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TIME FOR CHANGE: A CALL FOR THE LEGAL RECOGNITION OF TRANSSEXUAL AND OTHER TRANSGENDER PERSONS IN HONG KONG

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*This is the second of two articles by the author on the law relating to transgender persons in Hong Kong. The first article, which appeared in Volume 34(2) (2004) of this journal, examined in detail the current administrative and legal status of Hong Kong's transgender persons. This article considers how the present, unsatisfactory situation could be challenged through the courts or changed through legislative reform. First, the article examines the potential of judicial review proceedings under the Hong Kong Bill of Rights Ordinance and the Basic Law against the Hong Kong authorities' refusal to allow transgender persons to marry in their chosen gender or to amend their birth certificates. This section draws heavily on international and comparative case law, and in particular the landmark decisions of the European Court of Human Rights in *Goodwin v United Kingdom* and *I v United Kingdom* (2002). Concluding that there is a strong case to be argued under the right to marry, but that litigation is unlikely to provide a comprehensive solution to the problems faced by Hong Kong's transgender persons, the article then calls for full legal recognition to be granted to them through legislative means, and considers which of several models (focusing on Singapore, Japan and the United Kingdom) might be most suitable for Hong Kong.*

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Introduction

For over 20 years, transgenderism¹ has been recognised by Hong Kong's medical profession, and the Hong Kong government has provided public funding for its treatment through a specialist Gender Identity Clinic at Queen Mary Hospital. Such funding covers counselling and, for those who proceed further, the provision of gender reassignment surgery,² which aims to bring a transgender person's physical self in alignment with their psychological gender identity. Some estimates put the number of transgender persons in Hong Kong at 3,000.³ Of those, it is known that over 50 persons have undergone gender reassignment surgery to date through the Gender Identity Clinic at Queen Mary Hospital.⁴ Many more have undergone surgery privately, both in Hong Kong and, more commonly, overseas. In addition, various administrative concessions are made to facilitate the daily lives of those transgender persons who have completed gender reassignment surgery (frequently referred to as "post-operative transsexual persons"). These concessions include the reissue of identity cards, passports, driving licences and other documentation in their chosen gender. However, despite living permanently in their chosen gender and being recognised in that gender by the medical profession, the health authorities and (in the case of post-operative transsexual persons) the administrative authorities, Hong Kong's transgender persons are never extended *legal* recognition of their chosen gender. In other words, they remain forever classified under the law as their biological sex, as designated at birth. This is even true of those who have undergone gender reassignment surgery.

The plight of Hong Kong's transgender persons recently came to the fore after the suicide of Louise Chan, a young transgender woman, on 21 September 2004. Louise first came to the public's attention when she was stalked and "outed" by the local media in 2003 resulting, amongst other things, in the loss of her job.⁵ Two days after Louise's death, another transgender woman,

¹ The medical term for transgenderism is "gender dysphoria" or "gender identity disorder". The term "gender dysphoria" is adopted, for example, by the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, DSM IV, 1994*. The term "gender identity disorder" is used, for example, by the Harry Benjamin International Gender Dysphoric Association, see <http://www.hbigda.org> (visited 10 Nov 2004).

² The Gender Identity Clinic at Queen Mary Hospital uses the term "sex reassignment surgery". Gender reassignment surgery is also still commonly referred to as a "sex change operation" in Hong Kong.

³ David Watkins, "Victories and Setbacks for Hong Kong's Transsexuals", *South China Morning Post* (hereinafter "SCMP"), 26 Oct 2004, p A40.

⁴ M.L. Ng and J.L.C. Ma, "Hong Kong" in Robert T. Francoeur (ed), *International Encyclopedia of Sexuality on the Web: Volume 4* (New York and London: Continuum Publishing Group, 2001), pp 216, 230 at <http://www.sexquest.com/IES4/> (visited 10 Nov 2004).

⁵ Ravina Shamdasani, "Cross-dresser Slams Media Stalking", *SCMP*, 26 May 2003, p C3; and Benjamin Wong, "Suicide of Transsexual Triggers Activists' Plea for Better Support", *SCMP*, 22 Sept 2004, p C4.

Sasha Moon, also committed suicide.⁶ A whole host of press reports and radio programmes on transgender related matters has followed. Whilst it is lamentable that it has taken two such sad events to focus public attention on this issue, it is hoped that Louise Chan's and Sasha Moon's legacies are to have raised greater public awareness and understanding of the difficult situation faced by transgender persons in Hong Kong. This, in due course, will lead to full recognition of their chosen gender in law. This article, together with an earlier article published by the author in the HKLJ, "Neither Here Nor There: The Current Status of Transsexual and Other Transgender Persons Under Hong Kong Law",⁷ aims to advance the debate and to precipitate change.

Significantly, Hong Kong is out of sync with the international trend to legally recognise transgender persons (or at least post-operative transsexual persons) in their chosen gender. The vast majority of countries in Europe, including most recently the United Kingdom, together with many states/provinces in the United States and Canada now grant legal recognition to transgender persons. Nor has this development been confined to the "western world". In the Asia-Pacific region, similar advances have also been made. In some cases, these have been achieved through judicial means. Courts in Australia,⁸ New Zealand,⁹ and the Philippines,¹⁰ for example, have recognised the chosen gender of transgender persons to different degrees. In other jurisdictions within the Asia-Pacific region, new legislation has been passed, or existing legislation amended, to grant complete or partial legal recognition to transgender persons. Thus many of Australia's states and territories,¹¹ New

⁶ Clifford Lo, "Transsexual leaps to her death in front of boyfriend", SCMP, 24 Sept 2004, p 3.

⁷ 34 HKLJ 245.

⁸ In Australia, post-operative transsexual persons have been recognised in their chosen gender for the purposes of marriage (*Attorney General for the Commonwealth v "Kevin and Jennifer" & Human Rights and Equal Opportunity Commission* [2003] FCA 94 (hereinafter "Kevin and Jennifer"), available at <http://www.austlii.edu.au/> (visited 10 Nov 2004)); the criminal law (*R v Cogley* 799 VR 799; *R v Harris and McGuinness* 17 NSWLR 158); and social security law (*Secretary, Department of Social Security v SRA*, [1993] 118 ALR 467). In one of the rare cases to also consider the legal status of a pre-operative transsexual person, the court in *R v Harris and McGuinness* held that such a person should be regarded as their biological sex, not their chosen gender.

⁹ In New Zealand, post-operative transsexual persons have been recognised in their chosen gender for the purpose of marriage, *Attorney General v Otahuhu Family Court* [1995] NZLR 603.

¹⁰ In the Philippines, the courts have granted full legal recognition to post-operative transsexual persons by ordering the authorities to amend their birth certificate in individual cases. For example, *In the Matter of Change of the Entries as to Name and Sex in the Certificate of Live Birth from Rommel Jacinto Dantes Silverio to Mely D Silverio and from Male to Female*, SP Case No 02-1055207, Republic of the Philippines, National Capital Judicial Region, Regional Trial Court, Branch VIII, Manila (4 Jun 2003), one of several successful petitions on file with the author, kindly provided by Attorney Benito Cuesta of Cuesta & Associates, Manila, the Philippines. See also "UP Prof: From Rommel to Mely", *Philippine Star News*, 2 Aug 2003, p 1. The case of *Mely Silverio* is, however, currently under appeal.

¹¹ Gender Reassignment Act 2000 (Western Australia); Births, Deaths and Marriages Registration Amendment Act 1997 (Northern Territory); Births, Deaths and Marriage Registration Act 1997 (Australian Capital Territory); Births, Deaths and Marriages Registration Act 1995 (New South Wales); and Sexual Reassignment Act 1988 (South Australia).

