CHAPTER 6

GENDER: EQUALITY/SAMENESS/DIFFERENCE

Gender, and its legal construction, is a focal point for feminist analysis. As will be seen from the case-law relating to transsexuals in the first part of this chapter, the law insists that – for certain purposes but not others – whilst medical science and technology can realign a person's physical attributes to bring them more in line with the person's psychological gender, the law will not recognise this change for the purposes of the law of marriage. Law thus *defines* gender. The manner in which law achieves this is revealed in Ormod LJ's judgment in *Corbett v Corbett*.[1] The case of *Corbett* has been followed in two cases which have come before the European Court of Human Rights under the European Convention on Human Rights and fundamental freedoms: *Rees v United Kingdom*[2] and *Cossey v United Kingdom*.[3] In the extract which follows, Professor Katherine O'Donovan examines the rationale for the decision in *Corbett v Corbett*.[4]

The gender issue is, however, far wider than the construction of gender by law. In every field of law and legal practice, the law is itself gendered. That is to say, that the law – whether developed through the courts under the common law, or enacted in legislative provisions, reflects the gender of those who have created it: men. Contract law, the criminal law, employment law, family and social welfare law, property law, the law of torts – in fact every aspect of law and legal reasoning – and jurisprudence – reflects the maleness of law.

From a feminist perspective, the law – in its predominantly male guise – excludes, marginalises and silences women. The law excludes women by adopting male standards and perceptions. For example, as will be seen from the readings, the law relating to rape, that most violative of male crimes, is cast in terms of sexual intercourse not violence. From the law's perspective what is of crucial importance in a rape trial is the conduct of the victim: did she, or did she not consent. Thus it is the victim's behaviour and personality and lifestyle which is critical to the finding of guilt or innocence. How can this be explained? Why is it that the law of rape, and the criminal proceedings related to rape, does not focus primarily on the conduct of the alleged rapist? As rape law is currently constructed, the victim of rape is very much the victim also of the legal system.[5] As another introductory example of this phenomenon, the law relating to pornography[6] is cast in terms of 'obscenity', not violence or the subordination or degradation of women or sexual harassment or sexual discrimination.

1 [1971] P 110; [1970] 2 All ER 654, *infra*.

2 [1986] 9 EHRR 56, *infra*.

3 [1991] 2 FLR 492, *infra*.

4 *Sexual Divisions in Law* (Weidenfeld & Nicolson, 1985), Chapter 3.

5 See further Chapter 9.

6 On which see Chapter 10.

As Lucinda Finlay's article, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*,[7] so cogently argues, the law is characterised by maleness: authoritative, conflictual, objective, rational and non-emotional. Law presents itself as gender-neutral, but analysis reveals that law is far from that. It is the task of feminist legal scholars to unmask the maleness of law, to attempt to break down the exclusionary and often-invisible barriers which the law creates to exclude, to ignore and to silence women.

In *The Mirror Tells Its Tale*,[8] Sheila Duncan examines the criminal law and reveals the manner in which the doctrine of consent (in relation to sexual intercourse) is overlaid with maleness. In its legal construction of consent, the law constructs sexuality and reinforces the idea that men are the true subjects of law: women merely 'the other'.

Professor Carol Gilligan's theory of moral development of boys and girls, developed in *In a Different Voice: Psychological Theory and Women's Development*,[9] is next considered. Professor Gilligan, an educational psychologist, analysed the differing moral and psychological approaches of boys and girls to problem-solving. Gilligan's studies portray girls as primarily concerned with relationships and the ethic of care, while the moral reasoning of boys is less interpersonal, more objective and logically rational. Gilligan's work has formed the focus for much debate, and disagreement, among feminist scholars, as the extracts in this chapter will reveal.

In *Portia in a Different Voice: Speculations on a Women's Lawyering Process*,[10] Carrie Menkel-Meadow provides a constructive analysis of the application of Gilligan's theory to the lawyering process, revealing the manner in which the traditionally (male) adversarial legal process might change by the greater inclusion of women's reasoning.

Leslie Bender, in *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*,[11] while recognising the controversial nature of Giligan's work for feminists, offers a constructive analysis. It is the author's belief that an ethic of care, if incorporated into the law, would transform both justice and law by lessening the 'adversarial, competitive, win-or-lose' ethos which currently characterises law.

