court of Final Appeal (“CFA”).

In granting W’s appeal, the CFA indicated there were two issues to consider: (i) common law statutory interpretation of the relevant HK marriage laws and (ii) the constitutionality question. The Court also stressed that W’s case did not pertain to questions of same-sex marriage, but instead, whether W was legally a woman for purposes of marriage. On the first issue, the CFA pointed out the emphasis on procreation of children as an essential feature of marriage was rejected by Viscount Jowitt LC’s in *Baxter*. However, in light of *Corbett’s* acceptance by the House of Lords in *Bellinger*, the CFA determined that *Corbett* “must be acknowledged to be authoritative in English law.” Therefore, the CFA opined that if it was solely concerned with common law statutory interpretation then “it would have no alternative but to hold that W cannot be treated as a ‘woman’ for purposes of marriage.”

The Court then turned to the constitutionality question. Hong Kong Basic Law (“HKBL”) Article 37 provides: “The freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law,” and the

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173 *Id.* at 121.

174 *Id.* at 122-23.

175 *Id.* at 255-58.


180 *Id.* at 109-10.

181 *Id.* at 112.
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Bill of Rights Ordinance ("BORO") Article 19(2) states: "(2) The right of men and women of marriageable age to marry and to found a family shall be recognized." The Court found these provisions analogous to ECHR Article 12. The CFA cited the ECtHR’s position in Goodwin that "inability to conceive or parent a child" cannot be a ground of removing the right to marry and held that the same is equally applicable to HK. In addition, their Lordships held that in present-day multi-cultural HK there was "no justification for [procreation] as a sine qua non of marriage and thus as the premise for deducing purely biological criteria for ascertaining a person’s sex for marriage purposes."182 The CFA criticized the Corbett approach as "too restrictive and should no longer be accepted" and held that "the Court ought in principle to consider all the circumstances—biological, psychological and social—relevant to assessing that individual’s sexual identity at the time of the proposed marriage."183 To accept a fixed at birth criteria was, according to the CFA, adopting a “blinkered view.”184 Furthermore, the CFA agreed with Goodwin that to deny transsexuals who underwent irreversible surgery the right to marry in their post-operative sex, by saying that they could still marry in their former sex, would constitute impairment to the very essence of their right to marry.185 Finally, the CFA rounded off by rejecting Cheung J’s approach of relying on societal consensus by holding that whether there was a consensus was firstly irrelevant to the constitutional issue and, secondly, that absence of majority consensus as a reason for rejecting a minority’s claim was “inimical in principle to fundamental rights.”186

III. A CRITIQUE OF CORBETT IN THE MODERN AGE: OBSOLETE?

This Part seeks to provide a critique of the Corbett decision by examining it in light of (i) the logical fallacies inherent within the decision, and (ii) modern medical, legal and social changes.

A. Common law’s Logical Rejection of Corbett

Close scrutiny of Mr. Justice Ormrod’s reasoning is generally lacking in decisions that adopt Corbett’s approach, with judges appearing to take for granted Corbett’s logical soundness. For example, Lord Hope in Bellinger credited Corbett with giving a “single, clear meaning that can be applied uniformly in all cases" but failed to go into Corbett’s analysis of what is “male” and “female.”187 Closer inquiry into Corbett’s line of reasoning would have revealed that there are several

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182 Id. at 125-27; see also Bellinger v. Bellinger, [2001] EWCA (Civ) 1140, [128] (Eng.).
184 Id.
185 Id. at 133-34.
186 Id. at 134-35.
fundamental flaws in the logic of Mr. Justice Ormrod’s approach. These could be categorized as fallacies of: (i) begging the question, (ii) definitional sleights of hand, and (iii) cherry-picking.

1. Begging the Question

In Corbett, Mr. Justice Ormrod sets up the rationale for his biological test—chromosomal, genital, and gonadal—by providing what appear to be two statements:

[i] sex is clearly an essential determinant of the relationship called marriage because it is and always has been recognised as the union of man and woman . . . in which the capacity for natural heterosexual intercourse is an essential element”; [and]

. . . .

[ii] Since marriage is essentially a relationship between man and woman, the validity of the marriage in this case depends . . . [upon] whether the respondent is or is not a woman. . . . The question then becomes, what is meant by the word “woman” in the context of a marriage . . . . Having regard to the essentially hetero-sexual character of the relationship which is called marriage, the criteria must, in my judgment, be biological.”

