Understanding Goodwin: W v Registrar of Marriages

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In W v Registrar of Marriages, the Court of Appeal dismissed a post-operative male-to-female transsexual person’s claim based on the right to privacy and the right to marry (the “constitutional issue”). This article considers how the Court decided the “constitutional issue”. With reference to the jurisprudence of the European Court of Human Rights in Goodwin, it is argued that in deciding the “constitutional issue”, the Court has (i) recast Ms W’s claim (by focusing predominantly on the right to marry, omitting reference to personal autonomy underlying the interpretation of the right to privacy, and reducing the right to marry to one of definition), (ii) offered limited understanding of Goodwin and, it would seem, (iii) been influenced by the discarded decision in Sheffield.

Introduction

Ms W, a post-operative male-to-female transsexual person, sought judicial review to quash the refusal of the Registrar of Marriages to allow her to register her marriage with her male partner. Her argument was premised on the ground that the Registrar misinterpreted ss 21 and 40 of the Marriage Ordinance (Cap 181), specifically as to the meaning of the words “woman” and “female” in those sections (the “construction issue”).1 In an earlier paper, the author has already argued that Corbett v Corbett (Otherwise Ashley)2 (Corbett) has been exacerbated in the “construction issue”.3

Ms W further argued, in the alternative, that if ss 21 and 40 of the Marriage Ordinance had not been misinterpreted, such interpretation was inconsistent with her constitutional right to marry and her right to privacy (the “constitutional issue”). The constitutional issue is stated as follows:

“sections 21 and 40 of the MO [Marriage Ordinance], in failing to recognise her as a 'woman' or 'female' are unconstitutional in that they are inconsistent

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2 [1971] P 83.
with article 37 of the BL [Basic Law] (BL37) and/or articles 14 and 19(2) of the HKBOR [Hong Kong Bill of Rights] (BOR14 and BOR19(2)) and/or articles 17 and 23(2) of the ICCPR [International Covenant on Civil and Political Rights] (ICCPR17 and ICCPR23(2)). These constitutional provisions concern the right to marry and the right to privacy."

The Court of Appeal in *W v Registrar of Marriages* dismissed Ms W’s constitutional claim.

Part 1 of this paper outlines the *Corbett* test. Part 2 outlines the human rights provisions relevant to the constitutional issue on the right to privacy and the right to marry. These provide the grounds for challenging the *Corbett* test for the purpose of both the legal attribution of gender identity of transsexual persons, and for the determination of sex in the context of marriage. Part 3 examines the jurisprudence of the European Court of Human Rights (ECtHR) in *Sheffield and Horsham v United Kingdom (Sheffield)*¹⁵ and *Goodwin v UK (Goodwin)*.⁶ Part 4 shows how Ms W’s claim was effectively recast (in that it focused predominantly on the right to marry, omitted any reference to personal autonomy underlying the interpretation of the right to privacy, and reduced the right to marry to one definition). Part 4 therefore argues that *Goodwin* has been inadequately understood and that the Court of Appeal, instead of following *Goodwin*, was influenced by the discarded decision in *Sheffield*. For these reasons, it is argued that the Court of Appeal’s decision is a poor one. It is hoped that the Court of Final Appeal will allow *Goodwin* to be engaged as part of Hong Kong’s human rights jurisprudence. This would mean that the Hong Kong government must offer compelling and necessary reasons for the public good if it were to adopt the *Corbett* test for the purpose of the legal attribution of gender identity of transsexual persons, or the determination of sex in the context of marriage.

1. The *Corbett* Test

In *Corbett* (judgment dated 1970), the respondent (April Ashley) had been born a male, but desired to be a female. After having undergone successful sex reassignment surgery (SRS), as a post-operative male-to-female transsexual person, the respondent adopted a female name. She lived and worked as a female model. She then went through a marriage

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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 the respondent were a woman, she was incapable of consummating 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.\(^7\)

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 the biological criteria at birth. The psychological criterion has no role to play. In other words, “once a man, always a man”.\(^8\) This determination of sex based solely on biological criteria will be called the “Corbett test”. According to this test, SRS does not change the sex of an individual in the context of marriage.

In short, the Corbett test (sometimes also called the biological criteria)\(^9\) does not recognise the effect of SRS. April Ashley remained a male person, and as such he is legally entitled to marry, but only to a woman. The Corbett test has since served two separate purposes: first, to legally attribute the gender identity of transsexual persons, and second to determine sex in the context of marriage.

The adoption of the Corbett test in Hong Kong means that Ms W remains legally a man and is legally entitled to marry only a woman.

Ms W’s legal challenge is that she should be recognised as a woman, and is therefore entitled to validly enter into a marriage with a man. Although Ms W also applied to alter the sex entry on her birth certificate and was refused, that refusal was not challenged in the case.\(^10\)

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\(^7\) Corbett, p 106.
\(^9\) Goodwin, para 100.
\(^10\) [2010] 6 HKC 359, para 45.
Consequently, the question concerning alteration of the birth certificate will not be discussed in this paper.

2. Constitutional Issue: The Right to Privacy and the Right to Marry

The question for the Court of Appeal is whether the Corbett test is inconsistent with Hong Kong’s constitutional protection of the right to privacy and the right to marry.

In Hong Kong, the relevant constitutional provision protecting the right to privacy is to be found in Art 14 of the Hong Kong Bill of Rights, which provides that:

“1. No one shall be subjected to arbitrary or unlawful interference with his privacy…
2. Everyone has the right to the protection of the law against such interference or attacks.” (Emphasis added.)

The relevant provisions protecting the right to marry are in Art 37 of the Basic Law and Art 19(2) of the Hong Kong Bill of Rights. Article 37 of the Basic Law provides that:

“The freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law.” (Emphasis added.)

Article 19(2) of the Hong Kong Bill of Rights provides that:

“The right of men and women of marriageable age to marry and to found a family shall be recognized.” (Emphasis added.)