Catharine MacKinnon's *On Sex Discrimination: Difference and Dominance*[12] represents a powerful critique of the 'sameness/equality/ difference' debate which had taken such a hold on feminist legal scholarship. For MacKinnon, a central difficulty with the debate lies in the unavoidable fact that whichever approach is postulated – sameness or difference – the referent for the analysis is always male. It is MacKinnon's thesis that the debate should be recast. Once it is recognised that the issue is one of hierarchy and (male) power, the debate can

7 (1989) 64 *Notre Dame Law Review*, 886, *infra*.

8 *Feminist Perspectives on the Foundational Subjects of Law* (Cavendish Publishing Ltd, 1996).

9 Harvard University Press, 1982.

10 (1985) *Berkeley Women's Law Journal* 39.

11 (1990) 15 *Vermont Law Review* 1.

12 *Feminism Unmodified* (Harvard University Press, 1987).

be reformulated in terms which explicitly recognise this in terms of male dominance and female subordination. MacKinnon's writing has mesmeric power and has attracted – perhaps more than any other feminist lawyer – both great critical acclaim and controversy even within the feminist legal movement. One critique levelled at Catharine MacKinnon's theory is that of 'essentialism'. That is to say, that it is alleged that in her writing about 'women', MacKinnon fails to acknowledge the multiciplicity of women and women's experience, as if all women are essentially white, middle-class and heterosexual.

Drucilla Cornell's book review of Catharine MacKinnon's *Toward a Feminist Theory of the State*[13] challenges MacKinnon's work on the basis that MacKinnon, in emphasising women's sexuality, portrays women as sexual objects and no more than that. In so doing, Cornell argues, MacKinnon is perpetuating the gender hierarchy which she seeks to dismantle, rather than challenging it.

In *Jurisprudence and Gender* Robin West analyses the ideas of autonomy and individualism and their conceptual counterparts, attachment and relatedness. Each of these concepts play a central role in liberal legal theory and critical legal theory.[14] Also analysed is the manner in which traditional liberal legal theory and critical legal theory, and indeed all 'traditional jurisprudence' is gendered: it is masculine and exclusionary. What is needed is a truly feminist jurisprudence and the eradication of the maleness of traditional jurisprudence in order that there may be developed a 'humanist jurisprudence' — a 'jurisprudence unmodified'.

Both Catharine MacKinnon's and Carol Gilligan's writings are critiqued in Deborah Rhode's article, *Jurisprudence and Gender*.[15] It is Rhode's contention that both authors fall into the trap of 'essentialism': MacKinnon in relation to her portrayal of women as 'one woman' and Gilligan as representing relational feminism as the predominant feminist model. Deborah Rhode calls for a more explicit recognition of women's distinctive and multifarious experience. In her view, no one theoretical stance can claim the intellectual high ground in theorising about women. What is needed is a recognition of the multiplicity and diversity within the feminist legal movement.

Angela Harris subjects Catharine MacKinnon's and Robin West's theses to critical scrutiny from the perspective of a black feminist lawyer. In *Race and Essentialism in Feminist Legal Theory*,[16] Harris argues that feminist legal theory is characterised by essentialism, a factor which causes feminist theory to be the voice of 'mostly white, straight, and socio-economically privileged', thus excluding the particular concerns of black women. Whilst white, heterosexual and economically privileged women experience discrimination from and subordination to men, black women have traditionally faced the double oppression of both sexism and racism. Harris calls for feminist jurisprudence to

13 (1990) 100 *Yale Law Journal*, 2247, *infra*.

14 On which see Chapter 8.

15 (1988) 38 *Journal of Legal Education* 38, *infra*.

16 (1990) 42 *Stanford Law Review*, 581, *infra*.

move beyond essentialism, into a theory which reflects the 'multiple consciousness' of all women.

In the extract from Patricia Cain's article, *Feminist Jurisprudence: Grounding the Theories*[17] the author approaches the gender issue from the perspective of a lesbian feminist. In Patricia Cain's analysis feminist jurisprudence has fallen into one of two traps. The first is assimilationist – that is to say the assumption that all women – irrespective of race, class or gender-orientation – can be subsumed under the label 'women'. The second is essentialism: the characterisation of all women as imbued with identical characteristics. Both approaches fail to reflect the diversity of women and women's experiences which must be incorporated within feminist jurisprudence.

In *Deconstructing Gender*,[18] Joan Williams is critical of 'difference feminism', and calls for a move away from the 'destructive debate' on difference and sameness. What is needed, the author argues is an approach which deinstitutionalises gender: which separates sex and gender and which analyses the false descriptions which are traditionally used to describe men and women, and most particularly women's employment.

