

TRANSSEXUALS AND SEX DETERMINATION

SYNOPSIS

The law relating to the capacity of sex-change transsexuals to contract marriage is fraught with difficult policy considerations. *Lim v Hiok*, the first Singapore decision dealing with this fails to deal with the conflicting policy questions adequately. A quick review of the cases from around the world (both from the common-law and civil-law traditions) shows the courts divided on this issue. The writers suggest that upon the weighing of the pros and cons, the balance should tilt in favour of allowing the sex change transsexual to contract marriage in his or her newly assigned sex. A new test of determining sex, as regards the capacity to contract marriage, is submitted. This article will consider alternative ways by which married couples of such marriages may free themselves from what they may subsequently perceive to be a burdensome marital commitment. Further, reforms especially legislative reform in the mould of the Australia's Sexual Assignment Act would help to establish an infrastructure whereby sex-change transsexuals can adopt their new sex status, erase all public records of their original sex and replace them with new ones recording their new sex, without fear of discovery or reprisal.

I. INTRODUCTION

Lim Ying and Eric Hiok married in July 1990. Within less than three months, Madam Lim petitioned for annulment on the grounds that:

- (a) Eric Hiok, her 'husband' was biologically a female, and therefore there never was a marriage, or alternatively,
- (b) on the basis of non-consummation due to the incapacity of the respondent

This controversial landmark case provides Singapore with her first precedent on the legal status of transsexuals in the area of marriage, and touches a hotbed of legal issues, social policy and moral-religious concerns, and carries far-reaching implications that will be examined in this article¹.

Judicial Commissioner K S Rajah's decision that the marriage was null and void as the parties were "both of the female sex" draws its basis from the

¹ The Straits Times has carried at least five reports on this case before and since the judgement was given — see editions of 12 Jun 91, 14 Jun 91, 15 Jun 91, 25 Jul 91 and 28 Jul 91. The interest it has stirred up is evident in the divided reactions of members of the public who were interviewed by The Straits Times and who wrote in to the editor.

celebrated English case of *Corbett v. Corbett*² which has been almost universally and sometimes savagely criticised.

In *Corbett*, one April Ashley had undergone a sex-change operation to become a female. His male sex organs were removed and an artificial vagina created. He used oestrogen to develop his breasts. His appearance was assessed-by Ormrod J, who had both legal and medical training, to be “convincingly feminine”. Yet according to the four criteria formulated by Ormrod J, namely, chromosomal, gonadal (i.e. the presence or absence of testes or ovaries), genital (including internal sex organs), and psychological, the sex-change party was found to be male. The reason was that the first three criteria indicated that biologically, April Ashley was still of the male sex at birth, notwithstanding that she had undergone a psychological test and was found to be effectively female. As the law only recognised heterosexual marriages, Ormrod J. held that the marriage was null and void.

It will be submitted that the decision of *Lim Ying v. Hiok Kian Ming Eric*³ and *Corbett* are, with respect, obsolescent and out of touch with the advance of medical science and the social realities of today. The writers propose a more satisfactory workable and realistic set of criteria to determine sex, and shall consider the ancillary issue of alternative ways by which married parties in such marriages may free themselves from what they may subsequently perceive to be a burdensome marital commitment. Legislative reforms to clarify the present state of law, as now shaped somewhat amorphously by *Lim v. Hiok* will also be suggested. The very nature of marriage and the basic premises upon which it is established shall first be examined.

II. RATIONALE OF MARRIAGE

The first premise is that marriage is a hetero-sexual institution involving one male and one female respectively. In *Lim v. Hiok*, Rajah J C drew attention⁴ to the definition of “monogamous marriage” in S.2 of the Interpretation Act, CAP 1,1985 (Rev. Ed) which is defined as “a marriage which is recognised by the law of the place where it is contracted as a voluntary union of one *man* and one *woman* to the exclusion of all others

² Citation for *Corbett* (1971) P.83 (henceforth cited as *Corbett*). See also *Talbor v. Talbor* (1967) III Sol Jo 213.

³ [1992] 1 SLR 184 [herein cited as *Lim v. Hiok*].

⁴ *Lim v. Hiok*, p. 194

during the continuation of the marriage”⁵. This is similar to Lord Penzance’s in *Hyde v Hyde and Woodmanse*⁶.

It is interesting to note the development of English law in this respect. Taking the cue from the decision on transsexual marriage in *Corbett*, the English parliament enacted the Nullity of Marriage Act in 1971, section 1(i) of which makes null and void marriages between parties which are not respectively *male* and *female*. Today, this has been replaced by section 11(c) of the Matrimonial Causes Act 1973 which has the same legislative effect⁷. In Singapore, however, there is no such specific legislation⁸. Thus transsexual marriages in Singapore may arguably not be void in the absence of any legislation like the UK’s Matrimonial Causes Act 1973. This is reinforced by S.99 of the Women’s Charter, CAP 353, 1985 (Rev. Ed) which provides that “a marriage taking place after 1 Jun 1981 shall be void on the following grounds only”⁹. The literalist approach would be to construe S.99 as exhaustive and therefore a purported marriage between two parties of the same sex cannot be made null and void at all.

However, in the light of *Lim v. Hiok*, the approach now appears to be to

⁵ Writers’ emphasis.

⁶ “Marriage . . . may be defined as the voluntary union for life of one man and woman, to the exclusion of all others” per Lord Penzance (1866) L.R 1 P & D, 130. This statement has been expressly approved or endorsed in countries such as Canada, Hong Kong and Australia. In fact, the only country that has legalised homosexual marriages is Denmark, which did so in 1989.

⁷ Hong Kong has also enacted a similar legislation: the new section 20(1) of the Marriage Causes Ordinance, CAP 179 (1985 Ed) provided “that 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.”

⁸ An indirect method of importing section 11(c) of the UK’s Matrimonial Causes Act 1973 would be to use Section 85 of the Women’s Charter, Cap 353, 1985 (Rev. Ed) which permits the court to “act and give relief on principles which in the opinion of the court are, as nearly as possible, conformable to the principles on which the High Court of Justice of England acts and gives relief in matrimonial proceedings”. The objections are (i) section 85 appears of limited scope since it is under Part IV Chapter 1 of the Act dealing with Divorce, whereas Part IV Chapter 3 deals with Nullity of Marriage 1971, and (ii) it is uncertain whether “principles” cover both statute law and common law/equity, or only the latter. See Leong Wai Kum, *Family Law in Singapore* (1990) p. 20 and Michael Rutter, *The Applicable Law in Singapore and Malaysia — A guide to reception, precedent and the sources of law in the Republic of Singapore and the Federation of Malaysia*, (1989) p. 220.

⁹ Australia, like Singapore, also has no such specific legislation. The concluding words of section 23(B)(1) where the grounds of nullity are enumerated, of the Australia’s Marriage Act 1961 are “and not otherwise” and appear to be exhaustive. However, sections 46(1) and 69(1) of the Australia’s Marriage Act 1961 require a civil marriage celebrant in Australia and an Australian marriage officer overseas to recite the words of solemnization of a marriage: “Marriage, according to the law in Australia, is the union of a man and woman to the exclusion of all others, voluntarily entered into for life.” Also, section 43(a) of the Australia’s Family Law Act 1975 provides that the court should have regard to the “need to preserve and protect the institution of marriage as the union of a man and woman to the exclusion of all others voluntarily entered into for life.”

regard, even in the absence of specific legislation, that the indispensable condition to a valid marriage that both parties must be male and female respectively is so fundamental that without it, there is no marriage to speak of at all. Section 16(2) of the Woman's Charter empowers the Registrar not to issue a marriage licence until he has been satisfied that "(d) that there is no lawful impediment to the marriage." In Rajah J C's words "[a] legal impediment to the marriages of persons chosen not of opposite biological sex is implied in the statutory definition of the monogamous marriage"¹⁰. Further, the scheme of the Women's Charter contemplates the existence of this condition, in its many references to husband and wife in the areas of divorce, division of matrimonial property, maintenance and rights and duties of spouses¹¹. The words of solemnisation of marriage recited by the Registrar are formulated on the same premise¹². The choice of the words "man" and "woman", appear in the definition of "monogamous marriage" should be noted, for it does appear to connote the use of biological criteria to determine a person's sex status. This may be treated like the more neutral "male and "female", terms used in the UK's Matrimonial Causes Act. This will be explored in the latter part of this article.

The second premise is that marriage is a voluntary union of the mind and the body, where parties offer, inter alia, "companionship and mutual support". Consummation is one of the key elements of such union, sufficiently important for the Women's Charter to provide that marriages may be voidable at the option of either party on the ground of non-consummation. However, the parties may affirm or ratify by conduct a marriage in the absence of consummation and the law will not presume to interfere with its validity. Alternatively, the petitioner may be stopped in appropriate circumstances from applying to annul the marriage under Section 101(1) of the Women's Charter. Ormrod J enunciated in *Corbett* that marriage "is the institution on which the family is built, and in which the capacity for natural hetero-sexual intercourse is an *essential* element"¹³. The unfortunate use of the word "essential" appears to wrongly elevate consummation to the level of a condition subsequent, the

¹⁰ *Lim v. Hiok*, p. 194.

