CACV 266/2010

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL

CIVIL APPEAL NO. 266 OF 2010

(ON APPEAL FROM HCAL NO. 120 OF 2009)

BETWEEN

W Applicant

and

REGISTRAR OF MARRIAGES Respondent

Before: Hon Tang VP, Hartmann and Fok JJA in Court

Dates of Hearing: 12 & 13 October 2011

Date of Handing Down Judgment: 25 November 2011

J U D G M E N T

Hon Tang VP:

1. I have had the advantage of reading Fok JA's judgment in draft. I am in full agreement and have nothing to add.

Hon Hartmann JA:

2. I agree with the judgment of Fok JA.

Hon Fok JA:

A. Introduction

3. The appellant is a post-operative transsexual woman, who wishes to marry her male partner. The respondent has construed the relevant provisions of the Marriage Ordinance, Cap. 179 ("the MO") as not permitting such a marriage. The appellant challenges the respondent's construction of those provisions. Alternatively, the appellant says that the provisions, if construed correctly by the respondent, are unconstitutional being in breach of various articles of the Basic Law ("BL"), the Hong Kong Bill of Rights ("HKBOR") and the International Covenant on Civil and Political Rights ("ICCPR").

4. The appellant's judicial review proceedings were dismissed below by A. Cheung J[1] (as the learned Chief Judge then was) and the appellant appeals to this court. The appeal raises important issues. These issues arise in the context of a medical condition giving rise to hardship and distress by those who suffer from it and, regrettably, to discrimination against them. The court has been assisted by the helpful submissions of Mr Dykes SC, leading Mr Hectar Pun and Mr Earl Deng, for the appellant and of Ms Monica Carss-Frisk QC, leading Ms Lisa Wong SC and Mr Stewart Wong SC, for the respondent. In addition, leave was granted to the International Commission of Jurists ("ICJ") to intervene by way of written submissions.

B. The appellant

5. The appellant was born on 12 September 1975 in Hong Kong. At birth, she was registered as a male and this registration is reflected in the entry

[1] The judgment is reported at [2010] 6 HKC 359.

in the register of births kept by the Registrar General's Department. There is no dispute that this was a correct classification and that the appellant was born male. Her Hong Kong juvenile identity card and, later, her Hong Kong permanent identity card both record her sex as male.

6. However, from an early age, the appellant considered herself to be female rather than male. From about 2005, the appellant underwent gender reassignment treatment consisting of psychiatric assessment and hormonal treatment at public hospitals and clinics in Hong Kong. In January 2007, the appellant underwent an orchidectomy, being a surgical procedure to remove the testes, in a hospital in Thailand. During the course of 2007 the appellant changed her name by deed poll from that registered at her birth to a more feminine name. She also completed a period of living as a member of the opposite sex subject to professional supervision and therapy, known as the real-life experience, whereby she lived publicly in her preferred gender as a woman for over 12 months. Following further psychiatric assessment, the appellant was recommended for sex reassignment surgery.

7. In July 2008, the appellant successfully underwent an operation at a government hospital which involved the removal of her penis and the creation of an orifice likened to an artificial vagina. Following the operation, the Chief of Surgical Service of the hospital, Dr Yuen Wai Cheung, issued a letter on the hospital letterhead to certify that the appellant had undergone male to female transsexual surgery and that the appellant's gender should now be changed to female.

8. In August 2008, the appellant applied to amend the name and sex recorded on her Hong Kong identity card. This application was duly approved pursuant to regulation 18 of the Registration of Persons Regulations, Cap. 177A, and on 1 September 2008, the appellant was issued with a replacement identity

card which indicated her new name, as amended by the deed poll, and new sex, reflecting Dr Yuen's certifying letter. At about this time, the appellant also applied to the tertiary institution where she had studied to change her gender to female in all their records in respect of her.

9. The notice of application asserts that the appellant is, in appearance and physical conformation, indistinguishable from other women. She has developed a stable relationship with her male partner, whom she would like to marry. Her solicitors wrote to the Marriage Registration and Records Office of the Immigration Department on 17 November 2008 to seek confirmation from the respondent that the appellant is able to marry her partner in Hong Kong. On 26 November 2008, the respondent replied 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."

C. Transsexualism

10. The determination of a person's sex can usually be determined by reference to certain physiological characteristics. These include genital factors, being the external genitalia as well as internal sex organs, gonadal factors, being the presence or absence of testes or ovaries, and chromosomal factors, namely the pattern of XY chromosomes in males and XX chromosomes in females. With the relatively rare and special exception of inter-sexed persons, in whom these physiological characteristics are ambiguous, the determination of sex by

reference to these characteristics is a straightforward task undertaken at birth and a person is classified as being male or female accordingly.

11. There are some people, however, who do not accept their sex as determined by the biological indications described above and such people are described as transsexuals. Transsexuals are not content with living as a member of the sex they do not identify themselves with. They genuinely believe that they are members of the opposite sex and that their bodies are inconsistent with the sex to which they believe they belong and this often causes acute distress. The sex identity which a person believes he or she may have is known as the person's psychological sex. Such a person suffers from a medically recognised condition known as transsexualism, also known as gender identity disorder or gender dysphoria.

12. Transsexualism is medically defined 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 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. The World Health Organization publication, *International Statistical Classification of Disease and Related Health Problems* (version 10), notes that transsexualism is recognised as a medical condition under the category 'Gender Identity Disorders' (GID), and is coded 'F64'. There are five different conditions classified under GID and transsexualism is one of them, being given the code 'F64.0'.

13. Although it is generally thought that transsexualism is a psychological condition, there is a body of medical opinion that supports the view that the aetiology or causation of transsexualism is biological rather than psychological. Nevertheless, as is common ground on the evidence, the claim that the aetiology of transsexualism is biological and congenital in nature still

awaits further scientific investigation. In *Goodwin v United Kingdom* (2002) 35 EHRR 18, the European Court of Human Rights ("ECHR") noted (at §81) that:

> "It remains the case that there are no conclusive findings as to the cause of transsexualism and, in particular, whether it is wholly psychological or associated with physical differentiation in the brain."

14. In definitional terms, it is necessary to make certain distinctions. First, transsexualism is not concerned with sexual orientation. From his or her psychological point of view, a transsexual is not sexually attracted to a member of the same sex. Secondly, a transsexual is not the same as a cross-dresser or transvestite, namely a person who dresses in the opposite sex either so as to be publicly perceived as such or for sexual pleasure. Thirdly, there is a difference between a transsexual and a transgender individual. The latter term refers to a wide spectrum of cross-gender experiences and is not a medical diagnosis or condition. Finally, as already noted, a transsexual is to be distinguished from an inter-sexed person.

15. It is common ground that transsexualism is incurable in terms of changing the transsexual's psychological belief and self-perception to conform to the sex suggested by his or her biological and anatomical features and characteristics. Instead, sex reassignment surgery, together with hormone therapy and real-life experience, is the medically indicated and necessary treatment of persons diagnosed with transsexualism. This is reflected in the fact that treatment for transsexualism is publicly funded by the Government.

16. Sex reassignment surgery, which is the ultimate step a transsexual can take in order to transform his or her body into the preferred gender, is commonly referred to as a sex change operation. The nature of the surgery involved was described by Dr Yuen Wai Cheung in his expert evidence quoted

by the Judge (at §31 of his Judgment) and it is convenient to set out the materials parts of Dr Yuen's evidence here:

> "8. 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').
>
> 9. 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')."

17. In both types of sex reassignment surgery, only the external genital morphological organs and secondary sexual characteristics are changed from those of the transsexual's original sex to ones that resemble those of the desired sex. In the case of female-to-male sex reassignment surgery, a person may also lose the female gonadal organs (i.e. ovaries) and internal genital

morphological organs (i.e. uterus). Surgery, together with hormone treatment and further secondary sexual characteristics or changes (including, for example, breast development and elimination of unwanted body hair), therefore creates a physical appearance that conforms to the desired sex but does not and cannot: change the chromosomal make-up of the person; convert the gonadal and internal genital morphological structures of the original sex to those of the desired sex (although some of the original gonadal and internal genital morphological structures can be effaced); or create the capacity to reproduce as a person of the desired sex.

D. Transsexuals in Hong Kong

18. The need to provide treatment for transsexuals has been recognised by the Government. Public funding of the provision of medical services for sex reassignment surgery has been made available. In 1980, the Sex Clinic was set up in Queen Mary Hospital for the management of sexual problems of patients. The first recorded case of sex reassignment surgery was performed in 1981 at Princess Margaret Hospital. In 1986, the Gender Identity Team was set up in Queen Mary Hospital with the aim of providing assessment and counselling services to transsexuals in Hong Kong.

19. In September 2004, the Home Affairs Bureau established the Sexual Minorities Forum "to provide a formal channel for NGOs and the Government to exchange views on human rights and other issues concerning sexual minorities in Hong Kong". From 2005 onwards, the Government earmarked an annual budget of HK$500,000 for the Equal Opportunities (Sexual Orientation) Funding Scheme to support and promote awareness of sexual minorities.

20. In about May 2005, the Home Affairs Bureau established the Gender Identity and Sexual Orientation Unit. At about the same time the Hospital Authority reformed its hospital services and, in keeping with the Hospital Authority's concept of hospital clustering, the Queen Mary Hospital transferred patients from the Gender Identity Team to hospitals and clinics in their respective residential districts for psychiatric assessment and treatment.

21. Also in May 2005, the Home Affairs Bureau issued a report entitled "Discrimination on the Grounds of Sexual Orientation and Gender Identity".

22. From 1 October 2007 to 30 September 2009, there were 86 patients diagnosed with gender identity disorder (including transsexualism and disorders of psychosexual identity) in the Hospital Authority. From January 2006 to September 2009, 18 patients underwent sex reassignment surgery in the Hospital Authority.

23. Following the completion of sex reassignment surgery, post-operative transsexuals will be issued with a certificate from their surgeon declaring their new gender (as the appellant was in the present case). Upon production of a certificate, the Commissioner of Registration and the Director of Immigration will change the identity card and other identification documents of the certified post-operative transsexual's acquired gender. However, the birth sex recorded in the register of births will not be changed.

24. Unfortunately, it remains a fact that there exists prejudice and discrimination against transsexuals in Hong Kong. Aspects of this are described in an article published in Inter-Asia Cultural Studies, Vol. 7, Number 2, 2006, p. 243, by Robyn Emerton entitled "Finding a voice, fighting for rights: the emergence of the transgender movement in Hong Kong". The

fact that there is a stigma attached to being a transsexual in Hong Kong is also reflected in the fact that the appellant obtained, at an early stage of the judicial review proceedings below, an order for non-disclosure of her identity.

E. The issues

25. The specific target of the judicial review challenge is the decision of the Registrar of Marriages contained in his letter dated 26 November 2008 declining to confirm that the appellant is able to marry her male partner in accordance with the provisions of the MO. I have set out the material parts of that letter above.

26. The construction issue: The appellant says that the Registrar misinterpreted sections 21 and 40 of the MO, specifically as to the meaning of the words "woman" and "female" in those sections. This raises the issue of construction of whether a post-operative male-to-female transsexual is a "woman" or "female" for the purposes of the MO. The same issue also arises in respect of section 20(1)(d) of the Matrimonial Causes Ordinance, Cap. 179 ("MCO"). The appellant seeks an order quashing the Registrar's decision in his letter and a declaration that the decision was unlawful on the basis that he misdirected himself in law by misinterpreting sections 21 and 40 of the MO.