Zealand,¹² Singapore,¹³ and most recently Japan,¹⁴ have all legislated in this field. There are also reports of administrators in certain provinces of the People's Republic of China granting full legal recognition to transgender persons, including for the purpose of marriage.¹⁵

This article considers how the unsatisfactory legal status of transgender persons in Hong Kong might be challenged through the courts or changed through legislative reform. First, it examines the potential of judicial review proceedings under the Hong Kong Bill of Rights Ordinance ("BORO")¹⁶ and the Basic Law,¹⁷ against the authorities' refusal to allow transgender persons to marry in their chosen gender (or to recognise the validity of such marriages), and their refusal to amend the birth certificates of transgender persons. This section draws heavily on international and comparative case law, in particular the landmark decisions of the European Court of Human Rights ("ECHR") in *Goodwin v United Kingdom* and *I v United Kingdom* (collectively referred to as "*Goodwin*"),¹⁸ in which the United Kingdom was held to be in breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention") for maintaining the very same policies as those in Hong Kong. Concluding that there is a strong case under the right to marry, but that litigation is unlikely to provide a comprehensive solution to the problems faced by Hong Kong's transgender persons, the article then calls for full legal recognition to be granted to them through legislative means, and considers which of several models (focusing on Singapore, Japan and the United Kingdom) might be most suitable for Hong Kong.

Understanding the Terminology

In this article, the term "transgender" is used as an umbrella term for all those persons who have a deep conviction that their biological sex, as designated at birth, is incompatible with their gender, that is, their psychological or inner sense of being male or female, and who have an overwhelming desire *permanently* to live and function in the opposite gender to their biological sex (their

¹² Births, Deaths and Marriages Registration Act 1995.

¹³ Women's Charter Amendment Act 1996.

¹⁴ Law Concerning Special Cases In Handling Gender For People With Gender Identity Disorder. This came into effect on 16 Jul 2004.

¹⁵ Chan Siu-Sin, "Wedding Belle", SCMP, 3 May 2004, p 5; Ray Cheung "Transsexual Ties the Knot after Gender Approval", SCMP, 18 Mar 2004, p A8; and Alice Yan, "Transgender Man First to Legally Wed", SCMP, 3 Jan 2004, p 4.

¹⁶ Hong Kong Bill of Rights Ordinance (Cap 383), Laws of Hong Kong (hereinafter "BORO").

¹⁷ The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Cap 2101), Laws of Hong Kong (hereinafter the "Basic Law").

¹⁸ *Christine Goodwin v United Kingdom Government*, [2002] ECHR 28957/95; *I v United Kingdom Government*, [2002] ECHR 25680/94, judgment delivered 11 Jul 2002 (hereinafter collectively referred to as "*Goodwin*"). Note that all the ECHR decisions referred to in this article are also available at the ECHR's HUDOC database, at <http://www.echr.coe.int/Eng/Judgments.htm>.

“chosen gender”). It includes transsexual persons, who intend to undergo surgical procedures to bring their physical self in alignment with their gender identity (usually referred to as “pre-operative transsexual persons”), and those who have already undergone such gender reassignment surgery (“post-operative transsexual persons”). It also encompasses those other transgender persons who, for whatever reason, be it health-related or otherwise, do not intend to undergo surgery (although they may be receiving hormonal treatment), but who have nevertheless permanently adopted the opposite gender to their biological sex or have an overwhelming desire to do so. Sometimes, a broader meaning of the term “transgender” is adopted in the literature, which also includes cross-dressers (colloquially referred to as “transvestites”). However, as cross-dressers do not desire to live *permanently* in the opposite gender to their biological sex, and therefore do not seek legal recognition in that gender, their particular situation falls outside the scope of this article. Further, for the purpose of this article, those transgender persons who identify as men are referred to as “transgender men” (or “transsexual men” as appropriate), and those transgender persons who identify as women are referred to as “transgender women” (or “transsexual women” as appropriate). This gives due respect to a person’s gender identity, which is denied by the opposite classification in some of the literature.

Litigating for Change

No specific provision is made for transgender persons in Hong Kong’s legislation, nor have any precedents been established by the Hong Kong courts as to how laws of general applicability should be applied to the particular situation of transgender persons. The Hong Kong authorities’ policies with respect to transgender persons are therefore driven by their own interpretation of the relevant legislation (in the context of this article, the Marriage Ordinance, the Matrimonial Causes Ordinance and the Births and Deaths Registration Ordinance). Providing a transgender person is willing to front a test case,¹⁹ and brave the time, costs and inevitable publicity involved, then the authorities’ implementation of these policies in his or her particular case is capable of challenge by way of judicial review. With the growing confidence and activism of the transgender community in Hong Kong, the time might well be ripe to push for change through the courts in this way.

¹⁹ The applicant in judicial review proceedings must be able to show “sufficient interest in the matter to which the application related”, Ord 53, r 3(7) of the Rules of the Supreme Court (Cap 4), Laws of Hong Kong. Public interest litigation is not permitted in Hong Kong.

The following section examines the potential of judicial review proceedings against the Hong Kong authorities' policies as regards the marriage and birth certificates of transgender persons. The constitutionality of these policies is examined in the context of the right to marry, the right to privacy and the right to equality, which are variously guaranteed in the BORO and the Basic Law. These instruments are binding on both the government and public authorities.²⁰ If the authorities' interpretation of the law and consequent policies can be demonstrated as being incompatible with the BORO and/or the Basic Law, then the courts would be obliged to declare them invalid, as well as to grant remedies in the applicant's particular case.²¹

The potential success of judicial review proceedings relies on the courts' sympathetic interpretation of the three specified rights (the rights to marry, privacy and equality) *vis à vis* their application to the situation of transgender persons in Hong Kong. Importantly, the Hong Kong courts have held that, due to their constitutional character, a broader and more generous (purposive) approach should be adopted towards the interpretation of the BORO and the Basic Law than towards ordinary statutes.²² In particular, the courts have held that assistance may be gleaned from international and comparative case law (particularly from jurisdictions with an entrenched constitution) in the interpretation of the human rights provisions contained in the BORO and the Basic Law.²³ The following section therefore sets out the current situation in Hong Kong, then surveys relevant international and comparative jurisprudence, and finally discusses its likely impact on the Hong Kong courts in determining the issues. First, however, a few comments are pertinent on the general judicial climate in which any such proceedings would be brought.

²⁰ BORO, Art 7.

²¹ See further below, p 533.

²² See, for example, the oft-quoted passage from the Court of Appeal judgment in *R v Sin Yau-ming* [1991] 1 HKPLR 88, in which Silke VP (at 107), having remarked on the special constitutional character of the BORO, heralded the BORO as ushering in an "entirely new jurisprudential approach" under which the courts "are no longer guided by the ordinary canons of construction of statutes nor with the dictate of the common law". As regards the Basic Law, see *Ng Ka-Ling and others v Director of Immigration* [1999] 1 HKLRD 315, in which the Court of Final Appeal stated (at 340) that "what is set out in Chapter III [of the Basic Law] are the constitutional guarantees for the freedoms that lie at the heart of Hong Kong's separate system. The courts should give a generous interpretation to the provisions in Chapter III that contain these constitutional guarantees in order to give to Hong Kong residents the full measure of fundamental rights and freedoms so constitutionally guaranteed". Note that all the Hong Kong cases referred to in this article are also available at the Hong Kong Legal Information Institute at <http://www.hklii.org>.

²³ See *R v Sin Yau-ming* (n 22 above) in which Silke VP stated (at 105–107) that international and comparative case law, though not binding, would be considered "of the greatest assistance" and would be given "considerable weight". This view was upheld, albeit in more muted tones, by the Privy Council in *Attorney-General v Lee Kwong-kut; Attorney General v Lo Chak-man and another* [1993] 3 HKPLR 71, at 90–91.

Human Rights Litigation in the Current Judicial Climate

Since the following analysis draws heavily on international and comparative case law, it should be stated at this juncture that doubts have been expressed as to the receptiveness of the Hong Kong courts towards such materials in practice. In the context of the BORO litigation, various commentators found cause to remark in the late 1990s that the Hong Kong courts had a tendency to dismiss international and comparative case law as “unhelpful”,²⁴ and to look with “indifference and occasionally irritation”²⁵ on attempts to invoke such jurisprudence before them. However, recent case law seems to give more cause for optimism.²⁶ In the 2000s, the Hong Kong courts have clearly shown themselves to be receptive to arguments based on international and comparative materials in interpreting the human rights guarantees contained in the BORO and the Basic Law.²⁷ They have also kept an open mind to such arguments in interpreting human rights concepts in ordinary domestic legislation.²⁸ Thus it is to be hoped that the following analysis, which relies on the Hong Kong courts being persuaded by the ECHR decision in *Goodwin* as well as by some comparative case law, is not overly optimistic.