¹¹ See Parts VI, VII and IX, and section 10 and First and Second schedules of the Woman's Charter. In Canada, the absence of a provision such as section 11(c) of the UK's Matrimonial Causes Act 1973 has not prevented the courts from holding that marriage between parties of the same sex are null and void. See also *Re North and Matheson* (1974) 53 D.L.R. (3d) 280.

¹² The relevant text of the Registrar's address during the solemnisation of marriage at the Registry of Marriages:

"Before you are joined in matrimony, it is my duty to remind you of the solemn and binding character of the vows you are about to make. Marriage according to law is the union of one man and one woman, voluntarily entered into for life, to the exclusion of all others . . ."

¹³ *Corbett*, p. 105.

failure of which would operate to vitiate a marriage. This is suspect because one spouse may be unable to consummate a marriage, with the knowledge of the other spouse, without affecting the validity of the marriage. Late marriages between elderly people may be entered into for companionship and love, and not sex¹⁴.

The procreation of children also cannot realistically be said in today's social atmosphere to be a necessary condition to the sustenance of conjugality, though certainly, procreation is a welcome result of consummation, that to many, completes a marriage. Marriages do not flounder legally upon its mere absence¹⁵.

The traditional roles society has assigned to the husband and wife of the breadwinner and home-maker respectively have been blurred in their boundaries and even a complete reversal of their roles¹⁶ do not generally nullify a marriage. Societal mores have changed dramatically over the years and today in Singapore, the wife contributes an important share to the family income, while the husband is beginning to accept that household work is part of his lot as well.

In *Corbett*, however, Ormrod J. said, "Having regard to the essential hetero-sexual character of the relationship which is called marriage, the criteria must, in my judgement, 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"¹⁷. This statement has been described as "disturbingly simplistic" by Douglas K Smith¹⁸.

What the "essential role of a woman in marriage" means is unclear. If, from the tenor of his judgement, it is the capacity for hetero-sexual intercourse, this has been shown to be non-essential, though, admittedly important. If he means to consign to women the traditional role of home-maker, then, with respect, his views are no longer consonant with the pulse of modern Singapore society.

14 Marriages should be valid if the transsexual is found capable of performing the essential role of the sex he or she has assumed. See Douglas Smith, "Transsexualism, Sex Reassignment Surgery and the Law" (1971) 56 Cornell Law Rev 963 [herein cited as Smith] p. 1007.

15 "So then it is not the consent to marriage as it relateth to the procreation of children that is requisite; for it may consist though the woman be far beyond that date . . ." Stair's Institutions of the Law of Scotland, Book I.

16 One possible exception is the requirement that the husband maintains the wife during and after the marriage. See Part VII and Part IX Chapter 4 of the Woman's Charter.

17 Corbett, p. 106.

18 Smith at p. 1005-1009.

Ormrod J. himself suggested that some characteristics of a marriage are “companionship and mutual support”, but he places them as secondary to sexual intercourse. If this is the “essential role”, it cannot be the domain of the wife, and can and should be provided for by husband and wife alike. Ormrod J’s description of support as “mutual” implies this. Further, there is no reason why a post-surgery transsexual (or a converted transsexual) cannot provide the same quality of care and mutual support that Ormrod J requires. It is suggested that the following are important characteristics of a marriage:—

- (a) both parties are emotionally and mentally stable
- (b) ability to love and understand
- (c) availability of emotional support and comfort
- (d) ability to engage in sexual intercourse
- (e) having a desire to achieve a more fulfilling and progressive life.

It follows therefore that as long as a person, whose sex is determined according to the criteria spelt out below, enters into a marriage with another of the opposite sex, and is found capable of performing the essential role of his or her newly assigned sex (which conceivably would include some or all of the above characteristics), the marriage should be deemed *prima facie* valid¹⁹.

The next question then is what criteria should be used to determine a person’s sex?

III. SEX DETERMINATION

In *Corbett*, the learned judge besides affirming the requirement of natural heterosexuality as the basic presumption²⁰ of all marriages, proceeds to lay down the determinants of sex:—

Having regard to the essentially heterosexual character of the relationship which is called marriage, *the criteria must, in my judgement, be biological*. 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. The real difficulties, of course, will occur if these three criteria are not

¹⁹ See Smith, p. 1007.

²⁰ See *supra* note 13.

congruent . . . it would seem to follow from what I have said that the greater weight would probably be given to the genital criteria than to the other two²¹.

In other words, Ormrod J's criterion²² for the determination of sex is biological or anatomical, i.e. determined at birth. This biological criterion consists of three aspects, vis:—

- (a) Chromosomal;
- (b) Gonadal; and
- (c) Genitalia

In the event when all three do not coincide the last aspect, i.e. the genitalia, would be the determining factor. Applying the above criterion, the court held that the marriage was void as the respondent was borned a man and therefore could not marry another man. Although the psychological and social aspects were submitted for consideration, the learned judge decided against considering them (which he admits are relevant and considered in national insurance and social situations) because as he opines:—

These submissions, in effect, confuse sex with gender. Marriage is a relationship which depends on sex and not on gender²³.

In short, Ormrod J's approach is that for the purposes of sex determination, once borned a man or woman, that person remains so, as ordained, for the rest of his or her life. As Ormrod J's decision and approach is highly persuasive²⁴ in our Singapore courts and given the recent decision of *Lim v. Hiok*, in which the learned judge implied the biological criteria²⁵, it necessarily warrants a close examination and perusal of the premises contained therein. The writers' approach in this part of the article are mainly two-fold: a critique of both cases and offering an alternative approach to the issues raised in the cases.

21 [Writers' emphasis] Corbett, p. 106.

22 *Corbett* has been accepted as correctly elucidating the law pertaining to sex determination by the English Court of Appeal in *R v. Tan* [1983] Q.B 1053. Moreover, in a complaint by a British transsexual to the European Court of Human Rights in *Rees v. United Kingdom* [1987] 2 F.L.R. 111 that English Law made it impossible for him to enter into a valid marriage, the Court held that *Corbett's* decision was to be respected and accepted as a correct statement of English Law. See also S.M Cretney and J. M Masson, *Principles of Family Law*, (5th Ed., 1990) p. 48 in which the learned authors submit that "the balance of opinion favours treating the Corbett decision as still reflecting the law".

23 Corbett, p. 107.

24 See supra note 8.

25 See supra note 10.

Sex Determination

In the two cases, Rajah J C's and Ormrod J's strict reliance on biological criterion for sex determination, raises one key objection. This is their refusal to consider the other crucial non-biological criteria in the determination of sex and their over-emphasis on the biological criterion. In the case of *Lim v. Hiok*, Rajah J C relied on the definition of "monogamous marriage" in section 2 of the Interpretation Act, CAP 1, 1985 (Rev. Ed) which, inter alia, requires it to be a voluntary union of "one man and one woman". He automatically implied the biological criteria in the statutory definition of monogamous marriage, without explicitly stating his reasons. In both these cases, the courts had to grapple with the sex of a transsexual respondent in a petition by his/her other marriage partner to, inter alia, nullify the marriage. It is appropriate at this point to define what a transsexual is. The writers prefer the one by Sebastian Butler in his article, "The Definition of Marriage in English Law":—

A transsexual is a person of one biological sex who has an extremely powerful urge to become a member of the opposite sex to the fullest extent possible. . . they come to think of themselves as females imprisoned in male bodies, or vice-versa, and leads to intense resentment of and dislike for their own sexual organs, which constantly remind them of their biological sex²⁶.

Hence, given the above definition and applying the biological criterion as espoused by Ormrod J, and preferred by Rajah J C, the sex of a transsexual will always be that as ordained at birth. This illustrates how inflexible and illogical the law is to transsexuals²⁷. No amount of effort and treatment by the individual, modern medicine and surgery can convince the courts to steer away from an excessively conservative approach.

Another category of unfortunate people who is adversely affected by

²⁶ (1979) 42 MLR 409 at p. 422. There are other equally good definitions by I.M. Kennedy in his article "Transsexualism and Single Sex Marriage" (1973) 2 Anglo-American Law Review 112, [hereinafter cited as Kennedy] at p. 115-116 and Smith, at p. 963. Also, see Manitoba Law Reform Commission, Report on the Revision of Birth Certificates of Transsexual Persons (1976) at p. 6. Transsexualism is different from and ought not to be confused with homosexuality, transvestism and other sexual psychoses; see Ratnam, Goh & Tsoi "Cries From Within" — *Transsexualism, Gender Confusion & Sex Change*, (1991) [hereinafter cited as Ratnam, Goh & Tsoi], at pg 5-7 for further elucidation.

²⁷ See Smith, at p. 1007 sharing similar views. The illogical aspect of the Corbett's approach becomes evident in a situation where the male transsexual who being disallowed by law to be recognised a woman after an irreversible sex change, decides to marry a woman (for reasons best known to himself). Applying Corbett's approach, this marriage between the physical female transsexual and a biological woman would be considered legitimate and valid!

