### FACV No. 4 of 2012

**IN THE COURT OF FINAL APPEAL OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**FINAL APPEAL NO. 4 OF 2012 (CIVIL)**

(ON APPEAL FROM CACV NO. 266 OF 2010)

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Between :

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| **W** | Appellant |
| **- and -** |  |
| **The registrar of marriages** | Respondent |

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| Before : | | Chief Justice Ma, Mr Justice Chan PJ, Mr Justice Ribeiro PJ, Mr Justice Bokhary NPJ and Lord Hoffmann NPJ | |
| Dates of Hearing: | | 15 to 16 April 2013 | |
| Date of Judgment : | | 13 May 2013 | |
|  | **J U D G M E N T** | |  |

**Chief Justice Ma and Mr Justice Ribeiro PJ:**

1. The appellant, W, is a post-operative male-to-female transsexual person. In common parlance, she is a transsexual person who has undergone “sex change” operations and now lives as and appears in all respects to be a woman. She and her male partner wish to get married. However, the Registrar of Marriages has decided that she does not qualify as “a woman” under the Marriage Ordinance and the Matrimonial Causes Ordinance, so that there is no power to celebrate a marriage between her and her male partner.
2. The appellant brought judicial review proceedings to challenge that decision, contending that she ought in law to count as a woman for the purposes of marriage. The challenge failed at first instance[[1]](#footnote-1) and in the Court of Appeal.[[2]](#footnote-2) Lord Pannick QC, appearing for the appellant,[[3]](#footnote-3) makes it clear that it is no part of the appellant’s case that same sex marriage should be permitted. The contention advanced is that she is for legal purposes a woman and entitled to marry a person of the opposite sex. We should make it clear that nothing in this judgment is intended to address the question of same sex marriage.
3. Leave to appeal was granted by the Court of Appeal on the basis that the following questions of great general or public importance arise on the appeal:

Whether on a true and proper construction of the Marriage Ordinance, Cap 181 (‘MO’), the words ‘woman’ and ‘female’ in sections 21 and 40 of the MO include a post operative male to female transsexual?

If the answer to Question 1 is ‘No’, whether sections 21 and 40 of the MO are unconstitutional having regard to the Appellant's right to marry under Article 37 of the Basic Law and/or Article 19(2) of the Hong Kong Bill of Rights ['HKBOR']) and/or her right to privacy under Article 14 of the HKBOR?

1. The questions for the Court are therefore whether the Registrar has misconstrued the Ordinance in coming to his conclusion precluding the appellant from marrying her male partner. And if not, whether the Ordinance so construed is compatible with the right to marry guaranteed by the Basic Law and the Bill of Rights or with the right to privacy guaranteed by the Bill of Rights. We will consider in turn the question of statutory construction and the constitutional question. But first, we should examine the condition of transsexualism and the appellant’s circumstances.

**A. The condition of transsexualism**

1. It is now well-established that transsexualism is a condition requiring medical treatment. The World Health Organization classifies transsexualism as a species of gender identity disorder involving:

“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 anatomical sex, and a wish to have surgery and hormonal treatment to make one’s body as congruent as possible with one’s preferred sex.”[[4]](#footnote-4)

1. As Dr Ho Pui Tat[[5]](#footnote-5) explained, it is possible to regard the sexual identity of an adult individual as determinable by reference to psychological and biological factors. The psychological aspects include gender identity (self perception of being male or female); social sex role (living as male or female); sex orientation (homosexual, heterosexual, asexual or bisexual); and sex of rearing (whether brought up as male or female). The biological aspects include the genetic (the presence or absence of the Y chromosome); the gonadal (the presence of ovaries or testes); the hormonal (circulating hormones and end organ sensitivity); internal genital morphology (the presence or absence of male or female internal structures such as the prostate gland and the uterus); external genital morphology (the structure of male or female external genitalia); and secondary sexual characteristics (body hair, breasts and fat distribution).
2. In the vast majority of people, these indicia are all congruent, that is, they all point in the same direction, identifying the individual as either male or female.[[6]](#footnote-6) However, people who have the misfortune of suffering from the gender identity disorder or gender dysphoria of transsexualism possess the chromosomal and other biological features of one sex but profoundly and unshakeably perceive themselves to be members of the opposite sex. They may persistently experience acute emotional distress, feeling themselves trapped in a body which does not correspond with what they firmly believe to be their “real” sex.
3. The aetiology of the condition is uncertain. It has traditionally been regarded as psychological in origin but there is a body of scientific and medical opinion favouring the hypothesis that it may have a genetic or organic explanation. But whatever the aetiology, there is no doubt that in severe cases, it can give rise to much suffering and possibly self-destructive behaviour. As Professor Sam Winter[[7]](#footnote-7) stated in his affidavit, transsexual persons:

“... consider themselves females imprisoned in the male bodies, or vice versa, and intensely resent their own sexual organs which constantly remind them of their biological sex. They go to great lengths to relieve themselves of their psychological distress. For example, transsexual men put on make-up, remove facial and pubic hair, and use oestrogen to promote the development of female breasts. They implore doctors to perform operations to remove their male genital organs and construct for them a vagina from their penis. Some of them mutilate themselves in order to be rid of the gonads and genitalia they detest. ... the inner turmoil transsexuals experience prompts some of them to undergo prolonged and painful surgery or even take their own lives.”

1. Professor Winter noted that their “mental and emotional well-being is also affected by other’s perception of and judgment on them.” The gender recognition which the law accords to them is obviously relevant in this context.[[8]](#footnote-8)
2. Professor Robyn Emerton[[9]](#footnote-9) has pointed out[[10]](#footnote-10) that intrusive social pressures can cause great hardship and even lead to tragic consequences:

“The plight of Hong Kong’s transgender persons recently came to the fore after the suicide of Louise Chan, a young transgender woman, on 21 September 2004. Louise first came to the public’s attention when she was stalked and ‘outed’ by the local media in 2003 resulting, amongst other things, in the loss of her job. Two days after Louise’s death, another transgender woman, Sasha Moon, also committed suicide.”

1. It is generally recognized that transsexualism does not respond to psychological or psychiatric treatment. The only accepted therapy involves effecting hormonal and surgical changes to make the patient’s body conform sexually as closely as possible with his or her self-perception and thus to address his or her psychological needs. As Dr Ho Pui-tat explained, the management of persons with the relevant symptoms begins with a full psychiatric assessment. If the diagnosis of gender identity disorder is confirmed, the patient is usually required to go through a “real life experience”, living in the preferred gender for about two years while having hormones of the opposite sex administered to produce reversible physical changes in the body and to ease the patient’s psychological discomfort. If it appears from this process that the patient can successfully live as a person of the opposite sex, he or she is considered medically eligible for sex reassignment surgery (“SRS”).
2. However, as Dr Ho noted, not all transsexual patients choose to undertake SRS. The level of psychological discomfort in people with gender identity disorder differs, ranging from mild gender dysphoria to severe transsexualism. Those less severely afflicted may decline surgery. There may also be social constraints, for instance, a desire not to put good careers at risk by undergoing a sex reassignment. Or the patient may not be willing to face the painful process of surgery with what may be an uncertain outcome, especially in the case of female to male transsexuals where the surgery is more complex and difficult.
3. Dr Albert Yuen Wai Cheung[[11]](#footnote-11) explained that where the decision is made to proceed with SRS, the surgery comprises at least two elements: breast and genital surgery,[[12]](#footnote-12) the procedures differing for male-to-female and female-to-male patients. Dr Yuen described what can and cannot be achieved by surgical intervention as follows:

“For male-to-female transsexual surgery, breast augmentation is done for patients whom the breast enlargement after hormone treatment is not sufficient for comfort in the social gender role. Genital surgery includes at least orchidectomy (removal of both testes), penectomy (removal of penis), creation of a new vagina. The new vagina enables penetration of penis during sexual intercourse. There is preservation of erotic sexual sensation. However, surgery cannot remove the prostate organ or provide a functional uterus or ovaries, or otherwise establish fertility or child bearing ability. Neither can it change the sex chromosomes of the person, which remains that of a male (‘XY’).

For female-to-male transsexual surgery, the female breasts would be removed. The uterus, ovaries and vagina are removed. Construction of some form of penis is performed. There are different ways of constructing the penis, depending on the desire of person who would balance the risk of physical injuries inflicted on one’s body due to the surgery with the benefits. The form of penis construction ranges from an elongation of patient’s clitoris (metoidioplasty), raising an abdominal skin tube flap to mimic a penis, to the micro-vascular transfer of tissue from other parts of body to perineum to have a full construction of a penis inside which there is a passage for urine. The best outcome at present is that after surgery, the person can void urine while standing and can have a rigid penis which means it is rigid all the time, as opposed to an erected penis which is flaccid normally but becomes rigid when sexually aroused. However, the new penis, even fully constructed, cannot ejaculate or erect on stimulation, although it will not affect the person’s ability to have sexual intercourse and the person can still penetrate a vagina and have sensation in the penis and achieve orgasm because the clitoris and its nerve endings are preserved. The person cannot be provided with prostate (a male sex organ which secretes prostatic fluid which when combined with sperms produced by the testes forms the semen; a female does not have such an organ) or any functioning testes and will have no ability to produce semen, to reproduce or otherwise to impregnate a female. The sex chromosomes also remain those of a female (‘XX’).”

1. It can thus be seen that SRS involves very extensive and irreversible changes to a person’s physical state.

**B. The treatment of transsexuals in Hong Kong generally**

1. In Hong Kong, medical facilities for treating transsexuals were first established in 1980. The first documented instance of SRS performed locally occurred in 1981. From 1 October 2007 to 30 September 2009, there were 86 patients diagnosed with gender identity disorder. From January 2006 to September 2009, 18 patients underwent SRS in hospitals managed by the Hospital Authority. The practice is to confine SRS to persons who are at least 21 years old. The whole treatment, including SRS, is publicly funded. It has been suggested that “many more have undergone surgery privately, both in Hong Kong and, more commonly, overseas.”[[13]](#footnote-13) In the present case, W had the first of her operations (an orchidectomy) in Thailand.
2. After completion of the course of treatment, a letter certifying that the patient’s gender has been changed is issued by the Hospital Authority and signed by the consultant surgeon in charge. The practice, as Dr Albert Yuen Wai Cheung explained, is for such a letter to be issued only where a person has had the original genital organs removed and has had some form of the genital organs of the opposite sex constructed.
3. It is the practice of the Director of Immigration, who functions as the Commissioner of Registration under the Registration of Persons Ordinance,[[14]](#footnote-14) to accept such a letter as a basis for issuing the patient with a replacement identity card[[15]](#footnote-15) and passport[[16]](#footnote-16) reflecting his or her changed gender. The Commissioner also accepts certificates where the SRS has been conducted privately, whether locally or overseas.[[17]](#footnote-17) However, the practice is to refuse to alter the sex recorded in birth certificates on the basis that the document states historical fact which cannot be altered on the basis of a surgical sex reassignment. And, as occurred in the present case, a post-operative transsexual person is regarded as ineligible to marry someone of the gender opposite to his or her acquired gender.
4. Hong Kong’s position on marriage presently differs from the position adopted in many other countries where, by law or as a matter of administrative practice, post-operative transsexuals are able to marry in their acquired gender. From the evidence and submissions received, including from the International Commission of Jurists,[[18]](#footnote-18) it appears that in the Asia-Pacific region, such marriages are permitted on the Mainland and in Canada, India, Singapore, Japan, South Korea, Indonesia, Australia and New Zealand. In Europe, most states have for some years recognized such a right to marry and, after the decision of the European Court of Human Rights (“ECtHR”) in *Goodwin v United Kingdom*,[[19]](#footnote-19) discussed below, all 47 states which are members of the Council of Europe are required to give such marriages full recognition. Ms Monica Carss-Frisk QC, appearing for the Registrar,[[20]](#footnote-20) has helpfully provided a list of 41 countries which are approved for the purposes of the United Kingdom’s Gender Recognition Act 2004 (“GRA 2004”) and whose certification of a change of gender is therefore accepted in the United Kingdom.[[21]](#footnote-21) Those countries include the United States, covering the District of Columbia and all of the States except for Idaho, Ohio, Tennessee and Texas.

**C. The case of the appellant**

1. The appellant is a Hong Kong permanent resident in her thirties. She was registered as male at birth, a biologically correct classification. Until 2008, her identity card also stated that she was male. However, from an early age, she perceived herself as female. She was diagnosed as suffering from gender identity disorder and underwent a psychiatric assessment and hormonal treatment between 2005 and 2008. In January 2007, she had an orchidectomy performed in Thailand. She changed her name to a more feminine one by deed poll in that year. Her “real life experience” under professional supervision was deemed successful and in 2008, she successfully underwent SRS at hospitals managed by the Hospital Authority involving removal of her penis and the construction of an artificial vagina enabling her to engage in sexual intercourse with a man. She was thereafter issued with a Hospital Authority letter certifying that her “gender should now be changed to female”. She subsequently successfully applied for her acquired gender to be shown in her educational records and, in August 2008, was issued with a new identity card stating her new name and giving her sex as female. She has also been issued with a passport containing similar particulars.
2. On 17 November 2008, her solicitors wrote to the Registrar seeking confirmation that she was able to marry her male partner. The Registrar’s negative response, containing the decision under challenge, was in the following terms:

“Marriages in Hong Kong are governed by the Marriage Ordinance, Cap. 181, Laws of Hong Kong. Section 40 of the said Ordinance provides that every marriage under the Ordinance is a formal ceremony recognized by law as involving the voluntary union for life of one man and one woman to the exclusion of all others. According to our legal advice, the biological sexual constitution of an individual is fixed at birth and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means. The Registrar of Marriages is not empowered to celebrate the marriage between persons of the same biological sex. For the purpose of marriage, only an individual's sex at birth counts and any operative intervention is ignored.”

**D. The relevant statutory provisions**

1. Section 40 of the Marriage Ordinance (“MO”),[[22]](#footnote-22) referred to by the Registrar provides as follows:

(1) Every marriage under this Ordinance shall be a Christian marriage or the civil equivalent of a Christian marriage.

(2) The expression ‘Christian marriage or the civil equivalent of a Christian marriage’ implies a formal ceremony recognized by the law as involving the voluntary union for life of one man and one woman to the exclusion of all others.

1. Also important is section 20(1)(d) of the Matrimonial Causes Ordinance (“MCO”)[[23]](#footnote-23) which states:

A marriage which takes place after 30 June 1972 shall be void on any of the following grounds only ... (d) that the parties are not respectively male and female.

1. It is also relevant to note that in Hong Kong, a marriage which has not been consummated owing to the incapacity of either party to consummate it is voidable.[[24]](#footnote-24)
2. It will be necessary later to examine the abovementioned provisions in the light of the constitutional right to marry conferred by Article 37 of the Basic Law (“Article 37”) and Article 19(2) of the Bill of Rights (“Article 19(2)”), set out in Section F.1 of this judgment.

**E. The question of statutory construction**

1. It is common ground that under the law of Hong Kong, a marriage is the voluntary union for life of one man and one woman to the exclusion of all others, as MO section 40 provides. Everyone also agrees that “marriage” in Article 37 and “marry” in Article 19(2) bear the same meaning. The question is: Who qualifies as a “woman” for the purposes of marriage? In particular, does a post-operative male-to-female transsexual person such as W count as a “woman” for those purposes?
2. That question has only arisen as a legal issue in relation to transsexuals after gender reassignment treatment became possible.[[25]](#footnote-25) In the United Kingdom, it first received a judicial answer in 1970 in the important case of *Corbett v Corbett (otherwise Ashley)*[[26]](#footnote-26) which involved a post-operative male-to-female transsexual known as April Ashley. Ormrod J held, for reasons considered below, that the answer was “No”. He therefore granted a decree of nullity declaring that the marriage which the parties had celebrated was void *ab initio*.
3. When Ormrod J issued his judgment, there was no explicit statutory provision in England and Wales making it a requirement that a marriage be between a man and a woman. But in the following year, the United Kingdom Parliament enacted section 1(c) of the Nullity of Marriage Act 1971 which provided that a marriage taking place after the Act’s commencement is void if “the parties are not respectively male and female”. The Hong Kong legislature followed suit and enacted section 20(1)(d) of the MCO set out above, coming into effect on 1 July 1972. Our section is in terms materially identical to the English provision and it was obviously intended to adopt the measure locally, making it relevant to examine the origins of the 1971 provision and in particular, its relationship with Ormrod J’s decision in the *Corbett* case. Section 1(c) of the 1971 Act was subsequently re‑enacted in the United Kingdom as section 11(c) of the Matrimonial Causes Act 1973 in materially identical terms.