²⁴ Andrew Byrnes, “And Some Have Bills of Rights Thrust Upon Them: The Experience of Hong Kong’s Bill of Rights”, in Philip Alston, *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (Oxford: Oxford University Press, 1997), p 352.

²⁵ Johannes M.M. Chan, “Hong Kong’s Bill of Rights: Its Reception and Contribution to International and Comparative Jurisprudence” (1998) 47 *ICLQ* 306, at 314–315 and 355.

²⁶ In a review of the first 10 years’ of jurisprudence under the BORO in 2002, Byrnes expressed the view that the courts were becoming more receptive to arguments based on international and comparative case law, but was nevertheless under the impression that the courts tended to invoke such jurisprudence when it supported a restrictive reading of rights under the BORO and to put it to one side if it supported a broader reading of a right than they were inclined to adopt; Andrew Byrnes, “Jumpstarting the Hong Kong Bill of Rights in its Second Decade? The Relevance of International and Comparative Jurisprudence”, paper presented at *A Decade of the Bill of Rights and the ICCPR in Hong Kong: Review and Prospects*, 12 Jan 2002, Centre for Comparative and Public Law, University of Hong Kong, available at <http://www.hku.hk/ccpl/pub/conferences/index.html> (visited 10 Nov 2004), pp 3–4.

²⁷ See, for example, the Court of Final Appeal decision in *Chow Shun Yung v Wei Pih Stella and Another* (2003) HKFCA 18, in which Justice Ribeiro PJ stated (para 36) that the jurisprudence of the ECHR on Art 6(1) was “enlightening” and “should be given substantial weight in deciding the scope and effect of BORO Article 10”, and the Court of Final Appeal decision in *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793, in which Sir Anthony Mason NPJ (para 59), stated that, in interpreting Chapter III of the Basic Law and the provisions of BORO, “the court might consider it appropriate to take account of the established principles of international jurisprudence as well as the decisions of international and national courts and tribunals on like or substantially similar provisions in the ICCPR, other international instruments and national constitutions.” The recent decision of the Court of Appeal in *HKSAR v Leung Kwok Hung* HCMA 16/2003, judgment of 10 Nov 2004, drew *inter alia* on the jurisprudence of the ECHR and the decisions of the Supreme Court of Canada in identifying the appropriate limitations to be placed on the freedom of assembly under Art 27 of the Basic Law.

²⁸ See, for example, Hartman J’s references to the Human Rights Committee’s General Comment 18 (Non-Discrimination) and Convention on the Elimination of All Forms of Discrimination against Women in interpreting provisions of the Sex Discrimination Ordinance in *Equal Opportunities Commission v Director of Education*, [2001] 2 HKLRD 690.

It has been further noted that very few challenges have been successful under the BORO after the first few heady years of its introduction in 1991.²⁹ This situation has often been attributed to early statements made by the Privy Council in *Attorney-General v Lee Kwong-kut*,³⁰ in which it warned that disputes as to the effect of the BORO should not be allowed to “get out of hand” and stated that “it must be remembered that questions of policy remain primarily the responsibility of the legislature”.³¹ As various commentators remarked in the late 1990s, these observations had the effect of severely dampening the initial enthusiasm and innovativeness of Hong Kong’s judges towards the interpretation of the rights guaranteed by the BORO, and made the Hong Kong courts reluctant to subject the executive and legislature to any meaningful scrutiny against the standards of the BORO.³² The same reluctance might perhaps be expected of the courts in interpreting the Basic Law after the Court of Final Appeal’s decisions in the “right of abode cases” in 1999 were controversially “reinterpreted” by the Standing Committee of the National People’s Congress of the PRC (“NPCSC”), at the behest of the Hong Kong government.³³ Certainly, in the later “flag burning” case, the Court of Final Appeal was seen to “reposition” itself so as to avoid possible conflict with the Central government.³⁴ However, these were both politically sensitive cases, involving relations between the Hong Kong and Central governments. As Benny Tai has concluded, providing there is no conflict with “its more important constitutional position as the guardian of Hong Kong’s rule of law” (in terms of avoiding any further ingress on the judicial authority of the Hong Kong courts than that caused by the NPCSC’s reinterpretation in the right of abode cases), there is no cause to believe that the Court of Final Appeal has given up “its constitutional position as the guardian of human rights”.³⁵ Indeed, recent case law demonstrates that both the

²⁹ Byrnes (n 26 above), p 3.

³⁰ *Attorney General v Lee Kwong-kut* (n 23 above).

³¹ *Ibid.*, at 100.

³² Byrnes (n 24 above), pp 352 and 356; Chan (n 25 above), at 335; and Roda Mushkat, “International Law in HKSAR Courts” (1998) 28(2) *California Western International Law Journal*, 353, at 374–375.

³³ *Ng Ka-Ling and others v Director of Immigration* (n 22 above).

³⁴ *HKSAR v Ng Kung Sui and another* [1999] 3 HKLRD 907. In this case, the Court of Final Appeal, overruling the Court of Appeal, held that national and regional laws criminalising the desecration of the national flag constituted a valid restriction on the freedom of expression, as guaranteed by Art 27 of the Basic Law.

³⁵ Benny Y.T. Tai, “Chapter 1 of Hong Kong’s New Constitution: Constitutional Positioning and Repositioning”, Ming K. Chan and Alvin Y. So (eds), *Crisis and Transformation in China’s Hong Kong* (New York: M.E.Sharpe Inc, 2002; and Hong Kong: Hong Kong University Press, 2002), pp 205, 208. In this regard, it will be interesting to see what position the Court of Final Appeal adopts if the recent Court of Appeal decision in *HKSAR v Leung Kwok Hung* (n 27 above), is appealed, in which the Court held (by a majority) that the notification scheme for public processions under the Public Order Ordinance was constitutional, as being a valid restriction on the freedom of assembly, as guaranteed by Art 27 of the Basic Law.

Court of Final Appeal and the lower courts are still willing to hold against the government on human rights issues, even where their decisions have far-reaching implications.³⁶ The courts have a particularly strong track record in upholding equal treatment, requiring the government to put forward compelling reasons to justify any departure from it.³⁷ All of this indicates a positive environment in which the rights of transgender persons would be determined by the Hong Kong courts.

Challenging the Current Policies on Marriage

The first policy which is open to challenge through judicial review proceedings is the refusal of the Registrar of Births, Deaths and Marriages to celebrate a marriage involving a transgender person in Hong Kong. Alternatively, the refusal of various authorities to recognise the validity of such a marriage, even if it was validly contracted overseas, could be tested. Such a challenge would need to be framed within the right to marry, as contained in the BORO (Article 19 guarantees “the right of men and women of marriageable age to marry”) and the Basic Law (Article 37 guarantees, more broadly, “the freedom of marriage of Hong Kong residents”).

³⁶ For example, the Court of Final Appeal's decision in *Secretary for Justice and others v Chan Wah and others* [2000] HKLRD 641 required the reform of the village electoral arrangements, which were held *inter alia* to be contrary to the right to participate in public life under Art 21 of BORO; and Hartmann J's decision in *Equal Opportunities Commission v Director of Education* (n 28 above) necessitated the overhaul of the Secondary School Allocation System, which was held to be contrary to the Sex Discrimination Ordinance. The Court of Final Appeal also recently held against the government in *Secretary for Security v Sakthevel Prabakar* FACV00016/2003, judgment of 8 Jun 2004, in a traditional judicial review of the Secretary for Security's decision to deport a person who was in danger of being subjected to torture on return to their home country. It should be further noted that the Court of Final Appeal conducted a wide-ranging review of international materials in this case, including those not formally applicable to Hong Kong.

