Legal Issues Concerning the Transsexual Community in Malaysia†

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I. Introduction

Transsexuality has been considered by many a phenomenon of the late 20th century when functions of the hormones began to be understood and surgical options became technically possible. The word was probably popularised in the late 1940s and 1950s by Dr Harry Benjamin, an American psychiatrist. Transsexuality is a gender identity disorder in which there is strong cross-gender identification.[1]

In Malaysia, the local term for male transsexuals is *mak nyah* (*ie* males who want to be females in every aspect) while and for female transsexuals is *pak nyah* (females who want to be males in every aspect). One of the biggest problems faced by the transsexual community in Malaysia is that of exclusion. They have been frequently overlooked and excluded from decisions that affect their welfare, livelihood and legal status. Prior to 2001, there was no ministry regarded as suitable to look into the problems faced by this community, as a result they were heavily marginalised, under-represented and misunderstood, although the Malaysian Federal Constitution has provided for equality protection in Article 8. Article 8(1) and (2) of the Constitution states the following:

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[1] See "Transsexuality – An Evalengical Christian Response", http://www.ncf.org.my/news.print.cfm?&Menuid=12&action+view&retrieveid+658, accessed on 8 November 2006.

> (1) All persons are equal before the law and entitled to the equal protection of the law.
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> (2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

In 2001, the Women and Family Development Ministry announced its intention to look into the problems faced by the transsexual community and to provide such assistance as they could. There are only a few non-governmental organisations dedicated to helping and representing the transsexual community, including IKHLAS (Pink Triangle Foundation) and the Federal Territory Mak Nyah Associations.

Due to the conflict between gender identity and sex at birth, many transsexuals find that their only recourse is to undergo gender reassignment surgery ("GRS") or gender reassignment therapy ("GRT"), which may include taking hormones. The standards of care and requirements for GRS and GRT in most countries are commendably high. In most circumstances, a minimum time period of psychiatric counselling is required, as well as a minimum time (often one year) spent living in the target gender role prior to a GRS.[2]

The purpose of this paper is to examine three legal issues (though there are many more) concerning the rights of transsexuals in Malaysia, namely, right to change gender status in the National Registration Identification Card (MyKad), right to marry in chosen or acquired gender, and right to adopt a child.

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[2] See Wong, Ee Lynn, "Neither Here Nor There: The Legal Dilemma of the Transsexual Community in Malaysia", http://www.malaysianbar.org.my, accessed on 25 October 2006.

Before the discussion proper, it is important to first look at the definition of the term "transsexual" so that it is not confused with other related terms. According to the *Compact Oxford English Dictionary*:[3]

(a) "Transsexual"[4] is a person born with the physical characteristics of one sex who emotionally and psychologically feels that they belong to the opposite sex.
(b) "Transvestite" is a person, typically a man, who derives pleasure from dressing in clothes considered appropriate to the opposite sex.[5]
(c) "Intersex" refers to a hermaphrodite.
(d) "Hermaphrodite" is a person or animal having either male and female sex organs or other sexual characteristics.[6]
(e) "Homosexual" is a person who is sexually attracted to people of his or her own sex.

II. Right to Amend or Correct Gender Status in MyKad

As mentioned above, many transsexuals undergo GRS or GRT. Having undergone a GRS to have his or her sex changed, the next issue that arises is whether the said individual could apply to amend or correct his or gender status in his or her National Registration Identification Card (NRIC), Malaysia's primary document for personal identification. This document is important to the individual as it is used in virtually all inter-personal transactions. All citizens are required to apply for and carry their identity card from the age of 12. The latest version of the national identity card is the MyKad, a microchip-based smartcard which

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[3] *Compact Oxford English Dictionary*, http://www.askoxford.com/concise_oed/transsexual?view=uk, accessed on 8 November 2006.
[4] Note that transsexual also means transgender.
[5] Note that the term transvestite in Latin brings the following meaning - *Trans* = "across" and *vestire* = "clothe".
[6] Originated from the Greek term *hermaphroditos*, originally the name of the son of Hermes and Aphrodite who became joined in one body with the nymph Salmacis.

securely stores various types of information for personal identification, which include the name, date of birth, address and sex.[7] The sex of the holder would be indicated by the last digit on the MyKad number, odd numbers for males and even numbers for females.

Although there is no law which prohibits a GRS, unfortunately there is also no law to allow individuals who have undergone a GRS to have his or her sex changed in MyKad. In 2005, two interesting cases were reported in the law reports relating to applications to amend or correct gender status in the birth certificates and the NRIC by persons who had undergone a GRS. Both these cases attracted much publicity in the media and resulted in articles written on them. Although both cases concerned similar issues, the judgments were, however, different.

First, there is the case of *Wong Chiou Yong (P) v Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara.*[8] The applicant had undergone a sexual reassignment surgery to change her gender from a female to a male. According to her, she had two sex organs at the time of birth. Her father registered her as a female both at the time of birth at the Registry of Births and when she attained 12 years in the NRIC. When she reached the age of 25 years, she applied for a new NRIC and declared herself as a female in the application. In 2002, she underwent a GRS from female to male. A few months after the operation, she applied to the Registrar of Births and Deaths to alter the birth register and the NRIC from female to male so as to indicate the post-operative sex, giving the ground that there was an error in the entry at the register book. When the application was refused, she applied to the High Court for a declaration that she be accorded her current gender status, *ie* that of a male.

The learned judge, UT Singham J, examined two relevant statutes, *ie* the Births and Deaths Registration Act 1957 ("the BDRA"),

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[7] Information obtained from the official website of the National Registration Department of Malaysia at http://www.jpn.gov.my.
[8] [2005] 1 MLJ 551; [2005] 2 AMR 415.

in particular s 27, and the National Registration Act 1959 (Revised 1972) ("the NRA"), in particular s 6(2)(o). Sub-sections (1), (2) and (3) of s 27 of the BDRA provide that:

> (1) No alteration in any register shall be made except as authorised by this Act.
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> (2) Any clerical error which may from time to time be discovered in any register may be corrected by the Superintendent Registrar, in such manner as the Registrar-General shall direct.
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> (3) Any error of fact or substance in any register may be corrected by entry (without any alteration of the original entry) by the Registrar-General upon payment of the prescribed fee and upon production by the person requiring such error to be corrected of a statutory declaration setting forth the nature of the error and the true facts of the case, and made by two persons required by this Act to give information concerning the birth, still-birth or death with reference to which the knowledge to the satisfaction of the Registrar-General of the truth of the case; and the Registrar-General may if he is satisfied of the facts stated in the statutory declaration cause such entry to be certified and the day and the month and the year when such correction is made to be added thereto.

Sub-sections (1) and (2)(o) of s 6 of the NRA provide that:

> (1) The Minister may make regulations for the purposes of this Act.
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> (2) Without prejudice to the generality of the powers conferred by sub-section (1), the regulations may provide for -
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> (o) the making of corrections to and alterations in the register and identity cards.

According to the judge, s 27 of the BDRA allowed amendments only where an error was made in the initial registration of birth. It was observed that biological characteristics denoted that the applicant was a female at birth, and after the GRS the applicant was physiologically a male. As biological sexual constitution of an individual was fixed at birth, the decisive significance in the determination of the identity of the applicant would not be the physiological test but the biological test when she was born, which was in conformity with the evidence produced by the applicant. Thus it was held that there was no error in the initial entry of the sex of the applicant in the register of births and the birth certificate, and subsequently in the NRIC, as envisaged by s 27(2) or (3) of the BDRA or s 6(2)(o) of the NRA. The judge expressed the view that a person who had undergone a GRS could not be regarded as belonging to a sex for which the reassignment surgery was undertaken for the purpose of correcting the registration of sex on the register of births or the NRIC. The GRS could not affect the true gender status for the purpose of the birth certificate and the NRIC. This was because the registration of the applicant's sex at the time of the issuance of the NRIC was in accordance with the original identity of the applicant at the time of birth, which in this case was female, as registered in the register of births.

