Exacerbating Corbett: W v Registrar of Marriages

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The judgment of W v Registrar of Marriages held that, following Corbett v Corbett (Otherwise Ashley), a post-operative male-to-female transsexual was not a woman; and consequently was not eligible to marry her boyfriend. This paper, putting aside much of the criticisms of Corbett and assuming that it was a decision to be followed, examines W’s treatment of Corbett and the legal definition of marriage. It submits that, even if it might have been right to follow Corbett, W, in placing emphasis on the doctrine of the Church of England and procreation, went further than Corbett. It argues that this is a retrogressive development for marriage law in Hong Kong.

Introduction

The way in which a legal system defines marriage reflects the essential functions marriage performs. The traditional family unit, hinged on the marriage of heterosexual individuals, has historically been the basic and fundamental unit of society in which children have been raised and values transmitted. However, today other forms of living arrangements are increasingly being adopted, especially by the younger generation, for example, de facto relationships (cohabitation between heterosexual as well as same-sex couples) and unions involving post-operative transsexual persons. How the law and society adapt to such relationships remains a challenge to Hong Kong.

The judgment of W v Registrar of Marriages\(^1\) (W) held that, following Corbett v Corbett (Otherwise Ashley)\(^2\) (Corbett), Ms W, a post-operative male-to-female transsexual, was not a woman; and consequently was not eligible to marry her boyfriend. In a postscript to the judgment, Andrew Cheung J noted:

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1. \[2010\] 6 HKC 359.
2. \[1971\] P 83.
“the Court is acutely conscious of the suffering and plight of those who suffer from transsexualism, and the prejudice and discrimination they face as a minority group in our society.”

He urged the Government not to “view the result of this litigation as simply a victory”.

“Rather, it is hoped that this case will serve as a catalyst for the Government to conduct general public consultation on gender identity, sexual orientation and the specific problems and difficulties faced by transsexual people, including their right to marry.”

_W_ has attracted enormous academic interest. There have been at least 10 academic articles critiquing the judgment from various perspectives, including judicial deference and judicial review, application of ECHR jurisprudence, the right to equality, comparative legal approach in Europe, the use of history by the court, objectification of transgender jurisprudence and transgender science.

This paper, putting aside many of the criticisms of *Corbett* and assuming that it was a decision to be followed, examines _W_’s treatment of *Corbett* and the legal definition of marriage in Hong Kong. A critique of *Corbett*, the consequences of following it and what law reform might be appropriate for Hong Kong will not be examined in this paper.

When examining _W_’s treatment of *Corbett*, paras 116 and 122 (two passages) are particularly relevant. In para 116, Andrew Cheung J

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3 W, para 267.
4 W, para 268.
5 W, para 268.
8 Holning Lau and Derek Loh, "Misapplication of ECHR Jurisprudence in _W v Registrar of Marriages_" (2011) 41 HKLJ 75.
9 Kelley Loper, “_W v Registrar of Marriages and the Right to Equality in Hong Kong_” (2011) 41 HKLJ 89.
11 Marco Wan, “Doing Things with the Past: A Critique of the Use of History by Hong Kong’s Court of First Instance in _W v Registrar of Marriages_” (2011) 41 HKLJ 125.
13 Sam Winter, “Transgender Science: How Might it Shape the Way We Think About Transgender Rights” (2011) 41 HKLJ 139.
observed that, according to the doctrine of the Church of England, marriage is in its nature, *inter alia*, for the procreation of children. Having examined *Hyde v Hyde*[^14] (*Hyde*) and s 40(2) of the Marriage Ordinance (MO), Andrew Cheung J characterised both (*Hyde* and s 40(2) of the MO) as offering a “shorter definition” of a Christian marriage, as they do not expressly refer to procreation. Then at para 122, Andrew Cheung J stated that Ormrod J in *Corbett*, proceeded on the assumption that “marriage is a voluntary union of two individuals of [the] opposite sex ‘for the procreation and nurture of children’ – a function emphasized in Christian marriage”.

This paper submits that, even if it might have been right to follow *Corbett, W*, in placing such emphasis on procreation within marriage, went further than *Corbett* itself. It is submitted that this is a regressive development for marriage law in Hong Kong.

This paper is divided into six parts:

Part 1 examines the traditional legal definition of marriage in *Hyde* and s 40(2) of the MO;

Part 2 examines what *Corbett* decided;

Part 3 examines the decision in *W*;

Part 4 examines *W*’s treatment (in the two passages) of the traditional legal definition of marriage in *Hyde*, s 40(2) of the MO and *Corbett*. It is submitted that *W* went beyond *Corbett* by emphasising that marriage is for the procreation of children, a function emphasised in Christian marriage. Although the judge was right in identifying the traditional significance of procreation in a Christian marriage:

1. this was no longer part of the law by the time of *Corbett*, nor is it part of the ratio of *Corbett*. As such this part of the judgment is best treated as the judge’s personal view of marriage;
2. it is important to separate a marriage consistent with the doctrine of the Church of England from a “Christian” marriage. They are not legally coextensive concepts. The danger of conflating the two may backdate the law governing marriage to a time well before *Corbett*.

Part 5 attempts to offer an alternative interpretation of the two passages and submits that s 20(1)(d) of the Matrimonial Causes Ordinance (Cap 179) (MCO) arguably offers scope for development of the law beyond *Corbett*.

[^14]: (1866) LR 1 P & D 130.
Part 6 concludes that, even if the court might have been correct to apply *Corbett*, it should have done so without adding any further judicial gloss on it. Further, marriage law needs to change with the 21st century social conditions to remain sensible and relevant to the lives of those it serves.