Hong Kong is not a signatory to the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention). However, as Ms W’s claim is almost identical to the claims before the ECtHR in Sheffield and Goodwin, the Court of Appeal examined both cases in some depth. It is thus valuable to consider how the ECtHR has analysed these two rights.

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11 Article 14 of the Hong Kong Bill of Rights uses the same terms as Art 17 of the International Covenant on Civil and Political Rights.
12 Article 19(2) of the Hong Kong Bill of Rights uses the same terms as Art 23(2) of the International Covenant on Civil and Political Rights.
Both *Sheffield* and *Goodwin* concerned the European Convention which protects the right to respect for private life (Art 8) and the right to marry (Art 12). Article 8(1) of the European Convention provides:

“1. Everyone has the right to respect for his private and family life ...”

(Emphasis added.)

Article 12 of the European Convention provides:

“Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

(Emphasis added.)

Although the words used in the Basic Law, the Hong Kong Bill of Rights and the European Convention differ in some respects (a matter which will not be examined in this paper), an important common dimension is their intention to protect the “right to respect for private life” or “privacy”, and the “freedom of marriage” and “right to marry”. They provide the grounds for challenging the application of the *Corbett* test on two fronts: first, for the purpose of legal attribution of gender identity of transsexual persons, and second, in the context of marriage, as the legal basis for the determination of sex.

In this paper, the terms “right to respect for private life” and the “right to marry” will be used in the context of the ECtHR. The terms “the right to privacy” and “right to marry” will be used in the Hong Kong context (as has been so used in the Court of Appeal), although this does not mean that these rights in Hong Kong could not have a comparable meaning to that in the ECtHR.

### 3. The ECtHR Jurisprudence on Article 8

Unlike the Hong Kong courts, the ECtHR has had numerous opportunities to consider the rights protected by Art 8 and Art 12 of the European Convention in the context of transsexual persons. Before analysing the Court of Appeal’s treatment of Ms W’s claim (in Part 4), it is important to understand the ECtHR’s jurisprudence in these decisions.

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13 Article 8(2) contains the limitations upon the extent of the right in Art 8(1). Article 8(2) provides “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”
Until the landmark decision of Goodwin (in 2002), a series of challenges in the ECtHR—beginning with Rees v UK14 (in 1986), and followed by Cossey v United Kingdom,15 X, Y and Z v United Kingdom,16 and Sheffield (in 1998)17—had all failed.18

In each of these cases (apart from X, Y and Z v United Kingdom), the challenges were made against the UK government’s refusal to alter a post-operative transsexual person’s birth certificate, and the English law’s adoption of the Corbett test, rendering that person unable to marry in his or her acquired gender.19

This Part explains (i) why Goodwin (unanimously) decided not to follow Sheffield and (ii) how, with Goodwin’s landmark development, the rights of a post-operative transsexual person to private life and to marry in their acquired sex eventually prevailed. This Part focuses on Art 8 only. The reason for this is that Goodwin’s interpretation of Art 8 as protecting human dignity, human freedom and personal autonomy, was fundamental to its conclusion that the United Kingdom had violated both Art 8 and Art 12. Notably, it was Ms W’s contention in the Court of Appeal that:

16 (1997) 24 EHRR 143, a case concerning the refusal to register a post-operative female-to-male transsexual as the father of a child born to his partner by AID (donor insemination). The ECtHR examined the case in relation to the Art 8’s right to family life, as opposed to the right to private life. See Clare Ovey and Robin C.A. White, Jacobs and White, European Convention on Human Rights (Oxford: OUP, 3rd edn, 2002), p 247.
17 The facts of Sheffield were that the applicant, Miss Sheffield, was registered at birth as of the male sex, married and had one daughter. Later the applicant underwent gender re-assignment surgery. She had obtained a divorce as a pre-condition of that surgery and her former wife had obtained a court order terminating contact between the applicant and her daughter. She changed her name by deed poll and that name was recorded on her driving licence and passport. However, her birth certificate and various records including social security and police records continued to record her original name and gender; also car insurance required disclosure of her original sex; cumulatively these factors exposed her to embarrassment. In addition, she maintained that her decision to undergo gender reassignment surgery resulted in discrimination at work (she was a pilot).
18 Although the UK government had successfully resisted each of the earlier challenges until that in Goodwin in 2002, the level of dissent from the minority of the ECtHR increased over the years. In Rees, the ECtHR concluded that there was no violation of Art 8 (12 votes to 3); in Cossey, the votes were 10 votes to 8, and finally in Sheffield, the votes were almost evenly balanced, at 11 votes to 9. The reasoning in the dissenting judgments included some very powerful arguments, see for example, the judgment of Judge Martens in Cossey, part of which is extracted later in this paper and the judgment of Judge van Dijk, in Sheffield. See generally Peter van Dijk et al, Theory and Practice of the European Convention on Human Rights (Oxford: Intersentia, 4th edn, 2006).
“the right to marry is a strong right and is intertwined with a person’s dignity and well-being.”

Further, Ms W’s claim is almost identical to those in Sheffield and Goodwin, each of which having analysed Art 8 first. It is argued that it is important for the Court of Final Appeal to ensure that before analysing the right to marry, the right to privacy is fully canvassed so that its impact upon the right of a post-operative transsexual person to marry in their acquired sex may be fully appreciated.

Sheffield and Goodwin—A Positive Obligation

It is not disputed that Art 8 encompasses both a “negative obligation” on the part of the State to refrain from interference with an individual’s right to respect for private life, and a “positive obligation” for the State to take protective measures. As the ECtHR stated in Sheffield:

“The Court observes that it is common ground that the applicants’ complaints fall to be considered from the standpoint of whether or not the respondent State has failed to comply with a positive obligation to ensure respect for their rights to respect for their private lives.”