It was further observed that the medical evidence produced by the applicant had not supported her contention that she was born with two sex organs or was an intersexual. Therefore the court had no power to declare the applicant who was born a female, as male, and consequently had no power to direct the Registrar-General to alter the register of births and the NRIC under s 27(3) of the BDRA and s 6(2)(o) of the NRA, as to do so would be contrary to the object and the whole spirit of statutory interpretation and legal principle on which the judicial system was built. It was also stated that if the application was decided in the applicant's favour, the court would be usurping the function of the Parliament. This must be avoided as it was not a function of the court to substitute its own views to fill gaps in the statute, but merely to interpret each phrase in the statute in its statutory context. The human and practical trend to accept the reality of gender reassignment would depart from the proper approach of construing the

BDRA and the NRA. The applicant thus could not ask the court to read into both the said Acts words which were not included.

The above judgment results in those who have undergone GRS to live under the cloud of uncertainty as they will not be able to change their gender in their identification documents. The court in *Wong Chiou Yong* had strictly adhered to the letter of the law in the BDRA and the NRA and ruled that the remedy for registration of a transsexual's current gender was with the Parliament and not with the courts as any changes of facts in the registration of transsexuals must be introduced by an Act of Parliament and not by judicial pronouncement. Thus, the court here had left it to the legislature to make appropriate legislation to permit transsexuals to change their gender status in their identification documents.

It is submitted that his Lordship in the case above could have applied judicial creativity when interpreting the statutes concerned, in particular the NRA. For example, s 6(2)(o) of the NRA empowers the Minister to make regulations to correct and alter the register and identity cards. Under the National Registration Regulations 1990[9] made under the NRA, reg 14(1) and (2) provides for the change of name and correction of particulars as follows:

> (1) A person registered under these Regulations who -
> (a) changes his name;
> (b) acquires the citizenship of Malaysia or is deprived of his citizenship of Malaysia; or
> (c) has in his possession an identity card containing any particular, other than his address, which to his knowledge incorrect;
>
> shall forthwith report the fact to the nearest registration office and apply for a replacement identity card with the correct particulars.

[9] PU(A) 472/90.

> (2) Any person registered under these Regulations who applies to change his name under sub-regulation (1) shall submit to the registration officer with a statutory declaration which -
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> (a) certifies the fact that he has absolutely renounced and abandoned the use of his former name in lieu thereof and has assumed a new name; and
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> (b) contains the reasons for such change of name, other than a conversion of religion.

Therefore sub-reg (1)(a) allows a person to change his name in the NRIC, while and sub-reg (2)(b) provides that he or she must mention the reasons for such change of name, other than a conversion of religion. This would mean that in *Wong Chiou Yong*, the applicant who changed her gender from female to male was allowed to change her name in her NRIC but was not allowed to change her gender. However, sub-reg (1)(c) has also mandated a person, who has in his possession an identity card containing any particular, other than his address, which to his knowledge is incorrect, to apply for a replacement card. It is submitted that the learned judge could have applied sub-reg (1)(c) to allow the application to amend the applicant's gender, as "any particular in an identity card" is a general term, which could be read to include gender. Further, unlike the BDRA, reg 14 does not mention that the incorrect particular in the NRIC must be as a result of an initial error.

At this juncture, it is pertinent to refer to the words of the Honourable Mr Justice PN Bhagwati where he emphasised the importance of judicial creativity in ensuring social justice: [10]

> The law is not an antique to be taken down, dusted, admired and put back on the shelf. It is a dynamic instrument

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[10] Part of a speech delivered by the Mr Justice PN Bhagwati entitled "Democratisation of Remedies and Access to Justice" at the First South Asian Regional Judicial Colloquium on Access to Justice, New Delhi, India, 1-3 November 2002.

> fashioned by society for the purpose of eliminating friction and conflict and unless it secures social justice to the people it will fail in its purpose and some day people will cast it off. It is therefore the duty of the judges to mould and develop the law in the right direction by creatively interpreting it so that it fulfils its social purpose and economic mission. The judges must realise that the law administered by them must be a powerful instrument for ensuring social justice to all and by social justice, I mean justice which is not limited to a fortunate few but which encompasses large sections of the have-nots and handicapped, law which brings about equitable distribution of the social material and political resources of the community.

Though the judge in *Wong Chiou Yong* dismissed the applicant's application to change her gender in the NRIC, it could be observed that his Lordship was sympathetic towards transsexuals in this situation. His Lordship stated that:[11]

> There is an increase recognition of the problem which post operative transsexuals encounter and this cannot be disregarded and require legislation. Transsexuals are no doubt compelled to describe themselves in public by a gender which truly does not accord with their external appearance and is a cause of "profound embarrassment and distress" and they are bound by the information contained in the birth certificate and national registration identity card which is contrary to their present external appearances which has come about because of the post operative surgical treatment and places them as transsexuals.

In contrast, the High Court in another case has adopted a liberal view – *J-G v Pengarah Jabatan Pendaftaran Negara.*[12]

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[11] *Supra* n 8 at p 576.
[12] [2005] 4 CLJ 710.

This case was reported in the same year as *Wong Chiou Yong*. In this case, the facts were the other way around, where the plaintiff who was born a male underwent a GRS when she felt more inclined to be a woman except that she was in a man's body. After the operation she applied to the defendant, the registration authority, to change her name from that of the former to the present, namely J-G, on the ground that she had undergone a successful GRS. The defendant issued to her a new NRIC with her new name.

When the plaintiff applied for her MyKad, she was informed that the sex of a person would be stated therein. Since her current NRIC carried an odd digit at the end of a line of numbers, she would still be considered a male on the record of her MyKad. The plaintiff also stated that as she had started working as a model after her operation and that she was much sought after, she had to face embarrassment when she disclosed her NRIC number in some assignments which implicated her as a male. In addition, she intended to legally marry her boyfriend and this would be prevented by the incomplete change of identification of her gender.

The plaintiff produced medical evidence given by a consultant psychiatrist, a consultant surgeon in paediatric surgery and paediatric urology, and a consultant in obstetrics, gynaecology and oncology. All three consultants certified her as not suffering from any mental or psychological disability, living a full and satisfactory life as a woman, was a complete female, physically and mentally since the GRS and possessed female genitalia.

The defendant opposed the application on the ground that the record on the sex of a person could not be changed, that it must follow that as stated in the birth certificates, and in this case the plaintiff's birth certificate indicated that she was a male. As to its approval of the plaintiff's application to change her name in the NRIC, the defendant explained that a change relating to the name was permitted under reg 14 under the NRA, whereas the current application related to a gender change.

The parties cited *Wong Chiou Yong*. The learned judge, James Foong J, observed that from the authorities cited in the above case, two schools of thought surfaced: the traditional and the progressive - taken by the Commonwealth courts and the European Union courts. The court in *Wong Chiou Yong* had followed the traditional view set out in *Corbett v Corbett (otherwise Ashley)*[13] which laid down that to assess and determine the sex of a person, four basic criteria must be considered, *ie* the chromosomal, gonadal, genital and psychological factors. Under the traditional approach, the courts had only taken into consideration the first three factors and had ignored the last. Such restrictive view, as pointed out by James Foong J, drew some contrasting views some 30 years later in judgments in tandem with changes in social policy and advancements in medical science, particularly in the area of gender reassignment. His Lordship agreed with the minority view of Lord Thorpe in *Bellinger v Bellinger*,[14] and felt that the psychological factor had not been given much prominence in the determination of the issue.