1. Legal Definition of Marriage: *Hyde* and Section 40(2) of the Marriage Ordinance

Hong Kong is a predominantly Chinese society steeped in a unique cultural and legal heritage. Until the operative date of the Marriage Reform Ordinance (Cap 178) (MRO) on 7 October 1971, it was possible for Chinese inhabitants to enter into a valid marriage in accordance with Chinese laws and customs.\(^{15}\)

Since then, however, s 40 of the MO provides for only one form of marriage:

“(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 recognised by the law as involving the voluntary union for life of one man and one woman to the exclusion of all others.”

The definition in s 40(2) of the MO was derived from a dictum by Lord Penzance in 1866 in the case of *Hyde*. Lord Penzance said:

“I conceive that marriage, as understood in Christendom, may…be defined as the voluntary union for life of one man and one woman to the exclusion of all others.”\(^{16}\)

In light of this derivation and the wording of s 40(2), a “Christian marriage” or “the civil equivalent of a Christian marriage” must meet four criteria, ie it must be:

- heterosexual in nature (one man and one woman);
- voluntarily entered into by the parties;

\(^{15}\) Athena Liu, *Family Law in the Hong Kong SAR* (Hong Kong University Press, 2000), Chap 1.

\(^{16}\) (1866) LR 1 P & D 130, p 133.
a union for life; and
• excluding all others (monogamy).

Although Lord Penzance had not been concerned with the definitions of “man” and “woman”, attempts have since been made to provide them with legal meaning. In *Corbett* (decided in 1970), the question was whether a post-operative male-to-female transsexual, 17 who was living and working as a woman, should be considered a “woman” for the purpose of marriage.

2. What *Corbett* Decided

In *Corbett*, the respondent (April Ashley) was born a male, but desired to be a female. Having undergone successful sex reassignment surgery (SRS), as a post-operative male-to-female transsexual, the respondent adopted a female name. She lived and worked as a successful female model. She then went through a marriage ceremony with the appellant (Arthur Corbett), who knew of these facts. The parties however separated after only 14 days of marriage. Some three and a half years later the appellant petitioned for a decree of nullity on the grounds that: (i) the respondent was a person of the male sex (so the marriage was void *ab initio*), and (ii) even if April Ashley was a woman, she was incapable of, or had wilfully refused, to consummate the marriage (so the marriage was voidable).

Ormrod J examined the legal basis of sex determination. He noted that all medical witnesses accepted that there were at least four criteria for establishing the sex of a person, ie chromosomal, gonadal (organs which produce sex cells, namely, testes or ovaries), genital and psychological. He observed that these criteria are relevant to, but do not necessarily decide, the legal basis of sex determination. He also made it clear that he was concerned only with defining who was a “woman” in the context of a marriage, and was not concerned with the determination of the “legal sex” of a person at large.18

17 Note that the term used in *Corbett* was a “male transsexual”. A transsexual person is someone who physically belongs to one sex (either male or female) but psychologically identifies with the other. This conflict between the biological and the psychological sex may be reconciled via sex reassignment surgery (SRS). “A transsexual person is also to be distinguished from an intersexed person. Intersexuality refers to the congenital condition where the physical appearance of external sex organs cannot be distinguished into male or female.” See W, para 28. For a case example on intersex, see Athena Liu, *Family Law in the Hong Kong SAR* (Hong Kong University Press, 2000), Chap 1. See also PL Chau and Jonathan Herring, “Defining, Assigning and Designing Sex” (2002) *International Journal of Law Policy and the Family* 327.

18 Corbett, p 106.
He held that marriage is a union between a man and a woman. The legal basis for sex determination must (where chromosomal, gonadal and genital tests are congruent) be in accordance with biological criteria at birth and that psychological criteria have no role to play – “once a man, always a man”. SRS does not change the sex of an individual in the context of marriage. The use of biological criteria for sex determination is premised on the view that the essence of marriage is the capacity for natural heterosexual intercourse.

Ormrod J said:

“sex is clearly an essential determinant of the relationship called marriage … It is the institution on which the family is built, and in which the capacity for natural heterosexual intercourse is an essential element…

[T]he question then becomes, what is meant by the word ‘woman’ in the context of a marriage … Having regard to the essentially hetero-sexual character of the relationship which is called marriage, the criteria must … be biological, for even the most extreme degree of transsexualism in a male … cannot produce 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.” (Italics added by author)

He held (obiter) that even if April Ashley was a woman, a person with an artificial vagina is incapable of performing natural heterosexual intercourse and consummation of marriage. The implications of this on adultery and sexual offences like rape will not be discussed in this paper.

For the purpose of this paper, it is important to note that Ormrod J did not say that marriage (Christian or non-Christian) is for the procreation of children.

3. W v Registrar of Marriages

The facts of W are similar to Corbett. Ms W was born male but had always self-identified as female. Following three years of psychiatric assessment and hormonal treatment, Ms W underwent SRS in Hong Kong in 2008.
at the Ruttonjee and Tang Shiu Kin Hospitals. After the completion of the SRS, the hospital issued a letter certifying that the applicant’s gender should be designated as female. Ms W had all her educational certificates and Hong Kong ID card successfully amended showing her female identity. However, she failed to have her birth certificate amended. Through her lawyers, Ms W contacted the Marriage Registry regarding her capacity to marry a man.21

“However, her enquiries through solicitors with the Marriage Registry regarding her capacity to marry a man have been met with the answer that for the purposes of the law of marriage in Hong Kong, which does not allow same sex marriage, men and women are determined according to their biological sex at birth which cannot be changed subsequently.”22

Ms W sought judicial review to quash the refusal of the Registrar of Marriages to allow her to register her marriage with her male partner. She also sought a declaration that the Registrar had wrongly regarded her as a man for the purposes of s 40(2) of the MO; that it was inconsistent with Art 37 of the Basic Law and / or Arts 14 and 19(2) of the Hong Kong Bill of Rights (ie the equivalent of Arts 17 and 23(2) of the International Covenant on Civil and Political Rights (ICCPR)).