27. The constitutional issue: The appellant's alternative case, in the event it is held that the Registrar has not misinterpreted the statutory provisions in question, is that sections 21 and 40 of the MO, in failing to recognise her as a "woman" or "female" are unconstitutional in that they are inconsistent with article 37 of the BL ("BL37") and/or articles 14 and 19(2) of the HKBOR ("BOR14" and "BOR19(2)") and/or articles 17 and 23(2) of the ICCPR ("ICCPR17" and "ICCPR23(2)"). These constitutional provisions concern the right to marry and the right to privacy. On this basis, the appellant seeks

declaratory relief that sections 21 and 40 of the MO are unconstitutional insofar as they do not recognise a post-operative male-to-female transsexual as a "woman" or "female".

28. Whilst this appeal only concerns a post-operative male-to-female transsexual, it must be recognised that the resolution of the issues will also indirectly affect the position of a post-operative female-to-male transsexual in respect of the words "man" and "male" in the statutory provisions in question since the position of such a person is, in substance, reciprocal to that of a post-operative male-to-female transsexual.

29. One issue that is specifically not raised by the appellant in this appeal is the question of the legality of same sex marriages. The appellant does not contest that, in Hong Kong, marriage is heterosexual and she seeks to marry her male partner as a transsexual woman in her post-operative gender. Nor, as I have already noted above, is there any challenge by the appellant to the fact that she was correctly registered at birth as a male.

F. The construction issue

30. This is the first issue to be considered since, if the appellant succeeds on this issue, it is clear that the Registrar will have misdirected himself on the law in reaching his decision under challenge and the constitutional issue does not arise.[2] The Judge held that the Registrar did not misconstrue the relevant provisions of the MO and MCO.[3]

---

[2] The courts will not anticipate a question of constitutional law in advance of the necessity of deciding it: *Fateh Muhammad v Commissioner of Registration* (2001) 4 HKCFAR 278 at 286D-287E.

[3] The Judge addressed the issue of construction in §§104 to 162 of his Judgment.

F.1 The statutory provisions

31. As already noted, the statutory provisions which fall to be construed are sections 21 and 40 of the MO and section 20(1)(d) of the MCO. As its long title explains, the MO is an ordinance "[t]o provide for the celebration of Christian marriages or the civil equivalent thereof, and for matters connected therewith."

32. Section 40 of the MO provides:

> "(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."

33. Section 21 of the MO concerns the form of marriage ceremony before the Registrar of Marriages (or, more likely in practice, a deputy registrar of marriages) or a civil celebrant. The forms of words required to be used specify that a marriage is between a "male" party, on the one part, and a "female" party, on the other part.

34. Section 20(1)(d) of the MCO stipulates that a marriage which takes place after 30 June 1972 shall be void on the ground "that the parties are not respectively male and female".

35. There is no definition in either ordinance of the words "man", "woman", "male" or "female".

F.2 Ormrod J's decision in Corbett v Corbett (otherwise Ashley)

36. The first English case to decide the sex of a transsexual in the context of marriage was *Corbett v Corbett (otherwise Ashley)* [1971] P 83. In *Corbett*, Ormrod J had to consider the validity of a marriage between a man and a post-operative male-to-female transsexual. The husband sought a declaration that the marriage was null and void or alternatively a decree of nullity on the ground that his wife was in fact a post-operative male-to-female transsexual who was, as a matter of law, a man. On the medical evidence before him, Ormrod J applied four criteria to assess the sex identity of an individual, namely (i) chromosomal, (ii) gonadal, (iii) genital and (iv) psychological. He found (p. 104A-B) that the wife was male according to the first three criteria, which were biological criteria, and that she was psychologically a transsexual.

37. Ormrod J then went on to consider the essential aspects of marriage and the relevance of a person's sex in this context. He held (pp. 105H-106D) that:

> "… sex is clearly an essential determinant of the relationship called marriage because it is and always has been recognised as the union of man and woman. 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.
>
> …
>
> Since marriage is essentially a relationship between man and woman, the validity of the marriage in this case depends, in my judgment, upon whether the respondent is or is not a woman. … The question then becomes, what is meant by the word 'woman' in the context of a marriage, for I am not concerned to determine the 'legal sex' of the respondent at large. *Having regard to the essentially hetero-sexual character of the relationship which is called marriage, the criteria must, in my judgment, be biological*, for even the most

> extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage. *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*."
>
> (Emphasis added)

In the result, Ormrod J held (p. 108E-F) that the wife was not a woman at the date of the marriage but was at all times male and, accordingly, the marriage was at all times void.

38. As the Judge noted[4], the *Corbett* test for determining sex was followed in England in *R v Tan* [1983] QB 1053 (in the context of a prosecution for the offence, which could only be committed by a man, of living on the earnings of a prostitute) and in *Re P and G (Transsexuals)* [1996] 2 FLR 90 (a judicial review in respect of a refusal by the Registrar General to alter entries on the register of births in respect of two male-to-female post-operative transsexuals).

39. As will be seen, some overseas jurisdictions have followed *Corbett* and some have arrived at a similar conclusion independently. Equally, however, *Corbett* has been doubted in a number of overseas jurisdictions and has not been followed by judges in common law jurisdictions including some US states, Australia, New Zealand and Malaysia.

40. Nevertheless, so far as the position in England is concerned, despite some views questioning whether the *Corbett* test might need to be reconsidered in light of advances in medical knowledge concerning

---

[4] Judgment §§63-64.

transsexuals[5], including a powerful dissenting judgment of Thorpe LJ in the Court of Appeal in *Bellinger v Bellinger* [2002] 2 WLR 411, the *Corbett* test was approved by the House of Lords in *Bellinger v Bellinger* [2003] 2 AC 467. The leading speeches were delivered by Lord Nicholls and Lord Hope, with whom the other members of the House agreed, and they held[6] (adopting the helpful summary set out in the respondent's skeleton submissions):

(1) The words "male" and "female" in section 11(c) of the Matrimonial Causes Act 1973[7] are not technical terms and must be given their ordinary, everyday meaning in the English language.

(2) They refer to a person's biological sex as determined at birth so that for the purposes of marriage, a person born with one sex could not later become a person of the opposite sex.

(3) The three criteria identified in *Corbett* remain the only basis upon which the sex of the person at birth is determined.

(4) A complete change of the sex which individuals acquire when they are born is impossible.

(5) To accommodate a post-operative male-to-female transsexual in the word "female" in section 11(c) of the Matrimonial Causes Act 1973 or a post-operative female-to-male transsexual in the word "male" would give the words "male" and "female" such a novel and expanded meaning that it would amount to a major change in the law.

---

5 In *S-T (formerly J) v J* [1998] Fam 103 (at pp.122A-B, 146C-E and 153B-d) and in *W v W (Physical Inter-sex)* [2001] Fam 111 (at pp. 112G and 122D).

6 See per Lord Nicholls at §§8 and 36-37 and per Lord Hope at §§56, 57, 62 and 64.

7 The provisions of which, as will be seen, are replicated in section 20(1)(d) of the MCO.

41. Lord Nicholls also held, and the other members of the House agreed, that such a fundamental change in the law should not be made by judicial intervention in a case concerning one individual and her particular condition and circumstances, but should be made only by the legislature after extensive enquiry, the widest possible public consultation and discussion and careful deliberation. I shall return to the reasons for this holding later in this judgment.

42. The Judge concluded that the decision of Ormrod J in *Corbett* represented the present state of the law in Hong Kong, subject to possible change.[8] He rejected the appellant's arguments for departing from *Corbett* and concluded that the words "woman" and "female" in sections 21 and 40 of the MO did not include a post-operative male-to-female transsexual.[9]

F.3 The appellant's challenge to Corbett

43. Essentially, the appellant's case on this appeal is based on the contention (first) that *Corbett* does not represent Hong Kong law. On that basis, it is contended (secondly) that the ordinary meaning of "woman" and "female" is sufficiently wide to include a post-operative male-to-female transsexual. On the other hand, if *Corbett* does represent Hong Kong law, the appellant contends (thirdly) that the words in the statutory provisions should be given an updated construction so that a post-operative male-to-female transsexual is to be regarded as a woman and female for the purposes of the MO.

44. On the first contention, that *Corbett* does not represent Hong Kong law, the appellant makes the point that *Corbett* is not binding on a Hong Kong court. She contends that the definition of Christian marriage in section 38(2)

[8] Judgment §§119-125.
[9] Judgment §162.

of the Marriage Ordinance 1875 was introduced only to describe the monogamous nature of such a marriage. The local legislature never clarified or even considered what constituted a "man" or "woman" within the definition of a Christian marriage in the entire legislative history of the MO and MCO. Instead, the English provisions were simply transplanted to Hong Kong blindly. It is submitted that the concept of a Christian marriage was not introduced to impose the Christian values of procreation by natural heterosexual intercourse upon the local population and the mischief sought to be addressed by the Matrimonial Causes (Amendment) (No. 2) Ordinance (Ord. No. 33 of 1972) was simply to impose the institution of monogamy. The appellant contends that *Corbett* should not be followed because its reasoning has been doubted in many overseas jurisdictions and has not been followed by judges in other common law jurisdictions including the United States, Australia, New Zealand and Malaysia.

45. The second and third contentions as to the meanings of "woman" and "female" overlap to some extent. Essentially, the appellant's case is that the *Corbett* test is out of date. It is contended that Ormrod J applied the then contemporary medical criteria for the determination of sex but that medical science now recognises an individual's psychology to be just as important a factor as biological factors. It is submitted that the modern test is the congruence of external physical morphological factors and psychological factors. The appellant contends that there is evidence that the word "female" is today capable of including post-operative male-to-female transsexuals. Finally, it is submitted that the institution of marriage has evolved, generally and in Hong Kong, beyond being one for procreation by natural sexual intercourse.

F.4 The reception of Corbett in other jurisdictions

46. As I have already noted, some overseas jurisdictions have followed *Corbett* and some have arrived at a similar conclusion independently and the Judge listed these[10] as follows: *B v B* 355 NYS 2d 712 (1974) (New York); *Re T* [1975] 2 NZLR 449 (New Zealand); *W v W* 1976 (2) SA 308 (South Africa); *Ulane v Eastern Airlines Inc* 742 F 2d 1081 (1984) (US Court of Appeals, 7th Circuit); *M v M (A)* (1984) 42 RFL (2d) 55 (Prince Edward Island); *In re Ladrach* 513 NE 2d 828 (1987) (Ohio); *Lim Ying v Hiok Kian Ming Eric* [1992] 1 SLR 184 (Singapore); *Littleton v Prange* 9 SW 3d 223 (1999) (Texas); *In the matter of the Estate of Gardiner* 42 P 3d 120 (2002) (Kansas); *In re Application for Marriage License for Nash* 2003 WL 23097095 (Ohio App 11 Dist) (Ohio); *Kantaras v Kantaras* 884 So 2d 155 (2004) (Florida); and *Rommel Jacinto Dantes Silverio v Republic of the Philippines*, GR No 174689 (22 October 2007) (the Philippines).

47. On the other hand, other jurisdictions have reached a different conclusion, in some cases expressly declining to follow *Corbett*.

48. In New Zealand, Ellis J refused to follow *Corbett* in *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603 and held instead that a post-operative transsexual person should be allowed to marry in his or her chosen sex.

49. Similarly, the Superior Court of New Jersey refused, in *MT v JT* 355 A 2d 204 (1976), to follow *Corbett* and held (at p. 209) that:

> "for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, safety or psychological sex, and identity by sex must be governed by the congruence of the standards."

[10] Judgment §65.