His Lordship further observed that the courts in Australia and the European continent had taken a more liberal approach, where they treated biological factors entirely secondary to psychological ones. Further, where a person's gender identification differred from his or her biological sex, the former was given predominance. Therefore, all transsexuals were treated in law according to sex identification, regardless of whether they had undertaken any medical treatment to make their bodies conform to that identification.[15] His Lordship observed that in cases which followed the traditional approach:[16]

> ... the garnet is thrown back at the legislative body to make the necessary laws for the court to follow if Parliament so wishes. But then again, the legislative body will depend on

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[13] [1970] 2 All ER 33.
[14] [2002] 1 All ER 311.
[15] The judge referred to the Australian case of *AG for the Commonwealth v Kevin & Ors* [2003] FAMCA 94.
[16] *Supra* n 12 at p 716.

> the medical opinions. And here, in this instance case, the medical men have spoken: the plaintiff is a female. They have considered the sex change of the plaintiff as well as her psychological aspect. She feels like a woman, lives like one, behaves as one, has her physical body attuned to one, and most important of all, her psychological thinking is that of a woman.

His Lordship also noted that courts that followed the traditional approach had at the same time sympathised with the victim trapped in such predicament and regretted that they could not assist (as was the sentiment of UT Singham J of the High Court in *Wong Chiou Yong*). But here it was held that, for reasons discussed above, when there was medical evidence, the courts should play its part and grant relief where justice was due. Thus, the judge granted the declarations sought.

It is submitted that the decision in *J-G* is preferred to that in *Wong Chiou Yong*, as the former takes a liberal view and is in tandem with the spirit and intendment of the Federal Constitution, in particular Article 5(1) which guarantees that "no person shall be deprived of his life or personal liberty save in accordance with law". If a person is given the right to change his name, address or religion in his identification documents, why should he not be allowed to change his gender? As was held by his Lordship James Foong J in *J-G*, courts should not just wait for the legislative body to come up with the necessary laws, instead should play a part and grant relief where justice is due. If not, this would lead to many problems for the victim. They face constant harassment and persecution from the police and religious authorities, are often refused employment, deprived of the right to marry lawfully although they are fully functioning members of their chosen sex, and are exposed to other dangers such as hate crimes when their sex at birth is revealed.

III. Right to Marry in Chosen Gender

The second legal issue to discuss relates to right of transsexuals in Malaysia to marry in their chosen gender. In Malaysia, Muslims are governed by Syariah laws concerning marriage, and non-Muslim marriages are governed by the Law Reform (Marriage and Divorce) Act 1976[17] ("the LRA"). There is a *fatwa* prohibiting sex change operations for Muslims. This paper will only look at the right of non-Muslim transsexuals who have undergone GRS and who wish to marry in their acquired sex.

Part III of the LRA provides the requirements for a valid marriage. Sections 10, 11 and 12 provide the minimum age for marriage, prohibited relationships and requirements of consent respectively. None of the sections in Part III state that the parties to a marriage must be of a particular sex. However, reference is made to s 69 of the LRA which provides for the grounds on which a marriage is void, in particular, sub-ss (c) and (d). Sub-section (c) states that a marriage which takes place after the appointed date shall be void if the parties are not respectively male and female. Sub-section (d) reaffirms the common law position that a marriage is one "between a man and a woman".[18] Therefore, parties to a marriage must be male and female, failing which one of the parties to the marriage could apply to annul the marriage. The relevant issue here is whether the sex of the parties to a marriage is determined at the time of birth (the biological test) or at the time of marriage (the psychological test).

The media, in November 2005, highlighted the marriage of a transsexual, Jessie Chung (a male, who had undergone three rounds of GRS to become a woman) to one Joshua Beh in Kuching, Sarawak. *The Star*, when reporting the wedding, stated as follows:[19]

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[17] Act 164.

[18] Majid, Mimi Kamariah, *Family Law in Malaysia* (Kuala Lumpur: Malayan Law Journal, 1999) at p 110.

[19] *The Star*, November 2005.

> In a fairytale, the princess transforms a frog into a prince with one kiss, and they live happily-ever-after. But real-life does not always have a happy ending-especially when the change is dismissed for being against the law of nature.
>
> The twilight world that transsexuals are faced to live in - legally a man, emotionally and physically female - was spotlighted again, when Jessie Chung (born a man) married Joshua Beh in Kuching on November 12.
>
> A furore erupted, with some quarters labelling it an unholy union. The marriage was not legally recognised but their families and friends were supportive of the union.
>
> For a transsexual, gender-reassignment surgery is not the passport out of limbo. Life can still be a daily hell of petty discrimination of all kinds.

Responding to the above marriage, the Deputy Home Affairs Minister said that the marriage was invalid as the LRA did not allow the marriage between two people of the same sex even where one of them had undergone a GRS.[20]

However, todate there have not been any cases reported in Malaysia relating to applications to annul a marriage on ground that parties to a marriage are not male and female respectively. It is still early to see what the decision of the Malaysian courts would be if such a petition is brought. In view of the High Court's decision in the case of *J-G* where the court directed the National Registration Department to change the gender of the transsexual in MyKad, it could be argued that since the transsexual's MyKad would now reflect his or her acquired gender, there should not be any obstacle for him or her marrying in the acquired gender. However, it is highly likely that the Malaysian courts would follow the common law position on this issue, *ie* the decision in the landmark case of *Corbett v Corbett (otherwise Ashley)*.[21]

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[20] *The Star*, 14 November 2005.
[21] [1970] 2 All ER 33.

In *Corbett v Corbett (otherwise Ashley)*, the parties went through a ceremony of marriage in September 1963. At that time, the petitioner knew that the respondent had been registered at birth as of the male sex and had in 1960 undergone a GRS. In December 1963, the petitioner filed a petition for a declaration that the marriage was null and void because the respondent was of the male sex. The learned judge, Ormrod J, stated that marriage being essentially a relationship between man and woman, the validity of the marriage depended on whether the respondent was or was not a woman. On the medical criteria for assessing the sexual condition of an individual, the trial judge stated that there were at least four criteria for assessing the sexual condition of an individual, which were the:

(i) chromosomal factor;
(ii) gonadal factor (*ie* presence or absence of testes or ovaries);
(iii) genital factor (including internal sex organs); and
(iv) psychological factor.

Another criterion sometimes applied was the hormonal factor or secondary characteristics, such as the distribution of hair, breast development, physique and others, which were reflective of the balance between the male and female sex hormones in the body.

The court held that as the biological sexual constitution of an individual was fixed at birth and could not be changed, either by the natural development of the organs of the opposite sex, or by medical or surgical means, the respondent's operation could not affect her true sex. The only case where the term "change of sex" was appropriate was where a mistake as to sex was made at birth and subsequently revealed by further medical investigation. Therefore the respondent was held to be a male and accordingly, the so-called marriage was void and of no effect.

His Lordship, in laying down the biological test to determine the sex of a party to a marriage, stated:[22]

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[22] *Id* at p 48.

> Since marriage is essentially a relationship between man and woman, the validity of the marriage in this case depends, in my judgment, on whether the respondent is or is not a woman ... The question then becomes what is meant by the word "woman" in the context of a marriage, for I am not concerned to determine the "legal sex" of the respondent at large. Having regard to the essentially heterosexual character of the relationship which is called marriage, the criteria must, in my judgment, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage. In other words, the law should adopt, in the first place, the first three of the doctors' criteria, *ie* the chromosomal, gonadal and genital test, and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention.

The judgment by Ormrod J has had far reaching consequences. The test which he used to establish sex for legal purposes is a narrow and restrictive one, which condemns transsexuals to being classified forever in the sex assigned at birth.