Similarly, in Goodwin, the Court explained that the complaint raised the issue:

“whether or not the respondent State has failed to comply with a positive obligation to ensure the right of the applicant, a post-operative male to female transsexual, to respect for her private life, in particular through the lack of legal recognition given to her gender re-assignment.”

Protecting Human Dignity, Human Freedom and Personal Autonomy

Where Goodwin and Sheffield differ is on the meaning of “respect for one’s private life”. In Goodwin, the ECtHR regarded human dignity and

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20 W, para 119.
21 See Marckx v Belgium (1979–80) 2 EHRR 330, in which this concept was developed, and Pretty v United Kingdom (2002) 35 EHRR 1, para 62, which Goodwin cites at para 90.
22 Sheffield, para 51.
23 Goodwin, para 71.
human freedom as the very essence of the Convention.\textsuperscript{24} Although the right to respect for one’s private life is a broad one and not susceptible to exhaustive definition, Goodwin held that it is broad enough to encompass the notion of personal autonomy\textsuperscript{25} (which is an aspect of human dignity and human freedom). Goodwin explained the notion of personal autonomy:

“Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings…”\textsuperscript{26}

Personal autonomy encompasses the right to establish details of one’s identity and to live life as one chooses (as opposed to living a life defined by others).\textsuperscript{27} A post-operative transsexual person’s condition (in undergoing SRS and life after SRS) engages this notion of personal autonomy in that the person shapes his or her fate by undergoing and

\textsuperscript{24} Goodwin, para 90.

\textsuperscript{25} This notion of personal autonomy had been explicitly recognised in Pretty v United Kingdom (2002) 35 EHRR 1 at para 61, where it was said: "As the Court has had previous occasion to remark, the concept of ‘private life’ is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person…It can sometimes embrace aspects of an individual’s physical and social identity…Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8…Although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.”

\textsuperscript{26} Goodwin, para 90.

\textsuperscript{27} The term “personal autonomy” may be understood to imply that an individual makes an autonomous decision regarding his/her gender identity. This is not what is intended. However, a post-operative transsexual person does make a choice in undergoing surgeries and living as a post-operative transsexual person. For some transsexual persons, it is now generally accepted by the medical profession that surgery might be undesirable for a number of reasons. In any event, it would be very difficult to define exactly what surgery is needed. Given the health risks involved in phalloplasty, it would be rather inhumane to require all female-to-male transsexual persons to undergo this procedure as a pre-condition to gender recognition. This can be seen in the case of Western Australia where gender recognition is regulated by the Gender Reassignment Act 2000. The Western Australia Court of Appeal has decided recently AB v Western Australia [2011] HCA 42 (6 Oct 2011) that a female-to-male transsexual person who had not had either hysterectomy or phalloplasty was qualified under the Gender Reassignment Act 2000 for a gender recognition certificate. Similarly, in UK the Gender Recognition Act 2004 covers both pre- and post-operative transsexual persons. In Germany it was found to be unconstitutional to require surgery for a change of legal gender, as this forced the person to choose between change of legal gender and their physical integrity, another constitutionally protected right. For the position in other European jurisdictions, see Jens Scherpe, “Changing One’s Legal Gender in Europe – the ‘W’ Case in Comparative Perspective” (2011) 41 HKLJ 109. For the developing human rights jurisprudence on “personal autonomy” since Goodwin, see Jill Marshall, “A Right to Personal Autonomy at the European Court of Human Rights” (2008) European Human Rights Law Review 337.
completing a long, dangerous and painful series of medical treatment to become the assigned gender.

The conclusion in *Goodwin* that SRS engages the right to respect for private life echoes the views of Judge Martens in his dissenting judgment 12 years earlier in *Cossey v UK*, where he said:

“The principle which is basic in human rights and which underlies the various specific rights spelled out in the Convention is respect for human dignity and human freedom. Human dignity and human freedom imply that a man should be free to shape himself and his fate in the way that he deems best fits his personality. A transsexual does use those very fundamental rights. He is prepared to shape himself and his fate. In doing so he goes through long, dangerous and painful medical treatment to have his sexual organs, as far as is humanly feasible, adapted to the sex he is convinced he belongs to. After these ordeals, as a post-operative transsexual, he turns to the law and asks it to recognise the *fait accompli* he has created. He demands to be recognised and to be treated by the law as a member of the sex he has won; he demands to be treated, without discrimination, on the same footing as all other females or, as the case may be, males. This is a request which the law should refuse to grant only if it truly has compelling reasons...”

Twelve years after Judge Martens’ dissenting judgment in *Cossey*, *Goodwin* unanimously accepted this view. The ECtHR emphasised the importance of the notion of personal autonomy, stating that in the 21st century failure to recognise a post-operative transsexual person’s new gender is no longer acceptable:

“In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable.” (Emphasis added.)

Thus, *Goodwin* observed that domestic law which conflicts with gender identity amounted to serious interference with private life. This is so irrespective of the level of detriment (or frequency of embarrassment)

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28 (1990) 13 EHRR 622.
29 (1990) 13 EHRR 622, para 2.7.
30 *Goodwin*, para 90.
arising from the discordance between the law and reality. The ECtHR stated that:

“It must also be recognised that serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity. … The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court’s view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.”31

Sheffield, however, did not recognise a post-operative transsexual person’s right to establish his or her own gender identity. This fundamental difference in approach in Goodwin impacted upon the way the ECtHR conducted its balancing exercise between the interests of the applicants and those of the state, leading to its conclusion that there had been a violation of the obligation under Art 8.

**Striking a Fair Balance**

In both Sheffield and Goodwin, the claimants alleged that the failure of the United Kingdom to recognise a post-operative transsexual person’s new gender amounted to a violation of Art 8’s positive obligation. In assessing the means of fulfilling Art 8’s obligation, the ECtHR needed to strike a fair balance between the applicants’ rights and the public interest. Here a contracting state enjoys a wide margin of appreciation.32 As Beate Rudolf explained in “European Court of Human Rights: Legal Status of Postoperative Transsexuals”:33

“... the contracting states have a wide margin of appreciation as to the means of fulfilling their obligation under this provision. The court’s control is

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31 Goodwin, para 77.
Vol 42 Part 2  Understanding Goodwin: W v Registrar of Marriages  413

limited to finding whether the impugned domestic regulations strike a fair balance between the applicants’ rights and the public interest.”