Ormrod J's biological criteria is the hermaphrodites, or inter-sex²⁸. As hermaphrodites are people who possess an eclectic and inconsistent set of biological attributes of the two sexes²⁹, an application of the approach in *Corbett* will result in a piquant situation as the Australian case of *In the Marriage of C and D (falsely called C)*³⁰ illustrates. In this case, the respondent was a hermaphrodite, possessing an anomalous set of female chromosomes, male and female gonads (one ovary and one testis), a short penis, a tiny uterus, a rudimentary vagina and well-developed breasts. Notwithstanding these, the respondent undergone a series of complex surgery to effect a physical male composition. Psychologically, the respondent was reared as a man and functioned like one. 12 years after his marriage to the petitioner, a woman, she filed an application praying for a decree of nullity. Bell J in the Family Court of Australia (Brisbane) held the marriage void on two grounds³¹, viz:—

- (a) Mistake as to the identity of the other party at the time of marriage; and
- (b) that the respondent was neither a man nor a woman and that the marriage was impossible.

The writers have little difficulty with the first ground³² but take issue with the judge on the second ground. In arriving at his second ground, Bell J. adopted the biological approach of *Corbett* but with a difference³³. He decided to assess the three sub-criteria, i.e. the chromosomal, gonadal and genitalia only *after* surgery³⁴. In this case, he assessed that chromosomally the respondent was a male but was female on the other two sub-criteria³⁵. From this, he concluded that for the purposes of the law of marriage, the

²⁸ Here, the term "inter-sex" is used interchangeably with "hermaphrodites" throughout this article. The writers acknowledge the fact that the term "intersex" is actually much wider in connotation; see Burrows *Biological Action of Sex Hormones*, (2nd Ed., 1949) at p. 133 writes that "inter-sex" covers "an individual who cannot properly be described as a male, a female or a hermaphrodite". However, for purposes of this article which does not examine the application of the law on hermaphrodites in detail, such a distinction is not required.

²⁹ For a detailed definition and categories of hermaphrodites, see Bartholomew "Hermaphrodites and the Law", (1960) 2 University of Malaya L.R. [hereinafter to be cited as Bartholomew] at p. 83.

³⁰ [1979–80] 28 ALR 524 [hereinafter cited as *C & D*]

³¹ The law in force at the date of the marriage: Matrimonial Causes Act 1959 (Cth) S.18, now the Family Law Act 1975–1979 (Cth), s.51 and the Marriage Act 1961–1976 (Cth), S.23.

³² S.100(C) of the Women's Charter, CAP 353.

³³ Besides not being bound by English precedents, *Corbett* was not a case on hermaphrodites. Moreover, Ormrod J made a fleeting remark that his opinion of surgery on sex determination of transsexuals does not extend to hermaphrodites, see *Corbett* p. 106.

³⁴ *C & D*, p. 528.

³⁵ *Ibid*

respondent was neither a man or a woman³⁶! The result that flows from this decision was that the marriage was void *ad initio*. Again, this illustrates how absurd³⁷ the law can be in the determination of the sex of hermaphrodites. Arguably, the decision of *Lim v. Hiok* could lead to the same result as it's strict adherence to the biological criteria could probably import the application of Bell J's approach in the determination of sex of hermaphrodites in Singapore.

Here, two observations are submitted. One, that in applying Ormrod J's biological criterion, Bell J neglected the emphasis that Ormrod J placed on the genitalia sub-criterion when all three biological sub-criteria are not congruent³⁸. As Kennedy submits:—

. . . genitals provide the most obvious indication to the outside world of a person's gender, and are most important in socialisation as a member of either sex, Ormrod J's suggested preference for this criterion is probably sound³⁹.

For true transsexuals acquiring the desired genitalia with the aid of surgery is more important than having a functioning genitalia for the purpose of sex⁴⁰. Two, in *Corbett*, Ormrod J was cautious not to conclusively extend his approach to cases involving hermaphrodites when he writes “this problem and in particular the question of the effect of surgical operation in such cases of physical inter-sex must be left until it comes up for decision”⁴¹. Indeed, the opportunity came for Bell J. to settle the confusion with regards to determination of the sex of hermaphrodites. It is unfortunate that what could have been a panacea to the woes and problems hermaphrodites faced in determining their sex, was not fully tapped, resulting in an infernal confusion. From the above two instances, the law applying to transsexuals and hermaphrodites can be harsh and rigid. The writers would like to submit the following comments and proposals to soften the stance taken by the courts.

Bell J's approach in the case of *C and D* was not without merit, in that he, in applying Ormrod J's biological criterion, chose to assess the sex status of

³⁶ This decision, has been described by Rebecca Bailey in her commentary, “Recent Cases”, (1979) *The Australian Law Journal* Vol 53, 659 [hereinafter cited as Bailey] at p. 660 as “confused, illogical and demonstrative of an imperfect understanding of *Corbett*. It would not fail to lead to an unsatisfactory conclusion”.

³⁷ Here, the sex status of hermaphrodites as compared to the transsexual is worse, in that the transsexual has been ‘allotted’ a sex (albeit wrongly) whereas hermaphrodites, to begin, have none to contend or be discontented with.

³⁸ *Corbett*, p. 106. Also see Bailey, p. 660 who shares the same view.

³⁹ Kennedy, p. 121.

⁴⁰ Ratnam, Goh & Tsoi, p. 57.

⁴¹ *Corbett*, p. 106.

the respondent in a *post-surgery* setting. This, it is submitted, is a positive and right approach because it accords importance and significance to the remedial and curative effect of the present-day surgical “assignment”⁴². The writers would like to submit that despite Ormrod J’s insistence to “ignore any operative intervention”⁴³, our courts should take the cue from Bell J in assessing the sex of transsexuals after surgery. This would ensure that the law does not lag behind the noble intention of the effect of assignment surgery. This implies that Ormrod J’s biological criterion is justified when applied in a post-surgery situation. Rebecca Bailey too submits in her commentary on *Corbett* and *C and D* that the appropriate time for sex-determination is post surgery⁴⁴. However, given the case of *Lim v. Hiok*, this may not be possible as Rajah J C’s determination of sex relies heavily on the sex status recorded in the birth certificate⁴⁵ which according to the learned judge could not be altered unless it was recorded as a result of an error of fact or substance provided for by Section 24 of the Registration of Births and Deaths Act⁴⁶, CAP 267, 1985 (Rev. Ed).

Another criterion for the sex determination of transsexuals, besides the biological one which warrants the recognition of the law is the psychological and social circumstances or gender identity compatible to the assigned sex⁴⁷. This was staunchly rejected by Ormrod J in *Corbett* and not considered in *Lim v. Hiok*. Here, the writers advocate that the focal point for the importance of this psycho-social or gender factor of the transsexuals should be post surgery. Pre-surgical existence of compatible psycho-social or gender inclinations with a preferred sex is insufficient to warrant the law’s recognition because such behaviour would not be much different physically from that exhibited by transvestites and homosexuals, generally. The decisive factor or break is the assignment surgery which transports the transsexual to the ‘other side of the camp’⁴⁸. It is unfortunate that in *Corbett* and *Lim v. Hiok*, the judges completely ignored the practical real

⁴² Bailey, at p. 660 submits a similar view.

⁴³ *Corbett*, 106.

⁴⁴ *Supra* note 42.

⁴⁵ *Lim v. Hiok*, p. 196.

⁴⁶ *Lim v. Hiok*, p. 195.

⁴⁷ Gender is to be differentiated from sex. Sex is what a person is physically borned, and refers to organic differences between men and women. Gender, on the other hand, “overlaps with, but is separate from sex in the biological sense. Gender is a sociological concept that refers to the roles each sex is assigned by society and plays within it. Gender comprises all those social and cultural distinctions that distinguish women from men”: Erich Goode, *Sociology*, (2nd Ed., 1988) at p. 298. See Smith p. 969 and Bartholomew, p. 97 where both submit that the gender or psychological sex of an individual should be given the greatest weight in assessing his or her sex status.

⁴⁸ The extent of the assignment surgery, for the purpose of effecting the new sex status, would be the stage in which the transsexuals acquire the necessary sex organs. In the case of male assignment surgery the last stage of fixing the prosthesis (for the purpose of achieving erectio) is, it is submitted, therefore not relevant here. See *infra* note 82.

effects of human social and physical development which can have on a transsexual. It is fatalistic⁴⁹ as it prevents an individual from affecting his/her own destiny, which is beneficial to the transsexual and not harmful to society. A Swiss case illustrates how sensible and wisely courageous the law can be when handling such matters. *In re Leber*, the court laid down the rationale for recognising the transsexual desire to be recognised as a female:—

This aversion [to male clothing, genitals, etc] may even lead to self-mutilation . . . or to castration. . . It is clear that it is not an ordinary vice which can lead to such extremes and that the subject must be driven to them by inner forces beyond his control. This inclines us to attribute to the psychic element, in the determination of sex, an importance at least equal to that of the physical element. . . In granting him the civic status of a woman we are satisfying the most profound desire of his being while consolidating his psychic and moral equilibrium; at the same time we are facilitating his social adaptation by permitting him to lead a more normal type of life than hereto-fore. The personal interest which urges him to ask for a change of civic status is thus not opposed to the interests of public order and morality — quite the contrary⁵⁰.