The biological test was referred to and applied by the Court of Appeal in the case of *Regina v Tan*,[23] concerning one Gloria Greaves, who was living on the earnings of prostitution contrary to s 30 of the Sexual Offences Act 1956 (Cap 69), and one Brian Greaves who was living on the earnings of male prostitution contrary to s 5 of the Sexual Offences Act 1967 (Cap 60). An essential ingredient of the offences in these two counts was that Gloria Greaves was a man. It was accepted that Gloria was born a man and remained biologically a man although he had undergone both hormonal and surgical treatment, consisting essentially in the removal of the external male organs and the creation of an artificial vaginal pocket. It was contended that for

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[23] [1983] 3 WLR 361.

the purposes of ss 30 and 5 of the relevant statutes, besides the biological test, another test should be applied and that was if the person had become philosophically, psychologically or socially female, that person should not be held to be a man for the purposes of the sections. The Court of Appeal rejected the submission. Parker J, delivering judgment of the court, said:[24]

> In our judgment both common sense and the desirability of certainty and consistency demand that the decision in *Corbett v Corbett* should apply for the purpose not only for marriage but also for a charge under s 30 of the Sexual Offences Act 1956 or s 5 of the Sexual Offences Act 1967. The same test would apply also if a man had indulged in buggery with another biological man ... It would, in my view, create an unacceptable situation if the law were such that a marriage between Gloria Greaves and another man was a nullity, on the ground that Gloria Greaves was a man; that buggery to which she consented with such other person was not an offence for the same reason; but that Gloria Greaves could live on the earnings of a female prostitute without offending against s 30 of the Act of 1956 because for that purpose he or she was not a man and that the like position would arise in the case of someone charged with living on his earnings as a male prostitute.

As mentioned earlier, there are no cases reported in Malaysia on the application of the biological test laid down in *Corbett* to determine the gender of the parties to a marriage. At this juncture, reference could be made to two other jurisdictions, *ie* Singapore and the United Kingdom, where there have been positive developments in their respective laws on the issue. The developments in Singapore and England, as will be shown below, are substantively different. This paper will now examine the developments in order to assess whether they are suitable for Malaysia.

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[24] *Id* at p 369.

A. *The Position in Singapore*

The law governing marriages in Singapore is the Women's Charter.[25] Prior to 1 May 1997, there was no express provision in the Women's Charter requiring that parties to a marriage be of a particular sex. In 1992, there was a case reported concerning the validity of a transsexual's marriage – *Lim Ying v Hiok Kian Ming Eric*.[26] Eric Hiok was born a female and was registered as a girl. He underwent surgery to remove the female sexual organs and to replace them, to whatever extent surgery allowed, with male organs. After the surgery, he legally changed his name to Eric Hiok. This, together with the notification of sex as "male", was allowed to be recorded onto his NRIC. About three years later, Eric Hiok married Lim Ying at the Registry of Marriages. He was not asked by the Registrar of Marriages to produce his birth certificate and was not required to swear that he was born of the sex recorded in his NRIC. Lim Ying claimed that she was unaware of his transsexualism or sex change operation and this was accepted by the court. A few months later, Lim Ying presented a petition seeking a court order to nullify the marriage on two alternative grounds, one of them being that Eric was still in law a woman and thus their marriage was invalid for breach of the requirement that the two parties must be of different sexes. Eric did not defend.

The High Court awarded the decree sought and held that the marriage licence granted to them was not valid since Lim Ying did not know Eric's transsexualism. The learned judicial commissioner KS Rajah expressed three ipinions as regards the requirement of capacity to marry. First, there was a requirement in the Women's Charter that the two parties to a marriage must be male and female respectively. Secondly, a breach of this requirement made the marriage void so that the High Court could grant a decree of nullity to declare this. Thirdly, a person's sex was determined by the biological test as laid down in

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[25] Cap 353, 1997 Rev Ed.
[26] [1992] 1 SLR 184.

Corbett. For the purpose of this paper, the way the learned judicial commisioner came to the third opinion will be examined.[27]

In the opinion of the court, the NRIC and the birth certificate were official documents that served different purposes. Where the sex of a person was in issue, it must be proved to the satisfaction of the court. An identity card standing alone was not sufficient evidence. The judicial commissioner referred to the biological test laid down in *Corbett* and stated as follows:[28]

> It is desirable in the interests of certainty and consistency for the word "man" under the Charter to be given the ordinary meaning that is in contradistinction to woman. A person biologically a female with an artificial penis, after surgery and psychologically a male, must, for purposes of contracting a monogamous marriage of one man and one woman, under the Charter be regarded as a "woman".

Thus the court held that the respondent was still a female for purposes of marriage under the Charter and dismissed the notation in Eric's NRIC stating his sex as "male". Further, the court also held that had the petitioner known that the respondent had undergone a GRS, she would not have consented to the marriage. In the circumstances, she had not freely consented to the marriage. The marriage was therefore not solemnised on the authority of a valid licence and was also void on that ground under s 21 of the Charter.[29] It is respectfully submitted that the learned judicial commissioner had erred in referring to s 21 of the Charter as to the requirement of consent by the petitioner which merely referred to consent to be obtained for the marriage of a minor. He should have instead referred to s 22(3) of the Charter which required both the parties to the marriage to freely consent to the marriage in order for it to be a valid marriage.

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[27] For a discussion on the first and second opinions, see Leong, Wai Kum, *Principles of Family Law in Singapore* (Butterworths Asia, 1997) at pp 300-302.

[28] *Supra* n 26 at p 196.

[29] Section 21(1) of the Charter provides that: "the Minister, upon proof being

The above decision which accepted the biological test laid down in *Corbett* was severely criticised by academicians in Singapore. For example, Professor Leong Wai Kum, in her book the *Principles of Family Law in Singapore,* commented as follows:[30]

> It has been demonstrated that his Honour had a choice whether to follow this decision. Even among the English-speaking common law countries who share a tradition of family law emanating from the doctrines of the Roman Catholic Church, there is substantial variation. Further, several European legislatures have enacted legislation to accord legal recognition of transsexuals' post-operative sex. Given there were differing approaches, His Honour's choice of *Corbett v Corbett (otherwise Ashley)* was criticised ...
>
> ...
>
> The *Corbett v Corbett (otherwise Ashley)* test is defective in at least two ways. First, it is oblivious to "[t]he transsexual who undertakes such surgery has done the ultimate medical science can offer him. It is unnecessarily callous to ignore it altogether." Second, the biological tests of sex are not necessarily superior.[31]
>
> > [The biological tests] are ... more objective, but they are not the more relevant. A person's sex is not simply determinable by looking at his or her chromosomal material or the shape of his or her sex organs. It is part of his total personality. The

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made to him by statutory declaration that there are no lawful impediment to the proposed marriage, and upon being satisfied that the necessary consent, if any, to the marriage has been obtained, or that the consent has been dispensed with or given under section 13 may, if he thinks fit, dispense with the giving of notice and with the issue of a marriage licence, and may grant a special marriage licence in the prescribed form authorising the solemnisation between the parties named in that licence."

[30] *Supra* n 27 at pp 302-304.

[31] Here the author was quoting from her earlier writing titled "Reform of the Law of Nullity in the Women's Charter" (1992) 1 *SJLS* 1 at pp 17-18.

> way the person perceives himself is really more important than his or her sex organs. The person's perception determines whether the person lives as a man or as a woman ... It is with persons who have sexual disorders, such as transsexuals, that we need to remember that his or her sex has as much to do with psychological perception as with biological facts. Of what relevance is it to discover the chromosomal material the person is made of or the shape of his sex organs if, despite it being of one sex, he lives as the other because he perceives himself as the other?

