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TRANSSEXUAL IN ENGLAND STILL OF BIRTH SEX EVEN IF THIS TRANSGRESSES EUROPEAN HUMAN RIGHTS CONVENTION

Bellinger v. Bellinger[1]

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The House of Lords decision in *Bellinger v. Bellinger* was eagerly awaited by the transsexual community and interested followers of this area of law. Following the Court of Appeal in England's decision in the same case[2] that the test of a person's sex for marriage remains the one laid down in *Corbett v. Corbett*,[3] the European Court of Human Rights decided *Goodwin v. U.K.*,[4] which slammed English law as being in violation of two articles of the European Convention on Human Rights, *viz* Articles 8 on the "right to respect for his private ... life" and 12 on the "right to marry and found a family". In *Bellinger*, the House of Lords unanimously granted the declaration that, as a result of *Goodwin*, *Corbett*'s interpretation of the statutory marriage requirement that parties be "male" and "female" respectively must change but, at the same time, it refused to grant the declaration that this marriage between a post-surgery transsexual in her re-assigned sex[5] and a man

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1 [2003] U.K.H.L. 21, [2003] 2 All E. R. 593–614 [*Bellinger* cited to All E.R.].

2 [2002] 1 All E.R. 311; this was a majority decision of 2 : 1 and there was a powerful dissent from Thorpe L.J.

3 [1971] P. 83 [*Corbett*].

4 [2002] 2 F.L.R. 487 [*Goodwin*] and see similar decision in *I v. UK* [2002] 2 F.L.R. 518.

5 It is possible to differentiate "sex" from "gender": the former may be thought as referring to biological datum while the latter as the way we perceive ourselves and function in. The writer does not believe it is useful to make this differentiation in this note. Family lawyers have grown used to referring to the marriage requirement as that parties must not be of the same "sex"; see for example *The Family Law Library of Singapore by Leong Wai Kum* (CD-ROM) (Singapore, Butterworths Asia, 1999) at 299–305 and Cretney S.M., Masson J.M. and Bailey-Harris R. *Principles of Family Law* (7 ed) (London: Sweet & Maxwell, 2002) at 48–50. Focusing on their choice of this term would, however, stifle discussion as to whether there are tests of "sex" that are as relevant as the biological data at birth. The fact may be that the family lawyers' use of this term is attributable only to convenience. It ought not be regarded as thoughtful preference.

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is valid. In other words, the law must change but until the legislature does the job the courts will continue to apply it. Transsexuals, including those who undergo every treatment that medical science offers, will just have to wait until the wheels of the English Parliament are cranked up to treat them the way that European human rights law mandates they are entitled to. The House of Lords demonstrated an unintelligible intransigence to leave English law swimming against the tide that so many other countries have begun to flow along with.

I. THE FACTS

The facts are relatively straightforward. Mrs. Bellinger was born a boy and correctly classified and registered as such at birth. He was a transsexual, a condition described by Lord Nicholls of Birkenhead as "a person who has the misfortune to be born ... with the anatomy of a person of one sex but with an unshakeable belief or feeling that [he is a person] of the opposite sex."[6] He thus began accepting medical treatment that culminated in sex reassignment surgery to remove his penis and create a vagina.[7] Before the surgery he had in fact tried marriage with a woman but this was unsatisfactory and they soon divorced. On completion of the surgery, he (now as much a "she" as medical science could make) married Mr. Bellinger who was fully aware of the sexuality of his bride. This marriage appears to remain fulfilling. The application was to obtain a declaration that their 1981 marriage was valid despite Mrs. Bellinger having been born a boy.

II. ENGLISH LAW

The High Court of England decided *Corbett*[8] in 1971 at a time when medical knowledge of the disorder was far less developed and medical treatment less

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6 *Supra* note 1, at 596 para. 7. The Court of Appeal below had the benefit of hearing several experts who elaborated that this condition is medically known as "gender dysphoria", the etiology of which remains not clearly known. Professor Gooren, Professor of Endocrinology at the Free University Hospital Amsterdam, however, reported on a study he co-conducted that revealed that the process of becoming of one sex or the other is not complete at birth. The process involves a part of the brain as well and is not completed in its entirety until the first few years of life have passed. By this study, each of us is both male and female at birth (although predominantly of one) and only a few years later become all of one sex or the other. The majority of us, fortunately, become all of one sex only but the transsexual is not so clearly differentiated even by that time. For an introduction to such studies, see P.L. Chau and J. Herring, "Defining, assigning and designing sex" (2002) 16 I.J.L.P.F. 327.