From the Swiss Court's judgement, two points stand out clearly. One, the recognition that such tendencies of transsexuals or "aversion" is "not an ordinary vice", implying arguably that it is rare and should not be associated with the animosity and punitive measures ordinarily associated with most other vices or crimes, which are detrimental to the interests of public order and morality. Second, the court empathy with and the recognition of the transsexual's psycho-social circumstances is admirable. Compared to Ormrod J, the Swiss Court's approach appears more enlightened and progressive. The writers agree with Kennedy when he writes that Ormrod J's approach:-

. . . overlooks two points: first, that the transsexual is living proof that in actuality the psyche may operate in defiance of biological truths whatever the law says it should do: second, that the psyche is not necessarily formed by choice, but may instead be ordained for the individual by reason of forces operating on him during development⁵¹.

Similarly in *M T v. J T*⁵², the American court has decided not to follow *Corbett*. Although it agreed that for the purposes of marriage, a heterosexual union of two persons is a prerequisite, it not only refused to accept

⁴⁹ See Smith, p. 1007.

⁵⁰ Neuchatel Cantonal Court, July 2, 1945.

⁵¹ Kennedy, p. 121.

⁵² (1976) 335 A. (2d) 204. See also Anthony Dickey, *Family Law*, (2nd Ed, 1990) p. 121–122.

Ormrod J's biological criterion but felt it incorrect. It accepted that if a transsexual undergoes sex reassignment surgery coupled with the physical capacity to engage in sexual intercourse in accordance with his or her psychological sex, this person's sex should then be accorded for the purposes of the law of marriage, the assigned sex he or her has successfully effected by surgery⁵³. In *Re "M"*⁵⁴, a recent New Zealand case, a transsexual woman applied to annul her 12-year old marriage on the ground that at the time of marriage she was a man. The judge, Aubin J. refused to annul it based on this ground. Aubin J. observed that the petitioner, after her assignment surgery had strived for social and official acceptance and to be recognised as a woman physically and psychologically. The judge took these into consideration when determining her sex. He rejected the immutable biological criterion of Ormrod J as determinative, he was inclined to emphasise on the genitalia criteria coupled with the psychological and social conditions the petitioner was in and the fact that she had no problem having sexual intercourse during her marriage. Taking these into consideration, he decided that the petitioner was a woman when she married and the marriage remained valid.

Also, the law must not lag behind what the advances of modern science and medicine have achieved in the area of transsexual surgery⁵⁵. These advances in science and medicine show how obsolete the criteria for sex determination and classification are through the eyes of the law. Modern surgery can effect a convincing physical sex-change of a person, possessing the necessary organs for satisfactory sexual intercourse⁵⁶. Coupled with the necessary post and pre-surgical psycho and hormone therapy and counseling, the converted transsexual gradually and eventually attains the behaviour and attitude compatible to the surgically assigned sex⁵⁷. Modern medicine and surgery do not by themselves dictate how sex determination should be arrived at by the law but when combined with other criteria above, it tilts the scale in favour of the transsexuals who have undergone such a process and who can prove to the court that he/she is able to benefit

⁵³ Also *In Re Anonymous* 57 Misc. 2d at 816, an American judge, Pecora J. proposed a test for sex determination: where there is a clash between the psychological sex and the anatomical sex, then the latter should prevail. But, should these be harmonised by medical intervention and surgery, then the psychological sex is preferred. Hence, the court applied the above test in a converted transsexual and gave recognition to her new female status.

⁵⁴ This case has yet to be reported in any law reports, but was reported in Singapore's *The Sunday Times*, 21 Jul 91, also see New Zealand's *Evening Post*, 20 Jul 91 for a more detailed report on the facts and decisions of the case. It was decided on 30 May 91 by the Family Court at Otahuhu (FP No. 048/991/90).

⁵⁵ This view is also shared by Findlay, in his article "Sexual Identity and the Law of Nullity", (1980) 54 *The Australian Law Journal*, p. 126.

⁵⁶ This was rejected by Ormrod J though he found the respondent's "outward appearance at first sight . . . convincingly feminine" — Corbett, p. 104.

⁵⁷ Ratnam, Goh & Tsoi, p. 47–55, 81.

immensely from the assignment surgery and treatment. Despite this, Rajah J C in *Lim v. Hiok* was adamant not to consider such factors when he concludes in his judgement:—

A person biologically a female with an artificial penis, after surgery and psychologically a male must for purposes of contracting a monogamous marriage, of one man and woman, under the Woman's Charter be regarded as a "woman"⁵⁸.

In other words, we submit that in testing the validity of a transsexual marriage a host of other factors essential to the blissful function of a marriage be considered. The transsexual marriage should be upheld and given security and support by the law because there are safeguards or if inadequate, the law can impose additional ones which ensure clear conscience, practicality and fairness in the eyes of the law and the community at large. These safeguards are often a major surgical conversion, certification and approval by medical specialists, pre and post-operation psycho-therapeutic treatment and training. Essential also, is that the transsexual's decision must be an informed choice, made after being aware of the psycho-social, physical and legal implications of such an operation. The converted transsexual could then be said to have 'crossed the Rubicon and burnt the boats'. Having made such a courageous and difficult decision, which is supported by his or her medical specialists, close kins and friends, the law should complement and fulfil the wish of the converted transsexual and not frustrate it.

The courts in deliberating the law often take into policy considerations and reasons besides considering mere scientific or empirical data. Hence, Ormrod J acquitted himself well when he says that "the fundamental purpose of law is the regulation of the relations between persons, and between persons and the state or community"⁵⁹. This principle when applied here implies the evaluation of the transsexual's right to be identified with his/her preferred sex with fellow citizens inter-se and the community 's or state's interest in regulating acceptable behaviour. It is submitted, that given the rarity of such cases and the negligible impact it has on the disruption to the law's normal regulation of human behaviour, the law should not withhold recognition of the transsexual preferred sex⁶⁰. The consequence of recognising sex-change operations was considered by Ormrod J. He reasoned that a state of confusion would result if "a 50 years old male transsexual, married and the father of children, underwent the operation, he would then have to be regarded in law as a female and

⁵⁸ *Lim v. Hiok*, p. 196.

⁵⁹ Corbett, p. 105.

⁶⁰ See also Kennedy, at p. 119.

capable of ‘marrying’ a man”⁶¹. But, it is submitted that it is even more ‘bizarre’ if we take Ormrod J’s example one step further: that this person, legally a man, even after his assignment surgery stays married to the woman. Would this not approach, practically, homosexual or lesbian marriages, which the law abhors and is quick to strike down?

The vexed question is what are we to do with the decisions of *Corbett v. Corbett* and *Lim v. Hiok*? It is submitted that for *Corbett*’s case, the decision should be restricted to it’s own special factors which are essentially the following:—

- (a) It involves not a purely transsexual marriage but one tinged with a rather odd relationship in which the husband vacillated between different sexual tendencies: heterosexual, homosexual and transvestite⁶².
- (b) It was a relationship rife with insecurity, jealousy and unhappiness⁶³.
- (c) It lasted for a brief 14 days⁶⁴.
- (d) It was shown that the respondent had undergone sex surgery to prevent the deterioration of her mental health. She signed a consent form prior to the sex operation which explicitly stipulated that “I understand it will not alter my male sex and that it is being done to prevent deterioration in my mental health”⁶⁵.

In *Lim v. Hiok*, some special features of the case may be employed to distinguish it from future cases:—

- (i) The respondent, a converted male transsexual did not fully complete all stages of the sex-operation. There were three (3) stages involved in a female to male operation but the respondent only went through the second stage and did not complete the third stage at time of the marriage⁶⁶. It may thus be argued the respondent, not fitted with a prosthesis, is not totally male.
- (ii) During the hearing, submissions were made on the question of whether the respondent was male or female. Possible alternative submissions on mistake as to the respondent’s sex⁶⁷ and incapacity to consummate⁶⁸ were not decided upon at all. This was because

⁶¹ Corbett, p. 106.

⁶² Corbett, p. 91–92.

⁶³ Corbett, p. 93–94.

⁶⁴ Corbett, p. 94.

⁶⁵ Corbett, p. 98.

⁶⁶ See supra note 48.

⁶⁷ S.100(c) of the Women’s Charter, CAP 353.

⁶⁸ S.100(a) of the Women’s Charter, CAP 353.

Rajah J C was anxious to tackle the fundamental question of whether the marriage was void ab initio⁶⁹. Having decided that the marriage was indeed void ab initio, Rajah J C held it unnecessary to hear submissions on the question of voidability of the marriage. Further, the respondent did not contest the marriage. Therefore it was possible that the judge was not aware of the dire consequences of taking the *Corbett's* line of approach in a case which could have been decided on a question of voidability instead.