GENDER DETERMINATION – BY LAW

Under English law, as currently endorsed by the European Court of Human Rights which adjudicates upon alleged violations of the European Convention on Human Rights and Fundamental Freedoms, gender is biologically determined at birth and cannot be altered subsequently. The seminal case which remains good authority for this proposition is that of *Corbett v Corbett*.[19] The parties to litigation had been through a ceremony of marriage in 1963. The issue before the court was whether the 'marriage' was legally valid. The respondent had been born male, but in 1960 had undergone a sex-change operation, since which time he/she had lived as a woman. The Court of Appeal ruled that the marriage was void; the respondent – despite the surgical treatment – remained, in law, male. Ormrod LJ delivered the leading judgment:

> All the medical witnesses accept that there are at least four criteria for assessing the sexual condition of an individual. These are:
>
> (i) Chromosomal factors.
>
> (ii) Gonadal factors (ie presence or absence of testes or ovaries).
>
> (iii) Genital factors (including internal sex organs).
>
> (iv) Psychological factors.
>
> Some of the witnesses would add:
>
> (v) Hormonal factors or secondary sexual characteristics (such as distribution of hair, breast development, physique, etc. which are thought to reflect the balance between the male and female sex hormones in the body).

17 (1989) *Berkeley Women's Law Journal* 191, *infra*.

18 (1989) 87 *Michigan Law Review*, 797, *infra*.

19 [1971] P 110; [1970] 2 All ER 654.

It is important to note that these criteria have been evolved by doctors, for the purposes of systematising medical knowledge and assisting in the difficult task of deciding the best way of managing the unfortunate patients who suffer, either physically or psychologically, from sexual abnormalities. As Professor Dewhurst observed, 'we do not determine sex – in medicine we determine the sex in which it is best for the individual to live'. These criteria are, of course, relevant to, but do not necessarily decide, the legal basis of sex determination.[20]

The fundamental purpose of law is the regulation of the relations between persons and the state or community. For the limited purposes of this case, legal relations can be classified into those in which the sex of the individuals concerned is either irrelevant, relevant or an essential determinant of the nature of the relationship. Over a very large area the law is indifferent to sex. It is irrelevant to most of the relationships which give rise to contractual or tortious rights and obligations, and to the greater part of the criminal law. In some contractual relationships, eg life assurance and pensions schemes, sex is a relevant factor in determining the rate of premium or contributions. It is relevant also to some aspects of the law regulating conditions of employment and to various state run schemes such as national insurance, or to such fiscal matters as selective employment tax. It is not an essential determinant of the relationship in these cases because there is nothing to prevent the parties to a contract of insurance or a pension scheme from agreeing that the person concerned should be treated as a man or as a woman, as the case may be. Similarly, the authorities, if they think fit, can agree with the individual that he shall be treated as a woman for national insurance purposes, as in this case. On the other hand, sex is clearly an essential determinant of the relationship called marriage because it is and always has been recognised as a union of man and woman. It is the institution on which the family is built, and in which the capacity for natural heterosexual intercourse is an essential element. It has, of course, many other characteristics, of which companionship and mutual support is an important one, but the characteristics which distinguish it from all other relationships can only be met by two persons of opposite sex. There are some other relationships such as adultery, rape and gross indecency in which, by definition, the sex of the participant is an essential determinant.

Since marriage is essentially a relationship between man and women, the validity of the marriage in this case depends, in my judgment, upon whether the respondent is or is not a woman. I think, with respect, that this is a more precise way of formulating the question than that adopted in paragraph two of the petition, in which it is alleged that the respondent is a male. The greater, of course, includes the less but the distinction may not be without importance, at any rate, in some cases. 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 tests, and if all three are congruent, determine the sex for the purpose of marriage

20 *Ibid*, p 100, D–G.

accordingly, and ignore any operative intervention. The real difficulties, of course, will occur if these three criteria are not congruent. This question does not arise in the present case and I must not anticipate, but it would seem to me to follow from what I have just said that the greater weight would probably be given to the genital criteria than to the other two. This problem and, in particular, the question of the effect of surgical operations in such cases of physical intersex, must be left until it comes for decision. My conclusion, therefore, is that the respondent is not a woman for the purposes of marriage but is a biological male and has been so since birth. It follows that the so-called marriage is void.[21]

The precedent set by *Corbett* has been followed by two cases which ultimately went to the European Court of Human Rights, following a petition under the European Convention on Human Rights and Fundamental Freedoms, alleging violation of the right to privacy (Article 8) and the right to marry and found a family (Article 12). Extracts from the judgments explain the English law and reveal the approach adopted by the European Court.