**E.1 What Corbett decided**

1. Ormrod J had to decide whether the transsexual woman in question was in law a woman for the purposes of marriage. To do this, his Lordship had to ascertain the legal criteria for providing an answer. To identify those criteria, his approach was first to decide what, in his view, were the essential features of the institution of marriage. He then deduced from such essentials, what he considered to be the appropriate criteria and applied them to arrive at his conclusion, after an extensive examination of the evidence.
2. The starting-point as to the essential nature of marriage at common law is the judgment of Lord Penzance in *Hyde v Hyde,*[[27]](#footnote-27) where his Lordship stated as follows:

“Marriage has been well said to be something more than a contract, either religious or civil - to be an institution. It creates mutual rights and obligations, as all contracts do; but, beyond that, it confers a status. The position or status of “husband” and “wife” is a recognised one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite rights upon their offspring.

What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries; but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some prevailing identity and universal basis. 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.”

1. Building on this, Ormrod J focussed on the fact that “marriage is essentially a relationship between man and woman”,[[28]](#footnote-28) deducing from this basic characteristic the proposition that the ability to engage in heterosexual intercourse is a determining constituent of that relationship:

“...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. It is the institution on which the family is built, and in which the capacity for natural hetero-sexual intercourse is an essential element. It has, of course, many other characteristics, of which companionship and mutual support is an important one, but the characteristics which distinguish it from all other relationships can only be met by two persons of opposite sex.”[[29]](#footnote-29)

1. In emphasising that marriage so viewed is “the institution on which the family is built”, Ormrod J plainly regarded such sexual intercourse as essential because it was the basis for the procreation of children. As Lord Nicholls of Birkenhead was later to point out, this was very much in line with the notion of a Christian marriage. As Lord Nicholls explained:

“There was a time when the reproductive functions of male and female were regarded as the primary raison d’être of marriage. The Church of England Book of Common Prayer of 1662 declared that the first cause for which matrimony was ordained was the ‘procreation of children’. For centuries this was proclaimed at innumerable marriage services.”[[30]](#footnote-30)

1. Reviewing the medical evidence on how “the sexual condition of an individual” was assessed, Ormrod J recognised four possible criteria, namely:

“(i) Chromosomal factors; (ii) Gonadal factors (ie, the presence or absence of testes or ovaries); (iii) Genital factors (including internal sex organs); (iv) Psychological factors; ...” [[31]](#footnote-31)

1. His Lordship added that there was some support for a fifth possible criterion, namely:

“(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).”[[32]](#footnote-32)

1. However, since he regarded procreative intercourse as the essential constituent of a marriage at common law, his Lordship considered it appropriate to adopt only the first three of those five possible factors as the relevant criteria. Ormrod J put this as follows:

“Having regard to the essentially hetero-sexual character of the relationship which is called marriage, the criteria must, in my judgment, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage. 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.”[[33]](#footnote-33)

1. His Lordship therefore identified the biological factors as the only appropriate criteria for assessing the sex of an individual for the purposes of marriage. Moreover, he made it clear that he regarded such biological criteria as fixed at the time of birth. Psychological criteria would be disregarded since none would be manifest in a newborn baby. So would the fact of the individual’s subsequent psychological development, treatment and surgery:

“It is 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, either by the natural development of organs of the opposite sex, or by medical or surgical means. The respondent’s operation, therefore, cannot affect her true sex. The only cases where the term ‘change of sex’ is appropriate are those in which a mistake as to sex is made at birth and subsequently revealed by further medical investigation.”

1. He concluded on this basis that the transsexual person in question:

“... is not a woman for the purposes of marriage but is a biological male and has been so since birth. It follows that the so-called marriage of September 10, 1963, is void.”[[34]](#footnote-34)

1. *Corbett* received the approval of the House of Lords in *Bellinger v Bellinger*,[[35]](#footnote-35) where Lord Nicholls stated that Ormrod J’s decision represented the “present state of English law regarding the sex of transsexual people”, noting that:

“... in this context, 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. Any operative intervention should be ignored. The biological sexual constitution of an individual is fixed at birth, at the latest, and cannot be changed either by the natural development of organs of the opposite sex or by medical or surgical means.”

1. Given the importance that the *Corbett* line of cases attaches to procreation as an essential of marriage it is perhaps of some interest to note that a contrary view had been taken by Viscount Jowitt LC in *Baxter v Baxter*,[[36]](#footnote-36) a case on non-consummation, which was not referred to in either *Corbett* or *Bellinger*. His Lordship stated:

“... the insistence of procreation of children as one of the principal ends, if not the principal end, of marriage requires examination. It is indisputable that the institution of marriage generally is not necessary for the procreation of children; nor does it appear to be a principal end of marriage as understood in Christendom, which, as Lord Penzance said in *Hyde v Hyde*, ‘may for this purpose be defined as “the voluntary union for life of one man and one woman, to the exclusion of all others.” As regards the phraseology of the marriage service in the Prayer Book, this House in the recent case of *Weatherley v Weatherley*,[[37]](#footnote-37) pointed out the dangers of too strict a reliance upon these words. In any view of Christian marriage the essence of the matter, as it seems to me, is that the children, if there be any, should be born into a family, as that word is understood in Christendom generally, and in the case of a marriage between spouses of a particular faith that they should be brought up and nurtured in that faith. But this is not the same thing as saying that a marriage is not consummated unless children are procreated or that procreation of children is the principal end of marriage. Counsel were unable to cite any authority where the procreation of children was held to be the test in a nullity suit. On the contrary, it was admitted that the sterility of the husband or the barrenness of the wife was irrelevant.”

1. However, especially in the light of the House of Lords decision in *Bellinger* and of the legislative history considered in the following section of this judgment, the *Corbett* decision must be acknowledged to be authoritative in English law regarding the common law incapacity of a post-operative male-to-female transsexual to marry in her acquired gender.

**E.2 The Corbett decision and the Nullity of Marriage Act 1971**

1. In our view, the 1971 Act was needed because, as we have pointed out, Ormrod J had had to proceed without any explicit statutory basis. After his Lordship concluded that the marriage was invalid, he dealt with the parties’ contentions regarding relief. The petitioner invited him to make a bare declaration that there had not been a marriage at all to show disapproval at what was submitted to be a “meretricious” marriage. If that course had been taken, there would have been no power to grant ancillary relief. The respondent, on the other hand, submitted that the Court should grant a decree of nullity which would permit ancillary relief orders to be made.[[38]](#footnote-38)
2. In order to rule on that issue Ormrod J decided that it was necessary to ask “whether or not the ecclesiastical courts would have entertained such a case as the present and granted a ‘declaratory sentence’ on proof that the ‘wife’ was a man”.[[39]](#footnote-39) He decided that in the absence of contrary authority, those courts would have entertained such a case, noting that even if the marriage was considered “meretricious”, they would have granted declaratory sentences. His Lordship held that he had no discretion other than to grant a nullity decree.[[40]](#footnote-40)
3. It would obviously be quite unsatisfactory to require courts faced with like questions to undertake such an exercise. Ascertaining what the ecclesiastical courts would have done requires considerable legal archaeology (jurisdiction having been transferred from the ecclesiastical courts to the High Court by section 2 of the Matrimonial Causes Act 1857) and the degree of guidance which the case-law of the ecclesiastical courts could give is doubtful since those courts would never have had to consider matters such as the implications of sex reassignment surgery.
4. What the Nullity of Marriage Act 1971 did was to put cases like *Corbett* on a statutory footing by providing in its section 1(c), that a marriage was void on the ground that “the parties are not respectively male and female”. This gave the Court statutory powers to make ancillary relief orders under sections 15 and 19 of the Matrimonial Causes Act 1965. The 1971 Act also gave the Court jurisdiction to act where the husband was not domiciled in England.[[41]](#footnote-41) It was therefore no longer necessary to investigate what the position would have been in the ecclesiastical courts.
5. Examination of the origin and purpose of the 1971 Act, passed some 16 months after the *Corbett* decision, gives substance to the suggestion that the United Kingdom Parliament thereby intended to confer legislative recognition on that decision. It must have been aware of the issues and the lack of a statutory framework for dealing with them. In providing such a framework, and by specifically legislating that a marriage is void if the parties are not respectively male and female, reflecting Ormrod J’s holding that the marriage was void *ab initio*, the legislative intent must have been to endorse that decision. That such was the intent was the view expressed by the English Court of Appeal in *Bellinger v Bellinger*[[42]](#footnote-42) and *J v C*;[[43]](#footnote-43) and by the Full Court of the Australian Family Court in *AG (CTH) v “Kevin and Jennifer”*.[[44]](#footnote-44)

**E.3 The adoption of Corbett’s rationale by the Hong Kong legislature**

1. Ms Carss-Frisk QC submits that the Judge[[45]](#footnote-45) and the Court of Appeal were right to hold that in enacting MCO section 20(1)(d) which reproduces in materially identical terms section 1(c) of the 1971 Act, the legislative intent in Hong Kong was likewise to endorse Ormrod J’s decision in *Corbett*.
2. Fok JA points[[46]](#footnote-46) out that the Explanatory Memorandum to the Matrimonial Causes (Amendment) (No 2) Bill states:

“Clause 12 replaces section 20 of the principal Ordinance with a new section 20 which sets out the grounds on which a marriage may be declared null and void. These correspond to those set out under the Nullity of Marriage Act 1971.”

1. His Lordship concluded that the Hong Kong legislature :

“... consciously and expressly adopted the relevant provision of the Nullity of Marriage Act 1971 and thereby must have intended the law in Hong Kong to be the same as that in England, where *Corbett* was expressly adopted legislatively, and must have intended the same legislative intention behind the Nullity of Marriage Act 1971 when enacting section 20(1)(d) of the MCO.”[[47]](#footnote-47)

1. Save that we consider *Corbett* to have been implicitly rather than expressly adopted by the English legislature, we respectfully agree. In our view, as a matter purely of statutory construction (constitutional considerations being considered later), the legislative intent underlying MCO section 20(1)(d) – and, because of its similar content, MO section 40 – is plainly that the *Corbett* approach as described above applies. Marriage is the voluntary union for life of one man and one woman to the exclusion of all others and where the court has to decide whether a particular individual counts as a “woman” for those purposes, in Hong Kong no less than in England and Wales, the statutory intent is that Ormrod J’s criteria and approach should be adopted.
2. It follows that if this Court was concerned solely with the question of statutory construction, it would have no alternative but to hold that W cannot be treated as a “woman” for the purposes of marriage. The question then is whether a different result is reached under the Basic Law and the Bill of Rights. However, before leaving the statutory construction issue, we wish to deal briefly with certain other arguments which were raised in the present context.

**E.4 Ordinary meaning**

1. It has been stated in a number of cases that whether someone is a “woman” in the context under discussion depends on the “ordinary meaning” of the word.[[48]](#footnote-48) What is generally meant by that is that there is no technical or special meaning to be adopted, a proposition with which we readily agree. However, the reference to “ordinary meaning” must not obscure the crucial importance of context and purpose when construing the relevant provisions. One is not concerned with asking whether a post-operative transsexual woman is “a woman” in some abstract or general sense, but whether she is “a woman” for the purposes of the law of marriage and so has capacity to marry a man. This was recognized by Ormrod J who stressed that he was “not concerned to determine the ‘legal sex’ of the respondent at large” but only in the context of a marriage.[[49]](#footnote-49)
2. It is perfectly possible that as a matter of law, someone in W’s position may qualify as a woman for some, but not all purposes. Thus, in Hong Kong, W is recognized as a woman for the purpose of being issued with a new identity card and a new passport. W is required to use the women’s facilities in public toilets and swimming pool changing rooms. If she had the misfortune of being sent to prison, she would be sent to a women’s prison. Lord Pannick QC may well have been correct is submitting that a host of other gender-specific statutory provisions could be applied without difficulty to W on the basis that she is presently a woman, whereas before sex reassignment, they would have applied to W as a man. That is not to suggest that possibly difficult legal issues do not arise in consequence of an individual’s sex reassignment. Some of those issues are touched on later. The point is that context and purpose are crucial when one comes to construe the legislation because the right to marry may give rise to special impeding considerations which do not exist in other contexts.
3. It is for these reasons that we do not propose to address in any detail a second strand of the statutory construction argument which was advanced on behalf of the Registrar. That involved the textual argument that a post-operative male-to-female transsexual person cannot marry a man because she is not a “woman” within the ordinary meaning of that term. The argument relied on the absence of evidence that the current ordinary usage of “man”, “woman”, “male” and “female” encompasses transsexuals; on the dictionary meanings of such words; and on the existence of negative attitudes towards transsexuals in Hong Kong. While Ms Carss-Frisk accepted that the Hong Kong statutory provisions were “always speaking”, meaning that they ought to be continuously updated to allow for changes since enactment, she submitted that there was no evidence to support any need for such updating.
4. Our approach to construction has not proceeded on the basis of some textual “ordinary meaning” but on the legislative intent made evident by their enactment history in the light of the *Corbett* decision. That approach, in our view, leaves no room for a debate on “ordinary meaning” nor on whether the “always speaking” provisions deserve an updated meaning.

**E.5 Non-consummation**

1. It is sometimes suggested that the *Corbett* approach of regarding procreation as the essential ingredient of marriage finds support in provisions which render a marriage voidable for non-consummation. The absence of such a ground is also sometimes relied on as a basis for distinguishing *Corbett*.[[50]](#footnote-50) Non-consummation is such a ground in Hong Kong, and this argument was relied on by the Registrar. As Miss Carss-Frisk puts it, the argument is that there is an inextricable relationship between consummation and a valid marriage which shows that procreation “remains an important feature and purpose of a marriage”.[[51]](#footnote-51) This was the view taken, for instance, in *B v B*, a New York decision.[[52]](#footnote-52)
2. Since we have accepted, without reference to non-consummation, that it was central to Ormrod J’s decision that he saw procreative sexual intercourse as essential to marriage, it would be superfluous to devote much time to this argument. We will content ourselves with saying that we are not convinced that the existence of non-consummation as a ground for voidability has any necessary connection with procreation as an essential purpose of marriage. The test for consummation has traditionally been regarded as full coital penetration but without any requirement of emission,[[53]](#footnote-53) far less of conception.[[54]](#footnote-54) Moreover, there is in any event authority to support the view that consummation can be achieved where the woman has had a surgically constructed vagina, suggesting that there is no legal impediment to consummating a marriage with a post-operative transsexual woman who is able to engage in sexual intercourse.[[55]](#footnote-55) We are therefore not persuaded that the existence or otherwise of non-consummation as a ground for avoiding a marriage is of any present relevance.

**E.6 Leaving it to the legislature**

1. An important submission made by the Registrar, and one that was regarded as decisive for the refusal by their Lordships in *Bellinger* to adopt a construction differing from that of Ormrod J, is the submission that departing from the law as established by *Corbett* would involve such a major change with such far-reaching ramifications that it is a matter which should be left to the legislature. It was however the case that *Bellinger* was decided in the knowledge that comprehensive legislation was about to be introduced by the government. Lord Nicholls put this as follows:

“This would represent a major change in the law, having far reaching ramifications. It raises issues whose solution calls for extensive enquiry and the widest public consultation and discussion. Questions of social policy and administrative feasibility arise at several points, and their interaction has to be evaluated and balanced. The issues are altogether ill-suited for determination by courts and court procedures. They are pre-eminently a matter for Parliament, the more especially when the government, in unequivocal terms, has already announced its intention to introduce comprehensive primary legislation on this difficult and sensitive subject.”[[56]](#footnote-56)

1. In view of the decision we have reached on the construction question, it is unnecessary presently to deal with this argument. However, it features prominently in the constitutional debate, and will be addressed in that context.

**F. The constitutional question**

**F.1 The provisions relied on**

1. The constitutional provisions relied on by the appellant are primarily Article 37 of the Basic Law and Article 19(2) of the Hong Kong Bill of Rights:

Article 37

The freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law.

Article 19(2)

The right of men and women of marriageable age to marry and to found a family shall be recognized.

1. Since the case-law of the European Court of Human Rights (“ECtHR”) has been much referred to, the Hong Kong provisions may be compared with Article 12 of the European Convention on Human Rights (“ECHR”) which is in much the same terms:

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.

1. Lord Pannick QC also prays in aid the right to privacy guaranteed by Article 14(1) of the Bill of Rights as a provision in support of his main argument based on the right to marry:

Bill of Rights Article 14(1)

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

**F.2 The Court’s approach to the constitutional question**

1. The right to marry is accordingly addressed both in our statute-law and in our constitutional instruments. While we accept that the definition of marriage is the same under both regimes, the question for the Court is whether the scope of the constitutionally recognized right to marry differs from the scope of such right under statute, construed in the manner discussed above. If the statutory right excludes from the institution of marriage persons whose right to marry would be recognized under the Basic Law or Bill of Rights, it would fall to the Court to declare the statutory provision to such extent unconstitutional and to decide upon the appropriate constitutional remedy. It would in particular have to decide whether the validity of the infringing provisions can be preserved by giving them a remedial interpretation.
2. The power to provide a remedial interpretation or to grant other forms of constitutional remedy was explained in the judgment of Sir Anthony Mason NPJ in *HKSAR v Lam Kwong Wai*,[[57]](#footnote-57) and summarised in *HKSAR v Ng Po On,*[[58]](#footnote-58) in the following terms:

“*Lam Kwong Wai* reiterates that the Basic Law impliedly confers upon the courts of the Region power to apply a remedial interpretation to provisions which may otherwise be struck down as constitutionally invalid with a view, if possible, to preserving their validity. A remedial interpretation is capable of going beyond ordinary common law interpretation and may involve the use of judicial techniques such as reading down and reading in. The remedial techniques open to the Court also include the severance or striking out of parts or the whole of the offending provision (as held in *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229 at 265).