50. In Australia, *Corbett* was subjected to close examination and its reasoning criticised by Chisholm J in the Family Court of Australia in *Kevin v Attorney-General (Cth)* (2001) 165 FLR 404 at §§70 to 121. In particular, Chisholm J refused to follow Ormrod J in determining sex solely by reference to biological characteristics. Instead, he held (at §329):

> "To determine a person's sex for the purpose of the law of marriage, all relevant matters need to be considered. I do not seek to state a complete list, or suggest that any factors necessarily have more importance than others. However the relevant matters include, in my opinion, the person's biological and physical characteristics at birth (including gonads, genitals and chromosomes); the person's life experiences, including the sex in which he or she is brought up and the person's attitude to it; the person's self-perception as a man or woman; the extent to which the person has functioned in society as a man or a woman; any hormonal, surgical or other medical sex reassignment treatment is the person has undergone, and the consequences of such treatment; and the person's biological, psychological and physical characteristics at the time of the marriage, including (if they can be identified) any biological features of the person's brain that are associated with a particular sex. It is clear from the Australian authorities that post-operative transsexuals will normally be members of their reassigned sex."

Chisholm J's decision was affirmed on appeal by the Full Court of the Family Court of Australia: see *Attorney-General (Cth) v 'Kevin and Jennifer'* (2003) 172 FLR 300.

51. Finally, in Malaysia, in *JG v Pengarah Jabatan Pendaftaran Negara* (2005) 366 Malayan LJ 1, Foong J declined to follow *Corbett*.

F.5 Was Corbett adopted by the legislature?

52. Whilst it is correct that Ormrod J's decision in *Corbett* and those of other English courts following and applying that decision are not and never were binding on a Hong Kong court[11], the question remains as to whether

[11] *A Solicitor v The Law Society of Hong Kong* (2008) 11 HKCFAR 117 at §§9-17.

Corbett was given legislative recognition in Hong Kong. The Judge held that it was "quite plain" that this was the case.[12]

53. Shortly after *Corbett* was decided, the English legislature enacted section 1(c) of the Nullity of Marriage Act 1971. This provision was then re-enacted in section 11(c) of the Matrimonial Causes Act 1973. It is clear that these statutes gave legislative recognition to the decision in *Corbett*: see *Bellinger v Bellinger* [2002] 2 WLR 411 at §§16-17 and *J v C* [2007] Fam 1 at §29.

54. In Hong Kong, section 20(1)(d) of the MCO added a new ground of nullity of marriage. This was effected by section 12 of the Matrimonial Causes (Amendment) (No. 2) Ordinance (Ord. No. 33 of 1972) which came into effect on 30 June 1972. Section 20(1)(d) of the MCO is materially in the same terms as section 1(c) of the Nullity of Marriage Act 1971 and section 11(c) of the Matrimonial Causes Act 1973. 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."

And, although he made no express reference to *Corbett*, it is clear from the speech of the Attorney General moving the second reading of the Bill that the legislature was aware that the English law governing nullity was a codifying act[13] (thereby adopting into English legislation existing case law, which included *Corbett*). Clearly, the mischief at which the new section 20(1)(d) was directed was a marriage between two persons of the same biological sex.

---

[12] Judgment §§117-118.

[13] See Hong Kong Hansard of 12 April 1972 at p. 655.

55. It follows, in my view, that the 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.

56. Although it was submitted on behalf of the appellant that the promoter of the legislation in England intended the new provision to leave it open to a court to depart from *Corbett* when the state of medical science suggested new determining factors for differentiating sex[14], it is clear from the House of Lord's decision in *Bellinger* that their Lordships treated the mischief at which section 11(c) of the Matrimonial Causes Act 1973 was directed as being the marriage of two parties not of the opposite biological sex.

57. It would, in any event, be very surprising if, in enacting section 20(1)(d) of the MCO in 1972, the legislature had in mind anything other than biological sex as the determinant of "male" and "female" in that provision given the then state of medical knowledge of transsexualism and the fact that, in Hong Kong, it was not until 1980 that the Sex Clinic was set up in Queen Mary Hospital and not until 1986 that the first sex reassignment surgery took place.

58. The appellant refers to the fact that the legislature in Hong Kong never considered or debated the definition of "man" or "woman" in any legislation concerning the institution of marriage in Hong Kong. This is hardly surprising, so far as it is a submission made in relation to the Marriage Amendment Ordinance enacted in 1896 and the Marriage Amendment Ordinance and the Divorce Ordinance enacted in 1932, since the availability of

[14] See the speech of Mr Alexander Lyon MP moving the Nullity of Marriage Bill, set out in Thorpe LJ's judgment in *Bellinger* in the Court of Appeal (at §142).

sex reassignment surgery lay far off in the future. The lack of any debate over the adoption of the English provisions in the Nullity of Marriage Act 1971 in the Matrimonial Causes (Amendment) (No. 2) Ordinance is explicable on the basis of an absence of any controversy over the proposed new section 20 of the MCO. And by the time of the Marriage (Introduction of Civil Celebrants of Marriages and General Amendments) Bill 2005, the statutory recognition of the *Corbett* test had already been part of Hong Kong law for over 30 years. Indeed, the use of the terms "male" and "female" in the amendments introduced into the MO by that Bill when it was enacted without any definition being given to those words suggests there was no legislative intent to change their meanings as previously understood.

59. The appellant also argues that the statutory reforms to marriage law in Hong Kong in the Matrimonial Causes (Amendment) (No. 2) Ordinance were to address the mischief of customary Chinese marriages, which might be polygamous, and not to prevent transsexuals marrying in their chosen gender. However, whilst that submission is correct in respect of other provisions of the Matrimonial Causes (Amendment) (No. 2) Ordinance, it is equally clear that the mischief addressed by the new section 20(1)(d) of the MCO thereby introduced was not concerned with the mischief of customary Chinese marriages and it is the legislative intent of that particular provision that is relevant for present purposes.

60. In short, I agree with the Judge's conclusion that *Corbett* has been given statutory recognition in Hong Kong, although as the Judge rightly noted, this is merely a factor to be taken into account in the task of statutory interpretation with which we are here concerned. Without assuming the correctness of *Corbett* at the present time, I turn therefore to consider the issue of construction.

F.6 The essential nature of marriage in Hong Kong

61. It is helpful to start by examining the context in which the words "woman" and "female" (and, by extension, "man" and "male") are to be construed in this appeal, namely marriage. Marriage is an important institution in most if not all civilised societies. It is both a social institution, being affected by a society's culture, history and traditions, as well as a legal institution, being a matter governed by law. As the Judge noted, the MO serves to recognise, regulate and restrict marriages in our society.[15]

62. The first occasion on which marriage was defined judicially as the voluntary union for life of one man and one woman, to the exclusion of all others, appears to be the judgment of the Judge Ordinary (later Lord Penzance) in *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130 at 133. This is the definition adopted in section 40 of the MO (and previously section 38 of the Marriage Ordinance (No. 7 of 1875) which was introduced into that ordinance by amendment by Ordinance No. 34 of 1932). These two elements, i.e. a union of two persons of opposite sex and exclusivity, were described by Ward LJ in *S-T (formerly J) v J* [1998] Fam 103 at 141G as "the two vital cornerstones of marriage".

63. I have cited above the passage from Ormrod J's judgment in *Corbett* where he described sex as an essential determinant of the relationship of marriage. He went on to hold[16]:

> "I have dealt, by implication, with a 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 purpose of marriage. The illogicality would only arise if marriage were substantially similar in character to national insurance and other social situations, but the differences are obviously fundamental. These submissions, in effect,

[15] Judgment §§111-113.
[16] At pp. 106H-107B and 107F-G.

> confuse sex with gender. Marriage is a relationship which depends on sex and not gender."

64. Furthermore, the important role of the sex of the parties to marriage rather than gender, and by extension their ability to procreate, is evident from the fact that the incapacity to consummate a marriage is a ground on which a marriage may be annulled: see section 20(2)(a) of the MCO. Indeed, in *B v B* 355 NYS 2d 712 (1974), the Supreme Court of New York held:

> "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."
> (Emphasis added)

The same public policy underlies the concept of marriage in Hong Kong. This is an important factor and, as will be seen, is one which is absent in New Zealand and Australia.

65. That is not to say that the validity of a marriage depends on an ability to have children, for as Lord Hope said in *Bellinger*:

> "64. Of course, it is not given to every man or every woman to have, or to want to have content children."

However, as he continued in the same paragraph:

> "But the ability to reproduce one's own kind lies at the heart of all creation, and a single characteristic which invariably distinguishes the adult male from the adult female throughout the animal kingdom is the part which each sex plays in the act of reproduction. When Parliament used the words 'male' and 'female' in section 11(c) of the 1973 Act it must be taken to have used those words in the sense which they normally have when they are used to describe a person's sex, even though they are plainly capable of including men and women who happen to be infertile or are past the age of childbearing."

66. In support of the linkage between the concept of marriage and that of procreation, some support may also be derived from the fact that BL37 and

BOR19(2) (which are set out below) place, in one article, the right to marry and the (separate) right to found or raise a family.

67. Indeed, the special nature of marriage and the fact that it is to be distinguished from other legal contexts can be seen from *Chief Constable of the West Yorkshire Police v A* [2005] 1 AC 51, a case involving a male-to-female transsexual who was subject to sex discrimination when turned down for an appointment to the police force because she could not carry out personal searches. The House of Lords held that she should be treated as a woman for the purposes of sex discrimination law. In his speech, Lord Bingham said that his decision in that case was not intended to question the correctness of *Bellinger* and noted (at §12) that "the case concerned marriage, perhaps the most important and sensitive of human relationships." And Baroness Hale drew a distinction between the special case of marriage and other contexts:

> "51. As to domestic law, there might be good policy reasons for distinguishing between the different purposes for which the decision in *Corbett* [1971] P 83 may be invoked. Marriage can readily be regarded as a special case. True, it is perfectly possible to have a valid marriage between two people who cannot have children together. Also true, the fact that marriage law traditionally distinguished between husband and wife cannot be a conclusive argument against the marriage of two people who for all practical purposes are of opposite sexes. But marriage is still a status good against the world in which clarity and consistency are vital. In England, the Church has a role in celebrating marriages which means that special exceptions are to be made for people who are able to marry in civil but not ecclesiastical law. It is scarcely surprising that this House, in *Bellinger* [2003] 2 AC 467, held that these difficult questions of definition, demarcation and impact upon others were for Parliament rather than the courts to decide.
>
> 52. But the House in *Bellinger* was concerned only with capacity to marry and in particular with the meaning of the words 'respectively male and female' in section 11(c) of the Matrimonial Causes Act 1973. These presuppose two clearly distinguished genders. It is less clear why the immutability of birth gender for marriage purposes should apply for all other purposes, in particular to those criminal offences which used to depend upon the gender of the accused or the victim. …"

Although Baroness Hale's comment regarding the role of the Church of England in celebrating marriages does not have the same significance in Hong Kong, where the majority of the population is not Christian, I consider that her distinction between marriage and other legal contexts holds good in this jurisdiction just as much as in England.

68. Subject to the question of updating, which I shall address below, for my part, I see no reason to doubt that the essential aspects of marriage and the relevance of the sex of the parties to it as identified by Ormrod J in *Corbett* (and affirmed by the House of Lords in *Bellinger*) provide the starting point for the context in the which the words "woman" and "female" fall to be construed.

F.7 The ordinary meaning of the words

69. Do the words "woman" and "female" in the provisions in the MO in question encompass a post-operative male-to-female transsexual?

70. The Judge referred[17] to the *Shorter Oxford English Dictionary* (6th Ed, 2007) definition of "woman" as an adult female person (p. 3657) and of "female" as "of, pertaining to, or designating the sex which can beget offspring or produce eggs" (p. 946). So understood, the word "woman" clearly does not include a transsexual woman, since such a person cannot beget offspring or produce eggs. But as the Judge also noted[18], the question here is the use of the relevant words, whether in English or Chinese, in Hong Kong.

71. As the Judge commented, there is very little evidence before the court regarding the ordinary, everyday usage of the relevant words in this jurisdiction. The evidence there is suggests that transsexuals are not generally referred to simply as "male" or "female" or "man" or "woman". In

[17] Judgment §138.
[18] Judgment §139.