³⁷ See, for example, *Ng Ka-Ling and others v Director of Immigration* (n 22 above), in which the Court of Final Appeal held certain provisions in the Immigration Ordinance, which discriminated against children born out of wedlock, to be contrary to the principle of equality as enshrined in Art 25 of the Basic Law (note that this part of the decision still stands, it not having been referred by the Hong Kong government to the Standing Committee of the National People's Congress of the PRC for “reinterpretation”); *Secretary for Justice and others v Chan Wah and others* (n 36 above) in which the Court of Final Appeal held that the village electoral arrangements discriminated against men, contrary to the Sex Discrimination Ordinance; *Equal Opportunities Commission v Director of Education* (n 28 above) and *KYW v Secretary for Justice* DCEO3/1999, in which the District Court held that the policies of the Fire Services Department and Excise Department not to employ persons who had a parent who suffered from schizophrenia were discriminatory under the Disability Discrimination Ordinance. See also Carole J. Petersen, “The Right to Equality in the Public Sector: An Assessment of Post-Colonial Hong Kong”, (2002) 32 *HKLJ* 103.

The Current Situation in Hong Kong

All marriages which are celebrated in Hong Kong are governed by the Marriage Ordinance.³⁸ Section 40 of the Marriage Ordinance stipulates that a marriage is the “voluntary union for life of one man and one woman”, but the Ordinance does not define the words “man” and “woman” for these purposes. When asked to confirm the current policy on marriages involving transgender persons, the Registrar of Births, Deaths and Marriages stated that he is “not in a position to celebrate [a] marriage between persons of the same biological sex”,³⁹ even if one of them has undergone gender reassignment surgery. Under the current policy, heterosexual transgender persons⁴⁰ and their partners are therefore not permitted to marry in Hong Kong. This deprives them of the opportunity to publicly declare their love and commitment to each other through a marriage ceremony. It also denies them social recognition of their relationship and the whole range of rights, responsibilities and benefits which attach to marriage. These include numerous rights and benefits during marriage (for example, the married person’s tax allowance, the right as a married couple to public housing, the right to employment benefits for one’s spouse, the ability to bring one’s foreign spouse into Hong Kong as a dependent, and access to certain reproductive assistance, including artificial donor insemination); rights and responsibilities on the breakdown of marriage (for example, parental rights and responsibilities, maintenance); and rights on the death of one’s spouse (for example, inheritance rights, the right to claim a survivor’s pension benefit).

As regards marriages which have been validly entered into overseas (in the Asia-Pacific region alone, such marriages are already permitted in Japan, New Zealand, Taiwan and Singapore, as well as in certain provinces of China and certain states and territories of Australia), the Immigration Department,⁴¹ and Inland Revenue Department,⁴² have similarly stated that they would not recognise such marriages for immigration or taxation purposes, on the grounds that “the parties are not respectively male and female” and that their marriages are therefore void under section 20(1)(d) of the Matrimonial Causes Ordinance.⁴³

³⁸ Marriage Ordinance (Cap 181), Laws of Hong Kong.

³⁹ Letter to the author from the Director of Immigration (who is also the Registrar of Births, Deaths and Marriages), 7 Aug 2002 (on file with the author).

⁴⁰ Defined as those who are attracted to persons of the opposite gender identity, although they share the same biological sex. Ironically, however (since gay or lesbian marriages are not otherwise permitted in Hong Kong), transgender persons who are homosexual (those who are attracted to persons of the same gender identity, but are of the opposite biological sex) are permitted to marry in Hong Kong.

⁴¹ Letter to the author from the Immigration Department, 6 Dec 2002 (on file with the author). See further, Emerton, “Neither Here Nor There” (n 7 above), at 267.

⁴² Letter to the author from the Inland Revenue Department, 6 Aug 2004 (on file with the author). See further, Emerton, “Neither Here Nor There” (n 7 above), at 267–268.

⁴³ Matrimonial Causes Ordinance (Cap 179), Laws of Hong Kong.

The Registrar of Births, Deaths and Marriages expressly cites *Corbett v Corbett*⁴⁴ as the basis for his policy of refusing to celebrate marriages involving transgender persons where the persons are of the same biological sex, whilst the policies of the Immigration Department and Inland Revenue Department are also impliedly based on *Corbett's* biological test of sex.

Corbett's Biological Test of Sex

Corbett concerned the case of Arthur Corbett, who married April Ashley, a post-operative transsexual woman, in full knowledge of her transgender history. On the breakdown of their marriage, Mr Corbett petitioned for a declaration of nullity on the ground that his wife was male at the time of the marriage, or alternatively, incapable of consummating the marriage. The Court found in his favour on both counts.

In determining the definition of sex for the purpose of marriage in *Corbett*,⁴⁵ Ormrod J adopted a purely biological test. This had regard to three factors, genitals (penis in males; vagina in females), gonads (testes in males; ovaries in females) and chromosomes (XY in males; XX in females). If all three biological factors were congruent at birth, then this would determine a person's sex for the purpose of marriage.⁴⁶ Although all the medical expert witnesses in *Corbett* agreed that psychological factors were also relevant in the assessment of the sex of a person,⁴⁷ Ormrod chose not to include psychological criteria in his legal definition of sex for the purpose of marriage. In his view, the procreative purpose of marriage rendered it "a relationship which depends on sex and not on gender"⁴⁸ (gender being understood to include psychological factors), and even gender reassignment surgery could not "reproduce a person who is naturally capable of performing the essential [procreative] role of a woman in marriage".⁴⁹ Ormrod also adopted the unanimous opinion of the medical experts that a person's biological sex was fixed at birth, and therefore held that any surgical intervention, such as gender reassignment surgery, was irrelevant in determining a person's sex for the purpose of marriage.⁵⁰ Regarding the second submission, namely that the marriage was voidable on the grounds of non-consummation, Ormrod expressed the view that intercourse using "a completely artificial cavity", such as that

⁴⁴ [1970] 2 All ER 33 (hereinafter "*Corbett*").

⁴⁵ *Corbett* concerned the common law definition of marriage, which was subsequently incorporated into the Matrimonial Causes Act 1973 and Hong Kong's Matrimonial Causes Ordinance, hence its continued relevance in this field.

⁴⁶ *Corbett* (n 44 above), at 48.

⁴⁷ *Ibid.*, at 44.

⁴⁸ *Ibid.*, at 49.

⁴⁹ *Ibid.*, at 48.

⁵⁰ *Ibid.*, at 47.

surgically created in a transsexual woman, could “not possibly be described as ordinary and complete intercourse”⁵¹ and therefore held that Ms Corbett was physically incapable of consummating the marriage, with the effect that the marriage could also be nullified on this ground.

The House of Lords’ Affirmation of Corbett in Bellinger

Corbett was very recently affirmed in the United Kingdom by the House of Lords in *Bellinger v Bellinger*.⁵² Ms Bellinger, a post-operative transsexual woman, sought a declaration from the court regarding the validity of her marriage to Mr Bellinger some 20 years earlier. The House of Lords, upholding the Court of Appeal’s decision in 2001,⁵³ held that as the marriage was between two biological men, the parties were not respectively male and female for the purposes of section 11(c) of the Matrimonial Causes Act 1973 and therefore declared the marriage void.

There were two main strands to the House of Lords’ argument. First, the House of Lords held that it was impossible to stretch the ordinary meaning of the words “male” and “female” in s 11(c) of the Matrimonial Causes Act to include post-operative transsexual men and women in their chosen gender. Importantly, the House of Lords recognised the criticisms which had been made of *Corbett*, namely that in determining a person’s sex, it was too “reductionist” to have regard only to three factors, chromosomes, gonads and genitalia, and that this approach ignored the compelling significance of the psychological status of the person as a man or woman.⁵⁴ It also observed that although some overseas jurisdictions had followed *Corbett*, the current trend had been in the opposite direction.⁵⁵ Nevertheless, whilst agreeing that the words “male” and “female” in section 11(c) of the Matrimonial Causes Act were not technical terms and should be given their ordinary, everyday meaning, their Lordships felt that in contemporary usage in the United Kingdom (in contrast to the position in Australia, as judicially determined in *Attorney General for the Commonwealth v “Kevin and Jennifer” & Human Rights and Equal Opportunity Commission*),⁵⁶ the words were incapable of encompassing post-operative transsexual persons in their chosen gender.⁵⁷ Indeed, any such

⁵¹ *Ibid.*, at 49.