What in appearance are two separate propositions above, it is in fact one circular question-begging argument. By using the words “natural” and “biological” synonymously—assuming for the moment they are equivalent—the statements are posited in such a way that the answer is already in the premise of the enquiry—i.e. natural and biological criteria is the “essential determinant.” Sharpe refers to this as Mr. Justice Ormrod scripting April Ashley’s legal sex as male from the start. By setting up the issue in this question-begging format, the final—apparently logical—outcome, that an individual born as a man cannot be legally recognized as a woman for marriage, is therefore unavoidable.

2. Definitional Sleights of Hand

The side-stepping of important issues by presuming or defining them as irrelevant is a problem that runs throughout the Corbett argument. This is best elaborated by Judge Chisholm who provides an in-depth analysis of this fallacy in Re Kevin (see above).

Judge Chisholm notes that “Step 4 [Whether a person is a man or a woman depends solely on the person’s biological sexual constitution] . . . is the critical step. It is the kernel of [Mr. Justice Ormrod’s] judgment, the fundamental

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188 Corbett v. Corbett (otherwise Ashley), [1970] P. 83, [105]-[106] (Eng.).
189 See infra Part III.A.2 for critique of this assumption.
190 SHARPE, supra note 37, at 41-42.
191 HARRIS-SHORT, supra note 13, at 33.
conclusion that congruent biological factors exclusively determine whether a
person is a man or a woman. 192 However, as his Honor critically questions—
"[w]hat is remarkable about this proposition is that nothing has been said to support
it. No relevant principle or policy is advanced. No authorities are cited. . . ." 193
This unsupported assertion is further obscured by Mr. Justice Ormrod’s treatment
of “biological sexual constitution” as equivalent to “true sex” in Corbett, which
Judge Chisholm calls a “definitional sleight of hand” because by using the term
“true sex” synonymously with “‘biological sexual constitution,’” it generates the
false impression that other criteria, including social and psychological factors, are
not relevant to the “true” determination of sex. 194 In reality, the irrelevancy of
social and psychological factors is only an assumption created by the language
without actual principle, policy, or authority to support it.

Furthermore, Judge Chisholm takes issue with Mr. Justice Ormrod’s use of
double-meanings of “sex” when stating that “sex is clearly an essential determinant
of the relationship called marriage because it is, and always has been, recognised as
the union of man and woman” 195 This statement is accurate if “sex” is used in a
gender identity sense of man and woman, but the problem is that later in the
judgment, Mr. Justice Ormrod uses “sex” to mean biological sex when deciding to
exclude psychological and social factors. 196 The interchangeable use of biological
sex and gender sex when the two have very different meanings has the effect of
misdirecting the reader’s perception, making the flow of the argument “sound”
logical when in reality the premise on which the argument is grounded has shifted
dramatically. Furthermore, this switch in meanings is made by Mr. Justice Ormrod
without giving any reasons in support of it.

This problem was also spotted by Justice Ellis in Otahuhu Family Court,
noting that Mr. Justice Ormrod’s premise essentially means “marriage is a
relationship which depends on sex and not gender” but that “Mr. Justice Ormrod
makes this statement baldly and does not attempt to argue or justify that
interpretation.” 197

This treatment of “true sex”, and “biological sexual constitution” as
synonymous by Corbett is problematic for it is “defining the issues in terms that
exclude matters other than biology” such that the issue of taking other matters into
consideration, e.g. social and psychological factors, has been side-stepped. 198

192 Id. at 83.
193 Id. at 84.
194 Id.
196 Re Kevin (Validity of Marriage of a Transsexual) [2001] FamCA 1074, [88] (Austl.).
198 Re Kevin (Validity of Marriage of a Transsexual) [2001] FamCA 1074, [89] (Austl.).
3. Cherry-picking

One of the reasons suggested for Corbett’s longevity is the presence of a medically qualified judge and cast of distinguished medical experts coupled with the complex biological and anatomical focus of the case. This might have explained in part why subsequent judges were reluctant to depart from it. Mr. Justice Ormrod’s statement that “All the medical witnesses accept that there are at least four criteria for assessing the sexual condition of an individual. . . .” before laying out the Corbett test appears to give further credence to the test’s objectivity and authority.

However, this objectivity is illusionary and a closer reading of the Corbett judgment shows that Mr. Justice Ormrod was highly selective in which expert’s medical opinion to give weight. In particular, he accepted the views of Dr. Randell and Professor Dewhurst whom respectively classified April Ashley as “a male homosexual transsexualist” and a “castrated male,” while being dismissive of the evidence of Dr. Armstrong, who considered that Ashley was “inter-sex” and should be assigned as a female “mainly on account of the psychological abnormality of transsexualism,” and Professor Roth, who “thought that [Ashley] might be classified as a woman ‘socially’. “ His Lordship noted, “I was less impressed by Dr. Armstrong’s evidence. . . . I do not think that the facts on this case, when critically examined, support the assumptions [of] Professor Roth.” However, no substantive analysis was undertaken by Mr. Justice Ormrod as to why these medical opinions should be dismissed. Instead, their dismissal is made by bare assertion. His Lordship was equally dismissive of brain sex research that suggested an organic basis for transsexualism without elaborating why it was so.