Recognition of the need to strike a fair balance is a common factor in both Sheffield and Goodwin. As Sheffield explained,

“In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention …”

Similarly, in Goodwin, the ECtHR balanced the applicants’ rights and the public interest, having quoted the same passage above.

However, where Sheffield and Goodwin differ is in the outcome of the assessment of whether a fair balance had been struck, so that the interference with the applicant’s right to private life was justifiable. With Goodwin’s elucidation on the right to personal autonomy as a constituent of Art 8, the court’s assessment of the United Kingdom government’s justifications for its failure to offer gender recognition changed. Ultimately, the question became: could the government offer any concrete evidence of hardship to the public interest flowing from gender recognition?

What tipped the balance in Goodwin (but not in Sheffield) were the particular factors which the ECtHR considered to be important and the weight attributed to them. That led to Goodwin’s finding that there was insufficient acceptable justification for the State’s interference, and hence, the United Kingdom was in violation of Art 8.

In Goodwin, the ECtHR balanced the right of “transsexuals to personal development and to physical and moral security” against “the difficulties posed” for the State and “the important repercussions which any major change in the system will inevitably have”. It was for the government to show that there were sufficient public interests against gender recognition to justify their position. Goodwin was also conscious of the need for “coherence of the administrative and legal practices within the domestic system”. Goodwin found no logic in the government’s refusal to recognise the result of SRS when at the same time it accepted SRS as a proper treatment for transsexualism and funded such treatment.

34 Sheffield, para 52.
35 Goodwin, para 72.
36 Goodwin, see the conclusion reached at para 91.
37 Goodwin, para 90-91.
38 Goodwin, para 91; see also para 80.
39 Goodwin, para 78.
The Lack of Compelling Justification for Interfering with the Right to Establish Details of One’s Gender Identity

Goodwin responded differently to the three “countervailing arguments of a public interest nature” which had previously been given weight in Sheffield (and earlier cases). Using the headings employed in Goodwin, these are (a) “medical and scientific considerations”, (b) “the state of any European and international consensus”, and (c) “impact on the birth register system”. The last point is not developed here, as it was not part of Ms W’s case.

Medical and scientific considerations
Regarding the medical and scientific considerations, the ECtHR was no longer troubled by the fact that there was an ongoing scientific and medical debate as to the exact causes of transsexualism. Goodwin’s view was that the right to respect for private life does not depend on exact science (ie proving the exact causes of transsexualism). What was important was that “transsexualism has wide international recognition as a medical condition for which treatment is provided in order to afford relief.”

Also, responding to the argument in Sheffield that despite SRS a transsexual person could still not possess all of the biological characteristics of the acquired gender, Goodwin (rejecting the Corbett test) concluded that the chromosomal element could no longer be determinative for the purpose of legal attribution of gender identity for transsexuals.

“While it also remains the case that a transsexual cannot acquire all the biological characteristics of the assigned sex … the Court notes that with increasingly sophisticated surgery and types of hormonal treatments, the principal unchanging biological aspect of gender identity is the chromosomal element. It is known however that chromosomal anomalies may arise naturally (for example, in cases of intersex conditions where the biological criteria at birth are not congruent) and in those cases, some persons have to be assigned to one sex or the other as seems most appropriate in the circumstances of the individual case. It is not apparent to the Court that the chromosomal element, amongst all the others, must inevitably take on decisive significance for the purposes of legal attribution of gender identity for transsexuals … The Court is not persuaded therefore that the state of

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40 See n 10 above.
41 Goodwin, para 81.
42 Sheffield, para 56.
medical science or scientific knowledge provides any determining argument as regards the legal recognition of transsexuals."43

European and international consensus
In Sheffield, the United Kingdom government had successfully maintained that as there was generally no accepted approach among contracting states in respect of transsexuality, in view of its margin of appreciation, there had not been a violation of Art 8.44

Goodwin was conscious of the need to maintain a “dynamic and evolutive” approach to the construction of the European Convention. As the European Convention constituted a system for the protection of human rights, it was necessary for the ECtHR to "have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved".45

However, Goodwin’s acceptance of the need to respond to convergence does not equate with a requirement of an absolute consensus. The Court held that it attached “less importance to the lack of evidence of a common European approach to the resolution”46 of problems posed by gender recognition. It explained that the lack of a common or uniform European approach to tackle the legal consequences arising from gender recognition was only to be expected, given the diverse legal systems of the member States. Instead, Goodwin stressed that one of the significant factors was the clear and uncontested evidence of a continuing international trend in favour of legal recognition of the new gender identity.47 (The importance of such an “international trend” will be discussed in Part 4).

The above considerations led to the decision in Goodwin that the Corbett test, adopted by English law for the purposes of legal attribution of gender identity for a post-operative transsexual person, violated the right to respect for private life of that individual.

Contrasting Goodwin’s Conclusion with that of Sheffield

Goodwin found that no concrete or substantial hardship or detriment to the public interest had been demonstrated as likely to flow from

43 Goodwin, paras 82–83.
44 Goodwin, para 64.
45 Goodwin, para 74. The ECtHR continued: “It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory.”
46 Goodwin, para 85.
47 Goodwin, para 85.
any change to the status of transsexuals. Regarding other possible consequences, Goodwin held:

“Society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.”

Goodwin therefore concluded that the balance of interests under Art 8 fell in favour of the claimant. The United Kingdom government could no longer rely on its margin of appreciation, save as to the means of achieving gender recognition.