The High Court (Andrew Cheung J) dismissed both of Ms W’s claims. The High Court held that the meaning of “man” and “woman” under s 40 of the MO was a question of statutory interpretation. Having reviewed the relevant case law from other jurisdictions, Andrew Cheung J held that (following Corbett) the determination of the sex of a person for the purpose of marriage was based on biological factors alone (ie the sex of a person is fixed at birth and therefore immutable) and not psychological factors. Andrew Cheung J noted that Corbett was a decision made 40 years ago, and has been heavily criticised.23 Nonetheless, he concluded:

21 Robyn Emerton, “Neither Here nor There: The Current Status of Transsexual and Other Transgender Persons Under Hong Kong Law” (2004) 34 HKLJ 245, the author points to the possibility that “marriages” have in fact taken place in Hong Kong where the couple are of the same biological sex. This is because the Marriage Registrar relies upon the couple’s identity cards or travel documents when they attend to give notice of their marriage, not their birth certificates.

22 W, para 46.

“I take the view that Corbett does represent the present state of the law in Hong Kong.”

Having reached that conclusion, Andrew Cheung J recognised that:

“in considering whether the relevant provisions should be given an updated construction so as to include in the words ‘woman’ and ‘female’ a post-operative transsexual woman, ... it is necessary to consider what, if any, relevant changes there have been over the past 40 years since Corbett was decided.”

After considering the loss of prominence of procreation and other changes, the ordinary usage of language (especially whether there was any evidence that Hong Kong usage of the relevant words differed from that in the United Kingdom or the United States), Andrew Cheung J concluded that:

“the applicant 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.”

When the court said that Corbett represented the present state of Hong Kong law, one assumes that the court was applying Corbett. But from a careful reading of W, it appears that W ventured further than Corbett. It did so when discussing the legal definition of marriage, by placing emphasis on procreation and in drawing upon the doctrine of the Church of England. In this way W introduced two additional elements, (discussed in Part 4 below) both of which are not supported by legal authorities.

4. W’s Treatment of Corbett and the Legal Definition of Marriage

At para 116, Andrew Cheung J discussed these additional elements, saying:

24 W, para 125.
25 W, para 129.
26 W, paras 130–133.
27 W, paras 134–141.
28 W, para 141.
“According to the doctrine of the Church of England, marriage is in its nature a union permanent and life-long, for better or for worse, till death them do part, of one man and one woman, to the exclusion of all others on either side, for the procreation and nurture of children, for the hallowing and right direction of the natural instincts and affections, and for the mutual society, help and comfort which the one ought to have of the other, both in prosperity and adversity: Halsbury’s Laws of England (5th ed.), Vol. 72, para 1, citing Revised Canons Ecclesiastical, Canon B30 para 1. The 19th century case of Hyde v Hyde and Woodmansee (1866) LR 1 P & D 130 gave a shorter definition of Christian marriage, a definition adopted in section 40(2) of the Marriage Ordinance, that is to say, ‘the voluntary union for life of one man and one woman, to the exclusion of all others’ (p 133). Whilst this shorter definition does not, by comparison, expressly refer to procreation, the traditional significance of procreation in Christian marriage, when viewed in the relevant religious and historical context, cannot be doubted. And procreation is, by definition, a matter for members of the opposite biological sex.”

*The Traditional Significance of Procreation*

In para 116, the court correctly recalled the traditional significance of procreation in Christian marriage, and after comparing this with both Hyde and s 40(2) of the MO (where procreation is not mentioned), it concluded that the latter to be a shorter definition of Christian marriage. “Shorter” here suggests less complete. But it is that shorter definition which is found in s 40(2) of the MO itself.

It is submitted that although the judge was right in identifying the traditional significance of procreation in a Christian marriage (consistent with the doctrine of the Church of England), it was no longer part of the law by the time of *Corbett*.30

In 1947, two English House of Lords decisions made it clear that procreation was not the principal end (or one of the principal ends) of a Christian marriage.

The source of such belief – that procreation was the principal end (or one of the principal ends) of a Christian marriage – could be traced to the Book of Common Prayer.31 It stated that the procreation of children

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29 *W*, para 116.

30 On whether the Church of England today still requires procreation for a valid marriage, see Marco Wan, “Doing Things With the Past: A Critique of the Use of History by Hong Kong’s Court of First Instance in *W v Registrar of Marriages*” 41 HKLJ 125 at pp 129–132.

was one of the causes for which matrimony was ordained. Some judges, indeed, wrongly believed that the mutual right of sexual intercourse was fundamental to the marriage state. However, in two House of Lords cases in 1947, it was made clear that such a view was not part of the law. First, in *Weatherley v Weatherley* \(^{32}\) (*Weatherley*) the wife refused to continue to have sexual intercourse with the husband. The husband petitioned for a divorce on the grounds of desertion,\(^{33}\) arguing that the denial of sexual intercourse constituted a repudiation of the obligations of marriage sufficient to constitute desertion. The House of Lords rejected this argument as “dangerous and fallacious” as it confused religious with civil consequences of marriage. Lord Jowitt LC stated:

“The fact is that the law of the land cannot be co-extensive with the law of morals, nor can the civil consequences of marriage be identical with its religious consequences. What marriage means to different persons will depend on their upbringing, their outlook and their religious belief.”\(^{34}\)

Lord Jowitt LC continued by stating that the solution to the problem as presented by the facts of the case depended:

“not on a consideration of the Christian doctrine of marriage… but on the true construction of the relevant Acts of Parliament.”