⁵² *Bellinger v Bellinger* [2003] UKHL 21, United Kingdom Parliament, at <http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldjudgmt/jd030410/bellin-1.htm> (hereinafter “*Bellinger* (HofL)”) (visited 10 Nov 2004). Also [2003] 2 All ER 593.

⁵³ *Bellinger v Bellinger*, [2001] EWCA Civ 1140 (Court of Appeal) (hereinafter “*Bellinger* (CofA)”). Also [2002] 1 All ER 311.

⁵⁴ *Bellinger* (HofL) (n 52 above), para 13.

⁵⁵ *Ibid.*, paras 14 and 35.

⁵⁶ See below, p 528.

⁵⁷ *Bellinger* (HofL) (n 52 above), para 62.

extension of their meaning “would ... not be an exercise in interpretation however robust”, but rather “a legislative exercise of amendment”.⁵⁸

Second, their Lordships were strongly influenced by the practical consequences that such a “liberal” interpretation of the words “male” and “female” would entail, observing that the extension of the meaning of these words would “represent a major change in the law, having far reaching ramifications”.⁵⁹ These issues were “altogether ill-suited for determination by courts and court procedures” but rather were “pre-eminently a matter for parliament”,⁶⁰ particularly when the UK government had already announced its intention to introduce legislation on the subject. Lord Nicholls of Birkenhead went so far as to state that it was not “proper” or “responsible” for the court to determine the law on the basis of the present case,⁶¹ since once it attempted to do so, it would be getting into “deep waters”,⁶² including where the demarcation line should be drawn in granting legal recognition to transgender persons, for example, whether gender reassignment surgery should be a prerequisite for recognition, and if so, what particular type of surgery would be required.⁶³ The case was not just about marriage, but was part of a wider problem “which should be considered as a whole” and necessitated “a clear and coherent policy”.⁶⁴

This second part of the House of Lords’ judgment is open to criticism. Indeed, when similar concerns about the far-reaching implications of their decision were raised by his fellow judges in the Court of Appeal, Thorpe LJ (dissenting) attempted to reign the issues back to the case in hand, stating that all that needed to be considered was whether the right of marriage should be denied to Ms Bellinger, as a post-operative transsexual woman.⁶⁵ In Thorpe’s view, “the spectral difficulties are manageable and acceptable if the right is confined by a construction of section 11(c) to cases of fully achieved post-operative transsexuals such as the present appellant”, as was the approach taken by the court in the New Zealand case of *Attorney-General v Otahuhu Family Court*. Although compelling, Thorpe was unfortunately in the minority with this view.

Corbett’s Waning Influence in Other Common Law Jurisdictions

Ormrod’s biological test of sex in *Corbett* has been extremely influential in other common law jurisdictions around the world over the last 30 years. *Corbett*

⁵⁸ *Ibid.*, para 78.

⁵⁹ *Ibid.*, para 37.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*, para 40.

⁶² *Ibid.*, para 42.

⁶³ *Ibid.*, para 43.

⁶⁴ *Ibid.*, para 44.

⁶⁵ *Bellinger (CofA)* (n 53 above), para 152.

has been followed fairly recently in the United States, for example, in the case of *Littleton v Prange*.⁶⁶ Here, the Texas Court of Appeal held that a post-operative transsexual woman was not entitled to file a medical malpractice suit regarding the death of her husband as her marriage, being between two biological men, was invalid and she did not therefore qualify as his surviving spouse for the purposes of the relevant legislation. Leave to appeal to both the Texas Supreme Court and the US Supreme Court was rejected.⁶⁷ *Corbett* has also been followed in another Asian common law jurisdiction, Singapore, in the marriage case of *Lim Ying v Hiok Kian Ming Eric*.⁶⁸ However, the Singapore High Court decision was subsequently reversed by the legislature, with the effect that marriages of post-operative transsexual persons are now recognised under Singapore law.⁶⁹ The court's judgment was also based on a comprehensive survey of international and comparative case law at the time, which is now out of date.

Indeed, whilst some jurisdictions are still following *Corbett*, there is no doubt that its influence is now waning. In the Australian case of *Attorney General for the Commonwealth v "Kevin and Jennifer" & Human Rights and Equal Opportunity Commission*,⁷⁰ the Full Court of the Family Court of Australia held that, in contemporary Australian parlance, the words "man" and "woman" in the Marriage Act 1961 (Cth) would include a post-operative transsexual man and transsexual woman in their chosen gender,⁷¹ and therefore that the marriage between a transsexual man and a(nother) biological woman was valid. The court stated that a significant ground for distinguishing the case from *Corbett* was that in Australia, contrary to the position in England, procreative sex was no longer relevant to marriage; nor was the inability to consummate a marriage still a ground for a decree of nullity in Australia as it was – and continues to be – in England (and indeed in Hong Kong).⁷² *Corbett* was also rejected in the New Zealand case of *Attorney General v Otahuhu Family Court* (1995),⁷³ in which Justice Ellis similarly observed that the ability to procreate or have sexual intercourse was not essential to marriage in New Zealand and concluded that "the law of New Zealand has changed to recognise a shift from sexual activity

⁶⁶ *Littleton v Prange*, Texas (1999) 9 SW 3d 223. See further Stephen Whittle, *Respect and Equality: Transsexual and Transgender Rights*, (London: Cavendish, 2002), pp 137–139.

⁶⁷ For further information and documents relating to the case, see Texas Human Rights Foundation, at <http://www.thrf.org/cases.htm> (visited 10 Nov 2004).

⁶⁸ *Lim Ying v Hiok Kian Ming Eric* [1992] 1 *Singapore Law Reports* 184.

⁶⁹ See further below, p 545.

⁷⁰ *Kevin and Jennifer* (n 8 above).

⁷¹ *Ibid.*, paras 60–62.

⁷² *Ibid.*, para 293. In England, the Matrimonial Causes Act, s 11(c), renders a marriage voidable on the grounds of non-consummation. The same provision is reproduced in Hong Kong's Matrimonial Causes Ordinance, s 12(a).

⁷³ *Attorney General v Otahuhu Family Court* (n 9 above).

and more emphasis is being placed on psychological and social aspects of sex, sometimes referred to as gender issues".⁷⁴ The Australian and New Zealand decisions are indicative of a general movement away from *Corbett's* biological test of sex; a trend which has reached its high watermark to date in the ECHR decision of *Goodwin*.

The ECHR's Rejection of Corbett in Goodwin

In this landmark case in July 2002, and to the ultimate vindication of transgender activists in the United Kingdom who had repeatedly suffered defeat before the ECHR on these and other issues,⁷⁵ the ECHR held in *Goodwin* that, by failing to allow a post-operative transsexual person to marry in their chosen gender, the United Kingdom was in breach of the right to marry, as guaranteed by Article 12 of the European Convention (which is worded in the same way as the right to marry in Article 19 of the BORO).⁷⁶

After many years of permitting the United Kingdom's policy of refusing to marry transgender persons in their chosen gender, or to recognise the validity of such marriages,⁷⁷ the ECHR finally stated that "the situation as it has evolved, no longer falls within the United Kingdom's margin of appreciation".⁷⁸ Whilst the ECHR noted that the right to marry in Article 12 of the European Convention is expressly subject to the national laws of Contracting States, it reiterated that any 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 is impaired".⁷⁹ By limiting the allocation of sex for the purpose of marriage to that registered at birth, the ECHR held that the United Kingdom had infringed the very essence of the applicant's right to marry, putting it in breach of Article 12.⁸⁰ The UK government's argument that transsexuals were not barred from marriage since they were able to marry someone of the opposite biological sex (as is also the case in Hong Kong) was branded by the ECHR as "artificial".⁸¹

⁷⁴ *Ibid.*, at 606.