“Having regard to the above considerations, the Court finds that the respondent Government can no longer claim that the matter falls within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention. Since 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 now tilts decisively in favour of the applicant. There has, accordingly, been a failure to respect her right to private life in breach of Article 8 of the Convention.”

The approach in Goodwin is to be contrasted with that in Sheffield. Sheffield was decided four years earlier and was correctly summarised by the Court of Appeal. In short, on the right to respect for private life, without the benefit of considering the notion of personal autonomy, Sheffield took the view that the United Kingdom government had struck a fair balance between the applicants’ rights and the public interest. Sheffield took into account in particular the fact that “transsexualism raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States”, and that the level of detriment suffered by Ms Sheffield was not sufficiently serious as to override the state’s margin of appreciation. As these factors weighed

48 Goodwin, para 91.
49 Goodwin, para 93.
50 See W summarising Sheffield at paras 126–128.
51 See Sheffield, paras 56–59. See also, W, para 127: “in respect of the issue of the right to privacy, the ECHR [European Court of Human Rights] 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
against the applicant, *Sheffield* held that the United Kingdom could continue to rely on its wide margin of appreciation to defend its refusal to recognise in law post-operative transsexuals sexual identity, and that consequently, the United Kingdom had no positive obligation to modify its system of birth registration.

4. Court of Appeal’s Treatment of Ms W’s Claim

Having outlined *Goodwin*’s approach and how it represents a major departure from *Sheffield*, this paper now examines the Court of Appeal’s treatment of Ms W’s constitutional claim (ie the right to privacy and the right to marry). This Part focuses on only three aspects of the Court of Appeal’s judgment under the heading “the constitutional issue”.52 They are:

1. the way that Ms W’s claim was effectively recast,
2. the summary of *Goodwin* which suggests a limited understanding of the case, and
3. the fact that the Court of Appeal appeared to have been more influenced by the discarded decision of *Sheffield* than by *Goodwin*.

Recasting “the Nature of the Constitutional Issue”

There are three interconnected points concerning the way Ms W’s claim was framed by the Court of Appeal under the heading “The nature of the constitutional issue”.53 They are:

(a) the predominant focus on the right to marry,
(b) the omission of any reference to the importance of personal autonomy underlying the interpretation of the right to privacy, and

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.”

52 *W*, para 114.
53 *W*, para 118.
(c) the reduction of the issue concerning the right to marry to one of definition.

It is argued that the combined effect of the above effectively stripped Goodwin of its human rights jurisprudential impact, and consequently deprived Ms W’s claim of thorough consideration.

**Predominant focus on the right to marry**

Unlike Goodwin, the Court of Appeal focused primarily on the right to marry, and left the consideration of the right to privacy to seven paragraphs before its conclusion.\(^{54}\) This was so despite the fact that Ms W’s case was that the lower court’s interpretation of “woman” or “female” was inconsistent with her right to marry and her right to privacy.\(^{55}\)

This predominant focus on the right to marry became obvious when the Court of Appeal stated:

“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 … The appellant’s case is that the right to marry is a fundamental right protected by the constitutional provisions relied upon … The question with which this court is therefore concerned on the constitutional issue is whether the right of persons of the opposite sex to marry extends to a post-operative male-to-female transsexual a right to marry a man .... 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?”\(^{56}\) (Emphasis added.)

This narrow formulation of the constitutional issue has two consequences:

First, by focusing primarily upon the right to marry, and dealing relatively marginally with the right to privacy, the Court of Appeal avoided addressing the crucial importance of personal autonomy underlying the right to privacy. It is hoped that the Court of Final Appeal will be given an opportunity to address the notion of personal autonomy.

Second, it deprived Ms W of the benefit that a thorough examination of the right to privacy might have had on her right to marry. As explained earlier (in Part 3), in Goodwin, a thorough analysis of the issues in Art 8 preceded the consideration of the right to marry. Although the Court of Appeal did refer to Ms W’s contention that “the right to marry is a strong

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\(^{54}\) W, paras 164–170.

\(^{55}\) W, para 27 (quoted earlier) See n 4 above.

\(^{56}\) W, para 118–121.
right and is intertwined with a person’s dignity and well-being” (quoted earlier), it did not explore the scope of “a person’s dignity and well-being”, nor its relevance to the right to marry. It is hoped that the Court of Final Appeal will consider how the right to privacy is intertwined with the right to marry.

**Omission of the importance of personal autonomy underlying the interpretation of the right to privacy**

Connected with the above point is that even though Ms W’s claim is factually almost identical with that in *Goodwin*, her case was dealt with differently from *Goodwin*. As has been analysed above, *Goodwin* reached its decision about the importance of the right to respect for private life (mandating gender recognition) before giving its assessment on the right to marry. In so doing, the conclusion on gender recognition was able to influence the outcome of Ms Goodwin’s right to marry. As Beate Rudolf explains, in "European Court of Human Rights: Legal Status of Post-operative Transsexuals":

“What conclusively tipped the balance in favor of the applicants [in *Goodwin* and in *I*] was the consideration that personal autonomy is a value underlying article 8 and guiding its interpretation and that it includes the 'right to establish details of their identity as individual human beings' … With respect to the right to marry (article 12) the court reiterated its finding that the determination of a person’s sex should not be made solely on the basis of chromosomal factors. It held that the 'very essence' of the applicants’ right to marry was infringed because they could not marry a person belonging to the opposite sex, as determined with respect to an applicant’s new gender.” (Emphasis added.)

However, the Court of Appeal considered the rights in the reverse order, dealing first with the right to marry, and then, relatively briefly, with the right to privacy. In so doing, the Court of Appeal avoided dealing with the conclusions in *Goodwin* about the importance of personal autonomy and its effect on the legal gender to be attributed to a post-operative transsexual person.