As one subsequent judge noted, “Mr. Justice Ormrod did not appear to want to favor any expert medical opinions that classified [Ashley] as a woman.” Judge Martens was even more blunt in Cossey, commenting:

[T]he [first] reactions . . . of courts have been almost instinctively hostile and negative. . . . [T]he judgment of the High Court in the case of [Corbett] . . . well illustrates this tendency: using terms which scarcely veil his distaste and basing himself on reasoning which has been severely criticised by various legal writers, the learned Judge simply refused to attach any legal relevance to reassignment surgery.

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199 Gilmore, supra note 3, at 53-56.
201 Id. at 99.
202 Id.
203 Id. at 99-100.
4. A Biological Focus?

A fundamental tenet of *Corbett* is its strong “biological” focus, especially the essential role of a woman in marriage, which has been read to mean procreation. However, despite the earlier holdings of Lord Chancellor Viscount Jowitt in *Baxter* who declared that procreation was not necessary for, nor should be understood as, the principal purpose of marriage, neither Mr. Justice Ormrod in *Corbett* nor the House of Lords in *Bellinger* articulate why this biological interpretation of sex is necessary in family law. Although *Baxter* was never cited in *Corbett* or *Bellinger*, the HK CFA who had such knowledge appeared to accept that despite the contrary sentiment in *Baxter*, *Corbett* must be regarded as authoritative in light of *Bellinger* without in-depth analysis on why it was so. Similarly, the English court in *Tan* accepted the *Corbett* test in criminal law “without hesitation” merely because “common sense and the desirability of certainty and consistency demand” it. This shows that few, if any, reasons are given for the biologic focus of the *Corbett* test, and courts have accepted the biological criteria as a *fait accompli* without analyzing its suitability, let alone desirability, in family law.

Given the logical fallacies and internal consistencies contained in Mr. Justice Ormrod’s reasoning, it is advisable for future courts answering this legal question to not take *Corbett*’s holding at face value. It is necessary to see beyond the definitional bare assertions used to justify the biological focus of the *Corbett* test in order to comprehend and perhaps address some of the substantial issues raised. The analysis above has shown that *Corbett*, far from providing the answer, has left many substantive questions unresolved. Once these issues are flushed out, it is questionable whether the *Corbett* approach on legal classification of “sex” should still be considered good, let alone the foremost authority in the English common law. As the Australian and NZ decisions have shown, the logical outcome of this inquiry would be a common law rejection of the *Corbett* test instead.

**B. Developments Since Corbett**

Even if we were to accept the soundness of Mr. Justice Ormrod’s reasoning based on the facts and evidence available at the time, subsequent changes in medicine, law, and society show that our current circumstances are markedly different from those on which *Corbett* was premised. The common law must take into account and respond to these developments.

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207 Grenfell, *supra* note 143, at 765.
1. Medical Advancement

When Mr. Justice Ormrod devised the biological criteria in *Corbett*, it was clear he relied heavily on contemporaneous medical opinion in formulating the parameters of the test. Mr. Justice Ormrod observed that, despite the medical experts differing conclusions, “there was a very large measure of agreement between them on the present state of scientific knowledge on all relevant topics.” He praised the quality of the medical evidence on both sides as “quite outstanding” in its “intellectual and scientific objectivity” and expressed that the “cause of justice is deeply indebted to them.”

Furthermore, Mr. Justice Ormrod developed his test using the “doctor’s criteria” and relies on them to justify his conclusion by stating—rightly or wrongly—there was “common ground between all the medical witnesses that the biological sexual constitution of an individual is fixed at birth—at the latest—and cannot be changed.” However, forty years since *Corbett*, it is now clear there have been significant medical developments, in theory as well as research findings, in this area. While these changes are summarized in Part 1.3 above, one significant advancement worth highlighting is the research into “brain sex.” In *Corbett*, Mr. Justice Ormrod had referred to the—then—research on this area as “purely hypothetical and speculative.” However, recent research has shown that there does appear to be differences in the brain structure of transsexuals, showing they more closely resemble the sex they identify themselves with than the sex they were assigned to at birth. Furthermore, the medical perceptions of gender dysphoria have shifted from trying to find a “cure” to acceptance that sex might be changed surgically and hormonally such that the “body fits the mind.”