7 It is well known that the sex reassignment surgery for a male transsexual to adopt the sexual organs of a woman is more likely to be successful than for a female transsexual hoping to have a working penis created.

8 *Corbett, supra* note 3.

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finely tuned. In that case, a male transsexual similarly underwent surgery before marrying, as one April Ashley, to a man. That marriage was, however, not successful as the man later petitioned successfully for a decree of nullity on the ground that April Ashley was still a man such that the marriage between two men was not valid.[9]

Ormrod J. in *Corbett* had the benefit of hearing two medical inspectors to the court and several expert witnesses including leading gynaecologists, physicians and psychiatrists. On the basis of their testimony, the judge decided, in a passage that continues to be quoted today:[10]

> All the medical witnesses accept that there are, at least, four criteria for assessing the sexual condition of an individual. These are:
> (i) Chromosomal factors.
> (ii) Gonadal factors (*i.e.* presence or absence of testes or ovaries).
> (iii) Genital factors (including internal sex organs).
> (iv) Psychological factors.
> Some of the witnesses would add:
> (v) Hormonal factors or secondary sexual characteristics (such as distribution of hair, breast development, physique *etc.*, which are thought to reflect the balance between the male and female sex hormones in the body). ...
>
> [T]he law should adopt, in the first place, the first three of the doctors' criteria, *i.e.* the chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention. The real difficulties, of course, will occur if these criteria are not congruent. This question does not arise in the present case .... My conclusion, therefore, is that [April Ashley] is not a woman for the purposes of marriage but is biologically male and has been so since birth.

The writer has earlier suggested that in this paragraph Ormrod J. made two decisions.[11] One, that in English law sex is purely a "biological" matter so that where at birth the "biological" tests yield congruent data (and they would with a transsexual) there is no room to consider any other tests such as the "psychological" or the "social". Two, equally important, that the biological tests should be applied at the time of the person's birth or before any surgical intervention. If these same biological tests had been applied to April Ashley

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9 The difference in the success of the unions of the Corbetts and the Bellingers bears some testimony to the greater understanding and acceptance that general society now shows to people afflicted with this rather difficult medical disorder.

10 *Corbett*, *supra* note 3 at 100 and 106.

11 Leong Wai Kum, "Reform of the law of nullity in the Women's Charter" [1992] S.J.L.S. 1 at 10 [Leong].

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at the time of her marriage, they would not have yielded congruent data. By marriage, April Ashley was still by "chromosome" male but by "gonad" and "genital" she was female. Her female biological data, at the time of marriage, were regarded as irrelevant because sex for the purposes of the marriage requirement was nothing but biological data at birth. No person, tragic to a transsexual, can change a congruent biological birth sex.[12]

The House of Lords decided that *Corbett* continues to represent English law until changed by legislative intervention. It is relevant to trace developments between these English decisions, outside England first and then within England itself.

III. CORBETT LARGELY REJECTED OUTSIDE ENGLAND

Corbett has been rejected[13] in many common law and non-common law countries. Among the common law countries, New Zealand did so earlier than Australia. The New Zealand Family Court in *Re 'M'*[14] refused to be bound by biological tests and was willing to accept the post-surgery transsexual's re-assigned sex. In the Family Court of Australia, in Sydney, in *In re Kevin (Validity of Marriage of Transsexual)*[15] Chisholm J. reviewed decisions in many countries to conclude:

> Those courts that have followed *Corbett* ... are unable to accept the sex reassignment because they take the view that there is some essential and unalterable quality that is maleness or femaleness ... that a person's sex is fixed unalterably at birth, that no amount of surgery or other medical intervention can make any difference, and that the person's self perception and role in society are equally irrelevant. In my view however this is not a helpful approach. ... If one considers those courts and legal institutions that have correctly identified [the task of assigning individuals to one sex or the other], there is remarkable consensus, namely that the law

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12 It follows that it is only where the biological birth sex is not congruent, as in the case of a person who is "intersexual" (see footnote 28 and accompanying text), that English law permits consideration of psychological tests and there is some room for the person's choice of his or her sex.