- (iii) It was technically correct in implying the biological criteria in the definition of “monogamous marriage”, if ‘man’ and ‘woman’ here are given a strictly conservative meaning. However, it fails to take into account policy considerations and weigh them against the setting of a modern society fully equipped to give transsexuals a chance to live a meaningful and decent life.

IV. OTHER ANCILLARY ISSUES

A closer examination of the above proposed criteria for the determination of sex reveals the abridgement of the gap created by *Corbett* between medical science and present-day social realities, and the law⁷⁰.

Transsexual marriages where the sex-change party satisfies the suggested criteria for sex-determination are therefore valid. Like any normal marriage, it is voidable via section 100 and may be dissolved via section 88 of the Women’s Charter. Parties to such a marriage should be able to relieve themselves of the particular pressures and burdens which conceivably may attend transsexual marriages. Degrees of transsexualism vary and the converted transsexual may not be able to properly adjust to his or her new sex nor to the status of being married. The other spouse may also experience difficulties living with a converted transsexual.

On the voidability of marriages, grounds s.100(a)–(c) of the Women’s Charter merit a closer examination of the issues that are peculiar to transsexual marriages. These deal with the incapacity to consummate, wilful refusal to consummate, and invalid consent to marry respectively.

⁶⁹ *Lim v. Hiok*, p. 187.

⁷⁰ “I have dealt, by implication, with the submission that because the respondent is treated by society for many purposes as a woman, it is illogical to refuse to treat her as a woman for the purposes of marriage. The illogicality would only arise if marriage were substantially similar in character to national insurance and other social situation, but the differences are obviously fundamental. These submissions, in effect, confuse sex with gender”, per Ormrod J., *Corbett*, p. 106, 107. Ormrod J. makes it abundantly clear that the gap should be scrupulously maintained, at the expense of medical reality and without taking into account changing social values.”

(i) Incapacity To Consummate

There is consummation (*vera copula*) when the husband is capable of erection and carries out intromission that is full and complete, constituting “ordinary and complete intercourse”⁷¹. Anything short of that, where intercourse is “partial, imperfect and unnatural”⁷², is not consummation⁷³. Also, the incapacity to consummate must be permanent and incurable⁷⁴. It is irrelevant that either party is sterile⁷⁵, uses contraceptives⁷⁶ or does not experience sexual satisfaction⁷⁷.

Ormrod J in *Corbett* added to this definition of consummation the further requirement that intercourse had to be natural and hetero-sexual i.e. that both parties had to be biologically male and female as at birth. He referred to the English Court of Appeal case of *S. Y. v. S. Y.* which concerned a wife with an abnormally small vagina which prevented her from consummating her marriage who underwent an operation to enlarge her vagina. In that case, it was decided she was not incapable of consummation. By way of obiter, Willmer L J in that case, extended his reasoning to the situation where the wife had no vagina at all, and held that she was still capable of *vera copula* because an artificial vagina could be constructed⁷⁸. Ormrod J., however, dismissed it as obiter and saying, “I must therefore approach the matter as one of principle”⁷⁹, opted to consider April Ashley’s case on the question of sex determination.

Although Ormrod J. was justified technically in his approach, his cavalier refusal to consider more fully the well reasoned pronouncement of Willmer J. was too hasty. What difference is that between an artificial vagina reconstructed in a transsexual and that in a biological female that could prevent the transsexual from being capable of consummation? It is useful

⁷¹ Per Dr Lushington, *D-E v. A-G* (falsely calling herself D-E) (1845) 1 Rob. Eccl. 279, pp. 298,299.

⁷² *Ibid.*

⁷³ A husband who erects and penetrates but does not ejaculate has been held to be incapable of consummation in Australia — see *G v. G* [1952] V L R 402 but this has been questioned in *White v. White* [1948] p. 330. See also the Canadian case of *Miller v. Miller* [1947] O R 213 (CA). Emission of seed has been held to be irrelevant to the question of consummation in UK — see *W. (orse K) v. W* [1967] 3 All ER 178 (PDA) and *D-E v. A-G* (1845) 1 Rob. Eccl. 279. Singapore judges are likely to imitate the English stance.

⁷⁴ *S v. S* [1956] P1.

⁷⁵ *S v. S* (otherwise W) No. 2 [1962] 3 All ER p. 55. The UK Law Commission refused to recommend that non-disclosure of sterility should be a ground for nullity: The Law Commission, Report on Nullity of Marriage (Law Comm. No. 33) H.M.S.O. 1970, para 33, p. 16.

⁷⁶ *Baxter v. Baxter* [1947] 2 All E R 886.

⁷⁷ *S v. S* (otherwise W) No 2 [1962] 3 All E R 55, p. 62.

⁷⁸ *Ibid.*

⁷⁹ *Corbett*, p. 105.

to remember that in *S. Y. v. S. Y.*, the wife had “a vestigial vagina”⁸⁰ and the enlargement operation entailed the removal of soft tissue in the place where the vagina should be and the new passage ways lined by a skin graft. Her sexual satisfaction might, Willmer J. acknowledged, have been affected. However, since sexual satisfaction was irrelevant to the question of consummation, the learned judge found that in both cases of the enlargement of an existing vagina and the reconstruction of an artificial one, “there is no more than a cul-de-sac and there can be no possibility of a child being conceived.” Admittedly, Willmer J’s obiter might be restrictively interpreted to mean the surgical creation of an artificial cavity in a biological female. Still, it is submitted that his choice of words in formulating his principles are wide enough to embrace even an operation performed on a transsexual. Otherwise, it would be a distinction without difference⁸¹ and no less than a cruel hoax on transsexuals who cannot help their psychological needs and who have actually gone to great expense and lengths to undergo a sex-reassignment operation. Similar arguments could be canvassed for the transsexual who has an artificial penis constructed⁸². With the aid of a prosthesis, erection and intromission are possible, satisfying thus Dr Lushington’s definition of full and complete intercourse. There is also no necessary impediment to the other spouse, whether a natural male or female, deriving sexual satisfaction from intercourse with a partner with artificial sexual organs⁸³. In Donovan L.J’s words, “. . . if the surgically treated vagina will admit all the male organ and give its possessor sexual satisfaction, which is the probability here, what ground is left for saying that the wife is not capable of consummating the marriage?”⁸⁴. The likening by Ormrod J of sexual intercourse involving an artificial vagina to anal intercourse⁸⁵ distinguishes itself only by its strait-laced narrowness and its depreciatory conservatism, but not its’ logic.

Ormrod J also fails to satisfactorily resolve other knotty problems that his decision yields. A transsexual with an artificial vagina could therefore

⁸⁰ Her vagina was only two inches long and was small in diameter — Corbett, p. 108.

⁸¹ See Bartholomew, p. 104.

⁸² In an interview conducted by the writer with Prof S S Ratnam, Head of the Obstetrics & Gynaecology Department, National University of Singapore Hospital, he felt that with prosthesis designed by the department and manufactured in Japan, it is now a practice to fix female transsexuals with the prosthesis.

⁸³ This was true of the transsexual wife in *Re “M”* (see supra note 54). According to Prof S S Ratnam, this is true for almost all male transsexuals who claimed that they enjoy sex intercourse, have sensation in their constructed vaginas, with the majority claiming that they would reach orgasm (depending on how much they feel for their partner). For female transsexuals, most claim that they enjoy sexual relationship with their female partners, and a few claim that they reach orgasm.

⁸⁴ *S v. S (otherwise W)* No. 2 [1962] 3 All ER 55 p. 64.

⁸⁵ “In my judgement, it is the reverse of ordinary and in no sense, natural. When such a cavity has been constructed, anal or intra-crucal intercourse is, in my judgement, to be measured in centimetres.” per Ormrod J., Corbett, p. 107.

never be raped because (i) he is still biological male, which is all that matters; (ii) penetration of an artificial vagina is never intercourse. Neither could such a person be capable of committing adultery. The learned judge's reply was that the issue "does not seem to me to be very important, since neither oral intercourse with a woman nor mutual masturbation will afford the wife the remedy of adultery"⁸⁶. Such an answer does not address the issue that such individuals deserve the same personal rights accorded without question to ordinary people. To have brought up the instances of oral sex and mutual masturbation as being insufficient to found a case in adultery is neither here nor there, and is fallacious⁸⁷.

Both adultery and rape require only partial penetration, the rationale being that in one, the sacredness of marriage, and in the latter, the integrity of the body are so important and worthy of protection that the slightest degree of penetration would be violation of these rights. There is no reason at all why penetration with an artificial penis, or into an artificial vagina should yield different results.

In the wake of *Lim v. Hiok*, which impliedly endorses a reasoning that could lead to the same vexations as *Corbett*, it is suggested that even if the unfortunate decision of *Lim v. Hiok* is to remain the law, S.88(3)(a) of the Women's Charter relating to divorce on the ground of one spouse committing adultery should be accordingly amended to remove any uncertainty as to the scope of adultery. The relevant sections of the Penal Code with respect to rape⁸⁸ and unnatural connection⁸⁹ should also be clarified to afford protection to such individuals.