Ms Emerton's article referred to above, published in 2006, it is pointed out[19] that the commonly-used Cantonese term for a transgender person is the highly derogatory term that is transliterated as *yan yiu* and that this term is used frequently by the tabloid press "which further reinforces its usage in local parlance". She notes that "the Chinese-language broadsheets tend to use the neutral and non-derogatory term *bin sang yan*, which translates as 'change sex person', akin to the term 'transgender' and 'transsexual' adopted in the English-language broadsheets".

72. Hence, certainly at the time *Corbett* was given statutory effect in Hong Kong, I consider that the ordinary dictionary meanings of "woman" and "female" were complete and accurate definitions of those words and that they were not capable, without more, of accommodating a transsexual person within their scope. This is the conclusion reached by Lord Hope in *Bellinger* (at §62) where he also pointed out that in Australia, where *Corbett* has not been followed, a distinction has been drawn, even in contemporary usage in Australia, between pre-operative and post-operative transsexuals.[20] As Lord Hope there stated:

> "Distinctions of that kind raise questions of fact and degree which are absent from the ordinary meaning of the word 'male' in this country. Any attempt to enlarge its meaning would be bound to lead to difficulty, as there is no single agreed criterion by which it could be determined whether or not a transsexual was sufficiently 'male' for the purpose of entering into a valid marriage ceremony."

F.8 Is an updated meaning to be given to the words?

73. It is a rule of statutory construction that, save in the (comparatively rare) case of a statute intended to be of unchanging effect, a statute is treated as

---

[19] At p. 250.

[20] An example of this distinction is to be found in *Secretary, Department of Social Security v SRA* (1993) 43 FCR 299, a case concerning a pre-operative male-to-female transsexual living with a man as his wife, where the Federal Court of Appeal held that the transsexual was not qualified to receive a wife's pension under the relevant social security legislation.

always speaking and the court should construe it in accordance with the need to treat it as continuing to operate as current law: see *Secretary for Justice v Chan Wah & Ors* (2000) 3 HKCFAR 459 at p. 473E and Bennion on Statutory Interpretation (5th Ed.) Section 288. As Lord Bingham said in *R (Quintavalle) v Health Secretary* [2003] 2 AC 687 at §9:

> "There is, I think, no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is always speaking. If Parliament, however long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now."

74. In the light of my conclusion that, when *Corbett* was adopted by the legislature in 1972, the words "woman" and "female" (and "man" and "male") did not in their ordinary meaning include a transsexual woman (or transsexual man), the question arises, to which I shall now turn, of whether the words "woman" and "female" (and also "man" and "male") in the MO should be given an updated meaning so as to include a post-operative transsexual woman (and post-operative transsexual man). Is it the case that, in contemporary usage as a matter of everyday ordinary language, the words are now used to include a transsexual man or transsexual woman?

75. The appellant says legislation must be interpreted in the present context and, so interpreted, as a matter of everyday ordinary language, they do. The appellant contends, in support of the updated construction, that the contemporary usage of the words "man" and "woman" requires consideration of (i) social changes to marriage, (ii) modern medical evidence, and (iii) the practice and policies of the Government and whether they are applied consistently or not.

F.8a The modern view of marriage

76. As to (i) the current understanding of the nature and purposes of marriage, it was submitted that marriage in Hong Kong is now a vehicle for public demonstration of love and affection to a partner, to secure private law rights (such as inheritance and maintenance) and for access to public benefits (such as tax allowances and public housing) and no longer exists primarily for the procreation of life. In this context, reliance was placed on Thorpe LJ's strong dissenting judgment in *Bellinger* in the Court of Appeal where he noted (at §128) that the concept of marriage has changed since the time of Lord Penzance's definition:

> "… 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."

77. However, what remains a crucial fact in the concept of marriage as a matter of law in Hong Kong is that non-consummation remains a ground, under section 20(2)(a) of the MCO, for annulling a marriage. The essential nature of marriage therefore remains, in my view, the same today as it was when identified by Ormrod J in *Corbett* (and as confirmed by the House of Lords in *Bellinger* in 2003). However much the permanence of the

relationship has been diluted by modern attitudes towards divorce, pre-marital cohabitation, and the birth of children to unmarried couples and recognising that not every party to a marriage will want or be able to have children and that some may marry simply for mutual society, nurturing, help, companionship and comfort,[21] it remains the case, in my opinion, that, so far as the law of the Hong Kong is concerned, the essential nature of marriage requires a partnership between two persons of the opposite sex, with the procreation of children remaining as one of its purposes and attributes. This is the context in which the ordinary meaning of the words "woman" and "female" (and also "man" and "male") fall to be construed. As to Thorpe LJ's observations on the modern understanding of the concept of marriage, it must be remembered that his view was a minority one and the House of Lords in *Bellinger* upheld the contrary view of the majority in the Court of Appeal and reaffirmed the biological test of sex for the purposes of marriage.

78. Reliance was placed by the appellant on evidence from Dr Stephen Winter that:

> "In a recent survey conducted by Dr Mark King on nearly 900 randomly selected people taken to be representative of the population, it was found that 65% accepted or were neutral towards the proposition that transsexuals should have the right to a new birth certificate; and an overwhelming 80% accepted or were neutral to the proposition that a post-operative transsexual should have the right to marry in his or her affirmed sex."

79. There are a number of difficulties with this evidence. First, it is self-evident that the number of respondents to the survey in question is a small sample of the population of Hong Kong as a whole and the basis on which it is said that the selected respondents were representative of the population is not stated. Secondly, it is not known what questions were asked of the

---

[21] Mr Dykes referred to *Morgan v Morgan (orse Ransom)* [1959] P 92 which is an example of judicial recognition of the fact that elderly and aged people intermarry on the basis that they come together merely for companionship and without any thought of sexual relations.

respondents to the survey. Thirdly, and perhaps most significantly, there is no breakdown of the 80% of respondents who were said to be neutral or in support of the proposition that post-operative transsexuals should be allowed to marry in their chosen sex. If all or most of them were neutral, this would not support a conclusion that the current usage of "woman" and "female" should be taken to include post-operative male-to-female transsexuals.

80. Finally, in this context, it was contended in the grounds of appeal that the major Chinese majority population cultures and jurisdictions, including the PRC, allow transgender persons to marry in their acquired gender. The source of this contention is an article by Professor Douglas Sanders[22] entitled "Document Change for Transsexuals in Asia". It will be necessary to return to this in the context of the constitutional issue but, for present purposes, the article provides no evidence, in my opinion, of any general or common understanding that the terms "woman" and "female", in Chinese majority population cultures and jurisdictions, include post-operative male-to-female transsexuals.

F.8b The current medical view

81. As to (ii) the updated medical view, it was submitted that the attribution of "male" and "female" labels should be done by reference to all known relevant criteria, including chromosomes and other factors including societal and self-perception of the individual concerned. In the light of medical and psychological advances over the past 40 years, the modern approach is to apply a test of congruence of external physical morphological factors and psychological factors. A post-operative transsexual woman is now physically and psychologically female and the law should recognise her as such.

[22] Professor Emeritus, Faculty of Law, University of British Columbia, and Academic Board member for the Doctoral Program in Human Rights, Mahidol University, Bangkok.

82. However, in this regard, I accept the respondent's submission that, in terms of the evidence (of Dr Winter for the appellant and Dr Ho Pui Tat for the respondent), the most that can be said is that any advance in medical science since *Corbett* relates to the proper understanding of the aetiology of transsexualism, suggesting a biological or organic, as opposed to psychological, cause for the condition. However, Dr Winter himself states that the aetiology of transsexualism "awaits further scientific investigation".[23] And as Lord Nicholls noted in *Bellinger* the research suggesting that self-perception as one of the indicia of sex or gender is not exclusively psychological but is instead associated with biological differentiation within the brain is "very limited, and in the present state of neuroscience the existence of such an association remains speculative." See also, in this context, the reference to §81 of the judgment in *Goodwin* quoted above.

83. I also accept the submission made on behalf of the respondent that there has been no material advance in medical science as regards what can be achieved by means of sex reassignment surgery since *Corbett*. Despite completing sex reassignment surgery, the ultimate stage of the treatment for transsexualism, that process is limited in the way I have set out above (at §17). Sex reassignment surgery remains ineffective in turning a man into a woman (or a woman into a man) and the limitations of such surgery are recognised in the speeches of Lord Nicholls (at §§8 and 40) and Lord Hope (at §57) in *Bellinger*. What is achieved is not and cannot be the actual change of a person's sex but rather the change of their appearance as a member of the opposite sex to that of their birth.

84. It was also submitted on behalf of the appellant, in the context of modern medical science, that the labels "male" and "female" denote gender rather than sex and that gender is now understood as being a broader concept

[23] Affidavit of Stephen John Winter at §12.

than sex. In *Bellinger* in the Court of Appeal, this submission was made because the words used in section 11(c) of the Matrimonial Causes Act 1973 were "male" and "female" rather than "man" and "woman" and it was contended the meaning of the former was broader than that of the latter. As to this, the majority (Dame Elizabeth Butler Sloss P and Robert Walker LJ (as Lord Walker then was)) accepted that gender related to culturally and socially specific expectations of behaviour and attitude, mapped on to men and women by society and included self-definition, i.e. what a person recognised him or herself to be. On this basis, it would be impossible to identify gender at the moment of the birth of a child: see *Bellinger* (CA) at §23.

85. I do not, however, think that reference to the difference between gender and sex assists the appellant in the present case. In the first place, the construction issue arises in relation also to section 40 of the MO, which uses the words "man" and "woman", which indicate, in the context of marriage, a differentiation of sex rather than gender. In any event, as Lord Nicholls noted in *Bellinger* in the House of Lords at §5, the terms sex and gender can for present purposes be used interchangeably.

F.8c Consistency of treatment by the Government

86. As to (iii) consistency of treatment by the Government, the appellant's reliance on the fact that the Government funds the treatment of transsexualism and on the acceptance or accommodation of post-operative transsexuals in their new identities does not, in my opinion, lead to the conclusion that the ordinary meaning of "man" and "woman" should be treated as having been updated to include transsexuals. It is apparent that the practice of the Hospital Authority in issuing certificates to post-operative transsexuals indicating a change of gender is one based on the single criterion of the change

in external genitalia. I do not think that this reflects a general or common understanding for the purposes of marriage.

87. It was submitted on behalf of the appellant that the Hong Kong identity card is used as a personal identifier in transactions with the Government and many private institutions, such as banks and utilities providers, and that her new identity card showing her sex as female was government sanction of the appellant's appearance as female in society generally and recognition that the Government treated her in her new sex for all intents and purposes. The use of the identity card in the context of marriage is supported by the fact that Form MR21B, Information Required for Registration of Marriage, calls for identification of an intended marrying party by reference to their Hong Kong identity card and Form 1 in Schedule 1 to the MO, the Notice of Intended Marriage, calls for the Hong Kong identity card or a travel document as a supporting document.

88. Similarly, it was submitted on behalf of the appellant that there should be consistency in the law as regards distinctions drawn on the basis of sex. Reference was made to the regulations made under the Public Health and Municipal Services Ordinance, Cap. 132, concerning the segregation of the sexes in public conveniences and the use of dressing rooms in public swimming pools which excluded members of the opposite sex from entering these facilities.[24] Since a person would use their identity card to establish their sex if any issue arose as to which public convenience or dressing room they should use, this should be the basis on which sex was determined for the purposes of the MO as well.

[24] Public Conveniences (Conduct and Behaviour) Regulation, Cap. 132BL, reg. 7; Public Swimming Pools Regulation, Cap. 132BR, reg. 7.