The Court recognizes that such remedial techniques necessarily have their limits. The Court cannot take up a curative measure which is so fundamentally at odds with the intent of the legislation in question that adoption of such a measure properly calls for legislative deliberation.”

**F.3 The nature of the constitutional right to marry**

1. Article 37 speaks of the “freedom of marriage of Hong Kong residents” and Article 19(2) lays down “the right of men and women of marriageable age to marry”. We do not consider that there is any difference of substance between the two formulations. It makes no difference that the terms “freedom” and “right” are used respectively. They both enjoin rejection of any unduly restrictive or exclusionary approach to the right to marry. Nor does it make any difference that Article 19(2) refers to the right as one enjoyed by “men and women” whereas Article 37 speaks of its enjoyment by “Hong Kong residents”. It is common ground that a marriage for constitutional as for common law purposes is the voluntary union for life of one man and one woman to the exclusion of all others.
2. Both Article 37 and Article 19(2) also guarantee the right to raise or found a family. The ECtHR has held in relation to ECHR Article 12, 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 the first limb of this provision.”[[59]](#footnote-59)

In our view, the same plainly applies in Hong Kong.

1. It is in the nature of the institution of marriage that it must be subject to legal regulation, for instance, as to marriage having to be monogamous and between a man and a woman; as to what the marriageable age is and what are the permitted degrees of consanguinity. However, such legal rules must be consistent with the constitutional right to marry and must not operate so as to impair the very essence of that right. The Strasbourg Court has consistently so held. Thus, in *Goodwin*, it stated:

“The exercise of the right to marry gives rise to social, personal and legal consequences. It is subject to the national laws of the Contracting States but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired.”[[60]](#footnote-60)

1. This has also been recognized by the House of Lords. In *R (Baiai) v Secretary of State for Home Department*,[[61]](#footnote-61) Lord Bingham of Cornhill stated:

“The Strasbourg jurisprudence requires the right to marry to be treated as a strong right which may be regulated by national law both as to procedure and substance but may not be subjected to conditions which impair the essence of the right.”

1. His Lordship explained what he meant when he called the right to marry “a strong right” as follows:

“If by ‘absolute’ is meant that anyone within the jurisdiction is free to marry any other person irrespective of age, gender, consanguinity, affinity or any existing marriage, then plainly the right protected by article 12 is not absolute. But equally plainly, in my opinion, it is a strong right. It follows and gives teeth to article 16 of the Universal Declaration of Human Rights 1948 and anticipates article 23(2) of the International Covenant on Civil and Political Rights 1966. In contrast with articles 8, 9, 10 and 11 of the Convention, it contains no second paragraph permitting interferences with or limitations of the right in question which are prescribed by law and necessary in a democratic society for one or other of a number of specified purposes. The right is subject only to national laws governing its exercise.”[[62]](#footnote-62)

1. This is equally applicable in Hong Kong in respect of the right to marry protected by Article 37 and Article 19(2). The legal rules governing the exercise of that right must be compatible with those Articles and must not impair the essence of the right.

**F.4 Goodwin and Bellinger**

1. It is instructive to consider the evolution of the United Kingdom’s position under the ECHR in the case-law of the ECtHR as recognized by the House of Lords. In *Rees v United Kingdom,[[63]](#footnote-63)* a 1986 decision involving a post-operative transsexual man who had been refused alteration of his birth certificate to show that he was male, the ECtHR approach to the right to marry under ECHR Article 12 was not far-removed from that of Ormrod J in *Corbett*. While it emphasised that restrictions on the right could not be such as to impair its very essence, the ECtHR stated:

“In the court's opinion, the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 is mainly concerned to protect marriage as the basis of the family.”[[64]](#footnote-64)

1. It refused relief[[65]](#footnote-65) holding that:

“... there is at present little common ground between the Contracting States in this area and ..., generally speaking, the law appears to be in a transitional stage. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation.”[[66]](#footnote-66)

1. Four years later, in its decision in *Cossey v United Kingdom*,[[67]](#footnote-67) the Strasbourg Court had to deal with the complaint of a post-operative male-to-female transsexual regarding her inability under English law to enter into a valid marriage with a man. Miss Cossey:

“...challenged ... the adoption in English law of exclusively biological criteria for determining a person’s sex for the purposes of marriage ... and the Court’s endorsement of that situation in the *Rees* judgment, despite the absence from Article 12 of any indication of the criteria to be applied for this purpose.”[[68]](#footnote-68)

1. The ECtHR did not accept that complaint. Continuing to treat her as biologically male, the Court stated:

“As to the applicant’s inability to marry a woman, this does not stem from any legal impediment and in this respect it cannot be said that the right to marry has been impaired as a consequence of the provisions of domestic law.”[[69]](#footnote-69)

1. Like the Court in *Rees*, the ECtHR held that her inability to marry a man under English law was “in conformity with the concept of marriage to which the right guaranteed by Article 12 refers”.[[70]](#footnote-70) It resisted the argument that it should change its approach stating:

“Although some Contracting States would now regard as valid a marriage between a person in Miss Cossey’s situation and a man, the developments which have occurred to date ... cannot be said to evidence any general abandonment of the traditional concept of marriage. In these circumstances, the Court does not consider that it is open to it to take a new approach to the interpretation of Article 12 ... on the point at issue. It finds, furthermore, that attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of biological criteria for determining a person’s sex for the purposes of marriage, this being a matter encompassed within the power of the Contracting States to regulate by national law the exercise of the right to marry.” §46

1. Eight years later, in *Sheffield and Horsham v UK*,[[71]](#footnote-71) the Strasbourg Court had to deal with a challenge by a male-to-female transsexual person (who had previously been married as a male and who had a child by that marriage) against her post-operative inability to marry a man under English law. The Court re-iterated the approach to Article 12 adopted in *Rees* and *Cossey* and held that it was still not satisfied that there was a common European approach, especially with regard to:

“… the problems created by the recognition in law of post-operative gender status. In particular, the survey does not indicate that there is as yet any common approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection, or the circumstances in which a transsexual may be compelled by law to reveal his or her pre-operative gender.”[[72]](#footnote-72)

1. It was therefore the case that over a period spanning some twelve years, three challenges to the United Kingdom’s adherence to the *Corbett* approach failed. The ECtHR held that confining the sexual criteria for the right to marry to the individual’s biological characteristics fixed at the time of birth involved no violation of Article 12. It was a matter which fell within the United Kingdom’s margin of appreciation since there was no common European approach as to what such criteria should be and also no common approach as to how the repercussions of recognizing a post-operative change of gender should be handled. However, in each of those cases, the Court noted that questions regarding the rights of transsexual persons arose in an area of legal, social and scientific change, acknowledging the need to keep the position under review. Thus, in *Sheffield and Horsham v UK,[[73]](#footnote-73)* referring to its decision in *Rees*,it stated:

“The Court however expressed itself conscious of the problems faced by transsexuals, recalled the principle that the Convention had to be interpreted and applied in light of current circumstances and stated that the need for appropriate legal measures should be kept under review having regard particularly to scientific and societal developments.”

1. That the time for change had finally arrived was eventually acknowledged four years later by the ECtHR sitting as a Grand Chamber in *Goodwin v UK*.[[74]](#footnote-74) The applicant was a post-operative male-to-female transsexual who complained that although she currently enjoyed a full physical relationship with a man, she and her partner could not marry because the law treated her as a man. The United Kingdom Government argued that:

“... if any change in this important or sensitive area were to be made, it should come from the United Kingdom’s own courts acting within the margin of appreciation which this Court has always afforded. It also referred to the fact that any change brought the possibility of unwanted consequences, submitting that legal recognition would potentially invalidate existing marriages and leave transsexuals and their partners in same-sex marriages. Itemphasised the importance of proper and careful review of any changes in this area and the need for transitional provisions.”[[75]](#footnote-75)

1. The Court dealt in turn with each of the main points upon which its previous decisions against permitting transsexuals to marry in their acquired gender rested.
   1. Regarding its earlier view that excluding transsexuals was consonant with the wording of Article 12 as protecting marriage as the basis of the family, it now held (as noted in Section F.3 above) that the right to found a family was not a condition of the right to marry and therefore not an impediment.[[76]](#footnote-76)
   2. In the light of medical advances and social developments, it revised its view as to the adequacy of purely biological criteria for determining sexual identity. In discussing the applicant’s Article 8 complaint, it said:

“While it also remains the case that a transsexual cannot acquire all the biological characteristics of the assigned sex, the Court notes that with increasingly sophisticated surgery and types of hormonal treatments, the principal unchanging biological aspect of gender identity is the chromosomal element. ... It is not apparent to the Court that the chromosomal element, amongst all the others, must inevitably take on decisive significance for the purposes of legal attribution of gender identity for transsexuals.”[[77]](#footnote-77)

* 1. And in the context of the right to marry under Article 12, the Court stated:

“The Court is 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 of the Convention, 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 within Contracting States, 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.”[[78]](#footnote-78)

* 1. The Court had in its earlier decisions emphasised the absence of a common European approach as the basis for according a wide margin of appreciation to Contracting States which refused post-operative legal recognition to transsexuals. It now pointed out that the lack of common approach, as noted in *Sheffield and Horsham*, related more to the handling of the repercussions of legal recognition of a newly acquired gender, which it described as “hardly surprising” given that the states had widely diverse legal systems and traditions. It therefore decided to attach:

“...less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.”[[79]](#footnote-79)

* 1. It also reversed its previously expressed view that the restriction did not impair the essence of the right since there was no legal impediment against a post-operative male-to-female transsexual marrying a woman, stating as follows:

“The Court has therefore considered whether the allocation of sex in national law to that registered at birth is a limitation impairing the very essence of the right to marry in this case. In that regard, it finds that it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex. The 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 essence of her right to marry has been infringed.”[[80]](#footnote-80)

* 1. Moreover, since the exclusion of post-operative transsexual persons impaired the very essence of the right, the need for change could no longer be left within the margin of appreciation of Contracting States. To so hold:

“...would be tantamount to finding that the range of options open to a Contracting State included an effective bar on any exercise of the right to marry. The margin of appreciation cannot extend so far. While it is for the Contracting State to determine inter alia the conditions under which a person claiming legal recognition as a transsexual establishes that gender re-assignment has been properly effected or under which past marriages cease to be valid and the formalities applicable to future marriages (including, for example, the information to be furnished to intended spouses), the Court finds no justification for barring the transsexual from enjoying the right to marry under any circumstances.”[[81]](#footnote-81)

* 1. The Court had earlier pointed out that it did not underestimate

“... the difficulties posed or the important repercussions which any major change in the system will inevitably have, not only in the field of birth registration, but also in the areas of access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance.”[[82]](#footnote-82)

Its view, however, was that such difficulties were far from insuperable and that:

“...society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.”[[83]](#footnote-83)

1. The ECtHR’s decision in *Goodwin* was accepted by the United Kingdom Government and prompted it to announce that it would bring forward primary legislation allowing “transsexual people who can demonstrate that they have taken decisive steps towards living fully and permanently in the acquired gender to marry in that gender” and also dealing with other issues arising from legal recognition of acquired gender.[[84]](#footnote-84)
2. While the House of Lords in *Bellinger* held to the view that as a matter of statutory construction in domestic law, the *Corbett* biological criteria, fixed at the time of birth, remained determinative of who qualified as a “man” and a “woman” for the purposes of marriage, their Lordships accepted that the law so construed was incompatible with ECHR Articles 8 and 12. Lord Nicholls (with whom the other members of the House of Lords agreed) acknowledged this and held that a declaration of incompatibility with Articles 8 and 12 should be made:

“The question is whether non-recognition of gender reassignment for the purposes of marriage is compatible with articles 8 and 12. The answer to this question is clear: it is not compatible. The European Court of Human Rights so found in July 2002 in *Goodwin*, and the Government has so accepted. ...

If a provision of primary legislation is shown to be incompatible with a Convention right the court, in the exercise of its discretion, may make a declaration of incompatibility under section 4 of the Human Rights Act 1998. In exercising this discretion the court will have regard to all the circumstances. In the present case the government has not sought to question the decision of the European Court of Human Rights in *Goodwin* 35 EHRR 447. Indeed, it is committed to giving effect to that decision. Nevertheless, when proceedings are already before the House, it is desirable that in a case of such sensitivity this House, as the court of final appeal in this country, should formally record that the present state of statute law is incompatible with the Convention. I would therefore make a declaration of incompatibility as sought.”[[85]](#footnote-85)

1. We have in this judgment similarly held that as a matter of construction, the statutory intent underlying MCO section 20(1)(d), and by extension MO section 40, was to adopt the *Corbett* approach when section 1(c) of the Nullity of Marriage Act 1971 was reproduced in our statute book. We turn next to consider the constitutionality of those sections so construed.

**F.5 The Registrar’s main arguments**

1. The Registrar argues in the first place that at the times when the relevant constitutional instruments were promulgated (the ECHR in 1950, the International Covenant on Civil and Political Rights (“ICCPR”) – upon which Article 19(2) is founded – in 1966, the Joint Declaration in 1984, and the Basic Law in 1990), the framers should be assumed to have adopted a traditional approach to the nature of marriage and to the question of who qualifies as a “woman” for the purposes of the right to marry, along lines similar to those adopted by Ormrod J in *Corbett*.
2. The argument is that there is at present no reason to give “woman” a different meaning, especially in the absence of evidence that there has developed either a social consensus in Hong Kong or an international consensus among State Parties to the ICCPR in favour of permitting a transsexual woman like W to marry a man. On this basis, the Registrar submits that the Court should hold that there is no inconsistency between the capacity to marry under our domestic statutes construed along *Corbett* lines and the right to marry as laid down in Article 37 or Article 19(2).
3. Secondly, the Registrar reiterates that for the purposes of interpreting the constitution no less than of construing the Ordinances, the repercussions of legally recognizing the acquired gender of someone like W for the purposes of marriage are so far-reaching and complex that the Court should in any event refrain from intervening in a piecemeal fashion, whether by way of a remedial interpretation or otherwise, and should instead leave any changes to be made systematically by the legislature.

**F.6 Changes to the institution of marriage**

1. We are not persuaded that as at the dates when the various constitutional documents were promulgated, the framers would necessarily have accepted the approach adopted in *Corbett*. In any event, even if the hypothesis that they would have done so is reasonable, it is clear (as this Court has held) that the Basic Law (and the ICCPR as given constitutional effect by the Bill of Rights and Article 39 of the Basic Law) are living instruments intended to meet changing needs and circumstances.[[86]](#footnote-86) This is also true of the ECHR, as recognized by the ECtHR in *Tyrer v UK[[87]](#footnote-87)* and *A, B and C v Ireland*.[[88]](#footnote-88) Thus, in *Cossey v United Kingdom*,[[89]](#footnote-89) the Strasbourg Court acknowledged that departure from a position previously adopted may be warranted “in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions.” When the position in Hong Kong in 2013 is examined, it is in our view clear that there have been significant changes which call into question the concept of marriage adopted as a premise by Ormrod J and also the criteria which he deduced therefrom.
2. As noted above,[[90]](#footnote-90) the concept of marriage adopted in *Corbett* was derived from the classic description of a Christian marriage in *Hyde v Hyde* with an emphasis on procreative sexual intercourse being an essential purpose of the matrimonial union. While the legal definition of marriage referred to above remains the same, there have in many developed nations and in Hong Kong clearly been far-reaching changes to the nature of marriage as a social institution. This was cogently expressed by Thorpe LJ in his dissenting judgment in *Bellinger* in the Court of Appeal:

“...the world that engendered those classic definitions has long since gone. We live in a multi-racial, multi-faith society. The intervening 130 years have seen huge social and scientific changes. Adults live longer, infant mortality has been largely conquered, effective contraception is available to men and women as is sterilisation for men and women within marriage. Illegitimacy with its stigma has been legislated away: gone is any social condemnation of cohabitation in advance of or in place of marriage. Then marriage was terminated by death: for the vast majority of the population divorce was not an option. For those within whose reach it lay, it carried a considerable social stigma that did not evaporate until relatively recent times. Now more marriages are terminated by divorce than death. Divorce could be said without undue cynicism to be available on demand. These last changes are all reflected in the statistics establishing the relative decline in marriage and consequentially in the number of children born within marriage. Marriage has become a state into which and from which people choose to enter and exit. Thus I would now redefine marriage as a contract for which the parties elect but which is regulated by the state, both in its formation and in its termination by divorce, because it affects status upon which depend a variety of entitlements, benefits and obligations.”[[91]](#footnote-91)

1. It has of course never been a legal requirement that two individuals should be able to or wish to procreate children together as a condition of their getting married. People who are past child-bearing or child-begetting age, people who use contraceptives or have had themselves sterilised, and people who simply do not wish to have children, can get married, like anyone else. Developments such as those referred to by Thorpe LJ go further. They indicate how, taking such changes as a whole, the institution of marriage has evolved so that in contemporary society, the importance attributed by Ormrod J to procreation as the essential constituent of a Christian marriage has much diminished. Men and women who decide to share their lives together now exercise far greater choice in deciding whether to marry at all, whether to have children, how their property should be dealt with and indeed, whether they should remain together as a couple. While many in society will still no doubt regard procreation as of great importance to a marriage, many others will take a different view. Many people now marry without having children, while many others have children without getting married, neither group attracting social opprobrium.
2. In *AG (CTH) v “Kevin and Jennifer”*,[[92]](#footnote-92) the Full Court of the Australian Family Court dealt with an argument which similarly sought to deduce biological criteria for sexual identity on the basis that procreation is an essential purpose of marriage:

“The real point of the Attorney-General's submission was to support an argument that pro-creation is one of the essential purposes of marriage. It was argued that it follows from this that the biological characteristics of a person are central to determining a person's status as a man or a woman. It was put that the historical importance of the sexual relationship in marriage remains and that it is because of this significance that the law continues to look to the physical attributes, and not the psychological or social attributes, of a person. It is therefore said that because of Kevin's biological inability to procreate, the marriage to Jennifer could not be a valid marriage.”[[93]](#footnote-93)

1. That argument was rejected, their Honours stating:

“Like the trial judge, we reject the argument that one of the principal purposes of marriage is procreation. Many people procreate outside marriage and many people who are married neither procreate, nor contemplate doing so. A significant number of married persons cannot procreate either at the time of the marriage or subsequently -- an obvious example being a post-menopausal woman.”[[94]](#footnote-94)

1. The developments mentioned above compel re-examination of the premise – that procreative sexual intercourse is an essential constituent of marriage – from which the *Corbett* biological criteria were deduced. In present-day multi-cultural Hong Kong where people profess many different religious faiths or none at all and where the social conditions described by Thorpe LJ by and large prevail, procreation is no longer (if it ever was) regarded as essential to marriage. There is certainly no justification for regarding the ability to engage in procreative sexual intercourse 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.