What would be a better way to test compliance with the requirement? As there does not exist water-tight scientific tests, it was suggested: [32]

> In Singapore, where every person above the age of twelve possesses an identity card, there is a simple way to determine sex for the purpose of marriage. The notification of "sex" in the identity card represents what the holder of the card claims to be his or her sex. The National Registration Office has sensibly allowed persons who have undergone sex reassignment surgery to have their new sex recorded in their identity cards. This notification of sex in the identity card could suffice to determine the person's sex for the purposes of this marriage requirement. There is no need for the Registry of Marriages to go behind the notification or to demand to see the person's birth certificate in order to check his or her sex at birth. The sex at birth is irrelevant as all the Registry needs to know is whether the two parties are, at marriage of different sexes.

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[32] *Id* at pp 18-19.

As a result of the criticisms against the decision in *Lim Ying v Hiok Kian Ming Eric*, the Parliamentary Select Committee took steps to amend the Women's Charter *via* the Women's Charter (Amendment) Act 1996[33] which was enforced on 1 May 1997. This Amendment Act rejects the test laid down in *Corbett* and instead accepts the notification in the NRIC. The new s 12(2) and (3) read as follows:

> (2) It is hereby declared that, subject to sections 5, 9, 10, 11 and 22, a marriage solemnised in Singapore or elsewhere between a person who has undergone a sex re-assignment procedure and any person of the opposite sex is and shall be deemed always to have been a valid marriage.
>
> (3) For the purpose of this section -
>
> (a) the sex of any party to a marriage as stated at the time of the marriage in his or her identity card issued under the National Registration Act (Cap 201) shall be prima facie evidence of the sex of the party;[34] and
>
> (b) a person who has undergone a sex-reassignment procedure shall be identified as being of the sex to which the person has been re-assigned.

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[33] Act 30 of 1996.

[34] Note that in the original provision proposed in Bill No 5/96 leading to Act 30 of 1996, the notation of sex in a Singaporean's identity card was proposed to be "conclusive evidence" of the holder's sex. Suggestions were made to the Select Committee on the Bill that the language was inappropriately strong. The Select Committee accepted the suggestions and s 12(3) now provides that the notation shall be the prima facie evidence.

The above amendment was much welcomed in Singapore as it has moved away from the clutches of the rigid test laid down in *Corbett*. A Singaporean academic has praised the amendment, saying: [35]

> The Women's Charter (Amendment) Act 1996 thus corrects the problem of accepting *Corbett v Corbett (otherwise Ashley)*. England continues to labour under the burden of scientific tests which prefer the physical sciences ignoring the social sciences of psychology. We should celebrate our legislature's boldness in recognising the weakness of English law in this regard and to march ahead with adopting a test which will serve us better than *Corbett v Corbett (otherwise Ashley)* serves England.

To sum up the position in Singapore, it could be said that although the medical treatment of transsexuals in Singapore is no better than any other country, the legal treatment given to them is better than its neighbours, as a post-operative transsexual in Singapore is allowed to do the following:

(a) to change his or her "sex" on the identity card;
(b) to change his or her name; and
(c) to marry in the post-surgery new sex.

B. *The Position in the United Kingdom*

As mentioned earlier, the English position on the sex of transsexuals has been represented by the decision of Ormrod J in *Corbett*. This decision was later followed in *Regina v Tan*[36] and *S-T (formerly J) v J*[37] and also in certain foreign jurisdictions, for instance in South Africa in *W v W*[38] and in Canada in *M v M (A)*[39]. However there

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[35] *Supra* n 27 at p 305. See also Ong, Debbie SL, "The Test of Sex for Marriage in Singapore" (1998) 12 *IJLFP* 161.
[36] *Supra* n 23.
[37] [1998] Fam 103 at p 122.
[38] (1976) (2) SALR 308.
[39] (1984) 42 RFL (2d) 267.

have been highly significant developments throughout Europe since the year 1970. Sweden led the way in 1972 by legislation enabling transsexuals to change their legal sex and to marry a person of their former sex. In the mid 1970s, Denmark followed suit, followed by West Germany in 1980, Italy in 1982 and the Netherlands in 1985. The legislative provisions varied from state to state. In other jurisdictions similar results were achieved through administrative or court practices. According to the judgment of the court in *Sheffield and Horsham v United Kingdom*[40] in 1998, the transsexual's right to legal recognition to some extent had been achieved in at least 23 of the member states of the Council of Europe. In the same judgment it was also stated that the only member states whose legal systems had not recognised a change of gender were the United Kingdom,[41] Ireland, Andorra and Albania.

The decision in *Corbett* attracted much criticism in the United Kingdom too, from the medical profession and elsewhere. The criteria for designating a person as male or female are complex. It is too restrictive to have regard only to the three *Corbett* factors of chromosomes, gonads and genitalia. This approach ignores the compelling significance of the psychological status of the person as a man or a woman. The European Court of Human Rights ("the ECHR") severely criticised the United Kingdom Government for its breaches of Articles 8 and 12 of the European Convention on Human Rights ("the Convention"). Article 8 provides that:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. 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

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[40] (1998) 27 EHRR.

[41] Note that in 2004 the Gender Recognition Act, which recognises post-operative transsexuals in their acquired gender, was passed in the United Kingdom.

> 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.

Article 12 provides that:

> 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.

Apart from the above two articles, a third article in the Convention which is, in the writer's opinion, equally important is Article 14:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[42]

As a result of the criticisms made by the members of the ECHR, the Home Secretary set up an Inter-Departmental Working Group with the terms of reference:

> To consider, with particular reference to birth certificates, the need for appropriate legal measures to address the problems experienced by transsexual people, having due regard to scientific and societal developments, and measures undertaken in other countries to deal with this issue.

The Report of the Working Group was completed and presented to the Ministers in April 2000. It is a careful and comprehensive review of the medical condition, current practice in other countries, the present state of English law in all aspects of the life of an individual

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[42] Note that Article 14 of the Convention is similar to Article 8 of the Malaysian Federal Constitution.

including marriage and the position with regard to birth certificates. It contains various annexes, including details of the practices in Common Law states and European countries. In its conclusion, the Working Group identified three options for the future:

(a) to leave the current situation unchanged;
(b) to issue birth certificates showing the new name and possibly gender; and
(c) to grant full recognition of the new gender subject to certain criteria and procedures.

The Working Group concluded:

> We suggest that before taking a view on these options the Government may wish to put the issues out to public consultation.

The Report was published in April 2002. However, the government did not take immediate steps to carry this matter forward.

A year later, the case of *Bellinger v Bellinger*[43] was reported. The issue in this case was whether the marriage of a transsexual was valid. In this case, Mrs Bellinger was born and registered as male. For as long as she could remember she felt more inclined to be female. She had an increasing urge to live as a woman rather than as a man. Despite her inclinations and under some pressure, in 1967, at the age of 21, she married a woman. The marriage broke down and they were divorced in 1975. Since then Mrs Bellinger dressed and lived as a woman. She underwent various steps of treatment and finally underwent a GRS. When she married Mr Bellinger, he was fully aware of her background. He was entirely supportive of her throughout. She was described on her marriage certificate as a spinster. Apart from that, the registrar did not ask about her gender status, nor did Mrs Bellinger volunteer any information. Since their marriage, Mr

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[43] *Supra* n 14.

and Mrs Bellinger had lived happily together as husband and wife, and had presented themselves in this way to the outside world.

Mrs Bellinger petitioned for a declaration that the marriage celebrated between her and Mr Bellinger was valid at its inception and was subsisting. Section 1(c) of the Nullity of Marriage Act 1971, re-enacted in s 11(c) of the Matrimonial Causes Act, provides that a marriage is void unless the parties are "respectively male and female". Therefore, the question here was whether at the time of the marriage, Mrs Bellinger was a "female" within the meaning of that expression in the statute.