⁷⁵ *Rees v United Kingdom* (1987) 9 EHRR 56; [1986] ECHR 9532/81 (hereinafter "*Rees*"); *Cossey v United Kingdom* (1990) 13 EHRR 622; [1990] ECHR 10843/84 (hereinafter "*Cossey*"); *Sheffield and Horsham v United Kingdom* (1997) 27 EHRR 163; [1998] ECHR 22985/93; 5 BHRC 83 (hereinafter "*Sheffield and Horsham*"); and *X, Y and Z v UK* (1997) 24 EHRR 143 (hereinafter "*X, Y and Z*").

⁷⁶ Some commentators have however questioned whether *Goodwin* and *I* are such welcome decisions, see Ralph Sandland, "Crossing and Not Crossing: Gender, Sexuality and Melancholy in the European Court of Human Rights: *Christine Goodwin v United Kingdom* and *I v United Kingdom*", 11(2) (2003) *Feminist Legal Studies*, 191. Sandland argues that, by adopting the traditional binarist ideas of gender and sexuality and co-opting post-operative transsexual persons into the mainstream, the ECHR decisions suppress difference and ultimately deny transsexualism.

⁷⁷ *Rees*, *Cossey* and *Sheffield and Horsham* (n 75 above).

⁷⁸ *Goodwin* (n 18 above), paras 103 and 120.

⁷⁹ *Ibid.*, para 99.

⁸⁰ *Ibid.*, para 101.

⁸¹ *Ibid.*

Importantly, the ECHR explicitly rejected Ormrod's biological test of sex for marriage purposes, as laid down in *Corbett*. Whilst the ECHR noted that Article 12 of the European Convention referred in express terms to the right of a "man" and a "woman" to marry (as does Article 19 of the BORO), it was not persuaded that, "at the date of this case, it could still be assumed that the terms must refer to a determination of gender by purely biological criteria".⁸² Indeed, recognising that major social changes had taken place in the institution of marriage since the adoption of the European Convention, as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality, the ECHR concluded that "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".⁸³ Nor – referring implicitly to Ormrod's emphasis on the procreative purpose of marriage in his decision to confine legal sex to biological sex in *Corbett* – could the inability of any couple to conceive or parent a child be regarded *per se* as removing their right to marry.⁸⁴ Other important factors in the ECHR's decision were that the medical profession and the health authorities in the United Kingdom accepted the condition of gender identity disorder, and that the government provided treatment for it, including gender reassignment surgery, out of public funds (as is also the case in Hong Kong).⁸⁵

Disappointingly, the ECHR left it open to Contracting States to stipulate other conditions under which marriage would be made accessible to transgender persons in their jurisdiction.⁸⁶ To give the ECHR's example, this could include the particular criteria which a transsexual person would need to meet in order to prove that their gender reassignment surgery had been "properly effected".⁸⁷ In addition to being based on an assumption that some form of gender reassignment surgery is required before a person is entitled to claim the right to marry, the ECHR's comment also paves the way for further discrimination as to who qualifies for recognition under the relevant national legislation.⁸⁸ Despite this, the ECHR's ruling in *Goodwin* remains a landmark decision in this area.

Goodwin was handed down in the very period between the Court of Appeal and House of Lords decisions in *Bellinger*. Although the UK courts have an obligation under the Human Rights Act 1998 to read and give effect

⁸² *Ibid.*, para 100.

⁸³ *Ibid.*

⁸⁴ *Ibid.*, para 98.

⁸⁵ *Ibid.*, para 100.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ On the difficulties with setting such a pre-condition to marriage, or full legal recognition, see below, pp 548–549.

to domestic legislation in a way which is compatible with European Convention rights,⁸⁹ the House of Lords in *Bellinger* held that it was impossible to do so in this case. That is, they felt unable to read the words “male” and “female” in section 11(c) of the Matrimonial Causes Act to include post-operative transsexual persons in their chosen gender, as required by the ECHR’s decision in *Goodwin*, and accordingly felt bound to affirm *Corbett*. Their Lordships nevertheless made a declaration under the Human Rights Act⁹⁰ that section 11(c) of the Matrimonial Causes Act was incompatible with the right to marry in the European Convention. This “declaration of incompatibility” is of particular significance in the Hong Kong context, as will be discussed below.⁹¹

The Likely Impact of Corbett, Bellinger, Goodwin etc on the Hong Kong Courts’ Interpretation of the Right to Marry

So how are the various authorities discussed above likely to influence the Hong Kong courts in a judicial review of the authorities’ current policies regarding the marriages of transgender persons?

On the face of it, as indicated in the author’s earlier article, the outlook might seem bleak. Since it is an English decision made before 1 July 1997, the Hong Kong courts may feel obligated to follow *Corbett* in interpreting the Marriage Ordinance and the Matrimonial Causes Ordinance.⁹² As the final arbiter of Hong Kong law, the Court of Final Appeal would of course have the power to overrule *Corbett* as having been wrongly decided or unsuitable to conditions in Hong Kong,⁹³ but, presented with a recent House of Lords decision (*Bellinger*) affirming *Corbett*, in a context which closely resembles Hong Kong’s, it would be unlikely to do so on either of these grounds. On this analysis, the Hong Kong authorities’ interpretation of the legislation, and their consequent deferral to a person’s biological sex for the purpose of their marriage policies, seems fairly watertight, and certainly not arbitrary or irrational in terms of *Wednesbury* unreasonableness.

⁸⁹ Human Rights Act 1998, s 3(1).

⁹⁰ *Ibid.*, s 4(2).

⁹¹ See below, p 533.

⁹² The Basic Law, Arts 8 and 18, provide that the sources of Hong Kong law shall include the common law. This has been generally accepted as being the English common law, as at 30 Jun 1997 (*HKSAR v Ma Wai Kwan David* [1997] 2 JKC 315, 329). The “common law” arguably includes judicial decisions relating to the interpretation of English statutory provisions identical to, or substantially the same as, those in Hong Kong (such as *Corbett*), as well as English judicial decisions relating to the development of common law rules. In any event, the Hong Kong courts are likely to consider such judicial decisions – particularly those emanating from, or affirmed by, the House of Lords – as highly persuasive.

⁹³ Yash Ghai, *Hong Kong’s New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 2nd ed, 1999), pp 369–370, n 12.

However, as stated above, the applicant's argument would be that the failure of the authorities to recognise a transgender person's right to marry in their chosen gender is contrary to the right to marry, as guaranteed by the BORO and the Basic Law. This line of argument provides scope for much more meaningful judicial review of the authorities' policies than *Wednesbury* reasonableness. It also offers far more cause for optimism. Indeed, the *Corbett* reading of section 11(c) of the Matrimonial Causes Act (which is identical to section 20(1)(d) of Hong Kong's Matrimonial Causes Ordinance) was expressly declared by the House of Lords in *Bellinger* to be contrary to the right to marry, as guaranteed by the European Convention, even though the House of Lords ultimately applied *Corbett* in this case.

There is certainly a strong argument that the right to marry as contained in BORO and the Basic Law should be interpreted in line with the EHCR decision in *Goodwin*. First, the right to marry in the European Convention (Article 12) is cast in the same terms as the right to marry in the BORO (Article 19). Both guarantee the right of "men and women of marriageable age" to marry. The broader formulation of the right to marry in the Basic Law (Article 37), which simply guarantees the "freedom of marriage to Hong Kong residents", without any reference to "men" and "women", arguably provides even more scope for a generous interpretation. Second, the ECHR's reasoning in *Goodwin* is directly transferable to the situation in Hong Kong. Like the United Kingdom, whose marriage policies were under scrutiny in *Goodwin*, Hong Kong's marriage policies are also based on *Corbett's* biological definition of sex. As discussed above,⁹⁴ the ECHR held that this biological definition was too restrictive, and that it did not reflect current social, medical and scientific developments in the field of transsexuality. Further, the ECHR found it significant that the United Kingdom's medical profession and health authorities recognised gender identity disorder, and that public funding was provided for gender reassignment surgery, but that legal recognition of a person's chosen gender was ultimately denied. The very same incongruence exists in Hong Kong. In addition, it is generally recognised that although some jurisdictions (such as Texas, the United States) are still following *Corbett*, the current international trend is away from *Corbett's* biological definition of sex for marriage and other purposes, as demonstrated by the Australian and New Zealand decisions. Even the House of Lords recognised this fact in *Bellinger*.⁹⁵ Perhaps the Hong Kong courts would therefore find an affinity with the attitude of the Full Family Court in the Australian case of *Kevin and Jennifer*, which stated that even though Australia is not a party to the European Convention, *Goodwin* "provides startling confirmation of the

⁹⁴ See above, p 530.