In light of these advancements, the outcome of *Corbett* would likely have been different today. If it was proven that the brain plays a role in determining a person’s sexual condition, then it would justify a revision of the *Corbett* biological test to incorporate a fourth biological criteria being the brain factor or “brain sex.” This would be consistent with Mr. Justice Ormrod’s holding that “the criteria must, in my judgment, be biological” and would be an organic extension of the *Corbett* test rather than a departure from or a mutilation of it. At the same time, it would mean that for purposes of the common law, transsexualism may be seen as an intersex condition with the incongruence being between the brain—being of one sex—and the other three factors: chromosomal, gonadal, and genital—being of another sex. As discussed infra, in intersex cases, other factors excluded by

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211 *Id.* at 104, 106.
212 *Id.* at 99-100.
213 See Winter, *supra* note 21; Rogers, *supra* note 20; Chau, *supra* note 22.
214 See Green, *supra* note 25.
215 See infra Part III.B.2.b.
Corbett such as psychological and hormonal factors are instead given crucial weight in determining the individual’s sex.

Some judges have expressed reluctance to fully embrace the “brain sex” proposition; they have generally accepted the possibility that change might be coming and sufficient evidence for legal recognition may be available “at some future occasion.” Other judges have gone further and expressed support for the notion that if the medical opinion has changed then the law should move on as well. In S-T, Lord Justice Ward opined that “[t]aken with the new insight into the aetiology of transsexualism” Corbett should be revisited at an appropriate time. Judge Chisholm was even more resolute, noting that “[t]here is no suggestion in the authorities that the right approach is to ignore current medical knowledge” and cited with approval Professor Gooren’s opinion that, “[t]here should be no escape for medical and legal authorities that these definitions [of man and woman] ought to be corrected and updated when new information becomes available, particularly when our outdated definitions bring suffering to some of our fellow human beings.” As such, Judge Chisholm, while not holding “brain sex” as the decisive determinant in law, did express his agreement that “the medical evidence shows that there is a biological difference” and that “[i]t also seems possible, or even likely, that this feature of the brain determines whether individuals think of themselves as men or women, whatever their other biological characteristics, although the medical evidence does not expressly assert this.”

The relevance of brain sex was approved on appeal by the Full Court in Attorney-General (Cth) v. Kevin and Jennifer, who added that in addition to brain sex, the psyche—i.e. psychological factors—should also be “one of the relevant factors in determining sex and gender.”

The revision of the Corbett test in light of medical advancements would be consistent with the House of Lord’s ruling in Bellinger. While Lord Nicholls thought that research on brain differentiation and sexual identity was still “speculative,” his Lordship did not expressly state that it could not be proven. In fact, the House of Lord’s affirmation of Corbett might suggest otherwise. This is because the spirit of the Corbett decision is to attribute great relevance and weight to current medical expert opinion. In Corbett, Mr. Justice Ormrod’s ruling was based on what he perceived to be the medical consensus of the time. This consensus can change and, indeed, has undergone significant modification since then. As Judge Chisholm notes “Corbett itself seems to be authority against the
submission [that the law could not change in light of medical advances]. . .[Mr. Justice Ormrod] drew on the available medical evidence in reaching its conclusion.”\textsuperscript{223} Further, as the Full Court noted on appeal, the expert evidence in relation to brain sex presented at trial in \textit{Re Kevin} was stronger than in \textit{Bellinger}.\textsuperscript{224} This approach is also supported by the Malaysian decision of \textit{JG} where Justice Foong gave determinative weight to what “the medical men have spoken.”\textsuperscript{225}

Therefore, medical advancements and developments since \textit{Corbett} support the proposition that the \textit{Corbett} test should be revised. The new medical research on brain sex as a biological factor and the biological incongruence resulting from it would justify the court taking account of psychological and other factors when considering recognition of transsexuals in their self-identified sex. This would be in line and consistent with the holding in \textit{Corbett}.

2. Disharmony in the law

The adoption of the “fixed at birth” biological criteria, rather than a wider gender-based approach that incorporates psychological factors and social realities, has resulted in the discordance between marriage law and other areas of law.\textsuperscript{226} This disharmony is seen in \textit{Corbett}’s interaction with: (i) Other areas of law—especially the criminal law—and (ii) the contrary legal position on intersexuality.

a. Other areas of law

While Mr. Justice Ormrod was clear that \textit{Corbett}’s “fixed at birth” biological criteria should be confined to the “context of marriage,”\textsuperscript{227} there was an initial push to extend the test to other areas of law for the sake of legal certainty and consistency. This included cases on sex discrimination, unfair dismissal, equal pay, and criminal liability.\textsuperscript{228} However, the practical difficulties and injustices of this approach were soon apparent and courts were quick to reverse their position to accept the post-operative sex of the individual in many areas of law.

