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## Case Comment: Corbett vs Corbett

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### INTRODUCTION

Corbett v Corbett is a family law divorce case in the United Kingdom that was heard in November and December 1969 and was referred to a court of binding precedent. It includes a February 1971 appeal-level referred decision that established a comprehensive, narrow legal set of conditions under which a very small minority of transgender people, that biologically born intersex, could qualify in the United Kingdom to be recognized as of their new sex. The decision upheld the long-held belief that any transgender marriage that did not meet such conditions was null and void (until later legislative change). It narrowly pre-dated a time of marital separation<sup>1</sup> with mutual consent as a normal excuse to dissolve a marriage in clear paper form, and Arthur Corbett, the plaintiff, pursued a method of dissolving his marriage which took place with all of the usual formalities to transgender model April Ashley (or Corbett),<sup>2</sup> who had brought a petition under the Matrimonial Causes Act 1965<sup>3</sup> for maintenance.

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<sup>1</sup> Melissa Heinig, 'A Guide to Different Types of Separation: Trial, Permanent, and Legal Separation' (*divorcenet*) <<https://www.divorcenet.com/resources/family/types-separation.htm>> accessed 15 October 2021

<sup>2</sup> *Ibid*

The husband's argument for annulling the marriage was based on the common belief that April remained a man despite changing her gender before the wedding. The marriage was declared invalid from the start by the court. The Court consulted a wide variety of medical experts on transgender people. Ashley was "properly identified as a male homosexual transsexuality," according to John Randell, the man who founded the first transgender clinic at Charing Cross Hospital, while other court doctors favoured the term "castrated male." 1st Lord Justice Ormrod, a lawyer, devised a medical 'test' and description to assess April Ashley's legal status. Ormrod defined sex as (i) chromosomal factors; (ii) gonadal factors (i.e. the presence or absence of testes or ovaries); (iii) genital factors (including internal sex organs); and (iv) psychological factors. Transsexualism was classified as a 'psychological cause.'

The Court ruled that it was impossible to change sex and plainly distinguished legal statuses for which gender, which could change, as appropriate (National Insurance) from those for which sex was the determining category, among which marriage was the most prominent. Marriage must always be between a man and a woman, according to the constitution. It went on to say that both were classified based on sex rather than gender. The ruling was then adopted and used to define transgender people's sex for a variety of purposes until the Gender Recognition Act of 2004<sup>4</sup> was enacted (which ultimately defined the sex of transgender people as whatever is on their birth certificate, until such point as a Gender Recognition Certificate amends the birth certificate; hence for those who do not possess such a certificate, nothing has changed since 1970). Alternative methods of obtaining birth certificate amendments for transgender and intersex persons ceased as a result of LJ Ormrod's decision.<sup>5</sup>

## **BACKGROUND**

The respondent (April Corbett/Ashely), a transsexual, had married the petitioner (Arthur Corbett), a transvestite (a man who likes to dress in a feminine manner), in a ceremony in Gibraltar on 10 September 1963. During this time, the petitioner was aware that the respondent had been born as a man and had undergone a sex-change operation. In early December, the

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<sup>3</sup> Matrimonial Causes Act 1965

<sup>4</sup> Gender Recognition Act 2004

<sup>5</sup> *Ibid*

respondent suddenly left the petitioner without any warning, ending their relationship and acknowledging the same through a letter dated 11 December 1963. Since their marriage in October, the parties had spent only 14 days together in all.<sup>6</sup> The petitioner did not take this letter very seriously and wrote two more letters in 1964 despite the respondent's total withdrawal from the relationship. The petitioner and respondent had no further contact until the petitioner was issued with originating summons on 16<sup>th</sup> February 1966 by respondent claiming maintenance under Section 22 of the Matrimonial Causes Act, 1965<sup>7</sup>. These proceedings reached the stage of filing affidavits but did not go any further. Divorce by mutual consent was not recognized by courts back then and on 18 May 1967, the petitioner filed this suit for a declaration that marriage was null and void.<sup>8</sup>

## ARGUMENTS

### **By the petitioner:**

- The petitioner held marriage to be void because the respondent was a person of the male sex when the marriage ceremony took place or alternatively, asked for a decree of nullity due to non-consummation of marriage.

### **By the respondent:**

- The respondent, in her answer, alleged that marriage had actually been consummated. Alternatively, she prayed for a decree of nullity on the ground of the petitioner's incapacity or wilful refusal to consummate the marriage. At a later stage in the trial, she made an amended pleading that the petitioner is barred from alleging that marriage is void or alternatively, the court ought to refuse to grant the declaratory order asked by the petitioner under its discretionary jurisdiction.