13 In this note it is only the responses to the *ratio decidendi* of *Corbett* that are of interest. The legal treatment of transsexuals involves many issues beyond determining sex for capacity to marry, including whether the sex recorded at birth in the birth certificate may be altered and issues of discrimination in medical treatment and employment *etc.*

14 Unreported decision of 30 May 1991, F.P. No. 048/991/90.

15 165 F. L. R. 404, [2001] FamC.A. 1074 upheld on appeal without judgement provided as E.A./97/2001 [*In re Kevin (Validity of Marriage of Transsexual)* cited to F.L.R.]. Earlier Australian responses were mixed; the Family Court in *In the Marriage of C and D* [1979] 35 F.L.R. 340 and the court in Victoria in *R v. Cogley* [1989] V.R. 799 had accepted *Corbett* but the Court of Criminal Appeal of New South Wales in *Harris & McGuiness* (1988) 35 A. Crim. R. 146 rejected it.

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should treat post-operative transsexuals as members of their re-assigned sex.[16]

In the United States, the situation is mixed although the most often-cited case is the early decision of Superior Court of New Jersey that resoundingly rejected *Corbett*.[17]

European developments have been made through legislative provision. A study by the United Kingdom lobby group, Liberty, summarises the developments thus:[18]

> There is a body of states that have had in place for over a decade the means of conferring congruent civil status to transsexuals: Denmark and Switzerland (1945), Sweden (1972), Belgium (1979), Germany (1980), Italy (1982), the Netherlands (1985), Luxembourg (1985), Spain (1987). ... Of the 37 member states 23 permit change of the birth certificate in one form or another to reflect the reassigned sex of the person.[19] Only Albania, Andorra and Ireland join the UK in positively prohibiting such change.

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16 *Supra* at 472 paras. 315–316. In determining whether the "husband" was "male" at marriage, Chisholm J. took a range of factors into consideration. These included his biological birth data that he was born a girl with female chromosomes, gonads and genitals, the psychological or social information that he had an unshakeable belief that he was male which belief was accepted by the people around him as well as the fact that he had undergone the whole gamut of medical treatment including hormonal treatment and irreversible surgery. The consequence was that his appearance, characteristics and behaviour became male, he was accepted as a man by general society and he married as a man. On the basis of all these factors, the judge concluded that he was male at marriage so that this man's marriage to a woman was valid. In this long judgement that took some 89 pages, Chisholm J. rejected the *Corbett* approach as somewhat simplistic and instead adopted several other factors, besides the biological data at birth, as relevant for consideration.

17 *M.T. v. J.T.* (1976) 355 A2d. 204. Other states have not all responded in the same way. The Texas Court of Appeals in *Littleton v. Prange* (1999) 9 S.W.3d. 223 applied Corbett to decide that a post-surgery male transsexual was still of the sex he was born as and thus incapable of forming a valid marriage with a man. Similarly, despite the Court of Appeals of the State of Kansas in *Estate of Gardiner* (2001) 22 P. 3d. 1091 remanding the case for re-hearing, directing the court to consider factors other than the biological, on review, the Supreme Court of Kansas, in (2002) 42 P. 3d. 120, refused to regard the post-surgery transsexual as of the re-assigned sex, lamenting that any change in the law should have to come from the legislature.

18 Liberty submitted a paper entitled "Integrating Transsexual and Transgendered People" (1997) to the European Court of Human Rights as a Third Party Intervention in connection with the cases then before the European Court of Human Rights *viz Sheffield and Horsham v. U.K.* (1998) 27 E.H.R.R. 163. The paper is available online at the "Press for Change" website <http://www.pfc.org.uk/legal/liba-all.htm>.

19 The significance of permitting the transsexual's record of his or her sex in the birth certificate to be changed to his or her surgically re-assigned sex is clear. Even where the marriage law still requires the parties intending marriage to be of different sexes (and the laws of the majority of European states still do), the post-surgery transsexual whose birth certificate shows him or her to be of this re-assigned sex will have met the marriage requirement when he or she marries a person of a sex opposite of his or her re-assigned sex.

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The Singapore response is comparatively humane and liberal. *Corbett* was accepted by the High Court in *Lim Ying v. Hiok Kian Ming Eric*.[20] The decision was critically analysed and suggestions were made for reform, including the following:[21]

> In Singapore, where every person above the age of twelve possesses an identity card there is a simple way to determine sex for the purposes of marriage. The National Registration Office has sensibly allowed persons who have undergone sex reassignment surgery to have their new sex recorded in their identity cards.[22] This notification of sex in the identity card could suffice to determine the person's sex for the purposes of this marriage requirement.