Article 8

1. Everyone has the right to respect of or 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 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

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.

Rees v United Kingdom[22]

B. Compliance with Article 8

Transsexualism is not a new condition, but its particular features have been identified and examined only fairly recently. The developments that have taken place in consequence of these studies have been largely promoted by experts in the medical and scientific fields who have drawn attention to the considerable problems experienced by the individuals concerned and found it possible to alleviate them by means of medical and surgical treatment. The term 'transsexual' is usually applied to those who, whilst belonging physically to one sex, feel convinced that they belong to the other; they often seek to achieve a more integrated, unambiguous identity by undergoing medical treatment and surgical operations to adapt their physical characteristics to their psychological nature. Transsexuals who have been operated upon thus form a fairly well defined and identifiable group.

In the United Kingdom no uniform, general decision has been adopted either by the legislature or by the courts as to the civil status of postoperative transsexuals. Moreover, there is no integrated system of civil status registration, but only separate registers for births, marriages, deaths and adoption. These record the

21 *Ibid*, pp 105 B–106 F.

22 [1986] 9 EHRR 56.

> relevant events in the manner they occurred without, except in special circumstances, mentioning changes (of name, address, etc) which in other States are registered.
>
> However, transsexuals, like anyone else in the United Kingdom, are free to change their first names and surnames at will. Similarly, they can be issued with official documents bearing their chosen first names and surnames and indicating, if their sex is mention at all, their preferred sex by the relevant prefix (Mr, Mrs, Ms or Miss). This freedom gives them a considerable advantage in comparison with States where all official documents have to conform with the records held by the registry office.
>
> Conversely, the drawback – emphasised by the applicant – is that, as the country's legal system makes no provision for legally valid civil status certificates, such persons have on occasion to establish their identity by means of a birth certificate which is either an authenticated copy of or an extract from the birth register. The nature of this register, which furthermore is public, is that the certificates mention the biological sex which the individuals had at the time of their birth. The production of such a birth certificate is not a strict legal requirement, but may on occasion be required in practice for some purposes.
>
> It is also clear that the United Kingdom does not recognise the applicant as a man for all social purposes. This, it would appear that, at the present stage of the development of United Kingdom law, he would be regarded as a women, *inter alia*, as far as marriage, pension rights and certain employments are concerned. The existence of the unamended birth certificate might also prevent him from entering into certain types of private arrangements as a man.
>
> For the applicant and the Commission this situation was incompatible with Article 8, there being in their opinion no justification for it on any ground of public interest. They submitted that the refusal of the Government to amend or annotate the register of births to record the individual's change of sexual identity and to enable him to be given a birth certificate showing his new identity cannot be justified on any such ground. Such a system of annotation would, according to the applicant, be similar to that existing in the case of adoptions. The applicant and the Commission pointed to the example of certain other Contracting States which have recently made provision for the possibility of having the original indication of sex altered from a given date. The Commission additionally relied on the fact that the United Kingdom, through its free national health service, had borne the costs of the surgical operations and other medical treatment which the applicant had been enabled to undergo. They considered that this medical recognition of the necessity to assist him to realise his identity must be regarded as a further argument for the legal recognition of the change in his sexual identity; failure to do so had the effect that the applicant was treated as an ambiguous being.
>
> The Court is not persuaded by this reasoning.[23]

The Court accepted the Government's view that the changes necessary to respect Mr Rees' rights could not be justified in the public interest, and that given the broad band of discretion given to the State in this matter, there was no breach of Article 8. On the alleged violation of Article 12, the Court's judgment was terse:

23 Paras 38–42.

The applicant complained of the undisputed fact that, according to the law currently in force in the United Kingdom, he cannot marry a woman. He alleged a violation of Article 12, which provides:

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

The Government contested this: the Commission was divided between two conflicting views.

In the Court's opinion, the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 is mainly concerned to protect marriage as the basis of the family.

Furthermore, Article 12 lays down that the exercise of this right shall be subject to the national laws of the Contracting States. The limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of this right is impaired. However, the legal impediment in the United Kingdom on the marriage of persons who are not of the opposite biological sex cannot be said to have an effect of this kind.

There is accordingly no violation in the instant case of Article 12 of the Convention.