In refusing to make the declaration sought, the trial judge, Johnson J considered extensive written medical evidence from three distinguished experts in the field of gender identity disorder. They were largely in agreement and no oral evidence was given. The judge accepted that since *Corbett* case in 1970, there had been a marked change in social attitudes to problems of those in Mrs Bellinger's situation. The law on this matter in England was, or was becoming, a minority position, at least so far as Europe was concerned. But the law was clear. He therefore decided that the medical criteria, set out in *Corbett* remained equally valid today, and that under those criteria, Mrs Bellinger was unable to marry Mr Bellinger.

Mrs Bellinger appealed to the Court of Appeal.[44] The majority of the Court of Appeal, having considered up to date medical evidence, followed the *Corbett* approach. The three criteria relied upon by Ormrod J remained the only basis upon which to decide upon the gender of a child at birth. The Court of Appeal noted that although there was, in informed medical circles, a growing momentum for recognition of transsexual people for every purpose and in a manner similar to those who were intersexed which reflected changes in social attitudes as well as advances in medical research, recognition of a change of gender for the purposes of marriage would still require

[44] [2002] 2 WLR 411.

some certainty regarding the point at which the change took place. At what point would it be consistent with public policy to recognise that a person should be treated for all purposes, including marriage, as a person of the opposite sex to that which he or she was correctly assigned at birth was a question for the Parliament, not the courts.[45]

In his dissenting judgment, Thorpe LJ questioned whether it was right, particularly in the context of marriage, to make the chromosomal factor conclusive, or even dominant in light that this was an invisible feature of an individual, incapable of perception other than by scientific test. In the context of the institution of marriage today, predominance should be given to psychological factors, and essential assessment of gender should be carried out at or shortly before the time of marriage rather than at the time of birth.[46] In disagreeing with the biological test laid down in *Corbett*, his Lordship said:[47]

> 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 personality, the psyche. That its admission imports the difficulties of application that may lead to less certainty of outcome is an inevitable consequence. But we should prefer complexity to superficiality in that the psychological self is the product of an extremely complex process, although not fully understood. It is self-evident that the process draws on a variety of experiences, environmental factors and influences throughout the individual's development particularly from birth to adolescence, but also beyond.
>
> ... the foundation of Ormrod's judgment is no longer secure. It remains as a monument to his mastery of complex scientific evidence and to his clarity of thought and lucidity of expression. It served its time well but its time has passed.

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[45] *Id* at pp 434-436.
[46] *Supra* n 44 at p 449.
[47] *Supra* n 44 at paras 132-133.

> Recently it has been criticised, particularly by commentators in other jurisdictions, for the insensitivity of its language. That criticism risks injustice to a judge of exceptional humanity and understanding. The language reflects the era in which it was written rather than the writer. But his judgment does not bind us and ... should not in my opinion now be followed.

It is submitted that the above dissenting judgment of Thorpe LJ is preferred to that of the majority of the Court of Appeal. The psychological factor, which was left out by Ormrod J, is a very important factor in determining the gender of an individual as it is the factor that distinguishes a male's characteristics from a female's characteristics. From the passage above, it could be observed that his Lordship was witty when stating that Ormrod J, who was of exceptional humanity and understanding, should not be blamed for laying down the biological test which attracted much criticism. Rather it was the era in which *Corbett* was decided that made him lay down the biological test. Further, his Lordship also correctly stated that judges should be sensitive to social developments and must reflect them in their opinions, particularly in family proceedings, if the law was to meet the needs of society.

A further appeal was unanimously dismissed by the House of Lords.[48] The House of Lords made it clear that it was conscious of the humanitarian consideration underlying Mrs Bellinger's claim and was also aware of an international trend towards recognising gender re-assignment and not condemning post-operative transsexual people to live in an "intermediate zone",[49] not quite one gender or the other. It also acknowledged that in England gender re-assignment had already received legal recognition for some purposes, for example, for the purpose of the discrimination legislation.[50] However, the House of

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[48] [2003] UKHL 21; [2003] 2 AC 467; [2003] 2 All ER 593.

[49] As was described by the ECHR in *Goodwin v United Kingdom* (2002) 35 EHRR 18.

[50] See s 2A of the Sex Discrimination Act 1975.

Lords said recognising Mrs Bellinger as a female for the purposes of s 11(c) of the Matrimonial Causes Act 1973 would result in giving the expression "male" and "female" in that Act a novel, extended meaning, namely that a person could be born with one sex but later became, or became regarded as a person of the opposite sex. This would represent a major change in the law, having far reaching ramifications. Such a major change would raise issues whose solution required extensive enquiry and the need to involve public consultation and discussion. These issues, which included questions of social policy and administrative feasibility, were not suitable for determination by the courts and court procedures. The matter was said to be pre-eminently a matter for the Parliament.

However prior to the above House of Lords' decision, the case of *Goodwin v United Kingdom*[51] came before the ECHR, which gave its judgment in July 2002. Until the decision in *Sheffield & Horsham v United Kingdom*,[52] the ECHR had found that the United Kingdom's treatment of post-operative transsexual people was within the country's margin of appreciation and that this treatment did not violate the Convention. However in *Goodwin* case, the court took the view that the sands of time had run out. The United Kingdom's margin of appreciation no longer extended to declining to give legal recognition to all cases of gender re-assignment. The court held unanimously that the United Kingdom was in breach of Articles 8 and 12 of the Convention.

In *Goodwin v United Kingdom*,[53] Christine Goodwin was a post-operative male to female transsexual.[54] She complained that she, as a post-operative transsexual, was not treated fairly by the laws or practices of the United Kingdom in the following matters:

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[51] (2002) 35 EHRR 18.
[52] (1998) 27 EHRR 163.
[53] *Supra* n 49.
[54] Note that this is not a "marriage case".

(1) she was unable to pursue a claim for sexual harassment in an employment tribunal because she was considered in law to be a man;
(2) she was not eligible for a state pension at 60, the age of entitlement for women; and
(3) she remained obliged to pay the higher car insurance premiums applicable to men.

In many instances, she had to choose between revealing her birth certificate or foregoing advantages conditional upon her producing her birth certificate. Her inability to marry as a woman seemed not to have been the subject of specific complaint by her. However in its judgment, the court expressed its views on this and other aspects of the lack of legal recognition of her gender re-assignment.

Some of the main points in the court's judgment can be summarised as follows. In the interests of legal certainty, foreseeability and equality before the law, the court should not depart, without good reason, from precedents laid down in previous cases. But the court must have regard to changing conditions within the respondent state and within contracting states generally. The court must respond to any evolving convergence on the standards to be achieved. A test of congruent biological factors could no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual. With increasingly sophisticated types of surgery and hormonal treatments, the principal unchanging biological aspect of gender identity was the chromosomal element. It was not apparent that this must inevitably be of decisive significance. The court recognised that it was for a contracting state to determine, amongst other matters, the conditions for a person claiming legal recognition as a transsexual to establish that gender re-assignment had been properly effected. But it found "no justification for barring the transsexual from enjoying the right to marry under any circumstances".[55]

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[55] *Supra* n 52 at para 103.

The above decision prompted three developments in the United Kingdom. First, in written answers to the House of Commons on 23 July 2002, the Parliamentary Secretary to the Lord Chancellor's Department noted that the inter-departmental working group on transsexual people had been reconvened. Its terms of reference included re-examining the implications of granting full legal status to transsexual people in their acquired gender. Secondly, the government announced on 13 December 2002 its intention to bring forward primary legislation which would allow transsexual people who could demonstrate they had taken decisive steps towards living fully and permanently in the acquired gender to marry in that gender. The legislation would also deal with other issues arising from the legal recognition of the acquired gender. The third development was that from the time of the *Goodwin* decision, those parts of English law which failed to give legal recognition to the acquired gender of transsexual persons would be in principle incompatible with Articles 8 and 12 of the Convention. Domestic law, including s 11(c) of the Matrimonial Causes Act 1973 would have to change.