In 1996 the Singapore Parliament overruled *Lim Ying* by adding the current section 12 to the Women's Charter,[23] subsection (3) of which provides:

(a) the sex of any party to a marriage as stated at the time of the marriage in his or her identity card issued under the National Registration Act (Cap 201) shall be prima facie evidence[24] of the sex of the party; and
(b) a person who has undergone a sex re-assignment procedure shall be identified as being of the sex to which the person has been re-assigned.

Within a mere five years of *Lim Ying*, then, Parliament had overruled *Corbett*. We may be proud that our law does right by the small minority of people who suffer what the rest of us might never truly comprehend and who only ask that we recognise their helping themselves in the ways medical science offer. Transsexuals who undergo the ultimate medical treatment are recognised by

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20 [1992] 1 S.L.R. 184, and noted in Tan Cheng Han, "Transsexuals and the law of marriage in Singapore" [1991] S.J.L.S. 509.

21 Leong, *supra* note 11 at 18–9.

22 It is understood this humane practice continues: when a person produces medical certification of a change of sex this assigned sex substitutes what was recorded.

23 Section 12 was first added by Women's Charter (Amendment) Act (No. 30 of 1996) w.e.f. 1 May 1997. The current edition of the statute is Cap. 353, 1997 Rev. Ed. Sing.

24 The original proposal was overly enthusiastic in proposing that the sex stated in the NRIC "shall be conclusive evidence of the sex of the party". The writer in her private representation to the Select Committee of Parliament cautioned that this "goes further than necessary .... Even a public document [like the NRIC] should not be conclusive evidence. Suppose in a rare case, someone alleges and can prove that there has been a mistake or fraud in the recording of the notation; should the court not be allowed to consider this?" See *Report of the Select Committee on the Women's Charter (Amendment) Bill [Bill No. 5/96]* (Singapore, National Printers, 1996) at B23. The Select Committee then substituted "prima facie evidence" for "conclusive evidence".

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the law in Singapore as of their re-assigned sex at least for the purposes of being allowed to marry in that sex.[25]

IV. Developments in England

Corbett has been upheld in the English courts.[26] It is only where the person was not a transsexual but "intersexual"[27] that the High Court of England in *W v. W (Nullity: Gender)*[28] did give consideration to the surgery undergone to become of one chosen sex. Until *Goodwin* in 2002, challenges to the law before the European Court of Human Rights had not been successful[29] although the Court had observed that as medical knowledge of the condition increased England should accordingly review its law.

The United Kingdom government did respond to this as well as local calls for study and reform by setting up an Interdepartmental Working Group on Transsexual People. The Group completed its work and reported in April 2000. It identified the options presenting to the Government to be: "(a) to leave the current situation unchanged; (b) to issue birth certificates showing the new name and, possibly, gender; and (c) to grant full legal recognition of the new gender subject to certain criteria and procedures." The Group concluded: "We suggest that before taking a view on these options the government may wish to put the issues out to public consultation."[30] The government surprisingly took no further action![31]

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25 For a review of these developments, see Debbie Ong Siew Ling, "The test of sex for marriage in Singapore" (1998) 12 I.J.L.P.F. 161.

26 See *R v. Tan* [1983] 1 Q.B. 1053, *S-T (formerly J) v. J* [1998] Fam. 103 and *Re P and G (Transsexuals)* [1996] 2 F.L.R. 90.

27 An inter-sexual person is one whose sex is biologically indeterminate at birth. This condition is different from the transsexual's whose biological birth data are congruent.

28 [2001] 1 F.L.R. 324 and see Bainham A., "Does sex matter?" [2002] C.L.J. 44. The person's chromosomes and gonads were male but the external genitals were ambiguous. The general appearance and gender orientation were female. Later, surgery was undergone to make her sexual organs more consistent with her chosen sex, *i.e.* female. Charles J. held he was not bound by the *Corbett* test as the biological tests would not yield a congruent result and it was thus open to him to consider the psychological and hormonal factors to conclude that, although at birth he was registered as a boy, he had become a woman before marriage so that her marriage to a man was valid.

29 See *e.g. Rees v. UK* (1986) 9 E.H.R.R. 56, *Cossey v. UK* (1990) 13 E.H.R.R. 622 and *Sheffield and Horsham v. UK, supra* note 18.

30 As taken from the judgement of Dame Elizabeth Butler-Sloss P. in the Court of Appeal in *Bellinger, supra* note 2 at 331 at paras. 93 and 94.