**F.7 The Corbett criteria re-considered**

1. If one leaves aside that premise, it is not easy to see any justification for confining the criteria for deciding who counts as “a woman” for marriage purposes to biological criteria fixed at birth, and ignoring the psychological, post-operative and social dimensions of the transsexual person’s sexual identity viewed at the time of the proposed marriage. Such a selective choice of criteria is particularly hard to justify in the light of significant medical advances in the treatment of transsexualism and important changes in the understanding of and social attitudes towards transsexual persons which have occurred over the last 40 odd years.

**F.7a Medical advances and changed societal attitudes**

1. When the applicant in *Corbett* had her SRS in 1960, such surgery was not readily available in the United Kingdom. She had to have it performed in Casablanca by a Dr Georges Burou who pioneered that surgical procedure. In *B v B*,[[95]](#footnote-95) the New York Court noted that in the 15 years before 1974, Dr Burou had performed some 700 male-to-female operations. When Ormrod J decided the *Corbett* case in 1970, it appears that SRS was not yet regarded by the medical community as the accepted therapy for severe cases of transsexualism. His Lordship noted that transsexuals “do not appear to respond favourably to any known form of psychological treatment” and commented that “consequently, some serious minded and responsible doctors are inclining to the view that such operations may provide the only way of relieving the psychological distress.”[[96]](#footnote-96)
2. Today, transsexualism is everywhere recognized as a condition requiring medical treatment, with diagnostic criteria approved by the World Health Organization. The therapeutic regimen spanning several years, involving psychiatric assessment, hormonal treatment, monitored “real life experience” and ultimately SRS, is not only readily available and well-developed, but is often provided by health authorities at public expense.[[97]](#footnote-97)
3. This is true of Hong Kong where, as noted above, the first documented SRS procedure was performed in 1981. In 1986, the Government set up the Gender Identity Team in the Psychiatric Unit of Queen Mary Hospital and, in 2005, treatment was made available to gender identity disorder patients throughout Hong Kong in line with the Hospital Authority’s district hospital clustering concept. And as Andrew Cheung J recorded in the present case:

“In 2005, the Government set up a ‘Gender Identity and Sexual Orientation Unit’ to handle gender identity and sexual orientation issues and to liaise with relevant non-government organisations in relation to the same. Amongst other things, the Unit is responsible for maintaining an enquiry and complaint hotline, keeping statistics and details of the enquiries and complaints for future reference, conducting research on gender identity and sexual orientation issues, and organising further promotional activities to promote equal opportunities on the ground of sexual orientation. It also serves as the secretariat of the Sexual Minorities Forum, a forum set up by the Government for policy review and formulation purposes. It provides a channel for non-government organisations and the Government to exchange views on human rights and other issues concerning sexual minorities (including transsexual persons) in Hong Kong.”[[98]](#footnote-98)

1. As we have noted, on completion of SRS, the Hospital Authority issues the patient with a letter certifying that the patient’s gender has been changed, enabling the patient to be issued with a new identity card and passport which reflect that change and which permit his or her acquired gender to be recognized for many other purposes. Present day practice shows how, in the 40 odd years since *Corbett*, official policies and societal attitudes have evolved, with post-operative transsexuals now being recognized as persons of their acquired gender for a whole range of purposes. This is of course not to suggest that transsexual men and women no longer face prejudice and hostile treatment in the tabloid press and elsewhere in society. Considerable advances have nonetheless been made.
2. The position of W in the midst of such changes may be considered. From an early age she has psychologically held the unchangeable perception of herself as a woman and then made a long and painful transition which involving surgical removal of the original male genital and gonadal organs; hormonal or surgical creation of female breasts; surgical construction of an artificial vagina which permits sexual intercourse with a man; learning to live in society as a woman; and obtaining official recognition as a female for the purposes mentioned above, although retaining male XY chromosomes. Having had access to surgical, hormonal and psychiatric treatment of undoubtedly greater sophistication than available in *Corbett’s* time, she may now properly be described as an individual who is psychologically, medically and socially a woman living and having a physical relationship with a man, although a woman who is unable to bear children. Of the three biological criteria applied in *Corbett* with exclusionary effect, the male genital and gonadal factors have been permanently eliminated and only the male chromosomal criterion remains.
3. We think it would be quite wrong to exclude such a transsexual person from the right to marry in her acquired gender by characterising her as a “pseudo-type of woman”, a term used by Nestadt J in *W v W*, a South African case decided in 1976.[[99]](#footnote-99)
4. We share the view expressed by the ECtHR in *Goodwin*[[100]](#footnote-100)that it is not at all apparent that this chromosomal element, amongst all the others, should take on decisive significance in the legal attribution of gender identity for transsexuals for the purposes of marriage. We respectfully agree with Thorpe LJ’s view in his dissenting judgment in *Bellinger*,[[101]](#footnote-101) that confining the test to physiological factors is manifestly incomplete, especially so where those factors are, after sex reassignment treatment, further confined to the chromosomal element. As Lockhart J put it:

“Sex is not merely a matter of chromosomes, although chromosomes are a very relevant consideration. Sex is also partly a psychological question (a question of self perception) and partly a social question (how society perceives the individual).” [[102]](#footnote-102)

**F.7b The importance of psychological and social factors as criteria**

1. The importance of the psychological and social dimensions of a transsexual person’s sexual identity is now far better understood than in *Corbett’s* time. It is evident from Ormrod J’s judgment that the psychological forces driving the transsexual to seek sex reassignment were then given little weight. The following passage is revealing:

“Socially, by which I mean the manner in which the respondent is living in the community, she is living as, and passing as a woman, more or less successfully. Her outward appearance at first sight was convincingly feminine but on closer and longer examination in the witness box it was much less so. The voice, manner, gestures and attitudes became increasingly reminiscent of the accomplished female impersonator. The evidence of the medical inspectors and of the other doctors who had an opportunity during the trial of examining the respondent clinically is that the body in its post-operative condition looks more like a female than a male as a result of very skilful surgery. Professor Dewhurst, after this examination, put his opinion in these words: ‘the pastiche of femininity was convincing.’ That, in my judgment, is an accurate description of the respondent.”[[103]](#footnote-103)

1. To liken a post-operative transsexual woman to a “female impersonator” and to describe her as representing a “pastiche of femininity” (just as much as describing her as a “pseudo-type of woman”) suggests an element of artifice and betrays a failure to recognize the fundamental importance and potency of the individual’s psychological compulsion as a determinant of her sexual identity, a compulsion which is widely acknowledged today.
2. As Lord Nicholls recognized in *Bellinger*:[[104]](#footnote-104)

“...Much suffering is involved for those afflicted with gender identity disorder. Mrs Bellinger and others similarly placed do not undergo prolonged and painful surgery unless their turmoil is such that they cannot otherwise live with themselves. Non-recognition of their reassigned gender can cause them acute distress.”

1. And as the ECtHR noted in *Goodwin*:

“...given the numerous and painful interventions involved in such surgery and the level of commitment and conviction required to achieve a change in social gender role, ... it [cannot] be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender re-assignment.”[[105]](#footnote-105)

1. That transsexual persons are willing to endure such a long and painful ordeal to acquire a body which conforms as far as possible with their self-perception and to struggle for social recognition in their acquired gender is clear evidence of the fundamental importance of the psychological factor as a determinant of their sexual identity. For the law to exclude that factor as a criterion is quite unjustifiable.

**F.7c The inadequacy of the Corbett criteria**

1. It follows from the foregoing discussion that, in our view, the *Corbett* criteria which underlie the construction of MCO section 20(1)(d) and MO section 40 must be regarded as too restrictive and should no longer be accepted. In addressing the question whether an individual like W qualifies as “a woman” so as to be entitled to marry a man, 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. We can see no good reason for the Court to adopt criteria which are fixed at the time of the relevant person’s birth and regarded as immutable. That is to adopt a blinkered view, looking only at circumstances existing at a time when the psychological element – which is so important to the sexual identity of transsexuals – was not manifest, and when the surgical and social transformation of the individual had not yet taken place. It is contrary to principle that the Court, in making the important determination of whether a transsexual person has in law the right to marry, should be prevented from taking account of all the available evidence.
2. In *AG (CTH) v “Kevin and Jennifer”*,[[106]](#footnote-106) the Full Court expressed a similar view:

“We have difficulty in understanding how the *Corbett* test can continue to be applied in face of the evidence, not only as to brain sex,[[107]](#footnote-107) but also as to the importance of psyche in determining sex and gender. The fact that these issues cannot be physically determined at birth seems to us to present a strong argument: first, that a child's sex cannot be finally determined at birth; and second, that any determination at that stage is not and should not be immutable.”

1. The inadequacy of the *Corbett* criteria was central to the ECtHR’s decision in *Goodwin* to hold that the English statute was incompatible with Article 12[[108]](#footnote-108) of the ECHR, an incompatibility which the House of Lords accepted in *Bellinger.* As we noted above,[[109]](#footnote-109) the ECtHR stated:

“The Court is 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 of the Convention, 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 within Contracting States, 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.”[[110]](#footnote-110)

1. To apply statutory criteria which are incomplete and which do not permit a full assessment of the sexual identity of an individual for the purposes of determining whether such person has the right to marry is inconsistent with, and constitutes a failure to give proper effect to, the constitutional right guaranteed by Article 37 and Article 19(2).
2. We have in Section A of this judgment, set out the factors which, Dr Ho Pui Tat identified as relevant to assessing the sexual identity of an adult individual. In our view, all of those factors ought properly to be taken into account as they exist at the time of the marriage or proposed marriage when ascertaining whether the individual concerned has the right to marry in his or her acquired gender. In Section H below, we address the question of what, after taking account of all such criteria, the determining test of who counts as “a woman” for marriage purposes should be. But before turning to that question, there is a further reason why the relevant statutory provisions, construed as endorsing the *Corbett* criteria, are unconstitutional.

**F.8 Impairing the very essence of the right**

1. As indicated above,[[111]](#footnote-111) while the right to marry is necessarily subject to legal rules regulating its exercise, such rules must be consistent with, and must not operate to impair the very essence of, the constitutional right. [[112]](#footnote-112)
2. The existing statutory provisions, construed as aforesaid, preclude W from marrying a man. In the light of the irreversible surgery which she has undergone to eliminate the original male genital and gonadal organs; and in the light of her implacable rejection of her male sexual identity, there is no question of her enjoying in any meaningful sense the right to marry by being able to marry a woman. The applicant in *Goodwin v UK* was in the same position and, as we have noted, the Grand Chamber decided that she had been denied the essence of the right to marry. It held:

“...that it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex. The 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 essence of her right to marry has been infringed.”[[113]](#footnote-113)

1. As the New Zealand Court in *AG v Otahuhu Family Court*,[[114]](#footnote-114) pointed out, “Once a transsexual has undergone surgery, he or she is no longer able to operate in his or her original sex.” And as the Australian Court recognized, after surgery rendering “the patient’s psychic association with the female sex ... strongly supported by anatomical changes”, it is “impossible to go back”.[[115]](#footnote-115)
2. All this applies to W and we conclude that MCO section 20(1)(d) and MO section 40, construed as endorsing the *Corbett* criteria, operate to prevent W from marrying at all. They are therefore provisions which unconstitutionally impair the very essence of the right to marry guaranteed by Article 37 and Article 19(2).
3. In the light of the aforesaid conclusions, it is unnecessary to embark upon a discussion of the extent, if any, to which W’s right to privacy under Article 14 under the Bill of Rights may support her constitutional right to marry.

**F.9 Consensus**

1. An argument which we should mention is one which was pressed by the Registrar. The submission is that, by analogy with the reluctance of the ECtHR, prior to its decision in *Goodwin*, to declare the United Kingdom’s position on transsexual marriage a violation of the right to marry protected by ECHR Article 12 because of the lack of a European consensus on the issue, this Court should be equally reticent to declare the relevant statutory provisions unconstitutional unless persuaded that there is a general consensus among the people of Hong Kong in favour of permitting such individuals to marry in their acquired gender. It is submitted that there is no evidence either of such social consensus or of an international consensus among countries which are signatories to the ICCPR.
2. We do not accept that argument, even assuming that such consensus can somehow be guaged. In the first place, we do not consider that the practice of the ECtHR in seeking a European consensus when considering the margin of appreciation has any bearing on the Court’s role in interpreting the HKSAR’s constitution in a case like the present. In *R (Al Skeini) v Defence Secretary*,[[116]](#footnote-116)Lord Rodger of Earlsferry’s explanation of the ECtHR’s practice by reference to the very nature and make-up of that Court highlights the very different situation of this Court (and of States Parties to the ICCPR). His Lordship put it thus:

“The essentially regional nature of the Convention is relevant to the way that the court operates. It has judges elected from all the contracting states, not from anywhere else. The judges purport to interpret and apply the various rights in the Convention in accordance with what they conceive to be developments in prevailing attitudes in the contracting states. This is obvious from the court's jurisprudence on such matters as the death penalty, sex discrimination, homosexuality and transsexuals. The result is a body of law which may reflect the values of the contracting states, but which most certainly does not reflect those in many other parts of the world.”

1. There is, moreover, a more fundamental objection to the consensus argument. As we stated in Section F.6 above, we of course accept that the Basic Law and the Bill of Rights are living instruments intended to meet changing needs and circumstances. However, it is one thing to have regard to such changes as a basis for accepting a more generous interpretation of a fundamental right and quite another to point to the absence of a majority consensus as a reason for denying recognition of minority rights. Thus, as we pointed out, in its case-law leading up to its *Goodwin* decision, the ECtHR acknowledged that a departure from a position previously adopted – involving the upholding of the United Kingdom’s then denial of the right to marry – may be warranted “in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions.” Such a departure involved expanding the reach of the right on the basis of societal changes.
2. Reliance on the absence of a majority consensus as a reason for rejecting a minority’s claim is inimical in principle to fundamental rights. The Chief Justice of Ireland, Murray CJ, made the point extra-judicially in the following terms:

“...The use of consensus as an interpretive tool is inherently problematic, not only because of any perceived inconsistency in the application of the doctrine by the [ECtHR], but fundamentally because the very application of a doctrine of consensus by a court required to adjudicate on fundamental rights begs important questions of legitimacy. How can resort to the will of the majority dictate the decisions of a court whose role is to interpret universal and indivisible human rights, especially minority rights?...”[[117]](#footnote-117)

**G. Conclusion as to construction and constitutionality**

1. For the reasons discussed, we conclude that the Registrar did not misconstrue MO section 40 or MCO section 20(1)(d). The statutory intention behind enactment of MCO section 20(1)(d) was to reproduce in our statute book section 1(c) of the Nullity of Marriage Act 1971, later re-enacted as section 11(c) of the Matrimonial Causes Act 1973, and thereby to import into Hong Kong the endorsement which the United Kingdom Parliament gave to the *Corbett* criteria for determining who was “a woman” for the purposes of marriage. Since MO section 40 (which does not have an English equivalent) covers materially the same ground as MCO section 20(1)(d), the Registrar’s approach was in accordance with the true construction of both of those provisions.
2. However, the *Corbett* criteria are incomplete in that they are limited to a person’s biological features existing at the time of birth and treated as immutable. They ignore the psychological and social elements of a person’s sexual identity and ignore any sex reassignment treatment that has occurred. As such, they do not permit a full and appropriate assessment of the sexual identity of a person to be made for the purposes of determining whether he or she has the right to marry. In adopting such restrictive criteria, the provisions are inconsistent with and fail to give proper effect to the constitutional right to marry. They are therefore unconstitutional.
3. Additionally, they are unconstitutional since they impair the very essence of the right to marry. Viewing the realities of W’s position, by denying a post-operative transsexual woman like her the right to marry a man, the statutory provisions in question deny her the right to marry at all. They are therefore unconstitutional for this additional reason.