The European Court of Justice (“ECJ”) addressed the issue of sex discrimination against transsexuals in unfair dismissals in \textit{P v. S and Cornwall County Council}.\textsuperscript{229} The ECJ held that the scope of the “fundamental human right” of equal treatment “for men and women” and “no discrimination whatsoever on the

\textsuperscript{223} \textit{Re Kevin (Validity of Marriage of a Transsexual)} [2001] FamCA 1074, [132] (Austl.).
\textsuperscript{224} \textit{Attorney-General v. Kevin and Jennifer} [2003] FamCA 94, [290, 326] (Austl.).
\textsuperscript{227} \textit{Corbett v. Corbett} (otherwise Ashley), [1970] P, 83, [106] (Eng.).
\textsuperscript{228} \textit{SHARPE, supra} note 37, at 42-43.
\textsuperscript{229} \textit{P v. S and Cornwall County Council} [1996] IRLR 347 (Involving a transsexual (P) who was dismissed after informing her employer that she intended to undergo male-to-female reassignment surgery.).
grounds of sex” must also extend to transsexual persons. Similarly, the Full Court of the Federal Court of Australia in *SRA* held that a transsexual’s post-operative sex was to be recognized for social security purposes.

In the English decision *R v. Tan*, the court held “both common sense and the desirability of certainty and consistency demand” that the *Corbett* test be followed for purposes of criminal law. However, to apply this reasoning would result in many practical, undesirable problems. First, whether it is “common sense” to actually apply *Corbett* in the criminal context is questionable, for Mr. Justice Ormrod was clear that he did not intend the test to determine the ‘legal sex’ of the [individual] at large and expressed extra-judicially that “the law can accommodate the transsexual in almost all of its other aspects.” Secondly, this would give rise to absurd legal positions, e.g. that a post-operative male-to-female transsexual cannot legally be raped and, conversely, a post-operative female-to-male transsexual can never legally commit rape.

This proposition has been firmly rejected by the Australian courts. First, in *Re Harris and McGuiness* the court held post-operative transsexuals should be treated in their reassigned sex for criminal liability purposes. Second, in *R v. Cogley*, where the trial judge rejected the defendant’s defense that he was not guilty of assault with intent to commit rape because the victim was a post-operative male-to-female transsexual, by holding “the law should regard as a woman a male-to-female transsexual where core identity is established and where sexual reassignment surgery has taken place.” This finding was upheld by the Full Court of the Supreme Court of Victoria, which added that “core identity” was to be understood as the psychological personality of character of the individual.

The English courts have also since departed from the *Tan* approach. In *R v. Matthews*, involving a defendant charged with rape of a male-to-female transsexual, Judge Hooper rejected the defendant’s submission that following *Corbett* there was no vaginal intercourse, and hence no rape, and instead found that the victim’s vagina was recognized in the eyes of the law.

This departure from *Corbett* giving legal recognition to post-operative sex leaves marriage as one of the few exceptions in the law that still continues to insist on sex being determined at birth. However, what purpose does this serve? The

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230 *Id.* at 14-24.  
231 Secretary, Department of Social Security v. SRA [1993] 43 FCR 299.  
235 *Re Harris and McGuiness* [1988] 17 NSWLR 158 (where one of the defendant prostitutes was a post-operative male-to-female transsexual and charged with “procuring the commission of [an] indecent act.”).  
above cases have illustrated the practical problems and injustices of not recognizing a person’s post-operative sex. Should marriage law not follow this trend as well? As Justice Ellis expressed in Otahuhu Family Court “[t]here is no social advantage in the law” in not recognizing this “factual reality.” In fact, failure to recognize their post-operative sex is problematic for individuals who are still allowed to marry in the sex they were assigned at birth, which would amount in “all outward appearances” to same sex marriages.