Cossey v United Kingdom[24]

The applicant's allegations were contested by the Government. A majority of the Commission expressed the opinion that there had been a violation of Article 12, but not of Article 8.

The Court was confronted in the *Rees* case with issues akin to those arising in the present case. It therefore has to determine whether the two cases are distinguishable on their facts, or whether it should depart from the judgment which it gave in the former case on 17 October 1986 [1987] 2 FLR 111; 'the *Rees* judgment'.

1. Is the present case distinguishable on its facts from the *Rees* case?

In the view of the applicant and certain members of the Commission, the present case was distinguishable on its facts from the *Rees* case, in that, at the time of their respective applications to the Commission, Miss Cossey had a male partner wishing to marry her whereas Mr Rees did not have a female partner wishing to marry him. Reference was also made to the ceremony of marriage between the applicant and Mr X which, although the marriage was declared void, was said to underline her wish to marry.

The Court is not persuaded that this difference is material. In the first place, the fact that Mr Rees had no such partner played no part in the Court's decisions, which were based on a general consideration of the principles involved. In any event, as regards Article 8, the existence or otherwise of a willing marriage partner has no relevance in relation to the contents of birth certificates, copies of which may be sought or required for purposes wholly unconnected with marriage. Again, as regards Article 12, whether a person has the right to marry depends not on the existence in the individual case of such a partner or a wish to marry, but on whether or not he or she meets the general criteria laid down by law.

24 [1991] 2 FLR 492.

Reliance was also placed by the applicant on the fact that she is socially accepted as a woman, but this provides no relevant distinction because the same was true, *mutatis mutandis*, of Mr Rees. Neither is it material that Miss Cossey is a male-to-female transsexual, whereas Mr Rees is a female-to-male transsexual: thus – the only other factual difference between the two cases – is again a matter that had no bearing on the reasoning in the *Rees* judgment.

The Court thus concludes that the present case is not materially distinguishable on its facts from the *Rees* case.

II Should the Court depart from its *Rees* judgment?

The applicant argued that, in any event, the issues arising under Articles 8 and 12 deserved reconsideration.

It is true that, as she submitted, the Court is not bounds by its previous judgments; indeed, this is borne out by r 51(1) of the Rules of Court. However, it usually follows and applies its own precedents, such a course being in the interest of legal certainty and the orderly development of the Convention case law. Nevertheless, this would not prevent the Court from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so. Such a departure might, for example, be warranted in order to ensure that the interpretation of the Convention reflects societal changes, and remains in line with present day conditions.

A. Alleged violation of Article 8

The applicant asserted that the refusal to issue her with a birth certificate showing her sex as female constituted an 'interference' with her right to respect for her private life, in that she was required to reveal intimate personal details whenever she had to produce a birth certificate. In her view, the Government had not established that this interference was justified under Article 8(2).

On this point, the Court remains of the opinion which it expressed in the *Rees* judgment: refusal to alter the register of births, or to issue birth certificates whose contents and nature differ from those of the original entries, cannot be considered as an interference. What the applicant is arguing is not that the State should abstain from acting, but rather that it should take steps to modify its existing system. The question is, therefore, whether an effective respect for Miss Cossey's private life imposes a positive obligation on the United Kingdom in this regard.

As the Court has pointed out on several occasions, notably in the *Rees* judgment itself, the notion of 'respect' is not clear cut, especially as far as the positive obligations inherent in that concept are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention.

In reaching its conclusion in the *Rees* judgment that no positive obligation of this kind now in issue was incumbent on the United Kingdom, the Court noted, *inter alia*, the following points: [25]

(a) The requirement of striking a fair balance could not give rise to any direct obligation on the respondent State to alter the very basis of its system for the

25 At pp 121–122, paras 42–44.

registration of births, which was designed as a record of historical facts, by substituting therefore a system of documentation, such as that used in some other Contracting States, for recording current civil status.

(b) An annotation to the birth register, recording Mr Rees' change of sexual identity, would establish only that he belonged thenceforth – and not from the time of his birth – to the other sex. Furthermore, the change so recorded could not mean the acquisition of all the biological characteristics of the other sex. In any event, such an annotation could not, without more, constitute an effective safeguard for ensuring the integrity of his private life, as it would reveal the change in question.

(c) That change, and the corresponding annotation, could not be kept secret from third parties without a fundamental modification of the existing system for maintaining the register of births, which was accessible to the public. Secrecy could have considerable unintended results and could prejudice the purpose and function of the register by, for instance, complicating factual issues arising in the fields of family and succession law. It would also take no account of the position of third parties, in that they would be deprived of information which they had a legitimate interest to receive.