**H. Relief**

**H.1 Further submissions**

1. Because of the possible ramifications of the judgment in other areas of the law, both parties have requested the Court to afford them the opportunity to make further submissions as to the exact terms of the declaration to be granted and whether it should have immediate effect in the event that the Court finds in favour of the appellant. We agree that such course is advisable. We should nonetheless indicate (i) what relief we consider the appellant to be entitled to in any event; (ii) which areas we think may helpfully be considered for consequential legislation and how some of the main issues might be approached; and (iii) what would follow in the event that no legislation is enacted.

**H.2 The relief to which W would be entitled in any event**

1. It is well-established that where the Court concludes that a piece of legislation is unconstitutional, it has a duty either to declare it invalid or, as noted above,[[118]](#footnote-118) to provide a remedial interpretation rendering the provision consistent with the constitution.[[119]](#footnote-119) This was stated in *Ng Ka Ling v Director of Immigration*,[[120]](#footnote-120) as follows:

“In exercising their judicial power conferred by the Basic Law, the courts of the Region have a duty to enforce and interpret that Law. They undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. The exercise of this jurisdiction is a matter of obligation, not of discretion so that if inconsistency is established, the courts are bound to hold that a law or executive act is invalid at least to the extent of the inconsistency.”

1. In this context, while we accept (as we explain below) that the legislature may potentially play a highly valuable and constructive role in making provision for certain legal consequences that flow from our ruling of unconstitutionality, we cannot accept the argument that the Court should “leave it to the legislature” and should not itself decide upon the constitutional validity of the provisions as (correctly) construed by the Registrar.
2. It follows that while we are prepared to await further submissions from the parties before finalising the Orders to be made and would be amenable to suspending the operation of such Orders for an appropriate period to give time for the enactment of legislation,[[121]](#footnote-121) we hold that it is necessary in principle that a remedial interpretation should be given to MCO section 20(1)(d) and MO section 40. It is a remedial interpretation which requires the references to “woman” and “female” to be read as capable of accommodating post-operative male-to-female transsexual persons for marriage purposes and as allowing account to be taken of the full range of criteria for assessing sexual identity, viewed at the date of the marriage or proposed marriage.
3. On that basis, we hold that a transsexual in W’s situation, that is, one who has gone through full SRS, should in principle be granted a declaration that, consistently with Article 37 of the Basic Law and Article 19(2) of the Bill of Rights, she is in law entitled to be included as “a woman” within the meaning of MO section 40 and MCO section 20(1)(d) and therefore eligible to marry a man. We would not seek to lay down a rule that *only* those who have had full gender reassignment surgery involving both excising and reconstructive genital surgery, qualify. We leave open the question whether transsexual persons who have undergone less extensive treatment might also qualify.
4. In adopting that approach, we are of course conscious of the need, acknowledged in Section F.7c above, to address the question of what, upon applying the full range of criteria for assessing a person’s sexual identity, the test or means for determining who counts as “a woman” for marriage purposes should be. That question is shortly to be addressed. However, in our view, a transsexual person who, as Dr Albert Yuen Wai Cheung explained, has been issued with a certificate that his or her gender has been changed on the basis that the original genital organs have been removed and some form of the genital organs of the opposite sex have been constructed, ought in any event to qualify as a person entitled to marry in his or her acquired gender.
5. We consider this a result which should be reached as a matter of constitutional principle. As the ECtHR stated in *Goodwin*: “...the very essence of the Convention is respect for human dignity and human freedom.” [[122]](#footnote-122) We agree with the observation of Lord Nicholls in *Bellinger[[123]](#footnote-123)* that recognising such an individual’s change of gender is necessary to avoid:

“... condemning post-operative transsexual people to live in what was aptly described by the European Court of Human Rights in the *Goodwin* case 35 EHRR 447 as an intermediate zone, not quite one gender or the other.”

**H.3 Areas which would benefit from legislative intervention**

1. As previously mentioned, it is likely that in most cases, no difficulty will be encountered in applying gender-specific statutory and other legal provisions to a person whose gender change has been legally recognized. To take a relatively trivial example, a transsexual woman who previously used the men’s toilet and changing facilities will now use such facilities reserved for women without breaking any laws[[124]](#footnote-124) regulating their use.
2. But we of course recognize that possibly difficult issues could arise in certain areas and it is with a view to allowing an opportunity for the Government and the legislature to consider enacting legislation to deal with such areas that we are prepared to suspend operation of the Orders to be made by the Court. We also recognize that in addressing such potential problems, it is necessary to strike a balance between the rights of transsexual persons and the rights of others who may be affected by recognition of the gender change. The necessary balance was considered extra-judicially by Lord Reed as follows:

“... for the law to ignore transsexualism, either on the basis that it is an aberration which should be disregarded, or on the basis that sex roles should be regarded as legally irrelevant, is not an option. The law needs to respond to society as it is. Transsexuals exist in our society, and that society is divided on the basis of sex. If a society accepts that transsexualism is a serious and distressing medical problem, and allows those who suffer from it to undergo drastic treatment in order to adopt a new gender and thereby improve their quality of life, then reason and common humanity alike suggest that it should allow such persons to function as fully as possible in their new gender. The key words are ‘as fully as possible’: what is possible has to be decided having regard to the interests of others (so far as they are affected) and of society as a whole (so far as that is engaged), and considering whether there are compelling reasons, in the particular context in question, for setting limits to the legal recognition of the new gender.”[[125]](#footnote-125)

**H.4 The test for who qualifies as “a woman” for marriage purposes**

1. The first area in which legislative intervention would, in our view, be highly beneficial involves establishing the means for deciding who qualifies as “a woman” or “a man” for marriage and other purposes.
2. Two main approaches to deciding that question in the context of marriage have emerged. The first involves the formulation by judges of some test – usually involving the drawing of a line at some point in the sex reassignment process – for marking the stage at which a gender change is recognized. The second approach involves establishing a gender recognition procedure whereby each case is examined with a view to certification by an expert panel without necessarily adopting any bright line test. The latter approach can obviously only be achieved by legislation.
3. The first approach often involves the court drawing the line at the point where surgery is performed. This is understandable since the preceding hormonal and psychiatric treatments are generally reversible, while sex reassignment surgery is not. However, there are stages of such surgery to be considered: Is it enough that the individual’s original genital organs have been removed? Must the surgery extend to the construction of some form of the genital organs of the acquired gender? Must those organs be such as to permit sexual intercourse in the acquired gender?
4. A few examples of how judges have responded to such questions may be mentioned. In the Australian case of *Secretary, Dept of Social Security v “SRA”*[[126]](#footnote-126) the line was drawn between pre- and post-operative transsexuals, with Black CJ regarding “post-operative” cases as comprising only those where both removal and reconstruction of external genitalia have taken place:

“Where through medical intervention a person born with the external genital features of a male has lost those features and has assumed, speaking generally, the external genital features of a woman and has the psychological sex of a woman, so that the genital features and the psychological sex are in harmony, that person may be said, according to ordinary English usage today, to have undergone a sex change.”

1. The majority in the Court of Appeal in *Bellinger*,[[127]](#footnote-127)recorded that a similar test had been adopted in German legislation which, after laying down certain preconditions, required the person to have “undergone an operation by which clear resemblance to the other sex has been achieved.”
2. In *MT v JT*,[[128]](#footnote-128) a more demanding test was adopted by a New Jersey Court. The post-operative individual was required to have “sexual capacity” in his or her acquired gender, meaning “the physical ability and the psychological and emotional orientation to engage in sexual intercourse as either a male or a female.” Drawing the line at that point excluded a female-to-male transsexual who had had a hysterectomy and mastectomy but who had not received any male organs and was incapable of performing sexually as a male.[[129]](#footnote-129)
3. Such an outcome may be thought to be somewhat harsh, especially as it affects female-to-male transsexuals. This was recognized in the New Zealand case of *AG v Otahuhu Family Court*,[[130]](#footnote-130) where the suggestion was made that less exacting tests might perhaps be adopted in some contexts while retaining the more demanding tests for the purposes of marriage:

“... there may need to be different criteria in respect of different circumstances, involving the sex reassignment of any one individual. ... A pre-operative transsexual who nevertheless dresses and behaves in the assigned sex may be accepted in that sex for employment and social purposes, and for documents such as driving licences. It may not be appropriate for such a person whose genitals do not correspond with the sex of assignment to be able to marry in that sex.”

1. Some form of line-drawing is probably the only feasible approach if it is left to judges to determine what the test should be. While we have no reason to think that those jurisdictions which have followed that route have experienced any particular difficulties, it is an approach which has evident disadvantages. It would be highly undesirable to formulate different tests for different purposes (as suggested in the *Otahuhu* case) so that a person would only sometimes be recognized as an individual of his or her acquired gender. That is, indeed, to some extent the unsatisfactory position we have in Hong Kong at present. On the other hand, a bright line test applied universally is inevitably likely to produce hard cases in certain circumstances unless special provision is made. Moreover, as Lord Nicholls points out,[[131]](#footnote-131) drawing the line at the point where full SRS has been undertaken may have an undesirable coercive effect on persons who would not otherwise be inclined to undergo the surgery.
2. It is with such disadvantages in mind that we have refrained, at least at this stage, from attempting any judicial line-drawing of our own, contenting ourselves with declaring that a person in W’s post-operative situation does qualify and leaving it open whether and to what extent others who have undergone less extensive surgical or medical intervention may also qualify.
3. The second approach, involving legislative intervention, would in our view, be distinctly preferable. The legislature could set up machinery for an expert panel to vet gender recognition claims on a case-by-case basis and also to deal with some of the other legal issues mentioned below. A compelling model may readily be found in the United Kingdom’s Gender Recognition Act 2004 (“GRA 2004”) which, it will be recalled, was being prepared when *Bellinger* was decided in the House of Lords. The approach of the Act was then described by Lord Nicholls as “primary legislation which will allow transsexual people who can demonstrate they have taken decisive steps towards living fully and permanently in the acquired gender to marry in that gender”.[[132]](#footnote-132)
4. True to that description, the GRA 2004 does not lay down a bright line test for when a transsexual person does or does not qualify for recognition in his or her acquired gender. Instead, the Act sets up a panel with legal and medical members which hears applications for gender recognition and requires the panel to grant a gender recognition certificate :

“... 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 [which lays down the requirements regarding medical evidence and certain other supporting documents].”

1. If a full gender recognition certificate[[133]](#footnote-133) is issued, the person’s gender becomes for all purposes the acquired gender, save that this does not “affect things done, or events occurring, before the certificate is issued; but it does operate for the interpretation of enactments passed, and instruments and other documents made, before the certificate is issued (as well as those passed or made afterwards)”.[[134]](#footnote-134)

**H.5 Other areas of the law where legislative intervention would be beneficial**

1. As the GRA 2004 indicates, several other areas exist where legislative regulation would be particularly valuable. One prominent issue involves the impact of a legally recognized gender change on an existing marriage. For example, a male-to-female transsexual may be married to a woman before undergoing sex reassignment treatment qualifying her for legal recognition in her acquired gender as a woman. What impact would that have on the marriage and on the existing wife’s rights (and, if there are children, on the children’s rights)? Does the transsexual woman retain the rights and duties of a husband and father? If the couple wish to end the marriage, does the gender change provide a ground for doing so? No doubt the courts could work out the answers to such questions as they arise by applying existing legal provisions, but it would obviously be far preferable to have a legislative solution worked out in advance.
2. By way of illustration, the GRA 2004, provides in various ways for such a situation. If the applicant is married, the gender recognition panel can only grant an interim certificate and a full certificate can only subsequently be issued where the marriage is annulled or dissolved. The Act makes the issue of an interim gender recognition certificate a ground for treating the existing marriage as voidable, enabling the parties to annul the marriage and giving the Family Court full powers to deal with ancillary relief. It makes it clear that the change in gender does not affect the status of the person as father or mother of a child.
3. Perusal of the GRA 2004 indicates that legislative intervention would also be beneficial in areas which include (apart from marriage and parenting) entitlement to benefits and pensions, discrimination, succession, the position of trustees administering trusts, sport, the application of gender-specific offences and recognition of foreign gender change and marriage. In respect of all these areas, the Act provides a practical model for possible approaches to dealing with legal issues which could arise.
4. Furthermore, as that Act illustrates, questions of disclosure could beneficially be dealt with by legislation. Again, simply by way of illustration, it protects information concerning a person’s gender before it became the acquired gender subject to rules and procedures as to when such information may be disclosed.
5. Plainly, in any legislative scheme, cases may arise where certain legal ramifications of recognizing a person’s acquired gender have not been foreseen. To cater for such eventuality, the GRA 2004 empowers a responsible minister to make orders modifying the operation of any enactment or subordinate legislation in relation to persons whose gender has changed.[[135]](#footnote-135) The court’s are of course accustomed to dealing with such issues.
6. The object of this discussion is simply to draw attention to the sorts of questions which may arise in consequence of this Court’s decision as to unconstitutionality and to indicate how legislation would be beneficial in addressing such issues. It is fortunate that existing models which are readily adaptable to Hong Kong exist so that the task of providing a legislative framework is less daunting that it might otherwise be. But it is of course entirely a matter for the legislature to decide whether such legislation should be enacted.

**H.6 If there is no legislation**

1. If such legislation does not eventuate, it would fall to the Courts, applying constitutional principles, statutory provisions and the rules of common law, to decide questions regarding the implications of recognizing an individual’s acquired gender for marriage purposes as and when any disputed questions arise. That would not, in our view, pose insuperable difficulties.
2. In respect of the present appeal, we have indicated in Section H.2 above, the nature of the relief which we consider W entitled to in principle. Assuming that having taken account of further submissions from the parties, the Court grants W a declaration along the lines indicated below and suspends its operation for an appropriate period, such declaration would in principle come into effect in any event at the expiry of that period. At that stage, supporting consequential legislation may or may not be in place but W’s entitlement to appropriate relief should not be affected.

**H.7 Conclusion**

1. We would accordingly direct that the parties be at liberty to lodge within 21 days from the date of this judgment, submissions in writing in respect of the appropriate Orders to be made in the light of the Court’s judgment and also submissions on costs, with liberty to file written submissions in reply, if any, within 14 days thereafter.
2. Subject to any modifications which the Court may consider warranted in the light of such submissions and subject to the question of costs, we would make the following Orders, namely:
   1. That the appeal be allowed;
   2. That a Declaration be granted that, consistently with Article 37 of the Basic Law and Article 19(2) of the Hong Kong Bill of Rights, section 20(1)(d) of the Matrimonial Causes Ordinance and section 40 of the Marriage Ordinance must be read and given effect so as to include within the meaning of the words “woman” and “female” a post-operative male-to-female transsexual person whose gender has been certified by an appropriate medical authority to have changed as a result of sex reassignment surgery;
   3. That a Declaration be granted that the appellant is in law entitled to be included as “a woman” within the meaning of section 20(1)(d) of the Matrimonial Causes Ordinance and section 40 of the Marriage Ordinance and is accordingly eligible to marry a man;
   4. That the Declarations in paragraphs (b) and (c) shall not come into effect until the expiry of 12 months from the date of this Order.

**Mr Justice Chan PJ：**

1. I would, with respect, reject the appellant’s arguments on both the statutory construction issue and the constitutional issue and dismiss her appeal.
2. For the reasons which I shall seek to explain below, I am not persuaded that there is justification for extending the meaning of “marriage” in art 37 of the Basic Law to include a transsexual marriage. However, I can see a strong case for a comprehensive review of the relevant legislation with a view to propose changes in the law concerning the problems facing transsexuals as soon as practicable.

***The statutory construction issue***

1. On the statutory construction issue, I agree, for the reasons given by the courts below and the reasons discussed in the joint judgment of Chief Justice Ma and Mr Justice Ribeiro PJ, that the appellant’s argument cannot be accepted. In my view, it is clearly the intention of the legislation to adopt the approach in *Corbett v Corbett* [1971] P 83 for the purpose of marriage and that “man” and “woman” in s.40 of the Marriage Ordinance, Cap 181 and also s.20(1)(d) of the Matrimonial Causes Ordinance, Cap 179, mean a biological man and a biological woman. As a matter of statutory construction, these words are not capable of being given an extended meaning to cover a transsexual man or woman.