⁹⁵ *Bellinger* (HofL) (n 52 above), paras 14 and 35.

degree of international isolation that this country would adopt if *Corbett* is found to represent the law”,⁹⁶ and therefore held that a post-operative transsexual person should be recognised in their chosen gender for marriage purposes.

If the Hong Kong authorities’ policies were found to be incompatible with the right to marry in the BORO and the Basic Law, then the courts would have an obligation to declare their acts invalid. They would also be required to make a declaration as regards the future reading of the Marriage Ordinance and Matrimonial Causes Ordinance so as to render the relevant provisions compatible with the right to marry. If such a reading was not possible, then the courts would be obliged to declare the legislation invalid or unconstitutional to the extent of the inconsistency. As the Court of Final Appeal has emphasised in the context of the Basic Law, the exercise of their jurisdiction in this area is a “matter of obligation, not of discretion”.⁹⁷ Importantly, the Hong Kong courts do not have the “soft option” of making a declaration of incompatibility between the legislation and the BORO or the Basic Law, as is available to the UK courts and was exercised by the House of Lords in *Bellinger*. One would therefore expect the Hong Kong courts to be more amenable to interpreting the relevant provisions in the Marriage Ordinance and Matrimonial Causes Ordinance in line with the right to marry, rather than to striking them down. They might be aided in this decision by the case of *Kevin and Jennifer*, in which (as mentioned above)⁹⁸ the Australian Full Family Court upheld Chisholm J’s conclusion that the reference to “man” and “woman” in the relevant marriage legislation did include post-operative transsexual persons in their chosen gender.⁹⁹ Particular weight could be given to this interpretation by the fact that post-operative transsexual persons are already recognised in their chosen gender for everyday purposes in Hong Kong, through the physical and social reality of their situation, and through the recognition granted to their chosen gender on their identity cards, passports and other documentation.

⁹⁶ *Kevin and Jennifer* (n 8 above), para 314.

⁹⁷ *Ng Ka-Ling and other v Director of Immigration* (n 22 above), at 337. Although the express provision to the same effect in the BORO, s 3 was repealed, it is generally accepted that the position remains the same under general common law principles. See Peter Wesley-Smith, “Maintenance of the Bill of Rights”, 27 HKLJ 15 at 16.

⁹⁸ See above, p 528.

⁹⁹ Admittedly, the Australian courts had more grounds on which to come to this conclusion than would be available to the Hong Kong courts. In particular, the Australian courts had already recognised post-operative persons in their chosen gender for the purpose of criminal and social security law, and many states already granted statutory recognition in this area, so a strong case could be made for maintaining consistency in the context of marriage (see *Kevin and Jennifer* (n 8 above), paras 289 and 379). However, the Full Family Court also considered medical evidence, social reality and international legal developments in coming to its decision, and concluded (para 380) that its finding “was consistent with international law and with humanity” and that “a contrary finding would, in our opinion, result in considerable injustice to transsexual people and their children, for no apparent purpose”. These considerations are equally applicable to Hong Kong.

In conclusion, a very strong case can be built regarding the right of post-operative transsexual persons to be married, or to have their marriages recognised, in Hong Kong, and therefore for declaring the authorities' current policies on marriage as invalid under the BORO and the Basic Law. However, this still does not address the issue of the right to marry of other transgender persons; nor does it answer the problem of the lack of legal recognition for post-operative transsexual and other transgender persons in areas other than marriage. This might be achieved to some extent by challenging the policy of the Registrar of Births, Deaths and Marriages not to allow an amendment to the birth certificates of transgender persons to reflect their chosen gender, drawing on the right to privacy.

Challenging the Current Policy on Birth Certificates and General Non-recognition of a Transgender Person's Chosen Gender in Law

The Hong Kong authorities' policy of not allowing transgender persons (including those who have undergone gender reassignment surgery) to change their birth certificates means that they are forever condemned to their biological sex, as designated at birth, for all legal purposes. This situation could be challenged by way of judicial review proceedings under the right to privacy, as guaranteed by Article 14 of the BORO. This declares, in Article 14(1), that "no-one shall be subject to arbitrary or unlawful interference with his privacy", and, in Article 14(2), provides that "everyone has the right to the protection of the law against such interferences".¹⁰⁰

The Current Situation in Hong Kong

Registration of births in Hong Kong is governed by the Births and Deaths Registration Ordinance.¹⁰¹ Although the Births and Deaths Registration Ordinance does not stipulate the criteria for determining the sex of a child at birth, the Registrar of Births, Deaths and Marriages has stated that the practice is to rely on the birth return furnished by the relevant hospital.¹⁰² This is completed by reference to biological criteria – primarily the genitals, but also gonads and chromosomes in less straight-forward cases. As a historical record, the only circumstances in which a birth certificate can legally be amended is if it can be shown there was a clerical error or error of fact or substance when

¹⁰⁰ In this case, there is no equivalent right in the Basic Law.

¹⁰¹ Births and Deaths Registration Ordinance (Cap 174), Laws of Hong Kong.

¹⁰² Letter to the author from the Director of Immigration (who is also the Registrar of Births, Deaths and Marriages), 7 Aug 2002 (on file with the author).

the birth was recorded.¹⁰³ As regards sex, the Registrar has stated that this would require an error to be proven in the recorded biological sex of the person,¹⁰⁴ implicitly relying on the *Corbett* biological test of sex. Such an error would be extremely rare, although not impossible in the case of inter-sexed persons, whose biological make-up was incongruent at birth. Therefore, according to the Registrar, there is no mechanism by which a person's birth certificate can be amended to reflect their chosen gender in Hong Kong, even after gender reassignment surgery.¹⁰⁵

The privacy implications of the Registrar's position are two-fold. First, the inability of a transgender person to amend their birth certificate to reflect their chosen gender means that their biological sex and transgender history may be revealed against their wishes whenever they are required to produce their birth certificate. Although the compulsory identity card system in Hong Kong means that the identity card is relied upon for identification purposes in most everyday situations, a person must still disclose the sex on their birth certificate for various official purposes, as well as for insurance purposes. This situation renders transgender persons vulnerable to prejudice and discrimination.¹⁰⁶ Second, since the birth certificate is the mechanism by which a person's gender is determined for the purpose of the law, the inability to change it means that transgender persons will always be legally regarded as their biological sex. This situation also gives rise to a fundamental discrepancy between their legal status and personal identity, which can be very distressing for transgender persons.

In England, the Registrar General's refusal to amend the entries of two post-operative transsexuals in the register of births or to change their birth certificates – which refusal was based on identical statutory provisions to those in Hong Kong's Births and Deaths Registration Ordinance – was unsuccessfully challenged in a (pre-Human Rights Act) judicial review action before the High Court in *R v Registrar General for England and Wales, Ex parte P & G*.¹⁰⁷ The High Court held that it was neither arbitrary or irrational, in terms of *Wednesbury* unreasonableness, for the Registrar General to have acted in this way. However, the ECHR held in *Goodwin* that the United Kingdom was in breach of the right to respect for private life (Article 8 of the European Convention) for not permitting post-operative transsexual persons to change their birth certificates in the same situation as currently applies in Hong Kong.

¹⁰³ Births and Deaths Registration Ordinance, s 27.

¹⁰⁴ Letter to the author from the Director of Immigration, 7 Aug 2002 (on file with the author).

¹⁰⁵ *Ibid.*

¹⁰⁶ See further Emerton, "Neither Here Nor There" (n 7 above), at 270–271.

¹⁰⁷ (Unreported), available at Press for Change, <http://www.pfc.org.uk/legal/rp-pg.htm> (visited 10 Nov 2004).