89. Whilst the identity card is clearly an important document in everyday use on Hong Kong, and would likely serve to prove a person's sex for the purposes of the regulations referred to, it does not follow, in my opinion, that it serves the same purpose in the wholly different context of marriage where, as I have endeavoured to explain, biological sex remains determinative. The mere fact that a person's identity card is used for identification purposes in forms used for the purpose of marriage does not mean that the Registrar will not or cannot have regard to that person's birth certificate on which their biological sex will be recorded.

90. Recognition of the fact of the change in external genitalia by the practice of issuing new identity cards and identity documents to post-operative transsexuals is a reflection of the need for a practical means of recognising the consequences of the completion of sex reassignment surgery. It may be determinative for the purposes of using public conveniences or public swimming pools or (to take another example) for the assignment of inmates within prisons but cannot and does not, in my opinion, mean that determination is conclusive for all purposes including the different and special context of marriage: see the reference to *Chief Constable of the West Yorkshire Police v A* (*supra*).

91. As I have already noted, prejudice and discrimination against transsexuals regrettably still exists. This is reflected in the fact that the Sexual Minorities Forum was set up to provide a channel for non-governmental organisations and the Government to exchange views on human rights and other issues concerning sexual minorities including transsexuals in Hong Kong. The very fact that such a forum is thought to be necessary is an indication that post-operative transsexuals are not already accepted in their preferred sex in Hong Kong, whether generally or for the purposes of marriage.

F.8d Conclusion on updated meaning of the words

92. As I have already observed, the Judge noted that there was very little evidence placed before the court below regarding the ordinary, everyday usage of the relevant words in Hong Kong. In my view, such evidence as there is, does not support the appellant's case for an updated construction. In particular, the references above to the terminology used to describe transsexuals in Hong Kong described in Ms Emerton's article are powerful reasons against holding that, as a matter of everyday ordinary language, the words do refer to a transsexual man and woman, whether pre- or post-operative. The fact that a post-operative transsexual is generally known as a "sex changed male/female" suggests that the person is not regarded, as a matter of ordinary language, as having truly acquired his or her post-operative sex. That this may be a prejudiced view, and one which should in no way be encouraged, is not to the point.

93. The simple fact remains that the contemporary meaning of the words "man" and "woman" has not been shown to have expanded in ordinary, everyday usage to include a post-operative transsexual man or woman respectively. I therefore share the view of the Judge that the appellant:

> "… has not established a case that the relevant words, according to their ordinary, everyday usage in Hong Kong nowadays, encompass post-operative transsexuals in their assigned sex."[25]

F.9 The cases which have not followed Corbett

94. *Corbett* has been given statutory effect in Hong Kong since 1972 and strong reasons would be required to justify a departure from it. I have referred above to the cases in other jurisdictions which did not follow *Corbett*. The appellant urges this court to do likewise. However, for the reasons which

[25] Judgment §141.

follow, those cases are distinguishable and I do not consider that the reasoning in any of the cases in question is so cogent as to compel me to reach a different conclusion to that reached by the House of Lords in *Bellinger* upholding, in 2003, Ormrod J's decision in *Corbett*.

95. The Superior Court of New Jersey in *MT v JT* upheld the validity of a marriage between a man and a post-operative male-to-female transsexual and held that, for the purposes of marriage, a person's sex should be identified by the congruence of their anatomical and psychological sex.

96. However, I agree with the submission made on behalf of the respondent that the New Jersey court's approach of identifying sex by this test of congruence begs the question of when anatomical features are to be considered congruent with the person's perceived or desired sex and gives rise to difficult questions where, despite having had sex reassignment surgery, a post-operative transsexual is unable to have sexual intercourse with his or her partner. Also, given that sex reassignment surgery may be conducted in stages, difficulties may arise in identifying the precise stage at which congruence between anatomical features and psychological sex has actually been achieved.

97. In addition, the New Jersey court departed from *Corbett* expressly on the basis that there was a "different understanding of what is meant by 'sex' for marital purposes" (p. 209). The New Jersey court appears to have taken the view that it was the ability to engage in sexual intercourse, rather than to procreate, which was determinative. For reasons I have already explained, the essential nature of marriage in Hong Kong law is the same as that identified by Ormrod J in *Corbett* (and more recently affirmed by the House of Lords in *Bellinger*) and so the decision in *MT v JT* is distinguishable on this ground.

98. In *Otahuhu*, Ellis J declared that for the purposes of section 23 of the Marriage Act 1955 of New Zealand, a person who had undergone surgical and medical procedures that had effectively given that person the physical conformation of a person of a specified sex could marry as a person of that sex. However, that decision was reached on the basis that, under New Zealand law, the ability to procreate or to have sexual intercourse were not essential and that the law in New Zealand had changed to recognise a shift away from sexual activity with more emphasis being placed on psychological and social aspects of sex or gender: see p. 606 lines 42 to 49. Prior to the passing of the Family Proceedings Act 1980, a marriage which had not been consummated was voidable under New Zealand law but that was no longer the case after that act was passed. The position in Hong Kong is otherwise since non-consummation continues to be a ground, under section 20(2)(a) of the MCO, on which a marriage will be voidable.

99. The Australian case of *Kevin* and, on appeal, *Kevin and Jennifer* considered the validity of a marriage between a female and a post-operative female-to-male transsexual. The Australian courts held that the contemporary meaning of the word "man" in Australia encompassed a post-operative female-to-male transsexual. It is pertinent to note, in this regard, that a considerable body of evidence was produced on behalf of the transsexual at first instance. Chisholm J refers (at §68 of his judgment) to the cumulative impact of the evidence of the 39 witnesses that they perceived Kevin to be a man and not a woman pretending to be a man.

100. It is not for this court to doubt the validity of the holding of the Australian courts that the contemporary Australian meaning of the word "man" includes a post-operative transsexual. However, it was the place of the Judge below and of this court to say that, whatever the contemporary Australian meaning of the words "man" and "woman", the evidence does not establish that

the contemporary Hong Kong meaning of those words includes a post-operative transsexual. Nor does the contemporary Australian meaning of the words correspond with the meaning of those words elsewhere, for example in Kansas in 2002: see *In the matter of the Estate of Gardiner* where the Supreme Court of Kansas said (at p. 135):

> "The words 'sex', 'male,' and 'female' in everyday understanding do not encompass transsexuals. The plain, ordinary meaning of 'persons of the opposite sex' contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria. A male-to-female post-operative transsexual does not fit the definition of a female. The male organs have been removed, but the ability to 'produce ova and bear offspring' does not and never did exist. There is no womb, cervix, or ovaries, nor is there any change in his chromosomes. As the *Littlejohn* Court noted, the transsexual still 'inhabits … a male body in all aspects other than what the physicians have supplied.' "

101. The decision of the Full Court of the Family Court of Australia in *Kevin and Jennifer* was given after the Court of Appeal decision in *Bellinger* but before the House of Lords decision in that case. At §§288 to 297, the Full Court explained their reasons why the majority view in the Court of Appeal in *Bellinger* should not be followed. The Full Court accepted that it was open to Chisholm J to accept the evidence before him as to "brain sex" and that, on the balance of probabilities, transsexualism is biologically caused (§290) and the Full Court thought it difficult to distinguish the case before it from intersex cases such as *W v W* (§291). That is not the conclusion of the Judge below on the medical evidence in this case, nor was it the conclusion of the House of Lords on the medical evidence in *Bellinger*.

102. The Full Court noted that the decision in *Corbett* had received "some statutory recognition in England whereas it has never received such recognition in Australia" (§292). As I have endeavoured to explain above, the position in Hong Kong is similar to that in England as regards the statutory recognition of *Corbett*.

103. A further reason for distinguishing the majority view in *Bellinger* (CA) given by the Full Court, and one which was "most significant", was that procreative sex is still relevant to marriage in England where an inability to consummate a marriage still provided a ground for a degree of nullity, whereas in Australia it no longer did so (§293). Again, the position in Hong Kong is similar to that in England in this regard, by reason of section 20(2)(a) of the MCO.

104. For all these reasons, it is plain, in my view, that *Kevin* and *Kevin and Jennifer* are distinguishable from the present case and that the position in Hong Kong is indistinguishable from that in England, where the decision of the majority of the Court of Appeal in *Bellinger* was affirmed by the House of Lords.

105. The Malaysian case of *JG v Pengarah Jabatan Pendaftaran Negara* was not a case about marriage but concerned a request by the plaintiff post-operative male-to-female transsexual for a declaration that she be declared a female and that her identity card be changed to reflect the female gender. Foong J granted the relief sought but the report available does not indicate any statutory provisions that were being construed and accordingly is of limited value. More importantly, however, it would appear that a different conclusion has been reached by another judge in Malaysia, Justice Datuk Moh'd Yazid Mustafa, who ruled recently that post-operative transsexuals could not change their birth certificates to reflect a new female name.[26]

F.10 Should change in law be effected by judicial interpretation or legislation?

106. It is true that the appellant is only seeking a declaration in her judicial review proceedings in respect of her own particular status under the

[26] See the report of The Star online article dated 19 July 2011 entitled "Sex change op not enough for gender change, says judge".

relevant provisions of the MO. However, it is clear that any declaration in favour of the appellant would have wide-ranging consequences. In my opinion, if the court were to adopt the appellant's updated construction of the statutory provisions in question, it would amount to a change of the law under the guise of judicial interpretation.

107. The appellant suggests that this is within the degree of what Thorpe LJ in *Bellinger* (CA) described at §148 as the "judicial licence" which arises from the absence of any definition of the words "man", "woman", "male" or "female" in those provisions.

108. I disagree that the conclusion in favour of the appellant's case in this appeal would merely be the exercise of a judicial licence to adopt an updated construction of the words in question. In this context, it is relevant to refer to *Kantaras v Kantaras* 884 So 2d 155 (2004), a decision of the District Court of Appeal of Florida on the question of the validity of a marriage between a post-operative female-to-male transsexual and a woman. The court noted that courts in Ohio, Kansas, Texas and New York had addressed issues involving the marriage of a post-operative transsexual person and had invalidated or refused to allow the marriage on the grounds that it violated state statutes or public policy and held:

> "The controlling issue in this case is whether, as a matter of law, the Florida statutes governing marriage authorize a postoperative transsexual to marry in the reassigned sex. We conclude they do not. We agree with the Kansas, Ohio and Texas courts in their understanding of the common meaning of male and female, as those terms are used statutorily, to refer to immutable traits determined at birth. Therefore, we also conclude that the trial court erred by declaring that Michael is male for the purpose of the marriage statutes. *Whether advances in medical science support a change in the meaning commonly attributed to the terms male and female as they are used in the Florida marriage statutes is a question that raises issues of public policy that should be addressed by the legislature. Thus, the question of whether a postoperative transsexual is authorized to marry a member of their birth sex is a matter for the Florida legislature and*

> *not the Florida courts to decide*. Until the Florida legislature recognizes sex-reassignment procedures and amends the marriage statutes to clarify the marital rights of a postoperative transsexual person, we must adhere to the common meaning of the statutory terms and invalidate any marriage that is not between persons of the opposite sex determined by their biological sex at birth. Therefore, we hold that the marriage in this case is void ab initio."
> (Emphasis added)

109. In *Bellinger*, the House of Lords also declined to effect a change in the law by way of judicial intervention and held instead that such a change should be made only by the legislature for the following reasons[27] (again adopting the helpful summary set out in the respondent's skeleton submissions):

(1) Such a change in the law would have far-reaching ramifications not just for the traditional institution of marriage but would also affect many other areas of life where the classification of a person as male or female would have different legal and practical consequences.

(2) The contexts in which the distinction between male and female is material differ widely. There should, however, be a clear and coherent policy across the board.

(3) Therefore, the recognition of gender reassignment for the purposes of marriage cannot sensibly be made in isolation from a decision on the like problem in other areas where a distinction is drawn between people on the basis of sex.