Despite the separation between the law and religion on this point, there continued to be those who regarded procreation as the basis of marriage. This was finally dismissed in *Baxter v Baxter* \(^{35}\) (*Baxter*) when the House of Lords held that a wife who refused to permit intercourse unless her husband used a condom was not refusing to consummate the marriage. Lord Jowitt LC made it clear that it was wrong to say that a marriage was not consummated unless children were procreated; and equally wrong to say that the procreation of children was the principal end of marriage.

“Again, the insistence on the procreation of children as one of the principal ends, if not the principal end, of marriage requires examination. It is indisputable that the institution of marriage generally is not necessary for the procreation of children, nor does it appear to be a principal end of marriage as understood in Christendom… In any view of Christian marriage the essence


\(^{33}\) A ground for divorce first introduced by the English Matrimonial Causes Act 1937.

\(^{34}\) Per Lord Jowitt LC, at p 633.

of the matter, as it seems to me, is that the children, if there be any, should be born into a family, as that word is understood in Christendom generally, and in the case of a marriage between spouses of a particular faith that they should be brought up and nurtured in that faith, but this is not the same thing as saying that a marriage is not consummated unless children are procreated or that procreation of children is the principal end of marriage. Counsel were unable to cite any authority where the procreation of children was held to be the test in a nullity suit. On the contrary, it was admitted that the sterility of the husband or the barrenness of the wife was irrelevant.36 (Italics added by author)

In short, both Weatherley and Baxter support the view that historically the traditional significance of procreation in a Christian marriage (consistent with the doctrine of the Church of England) cannot be doubted; however, by 1947 this view was no longer valid in law.37

In fact, the word “procreation” does not appear in Corbett.38 In contrast, the word “procreation” was mentioned 12 times in W, in various contexts,39 and “reproduction” was mentioned three times.

Indeed, the traditional significance of procreation in a Christian marriage was not part of Corbett. As can be seen above, Corbett emphasised the capacity for natural heterosexual intercourse being an essential element of marriage (which has been heavily criticised).40 However, Andrew Cheung J appears to assume that “procreation” formed part of the ratio of Corbett, notably at para 122, where he said:

“However, if one proceeds, as Ormrod J did, from the premise that marriage is… between two individuals of opposite sex ‘for the procreation and nurture of children’ – a function emphasized in Christian marriage, one simply cannot escape from the conclusion that the ability to engage in natural heterosexual intercourse is an essential feature of marriage.” (Italics added by author)

It appears that in para 122, Andrew Cheung J incorporated the expression “marriage is… for the procreation… of children” to be part of Corbett, when in fact it is not.

In all fairness, Andrew Cheung J acknowledged that the law has always allowed those who are past childbearing age to marry, and that

36 Ibid., at p 286.
38 The word “reproduce” appears once (at p 106) but not with the meaning of procreation; the word “reproduction” does not appear in Corbett either.
39 Four times in W, para 116 itself.
40 See n 23 above.
infertility is not, by itself, a ground for denying a person’s right to marry.\textsuperscript{41} Indeed he noted that the nature and purpose of marriage has shifted.\textsuperscript{42}

The same sentiment can be found in paras 203,\textsuperscript{43} 205\textsuperscript{44} and 206.\textsuperscript{45}

More recently, Charles J in \textit{W v W (Physical Inter-sex)}\textsuperscript{46} (a case cited in \textit{W})\textsuperscript{47} said:

“Ormrod J [in \textit{Corbett}] does not say or indicate that to be a woman or female for the purposes of marriage a person must have the capacity to bear children …

In my judgment the institution of marriage on which the family is built does not require the parties to the marriage to be capable of naturally bearing children and Ormrod J was not intending to indicate the contrary. In my view, even if it was accepted that a primary purpose of marriage was the procreation of children, one only has to pause for a moment to conclude that

\textsuperscript{41} \textit{W}, paras 123 and 124.
\textsuperscript{42} \textit{W}, para 130.
\textsuperscript{43} “I have described the argument, that nowadays, procreation is no longer an important aspect of the institution of marriage. Rather, the emphasis is on the mutual society, help and comfort that one ought to have of the other.”
\textsuperscript{44} “…even within the institution of marriage, procreation has lost much of its previous significance as the, or a, major purpose for the institution. Some people marry with no ability to procreate (because of health, age or other reasons). More importantly, many people marry with no intention to having children. Stripped of procreation as its, or its main, purpose, the argument runs, marriage becomes more a legally recognised relationship to afford mutual society, help and comfort that the one ought to have of the other. Moreover, a family can be founded without having natural children. Children may be adopted. Children from former marriages and relationships would become members of the same family after a new marriage. And children may be conceived by artificial insemination – this is possible with a couple involving a post-operative transsexual man.”
\textsuperscript{45} “However, as Lord Hope pointed out in \textit{Bellinger} … the ability to reproduce one’s own kind still lies at the heart of all creation, and the 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. There can be no doubt that originally marriage had a lot to do with procreation and the continuation of the family line. That is, or was, particularly true with a predominantly Chinese society like Hong Kong.”
\textsuperscript{46} [2001] Fam 111. The Respondent (W) was born (in 1947) of indeterminate sex (intersex). W was registered and raised as a boy. At the age of 40, W underwent gender reassignment surgery and married the Applicant (Mr W who was a male person). Three years after the marriage, the parties separated and the Applicant sought a decree of nullity on the ground that W was not female. Charles J (in the Family division) refused a decree of nullity, holding that as the entry in the birth certificate was not conclusive, W was a female person at the time of the marriage. Charles J found that W’s intersex condition was not resolved by using the \textit{Corbett} test. He held that in cases where the \textit{Corbett} factors did not all point in one direction, all of the following factors should be considered: (i) chromosomal factors; (ii) gonadal factors (ie presence or absence of testes or ovaries); (iii) genital factors (including internal sex organs); (iv) psychological factors; (v) hormonal factors, and (vi) secondary sexual characteristics (such as distribution of hair, breast development, physique, etc.). For further discussion, see PL Chau and Jonathan Herring "Defining, Assigning and Designing Sex" (2002) \textit{International Journal of Law Policy and the Family} 327.
\textsuperscript{47} \textit{W}, para 235.
it is not an essential ingredient of a marriage between a man and a woman that they are both naturally capable of having children because there are a number of men and women who are not.”