It is argued that, as with the effect of the narrow formulation of the constitutional issue, this reversed intellectual sequence effectively deprived Ms W of the benefit of *Goodwin*’s jurisprudential impact on the right to respect for private life. While the exact reason for the reversal

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57 *W*, para 119. See n 20 above.
is unclear, what is clear is that, as a result, the Court of Appeal did not consider the merit of Goodwin's analysis on Art 8 and its implication on the right to marry. It is hoped that the Court of Final Appeal will correct this in its constitutional analysis by first examining the importance of Ms W’s right to privacy, which necessarily involves asking whether a post-operative male-to-female transsexual person (eg Ms W) is entitled to be treated in law as a female person, before it turns to examine the right to marry.

**Reduction of the right to marry to one of definition**

In its examination of the right to marry, the Court of Appeal reduced the issue to one of definition, namely:

“What are a ‘man’ and a ‘woman’ in the context of the right to marry under the constitutional provisions?” (quoted earlier)

This definitional approach evaded two fundamental questions that were posed in Goodwin. The first question is whether Ms W’s right to privacy entitles her to gender recognition. As Goodwin stated:

“whether or not the respondent State has failed to comply with a positive obligation to ensure the right of the applicant, a post-operative male to female transsexual, to respect for her private life, in particular through the lack of legal recognition given to her gender re-assignment.” (quoted earlier)

The second one being whether the Corbett test amounts to an impairment of Ms W’s right to marry:

“Whether the allocation of sex in national law to that registered at birth is a limitation impairing the very essence of the right to marry in this case.”

The Court of Appeal's analysis of the constitutional issue mirrored, or practically replicated, its analysis of the construction issue.

The Court of Appeal construed the right to marry in a way that would exclude Ms W, and concluded that, as a result, there was no violation of Ms W’s right to marry. As quoted earlier, the Court stated that “the constitutional issue is whether the right of persons of the opposite sex to

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59 W, para 121. See n 56 above.
60 Goodwin, para 71. See n 23 above.
61 Goodwin, para 101.
marry extends to a post-operative male-to-female transsexual a right to marry a man”.62 The Court of Appeal then held: “the right to marry is a right to marry a biological opposite”, 63 and hence it does not cover Ms W marrying a man.

This analysis again omits any reference to the right to personal autonomy which convinced the ECtHR in Goodwin that the Corbett test should no longer be followed. Thus, although the Court of Appeal referred to the appellant’s human rights submissions about the intertwining of the right to marry with a person’s dignity, and accepted the fact that any restrictions on the right to marry must be rational, necessary and proportionate,64 the focus of the Court of Appeal appeared to be upon arguments similar to those already presented on the construction issue. Thus the Court of Appeal states:

“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.”65

Consequently, the Court of Appeal did not engage in a complete assessment of whether denying Ms W the ability to marry her male partner impeded her right to marry, nor whether such a restriction was rational, necessary and proportionate.

**Limited Understanding of Goodwin**

Having highlighted the aspects pertinent to the way Ms W’s claim was framed, it must be acknowledged that a number of the significant features in Goodwin are accurately referred to by the Court of Appeal, but not all of them.

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62 W, para 121.
63 W, para 167.
64 W, para 119.
65 W, para 122.
Immediately after identifying the constitutional issue, the Court of Appeal referred to the important fact that Goodwin had rejected the Corbett test.

“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.”66

The Court of Appeal also noted the “significance” of Goodwin, in that it departed from previous ECtHR decisions (such as Sheffield).67

In an attempt to understand Goodwin and the evolution of the European human rights jurisprudence concerning the rights of a post-operative transsexual person, the Court of Appeal examined both Sheffield and Goodwin systematically, and in some depth, starting with the right to respect for private life, and then the right to marry (reflecting the order in which these issues were dealt with in these cases).

The Court of Appeal correctly summarised Sheffield’s approach on the right to respect for private life (discussed above in Part 3). However, it is submitted that the summary of Goodwin, at para 130, is problematic.

Despite the dramatic turnaround by the ECtHR in Goodwin, the Court of Appeal did not mention the crucial passages which addressed the fundamental relevance of the notion of personal autonomy (outlined in Part 3) to Art 8.

The Court of Appeal correctly stated (at para 130) that Goodwin had “concluded that the United Kingdom could no longer rely on its margin of appreciation”. It listed four “factors” that “appear[ed]” to influence the decision in Goodwin. However, the choice and presentation of these factors requires further careful consideration. The factors listed are:

“(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);

66 W, para 123.
67 “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.” W, para 125.
(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);
(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)."

Having carefully read Goodwin, it is noted that there are problems with para 130 as a whole (in that there are serious omissions in the choice of factors listed), and para 130(3), in particular. These problems will be examined in turn.

Paragraph 130 as a whole is potentially misleading
It is argued here that the Court of Appeal’s choice of the four factors (in para 130) is incomplete as it omits two other factors of fundamental importance to Goodwin’s judgment (mentioned in Part 3 already), namely:

1. the concept of personal autonomy, and
2. a continuing international trend towards legal recognition of the new gender identity of post-operative transsexual persons.

Commenting on Goodwin, Beate Rudolf in “European Court of Human Rights: Legal Status of Postoperative Transsexuals” identifies two decisive considerations which account for Goodwin’s decision:

“an ‘international trend’ toward legal recognition of the new sexual identity of a postoperative transsexual, and the concept of personal autonomy as, inter alia, the right to establish one’s personal identity.”\(^{68}\) (Emphasis added.)

It is argued that these two factors (influenced by the need for coherence of administrative and legal practices)\(^{69}\) were decisive and vital to Goodwin’s decision. The four points listed by the Court of Appeal (in para 130)

\(^{69}\) Goodwin, para 78.
were, by comparison, of tangential relevance. Alone, they would not have provided sufficient weight for the turnaround in *Goodwin*.

**Reference to “consensus” in para 130(3) is potentially misleading**

Paragraphs 55 and 84 of *Goodwin* were cited in support of the emerging consensus point made in para 130(3), which, in short, states that there was an emerging consensus within the contracting states in the Council of Europe on providing legal recognition following gender reassignment.