(4) Secondly, there must be some objective, publicly available criteria by which gender reassignment is to be assessed.

(5) However, the circumstances of transsexual people vary widely. Surgical intervention takes many forms and is undertaken by

[27] See per Lord Nicholls at §§36-45, Lord Hope at §69 and Lord Hobhouse at §76.

different people to different extents. It may even be questioned whether the successful completion of some sort of surgical intervention should be an essential requisite to the recognition of gender reassignment. The preconditions for recognition vary considerably among states which recognise gender reassignment.

(6) Where the demarcation line should be drawn is far from self-evident.

110. Those reasons apply equally in the context of Hong Kong. The Judge also identified and addressed the difficulties that would be posed by such a fundamental change in the law here.[28] They included: the uncertainty surrounding the circumstances in which gender reassignment should be recognised for the purposes of marriage; the fact that recognising gender reassignment for the purposes of marriage is part of a wider problem which should be considered as a whole and not dealt with piecemeal; the implications of same-sex marriage; the different tests and rationales put forward to determine when a transsexual individual should be recognised in his or her desired sex; and the question of disclosure.

111. I respectfully agree with the conclusion reached by the Judge that because of those difficulties, if the law is to be changed, it has to be done by the legislature in a comprehensive manner. It is not only the law of marriage that would be affected by a decision in favour of the appellant in this case. The respondent provided a summary of the various other areas of the law which might be affected by the recognition of a change of gender of a post-operative transsexual. This list summarised the statutory provisions in contexts other than marriage which might be affected if the acquired sex of a post-operative transsexual were given recognition for the purpose of marriage. The contexts

[28] Judgment §§142 to 157.

include: aspects of family law, parenthood and domestic violence; criminal law, procedure and evidence; succession and inheritance; entitlement to compensation and benefits; tax-related provisions. The summary identifies 79 items of primary and subsidiary legislation which might be affected.

112. Clearly, there are different ways in which gender change may be provided for by legislation. The elaborate provisions of the Gender Recognition Act 2004 regarding gender change provide a useful illustration of how the law has been changed in that manner in the United Kingdom. But, equally, there are statutes in other jurisdictions that provide different legislative schemes to deal with gender change.[29] A change of the law of the nature sought by the appellant raises issues of public policy and is not for the court to effect such a change by statutory interpretation. It is a task which, if it should be undertaken, should be left to the legislature. As Li CJ said, in his speech marking the Ceremonial Opening of the Legal Year on 9 January 2006:

> "Within the parameters of legality, the appropriate solution to any political, social or economic problem can only be properly explored through the political process. Such problems are usually complex involving many dimensions and there are no easy or ready solutions to them. It is only through the political process that a suitable compromise may be found, reconciling the conflicting interests and considerations in question and balancing short term needs and long term goals. The responsibility for the proper functioning of the political process in the interests of the community rests with the Administration and the Legislature."

F.11 Conclusion on construction issue

113. For the reasons set out above, I conclude that the Registrar did not misconstrue the relevant sections of the MO in reaching his decision under challenge.

---

[29] See, e.g., the Gender Reassignment Act 2000 (Western Australia) and the Alteration of Sex Description and Sex Status Act 2003 (South Africa).

G. The constitutional issue

114. Having concluded that the Registrar did not misconstrue the provisions of the MO, it next falls to consider the appellant's alternative case, which is that those provisions, if properly construed as not permitting a post-operative male-to-female transsexual to marry another man, are unconstitutional.

G.1 The constitutional provisions relied upon

115. BL37 provides that:

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

116. BOR19(2) is in the same terms as ICCPR23(2), which provides that:

> "2. The rights of men and women of marriageable age to marry and to found a family shall be recognized."

117. BOR14 is in the same terms as ICCPR17, which provides that:

> "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.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks."

G.2 The nature of the constitutional issue

118. BL37 is within Chapter III of the Basic Law, which sets out the constitutional guarantees for the freedoms that lie at the heart of Hong Kong's separate system, and it is now well-established that the courts should give a generous interpretation to the provisions in Chapter III that contain these constitutional guarantees in order to give to Hong Kong residents the full

measure of fundamental rights and freedoms so constitutionally guaranteed: see *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4 at p. 29A.

119. The appellant's case is that the right to marry is a fundamental right protected by the constitutional provisions relied upon. Whilst it is accepted that it is not an absolute right and that restrictions may be imposed, such restrictions (such as age limits) must be rational, necessary and proportionate. It is contended that the right to marry is a strong right and is intertwined with a person's dignity and well-being: see *R (Baiai) v Home Secretary* [2009] 1 AC 287 at §§44-45.

120. One preliminary point may be disposed of immediately. The appellant points out that the right to marry in BL37 is gender neutral, since that article does not (unlike section 40 of the MO) refer to a "man" and a "woman" but instead simply refers to "Hong Kong residents". This, however, is irrelevant in the present context because the appellant is not contending that BL37 provides a constitutional guarantee of same-sex marriage and accepts that the constitutional right to marry is one confined to parties of the opposite sex.[30] In any event, as already noted, ICCPR23(2) does use the gender specific terms "men" and "women".

121. The question with which this court is therefore concerned on the constitutional issue is whether the right of persons of the opposite sex[31] to marry extends to a post-operative male-to-female transsexual a right to marry a man. As the Judge held,[32] this is a definitional question rather than a question of whether there is a restriction on the right to marry and whether that restriction

---

[30] Contrast the right in article 9 of the Charter of Fundamental rights of the European Union (signed on 7 December 2000) which guarantees the right to marry and the right to find a family but, unlike article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, removes the reference to "men" and "women".

[31] As I have already noted, it is not the appellant's case that the right to marry in BL37 confers a right of same-sex marriage.

[32] Judgment §181

is justified. In other words, the issue is what are a "man" and a "woman" in the context of the right to marry under the constitutional provisions?

122. As to this, the appellant's case on the constitutional issue relies on similar arguments to those advanced on the construction issue, namely that societal changes in Hong Kong (in the context of the right under BL37 and BOR19(2)) and internationally (in the context of the right under ICCPR23(2)) have led to a consensus that the terms "man" and "woman" in the context of marriage should include post-operative transsexuals. Particular reliance is placed via the appellant upon the decision of the ECHR in *Goodwin v United Kingdom* (2002) 35 EHRR 18.

123. It is also convenient to deal with another point here. The appellant says that it is artificial for the respondent to contend that her right to marry has not been interfered with because she is free to marry in her biological sex, as a male, so she could marry a biological woman. In *Goodwin*, the ECHR found (at §101) that it was artificial to assert that post-operative transsexuals have not been derived of the right to marry, as according to law, they remain able to marry a person of their former opposite sex. Since the applicant there was living as a woman and was in a relationship with a man, she would only want to marry a man but could not. Therefore, in the ECHR's view, she could claim that the very essence of her right to marry had been infringed. But whether the appellant's right to marry has been infringed in the present case begs the question of the nature of that right. Only when the nature of that right has been indentified can it be determined whether denying the appellant a right to marry her male partner is an infringement of that right. Thus, it is not a matter of the respondent contending in favour of an artificial right, but rather a question of defining the ambit of the right itself. As we shall shortly see, the ECHR decided in *Goodwin* that the right to marry in article 12 of the European Convention was not to be defined by reference to the purely

biological criteria and therefore extended to permit a post-operative male-to-female transsexual to marry in her assigned gender. At issue in the present case is whether the right in BL37 should similarly not be so defined.

G.3 Goodwin

124. This case concerned a United Kingdom citizen who was a post-operative male-to-female transsexual. Although domestic law permitted the applicant to change her name, she was unable to change a number of official government records which listed her as male. The result of this was that she continued to be treated as a male for purposes of, amongst other things, social security, national insurance, pensions and retirement age. She also alleged that this information could be available to other persons, such as her employers, hence enabling her to be identified as a transsexual. The applicant contended that this failure to amend her official records constituted a violation of her rights under, amongst other provisions, article 8 (the right to respect for private and family life) and article 12 (the right to marry) of the European Convention.

125. *Goodwin* is significant in terms of its context because previous challenges to the application of the *Corbett* criteria and the resulting non-recognition of change of gender for post-operative transsexuals had led to decisions of the ECHR confirming that the United Kingdom's application of the *Corbett* criteria did not breach articles 8 or 12 of the European Convention. The ECHR held that the non-recognition of a change of sex of a post-operative transsexual lay within a Contracting State's margin of appreciation in the area of privacy (article 8) and marriage (article 12). Those previous challenges were: *Rees v United Kingdom* (1986) 9 EHRR 56; *Cossey v United Kingdom* (1990) 13 EHRR 622; *X, Y and Z v United Kingdom* (1997) 24 EHRR 143; and *Sheffield and Horsham v United Kingdom* (1998) 27 EHRR 163. The date of the decision in the last of these cases was 30 July 1998.

126. *Sheffield and Horsham* concerned two applicants who were male-to-female post-operative transsexuals. They complained of the refusal to give legal recognition to their status as women following their gender reassignment surgery as constituting an infringement of their rights under, amongst other provisions, articles 8 and 12 of the European Convention.

127. In respect of the issue of the right to privacy, the ECHR held that the applicants had not shown that since the *Cossey* decision there had been any findings in the area of medical science which settled conclusively the doubts concerning the causes of the condition of transsexualism. The court also noted that it still remained established that gender reassignment surgery did not result in the acquisition of all the biological characteristics of the other sex despite the increased scientific advances in the handling of gender reassignment procedures. Referring to a comparative study submitted by Liberty, the court was not fully satisfied that the legislative trends outlined were sufficient to establish the existence of any common European approach to the problems created by the recognition in law of post-operative gender status. In particular, the court noted that the survey did not indicate that there was as yet any common approach as to how to address the repercussions which the legal recognition of a change of sex might entail for other areas of law such as marriage or the circumstances in which a transsexual might be compelled by law to reveal his or her pre-operative gender. The court considered that it continued to be the case that transsexualism raised complex science, legal, moral and social issues, in respect of which there was no generally shared approach among the Contracting States.[33]

128. In respect of the right to marry, the ECHR held that the legal impediment in the United Kingdom on the marriage of persons who were not of the opposite biological sex could not be said to restrict or reduce the right to

[33] See §§56-58.

marry in such a way or to such an extent that the very essence of the right was impaired. The traditional concept of marriage underpinning article 12 of the European Convention provided sufficient reason for the continued adoption by the United Kingdom of biological criteria for determining a person's sex for the purposes of marriage. Hence, the inability of either applicant to contract a valid marriage under the domestic law of the United Kingdom having regard to the conditions imposed by the Matrimonial Causes Act 1973 could not be said to constitute a violation of article 12.[34]

129. In *Goodwin*, which was decided on 11 July 2002, the ECHR departed from its previous decisions and held instead that there were violations of articles 8 and 12 of the European Convention.

130. In respect of the right to privacy, the ECHR concluded that the United Kingdom could no longer rely on its margin of appreciation. The factors which appear to have led to this change of opinion on the part of the ECHR included:

(1) The fact that the ECHR had on several occasions already examined complaints about the position of transsexuals in the United Kingdom (§73) and had since 1986 emphasised the importance of keeping the need for appropriate legal measures under review having regard to scientific and societal developments (§92);

(2) The fact that the plight of transsexuals in the United Kingdom had been acknowledged in the domestic courts and that various options for reform proposed in a report issued in April 2000 by an Interdepartmental Working Group had not been implemented (§92);

---

[34] See §§66-68.

(3) There was an emerging consensus within the Contracting States in the Council of Europe of providing legal recognition following gender reassignment and, in 1998, only 4 countries out of 37 did not permit a change to be made to a person's birth certificate to reflect the reassigned sex of the person (§§55, 84); and

(4) There was already provision in the United Kingdom for changing birth certificates in certain circumstances and the government had recently issued proposals for reform which would allow ongoing amendment to civil status data (§§87-88).