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<sup>6</sup> *Ibid*

<sup>7</sup> Matrimonial Causes Act 1965, s 22

<sup>8</sup> *Ibid*

- Since the respondent lived as a woman and was treated as a woman by society for many purposes, it would be unreasonable to treat her as a man for the sole purpose of marriage.

## LITERATURE REVIEW

The case of Corbett vs Corbett challenged the marriage rights of transsexuals in the United Kingdom. Prior to the judgment, in this case, there were many transsexuals who underwent sex-change operations or married the people of the the opposite sex. The law was silent on this subject. The court's remarks made it clear that marriage could only be a union of biological male and biological female as natural heterosexual intercourse was the key factor that distinguished the relationship of marriage from other social relationships. The court acknowledged that a person of one sex can have the desire to live as another sex or feel as if they belong to the other sex but held that this psychological factor did not change their biological sex which was fixed at birth. A medical surgery or use of hormones to develop the features of the desired sex was irrelevant as it could not change the sex that one had been assigned at birth. Court maintained that only the chromosomal, gonadal,, and genital factors are to be considered when determining the sex of someone.<sup>9</sup>

In United Kingdom it was the first case where the court was responsible for determining an individual's sexual identity. In previous such cases, the court had to base its decision on the incapacity or wilful refusal of the consummation of marriage by the parties involved. But in this case, the court noted that the legal validity of such a marriage and the capability on part of the respondent to consummate the marriage was dependent on her being a woman. It was observed that the respondent had been quite successful in leading life as a woman. She had worked as a female model, obtained a deed poll and passport in her new name as a woman, and was treated by the national insurance authorities as a woman for the purpose of insurance. Her mannerism and appearance were the same as a woman's. There was also evidence of several therapeutic interviews with the respondent with her doctor in which she had expressed great desire to be a woman and confessed that she had experienced it since she

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<sup>9</sup> *Ibid*

was a child. However, these facts were ignored by the court in giving its judgment. The respondent,, in this cas,e, was held to be a transsexual psychologically but her sexual identity was still considered to be a male.<sup>10</sup>

It was observed that just because a person wished to be a member of the opposite sex, it would not change their real sexual identity. If a person wished to be treated as a member of the the opposite sex for social purposes, it was the decision of the concerned authorities to make that choice as done by the national insurance. When it came to marriage, there was a fundamental difference between this relationship and other social relationships. The court was adamant that the the biological nature of a marital relationship was dependent on natural heterosexual intercourse which could not be achieved by any artificially constructed cavity. The court continuously referred to homosexual behavior as ‘sexual deviations’. Since the respondent was considered to be a man for the purpose of marriage, her marriage with the petitioner was also considered to be void ab initio. The court’s judgment was a step back for the entire LGBT+ community. The social and legal status of transsexuals was even worse after this judgment. Their sex was legally considered fixed at birth and they could not change it even if they had medical surgeries. It was only with the coming of the the Gender Recognition Act, 2004 that transsexuals won the right to marry a person of their choice and found legal recognition for their sexual identity.

## **RATIO DECIDENDI**

The court adjudged that though the respondent could be treated as a woman for some social purposes, the same could not extend to marriage. This was because her biological sex was not the essential factor in governing those relationships whereas marriage is based on the union of a man and a woman. The capacity of natural heterosexual intercourse between the parties of a marriage distinguished it from other social relationships and is its key factor. Keeping in mind the biological nature of marriage, it was held that based on the chromosomal, gonadal, and genital factors, the respondent was a male and though psychologically she was a transsexual, her opinion or even a medical surgery could not change her sexual identity. Thus, the

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<sup>10</sup> *Ibid*

respondent was held to be a man at all times, including the marriage ceremony, and the marriage between the petitioner and respondent was held to be void.

## ISSUES

Whether the natural right of transsexuals to marriage was recognized by the court?