The Court, having concluded that there were no material differences between the *Rees* case and the instant case, ruled that there had been no violation of Article 8. The Court proceeded, however, to make the following observation:

The Court would, however, reiterate the observations it made in the *Rees* judgment. It is conscious of the seriousness of the problems facing transsexuals and the distress they suffer. Since the Convention always has to be interpreted and applied in the light of current circumstances, it is important that the need for appropriate legal measures in this area should be kept under review.

B. Alleged violation of Article 12

In reaching its conclusion in the *Rees* judgment that there had been no violation of Article 12, the Court noted the following points:

(a) The right to marry, guaranteed by Article 12, referred to the traditional marriage between persons of opposite biological sex. This appeared also from the wording of the article, which made it clear that its main concern was to protect marriage as the basis of the family.

(b) Article 12 laid down that the exercise of the right to marry shall be subject to the national laws of the Contracting States. The limitations thereby introduced must not restrict or reduce the right in such a way, or to such an extent, that the very essence of the right was impaired. However, the legal impediment in the UK on the marriage of persons who were not of the opposite biological sex could not be said to have an effect of this king.

Miss Cossey placed considerable reliance, as did the Delegate of the Commission, on the fact that she could not marry at all: as a woman, she could not realistically marry another woman and English law prevented her from marrying a man.

In the latter connection, Miss Cossey accepted that Article 12 referred to marriage between a man and a woman, and she did not dispute that she had not acquired all the biological characteristics of a woman. She challenged, however, the adoption in English law of exclusively biological criteria for determining person's sex for the purposes of marriage and the Court's endorsement of that situation in the *Rees* judgment, despite the absence from Article 12 of any indication of the criteria to be applied for this purpose. In her submission, there was no good reason for not allowing her to marry a man.

> As to the applicant's inability to marry a woman, this does not stem from any legal impediment and, in this respect, it cannot be said that the right to marry has been impaired as a consequence of the provisions of domestic law.
>
> As to her inability to marry a man, the criteria adopted by English law are in this respect in conformity with the concept of marriage to which the right guaranteed by Article 12 refers.
>
> Although some Contracting States would not regard as valid a marriage between a person in Miss Cossey's situation and a man, the developments which have occurred to date cannot be said to evidence any general abandonment of the traditional concept of marriage. In these circumstances, the Court does not consider that it is open to it to take a new approach to the interpretation of Article 12 on the point at issue. It finds, furthermore, that attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of biological criteria for determining a person's sex for the purposes of marriage, this being a matter encompassed within the power of the Contracting States to regulate by national law the exercise of the right to marry.
>
> The Court thus concludes that there is no violation of Article 12.

In spite of the decision, no fewer than eight judges issued partly or fully dissenting opinions in respect of the judgment, thus suggesting that before too much longer the court will require the United Kingdom to relax its law.

Professor Katherine O'Donovan[26] examined the issues raised in *Corbett v Corbett* in the following manner.

LEGAL CONSTRUCTION OF SEX AND GENDER[27]

Katherine O'Donovan

> ... Gender is the term used to denote the social meaning of sex categorisation. Sex is determined through physical assessment; gender refers to the social consequences for the individual of that assessment. Gender stereotypes embody society's view of appropriate behaviour for men and women. These take the form of gender roles, reinforced by law, thorough which individuals conform to their label and to the community's conventions. Gender identity is the psychological experience of being female or male for the individual; it is the sense of oneself as belonging to one gender category ... [28]
>
> *Legal Definitions of Sex*
>
> Legal classification of women and men as belonging to two different and separate groups follows from biological and social classifications. Biology forms the material base on which an elaborate system of social and legal distinction is built. As has already been shown, medical research no longer justifies the use of biology as support for treating the social or legal categories woman and man as opposite and closed. Nevertheless the law continues to classify human beings as if there were two clear divisions into which everyone falls on an either/or basis. In general the way in which this occurs is where legislation uses a classificatory scheme based on sex. A criminal, victim, employee, recipient of public benefit, taxpayer may be specified as belonging to one sex category only. The courts are

26 Currently Professor of Law, Queen Mary and Westfield College, University of London.

27 Katherine O'Donovan, *Sexual Divisions in Law* (Weidenfeld & Nicolson, 1985) Chapter 3.

28 *Ibid*, p 62.