b. The Law on Intersexualism

The English decision of *W v. W (Nullity: Gender)*, involved a physically intersex individual—Mrs. W—with male chromosomes and male gonads, but inconclusive genitals at birth, who later underwent female reassignment surgery. Mr. Justice Charles distinguished *Corbett* by noting that in the present case, the three biological factors were incongruent at birth. Mr. Justice Charles also rejected the approach that the intersex individual was neither male nor female—previously accepted in the Australian decision of *C and D*—as his Lordship thought this ran counter to the intent of the law that everyone was either male or female for marriage purposes. *C and D* has also been rejected by the Australian Full Court in *Kevin and Jennifer*, who described it as “clearly wrong.” Instead, Mr. Justice Charles appeared to give much more weight to the life decision that Mrs. W had made in undergoing reassignment surgery to be of the female sex. First, his Lordship side-stepped the issue of consummation by interpreting Mr. Justice Ormrod’s phrase “essential role of a woman in marriage” into meaning “capacity for natural sexual intercourse” but not necessarily the capacity to bear children. Given that some surgical intervention was necessary for Mrs. W to have intercourse either as a man or female, the case was more analogous to the *SY* decision decided pre-*Corbett*. Secondly, and more importantly, Mr. Justice Charles rejected the submission that Mrs. W could have consummated marriage as a male if she had decided to undergo male reassignment surgery instead, noting that such an argument was “unreal” and that it would be “contrary to what . . . is a final and irreversible choice of the gender in which [the] respondent has chosen to live her life.” Instead, in what has been described as a “radical” contrast to *Corbett*’s “fixed at birth” approach, Mr. Justice Charles held that for intersex individuals

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240 Id. at 607; see also Whittle, supra note 12, at 140-41.
242 Id. at 141-42.
243 Id. at 145
245 Id. at 143-44 (Emphasis added).
246 Barlow, supra note 226, at 232.
“whether the person is male or female for the purposes of marriage can be made with the benefit of hindsight looking back from the date of the marriage or if earlier the date when the decision is made.”

This notable contrast in legal approach to intersexuals has led some to question why there should be a distinction between intersexuals and transsexuals. In essence, they question why the law should insist that sex should be fixed at birth for some people but not for others. Justice Ellis was similarly critical of this distinction in *Otahuhu Family Court*, noting that in intersex cases of Klinefelter’s Syndrome—XXY chromosome combination—and Turner’s syndrome—XO chromosome combination, where some genetic material is deleted—if the surgical operation does not take place until later in life then the “deciding factor in choosing the sex in which the person will operate is usually the sex into which that person has been socialised up to that point in time.”

Justice Ellis argues this “supports the view that the psychological and social factors which go to make up a person’s gender identity are very powerful, so powerful that where there is physical ambiguity they may override the chromosomal fact” and crucially that “[i]f in cases of “inter-sex” the psychological factors should be determinative of the sex to be assigned to that individual, surely the same reasoning should be used in the case of a post-operative transsexual.” If the laws on intersexualism and transsexualism are not harmonized, with the latter adopting the former’s position, then it would result in what has been described by some as a “happy limbo” where intersexuals can effectively choose which sex to live freely in while transsexuals—provided “brain sex” is not recognized as a biological factor—cannot.

### 3. Pursuit of Certainty Over Humanity?

Stepping back and evaluating the controversy surrounding *Corbett’s* biological criteria in determining an individual’s sex, we should query what advantage the *Corbett* test actually gives us. The overarching theme in support of *Corbett* appears to boil down to the simple proposition of certainty. But, practically, just how beneficial is this “certainty?”

The argument that *Corbett* provides legal certainty and consistency has been popular with courts that adopt the *Corbett* approach. However, this legal certainty is increasingly out-of-sync with the medical perspectives that—as seen above—have changed dramatically. In fact, even at the time of the *Corbett*
decision, a medical expert on which Mr. Justice Ormrod relied, Professor Dewhurst opined that medicine did not determine sex, but only determined the sex in which it was best for the individual to live. Legal certainty would also conflict with physical appearances for as Justice Ellis bluntly pointed out in Otahuhu Family Court, for all outward appearances transsexual individuals belong in their post-operative sex.

Another argument advanced in support of Corbett is administrative certainty and convenience. Proponents of this view contend that relaxation of Corbett’s clear-cut boundaries would generate significant difficulties for administrative authorities in ascertaining an individual’s sex. They doubt the practical feasibility of departing from Corbett. However, drawing from international experiences, it is questionable whether determining sex at the time of marriage, as opposed to time of birth, would be as problematic as feared. This issue was pre-empted by Justice Ellis in Otahuhu Family Court, who held that, should the administrative authorities have any doubts, then the solution is to arrange a medical examination to obtain medical opinions to enable the registrar to reach his conclusion. Furthermore, as Lord Justice Thorpe in the Court of Appeals in Bellinger noted, we could “take some comfort from the knowledge” that many European countries have recognized the right of transsexuals to marry in their post-operative sex and there was “no evidence that they have encountered undue difficulty in applying [such] provisions.”

There also appears to be an underlying fear that if we allow people to alter their sex, then it might lead to changes vacillating back and forth with “reverse sex reassignment surgery,” which would create social uncertainty or possible social-identity chaos. However, this uncertainty is, in practice, unfounded. In many cases, the reassignment surgery is irreversible, especially if genito-gonadal surgery is involved. Moreover, even if there were this possibility, the burden of proof would most likely be on the individual to provide compelling reasons to justify recognition of their “reverse sex reassignment” in light of their earlier reassignment.