A careful examination of *Goodwin*, paras 55 and 84, shows that para 130(3) is potentially misleading because other more important relevant passages from paras 56, 84 and 85 are not mentioned.

*Goodwin*, para 56

Para 130(3) accurately presented *Goodwin* para 55 in which the ECtHR referred to the written observations of Liberty that were submitted in *Sheffield* in 1998. Para 55 of *Goodwin* reads:

> “Liberty updated the written observations submitted in the case of Sheffield and Horsham concerning the legal recognition of transsexuals in comparative law ... In its 1998 study, it had found that over the previous decade there had been an unmistakable trend in the member States of the Council of Europe towards giving full legal recognition to gender re-assignment. In particular, it noted that out of thirty seven countries analysed only four (including the United Kingdom) did not permit a change to be made to a person’s birth certificate in one form or another to reflect the re-assigned sex of that person.”

However, this was only part of the evidence before *Goodwin*. In fact, it was in the following paragraph (ie *Goodwin* para 56) that the ECtHR referred to the “follow up study submitted on 17 January 2002”, showing that there had been *no change* in States giving full legal recognition of gender reassignment within Europe. Thus *Goodwin* para 56 states:

> “Liberty noted that while there had not been a statistical increase in States giving full legal recognition of gender re-assignment within Europe…” (Emphasis added.)

In omitting to mention the follow up study submitted in January 2002, the Court of Appeal may have unwittingly conveyed to readers the impression that one of the important factors underlying *Goodwin*’s conclusion was that there was an emerging “consensus”.\(^7^0\) What in fact

\(^7^0\) Thus far, one might wonder whether the Court of Appeal was not familiar with the detailed subject matter of the Liberty evidence presented before *Goodwin*, but that was not the case. As
transpired in *Goodwin* was that the emerging “consensus” towards giving legal recognition to gender re-assignment had remained unchanged since *Sheffield*.

*Goodwin*, paras 84 and 85

More crucially, as already discussed in Part 3, whereas *Sheffield* regarded the lack of a common European approach to the problems posed as important and fatal to Ms Sheffield’s claim, *Goodwin* explained that such a lack was understandable. What was more important to *Goodwin* than the lack of a common European approach was the clear evidence of a continuing “international trend” towards legal recognition of the new sexual identity of post-operative transsexuals.\(^{71}\)

A careful reading of *Goodwin* para 84 reveals that it deals with two important matters:

(a) at the time of *Sheffield*, an emerging “consensus” within contracting states in the Council of Europe on providing legal recognition following gender re-assignment, and  
(b) at the time of *Goodwin*, a continuing “international trend” towards legal recognition.

The first matter is dealt with in the opening of para 84 of *Goodwin* which refers to *Sheffield*.\(^ {72}\) The second matter is dealt with in the latter part of para 84 of *Goodwin*, where the ECtHR went on to consider the latest survey submitted by Liberty (in 2002) which provided the evidence of the continuing international trend towards legal recognition. However, the latter part of para 84 of *Goodwin* was not mentioned in the Court of Appeal’s judgment anywhere. It is argued that the latter part of para 84 of *Goodwin*, together with para 85, is key to *Goodwin*’s judgment, and each has a greater relevance to *Goodwin* than the opening passage of para 84.

at the time of *Goodwin*, the Liberty survey indicated that 54% of contracting states permitted post-operative transsexuals to marry a person of the sex opposite to their acquired gender, while 14% did not, and the position in the remaining 32% the position was unclear. This appears in *Goodwin* at para 57. This evidence only showed a relatively marginal majority permitting marriage—by no means a consensus. However, the Court of Appeal only refers to this Liberty survey in a footnote (n 35 of W).

\(^{71}\) *Goodwin*, para 85.

\(^{72}\) “Already at the time of the Sheffield and Horsham case, there was an emerging consensus within Contracting States in the Council of Europe on providing legal recognition following gender re-assignment ...” *Goodwin*, para 84.
Although the Court of Appeal never explicitly stated that it preferred the reasoning in Sheffield, in light of the re-casting of Ms W’s claim as well as the limited understanding of Goodwin, it would seem that the Court of Appeal was influenced by Sheffield more than Goodwin.

There are various reasons for so speculating. First, the unsuccessful outcome of Ms W’s claim suggests this. Second, the Court of Appeal’s discussion on “consensus… internationally” also suggests so.

Under section G.5, the Court of Appeal used the heading “Societal consensus in Hong Kong or internationally”, hence the consideration of the expression “international consensus” here. It is argued that the expression “international consensus” should be distinguished from the expression “international trend”, which was one of the important factors in Goodwin.

Goodwin did not (and nor did the Court of Appeal) explain the meaning of “consensus” or of an international “trend”. The former seems to refer to “a general agreement”, the latter to “a general direction in which something is developing or changing”. An “international” trend is not limited to regional development (eg contracting states of the Council of European or member States of the International Covenant on Civil and Political Rights). Further, the notion of a “trend” is more flexible than “consensus”, in that a “trend” is free from any mathematical formula such as a “majority” of the countries in the world.

It was argued before the Court of Appeal that there was an “international trend” in favour of gender recognition. The ICJ submission reads:

“Internationally, there is a strong trend toward recognition of an individual’s new gender…”

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73 W, para 141.
76 Ibid.
77 W, para 148.
In the Court of Appeal, examples showing the existence of an international trend towards gender recognition were given. Thus, apart from the 54 per cent of member States of the Council of Europe (at the time of Goodwin), other examples included Australia, Canada, New Zealand, South Africa, Israel, Brazil, Argentina, Uruguay and all but three of the states in the United States. The Court of Appeal also quoted the ICJ, stating that:

“[m]ost Asian countries permit a transgender individual to marry in his or her acquired gender or have erected no legal barrier”.

Unless one was to doubt the accuracy of the ICJ submission, this seems to provide very clear description of a continuing international trend. It may not be a trend that is preferred by some, but it is a clear trend nonetheless.