***The constitutional issue***

1. On the constitutional issue, it is the appellant’s case that she has a right to marry under art 37 of the Basic Law (art 37) and art 19(2) of the Bill of Rights (art 19(2)). She accepts that “marriage” under these constitutional provisions refers to a union between a man and a woman. However, it is argued that she is a woman and should be recognized as such for the purpose of marriage as provided in these constitutional provisions and that if s.40 is interpreted as not permitting her to marry on the ground that she is not a biological woman and cannot marry a biological man, this provision (together with s.20(1)(d)) is incompatible with art 37 and art 19(2). She asks the Court either to strike down or apply an appropriate remedial interpretation to these legislative provisions.

***The relevant articles***

1. Art 37 provides: “The freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law.” Art 19(2) of the Bill of Rights provides: “The right of men and women of marriageable age to marry and to found a family shall be recognized.”
2. For the purpose of the arguments in this case, it is accepted that art 19(2) by expressly referring to men and women does not add anything to the appellant’s argument on art 37. In the discussion which follows, for the sake of clarity, I shall mainly deal with art 37.
3. The appellant also relies on art 14 of the BOR which protects her right to privacy. However, as indicated by counsel, art 14 is not argued as a separate ground but is relied on in support of the right to marry argument.

***The right to marry under art 37***

1. The appellant’s contention that she has a right to marry under art 37 raises the prior question of what is the nature of the right to marry under this provision. As A Cheung J (now Cheung CJHC) and the Court of Appeal pointed out, this is not a case of restriction on the right to marry; it is a case of what that right entails. Since it is not disputed that “marriage” in art 37 refers to a union between a man and a woman, the dispute turns on the meaning of “man” and “woman” for the purpose of this article. In effect, the question raised is whether on the true construction of art 37, “man” and “woman”, the parties to a marriage, can be given a meaning to include a transsexual man or transsexual woman.
2. The meaning contended for by the appellant of “man” and “woman” is different from the ordinary meaning of these words. It amounts to a radical change to the traditional concept of marriage. It also represents a departure from the domestic law as it was and still is which must have been intended to be the basis of art 37 when it was first enacted.

***The ordinary meanings of man and woman***

1. The ordinary meanings of “man” and “woman” for the purpose of marriage refer respectively to a biological man and a biological woman capable of producing children. This accords with the common understanding of these words and is also reflected in their meanings in the dictionary. These words do not include a post-operative transsexual man and woman, as submitted by the appellant.
2. There is no evidence that in Hong Kong, these words have acquired any new contemporary meanings which are different from what is commonly understood by these words. Neither were the House of Lords in *Bellinger v Bellinger* [2003] 2 AC 467 able to discern evidence of such a change in contemporary usage in the UK (#62). But contrast the situation in Australia as discussed by the Full Court of the Family Court in *Kevin and Jennifer* [2001] Fam CA 1074 in which it was held that there was evidence that the contemporary meaning of these words in Australia has changed. Obviously, the situation varies in each country, depending on its social and cultural conditions.

***The concept of marriage***

1. The meaning contended for by the appellant will also have an extremely important effect on the concept of marriage. Marriage has been generally recognized as the basis of the family and the family is an essential unit of society. Although there are men and women who do not go through marriage, it is still regarded as an important social institution. It has a long history and in many countries, also a religious and cultural background. As Lord Nicholls remarked in *Bellinger* #46, marriage “is deeply embedded as a relationship between two persons of the opposite sex.” People such as Catholics and Christians, and if I may add, traditional Chinese, marry for the purpose of procreation, although there are people who marry for other purposes, such as mutual help and companionship.
2. Because there are people who get married and set up their families, society finds it necessary to have a marriage institution which is regulated by the law. The marriage institution confers legal status from which follows practical and legal consequences affecting many areas of life (Lord Nicholls in *Bellinger* #28). See also Lord Hope in #58. Marriage confers legal status not only on the married couple, but also on their children and their relatives. It is difficult and unrealistic to consider marriage to be entirely unconnected with procreation.
3. There is no evidence that social attitudes in Hong Kong on the institution of marriage have changed to the extent that this concept of marriage has been abandoned or generally and substantially weakened. As I shall seek to demonstrate later, the traditional concept of marriage was one of the main bases on which the European Court of Human Rights (ECHR) in the cases prior to *Goodwin v UK* (2002) 35 EHRR 18, held that there was no violation of the right to marry by limiting the institution of marriage to exclude transsexual men and women; and it was the change in this concept in Europe and the UK as perceived by that court which persuaded it to come to a different conclusion in *Goodwin*.

***The state of domestic legislation***

1. When the Basic Law was drafted in the 1980s and promulgated in 1990, the meaning of marriage in art 37 must have been informed by the state of the domestic legislation at the time. (See the relevance of the state of domestic law as part of the context for interpretation of a constitutional provision in *Chong Fung Yuen v Director of Immigration* (2001) 4 HKCFAR 211.) The right to marry under that article was clearly intended to refer to the right to marry of a man and woman as it was then understood. The case law and statute law have adopted the *Corbett* approach, i.e. applying only the biological criteria, in deciding whether a party to a marriage is a man or woman. That was the basis of the right to marry intended to be protected under art 37 when it was drafted/adopted and promulgated.
2. It is submitted, however, that a constitutional instrument is a living instrument and the meaning of its provisions should be adapted to meet changing needs and circumstances. (*Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4*,* p.28D). Lord Pannick QC for the appellant argues that an updated interpretation should be given to art 37 because of changed circumstances: first, the *Corbett* approach can no longer be relied on as the only criteria and secondly, international jurisprudence shows that there have been developments regarding the recognition of transsexual marriages in many countries.
3. The *Corbett* approach has been heavily criticized for decades in numerous cases as being outdated and inadequate in the light of the advancement made in medical science which suggests that the psychological factor may become an important or even overriding consideration later in life, say, at the time of marriage. However, this latter factor is also regarded as not entirely satisfactory because there is no certainty as to the stage at which psychological changes have become a dominant or decisive factor in determining whether the party has become a person of the sex of his or her choice for the purpose of marriage. This will have to depend on the condition of the individual concerned.
4. One would readily acknowledge the force of the criticisms on the *Corbett* approach and its shortcomings. They have been discussed at length in the joint judgment of Ma CJ and Ribeiro PJ and I do not propose to repeat them. (See, for instance, the comments made by Thorpe LJ in his dissenting judgment in the Court of Appeal in *Bellinger* (#155)). Even if the *Corbett* approach can no longer be regarded as satisfactory, whether the law should be changed and how it could be improved should, as Lord Nicholls and Lord Hope emphasized in *Bellinger,* be left to the legislature.
5. In the present case, we are of course dealing with a different question: the interpretation of art 37 – whether legislation adopting the *Corbett* approach is incompatible with this article. And this brings us to Lord Pannick’s the second main point: whether art 37 should be given an updated interpretation in the light of changed circumstances.
6. Until the present case, the position has always been that the right to marry protected under art 37 is understood to refer to the right to marry under the current legislation which was based on the *Corbett* approach. While a constitutional provision can be given an updated meaning if the circumstances so require, there must be strong and compelling reasons for the Court now to depart from what has been generally understood to be the law on a matter as fundamental as the marriage institution which has its basis in the social attitudes of the community. A firm line has to be drawn between giving an updated interpretation to a constitutional provision to meet the needs of changing circumstances on the one hand and making a new policy on a social issue on the other. The latter is not the business of the court. For the former function, the court must be satisfied that there is sufficient evidence to show that the present circumstances in Hong Kong are such as to require the court to construe art 37 differently from the law which formed the basis on which this article was drafted/adopted. In my view, in the absence of such evidence, the Court should not invoke its power of constitutional interpretation to make such a radical change.

***The international jurisprudence***

1. Lord Pannick submits that circumstances have changed in Europe and internationally which strongly indicate that a different approach should now be taken in Hong Kong to include a transsexual man and woman for the purpose of marriage. Counsel has referred us to a number of decisions in other jurisdictions in support of his submission. He has also drawn the Court’s attention to legislative changes in many countries in this area of the law, such as Australia, New Zealand, Singapore, Canada and most of the states in the United States. With respect, I would approach these authorities and legislative changes with caution since the social conditions in different countries are obviously not the same. The background to these changes and the extent of such changes in each country are not entirely clear. It is important to note that the discussions in these cases also show that there was divergence of opinions over the proper treatment of transsexuals in different countries.
2. Counsel relies in particular on *Goodwin* in which the ECHR, departing from its previous decisions, held that the UK was in breach of art 12 of the European Convention (which is similar to art 37) by refusing to allow the post-operative transsexual complainant to get married under the UK marriage legislation. (It is accepted that the jurisprudence on similar provisions in the ICCPR is of less significance to the present case.) It is submitted that *Goodwin* is of great persuasive authority for the present case and should be followed.

***Pre-Goodwin decisions***

1. *Goodwin* did not follow *Rees v UK* (1987) 9 EHRR 56; *Cossey v UK* (1990) 13 EHRR 622*;* and *Sheffield and Horsham v UK,* (1998) 27 EHRR 163. In these 3 cases, the ECHR was asked to adjudicate on the complaints by post-operative transsexuals against the UK Government for violating their right to respect for private life and/or the right to marry (art 8 and 12 of the European Convention). It was alleged by the complainant in each case that the UK Government had refused to alter the register of birth or issue a new birth certificate to reflect their sex change or prohibited him or her to marry. In all these cases, the ECHR held that there was no violation of both articles.
2. An examination of the reasons given by the ECHR in these cases clearly shows that in considering the right to marry under art 12 of the European Convention, the court held that the traditional concept of marriage was of crucial importance. In *Rees*, the ECHR emphasized that “the right to marry guaranteed by Article 12 refers to *the traditional marriage between persons of opposite biological sex*” (#49) (my emphasis). It took the view that restricting the right to marry to persons of opposite biological sex cannot be said to have the effect of reducing the right to such an extent as to impair the very essence of the right (#50). This reasoning was adopted without question in *Cossey* (#43 to 47) and again in *Sheffield* (#66 to 68).
3. In *Cossey,* the ECHR made two further points. First, in relation to the inability of a transsexual person to marry a man or a woman, the court’s answer (which was based on the same reasoning) was this (#45):

“As to the applicant’s (a male to female post-operative transsexual) inability to marry a woman, this does not stem from any legal impediment and in this respect it cannot be said that the right to marry has been impaired as a consequence of the provisions of domestic law.

As to her inability to marry a man, the criteria adopted by English law are in this respect in conformity with the concept of marriage to which the right guaranteed by Article 12 refers.”

1. Secondly, the court recognized the developments in some Contracting States in allowing the marriage of a transsexual person. However, it found that such developments “cannot be said to evidence any *general abandonment of the traditional concept of marriage*” (my emphasis) and added that “in these circumstances, the Court *does not consider that it is open to it to take a new approach* to the interpretation of Article 12” (#46) (my emphasis). Clearly, the traditional concept of marriage was considered as a significant if not decisive factor.

***Developments before Goodwin***

1. As noted above, in *Cossey*, the ECHR recognized that there were developments in some member states regarding transsexual marriages and in *Sheffield*, the court noticed “a clear trend” among European countries moving towards acknowledgement of gender reassignment. It also acknowledged that “transsexualism raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States” (#58). However, the court found no “common approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage.”(#57) In both *Cossey* and *Sheffield*, the ECHR did not find the evidence sufficient to justify a departure from its previous decisions. However, it is clear that the developments in Europe had gathered momentum after these cases.
2. In the UK, prompted by *Sheffield*, the Government took steps to review the problems facing transsexuals in the UK. In April 1999, it set up an Interdepartmental Working Group on Transsexual People (Working Group) to conduct a comprehensive study and review of the medical condition, current practice in other countries and the state of the English law. In April 2000, the Working Group produced a report which was presented to Parliament and copies were sent to the public. It proposed different options including the granting of full legal recognition of the reassigned gender subject to certain criteria and procedures. It suggested that the Government should seek public consultation before making any decision to move forward with its proposals. Yet no further progress was made on these proposals and this had drawn further criticisms from the Court of Appeal in *Bellinger* (#96).
3. The ECHR was understandably concerned with the developments in its member states. These developments would reflect any change in the social attitudes of European countries towards the institution of marriage which must be an important factor in construing the nature of the right to marry. As the court said in *Goodwin*, it “must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved” and it was necessary “to maintain a dynamic and evolutive approach” (#74).

***The decision in Goodwin***

1. In *Goodwin*, the ECHR, having examined further evidence of the developments in Europe (including the results of Liberty’s 1998 study) and the advancement of medical science, was persuaded that it should change its previous view on both art 8 and art 12.
2. In that case, the applicant (a male to female transsexual) complained that despite the warnings by the ECHR, the UK Government had, in breach of her right to respect for private life under art 8, failed to take constructive steps to address the problems she was facing. She alleged that she had suffered discrimination, humiliating experiences and abuses. It was held that the UK Government could no longer rely on the margin of appreciation (#93).
3. It is necessary to examine the court’s reasons for holding that there was a violation of the right to marry under art 12. It is important to note the following reasons (#100). First, it could no longer be assumed that the determination of gender for the purpose of marriage must be made by purely biological criteria. Second, there had been major social changes in the institution of marriage. Third, there were dramatic changes brought about by developments in medicine and science in the field of transsexuality. Fourth, there was greater social acceptance by the medical profession and the health authorities of transsexuals who could now assume a proper social role. The court drew support in coming to this conclusion from the removal of the reference to “man and woman” in art 9 of the newly adopted Charter of Fundamental Rights which arguably might suggest that this was a further step moving away from the traditional concept of marriage.
4. With regard to the first reason, I do not think this is anything new: the *Corbett* approach has been criticized as inadequate for many years. As to the third reason, I do not think medical science in the field of transsexualism has made any significant development since the decision in *Sheffield* in 1998 and in any event, the more recent medical views are either inconclusive or uncertain.
5. In my view, it was the evidence (which was accepted by the court) of the “major social change” in the institution of marriage and the “greater social acceptance of transsexuals” in its member states which had persuaded the ECHR to change its mind. Because of this major social change in the institution of marriage, the court was no longer able to place emphasis (as it did in previous cases) on the traditional concept of marriage as a basis for holding there was no violation of the right to marry. The greater social acceptance of transsexuals also reflected a significant change in the social attitudes among European countries towards transsexuals. This was seen as a material factor. It is also important to note that the court attached considerable weight to the Report of the UK Working Group and its recommendations for change. The UK was then obviously ready to move forward.
6. In the light of these major changes, the ECHR was then able to conclude (contrary to what it said in *Cossey* quoted in paragraph 175 above) that the national legislative limitation based on *Corbett* resulting in the inability of a transsexual to marry did have the effect of impairing the very essence of the right to marry:

“In that regard, it finds that it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex. The 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 essence of her right to marry has been infringed.” (#101)

1. The above analysis clearly demonstrates that the catalyst for the reversal of opinion by the ECHR was the clear evidence of a shifting away from the traditional concept of marriage and a greater social acceptance of transsexualism within Europe and in the UK. In the light of these changes, it makes ample sense to construe art 12 as to confer upon transsexuals the same right to marry as enjoyed by biological men and women which the court had prior to that case consistently declined to extend to them.

***Giving extended meaning to art 37?***

1. While the situations overseas are clearly relevant and must be taken into account in the interpretation of art 37, one must bear in mind that the culture and social conditions in each place are not the same. For the purpose of the interpretation and application of the Basic Law, I think the principal consideration must be the circumstances in Hong Kong, just as the ECHR was more concerned with the situations among its member states.
2. In my view, the present position in Hong Kong is quite different from that in Europe and the UK when *Goodwin* was decided. While there was evidence of the changing attitudes in both Europe and the UK, I do not think there is sufficient evidence to show that the circumstances in Hong Kong are such as to justify the Court giving an interpretation to art 37 to include transsexual men and women for the purpose of marriage. As pointed out earlier, there is no evidence showing that for the purpose of marriage, the ordinary meanings of man and woman in Hong Kong have changed to accommodate a transsexual man and woman. More importantly, there is no evidence that the social attitudes in Hong Kong towards the traditional concept of marriage and the marriage institution have fundamentally altered. Nor is there evidence on the degree of social acceptance of transsexualism.
3. It must be recalled that in *Cossey*, the ECHR appeared to take the view that in the absence of evidence of a *general abandonment* of the traditional concept of marriage, it was not open to it to take a new approach to the interpretation of art 12 and in *Sheffield*, the emergence of a “clear trend towards acknowledgement of gender reassignment” was not considered by the ECHR to be sufficient to require a new interpretation of that article. I am far from satisfied that the present situation in Hong Kong has even reached that stage.
4. I would therefore agree with the conclusion of the judge and the Court of Appeal in rejecting the argument on the constitutional issue although I would hesitate in relying on the lack of “consensus”. Evidence of changing circumstances, especially changes in the social attitudes on controversial issues, is a very material factor in support of an updated interpretation. It is not the same as evidence of a consensus. Consensus is seldom relevant to interpretation and may never be achievable on these issues.
5. The Court’s power to give an updated interpretation to meet changing needs and circumstances must be exercised with great caution, especially where such interpretation has far reaching ramifications. I am not persuaded that a case has been made out in the present case to give such an interpretation to art 37.
6. More fundamentally, giving recognition to the reassigned gender for the purpose of marriage involves a change of social policy. In my view, the court’s power to give an updated interpretation is to react to changing circumstances and reflect changing social attitudes. The role of the court is to give effect to a change in an existing social policy, not to introduce any new social policy. The former is a judicial process but the latter is a matter for the democratic process. Social policy issues should not be decided by the court. As Lord Slynn said in *Fitzpatrick v Sterling Housing Association Ltd* [2001]1 AC 27, 33:

“When considering social issues in particular, judges must not substitute their own views to fill gaps. They must consider whether the new facts ‘fall within the parliamentary intention’”.