Finally in June 2004, the English Parliament passed the Gender Recognition Act 2004.[56] Section 1 of this Act states that a person of either gender who is aged at least 18 may make an application for a gender recognition certificate on the basis of (a) living in the other gender, or (b) having changed gender under the law of a country or territory outside the United Kingdom. Such an application would be determined by a Gender Recognition Panel.[57] An important section to note is s 9 which generally states the consequences of issuing a gender recognition certificate. It states as follows:

> (1) Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is

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[56] Note that England passed the Gender Recognition Act eight years after Singapore amended its Women's Charter.

[57] See s 2 of the Gender Recognition Act on the criteria for the Panel to grant the application.

> the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).
>
> (2) Subsection (1) does not affect things done, or events occurring, before the certificate is issued; but it does operate for the interpretation of enactments passed, and instruments and other documents made, before the certificate is issued (as well as those passed or made afterwards).

Although s 9(1) states that a transsexual's "gender becomes for all purposes the acquired gender" once a full gender certificate is issued, reference would still have to be made to other English legislation in order to see whether the effect of the Act is reflected therein.

The first and foremost question is whether a transsexual, once having acquired the certificate, may marry in his or her acquired gender. For this reference must be made to the Marriage Act 1949. Part II of this Act provides for marriages according to the rites of the Church of England and Part III provides for marriages under the Superintendent Registrar's certificate. Section 5B (which falls under Part II) states in sub-s (1) that a clergyman is not obliged to solemnise the marriage of a person if the former reasonably believes that the person's gender has become the acquired gender under the Gender Recognition Act 2004. Further, sub-s (2) states that a clerk in Holy Orders of the Church of Wales is not obliged to permit the marriage of a person to be solemnised in the church or chapel of which the clerk is Minister if the clerk reasonably believes that the person's gender has become the acquired gender under the Gender Recognition Act 2004. However, Part III of this Act (marriages under the Superintendent Registrar's certificate) is silent on this matter. Thus, this means that a post-operative transsexual may marry under the Superintendent Registrar's certificate if he or she is not allowed to marry in the church.

Secondly, as mentioned earlier, one of the developments after *Goodwin* case is that those parts of English law that fail to give legal

recognition to the acquired gender of transsexuals, which include s 11(c) of the Matrimonial Causes Act 1973, would have to change. However, upon perusing s 11(c), it is observed that the provision is still the same as it was prior to the passing of the Gender Recognition Act. It is submitted that the legislature should amend this provision to give effect to the Gender Recognition Act. For example, it could be amended to read as follows:

> s 11 Grounds on which a marriage is void
>
> A marriage celebrated after 31 July 1971 shall be void on the following grounds only, that is to say -
>
> ...
>
> (c) that the parties are not male and female;
>
> ...
>
> For the purpose of paragraph (c), "male" and "female" includes reference to a transsexual in his or her acquired gender under the Gender Recognition Act 2004 at the time of marriage.

C. *Suitability of the Singapore and United Kingdom Approaches in Malaysia*

Having examined the legal developments in Singapore and the United Kingdom, the writer is of the opinion that the Singapore Women's Charter (s 12(2) and (3)) is more appropriate for Malaysia. The reason for preferring the Singaporean development over the United Kingdom development is because the amendment to the Women's Charter expressly permits a person who has undergone a GRS to marry in his or her acquired gender, thereby giving legal recognition to the rights of a transsexual. The development in England, on the other hand, is of a general nature as s 9 of the Gender Recognition Act basically lays down the consequences of a gender recognition certificate. No reference however is made to the right of a transsexual to marry in his acquired gender. Furthermore, s 11 of the Matrimonial Causes

Act 1973 will have to be amended to reflect the development in the Gender Recognition Act.

Therefore, the writer proposes that s 69 of the Malaysian Law Reform (Marriage and Divorce) Act 1976 be amended to read as follows:

(1) A marriage which takes place after the appointed date shall be void if –
   (a) ...
   (b) ...
   (c) ...
   (d) the parties are not respectively male and female.

(2) Notwithstanding subsection (1)(d), a marriage solemnised in Malaysia or elsewhere between a person who has undergone a sex re-assignment procedure and any person of the opposite sex is and shall be deemed always to have been a valid marriage.

(3) For the purpose of this section -
   (a) the sex of any party to a marriage as stated at the time of the marriage in his or her identity card issued under the National Registration Act 1959 (Revised 1972) shall be prima facie evidence of the sex of the party; and
   (b) a person who has undergone a sex-reassignment procedure shall be identified as being of the sex to which the person has been re-assigned.

IV. Right to Adoption

In Malaysia, there are primarily two statutes regulating adoption, namely the Registration of Adoptions Act 1952[58] and the Adoption Act 1952.[59] Adoption in Malaysia may either be *de facto* (or customary) or in accordance with statute. The Registration of Adoption Act 1952 provides for the registration of *de facto* or customary adoptions. There is no mention about restricting the provisions thereunder to non-Muslim children or non-Muslim prospective adoptive parents. Muslims may therefore register their customary adoptions under this Act. The issue that arises is whether a transsexual may adopt a child. Although there is no reference in the legislation to child adoption by a transsexual person, it is also not expressly prohibited under the current Malaysian laws.

A. *The Adoption Act 1952*

Section 3(2) of the Adoption Act 1952 provides that only one person can apply to the court for adoption, save where the application is made by two spouses jointly. There are therefore two scenarios under the Act:

1. *Sole applicant*

Assume that a transsexual is applying to the court for an adoption order. "Applicant" in s 2 of the Act means, *inter alia*, a person who is proposing to adopt, or who has adopted a child, whether in pursuance of an adoption order or otherwise. In this scenario, two issues may arise:

(i) What is the sex of a transsexual who has undergone a GRS for the purpose of adoption? Would he or she be

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[58] Act 253. Section 1(2) provides that the Act applies only to Peninsular Malaysia.

[59] Act 257. This Act applies only to Peninsular Malaysia and does not apply to Muslims. Sabah has the Adoption Ordinance 1960 (No 23 of 1960) and Sarawak, the Adoption Ordinance (Cap 91).

considered by the law to be in the acquired sex or the sex assigned at birth? This is an important issue, which leads to the next issue.

(ii) Section 4(2) of the Act states that an adoption order shall not be made in any case where the sole applicant is a male and the child in respect of whom the application is made is a female, unless the court is satisfied that there are special circumstances which justify as an exceptional measure the making of an order. Therefore, what would be the sex of a transsexual, who has undergone a GRS from a female to male, for the purpose of s 4(2)? Would he be considered a man now and thus not be allowed to adopt a female child, or would he still be considered a female and be allowed to do so, bearing in mind the recent High Court decision in *J-G*?

The court is cautious in issuing an adoption order. When an application for an adoption order is made, the court appoints a guardian *ad litem* of the child in respect of whom the application is made.[60] The duties of the guardian *ad litem* are laid down in s 13(1) of the Act, where it states that he shall investigate as fully as possible all the circumstances of the child and the applicant, and all other matters relevant to the proposed adoption, in order to safeguard the interests of the child before the court. The court will only make an adoption order when it is satisfied that the child will be well looked after by the applicant and that the adoptive home is suitable. If the court feels that the adoptive home is unsuitable, the court may if it considers it to be in the interests of the child, make an immediate order committing the child to the care of the Director-General of Social Welfare.

It is submitted that a transsexual applying to the court for an adoption order may be allowed to adopt a male child. However, where it concerns a female child, s 4(2) might be a hindrance.