131. In respect of the right to marry, the ECHR held that, as at the date of *Goodwin*, it could not still be assumed that the terms in article 12 must refer to the determination of gender by purely biological criteria since there had been major social changes in the institution of marriage since the adoption of the European Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality. It held that the test of congruent biological factors could no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual (§100). The ECHR noted that article 9 of the recently adopted Charter of Fundamental Rights had departed from the wording of article 12 of the European Convention in removing the reference to men and women (§100).

132. In response to the argument that eligibility for marriage under national law should be left to the domestic courts within the State's margin of appreciation, the ECHR noted that, whilst the majority of the Court of Appeal in *Bellinger* took the view that the matter was best handled by the legislature, the United Kingdom Government had no present intention to introduce legislation (§102).

133. The ECHR referred to material submitted by Liberty supporting the widespread acceptance of the marriage of transsexuals (§57),[35] but noted that fewer countries permitted the marriage of transsexuals in their assigned gender than recognised the change of gender itself (§103). The ECHR was not persuaded that this supported an argument for leaving the matter entirely to the Contracting States as being within their margin of appreciation since it would be tantamount to finding the range of options open to any Contracting State included an effective bar on any exercise of the right to marriage. While it was for the Contracting State to determine, amongst other things, the conditions under which a person claiming legal recognition as a transsexual established that gender reassignment had been properly effected or under which past marriages ceased to be valid and the formalities applicable to future marriages (including, for example, the information to be furnished to intended spouses), the ECHR found no justification for barring a transsexual from enjoying the right to marry under any circumstances (§103).

134. The decision of the ECHR in *Goodwin* was and is binding on the United Kingdom as a member of the Council of Europe. It was essentially prospective in character and was decided after the decision of the Court of Appeal in *Bellinger* but before that case reached the House of Lords. As Lord Nicholls explained in *Bellinger*,[36] the decision of the ECHR prompted three developments: the reconvening of the Interdepartmental Working Group on Transsexual People to consider urgently the implications of the *Goodwin* judgment; the announcement of an intention to bring forward primary legislation to allow transsexual people to marry in their gender of choice; and an acceptance before the House of Lords by counsel for the Lord Chancellor that those parts of English law which failed to give legal recognition to the acquired

[35] Liberty's 2002 survey indicated that 54% of Contracting States permitted post-operative transsexuals to marry and person of the sex opposite to their acquired gender, while 14% did not and the legal position in the remaining 32% was unclear.

[36] At §§25-27.

gender of transsexual persons (including section 11(c) of the Matrimonial Causes Act 1973) were in principle incompatible with articles 8 and 12 of the European Convention. The first two developments led to the enactment of the Gender Recognition Act 2004[37] and the third development explains the particular relief ordered by the House of Lords in *Bellinger*, namely the declaration of incompatibility, pursuant to section 4 of the Human Rights Act 1998, of section 11(c) of the Matrimonial Causes Act 1973 with articles 8 and 12 of the European Convention.

G.4 The constitutional right to marry

135. It will be necessary to consider later whether circumstances similar to those that led the ECHR to its decision in *Goodwin* are present in the context of Hong Kong. The first task, however, is to consider the meaning of the words "marriage" in BL37 and "men" and "women" in ICCPR23(2) respectively.

136. As at the date of the promulgation of the Basic Law, 4 April 1990, the *Corbett* criteria had been adopted and recognised in Hong Kong law for 18 years. At that date, the ECHR had consistently upheld the *Corbett* criteria in challenges from the United Kingdom based on articles 8 and 12 of the European Convention and the change of tack in *Goodwin* lay 12 years in the future. Furthermore, like certain other provisions of the Basic Law, BL37 was intended to maintain the effect of the laws previously in force in Hong Kong. BL37 is derived from Section XIII of Annex I to the Sino-British Joint Declaration on the Question of Hong Kong which provides[38]:

---

[37] In the same year, Parliament also enacted the Civil Partnership Act 2004 to enable same-sex couples to obtain legal recognition of their relationship by forming a civil partnership with rights and responsibilities identical to civil marriage.

[38] At paragraph 151 in the annotated version of the Joint Declaration.

> "The Hong Kong Special Administrative Region shall maintain *the rights and freedoms as provided for by the laws previously in force in Hong Kong, including* freedom of the person, of speech, of the press, of assembly, of association, to form and join trade unions, of correspondence, of travel, of movement, of strike, of demonstration, of choice of occupation, of academic research, of belief, inviolability of the home, *the freedom to marry and the right to raise a family freely*."
> (Emphasis added)

137. So far as the Basic Law is concerned, therefore, the position at the date of its promulgation on 4 April 1990 is clear: the right to marry under BL37 was given to a person to marry another person of the opposite biological sex and a post-operative male-to-female transsexual remained a man for the purposes of the right to marry. The Judge considered this could not seriously be in doubt[39] and I agree.

138. The ICCPR was adopted in 1966 and entered into force in 1976. It was ratified by the United Kingdom in 1976 and extended to Hong Kong by virtue of that ratification. So far as the ICCPR is concerned, it has not been suggested that there was at that time an international consensus by which the words "men" and "women" in ICCPR23(2) should be understood to include post-operative transsexuals.

139. As I have noted above, it was only in 2002 in *Goodwin* that it was thought that the societal consensus in Europe had changed to the extent that the ECHR should depart from its earlier decisions concerning the *Corbett* criteria in the United Kingdom.

140. So the position under the Basic Law and the ICCPR in their respective historical contexts is, in my opinion, plain. Since, however, the Basic Law is "a living instrument intended to meet changing needs and circumstances" (*Ng Ka Ling* at p. 28D), the question arises as to whether,

---

[39] Judgment §184.

notwithstanding the position when it was promulgated, there is now a societal consensus in Hong Kong that post-operative transsexuals should be allowed to marry in their chosen rather than their biological sex. In the context of the ICCPR, the same question arises as to whether there is now an international consensus to like effect.

G.5 Societal consensus in Hong Kong or internationally?

141. I have addressed above the question of whether an updated meaning should be given to the words "woman" and "female" in the MO in the light of the current state of medical knowledge and contemporary attitudes towards the institution of marriage. The same factors are also relevant in the context of considering whether there is evidence of a clear societal consensus in Hong Kong (in relation either to the BL37 right or the BOR19(2) right) or internationally (in relation to the ICCPR23(2) right) regarding marriage in general and the right of transsexuals to marry in their chosen rather than biological sex.

142. For my part, I can discern no evidence of a societal consensus in Hong Kong, in respect of the constitutional right under BL37 or BOR19(2), to move away from what I have held above to be the proper construction of the provisions of the MO in question: i.e. that the constitutional right to marry is to marry a person of the opposite biological sex. On the contrary, there would not appear to be any reason to question the validity of the evidence of Mr Yu Kin Keung, Assistant Secretary for Security, that any substantive change to the institution of marriage, including the recognition of the new sex of a transsexual person for the purpose of marriage, would be likely to give rise to genuine public concern and spark wide public debate similar to that expressed by different parties about the concept of a family unit in the course of consideration of the Domestic Violence (Amendment) Bill 2009.

143. Nor is there any evidence of a societal consensus in Hong Kong that the obligation under BOR19(2), as distinct from the constitutional right under BL37, gives rise to a right to a transsexual to marry in his or her post-operative sex.

144. That such a societal consensus might be relevant to the interpretation of the extent of the right under BOR19(2) is supported by the ECHR's approach regarding abortion in Ireland. In *A v Ireland* (2010) 29 BHRC 423, the ECHR noted that there was a consensus among a substantial majority of Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law (§235). However, the ECHR did not consider that this consensus decisively narrowed the broad margin of appreciation of the State (§236). Having regard to the right lawfully to travel abroad for an abortion with access to appropriate information and medical care in Ireland, the ECHR did not consider that the prohibition in Ireland of abortion for health and well-being reasons, based as it was on the profound moral views of the Irish people as to the nature of life and as to the consequent protection to be accorded to the right to life of the unborn, exceeded the margin of appreciation accorded in that respect to the Irish state.

145. So far as evidence of any international consensus regarding ICCPR23(2) is concerned, Dr Winter has deposed, on behalf of the appellant, to the fact that:

> "44. In the Asia-Pacific region alone, the People's Republic of China, Japan, South Korea, Singapore, Indonesia, India, Kazakhstan, Australia and New Zealand or allow transsexuals to marry. In Europe, countries such as the United Kingdom, France, Germany, Italy, the Netherlands, Poland, Portugal, Romania, Denmark, Finland and Sweden also allow transsexuals to marry."

146. In addition to Dr Winter's evidence, which refers to the apparent practice in 20 states, the website of the Gender Recognition Panel in the United

Kingdom has published a "Table of gender recognition schemes in countries and territories that have been approved by the Secretary of State, April 2005". That table shows that recognition to a change of gender in 34 states has been given under the Gender Recognition Act 2004.

147. It is at this point that it is relevant to refer to the intervention by the ICJ. As already noted, the ICJ was given leave to intervene in this appeal (as it was in the court below). The written submissions of the ICJ dated 11 October 2011 sought to intervene "for the limited purpose of reiterating the arguments made and law presented in [its] earlier brief". The ICJ submitted that *Corbett* should not now be regarded as good law in Hong Kong since it had been "overturned" by the ECHR in *Goodwin* and "called into question" by the House of Lords in *Bellinger* and since then superseded by statute. The ICJ urged the adoption of the reasoning of *Otahuhu* and *Kevin*.

148. Of particular relevance in the present context were the submissions of the ICJ (in its written submissions dated 5 August 2010 supplied to the Judge) that:

> "Internationally, there is a strong trend toward recognition of an individual's new gender by changing the gender indicated on birth certificates and other identity documents. The change of official identity documents is closely linked, in turn, with an individual's ability to marry a now opposite sex partner."

In addition to the 54% of Member States of the European Union referred to in *Goodwin*, the ICJ pointed out that transgender individuals are also permitted to marry in their new gender in Australia, Canada, New Zealand, South Africa and Israel. Reference was made to the fact that in Brazil, Argentina, Uruguay and all but three of the states in the United States an individual who had undergone gender reassignment surgery was entitled to have the sex on their birth certificate changed.

149. The ICJ also asserted that "[m]ost Asian countries permit a transgender individual to marry in his or her acquired gender or have erected no legal barrier". Reference was made to this being the position in Japan, Singapore, the PRC and South Korea. The position in Malaysia was said, based on the decision in *JG v Pengarah Jabatan Pendaftaran Negara*, to be "not entirely settled".

150. Whilst this evidence certainly provides material to support changing societal attitudes in a number of countries internationally towards transsexuals, it falls considerably short of the degree of European consensus which led the ECHR in *Goodwin* to depart from its previous decisions in respect of the United Kingdom's refusal to recognise post-operative transsexuals in their new sex for the purposes of marriage. It will be recalled that the ECHR referred in *Goodwin* to the survey by Liberty indicating that 54% of Contracting States (to the European Convention) permitted post-operative transsexuals to marry a person of the sex opposite to their acquired gender. The total number of States Parties to the ICCPR is currently 167. However, there is no evidence before the court of any relevant consensus or majority understanding or practice amongst those 167 states.