1. Furthermore, recognition of transsexuals for the purpose of marriage involves a major change in the law on the institution of marriage which calls for a comprehensive study and wide public consultation; it is only one aspect of the whole picture which needs to be investigated (Lord Nicholls in *Bellinger* #37).

***Need for comprehensive review***

1. I am mindful of the problems facing transsexuals. If their reassigned gender is not recognized, this may cause them great distress. The Government is already prepared to fund the treatment and surgery of transsexuals and to issue new identity cards for those who have acquired a new gender. There is no logical reason why full recognition should not be extended to enable them to marry in their reassigned gender. I can see the force of the reasoning of Ellis J in *AG v Otahuhu Family Court* [1995] 1 NZLR 603, 607:

“If society allows such persons to undergo therapy and surgery in order to fulfill that desire, then it ought also to allow such persons to function as fully as possible in their reassigned sex, and this must include the capacity to marry.”

1. Equally forceful is the argument of Judge Martens in his dissenting judgment in *Cossey* (#2.7)

“The principle which is basic in human rights and which underlies the various specific rights spelled out in the Convention is respect for human dignity and human freedom. Human 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. A transsexual does use those very fundamental rights. He is prepared to shape himself and his fate. In doing so he goes through 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… He demands to be recognized and to be treated by the law as a member of the sex he has won; he demands to be treated, without discrimination, on the same footing as all other females, or, as the case may be, males. This is a request which the law should refuse to grant only if it truly has compelling reasons.”

1. However, as I have discussed above, the consequence of legal recognition of transsexuals for the purpose of marriage is more than making changes for individual transsexual persons; it involves making changes to an important social institution.
2. In my view, there is a strong case for a comprehensive review of the relevant legislation with a view to propose changes in the law concerning the problems facing transsexuals as soon as practicable.

**Mr Justice Bokhary NPJ：**

1. Can a person who has undergone sex reassignment surgery marry as a person of the reassigned sex? In other words, can a post-operative transsexual marry in the reassigned capacity? I pause to mention that “sex reassignment” and “gender reassignment” are interchangeable expressions. The reassignment is of anatomic sex, not of what are sometimes referred to as biological factors.
2. The appellant W has undergone male-to-female sex reassignment surgery. She is in a relationship with a man. They wish to marry each other. So far, the courts (being the High Court at first instance and the Court of Appeal on intermediate appeal) have held that they cannot do so. The question has now reached us on final appeal.

***Transsexualism and sex reassignment surgery as a treatment for it***

1. Transsexualism is defined by the World Health Organization 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 surgery and hormonal treatment to make one’s body as congruent as possible with one’s preferred sex”. The evidence in this case shows that transsexualism is regarded as a medical condition for which sex reassignment surgery is an effective and appropriate treatment. And it was the medical condition which W, born male, was in prior to undergoing male-to-female sex reassignment surgery.
2. Following long periods of psychiatric and social assessment at the Castle Peak Hospital and “real life experience” living as a woman with professional supervision and therapy from that hospital, W underwent sex reassignment surgery in July 2008. The surgery was performed at the Ruttonjee & Tang Shiu Kin Hospitals which have issued a certificate stating that W’s gender is now female. Having funded her male-to-female sex reassignment surgery, the Hong Kong Government has issued to her a replacement identity card in which her sex is stated to be female.
3. One of the things said by the respondent the Registrar of Marriages is that it may not be easy to draw the line on what amounts to sex reassignment. I accept that there may be instances where the line may not be easy to draw. But I do not accept that the matter is attended by any such uncertainty as forces one to treat the expression “sex reassignment” as meaningless or prevents one from pronouncing on the effect in law of sex reassignment. Without attempting an exhaustive statement of what amounts to sex reassignment by surgery, I hold that anyone who has been certified by an appropriate medical authority as someone whose sex has been reassigned by surgery is to be seen in the eyes of Hong Kong law as a person of the reassigned sex. W has been so certified as female.

***Increasing international trend towards recognition***

1. The humanitarian considerations underlying claims of persons in W’s position were acknowledged by Lord Nicholls of Birkenhead in *Bellinger v Bellinger* [2003] 2 AC 467 at para. 34. There he spoke, insightfully as always, of the suffering that drives them to endure prolonged and painful surgery for relief from the turmoil in which they find themselves and of the acute distress that non-recognition of their reassigned gender can cause them. There is, he went on to note at para. 35, an increasing international trend towards recognizing gender reassignment and not condemning post-operative transsexual people to live in an intermediate zone, not quite one gender or the other. In all of these matters, I respectfully echo what Lord Nicholls has said. As to the plight of transsexual people in Hong Kong and the tragedy which has overtaken some of them, the valuable writings of Professor Robyn Emerton are there to be read. This country China, of which Hong Kong is a part, will be fully within the international trend to which Lord Nicholls referred if we in Hong Kong uphold the right of a post-operative transsexual to marry in the reassigned capacity. I say that because such a right is recognized in the Mainland.

***The statutes***

1. There are two statutes to be interpreted. They are the Marriage Ordinance, Cap. 181, and the Matrimonial Causes Ordinance, Cap. 179.
2. In so far as the Marriage Ordinance defines “marriage”, it does so by s 40. That section begins by saying, in subsection (1), that “[e]very marriage under the Ordinance shall be a Christian marriage or the civil equivalent of a Christian marriage”. And the section then goes on to say, in subsection (2), that “[t]he expression ‘Christian marriage or the civil equivalent of a Christian marriage’ implies a formal ceremony recognized by the law as involving the voluntary union for life of one man and one woman to the exclusion of all others”. A religion having been mentioned, it should be stressed that the question before the Court is one of secular law, and does not involve how things are regarded according to any religion.
3. The form of a marriage ceremony before the Registrar of Marriages, a deputy of that office-holder or a civil celebrant is provided for by s 21 of the Marriage Ordinance. This section refers to the “male party” and the “female party”.
4. Turning to the other statute calling for interpretation, namely the Matrimonial Causes Ordinance, the provision to be interpreted is s 20(1)(d) by which it is laid down that a marriage that takes place after 30 June 1972 shall be void if “the parties are not respectively male and female”.
5. Neither the Marriage Ordinance nor the Matrimonial Causes Ordinance defines the words “man”, “woman”, “male” or “female”.

***Right to marry***

1. Our constitution guarantees to persons here the right to marry and freedom from arbitrary or unlawful interference with privacy. That is done by the rights and freedoms that the Basic Law enumerates and therefore entrenches and those contained in the Bill of Rights which art. 39 of the Basic Law entrenches by incorporation. The right to marry is to be found in art. 37 of the Basic Law and art. 19(2) of the Bill of Rights. Freedom from arbitrary or unlawful interference with privacy is to be found in art. 14 of the Bill of Rights.

***Is a post-operative transsexual a person of the reassigned sex in the eyes of the family legislation of Hong Kong?***

1. Is a person who has undergone male-to-female sex reassignment surgery a “woman” and a “female” in the eyes of the family legislation of Hong Kong? W contends for an answer in the affirmative. If that answer is the right one, she can marry as she wishes. The respondent the Registrar of Marriages contends for an answer in the negative, which is the answer given by the courts below whose view W attacks and the Registrar of Marriages defends. Since the sex reassignment surgery which W underwent was male-to-female, the foregoing way is the one in which the question has been put in argument. But the answer would of course be the same whether the sex reassignment surgery is of the male-to-female kind or the female-to-male kind. So the question of statutory interpretation involved comes, as fully stated, to this: is a post-operative transsexual a person of the reassigned sex in the eyes of the family legislation of Hong Kong?

***If not***

1. If the answer has to be “No”, then the question of whether the legislation concerned is constitutional or unconstitutional would arise for decision.
2. It is argued on W’s behalf, with the contrary being argued on behalf of the Registrar of Marriages, that it would be unconstitutional for Hong Kong legislation to prohibit a post-operative transsexual from marrying in the reassigned capacity.
3. If W were to fail on the question of statutory interpretation but succeed on the question as to constitutionality, the legislation would have to be struck down. In the event of a striking-down, the Court’s obvious course would be to resort to the power of suspension identified, explained and exercised in *Koo Sze Yiu v. Chief Executive* (2006) 9 HKCFAR 441. Doing that the Court would suspend the striking-down order for an appropriate period so as to afford an opportunity for the passing of corrective legislation. Such legislation would enable a person who has undergone sex reassignment surgery to marry in the reassigned capacity.
4. None of that is to say that the constitution only enters the picture if and when the question of statutory interpretation is answered against W. The constitution is a constant presence in the law. It can crucially affect how legislation is interpreted. The courts will strive to give legislation such a reading as would bring it in line with the constitution. It is only if it is impossible to do so that the legislation concerned would be struck down, for striking-down is a course of last resort.

***Remedial interpretation***

1. If I had to confine the legislation concerned to an ordinary rather than a remedial interpretation, I would find it difficult to read the words of gender therein as including gender acquired by sex reassignment surgery. And if a non-inclusive reading would produce unconstitutionality, then the only possible alternative to striking-down would be an inclusive reading. That alternative would be available if it can be regarded as interpretation, albeit of a remedial kind, rather than something which goes beyond interpretation of any kind.
2. In *Goodwin v United Kingdom* (2002) 35 EHRR 447 the European Court of Human Rights, upholding the right of a post-operative transsexual to marry in the reassigned capacity, said (at para. 100) 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 within Contracting States, 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.”

That was said of course with reference to the European Convention on Human Rights and the Contracting States thereto. But I see the position in the same way in regard to Hong Kong and our constitution.

1. The Registrar of Marriages says that procreation is an important aspect of marriage. So it is. It may well be by far the most important aspect of marriage. But the ability to procreate is not a condition of the right to marry. Nor is the wish to procreate.
2. As to the question of consummation raised by the Registrar of Marriages, I do not accept that what a post-operative transsexual and a person of a sex opposite to the reassigned one are capable of doing cannot amount to consummation as a matter of law. Consummation is nonetheless consummation even though only made possible by surgery and incapable of leading to procreation. Although I do not require any authority to convince me of that, I should mention that I happen to find myself in agreement with the whole of what the English Court of Appeal said in *SY v SY (orse W)* [1963] P 37 including the part which was treated by Ormrod J in *Corbett v Corbett (orse Ashley)* [1971] P 83 as unpersuasive *dicta*. Whether or not what the learned judge considered *dicta* was in truth, as Lord Pannick QC for W submitted, an alternative *ratio* does not matter to my decision.

***Protection of minorities***

1. The Registrar of Marriages also raises the question of societal consensus in Hong Kong, saying that there is no evidence before the Court of any such consensus in favour of a post-operative transsexual marrying in the reassigned capacity. That is so, but nor is there any evidence of any such consensus against such a course. On a matter like this, it is doubtful that gathering and presenting reliable evidence of any societal consensus one way or the other would be at all easy.
2. Moreover, it is to be borne in mind that the present exercise is not to be confused with developing the law to meet new expectations. What is involved is a constitutionally guaranteed human right. One of the functions – perhaps by far the most important one – of constitutionally guaranteed human rights is to protect minorities. Why is there any need to guarantee a right to marry? After all, no society is likely to put impediments in the way of the majority entering into marriages as they like. The greatest and most urgent need for constitutional protection is apt to be found among those who form a minority, especially a misunderstood minority.

***Striking down and declarations of incompatibility contrasted***

1. In *Bellinger v Bellinger* it was by way of a declaration of incompatibility rather than by way of statutory interpretation that the House of Lords came to the aid of post-operative transsexuals. Rather than reading the legislation there concerned to permit a post-operative transsexual to marry in the reassigned capacity, their Lordships declared that the legislation, by reason of its not permitting that, was incompatible with the right to marry and the right to respect for private life. For at least two reasons, it is perfectly understandable why their Lordships intervened by way of a declaration of incompatibility rather than by way of statutory interpretation (even though s 3(1) of the Human Rights Act 1998 provides that “[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights”).
2. First of all, the British Government had already announced its intention to bring forward primary legislation which would allow transsexual people who can demonstrate that they have taken decisive steps towards living fully and permanently in the acquired gender to marry in that gender. This announcement was said by Lord Nicholls (at para. 26) to have “an important bearing on the outcome” of the appeal.
3. Secondly, a declaration of incompatibility under the Human Rights Act is by no means exactly the same thing as a striking-down order under an entrenched constitution. And as it seems to me, a remedial interpretation can, at least sometimes, amount to a considerably more radical course than a declaration of incompatibility. I say so for these reasons. A declaration of incompatibility may well result in corrective legislation. Indeed, it may result in such legislation very quickly. But, unlike a striking-down order, it does not nullify the legislation against which it was made. Nor does it impose any legal duty to introduce or pass corrective legislation at all let alone quickly. By a declaration of incompatibility the judiciary alerts the political branches of government to legislation which cannot be given a reading compatible with Convention rights, but ultimately still leaves the matter in the hands of those branches of government. A striking-down order, on the other hand, is truly a course of last resort in the fullest sense. It is a more radical course than a remedial interpretation – even where a period of *Koo* suspension is granted to afford an opportunity for corrective legislation.

***Right to marry in the reassigned capacity***

1. Neither the appellant W, the respondent the Registrar of Marriages nor the intervener the International Commission of Jurists has addressed us on the question of same-sex marriage. I proceed in this case on the footing that the right to marry guaranteed by our constitution is a right to marry a person of the opposite sex. Such a right is undoubtedly a human right. To say that it has no application to post-operative transsexuals is to deny their humanity. So it does apply to them. In what way? To say that what it guarantees is a right to marry in the pre-reassignment capacity would run counter to the purpose of sex reassignment surgery as a treatment for transsexualism. It is inconceivable that a human right would operate in such an inhumane way. What is left? Quite simply and obviously, the right to marry in the reassigned capacity.

***Yes, by way of remedial interpretation***

1. I hold that the right to marry guaranteed by our constitution extends to the right of a post-operative transsexual to marry in the reassigned capacity. This means, without any need to rely on freedom from arbitrary or unlawful interference with privacy, that the legislation concerned would be unconstitutional unless the words of gender therein are read to include gender acquired by sex reassignment surgery. If those words can be so read, they should be so read. In my view, they can be so read. And, by way of remedial interpretation, I so read them.

***Conclusion***

1. In the result, holding that the words of gender in the legislation concerned include gender acquired by sex reassignment surgery and that such legislation therefore permits a post-operative transsexual to marry in the reassigned capacity, I would allow the appeal in the terms proposed by Chief Justice Ma and Mr Justice Ribeiro PJ. My view of the law, while strongly held, does not involve any disrespect for the opposite view ably advanced by Ms Monica Carss-Frisk QC for the Registrar of Marriages and accepted by so good a judge as Mr Justice Chan PJ. And I certainly think that much room for legislative reform still remains.
2. I wish to acknowledge the very considerable assistance which I have derived from the arguments prepared and presented by counsel and solicitors for W and the Registrar of Marriages respectively, and from the written submissions provided by the International Commission of Jurists.
3. Finally, I wish to make it clear that I have used the expression “post-operative transsexual” because it is the one used by courts here and abroad when dealing with cases like this one. But that is not to say that a person who has undergone sex reassignment surgery as a treatment for transsexualism is still to be regarded as a transsexual. In truth, such a person is a person of the sex brought about by such treatment.

**Lord Hoffmann NPJ:**

1. I agree with the joint judgment of the Chief Justice and Mr Justice Ribeiro PJ.

**Chief Justice:**

1. By a majority, Mr Justice Chan PJ dissenting, the appeal is allowed. In accordance with what is stated in Section H of the Joint Judgment of myself and Mr Justice Ribeiro PJ, the precise orders to be made by the Court will be finalised after receiving the parties’ further submissions as provided for in paragraph 149 of that Judgment.