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[60] Section 12(1) of the Adoption Act 1952.

2. *Joint applicants*

As mentioned in s 3(2), a joint application to adopt a child is only allowed if both the applicants are spouses. Hence the issue that arises is if one of the parties to the marriage is a transsexual who has undergone a GRS, would the court grant the adoption order? For example, if Jessie Chung and Joshua Beh applied to the court for an adoption order, would they succeed? The Malaysian courts have yet to decide on this issue. It is speculated that perhaps the court would first see whether the marriage is valid. In order to decide whether the marriage is valid, the court would apply either the biological test laid down in *Corbett* or the psychological test. If the court applies the former, the marriage would not be valid and consequently the couple would not be considered "spouses" for the purposes of adoption under this Act.

Nevertheless, at the end of the day, the court is most concerned about the interests of the child before it issues an adoption order. Thus, even if the court recognises the marriage of a post-operative transsexual, it will still appoint a guardian *ad litem* to investigate the home environment of the couple in order to see whether it is suitable for the child.

B. *The Registration of Adoptions Act 1952*

As said, the Registration of Adoptions Act 1952 provides for the registration of *de facto* or customary adoptions. The *Oxford Dictionary* defines *de facto* as "in fact; whether by right or not; as if". It is suggested that a transsexual who intends to adopt a child may adopt a child first, and two years later register the *de facto* adoption under this Act. Requirements as to the registration of such adoption are provided for under s 6(1) of the Act. They are:

(a) the child has to be below the age of 18 years;
(b) the child must never have been married;

(c) the child is in custody of and is being brought up, maintained and educated by the applicant or applicants as his, her or their own child under any *de facto* adoption; and
(d) the child has for a period of not less than two years continuously and immediately before the date of such application been in such custody and has been so brought up, maintained and educated.

Although there is no provision in the Registration of Adoptions Act 1952 similar to s 4(2) of the Adoption Act 1952 that prohibits a male applicant from adopting a female child, the effect of an adoption order under the Adoption Act is different from that of the registration of a *de facto* adoption under the Registration of Adoptions Act. Section 9 of the Adoption Act grants the adopter or adopters all rights and duties *vis-à-vis* the adopted child and *vice versa*, whereas the registration of a *de facto* adoption under the Registration of Adoptions Act does not have a similar effect. For example, s 9(1) of the Adoption Act provides that upon the adoption order being made, all rights, duties, obligations and liabilities of the natural parent or parents, guardian or guardians of the adopted child shall be extinguished and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock.

Another obstacle faced by a transsexual intending to register adoption under the Registration of Adoptions Act is s 11. This section stipulates that irrespective of whether the *de facto* adoption is registered or not, it shall be valid or invalid, whichever the case. Thus, if the adoption is valid *per se*, the omission to register it does not make it invalid. Likewise, if the adoption is invalid, its registration does not make it valid.[61] Thus, should in future a transsexual, who is refused by the Malaysian courts to adopt a child, decide to register a *de facto* registration under the Registration of Adoptions Act, the registration would still appear to have no legal effect in light of s 11.

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[61] See the case of *Re Loh Toh Met, Decd; Kong Lai Fong & Ors v Loh Peng Heng* [1961] 1 MLJ 234.

V. The Need to Amend the Existing Legislation

The issues highlighted above are only a drop in the ocean. There are many other dilemmas faced by the transsexual community in Malaysia. It is critical that the Malaysian government attempt to resolve the problems faced by the transsexual community in an objective and dignified manner. An important step that be taken by the government is to amend the existing legislation which affect the rights of the transsexuals, as was done in Singapore and the United Kingdom. In this respect, amendments to the existing statutes relevant to the three issues discussed above are suggested here.

First, the Births and Deaths Registration Act 1957 and the National Registration Act 1959 need to be amended in order to provide for recognition of post-operative transsexual's legal gender in the identification documents. This would remove many of the obstacles to their acceptance and integration as well as be in accordance with the needs and interests of the transsexual community. However the amendment may not be easily attained in light of the reply of the Home Minister to the Opposition Party's call in the Parliament to amend the law to allow transsexuals who have undergone GRS to have their MyKads corrected to reflect the change. The Home Minister replied as follows:[62]

> The power is here (Parliament), when everyone agrees to it. You can persuade the MPs but from what I have heard, you will have a tough time.

Secondly, the Law Reform (Marriage and Divorce) Act 1976 ("the LRA"), which provides the requirements for a valid marriage, should also be amended to permit transsexuals to marry in their acquired gender, as was done as regards the Singaporean Women's Charter in

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[62] Datuk Azmi Khalid, Home Minister, reported in the *New Straits Times* on 20 October 2005.

1996. This may be considered by many as a drastic and radical change to the biological test to determine the sex of the parties to a marriage as was laid down in *Corbett*. However, it is submitted that if the intended spouse of the transsexual is aware of the latter's GRS and has freely consented to the marriage, there should not be any legal bar to the marriage.

Thirdly, though this has not become an issue yet in Malaysia, it is submitted that transsexuals should be given the right to adopt a child. This, however, is subject to the court's satisfaction that the child will be well looked after by the transsexual. As mentioned earlier, under the Adoption Act 1952, whenever an application is made to the court for an adoption order, the court would appoint a guardian *ad litem* to investigate the home environment of the adoptive parent in order to see whether it is in the best interests of the child to be placed there.

Apart from the Parliament playing its role in reforming the law or introducing new laws to accommodate transsexual individuals, it is also the responsibility of the courts, law enforcers and society to create a safe social environment for all, including transsexuals.

VIII. Conclusion

In conclusion it is to be noted that medical science has advanced rapidly over the years, where an individual born in one sex may undergo a GRS to acquire a new gender. However, the law has not moved together with the advancement in the medical field in recognising the acquired gender of a post-operative transsexual. In 1990, in his dissenting judgment in *Cossey v United Kingdom*, Judge Martens summarised medical perception in these words: [63]

> Medical experts in this field have time and again stated that for a transsexual the "rebirth" he seeks to achieve with the

[63] (1990) 13 EHRR 622 at para 2.4.

> assistance of medical science is only successfully completed when his newly acquired sexual identity is fully and in all respects recognised by law. This urge for full recognition is part of the transsexual's plight.

Therefore, it is submitted that there is inconsistency in Malaysia where through its health services it provides full treatment for gender identity disorder but by its legal system it denies the desired recognition. Transsexuals in Malaysia, as Malaysian citizens, have the same rights as other Malaysians. They should not be treated as second class citizens. To continue to deny legal recognition to them is to encourage lack of respect for their dignity, privacy and rights. Living in a civilised society we should extend our circle of compassion and concern to all, regardless of sexual orientation, gender identity and social status.

The Public Authorities Protection Act 1948 – A Case for Repeal†

Sujata Balan*

I. Introduction

The Public Authorities Protection Act 1948 (Act 198)(Revised 1978) is a short Act containing only three sections. Its main provision is s 2 which prescribes a short limitation period of 36 months if an intended defendant is a public authority, and if the act, neglect or default complained of was done in the execution or intended execution of any written law or of a public duty or statutory duty or authority.

In this paper, the writer attempts a critical examination of the 1948 Act with the purpose of highlighting its anomalies and deficiencies and to put forward a case for its repeal.

II. Background

The Public Authorities Protection Act 1948, a Federal statute which applies throughout Malaysia, is a progeny of the (now repealed) Public Authorities Protection Act 1893 of England. Legislation based on the English Act of 1893 was first introduced in the Straits Settlements in 1912 as the Public Authorities Protection Ordinance (Straits Settlements Cap 14). Likewise, legislation in almost similar form was enacted in the Federated Malay States as a Federated Malay States Enactment

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