151. Returning here to the article by Professor Sanders entitled "Document Change for Transsexuals in Asia", it is clear that the main thrust of that article is concerned with the ability of transsexuals to get the designation of their sex changed on some or all of their personal documents. Insofar as the article is relied upon to support the contention that major Chinese majority population cultures and jurisdictions, including the PRC, allow transgender persons to marry in their acquired gender, I do not think the material presented is sufficient to justify that contention. In respect of China, the article simply states that transsexual individuals have been able to marry in their new sex. There is no indication of whether this is because the law recognises a

post-operative transsexual in their new sex for the purposes of the law of marriage. In respect of Taiwan, it is stated that a post-operative transsexual is legally able to marry in the new sex but no details of the relevant legal provisions are provided. The article does appear to disclose a change of the law in Singapore by virtue of amendments to the Women's Charter in 1996 to make the national identity card, rather than the birth certificate, the relevant document for marriage but there is no indication that this change was effected because of any perceived need to align Singapore domestic law with any international treaty obligation, for example under the ICCPR.

152. That the relevant approach is to examine whether there is a relevant consensus among States Parties to the ICCPR is supported by the similar approach taken in the European jurisprudence concerning same-sex marriage. In *Schalk and Kopf v Austria* [2010] ECHR 995, the ECHR noted that in the 1950's "marriage was clearly understood in the traditional sense of being a union between partners of different sex" (§55). The ECHR noted, however, that, whilst having regard to article 9 of the Charter of Fundamental Rights, the ECHR would no longer consider that the rights to marry enshrined in article 12 of the European Convention must in all circumstances be limited to marriage between two persons of the opposite sex, the question whether or not to allow same-sex marriage was left to regulation by the national law of the Contracting State (§61). This was because "marriage has deep-rooted social and cultural connotations which may differ largely from one society to another" and the ECHR "must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society" (§62).

153. At §105 of its judgment, the ECHR held:

> "The Court cannot but note that there is an emerging European consensus towards legal recognition of same-sex couples. Moreover,

> this tendency has developed rapidly over the past decade. *Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus*, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes …".
> (Emphasis added)

154. Nor is there any evidence that, in states where the ICCPR applies and in which transsexuals have been given the right to marry in their post-operative sex, such an extension of the right to marry has been given out of a sense of recognition by that state that it is obliged by ICCPR23(2) to do so rather than simply their own vision of the role of marriage in their societies.

155. Such evidence would be relevant because of the rules as to interpretation of treaties: see, for example, article 31(3)(b) of the Vienna Convention on the Law of Treaties making relevant "any subsequent practice in the application of the treaty *which establishes the agreement of the parties regarding its interpretation*" (emphasis added). An example of the absence of such agreement in the context of article 12 of the European Convention is provided by the observations of the ECHR concerning the extension of marriage to same-sex partners in *Parry v United Kingdom*, App. No. 42971/05 and *R and F v United Kingdom*, App. No. 35748/05.

156. Nor is there any evidence of any decision by the United Nations Human Rights Committee interpreting the ICCPR as requiring that transsexuals should be permitted to marry in their post-operative sex.

157. There is no mention of any such view by the Human Rights Committee in *Joslin v New Zealand*, Communication No. 902/1999, which was a case involving a same-sex couple who were refused a marriage licence and who complained that this amounted to an infringement of their rights under, amongst other provisions, ICCPR23(2) and ICCPR17. The Human Rights

Committee held there was no such infringement since any claim that the right to marry had been violated must be considered in the light of ICCPR23(2) and that that article had been "consistently and uniformly understood as indicating that the treaty obligation … is to recognize as marriage only the union between a man and a woman wishing to marry each other" (§§8.2-8.3).

G.6 Margin of appreciation not relevant

158. One sense in which the expression margin of appreciation is used is in the context of a supra- or trans-national court exercising a supervisory jurisdiction over the courts of various states. The ECHR is such a court exercising jurisdiction over the member states of the European Union in respect of the European Convention. The transnational court has to bear in mind two things: first, the respect due to national sovereignty and autonomy and, secondly, its own limited familiarity with local traditions: see *Mok Charles Peter v Tam Wai Ho & Anor* [2011] 2 HKC 119 per Bokhary PJ at §79.

159. Such a context does not apply in the present case since, in respect of the constitutional issue in this or indeed any other case, this court sits to determine whether the challenged provisions (in this case the relevant provisions in the MO) are or are not consistent with the relevant constitutional provisions (in this case with the relevant articles in the BL and ICCPR). There is no supervisory jurisdiction in the sense described in the preceding paragraph.

160. The margin of appreciation concept has also been recognised as now being well-established in our courts in another sense. In this sense, the concept of the margin of appreciation is applied by national courts in relation to views of the national legislature: see *Mok* (*supra*) per Ma CJ at §55 citing examples of the application of this concept both in Hong Kong and in other jurisdictions. Here, it is usual to refer to the deference which is afforded to the

local legislature. Such deference may well be due when the court is considering whether, for example, a restriction on a constitutional right is no more than necessary to achieve a particular legitimate aim.

161. But, as Ma CJ pointed out (*ibid* at §56), there are limits to the utility of this concept since, although the views of the legislature must be considered, it is the court that has the ultimate responsibility to determine whether legislation is constitutional. That is a matter of law, only for the courts to determine.[40] As Bokhary PJ pointed out (§79):

> "As for deference, the Court must not and does not defer to anybody on the question of what is or is not constitutional. What the Court will do is to recognise that, save where absolute and non-derogable rights and freedoms are concerned, there will generally and naturally be a range of legislative choices as to which any preference that the Court may have is irrelevant. Where legislation lies outside that range, the Court will intervene."

162. As I have observed above, the nature of the constitutional issue in this case is one of definition rather than restriction or limitation. Either the challenged provisions of the MO are constitutional or they are not constitutional. If the BL and ICCPR require the right to marry to be construed as being extended to post-operative transsexuals to marry in their chosen sex, the provisions of the MO (which I have held are to be construed as limiting the right to marry to persons of opposite biological sex) are inconsistent with the constitutional right and there is no room for any margin of appreciation or deference to legislative choice. In that event, the MO provisions simply could not stand. This is not a case where the right to marry has been interpreted as giving rise to a choice of legislative options, either of which would be consistent with the constitutional provision as interpreted by the court, and the legislature has, acting within the margin of appreciation, chosen one option over another. Nor is this a case in which the court is considering restrictions on the right to

[40] See also, in this context, the constitutional role of the courts as described by Li CJ in *Ng Ka Ling* at §p.25J.

marry and whether those restrictions satisfy the test of proportionality, in which context the margin of appreciation might also be relevant.

163. For this reason, it is not necessary in this case to consider the margin of appreciation or the question of deference to the legislature.

G.7 The right to privacy

164. The appellant contends, relying on European jurisprudence concerning article 8 of the European Convention, that the right to privacy encompasses the right to personal development, physical and moral security in the full sense and the right to establish and develop relationships with other human beings: see *Goodwin* at §90 and *Niemietz v Germany* (1992) 16 EHRR 97 at §29. Further, it is contended that the concept embraces aspects of an individual's physical and social identity and that elements such as gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by article 8: see *Pretty v United Kingdom* (2002) 35 EHRR 1 at §61.

165. In this jurisdiction, Hartmann J (as he then was) addressed the right to privacy under ICCPR14 in *Democratic Party v Secretary for Justice* [2007] 2 HKLRD 804, in the context of a challenge by a political party which was incorporated under the Companies Ordinance, Cap. 32, to a provision in that ordinance giving the public a right to inspect the register of members of the company. He held that the concept of "privacy" in ICCPR14 is indistinguishable from "private life" in article 8 of the European Convention and cited §29 of the ECHR's judgment in *Niemietz* in which it was said:

> "Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings."

166. Accordingly, it was submitted on behalf of the appellant that, on the assumption that being theoretically capable of procreation and natural heterosexual intercourse is the definitive essence of a lawful marriage in Hong Kong, the absence to provide for an alternative means of formal relationship for the appellant rendered her unable to exercise her right to private life and privacy. The appellant is arguing, in effect, that the failure to provide for some form of civil union, as an alternative to marriage, infringes her right to privacy, encompassing her right to establish and develop relationships with other human beings.

167. There are a number of flaws in this argument. First, the ability of the appellant to develop a relationship with any other person, whether male or female, is not affected by the statutory provisions under challenge. The consequence of the Registrar's decision under challenge is that the appellant cannot marry her male partner, not that she and her male partner cannot maintain and develop their relationship. The relevant matter in issue is the appellant's right to marry. But as I have held, the right to marry is a right to marry a biological opposite and resort to the right to privacy cannot assist the appellant to overcome that hurdle.

168. Secondly, the complaint that the appellant, a biological male, is not able to enter into a formal relationship akin to marriage with her male partner, is in substance a complaint of a failure to provide for same-sex marriage. However, as already noted, the appellant expressly does not advance such a case.

169. Thirdly, the complaint that the appellant's right to privacy has been infringed by reason of the failure to provide for a form of civil union other than marriage is not advanced in the Form 86A Notice, nor is any complaint of unlawful discrimination on the grounds of sex advanced there. The only relief

claimed by the appellant is a declaration of the right to marry under the provisions of the MO. In the circumstances, the appellant should not be permitted to raise these arguments at this stage. In any event, a similar argument was advanced in *Schalk*, where the applicants' challenge was that they were discriminated against as a same-sex couple in that they were denied the possibility to marry or to have their relationship otherwise recognised by law. At §101, the ECHR rejected the applicant's case that the right to marry, if not within article 12 of the European Convention, could be said to arise under article 14 (prohibition against discrimination) taken in conjunction with article 8 (right to respect for private and family life). The Convention was to be read as a whole and its articles should be construed in harmony with one another. Since article 12 did not impose an obligation on Contracting States to grant same-sex couples access to marriage, article 14, taken in conjunction with article 8, could not be interpreted as imposing such an obligation either.

170. In short, I agree with the Judge's view that the appellant's resort to the right to privacy does not add anything to her constitutional challenge based on the right to marry.[41]

G.8 Conclusion on constitutional issue

171. For the reasons set out above, I reach the same conclusion as the Judge below, namely that the provisions of the MO as properly construed are not inconsistent with BL37, BOR19(2) or ICCPR23(2), nor do they infringe the right to privacy under BOR14 or ICCPR17.

172. In the circumstances, there is no question of having to apply any remedial interpretation of the relevant provisions of the MO. In any event, had there been any question of unconstitutionality, for the reasons given by

[41] Judgment §§165-167.

Lord Hope in *Bellinger* (at §§67 to 69), I doubt it would have been possible or appropriate to resolve the inconsistency by remedial interpretation. However, since that is an academic question in view of my conclusion on the constitutional issue, it is not necessary to address this further.

H. Disposition

173. For the reasons set out above, I would dismiss this appeal.

174. As to costs, I would make an order *nisi* that the appellant pay the respondent's costs of the appeal, to be taxed if not agreed with a certificate for three counsel. The appellant's own costs will be taxed in accordance with the Legal Aid Regulations.

175. Before finally concluding this judgment, I note that, at the end of his careful and thorough judgment, the Judge added a postscript expressing the hope that this case would act as a catalyst for the Government to conduct public consultation on gender identity, sexual orientation and the specific problems faced by transsexuals, including the issue of their right to marry. Ms Carss-Frisk concluded her submissions by informing the court that the Government had considered the Judgment below and, although it was not thought appropriate to consult the public on these issues yet, they were matters for internal discussion at present. There would therefore appear to be some prospect that the sentiments underlying the Judge's remarks, which I would endorse, may yet lead to the public consultation suggested.

(Robert Tang)	(M.J. Hartmann)	(Joseph Fok)
Vice-President	Justice of Appeal	Justice of Appeal

Mr Philip Dykes SC, Mr Hectar Pun and Mr Earl Deng, instructed by Messrs Vidler & Co., assigned by Director of Legal Aid, for the Applicant/Appellant

Ms Monica Carss-Frisk QC, Ms Lisa K Y Wong SC and Mr Stewart K M Wong SC, instructed by the Department of Justice, for the Respondent/Respondent

International Commission of Jurists, intervening in person (by written submissions only)