An interesting question arises: if the incapacity of a party arises only after marriage, and consummation had hitherto not occurred, can the marriage be avoided on the ground of subsequent incapacity?⁹⁰

⁸⁶ Corbett, p. 108.

⁸⁷ Bartholomew, p. 109:

"One must show possession by one party of an organ capable of effecting penetration and by the other of an organ capable of being penetrated to an extent sufficient from the purpose of the law relating to adultery. Unless these are present, by definition, there can be no adultery; if they are present, then adultery is possible irrespective of any further enquiry into the sex of the parties."

⁸⁸ Section 375, Penal Code, Cap 224, 1985 (Rev. Ed.)

⁸⁹ Section 377 and 377A, Penal Code, Cap 224.

⁹⁰ In England, before the statutory modification in 1971 of common law, the position was that the incapacity must occur or exist (& not after) the time of the marriage in order for the marriage to be voidable. The legislation of the UK's Nullity of Marriages Act 1971 was not intended to change the law — see the explanatory notes to the Law Commission's draft bill: The Law Commission, Report on Nullity of Marriage (Law Comm. No. 33) H.M.S.O. 1970, p. 47. However, the Law Commission Report cannot be read for the purpose of interpreting the words of the legislation in a manner consistent with the recommendations of the paper.

It is interesting to note that in Canada, the inability to consummate is a ground for both divorce and voidability of the marriage.

In the context of transsexual marriage, the incapacity may manifest itself as a subsequent physiological post-surgery defect arising after marriage that prevents full and complete penetration. For instance, the artificial penis may reject the prosthesis or the artificial cavity may seal up from lack of proper care by the converted transsexual. This is an untested question in both Singapore and UK, where the respective statutes are silent on this point. It seems logical that so long as the parties contract a marriage where no possible vitiating factors exist at the time of the marriage to make the marriage void or voidable, any supervening circumstance thereafter should be accepted by the parties as a burden both have agreed to shoulder together. There is in this stance the implicit policy endorsement of the sacredness of marriage. It is reinforced by Section 100(c) to (f), the relevant event of each occurs or exists at the time of the marriage. However, S.100 (b) appears to be predicated on the notion that subsequent surpassing factors may be operative⁹¹. The uncertainty as to whether section 100(a) may apply in situation of subsequent incapacity arises from this divergence between section 100(b) and section 100(c) to (f). In cases where the subsequent incapacity can be cured by an operation and the party suffering from the incapacity refuses unjustly to submit to the operation, this very uncertainty may be obviated by resorting to section 100(b) as a ground for annulling the marriage. Thus, the issue of invoking section 100(a) becomes purely academic. The problem arises where the incapacity is incurable and permanent, or at least, cannot be cured without endangering the life of the person undergoing surgery for its removal.

(ii) Wilful Refusal To Consummate

A transsexual who has undergone an initial operation may have to submit to future medical treatment to complete his or her sex change and to enable him to consummate the marriage. For instance, a female transsexual may have had her breasts removed and an artificial penis constructed but the prosthesis may not yet be fitted (as in *Lim v. Hiok*). The absence of this apparatus would prevent him from engaging in sexual intercourse.

If such a person refuses for no just reason to go for further treatment, then the other spouse may petition for annulment on the grounds that the person has wilfully refused to consummate it via section 100(b) of the Women's Charter⁹². If, however, the medical treatment or surgical

⁹¹ The arguments for and against the removal of this ground as a reason for annulment are briefly spelt out in SM Cretney, *Principles of Family Law*, (Fourth Ed), p. 69–72.

⁹² In *Horton v. Horton* [1947] 2 All E R 871, p. 874, Lord Jowitt L C explained the words "wilful refusal to consummate the marriage" in connoting ". . . a settled and definitive decision come to without *just* excuse." It is interesting to note that in Canada, the refusal to consummate the marriage is only a ground for divorce not voidability of the marriage. However, there appears to be no defence of "just excuse" — see Section 4(1)(d) of the Canadian Divorce Act 1985.

operation poses a high degree of danger or where the chance of a cure are low so that no reasonable person “after such tact, persuasion and encouragement as an ordinary spouse would use in the circumstances”⁹³ would chose to submit to such treatment or operation, then there is just excuse and no wilful refusal. This would of course be a question of fact.

(iii) Absence Of Genuine Consent

S.100(c) provides that annulment of a marriage is possible if “either party to the marriage did not validly consent to it, whether in consequence of duress, unsoundness of mind or otherwise”⁹⁴. This notion represents the “voluntary” element in Lord Penzance’s classic description of a marriage in *Hyde v. Hyde*. Seen as a somewhat lesser factor, spouses are thus given the option to ratify the marriage or petition for an annulment⁹⁵. In *Lim v. Hiok*, Rajah J C found that there was indeed such an absence of consent, and even went so far as to say that the marriage was not solemnised on the authority of a valid licence and is “void on that ground under S.21 of the Women’s Charter”⁹⁶. However, since he decided the case primarily on the issue of sex determination, this remark as to mistake of sexual identity is probably only weak obiter considering the scant attention given to it. It remains for future cases to decide the question: does a mistake as to the sex identity of 2 spouses result in absence of genuine consent that will render the marriage voidable?

(iv) Mistake

It is established that a mistake as to the identity of the party based on error of his/her condition, fortune or to any of his/her attributes/qualities is not a mistake within the meaning of S.100(c)⁹⁷. It is only an error of the person itself that will vitiate a marriage. This is singularly difficult to prove. Such a situation arises when C thinks he is marrying A, but in actual fact, marries B. Mere mistake as to a person’s name is insufficient if C has already met B and has consented to marry this same person, known by whatever name. If

⁹³ Rayden and Jackson’s *Law and Practice in Divorce and Family Matters*, (Fifteenth Ed, 1988) Vol. 1, p. 150.

⁹⁴ Canadian and Australian Law depart from UK, Hong Kong and Singapore in this respect. Lack of consent makes a marriage void in both these countries, for instance, see Section 23(B)(1)(d) of the Australia’s Marriage Act 1961. In Canada, though, a marriage is void for lack of consent on common law, the parties may, strangely, ratify the marriage.

⁹⁵ How serious a fact or lack of consent should be is highly subjective. In Hong Kong, there is the move from void to voidable for marriages celebrated on or after 1 July 1972, with the legislation of the new section 20(2)(c) to replace the old section 20(1)(c) of the Matrimonial Causes Ordinance. Australia not only has lack of consent as a ground for making marriages void but has also abolished the category of “voidable” marriages altogether with the legislation of section 51 of the Family Law Act 1975.

⁹⁶ *Lim v. Hiok*, p. 196.

⁹⁷ See Jeune P’s judgement in *Moss v. Moss* [1897] p. 263 at p. 271–272.

C thinks that the person possesses some quality which is consequent upon his being known as A, then the mistake is as to attribute⁹⁸.

In the context of transsexual marriages, where a converted transsexual marries without telling his/her spouse of the sex change, the Australian case of *In the Marriage of C and D* (falsely called C)⁹⁹ is instructive. The court held that such a marriage may be avoided on the ground of lack of consent. The wife petitioned on the ground that she had been mistaken as to the identity of her spouse at the time of the marriage, because she had believed he was a male when actually he was in fact both male and female. Bell J. referred to S.18(1)(d) of the then Matrimonial Causes Act 1959¹⁰⁰ and said, “The wife did not in fact marry a male but a combination of male and female and notwithstanding that the husband *exhibited as a male*, he was in fact not and the wife was mistaken as to the identity of her husband and the ground under the Matrimonial Causes Act is made out.”¹⁰¹

Bell J’s reference to “male and female” is to the biological state as at birth. For transsexuals, either male or female at birth, whatever characteristics of the opposite sex they display later on or after a surgical operation to change their sex, there is no reason why the above reasoning in *C v. D* should not apply if non-disclosure of the sex change to the other spouse. A fortiori evidence of fraud in concealing such fact.

The only obstacle is the reconciliation of *C v. D* with other decisions in family and commercial law. Finlay¹⁰², in analyzing the cases, opines that “in *C v. D*, the error was to the respondent’s sex and did not go to his identity in the sense in which this concept must be understood for present purposes in the light of the above authorities’. He contends that an examination of commercial cases such as *Phillips v. Brooks Ltd*¹⁰³ and *Edmunds v Merchants’ Despatch Transport Co.*¹⁰⁴ (an American case) clearly show that as long as an individual present in person is identified by sight and hearing, there can be no mistake that could defeat a commercial transaction. The assumption of a false name pro tanto is insufficient to constitute a mistake as to the person.

⁹⁸ The distinction is admittedly a fine one — see *Allardyce (falsely called Gordon) v. Mitchell* (1869) 6 W.W. & A B (M) 45.

⁹⁹ Specifically, Section 18 (1)(d)(ii) of the Australia’s Matrimonial Causes Act 1959. See also *C & D* p. 527.