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| --- | --- | --- | --- |
| (Geoffrey Ma)  Chief Justice | (Patrick Chan)  Permanent Judge | | (RAV Ribeiro)  Permanent Judge |
|  |  | |  |
| (Kemal Bokhary)  Non-Permanent Judge | | (Lord Hoffmann)Non-Permanent Judge | | |
|  | |  | | |

Lord Pannick QC, Mr Hectar Pun and Mr Earl Deng instructed by Vidler & Co and assigned by the Legal Aid Department for the appellant

Ms Monica Carss-Frisk QC, Ms Lisa KY Wong SC and Mr Stewart K.M. Wong SC instructed by the Department of Justice for the respondent

International Commission of Jurists, the Intervener, submissions on paper

[Press Summary (English)](http://legalref.judiciary.gov.hk/doc/judg/html/vetted/other/en/2012/FACV000004_2012_files/FACV000004_2012ES.docx)

[Press Summary (Chinese)](http://legalref.judiciary.gov.hk/doc/judg/html/vetted/other/en/2012/FACV000004_2012_files/FACV000004_2012CS.docx)

1. Andrew Cheung J (now Chief Judge of the High Court), HCAL 120/2009 (5 October 2010). [↑](#footnote-ref-1)
2. Tang VP, Hartmann and Fok JJA, CACV 266/2010 (25 November 2011). [↑](#footnote-ref-2)
3. With Mr Hectar Pun and Mr Earl Deng. [↑](#footnote-ref-3)
4. *International Statistical Classification of Disease and Related Health Problems* (version 10), F64. [↑](#footnote-ref-4)
5. Associate Consultant in Psychiatry who has had extensive experience treating transsexuals in Kwai Chung Hospital, a hospital operated by the Hospital Authority, affirmation made on 28 January 2010. [↑](#footnote-ref-5)
6. We are not concerned in this judgment with addressing the rare condition of persons born inter-sexed, that is, with both male and female biological features. See *W v W (Physical Inter-sex)* [2001] Fam 111. [↑](#footnote-ref-6)
7. Associate Dean, Faculty of Education, University of Hong Kong, who has researched and taught in the field of transsexualism since the year 2000 and also provided clinical services to transsexuals in Hong Kong, affidavit sworn on 19 July 2010. [↑](#footnote-ref-7)
8. In an influential dissenting judgment in *Cossey v United Kingdom* (1990) 13 EHRR 622, Judge Martens pointed out that: “... (medical) experts in this field have time and again stated that for a transsexual the ‘rebirth’ he seeks to achieve with the assistance of medical science is only successfully completed when his newly acquired sexual identity is fully and in all respects recognised by law. This urge for full legal recognition is part of the transsexual’s plight. That explains why so many transsexuals, after having suffered the medical ordeals they have to endure, still muster the courage to start and keep up the often long and humiliating fight for a new legal identity.” (At §2.4) [↑](#footnote-ref-8)
9. Research Assistant Professor, Faculty of Law, University of Hong Kong. [↑](#footnote-ref-9)
10. Robyn Emerton, “*Time For Change – A Call for the Legal Recognition of Transsexual and Other Transgender Persons in Hong Kong*” (2004) 34 HKLJ 515 at 516-517. See also Prof Emerton’s other articles on transsexuals in Hong Kong: “*Neither Here nor There: The Current Status of Transsexual and Other Transgender Persons Under Hong Kong Law*” (2004) 34 HKLJ 245; and “*Finding a voice, fighting for rights: the emergence of the transgender movement in Hong Kong*”, (2006) Inter Asia Cultural Studies, Vol 7, No 2. [↑](#footnote-ref-10)
11. Consultant surgeon and Chief of Surgical Service of Ruttonjee Hospital of the Hospital Authority, who has been performing sex reassignment surgery since 1987, affirmation made on 28 January 2010. [↑](#footnote-ref-11)
12. Other surgical procedures may be involved, for instance, the shortening of vocal chords in the case of a male-to-female transsexual, see, eg, *Goodwin v UK* (2002) 35 EHRR 18 at §13. [↑](#footnote-ref-12)
13. Prof Emerton, *op cit*, (2004) 34 HKLJ 515 at 516; Prof Winter, “*Country Report: Hong Kong social and cultural issues*”, http://web.hku.hk/~sjwinter/TransgenderASIA/. [↑](#footnote-ref-13)
14. Cap 177. [↑](#footnote-ref-14)
15. Pursuant to regulation 14(1) of the Registration of Persons Regulations (Cap 177). [↑](#footnote-ref-15)
16. Under the Hong Kong Special Administrative Region Passports Ordinance (Cap 539), section 5. [↑](#footnote-ref-16)
17. Affirmation of Yu Kin Keung, Assistant Secretary for Security (28 January 2010) §16. [↑](#footnote-ref-17)
18. Who were permitted to lodge written submissions for the purposes of this appeal. They had lodged submissions before Andrew Cheung J dated 5 August 2010. [↑](#footnote-ref-18)
19. (2002) 35 EHRR 18. [↑](#footnote-ref-19)
20. With Ms Lisa K Y Wong SC and Mr Steward K M Wong SC. [↑](#footnote-ref-20)
21. The GRA 2004 introduces a certification scheme for the legal recognition of changed genders. It permits applications for a gender recognition certificate on the basis of having changed gender under the law of a country or territory outside the United Kingdom approved by the Secretary of State. The list identifies the countries which have received approval pursuant to the Gender Recognition (Approved Countries and Territories) Order 2005, SI 2005 No 874. [↑](#footnote-ref-21)
22. Cap 181. [↑](#footnote-ref-22)
23. Cap 179. [↑](#footnote-ref-23)
24. MCO, section 20(2)(a): “A marriage which takes place after 30 Jun 1972 shall, subject to subsection (3) [which is not presently material], be voidable on any of the following grounds only – that the marriage has not been consummated owing to the incapacity of either party to consummate it”. [↑](#footnote-ref-24)
25. It appears that the first published case of SRS involved a man in Denmark in 1951. See Gender Identity Team, Queen Mary Hospital, *Transsexualism: Service and Problems in Hong Kong*, The Hong Kong Practitioner, 1989. [↑](#footnote-ref-25)
26. [1971] P 83. [↑](#footnote-ref-26)
27. (1866) LR 1 P & D 130 at 133, cited to Ormrod J but not expressly referred to by him. [↑](#footnote-ref-27)
28. At 106. [↑](#footnote-ref-28)
29. At 105-106. [↑](#footnote-ref-29)
30. *Bellinger v Bellinger* [2003] 2 AC 467 at §46. [↑](#footnote-ref-30)
31. At 100. [↑](#footnote-ref-31)
32. *Ibid*. [↑](#footnote-ref-32)
33. At 106. [↑](#footnote-ref-33)
34. *Ibid*. [↑](#footnote-ref-34)
35. [2003] 2 AC 467 at §11, although it was recognized that *Corbett* had been criticised by scientists and courts alike: §§13-17 and 18. [↑](#footnote-ref-35)
36. [1948] AC 274 at 286. [↑](#footnote-ref-36)
37. [1947] AC 628 at 633. [↑](#footnote-ref-37)
38. At 109. [↑](#footnote-ref-38)
39. *Ibid*. [↑](#footnote-ref-39)
40. At 109-110. [↑](#footnote-ref-40)
41. By the combined effect of section 7(2) of the 1971 act and section 40(1)(a) of the Matrimonial Causes Act 1965. [↑](#footnote-ref-41)
42. [2002] Fam 150 at §16 per the majority . [↑](#footnote-ref-42)
43. [2007] Fam 1 at §29. [↑](#footnote-ref-43)
44. (2003) 172 FLR 300 at §292. [↑](#footnote-ref-44)
45. Judge at §§117-118. [↑](#footnote-ref-45)
46. Court of Appeal §54. [↑](#footnote-ref-46)
47. Court of Appeal §55. [↑](#footnote-ref-47)
48. Eg, *Secretary, Dept of Social Security v “SRA”* (1993) 43 FCR 299; and *Bellinger v Bellinger (Lord Chancellor intervening)* [2003] 2 AC 467 at §62. [↑](#footnote-ref-48)
49. At 106. [↑](#footnote-ref-49)
50. Eg, *AG v Otahuhu Family Court* [1995] 1 NZLR 603 at 612; *AG (CTH) v “Kevin and Jennifer”* (2003) 172 FLR 300 at §§153, 170 and 293. [↑](#footnote-ref-50)
51. Respondent’s Case §42(2)(d). [↑](#footnote-ref-51)
52. 355 NYS 2d 712 (1974) at 717 per Louis B Heller J: “That the law provides that physical incapacity for sexual relationship is ground for annulling a marriage sufficiently indicates the public policy that the marriage relationship exists with the result and for the purpose of begetting offspring (*Mirizio v Mirizio*, 242 N Y 74, 81).” [↑](#footnote-ref-52)
53. *R v R (Orse F)* [1952] 1 All ER 1194. [↑](#footnote-ref-53)
54. *Baxter v Baxter* [1948] AC 274. [↑](#footnote-ref-54)
55. *S Y v S Y (otherwise W)* [1963] P 37. [↑](#footnote-ref-55)
56. *Bellinger v Bellinger* [2003] 2 AC 467 at §37. [↑](#footnote-ref-56)
57. (2006) 9 HKCFAR 574 at §§61-79. [↑](#footnote-ref-57)
58. (2008) 11 HKCFAR 91 at §§46-47. [↑](#footnote-ref-58)
59. *Goodwin v UK* (2002) 35 EHRR 18 at §98; *Schalk and Kopf v Austria* (2011) 53 EHRR 20 at §56. [↑](#footnote-ref-59)
60. *Goodwin v UK* (2002) 35 EHRR 18 at §99. See also *Rees v United Kingdom* (1986) 9 EHRR 56 at §50; *Sheffield and Horsham v UK* (1998) 27 EHRR 163 at §66 and *Schalk and Kopf v Austria* (2011) 53 EHRR 20 at §49. [↑](#footnote-ref-60)
61. [2009] AC 287 at §16 [↑](#footnote-ref-61)
62. At §13. [↑](#footnote-ref-62)
63. (1986) 9 EHRR 56. [↑](#footnote-ref-63)
64. At §49. [↑](#footnote-ref-64)
65. Under Article 8 (the right to respect for private life) and Article 12 (the right to marry). [↑](#footnote-ref-65)
66. At §37. [↑](#footnote-ref-66)
67. (1990) 13 EHRR 622. [↑](#footnote-ref-67)
68. At §44. [↑](#footnote-ref-68)
69. At §45. [↑](#footnote-ref-69)
70. *Ibid*. [↑](#footnote-ref-70)
71. (1998) 27 EHRR 163. [↑](#footnote-ref-71)
72. At §57. [↑](#footnote-ref-72)
73. (1998) 27 EHRR 163 at §43. [↑](#footnote-ref-73)
74. (2002) 35 EHRR 18. [↑](#footnote-ref-74)
75. At §96. [↑](#footnote-ref-75)
76. At §98. [↑](#footnote-ref-76)
77. At §82. [↑](#footnote-ref-77)
78. At §100. The Court also pointed to the absence of a reference to men and women in wording of the relevant provisions of the then recently adopted European Union Charter of Fundamental Rights. [↑](#footnote-ref-78)
79. At §85. [↑](#footnote-ref-79)
80. At §101. [↑](#footnote-ref-80)
81. At §103. [↑](#footnote-ref-81)
82. At §91. [↑](#footnote-ref-82)
83. *Ibid*. [↑](#footnote-ref-83)
84. *Bellinger v Bellinger* [2003] 2 AC 467 at §27. [↑](#footnote-ref-84)
85. At §§53 and 55. [↑](#footnote-ref-85)
86. *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4 at 28. [↑](#footnote-ref-86)
87. (1979-80) 2 EHRR 1 at §31. [↑](#footnote-ref-87)
88. (2011) 53 EHRR 13 at §234. [↑](#footnote-ref-88)
89. (1990) 13 EHRR 622 at §35. [↑](#footnote-ref-89)
90. Section E.1 above. [↑](#footnote-ref-90)
91. *Bellinger v Bellinger* [2002] Fam 150 at §128. [↑](#footnote-ref-91)
92. (2003) 172 FLR 300. [↑](#footnote-ref-92)
93. At §152. [↑](#footnote-ref-93)
94. At §153. [↑](#footnote-ref-94)
95. 355 NYS 2d 712 (1974) at 717. [↑](#footnote-ref-95)
96. At 98. [↑](#footnote-ref-96)
97. In the United Kingdom, by 1974, SRS was available on the National Health Service: *Rees v United Kingdom* (1986) 9 EHRR 56 at §14. [↑](#footnote-ref-97)
98. Judge at §34. [↑](#footnote-ref-98)
99. SA 308 at 314, in a passage highlighted in the Registrar’s written case. [↑](#footnote-ref-99)
100. *Goodwin v UK* (2002) 35 EHRR 18 at §82. [↑](#footnote-ref-100)
101. [2002] Fam 150 at §132. [↑](#footnote-ref-101)
102. Sitting in the Australian Federal Court, General Division, NSW District Registry, in *Secretary, Dept of Social Security v “SRA”* (1993) 43 FCR 299 at 325. [↑](#footnote-ref-102)
103. [1971] P83 at 104. [↑](#footnote-ref-103)
104. *Bellinger v Bellinger* [2003] 2 AC 467 at §34. [↑](#footnote-ref-104)
105. *Goodwin v UK* (2002) 35 EHRR 18 at §81. [↑](#footnote-ref-105)
106. (2003) 172 FLR 300 at §295. [↑](#footnote-ref-106)
107. Such evidence was not provided or accepted either in the present case or in most of the other authorities cited. However, the point made is still apposite. [↑](#footnote-ref-107)
108. And Article 8. [↑](#footnote-ref-108)
109. Section F.4. [↑](#footnote-ref-109)
110. At §100. The Court also pointed to the absence of a reference to men and women in wording of the relevant provisions of the then recently adopted European Union Charter of Fundamental Rights. [↑](#footnote-ref-110)
111. Section F.3. [↑](#footnote-ref-111)
112. *Goodwin v UK* (2002) 35 EHRR 18 at §99; *Rees v United Kingdom* (1986) 9 EHRR 56 at §50; *Sheffield and Horsham v UK* (1998) 27 EHRR 163 at §66; *Schalk and Kopf v Austria* (2011) 53 EHRR 20 at §49; and *Bellinger v Bellinger* [2009] AC 287 at §16. [↑](#footnote-ref-112)
113. At §101. [↑](#footnote-ref-113)
114. [1995] 1 NZLR 603 at 607. [↑](#footnote-ref-114)
115. *Secretary, Dept of Social Security v “SRA”* (1993) 43 FCR 299 at 317. [↑](#footnote-ref-115)
116. [2008] AC 153 at §78. [↑](#footnote-ref-116)
117. John L Murray, Chief Justice of Ireland*, “Consensus: concordance, or hegemony of the majority?”* in *Dialogue Between Judges 2008*, Strasbourg, European Court of Human Rights. [↑](#footnote-ref-117)
118. See Section F.2. [↑](#footnote-ref-118)
119. As to remedies, see also section 6 of the Hong Kong Bill of Rights Ordinance (Cap 383). [↑](#footnote-ref-119)
120. (1999) 2 HKCFAR 4 at 25. [↑](#footnote-ref-120)
121. The power to suspend was acknowledged in *Koo Sze Yiu v Chief Executive of the HKSAR* (2006) 9 HKCFAR 441*.* [↑](#footnote-ref-121)
122. At §90. [↑](#footnote-ref-122)
123. At §35. [↑](#footnote-ref-123)
124. Eg, Public Conveniences (Conduct and Behaviour) Regulations (Cap 132) reg 7; Public Swimming Pools Regulation (Cap 132), reg 7. [↑](#footnote-ref-124)
125. *“Splitting the Difference: Transsexuals and European Human Rights Law”* (lecture given to Anglo-German Family Law Judicial Conference in Edinburgh, September 2000), §50, cited in *Bellinger v Bellinger* [2002] Fam 150 at §159. [↑](#footnote-ref-125)
126. (1993) 43 FCR 299 at 305, per Black CJ: “...I consider that whilst a pre-operative male-to-female transsexual cannot come within the category of eligibility for a wife's pension under the Act, the respondent in this case would have come within that category had she successfully undergone the surgery that has been recommended for her.” [↑](#footnote-ref-126)
127. *Bellinger v Bellinger* [2002] Fam 150 at §103. [↑](#footnote-ref-127)
128. 355 A 2d 204 (1976) Superior Court of New Jersey, Appellate Division, Handler JAD. [↑](#footnote-ref-128)
129. Citing the example of *B v B* 78 Misc.2d 112, 355 N.Y.S.2d 712 (Sup.Ct.1974). [↑](#footnote-ref-129)
130. [1995] 1 NZLR 603 at 616-617; in submissions of counsel generally adopted by the Court (at 604). [↑](#footnote-ref-130)
131. *Bellinger v Bellinger* [2003] 2 AC 467 at §41. [↑](#footnote-ref-131)
132. *Ibid* at §26. [↑](#footnote-ref-132)
133. As opposed to an interim certificate referred to in Section H.5 below. [↑](#footnote-ref-133)
134. GRA 2004, section 9. [↑](#footnote-ref-134)
135. Section 23. [↑](#footnote-ref-135)