In contrast, the consequences of denying legal recognition would likely exacerbate the plight of post-operative transsexuals. Sex reassignment surgery is painful, expensive, dangerous, has very variable outcomes, and is not a casual

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254 Corbett v. Corbett (otherwise Ashley), [1970] P. 83, [100] (Eng.).
260 Winter, supra note 21, at 146.
choice made without serious consideration and strong commitment. Secondly, in many cases, transsexuals are likely to face difficult social issues post-operation including social stigma, potential harassment, and employment discrimination that might require legal redress. For example, the plaintiff in Goodwin, reported that post-operation, some colleagues at work—including management—tried to hold her down to see under her skirt and to feel her breasts, but her complaint of sexual harassment to the Employment Tribunal failed because she was told that legally she was a man. This denial adds to their suffering by not recognizing a part of their humanity. As Judge Martens eloquently elucidated in Cossey, “[h]uman dignity and human freedom imply that a man should be free to shape himself and his fate in the way that he deems best fits his personality” and in refusing to recognize transsexuals in their post-operative sex, despite the fait accompli of their physical appearance and all the ordeals they have faced, “can only be qualified as cruel.”

It would appear that in many cases, the certainty of Corbett has been substantially overvalued and, conversely, the suffering of post-operative transsexuals who have undergone long, painful and dangerous procedures to have their bodies conform to their desired sex, are significantly undervalued. In the words of Chief Justice Street in Re Harris and McGuiness, “as a more compassionate, tolerant attitude to the problem of human sexuality emerges amongst the civilised nations of the world, the founding of [Corbett] on clinical factors present at birth has come under increasing criticism.”

IV. THE BILL OF RIGHTS/HUMAN RIGHTS ROUTE

While all of the above grounds are by themselves sufficient to justify departing from Corbett, an additional legal avenue—that of human rights—has emerged from the case law to further substantiate abrogating from the Corbett biological approach. This additional route was elaborated by the ECtHR in Goodwin and has subsequently gained traction in the UK’s House of Lord’s in Bellinger, in Ireland in Foy (No.2), and with HK’s CFA in W v. Registrar of Marriages. The key focus revolves around two fundamental rights: (i) the right to respect for private life and (ii) the right to marry.

As the ECtHR in Goodwin made clear, personal autonomy is an important principle that underlies respect for private life and encapsulates guarantees for the “personal sphere of each individual, including the right to establish details of their

262 WHITTLE, supra note 12, at 99-100 (note the Employment Tribunal’s position is no longer valid in the EU after P v. S and Cornwall County Council [1996] IRLR 347); see supra at Part II.B.1.a-b and Part II.B.2.c.
identity as individual human beings.”265 In the transsexual context, this includes the right to enjoy “personal development and moral security in the full sense” and the “unsatisfactory situation” of an “intermediate zone [being] not quite one gender or the other” which post-operative transsexuals live under “is no longer sustainable.”266 Hence, the legal failure to recognize the transsexual individual’s post-operative identity constitutes a breach of the right to respect for private life.267 This conclusion was reaffirmed by Mr. Justice McKechnie in Foy (No.2) who held the Irish government’s failure to legislate post-Goodwin to give recognition to post-operative transsexuals was in breach of the right to respect for private life.268

Similarly, the ECtHR held that restricting marriage to sex at birth would be a breach of the right to marry in the transsexual context. It was “artificial” to argue that the post-operative transsexual could marry in the sex he or she was assigned at birth because, like Mrs. Goodwin, in a majority of cases, they would be living in their post-operative sex, be in a relationship with someone of the opposite sex—to their post-operative sex—and would only want to marry in their post-operative sex and would have “no possibility of doing so” under the Corbett biological test.269 In coming to this conclusion, the ECtHR also stressed the major social changes in defining the institution of marriage since Corbett and the developments in medicine and science in relation to transsexuality.270 The CFA agreed with the ECtHR’s reasoning in W v. Registrar of Marriages where it held that the above argument constituted impairment on “the very essence of their right to marry.”271

It is also clear from the case law that these two rights are distinctively separate rights and can be advanced independently of each other. The ECtHR in Goodwin noted that the right to respect for private life “does not... subsume all the issues” under the right to marry.272 Furthermore, Mr. Justice McKechnie in Foy (No.2) was able to find a breach of the right to respect for private life without going in-depth into the right to marry and, vice versa, the CFA focused mainly on the right to marry in W v. Registrar of Marriages without much discussion on the right to respect for private life.273 In the present context, these two rights are often closely intertwined—and as a matter of litigation strategy it might be advantageous to put them forward concurrently—but it must be remembered that they are independent rights. Even when standing alone, either of the two rights is sufficient

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266 Id.
267 Id. at 93.
268 Foy v. An t-Ard Chláraitheoir & Ors, [2007] IEHC 470 [100-02], [115] (H. Ct.) (Ir.).
270 Id. at 100.
in itself to carry forward and substantiate legal recognition of a transsexual’s post-operative sex on the human rights route. Therefore, the human rights pillar does not crumble even if in certain circumstances only one of the two rights is available.