¹⁰⁰ Section 18(1)(d): “... the consent of either of parties is not a real consent because . . . (ii) that party is mistaken as to the identity of the other party or as to the nature of the ceremony performed.”

¹⁰¹ *C and D*, p. 527.

¹⁰² “Sexual Identity and the Law of Nullity”, [1980] 54. *The Australian Law Journal* 115 at p. 118.

¹⁰³ [1919] 2 K.B. 243.

¹⁰⁴ 135 Mass 283.

It is respectfully submitted that such reasoning fails to take into account the different nature of marriage, which is a special contract to which many ordinary contractual principles do not apply and for which new considerations and rules have been formulated. To place it on the same level as commercial transactions is inappropriate. The sex of a person is quite irrelevant in most business transactions but certainly not in a marriage. Further, Finlay's view is formulated in the context of Australian law, where lack of consent automatically nullifies a marriage. He was perhaps anxious to avert the drastic consequence of a void marriage. In Singapore, though, a finding that there was an error as to a person's biological sex (assuming it is accepted as an error as to the person) would be less severe, because the marriage is only voidable. In this respect, Bell J's Australian decision in holding the marriage void may be questioned.

To reconcile *C v. D* with the existing authorities, it is suggested that a person's biological sex as at birth is so important in matrimonial matters that it forms an inextricable aspect of his person, an error of which would lead to a mistake as to identity under S.100(c) of the Women's Charter¹⁰⁵. This is because a person's natural sex and/or converted sex may influence or determine to a not inconsiderable extent his or her ability to consummate, the quality of consummation, the capacity to procreate and the chances of satisfactorily fulfilling his or her spousal role in the same way a person of natural sex would be able to. Since these abovementioned areas are significant characteristics of a marriage, it is only fair that the other spouse has the option to re-consider the marriage upon discovering an error relating to the natural sex of his or her spouse. In the event that one spouse is aware of the sex change of the other spouse before marriage and willingly enters into the marriage, then clearly there is no mistake as to identity at all.

(v) Divorce

In the final analysis, parties in a transsexual marriage can always resort to divorce, even if the grounds of voidability are not available to them. It may be no real disadvantage because the distinction between divorce and voidability have been much blurred in Singapore. Presently, both divorce

¹⁰⁵ This is implicit in *C and D* when Bell J says: "The ground of identity is in my opinion made out in that the wife was contemplating immediately prior to marriage and did in fact believe that she was marrying a male. She did not in fact marry a male but a combination of both male and female and notwithstanding that the husband exhibited as a male, he was in fact not and the wife was mistaken as to the identity of her husband and the ground under "the Matrimonial Causes Act" is made out". The test suggested by Anthony Dickey, *Family Law*. (2nd Ed), 1990 at p. 143 is, "did the applicant truly consent to marry a person having the fundamental physical characteristics of the person whom he or she did marry? If the answer to this question is no, a decree of nullity based on mistaken identity will lie."

and annulment of a voidable marriage operates prospectively¹⁰⁶ i.e. the marriage is deemed valid for the period before the respective decree is given by the court. Also, under S.106 of the Women's Charter, the court has the powers to decide on the question of division of matrimonial property, custody of children (which includes those legally adopted)¹⁰⁷, and maintenance for an annulment or divorce. Either spouse can initiate a petition for divorce or annulment; but this must be done during the lifetime of the other spouse¹⁰⁸.

In the Women's Charter, S.88 spells out the factors which evidences that "the marriage has broken down irretrievably". Of particular significance in this article is section 88(3)(a), which deals with adultery.

Adultery, in section 88(3)(a), means voluntary sexual intercourse between a married person and someone other than his spouse. As will later be discussed adultery should have been made out if there is penetration with an artificial penis or into an artificial vagina, whatever the degree of penetration¹⁰⁹. Therefore, a natural sex or converted transsexual spouse has intercourse with a person (of natural or converted sex) other than his or her spouse will have committed adultery. This coupled with the innocent spouse finding it intolerable to live with the guilty party will constitute a ground for divorce.

For S.88(3)(b), the use of "cannot reasonably be expected to live with the respondent" admits of wide-ranging possibilities. Those that directly affect the problem of sex-determination are the situations where one natural-sex spouse suffers from and/or practises transvestism or transsexualism. Depending on the facts of each case, the behaviour of such spouse could conceivably be such that the petitioner cannot reasonably be expected to live with him or her.

V. CONCLUSION: PROPOSED REFORMS

In this concluding part of the article, the writers would like to submit the proposed reforms that can be considered to be effected. Firstly, it would be apt to clarify the provision for the grounds for "void marriages" in the

¹⁰⁶ For voidable marriages, see s.104 of the Women's Charter, CAP 353.

¹⁰⁷ See section 7 of the Adoption of Children Act, Cap 4, 1985 (Rev. Ed.)

¹⁰⁸ Leong Wai Kum, *Family Law in Singapore* (1990), at p. 80, comments: "It is little wonder that the conceptual distinction between them is unmeaningful. . . This problem of misconception is such that we may, have to review the necessity of retaining the category of voidable marriages. Could we not expect parties to such marriages simply to present divorce instead?" Australia's abolition of the category of voidable marriages shows that it is realistically possible.

¹⁰⁹ See the part of this article dealing with "Incapacity to Consummate".

Woman's Charter (1985 Edition), i.e. Section 99. The issue is whether in the absence of an expressed requirement of heterosexuality in all marriages in S.99, does the Court have the power to nullify such marriages? It is clear that whichever answer is given, it is not free from contention. Hence, it is proposed that our legislation enacts a similar provision like that of S.11 (c) of the UK's Matrimonial Causes, providing that a marriage is void if "the parties are not respectively male and female". Although, such a proposal has been criticised¹¹⁰, the writers are of the view that the benefit to be had is the clarification of the court's power to nullify marriages which are not heterosexual. It is submitted that as "male" and "female" are neutral words compared to "man" and "woman", the courts will have the flexibility to define what these are. In the light of growing criticism of the rigid and conservative biological approach in *Corbett*, the writers are confident that in future our courts will adopt the more justifiably flexible and enlightened interpretation of the American and New Zealand courts¹¹¹. Alternatively, there could be a definition provision for the terms used, importing the psycho-social attributes for the purpose of legally recognising the converted transsexual's assigned sex after their sex change.

The next legislative reform is inextricably linked to the first. It is submitted that our legislative may want to consider passing an Act which is similar to the Australia's Sexual Reassignment Act¹¹². This Act consists of 16 provisions and is categorised into basically 3 parts:—

- (a) Reassignment procedures¹¹³
- (b) Recognition certificates¹¹⁴
- (c) Miscellaneous¹¹⁵

The writers would only focus on the essence of the Act which is in the first two parts. Briefly, the "Reassignment Procedures" part lays down the approved hospitals, and medical practitioners who can perform such sexual reassignment/operation¹¹⁶. In addition, there are provisions ensuring and governing the professional standards, expertise and facilities of such

¹¹⁰ See Kennedy, p. 125–127.

¹¹¹ US: *MT v. JT* supra note 52 *In re Anonymous*, supra note 53. *K v. Health Division, Dept of Human Resources* (1976) 522 p. 2d 840 (Or. App) New Zealand: Evening Post, 20 Jul 91.

¹¹² Sexual Reassignment Act (South Australia) No. 49 of 1988 [hereafter cited as SRA].

¹¹³ SRA, S.6.

¹¹⁴ SRA, S.7 — 10.

¹¹⁵ SRA, S.11 — 16.

¹¹⁶ SRA, S.6 (1).

hospitals which are monitored and controlled by the South Australia Health Commission¹¹⁷. The next part deals with the topic of “Recognition Certificates”. A recognition certificate is a document, issued under this Act which acknowledges the holder as being of the sex to which he/she has been assigned. The recognition certificate is “conclusive evidence”¹¹⁸ of two points; one, that the person has undergone a reassignment surgery and two, is of the sex stated therein. The power of issuing such certificates is vested in the magistrates, appointed by the Governor. Before the magistrate issues out a certificate, he must consider several factors before deciding to issue such certificates. It is important to note that among other things, the psycho-social character of the transsexual newly acquired sex is important here¹¹⁹. Once, a recognition certificate has been issued, the transsexual must wait for at least a period of one month¹²⁰ before representing it to the Registrar of Births, Deaths and Marriages to effect the appropriate documental changes and amendments. On representing the recognition certificate to the Registrar, it is imperative that he registers the reassignment of the new sex and make the appropriate changes and alterations on all registers and records kept by his department¹²¹. All in all, this Act settles once and for all the confusion which may arise from the sex status of a converted transsexuals. With this recognition certificate, and the changes made to his/her or her documents in the department of the Registrar of Births, Deaths and Marriages, the transsexual can then proceed to acquire other official documents or papers in the status of the reassigned sex, e.g., driving licence, credit/bank cards, passport, identification papers and insurance policy. Besides Australia, there are 15 states¹²² in the United States of America which permit post-operative change of sex status on birth certificates by statute, an essential pre-requisite for similar

117 SRA, S.6 (2).

118 SRA, S.8 (1).

119 SRA, S.7(8)(b) requires that the magistrate be satisfied that the transsexual:—

- (i) believes that his or her true sex is the sex to which he or she has been reassigned;
- (ii) has adopted the lifestyle and has the sexual characteristics of a person of the sex to which the person has been reassigned; and
- (iii) has received proper counselling in relation to his or her sexual identity.