The House of Lords in *Bellinger v Bellinger* (*Bellinger*) considered *Corbett*. Lord Nicholls was careful in discussing the historical and religious importance of procreation in marriage.

“even in the context of marriage, the present question raises wider issues. Marriage is an institution, or relationship, deeply embedded in the religious and social culture of this country. It is deeply embedded as a relationship between two persons of the opposite sex. There was a time when the reproductive functions of male and female were regarded as the primary raison d’être of marriage. The Church of England Book of Common Prayer of 1662 declared that the first cause for which matrimony was ordained was the ‘procreation of children’. For centuries this was proclaimed at innumerable marriage services. For a long time now the emphasis has been different. Variously expressed, there is much more emphasis now on the ‘mutual society, help and comfort that the one ought to have of the other.’

In light of the above reasons, it is submitted that whilst *W* might have been right to follow *Corbett* (despite the fact that there is a significant number of well-reasoned recent cases departing from it), it should not have proceeded on the premise that marriage is for the procreation of children. It is further submitted that this part of the judgment is best treated as the judge’s personal view on marriage.

A related, and potentially misleading, reference in the two passages was to the Church of England and its ostensible nexus with Christian marriage in s 40(2) of the MO. This will be examined next.

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50 *Bellinger*, para 46.
Christendom, Christian Marriage and the Church of England

In para 116, Andrew Cheung J stated that according to the doctrine of the Church of England, marriage is for procreation. He emphasised the traditional significance of procreation in Christian marriage at para 122 again. It seems that a marriage according to the doctrine of the Church of England is being used to determine the meaning of Christian marriage in s 40(2) of the MO.

It is submitted that it is important to separate the description “a marriage consistent with the doctrine of the Church of England” from the broader description of Christian marriage in s 40 of the MO, as they are not legally coextensive concepts. This requires an examination of the different possible meanings of Christian marriage in Hyde, s 40 of the MO and in W.

The case of Hyde was decided in 1866. It was not a case about the legal definition of marriage, nor was it about who was a man or woman. Instead, the court in Hyde was concerned with the matrimonial jurisdiction of the English court. The parties in Hyde were both members of the Mormon faith (today the Church of Jesus Christ of Latter-day Saints). They married in Salt Lake City, Utah. The husband renounced that faith and moved to England. The wife subsequently obtained a divorce from her husband in Utah and remarried. The Utah divorce, however, was not recognised in England and so the husband petitioned the English court for a divorce on the grounds of the wife’s adultery. His petition was dismissed. The court held that English matrimonial law was based on the notion of a Christian marriage and it was inapplicable to a potentially polygamous marriage (as marriage in the Mormon faith was at the time). It was in this context that Lord Penzance made his dictum. It is worth repeating it in full here, providing the context of this classical definition of marriage:

“Marriage has been well said to be something more than a contract, either religious or civil – to be an Institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of ‘husband’ and ‘wife’ is a recognized one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite rights upon their offspring. What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable

52 It is no longer true today, see lds.org/ (visited on 3 Nov 2011).
features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others."53 (Italics added by author)

Lord Penzance was identifying the essential pervading elements of marriage throughout Christendom,54 or all Christian nations,55 not, more narrowly, marriage consistent with the doctrine of the Church of England.

This notion has been further elucidated upon by the Court of Appeal in 1930 in Nachimson v Nachimson56 (Nachimson) applying Warrender v Warrender57 (Warrender) (a decision of the House of Lords in 1835). In Nachimson, Romer LJ quoted from Lord Brougham's judgment (in Warrender) on the meaning of "Christendom" and a "Christian" marriage. He contrasted marriage known to all the Christian world with other marriages "amongst infidel nations";58 the former clearly monogamous in nature; whereas the latter accepted several wives. Lord Brougham said:

“If indeed…there go two things under one and the same name in different countries – if that which is called marriage is of a different nature in each – there may be some room for holding that we are to consider the thing to which the parties have bound themselves, according to its legal acceptance in the country where the obligation was contracted. But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe, that we regard it as a wholly different thing, a different status, from Turkish or other marriages among infidel nations, because we clearly never should recognize the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorize and validate. This cannot be put upon any rational ground, except our holding the infidel

53 Hyde, p 133.
54 “Christendom” is a rather old term. The Concise Oxford Dictionary defines “Christendom” as a noun which means “the worldwide body or society of Christians”.
55 The Concise Oxford Dictionary defines “Christian” (as an adjective) to mean: “relating to or believing in Christianity or its teachings” and (as a noun): “a person who has received Christian baptism or is a believer in Christianity.”
56 Nachimson v Nachimson [1930] P 217, a case concerning whether two Russians who married in 1924 in Moscow had a valid marriage which the English Court could dissolve.
57 Warrender v Warrender (1835) 2 Cl & F 488, the House of Lords was called upon to consider whether the Scottish Courts were competent to entertain a suit to dissolve a marriage entered into in England between a man domiciled in Scotland and a woman domiciled in England.
58 “Infidel” is again a rather old term and the Concise Oxford Dictionary defines it as “a person who has no religion or whose religion is not that of the majority.”
marriage to be something different from the Christian, and our also holding Christian marriage to be the same everywhere.”