However, commenting upon the ICJ’s submission on the international trend towards gender recognition, the Court of Appeal observed that this evidence is short of “consensus”. The Court of Appeal stated that:

“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.”

Given that the notion of “trend” and “consensus” differ in the manner described above, this conclusion must be inevitable. The conclusion also shows that the Court of Appeal did not follow Goodwin’s acceptance of the importance of a continuing “international trend” in favour of gender recognition. Instead, it followed the discarded search for “consensus” in Sheffield. Consequently, the Court of Appeal was able to hint that, by analogy with the Council of Europe and the European Convention, and in the context of Hong Kong, there also needed to be something akin to that degree of consensus. The Court of Appeal then noted that the total number of States Parties to the International Covenant on Civil and Political Rights was 167. Working through mathematically, 84 States out

78 W, para 148. There, “Member States of the European Union” was referred to, but, at para 150, the reference is to 54% of Contracting States to the European Convention (ie Members of the Council of Europe). The latter is correct. The European Union and Council of Europe are two different bodies altogether. However, it is not uncommon for them to be confused.
79 After the decision of Goodwin, it is now 100% of Members of the Council of Europe; otherwise a contracting state would be in violation of the European Convention.
80 W, para 149.
81 W, para 150.
of those 167 would give just over the 50 per cent required for a majority. One wonders if the Court of Appeal was implying that this number of 84 is sufficient for there to be a consensus.\textsuperscript{82}

In sum, the Court of Appeal appeared to prefer Sheffield. This is apparent both from the discussion on "international consensus" and from the outcome of Ms W's claim. There are also further reasons supporting this speculation, eg the fact that the right to personal autonomy (examined in Part 3) was not discussed at all, and that the right to marry was reduced to one of definition (Part 4). By not being explicit about this preference for the superseded case of Sheffield, the Court of Appeal escaped what would otherwise have been an obvious requirement: namely, to explain why the more recent case of Goodwin should not be applied in Hong Kong, and why Sheffield instead appears to have had such an influence on the Court of Appeal's decision.

Conclusion

This paper has outlined the European human rights jurisprudence in Sheffield and Goodwin. It has shown also how Goodwin was able to free itself from Corbett and Sheffield, allowing the ECtHR to interpret the European Convention in such a way that it protects a post-operative transsexual person's right to respect for private life and the right to marry. It is unfortunate that the Court of Appeal has been influenced by the discarded reasoning in Sheffield and dismissed Ms W's constitutional claim. As Ms W's claim is almost identical to those of Sheffield and Goodwin, it is unclear why Ms W's claim should have been framed so differently, and why Goodwin was addressed in such a limited way. No reasons were given as to why it was inappropriate to follow Goodwin, or why the discarded decision in Sheffield was preferred.

On the point of consensus, whilst one may concede that there is no societal consensus in Hong Kong on a post-operative transsexual person's right to marry in their acquired gender, is this the same as there being no societal consensus on a post-operative transsexual person's right to be recognised in law in their acquired gender? But in any case, as Andrew Cheng J explained in the Court of First Instance decision in W v Registrar of Marriages,\textsuperscript{83} fundamental rights are an exception to the democratic principle of majority rule. He stated:

\textsuperscript{82} Even then, there is the difficult question as to precisely what the consensus is on, something that Goodwin has addressed.

\textsuperscript{83} [2010] 6 HKC 359, para 217.
“I have not forgotten that fundamental rights are an exception to the democratic principle of majority rule. Some rights are considered to be so fundamental that even the majority of a society cannot, or cannot without justification, take them away from the minority.”

As Anne Scully-Hill and Amy Barrow observed:

“there is no societal consensus relating to a post-operative transsexual's right to marry, despite recognition of the government's actions such as allowing a change of sex on Hong Kong ID cards, as well as publicly funding sex reassignment surgery.”

Here, it may be argued that the logic of the respondent's case needs to be examined carefully. The logic would appear to be this: despite there being no societal consensus in Hong Kong on accepting transsexuals in their acquired gender, the government has nonetheless—acting unilaterally, and contrary to the apparent lack of societal consensus—funded SRS (since the 1980s). Furthermore, it has also offered post-operative transsexuals new ID cards (permitting them to live in their acquired gender). In other words, the government has been spending tax-payers' money despite the apparent lack of societal consensus. This has resulted in the unusual situation highlighted in Ms W's claim. The government is now using this very same apparent lack of societal consensus to defend its non-acceptance of the consequence of SRS. This means that, logically, Ms W appears as a woman; but in showing her ID card (stating that she is female) to the Registrar of Marriages, she is nevertheless allowed to marry only a female, as the Registrar of Marriages must take Ms W's birth certificate (stating that W is a male person) as conclusive evidence that she is entitled to so marry.

This demonstrates that the Court of Appeal's decision is a poor outcome for both the law and society.

It is hoped that the Court of Final Appeal, in discharging its constitutional duty, will consider moving beyond Sheffield and allow Goodwin to be engaged as part of Hong Kong's human rights jurisprudence. Then, the Hong Kong government would have to provide compelling and necessary reasons for the public good to justify its continued adoption

85 W, para 18.
of the *Corbett* test\(^{86}\) for the purpose of the legal attribution of gender identity of transsexual persons, as well as in the context of marriage.

In a case such as this, the question of the gender identity of a person (and the legal gender of a person) is a question that needs to be addressed before the question of the sex of a person for the purpose of marriage can even arise. Answering both questions together, or even the marriage question before the gender identity issue has been resolved, is nonsensical when *Goodwin* is so frequently cited, and yet not explicitly rejected. This approach reveals a lack of understanding of *Goodwin* and the underlying issues: namely, that gender identity concerns any person irrespective of his or her relationships to other people. Gender identity is about self-identity and how a person relates to the world generally. Although the desire to relate to another person (eg by marriage) is a logical extension of the question of gender identity, it is a completely different and separate matter.