## JUDGMENT

The court held that the respondent was a biological male at birth and incapable of consummating a marriage as intercourse using an artificially constructed cavity could not be regarded as natural intercourse or 'ordinary and incomplete' intercourse as noted in *D-E vs A-G*<sup>11</sup>. It was observed that the respondent could not be treated as a woman for the purpose of marriage and thus, the marriage was void ab initio. A decree of nullity was granted to the petitioner.<sup>12</sup>

## ANALYSIS

One of the biggest contributions of natural law to the legal system has been a culmination of some inalienable rights of individuals. It has given rise to the concept of 'natural rights of individuals that one enjoys simply by the virtue of being born a human. This is also highlighted by the Bill of Rights in America, Fundamental Rights in the Indian Constitution, and European Charter on Human Rights (ECHR). The court, in this case, held the marriage between the petitioner and respondent to be void on the ground that marriage could only be a union between a man and woman and the respondent being a biological male at birth is to be treated as a man in the context of marriage. This decision is in conflict with the principles of natural justice. Article 8<sup>13</sup> of the ECHR provides for the Right to Respect for private and family life and Article 12 provides the right to marry and establish a family.<sup>14</sup> Ulpian, a natural law philosopher had stated that natural law applied equally to all living creatures. Thus,

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<sup>11</sup> *D-E v A-G* (1845) 163 ER 1039

<sup>12</sup> *Ibid*

<sup>13</sup> European Charter on Human Rights 1950, art 8

<sup>14</sup> European Charter on Human Rights 1950, art 12

transsexuals are also entitled to enjoy the same right to privacy and marriage as other members of society.<sup>15</sup>

The court maintained that the respondent could live as a woman and be treated as a woman for the purpose of national insurance as per the choice of concerned authorities but she could not perform the essential role of a woman in marriage as there was a difference between sex and gender. Even though the medical report relating to the examination of the respondent's artificially constructed cavity noted it to be similar to a vagina and it was observed there was no obstacle on her part to sexual intercourse, the court held the respondent to be incapable of consummating the marriage. The sex-change operation undergone by the respondent and her desire to be a woman since childhood despite being brought up as a boy did not change the fact that her sex was fixed as biological male at birth and cannot be changed later.

This view taken by the court is in direct conflict with the rules of natural law. Ronald Dworkin, a natural law thinker advocated that the legal system should ensure human dignity which implies self-autonomy for individuals or the freedom to live one's life the way one wants. The autonomy or freedom in taking responsible decisions, freedom of speech, and right to privacy was at the focus of his legal philosophy. Refusal to give legal recognition to the sexual identity of the respondent for the purpose of marriage is in violation of this principle. As observed by another natural law theorist, Zeno, a man was a rational creature capable of regulating life and making decisions according to his innate reason or the law of his own nature. In this case, the respondent had been living as a woman, had undergone a sex change operation, and had been taking the female sex hormone to develop feminine features. She had worked as a female model successfully, obtained a passport in the name of April Ashley, and was also treated as a woman for insurance purposes. The intense desire and identification as a woman had been present in the respondent since her childhood. In doing so, she was following her own nature and expressing her sexual identity. The petitioner was aware of all the facts when he entered into marriage with the respondent. The ceremony took place with consent and full freedom of both parties. Then, the court's decision to hold the psychological factors to be irrelevant for

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<sup>15</sup> *Ibid*

determining the sex of the respondent and refusing to treat her as a woman as far as marriage is concerned goes against everything that natural law stands for. It is a violation of the right to privacy, dignity, life, marriage, and equality that are granted to individuals by natural justice. It took away the freedom that the respondent could exercise in making decisions about her own life.<sup>16</sup>

The court reasoned marriage to be a union of biological male and biological woman alone because it was the foundation on which the family and society are built. But the judges and jurists should be able to look beyond the social conditioning and norms to follow the principles of natural law. Natural justice is about embodying humanism in law<sup>17</sup> and giving importance to liberties and rationality of humans rather than divine or supernatural rules. Rudolf Stammler, an advocate for the revival of natural law theory, had noted that a fair law would aim to strike balance between the interests of the individual and society<sup>18</sup>. Everyone in society has an obligation to respect the rights and claims of others. The court's disregard for the respondent's sexual identity and limiting marriage to a union of biological male and female alone excludes homosexuals as well as transsexuals alienates them from the rest of the society and fails to harmonize their interests and rights with the rest of society. A just law should be the highest expression of a man's social life and aim at preserving the freedom of individuals rather than curtailing it. The court failed to recognize that transsexuals enjoy the natural right to marriage just as other members of society.<sup>19</sup>

## SUGGESTIONS

- Ormrod J dismissed the notion that a surgical operation could alter a person's sex with regard to marriage in *Corbett v Corbett*. Ashley was not a virgin for the intent of marriage in the eyes of the law. No artificially constructed body could fulfil the requirements of marriage, which was a heterosexual union of man and woman.