Joseph Jackson, in *The Formation and Annulment of Marriage*, made it clear that the expression a “Christian” marriage:

“does not relate to Christianity as a religion but to the concept of marriage acknowledged and recognised by that religion, so that non-Christians are entitled to have their marriages recognised by English courts.”

Similarly, Anthony Dickey in *Family Law* said, in relation to the reference to Christendom in *Hyde*:

“this has been said to be simply a convenient way to express the idea that the only marriages which have traditionally been recognized in Western cultures are monogamous, heterosexual unions.”

In sum, Christian marriage in *Hyde* is not a reference to Christianity as a religion (nor the Anglican faith). It refers only to the concept of marriage acknowledged and recognised by Christendom / Christian nations. Christian marriage in s 40(2) of the MO, as derived from *Hyde*, is a convenient abbreviated shorthand for marriage acknowledged and recognised by Christendom / Christian nations, that is “the voluntary union for life of one man and one woman to the exclusion of all others”, nothing more.

A careful examination of s 40 of the MO and its history shows that the reference in Hong Kong, in the MO, to “Christian” marriage, is to be contrasted with “non-Christan” customary marriages (in which plurality of wives was permitted). Section 40 of the MO originated from s 38 of the Marriage Ordinance 1875 (No 7 of 1875).

Sections 37 and 38 of the Marriage Ordinance 1875 (No 7 of 1875) provided that:

“This ordinance shall apply to all marriages celebrated in the Colony except non-Christian customary marriages duly celebrated according to the personal law and religion of the parties…"

Nachimson, p 237.


38. – (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 by the law as involving the voluntary union for life of one man and one woman to the exclusion of all others.”

(Italic added by author)

Section 38 was later replaced by the Marriage Amendment Ordinance (No 34 of 1932). In the first reading of the Marriage Amendment Ordinance, it was said that:

“The definition in section 38 (2) is derived from Nachimson’s case, (1930) p. 217 and other cases referred to therein.”

Hyde and Warrender were referred to in Nachimson. In all these three cases, Christian marriage provides a convenient shorthand reference to voluntary, monogamous and heterosexual union (as compared to non-Christian marriage). That such an abbreviated term could be associated with a religion, eg consistent with the doctrine of the Church of England or the Book of Common Prayer of 1661, is unfortunate. It is submitted that s 40(2) of the MO has nothing to do with Christianity as a religion, contrary to what Andrew Cheung J stated in para 116.

From Hyde to Corbett to W

This paper submits that the legal definition of marriage found in s 40(2) of the MO has been interpreted too widely in W to mean more than a “voluntary union for life of one man and one woman to the exclusion of all others”. As a result, two additional elements might have been introduced, ie marriage is “for the procreation and nurture of children” – a function emphasised in Christian marriage (meaning consistent with the Church of England); and in para 122, W also adopted Corbett’s emphasis on the ability to engage in natural heterosexual intercourse as

63 Marco Wan, “Doing Things With the Past: A Critique of the Use of History by Hong Kong’s Court of First Instance in W v Registrar of Marriages” (2011) 41 HKLJ 125.
an essential element in a marriage. Figure 1 below illustrates, in sum, the extent of W’s journey for Hong Kong marriage law.

Figure 1  Legal Definition of Marriage from Hyde to Corbett to W

It may be fair to Andrew Cheung J to add that, on the relevance of the ability to engage in natural heterosexual intercourse to the formation of a valid marriage, he noted that a marriage affected by non-consummation is still a valid subsisting marriage and non-consummation merely empowers one or other of the spouses to take steps to have it brought to an end. If so, as Charles J in W v W (Physical Inter-sex) said:

“It follows that there is not a necessary connection between the issue whether a person is male or female and a capacity to consummate a marriage as a male or a female.”

PL Chau and Jonathan Herring noted that Corbett renders the ability to have natural heterosexual intercourse a key element in defining sex for

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64 W, para 133, see s 20(2)(a) and (b) of the MCO.
65 [2001] Fam 111 (discussed earlier).
66 W, para 143.
the purposes of marriage. This effectively reduces natural heterosexual intercourse as key to a person's sexual identity. Such an approach “leads to [an] unacceptable assumption about the sexual role expected of men and women”67 both in marriage and generally.

Similarly, Thorpe LJ in Bellinger (dissenting in the Court of Appeal)68 has criticised the Corbett test in these terms:

“In my opinion the test that is confined to physiological factors, whilst attractive for its simplicity and apparent certainty of outcome, is manifestly incomplete. There is no logic or principle in excluding one vital component of the personality, the psyche.”69

Stephen Gilmore70 in examining the House of Lords' decision in Bellinger71 rightly pointed out that Lord Nicholls reached his conclusion without examining the nature of marriage in English law, or the reasoning of Ormrod J in Corbett. These are striking omissions, since Corbett was indistinguishable from Bellinger.

5. An Alternative Interpretation of W and Section 20(1) of the Matrimonial Causes Ordinance

Perhaps there is another way of reading the two passages, that is they are focused on the interpretation of the meaning of the words “man” and

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68 [2001] EWCA Civ 1140.
69 Bellinger, para 132.
71 Ms Bellinger, born a man, and a post-operative transsexual woman, went through a ceremony of marriage with Mr Bellinger (a biological man) who was aware of her gender reassignment background. Nearly 20 years after their ceremony of marriage, the parties continued to live happily together as husband and wife. With the support of Mr Bellinger, she sought a declaration that her marriage was valid at its inception and subsisting. The House of Lords (Apr 2003), having considered Corbett, unanimously refused to grant the declaration sought. It held that the words “male” and “female” in s 11(c) of the Matrimonial Causes Act 1973 (s 11(c) of the MCA) referred to a person’s biological gender as determined at birth. Any other conclusion would amount to a major change in the law and should be done only by Parliament after careful deliberation. However, the House of Lords noted that under s 3(1) of the Human Rights Act 1998, UK legislation must be read in a way compatible with the Convention rights (the European Convention on Human Rights). Since there was no domestic provision for the recognition of gender reassignment for the purposes of marriage, s 11(c) of the MCA was a continuing obstacle to the petitioner entering into a valid marriage with a man. It was therefore incompatible with the petitioner’s right to respect for her private life and with her right to marry pursuant to Arts 8 and 12 of the Convention. A declaration of incompatibility was granted.
“woman” in s 40(2) MO. W made a special reference to the importance of procreation as a relevant consideration in construing the words “man” and “woman”; procreation being a matter for members of the opposite biological sex. This explains para 116:

> “Whilst this shorter definition does not, by comparison, expressly refer to procreation, the traditional significance of procreation in Christian marriage, when viewed in the relevant religious and historical context, cannot be doubted. And procreation is, by definition, a matter for members of the opposite biological sex.”  

Further, W emphasised the “ability to engage in natural heterosexual intercourse” as an essential feature of marriage.

> “However, if one proceeds, as Ormrod J did, from the premise that marriage is … between two individuals of opposite sex ‘for the procreation and nurture of children’ … one simply cannot escape from the conclusion that the ability to engage in natural heterosexual intercourse is an essential feature of marriage.”

Andrew Cheung J also recognised (at para 17) that the medical science understanding of a person’s sex and its determination have moved away from a purely biological approach by including other factors, as well, such as psychological conviction and social perception. Also (at para 132) he emphasised that, at least medically speaking, the biological indications at birth of a person’s sex are only some of the factors to be taken into account in determining a person’s sex or gender.

Read this way: the emphasis in W on both the ability to engage in natural heterosexual intercourse and procreation are factors relevant to the legal determination of the sex of a person for purposes of marriage. Arguably, this alternative interpretation is separate from the broader consideration of the legal definition of marriage generally.

One difficulty with this argument is that it seeks to discard the underlying premise upon which these factors are distilled. Furthermore, as has been argued, the words “man” and “woman” must be construed in the context of s 40(2) of the MO without any further judicial gloss.

In W, at para 117, the court noted the difference in wording between “man” and “woman” in s 40(2) of the MO and “male” and “female” in s 20(1)(d) of the Matrimonial Causes Ordinance (MCO) (that is, a

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72 W, para 116.
73 W, para 122.
marriage is void if “the parties are not respectively male and female”). As the court rightly pointed out, it is based on the equivalent of s 1(c) of the English Nullity of Marriage Act 1971, which was re-enacted as s 11(c) of the English Matrimonial Causes Act 1973.

Andrew Cheung J rightly pointed out that the English Nullity of Marriage Act 1971 was generally regarded as a provision which gave statutory recognition to the decision of Ormrod J in Corbett. In Bellinger, Thorpe J traced its enactment. He noted that prior to the English Nullity of Marriage Act 1971, apart from the decision of Corbett, there was no statutory provision to the effect that a marriage was void if the parties were not respectively male and female. He continued:

“the Law Commission issued for consultation its working paper of 14 June 1968… However in its subsequent 1970 report on Nullity of Marriage (Law Com No 33) the Law Commission considered two possible additional grounds of nullity… The first was parties of the same sex. However again the Law Commission concluded that that would be an unnecessary addition. Impliedly rejecting Ormrod J’s preference for a decree of nullity rather than a declaration as to status, the Commission considered that the only consequence of the decision would be to allow or to bar applications for financial relief. It left to parliament the decision as to whether the draft bill proffered with the report should be extended to include same sex parties as a ground of annulment.

An amendment to add as a ground of annulment ‘that the parties are not respectively male and female’ was moved by Mr Lyon MP, the promoter of the bill. He did not propose any statutory definition of ‘male’ or ‘female’. In Hansard’s report of the debate on 2 April 1971 Mr Lyon is recorded as follows:

‘The way that a judge decides the sex of a particular person is and always will remain a question of fact. It will be a question of fact which will change with the change in medical opinion which will ensue in the coming years. If medical opinion were that the mere sex change operation was enough to change a person from a man to a woman or a woman to a man, that would be the end of the case; but because the medical evidence is not so clear cut the judge in the Corbett case took the view which he did and courts will continue to take the course which he took.

I urge upon those who have written to me and are concerned about the matter to appreciate that this is not a matter about which parliament can legislate. In the final analysis it must depend upon the state of medical opinion. If in the end medical opinion is able to state with greater
certainty who is male and who is female on tests which were not applied in the Corbett case then some new court can apply those tests because the evidence will have changed and the question of fact, therefore, will also have changed.

If the amendment is accepted we shall not be making a rule about how one determines who is male and who is female. All we are saying is that once one has come to the conclusion that the parties are not respectively male and female, then one can grant a decree of nullity.’

Thus emerged section 1(c) of the Nullity of Marriage Act 1971, subsequently consolidated as section 11(c) of the Matrimonial Causes Act 1973.’

In S-T v J (a case not cited in W),75 Ward LJ commented on the fact that the deliberate choice of using “male” and “female” (as opposed to using “man” and “woman”) was to allow room for the court to acknowledge the importance of gender.

“It is suggested that the Act has made a subtle but perhaps important change to the terminology. What governed Ormrod J’s decision in Corbett’s case, based as it was on ecclesiastical principles, was whether the parties were ‘a man and a woman’. It may be – but I express no view about it – that the choice ‘male and female’ has left the way open for a future court, relying on the developments of medical knowledge, to place greater emphasis on gender than on sex in deciding whether a person is to be regarded as male or female. There is a body of very respectable academic opinion making that point . . .”