In addition, the CFA’s judgment in *W v. Registrar of Marriages* shows it is possible to achieve the same outcome using the human rights grounds to those cases—notably Australian and NZ decisions—departing from *Corbett* on common law reasoning grounds. This was done in *W v. Registrar of Marriages* by adopting a “remedial interpretation” of the law to incorporate the approach used in *Re Kevin/ Kevin and Jennifer* being that of determining an individual’s sex in light of all relevant factors at “time of marriage or proposed marriage” and “ascertaining whether the individual concerned has the right to marry in his or her acquired [sex].”

Therefore, the human rights arguments are another route that could be advanced in the increasingly growing trend to depart from *Corbett*.

**CONCLUSION**

The arguments above illustrate that *Corbett* in the modern world is increasingly becoming obsolete and out-of-touch with new medical advancements, societal perceptions, and notions of equality and justice. In fact, in nearly all the judicial decisions pertaining to post-operative transsexuals, even in those upholding *Corbett*,

have expressed near universal sympathy for the distress faced by post-operative transsexual individuals in not having their post-operative identity recognized. In light of this, the impetus for revisiting and re-evaluating the *Corbett* ruling could not be greater.

The analysis on the logical flaws in Mr. Justice Ormrod’s reasoning illustrates that *Corbett* might not have been rightly decided in the first instance and highlights why this authority should not have been followed in other common law jurisdictions subsequently. The subsequent analysis on new modern medical developments and the disharmonies in the law resulting from a bifurcated approach to the post-operative transsexual’s legal sex demonstrates that even if *Corbett* was correctly decided based on the material available at the time, a different outcome should be reached today in light of the evidence and experience available now. Both analyses support the proposition that the law should move on. Furthermore, we should reject merely endorsing *Corbett* purely for the sake of legal certainty for it fails to address the problems and complications that flow from adopting

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Corbett’s “fixed at birth” biological approach. Finally, the discussion shows that in an age where a strong legal emphasis is placed on the rights of the individual, the human rights route offers another additional path for advancing the legal recognition of the post-operative sex of transsexuals. Any of these three avenues—logical flaws, subsequent modern developments, and human rights—taken alone is sufficient to justify departing from Corbett. When advanced together, the impetus for change in this area of law is undeniable.

While these three routes for recognition could be brought forward concurrently in legal arguments, it is important to note that they are not mutually dependent on each other but instead exist independently and are able to stand alone on their own merits. This is especially important for countries in which the human rights route is not feasible. An example is Malaysia where the fundamental liberties enshrined in the Federal Constitution of Malaysia do not contain the right to marry or the right to respect for private life. Hence, even though Justice Singham in Wong Chiou Yong was conscious that the suffering and plight of post-operative transsexuals “may raise serious issues of human rights,” he concluded it was “not a matter for this court to decide.” In such instances, the judicial recourse available is to instead argue that the common law position of Corbett should not be followed—either on Corbett’s internal incoherence and/or subsequent developments justifying departure.

This is not to say that the legal routes highlighted above are the only way forward. Rather, legal efforts should be augmented with social endeavors to educate the public, clarify misconceptions and advance societal understanding on the problems faced by post-operative transsexuals manifesting from their lack of legal recognition. There is inherent value in shedding more light on these issues for there is another way forward that falls outside the sphere of the courts, which is positive legislative enactment by the legislature to override Corbett. This was the case in Singapore, where despite the court’s decision to follow Corbett in Lim Ying, the Singapore Parliament enacted legislation that effectively overturned that ruling based on practical and humane grounds.

What is clear, however, is that preserving the status quo for post-operative transsexuals in the jurisdictions that still follow Corbett is “no longer sustainable,” especially in light of the logical problems inherent within Corbett and the modern developments discussed above. In less than twenty years after Corbett was decided, Chief Justice Street remarked in Re Harris and McGuiness that Corbett

276 See Federal Constitution of Malaysia.
279 Chan, supra note 157, at 554.
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was increasingly out of place and under mounting criticism in a more compassionate, tolerant, and civilized society.280 Now over forty years since Corbett, it should finally be time to declare that *Corbett* no longer has a place in our modern common law.

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