31 Dame Elizabeth Butler-Sloss P, *supra* note 30, could not withhold her "dismay" and added, at 332 para. 96: "That would seem to us to be a failure to recognise the increasing concerns and changing attitudes across Western Europe which have been set out so clearly and strongly in judgments of members of the European Court at Strasbourg, and which in our view need to be addressed by the United Kingdom." It bears noting that the Report was not just presented

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By the time of *Goodwin*, however, the European Court decided that the United Kingdom government could no longer validly claim that the matter falls within their "margin of appreciation" and

> [s]ince there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment, it reaches the conclusion that the fair balance that is inherent in the Convention [of human rights] now tilts decisively in favour of the applicant.[32]

The government has swung into action again. The Interdepartmental Working Group on Transsexual People is reconvened to consider urgently the implications of *Goodwin*. On 13 December 2002, the government announced its intention to bring forward primary legislation which will allow transsexual people who can demonstrate they have taken decisive medical treatment to marry in their chosen sex. The Lord Chancellor followed this up with an explanation that the current understanding of the requirement that parties should be "male and female" respectively should have to change.

V. Analysis of the House of Lords Decision

The five Law Lords were unanimous in their reading of the effect of *Goodwin*. The decision affirms that the existing English law is incompatible with the requirements of European human rights law. In a representative opinion, Lord Nicholls of Birkenhead said "the present state of statute law is incompatible with the convention. I would therefore make a declaration of incompatibility as sought."[33]

Why then not also grant the other declaration sought, *viz* that the 1981 marriage between the Bellingers is valid despite Mrs Bellinger having been born a boy who subsequently underwent full medical treatment including sex re-assignment surgery to become female? The five Law Lords would have us believe that this issue is too complicated and raises so many other questions that only public debate and Parliament can settle.[34] Lord Nicholls identified the following. Recognising Mrs Bellinger as female[35] "would necessitate giving the expressions 'male' and 'female' in [the (UK) Matrimonial Causes

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to the Ministers but also to the English Parliament in July 2000, was sent widely to interested groups and officers, publicised by a Home Office press notice and made available to members of the public.

32 *Goodwin, supra* footnote 4 at 510 para. 93.

33 See judgement of Lord Nicholls of Birkenhead, *Bellinger, supra* footnote 1, at 605 para. 55.

34 This is not to say that their Law Lords were not sympathetic to the plight of a transsexual such as Mrs. Bellinger; see for example the judgement of Lord Nicholls of Birkenhead *Bellinger, supra* footnote 1 at 601 paras. 34 and 35.

35 *Bellinger, supra* footnote 1 at 602 para. 36.

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Act 1973 s 11(c)] a novel, extended meaning: that a person may be born with one sex but later become, or become regarded as, a person of the opposite sex." Moreover,

> much uncertainty surrounds the circumstances in which gender reassignment should be recognised for the purposes of marriage. ... It is questionable whether the successful completion of some sort of surgical intervention should be an essential prerequisite to the recognition of gender reassignment. ... Your Lordships' House is not in a position to decide where the demarcation line could sensibly or reasonably be drawn.[36]

And further:

> There was a time when the reproductive functions of male and female were regarded as the primary raison d'etre of marriage. The Church of England *Book of Common Prayer* of 1662 declared that the first cause for which matrimony was ordained was the 'procreation of children'. ... [T]here is much more emphasis now on the 'mutual society, help and comfort that the one ought to have of the other'. Against this background there are those who urge that ... [i]t should be possible for persons of the same sex to marry. ... [T]his raises a question which ought to be considered as part of an overall review of the most appropriate way to deal with the difficulties confronting transsexual people.[37]

With respect, none of these reasons for inaction persuade. Of the first, any change in the law, *e.g.* the understanding of terms like "male" or "female", by the highest court in the land will surely be somewhat novel. If that was a good reason for not acting, the House of Lords would cease to play its role which is, even by the most conservative understanding, to convey the current understanding of the common law or the current interpretation of statutory provision. Indeed, the need to make this particular change in the law could not be any clearer as the declaration the House of Lords did give, of the effect of *Goodwin*, attests.

Of the second, making choices is legion to law. If a decision ought not be made because making it requires their Law Lords to make a choice, the House of Lords will also cease to be relevant. Indeed, the choices here may not be as difficult as in another case because the transsexual who is resolved to live in his or her chosen sex must seek medical treatment from a doctor. No self-respecting doctor would offer the treatment before clinically determining that the patient truly suffers from the recognised medical disorder. When treatment is offered no self-respecting doctor would offer them in any way but progressively, *viz.* psychological and psychiatric counselling

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[36] *Bellinger, supra* footnote 1 at 602–603 paras. 39, 41 and 43.