Similarly, Sir Brian Neill in S-T v J said, at p 1332:

“It is not necessary for the purpose of this appeal to consider whether the decision of Ormrod J in Corbett . . . requires re-examination in the light of modern medical advances and in the light of decisions in other jurisdictions, or whether it is distinguishable because the words used in section 11(c) of the Act of 1973 are ‘male’ and ‘female’ which, I suppose, it might be argued, indicate a test of gender rather than sex.”

In other words, W could have explored the inherent flexibility in s 20(1)(d) of the MCO and developed the law beyond Corbett.’

74 Bellinger, paras 141–143.
75 [1997] 3 WLR 1287.
6. Conclusion

This paper has argued that, when the court purported to follow Corbett, it has in fact added a judicial gloss upon the statutory legal definition of marriage. There is no justification for that.

Looking at W from a wider perspective, W is a sad decision. David Green commented on Corbett 40 years ago:

“Surely the sane and humane attitude of the law ought to be to recognise the factor which is dominant. What does it comfort any of us to insist that an individual shall be a man, when for all the purposes of ordinary life that individual can only be, and be recognised, as a woman? What pride can there be for a law which vetoes the attitudes dictated by ordinary humanity?”77

When the law frustrates medical advances and the quest for peace and happiness of Ms W (and others like her), it does so via an unduly legalistic, technical, inflexible and unsatisfactory response to a genuine human and social problem.78 Andrew Cheung J accepted that the possibility of fake cases can safely be ignored; and SRS is sometimes the only means of alleviating distress.79 What is the harm to society in allowing Ms W (who is not challenging the heterosexual nature of the institution of marriage) to marry?

Applying Corbett, without critical examination of its underlying social and medical context, not only impedes a transsexual person’s right to marry, it also undermines the social institution of marriage. It is ironic that W, in an attempt to prevent same-sex marriage, in effect made it possible (if not endorsed it). An ordinary person will most likely think that allowing Ms W (who has the physical appearance of, lives and acts like a woman) to marry another woman would be to allow a same-sex marriage.80 W further undermines the legal institution of marriage. According to W, marriage is an institution in which the essential role of a woman (and so necessarily, a man) is procreation and natural heterosexual intercourse. This fixation or pre-occupation on procreation and intercourse (and therefore procreative sex) degrades the legal institution of marriage and insults the parties by restricting them to their primitive biological roles. If this perception of marriage resembles something

78 For how the law has failed to do so by insisting on a critical examination of a transsexual person’s body configuration and anatomical structures, see Terry Kogan, “Transsexuals, Intersexuals, and Same-Sex Marriage” BYU L. Rev. 371.
79 W, paras 19 and 32.
80 W, paras 245–246.
antiquated, it is Chinese customary marriages, in which procreative sex for the continuation of male descendants was the primary goal. This is a very retrogressive step.

There are other more inviting, enduring and important factors which foster both the social and legal institution of marriage, for instance (and not in any order of priority), love, commitment, respect, shared lives, homemaking, nurturing of children, financial, emotional, psychological and spiritual support and personal growth. They should not be sidelined. These important multidimensional aspects of the institution of marriage which has endured the test of time and social change across different cultures can be seen in *Halpern v Canada* (Attorney General):

“Marriage has been a basic element of social organization in societies around the world. Through the institution of marriage, individuals can publicly express their love and commitment to each other. Through this institution, society publicly recognizes expressions of love and commitment between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society's approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships. This can only enhance an individual's sense of self-worth and dignity.”

Returning to the notion of Christian marriage in s 40(2) of the MO which is derived from *Hyde*; its reference to a “union for life” was arguably inaccurate even in 1866, as the English Matrimonial Causes Act 1857 had been in operation for several years allowing marriages to be dissolved.

In Hong Kong, *Hyde's* Christian marriage was a product of the Marriage Ordinance (No 7 of 1875), reflecting the 19th century legal and social concerns. It is now time to update Hong Kong marriage law on at least two aspects. First, to what extent is marriage a “voluntary union for life of one man and one woman to the exclusion of all others”? Unfortunately, a quick look at this definition exposes its various problems. A marriage not voluntarily entered into (without the parties’ genuine consent) is not void, but voidable only. A union today is not bound to be

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81 Athena Liu, *Family Law in the Hong Kong SAR* (Hong Kong University Press, 2000), Chap 1.
82 (2003), 36 RFL (5th) 127, para 5.
83 See Romer LJ in *Nachimson*; for another critique of this *Hyde* definition, see Sebastian Poulter, “The Definition of Marriage in English Law” (1969) MLR 409.
“for life” (as divorce has been on a steady rise over the last twenty years). Marriage is not necessarily a union to the “exclusion of all others” (as adultery, extra-marital affairs, mistresses are not uncommon). Second, and more importantly, to what extent is it appropriate to continue to employ Hyde’s convenient shorthand reference of Christian marriage in s 40(2) of the MO? In view of the term’s unfortunate and potentially misleading association with a particular religion or faith, it is time to consider updating that term by either deleting “Christian” altogether, or replacing it with a more appropriate description, such as “civil” or “monogamous”.

W concerns a post-operative male-to-female transsexual’s right to marry. It has exposed the need for updating marriage law so that it evolves in tandem with the 21st century social conditions and remains sensible and relevant to the lives of those it serves. Thus as Andrew Cheung J has said, it is hoped that it will not be long before the Government conducts general public consultation on gender identity, sexual orientation and the specific problems and difficulties faced by transsexual people; and in the course of doing so, update Hong Kong marriage law generally.

84 See “Women and Men in Hong Kong Key Statistics” 2009 edn, published by the Census and Statistics Department, the Government of the HKSAR, table 2.5 http://www.censtatd.gov.hk/ (visited on 3 Nov 2011). The number of divorce decrees in 1981 was 2,062 and has been steadily rising, and in 2009, the figure was 17,002.