120 SRA, S.9 (2). This period of a month is probably for any objection which may be raised by parties who have an interest in the application of the transsexual for a recognition certificate, for example the Minister, the Registrar of Births, Deaths and Marriages or the Health Commission after the awarding of the recognition certificate by the Magistrate. These parties arguably have the locus standi to object to the award of the recognition certificate by virtue of S.7 (2) in which the transsexual must serve extra copies of his/her application forms to:

- (i) the Minister, and
- (ii) any other person who should, in the magistrate’s opinion, be served with a copy.

121 SRA, S.9 (1).

122 Alabama, California, Hawaii, Illinois, Louisiana, Maryland, New Jersey, North Carolina, Pennsylvania, Virginia, Tennessee, Texas, Iowa, Colorado, Minnesota.

change in other documents. Similar legislations have also been enacted in Germany¹²³, France¹²⁴ and Italy¹²⁵.

In Singapore at present, a sex operation only means that the transsexual can change his or her sex status with regards to the identity card, and not the birth-certificate. This poses problems to the transsexuals who are required to produce their birth certificates for the purpose of verification of their sex when applying for jobs, registration of marriages or any other activities. Hence, the transsexuals face two contrasting requirements from public and private bodies when applying to them for various purposes i.e. one set of people or bodies recognising the birth-certificate and another set recognising the identity card as the sole verification document of their sex status. Viewing these as a whole, it would appear that such contrasting and conflicting reactions should be ironed out. It is submitted that an Act à la the Australia's Sex Reassignment Act would be the answer. Moreover, if the law permits sex-change operations in Singapore¹²⁶ and allows the transsexual to have the new sex incorporated into his or her identity cards, it would be an incomplete recognition of the transsexual's right to lead the life of his or her newly acquired sex if it does not extend this to all other aspects of his or her life. It would be humane and complete to extend this recognition across the board, so that in effect an identical 'recognition certificate' scheme which when issued and uncontested will result in the change of all existing official documents to incorporate the new sex status of the transsexual. This would mean that all transactions which flow from this basic recognition of a transsexual sex status will be solved, for example marriage, law of inheritance, adoption, etc.

In the area of criminal law, the law must also clarify how the transsexual is to be treated. In *Regina v. Tan*¹²⁷, one of the issues before the English Court of Appeal was whether the appellant, a male to female transsexual was liable for living on the earnings of a prostitute, contrary to Section 30 of the UK's Sexual Offences Act 1956. To be liable for this offence, the appellant must be considered a man. The appellant was born a man, but

¹²³ Details of the legislations can be found by reference to Horton, "The Law and Transsexual in West Germany" (1978) Fam. Law 191.

¹²⁴ See Delia, "The Anomalous Injustices in Transsexual Legal Status", Self Help Association for Transsexual's Newsletter, No. 7 (1980).

¹²⁵ Reported in The Guardian, 3 Oct 81.

¹²⁶ In Argentina, sex-change operations are criminal offences. In an Argentinian case of *Ricardo San Martin* 123 Lay Ley 605 (C.N Crim y Correc. Argen. 1966), the surgeon who operated on a voluntary and consenting transsexual was severely punished and his act bitterly criticised as immoral. It logically follows that for such a country, post-operative recognition of the transsexual's sex status is disallowed for all purposes.

¹²⁷ [1983] QB 1053.

after having undergone hormone and surgical treatment, was psychologically, physically and socially a woman. The court had no hesitation in applying Ormrod J's biological criterion because "common sense and the desirability of certainty and consistency demand that the decision in *Corbett v. Corbett* should apply for the purpose not only of marriage but also for a charge under Section 30 of the Sexual Offences Act 1956". It is logical that the English Court of Appeal follows *Corbett* for the reasons stated above¹²⁸. In other words, the decision of *Regina v. Tan* is predictably consequential of *Corbett's*. As, the writers are proposing that our courts should deviate from the approach taken in *Corbett*, a similar submission that the *Regina v Tan* should not be followed in the application of criminal sexual offences is intended. Similarly in Singapore, our courts in presiding over criminal matters involving the determination of sex, may follow the biological approach in *Lim v. Hiok*. Although "certainty and consistency" was considered essential in *Lim v. Hiok*¹²⁹, these should not be stumbling blocks to humanitarian and relevant policy considerations, which were elucidated earlier. As an alternative, it is submitted that the similar approach as proposed in the civil law be used for the determination of sex for the purpose of sexual offences. The definition of the two sexes in the Penal Code is as follows: "man" and "woman" denotes a male and female human being of any age respectively¹³⁰. Given the neutral adjectives of "male" and "female", it is possible for our courts to interpret these to incorporate the gender identity of transsexuals. However, a better approach would be to effect legislative amendments to the Penal Code, rather than to leave such interpretation to the Courts, which may not be prepared to support this line of approach. Alternatively, if a similar Sex Reassignment Act, is to be enacted then the law here would be clear as to the sex status of a transsexual. Together, this would mean that a transsexual could be protected against sexual offences and offences against marriage in which a female can expect protection from the law, for

¹²⁸ See P J Pace, "Sexual Identity and the Criminal Law", [1983] Crim. L. Rev. 317 in which the learned writer criticised the decision of *Regina. v. Tan*. He submits that the Court of Appeal should not have applied the *Corbett's* approach in sex-determination because of the following reasons:—

- (i) it is not in line with the relevant and applicable laws of Western European countries and the US.
- (ii) *Corbett's* decision was understandably restrictive given the conservative circumstances and the rarity of such phenomenon at that time.
- (iii) it fails to give the gender or psychological aspect of sexual identity the recognition it undoubtedly deserves.
- (iv) different policy considerations apply in the criminal and civil law.
- (v) it is not uncommon to find inconsistencies between the civil and criminal law.

¹²⁹ *Lim v. Hiok*, p. 196.

¹³⁰ Penal Code CAP.224, 1985 (Rev. Ed) [hereinafter cited as P.C] — S.10.

example, against rape¹³¹, adultery¹³², outrage of modesty¹³³, illicit intercourse or prostitution¹³⁴. Also, transsexuals who committed sexual offences should be similarly punished¹³⁵.

Lastly, in court proceedings involving transsexual matters, for example in sex determination or dissolution of marriages etc, it is submitted that anonymity be accorded to the parties involved in the dispute. Also, the proceedings should be carried out in camera as is usually done where private family matters are involved in the UK's Chancery Division¹³⁶. These will ensure that confidentiality and a sense of security be accorded to the parties who would certainly want to avoid the glaring publicity and stigma attending such matters. All in all, the time is now ripe to give legal recognition to the reassigned status of transsexuals after their sex-change operation. This move will be in line with our nation's quest to make Singapore a more gracious and compassionate society. This is a way in which the law can contribute to achieve the noble objectives. The pleas of a MP in the English Parliament against the passing of a Bill which gives legislative effect to the decision of *Corbett* are relevant in ending this article:—

To live under a law which is too hidebound, too rigid and, perhaps, too frightened to acknowledge that not all the human race can be neatly divided into two — and only two — separate compartments. Nature does not obey man-made laws and although this may be inconvenient to the lawyers, law commissioners and legislators we would be unjust and unfair if we persist in continuing to believe that Nature is not often shamelessly untidy. We have in our community a small group of people on whom Nature has played a tragic trick and, because of this, they live in a twilight world and our laws can do little to rescue them from their

131 PC, S.375 and 376. The maximum punishment is 20 years imprisonment, fine or 12 strokes of the cane or a combination all these.

132 PC, S.493 and 494. The maximum punishment is 10 years and 7 years imprisonment respectively and also liable to a fine.

133 PC, S.509. This offence also includes offensive words or gestures and may be especially important for transsexuals after sex-change operation because it will punish insidious and unkind remarks made by inconsiderate members of our community. This offence carries a maximum punishment of 1 year, or fine or both.

134 PC, S.366. This is important for a converted transsexual who may be taken advantage of and bullied by rogues, believing that such acts would be difficult to be prosecuted (a likely consequence if *Corbett* is to be applied, see *Corbett*, p. 108). The maximum punishment is 10 years imprisonment and also liable to a fine, or caning.

135 See supra note 86–89, such offences can equally apply to transsexual perpetrators, where the circumstances warrant so.

136 UK's Matrimonial Causes Act 1973, S.48 (2).

fate. We would indeed be an insensitive Parliament if we allowed the passing of this Bill without amendment, for that would push these people yet further into a bewildering limbo¹³⁷.

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¹³⁷ UK's Hansard H.C, Col. 1834 (Apr 2, 1971).

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