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<sup>16</sup> Morris R Cohen and others, *Readings in Jurisprudence And Legal Philosophy* (Little, Brown 1979)

<sup>17</sup> *Ibid*

<sup>18</sup> Rudolf Stammler, *Theory of Justice* (Gale, Making of Modern Law 2013)

<sup>19</sup> *Ibid*



- Psychological sex (gender) was considered meaningless if the chromosomes, gonads, and external genitalia were compatible at birth. Whereas gender identity might be permissible in other areas of law, sexual identity was the property of the marriage.
- The medical experts were split, and the judge dismissed Ashley's claim that she should be considered intersex and her psychological gender recognized. The judge specified how the medical evidence could be analyzed in order to produce a legal category, with an ostensibly biomedical judgement concealing common sense logic (the category true sex) and ordinary language assumptions. Despite the judge's denial that he intended to describe legal sex in the broadest sense, i.e., for all legal purposes, the judgement effectively established it.

## CONCLUSION

The judgment of the court, in this case, had a lasting negative impact on the rights of transsexuals in the United Kingdom. Before the judgment, transgender people were able to marry a person of the opposite sex even though the law was silent on it but the court's decision was a huge step back in securing rights for trans-genders and achieving equality. It set a legal precedent that barred them from marrying people of the opposite sex and their sex was fixed at the time of their birth. Even if they underwent a sex-change operation, the law still held them to be part of the sex group that they were assigned at birth. John Locke had stated that the purpose of the law and government was to protect the natural right of individuals but the case resulted in a reverse situation. The roots of natural law lie in morals and ethical values like justice, fairness and equality<sup>20</sup>. The exclusion of people from social institutions like marriage based on their sexual identity is neither ethical nor just. Fortunately, with the passing of the Gender Recognition Act, 2004 a person in the United Kingdoms can live according to their desired sex (includes the right to marry a person of the opposite sex), regardless of surgery. Though transsexuals still face social discrimination in the UK, their legal

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<sup>20</sup> Dr NV Pranjape, *Studies in Jurisprudence and Legal Theory* (9th edn, 2019)

machinery has incorporated provisions that confers equal rights on them and safeguard their interest.<sup>21</sup>

In India, the right to equality, freedom, privacy, expression, and marriage has been enshrined in Part III of the Constitution,<sup>22</sup> as Fundamental Rights and the Transgender Persons (Protection of Rights) Act, 2019<sup>23</sup> was passed by Parliament in November 2019. It gives valid recognition to the sexual identity of trans-people and includes provisions for obtaining a certificate with their new sexual identity.<sup>24</sup> However, marriage is still believed to be a union of a man and woman which does not permit same-sex marriages to be recognized by law. Currently, a petition is being entertained by the Supreme Court of the country to legalize same-sex marriages but it has been faced with severe vehemence and opposition from the government. The landmark judgment in K.S. Puttuswamy case,<sup>25</sup> was of great significance for recognition of a right to privacy in India and also led to the decriminalization of Section 377 of the Indian Penal Code that penalized gay sex. Despite these milestones, a lot of stigmas is associated with transgender people. It is not uncommon for them to be disowned by their parents and kicked into the streets. They are often victims of sexual harassment and still find it difficult to be accepted into society. The law needs to be more sensitive to the ground-level issues faced by them. It is not enough to enact laws that prohibit discrimination but the source of the discrimination should be addressed and eliminated. The equality that is enjoyed only by a few is no equality. It cannot be deemed as justice.

As noted by the theories and principles laid out by various natural law scholars mentioned above, natural law recognizes the rational ability of one's mind to regulate life and form decisions about one's life. The right to have autonomy over one's life is an essential ingredient of natural law. It seeks to align individual interests with that of society and grants basic fundamental rights to all individuals without any discrimination. Marriage is a social institution that can have a huge impact on one's life. All individuals have a natural right to the

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<sup>21</sup> *Ibid*

<sup>22</sup> Constitution of India, part III

<sup>23</sup> Transgender Persons (Protection of Rights) Act 2019

<sup>24</sup> *Ibid*

<sup>25</sup> *K S Puttaswamy (Retd) & Anr v Union of India & Ors* Writ Petition (Civil) No 494/2014

physical relationship, companionship, and comfort of marriage as per their choice.<sup>26</sup> No one can be denied this choice as per natural law. The inference drawn by the judge in this case from various medical tests in determining the sexual identity of a person is widely criticized today. The freedom, dignity, and sexual identity of the trans-community had been ignored. The court's decision did not conform to the principles of natural justice.

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<sup>26</sup> *Ibid*