[37] *Bellinger, supra* footnote 1, 603–604 paras. 46–48.

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to ensure that the belief is unshakeable and the decision to live in the chosen sex is firm, followed by hormonal treatment initially, then allowing the patient some time to live in the chosen sex and time for serious reflection on his or her decision. Alignment of the patient's body with the chosen sex by sex re-assignment surgery is the last step. Even the most conservative approach should accept medical certification that the transsexual has undergone as much of the sex re-assignment surgery as necessary to be of the chosen sex, as the marker. Once the marker is passed the transsexual is, for all intents and purposes, a person looking and functioning in his or her re-assigned sex. How is this choice that difficult? As the dissenting judge in the Court of Appeal in England decision below, Thorpe L.J., said:[38]

> Ormrod J's monumental judgement in *Corbett*'s case was undoubtedly right when given on 2 February 1970. It is only subsequent developments, both medical and social, that render it wrong in 2001. ... [The claim for a declaration of validity of marriage] lies most evidently in the territory of family justice system. That system must always be sufficiently flexible to accommodate social change. It must also be humane and swift to recognise the right to human dignity and to freedom of choice in the individual's private life.

Of the third, there is no need to link the right of a post-surgery transsexual to marry in his or her re-assigned sex with that of a homosexual to marry another. The experience of other countries does not bear out that these issues need be decided at one and the same time. That society is not ready to consider unisex marriages is not a good enough reason why it should also hesitate over a transsexual's right to marry in the re-assigned sex. If their Law Lords believed that it is just as wrong to deny homosexuals the right to marry, maintaining two wrongs is hardly the more just decision.

VI. Conclusion

The House of Lords may have made its decision on the application for a declaration of validity of marriage sound more difficult than it is.[39] There remain many areas of family law where ambiguities are yet to be clarified or queries remain over whether the tests developed to date are the best yet. Resolving one problem or removing one area of unfairness at a time is the

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[38] *Supra* note 2 at 346, paras. 155 and 348, para. 160.

[39] This note has not considered other issues that the House of Lords decision raises, *e.g.* does *Goodwin*, deciding that English domestic law transgresses European law of human rights, transform domestic law automatically (see suggestion in Thio Li-ann, "The impact of internationalization on domestic governance: Gender egalitarianism & the transformative potential of CEDAW" (1997) 1 S.J.I.C.L. 278) or the implications of *Bellinger* on the process of case law development.

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way the law moves ahead. We might never see the end of this quest to improve family law. Not to act on the unfairness that has been exposed may be inexcusable.

The declaration given by the House of Lords that the law must change makes unintelligible their second decision that their Lordships will not apply their minds to the shape it should change to. It is clearly the prerogative of the English Parliament to determine the final shape of the law to grant recognition to the re-assigned sex of a transsexual. One would have thought that the House of Lords could in the meantime overrule *Corbett* to the extent necessary to grant Mrs. Bellinger the declaration that she had validly married Mr. Bellinger after having received appropriate medical treatment for her transsexual condition including sex re-assignment surgery to become the woman she has lived as for ever so long. The courts in New Jersey in the United States, New Zealand and Australia had been able to do so for their constituents but the House of Lords decided it was unable to do the same for her.

Postscript:

On 11 July 2003 the U.K. government published the draft Gender Recognition Bill 2003 that is expected to be presented to Parliament in 2004. It allows a transsexual to convince a "gender recognition panel" that his or her re-assigned sex ought to be recognised on the bases he or she did suffer gender dysphoria and there is a medical or psychological report and he or she swears to have lived in this re-assigned sex for at least two years and intends to do so for life. On such recognition the "sex" recorded in the person's birth certificate will be changed accordingly and marriage will be allowed in this sex.

Mrs. Bellinger could be thought to have met all these requirements by the time of her marriage. She had been living as a woman since the termination of her first marriage, as a man, in 1971 although she only underwent the sex re-assignment surgery in 1981 after which she married Mr. Bellinger in the same year. The publication of this draft Bill does put an unsatisfactory complexion on their Lordships' claim not to be able to decide on the proper factors to consider whether her re-assigned sex ought to be recognised for the purposes of her marriage to Mr. Bellinger.

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