As stated above,¹⁰⁸ the Hong Kong courts may make reference to ECHR decisions – here *Goodwin* – in interpreting the rights guaranteed in the BORO.¹⁰⁹

The ECHR's Jurisprudence on Privacy: From Rees to Goodwin

The ECHR's decision in *Goodwin* certainly indicates that there is a *prima facie* case to argue under the right to privacy in Article 14 of the BORO. However, it is important for the analysis below to note that the ECHR's jurisprudence on transgender privacy issues actually goes back much further than *Goodwin*. In the much earlier cases of *Rees v United Kingdom*,¹¹⁰ and *Cossey v United Kingdom*,¹¹¹ the ECHR held that the UK government was not in breach of the right to respect for private life by refusing to issue new birth certificates or alter the register of births of the two transsexual applicants following their gender reassignment surgery. The ECHR found it significant in these cases that although a change of birth certificate was not permitted, the United Kingdom authorities had taken certain other steps to minimise intrusive enquiries of post-operative transsexual persons (for example, by issuing them with passports, driving licences and other documents in their new name and chosen gender, and allowing them legally to change their name). These factors kept the United Kingdom within the margin of appreciation permitted to Contracting States, which the ECHR reiterated was particularly wide in the context of positive obligations, such as those imposed by Article 8 of the European Convention.¹¹²

In the case of *B v France*,¹¹³ however, the ECHR held that a violation of the right to respect for private life *could* arise where a post-operative transsexual person had to suffer almost daily disclosure of her private life to third parties. Like the UK government, the French government did not allow the applicant to change her birth certificate after gender reassignment surgery. However, the applicant's situation was greatly compounded by the fact that she had not been permitted to legally change her first name,¹¹⁴ nor to change any of her identity documents, most importantly her national identity card and passport, but also her voting card, social security number, cheque book, bank statements and utility invoices. All of these documents still identified

¹⁰⁸ See above, p 520.

¹⁰⁹ As far as the author is aware, there is no comparative case law which could be drawn upon in this context.

¹¹⁰ *Rees* (n 75 above).

¹¹¹ *Cossey* (n 75 above).

¹¹² See below, p 540.

¹¹³ *B v France* (1993) 16 EHRR 1; [1992] ECHR 13343/87.

¹¹⁴ Interestingly, although the French courts had power to grant a legal change of name, the applicant was refused on the basis that the name she had proposed was not gender neutral (which would have been allowed), but rather was exclusively female, *ibid.*, para 57.

her by her former name and biological sex. The resulting, almost daily, disclosure of the applicant's transgender history in this case led the ECHR to distinguish *B v France* from *Rees* and *Cossey* in finding the French government to have breached the applicant's right to respect for private life under Article 8 of the European Convention.

Until *Goodwin*, the situation in Hong Kong was in line with ECHR jurisprudence on this issue. The Hong Kong authorities' policy of issuing new passports, driving licences and other documentation to post-operative transsexual persons in their chosen gender, in addition to their ability legally to change their name, kept the situation within *Rees* and *Cossey*. Further, the Hong Kong authorities' policy of issuing new identity cards to post-operative transsexual persons in their chosen gender meant that they did not fall foul of *B v France*. However, *Goodwin* changed all of that. Overruling its earlier decisions in *Rees* and *Cossey*, the ECHR held that the United Kingdom was now in breach of its obligation to respect a post-operative transsexual person's private life, first, by failing to issue her with a birth certificate in her chosen gender (or otherwise to amend the details recorded in the birth registration system after gender reassignment surgery), and second, by generally failing to recognise her chosen gender for the purpose of the law. The United Kingdom could no longer be allowed to take refuge in the margin of appreciation previously granted to it.

The ECHR took a fresh approach to the privacy issues in *Goodwin*, examining them in a much wider context than the "mere" inability to amend a birth certificate or birth register. Whilst acknowledging that the level of daily interference suffered by the post-operative transsexual applicants in *Goodwin* was not as high as in *B v France*, and that some of the difficulties or embarrassment faced by them could be avoided or minimised by the practices adopted by the UK authorities,¹¹⁵ the ECHR focused instead on the serious incongruence between the applicants' post-operative identities and their status in law,¹¹⁶ which it held went against the very grain of Article 8, stating:

"[a] serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity. The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by the law which refuses to recognise the change of gender cannot ... be regarded as a minor inconvenience arising from a formality. A conflict

¹¹⁵ *Goodwin* (n 18 above), para 89.

¹¹⁶ Although this more fundamental issue had been raised in the earlier cases of *Rees* and *Cossey*, the ECHR's analysis focused each time on the more technical issue of the refusal to alter the register of births. See *Cossey* (n 75 above), dissenting opinion of Judge Martens, para 3.2.

between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety".¹¹⁷

As it also noted in the context of the right to marry, the ECHR found it particularly illogical that the UK government had authorised, and through its national health service financed, the applicant's gender reassignment surgery, and yet had refused to recognise the legal implications of such surgery. Indeed it specifically highlighted the coherence of the administrative and legal practices within the domestic system as an important factor in its assessment under Article 8.¹¹⁸ Later, emphasising that the very essence of the European Convention was respect for human dignity and human freedom, the ECHR stated:

"under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as human beings ... the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable".¹¹⁹

Finally, as regards the fair balance to be struck between the interests of the applicants and the interests of the state, the ECHR held that no substantial hardship or detriment to the public interest had been demonstrated as likely to result from recognising a post-operative transsexual person's chosen gender in law, and, as regards any other possible consequences, "society might reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost".¹²⁰

The Likely Impact of Goodwin on the Hong Kong Courts' Interpretation of the Right to Privacy

At first sight, Goodwin would appear to be a strong authority on which to base a challenge to the present situation in Hong Kong, at least as regards post-operative transsexual persons. As in the United Kingdom, the Hong Kong government authorises and funds gender reassignment surgery through

¹¹⁷ *Goodwin* (n 18 above), para 77.

¹¹⁸ *Ibid.*, para 78.

¹¹⁹ *Ibid.*, para 90.

¹²⁰ *Ibid.*, para 91.

its public health service, and grants various administrative concessions to those who have undergone such surgery, but yet does not follow this through to its logical conclusion by granting full legal recognition to post-operative transsexual persons by amending their birth certificates. However, there is good reason to believe that the Hong Kong courts would not follow *Goodwin* in this context.

Article 8(1) of the European Convention states that “everyone has the right to respect for his private ... life”, and Article 8(2) provides that “there shall be no interference by a public authority with the exercise of this right”, except in the listed circumstances. In his dissenting opinion in *Cossey*, Martens opined that the maintenance in force of a legal system, which “keeps treating post-operative transsexual persons for legal purposes as members of the sex which they have disowned psychically and physically as well as socially ... must continuously, directly and distressingly affect their private life” and as such should be deemed to constitute “a continuing *interference with private life*”,¹²¹ and therefore a violation of the state’s *negative* obligation under Article 8(2). However, the ECHR has consistently approached privacy issues in its transgender jurisprudence in the context of the state’s positive obligation to “respect” private life under Article 8(1), rather than its negative obligation not to “interfere with” private life under Article 8(2).

Thus, in the very first case before it, in *Rees*, the applicant complained both about the United Kingdom’s refusal to issue him with a new birth certificate and its non-recognition of his chosen gender in law. Despite couching his whole complaint as an interference with his private life under Article 8(2),¹²² the ECHR held that only the existence and the scope of the *positive* obligations flowing from Article 8(1) were at stake, and that “the mere refusal to alter the register of births or to issue birth certificates whose contents and nature differ from those of the birth register [could not] be considered as interferences”.¹²³ In *B v France*, which, as we have seen, involved a very high degree of daily interference with the applicant’s private life, the ECHR still considered the case in the context of the positive, not the negative, obligations of the state.¹²⁴ And finally, 10 years later, in *Goodwin*, the ECHR commenced its very judgment by stating that the issue turned on “whether or not the state has failed to comply with a *positive* obligation to ensure the right of the applicant, a post-operative male to female transsexual, to respect for her private life, through the lack of legal recognition given to her gender reassignment”.¹²⁵

¹²¹ *Cossey* (n 75 above), para 3.4. Emphasis added.

¹²² *Rees* (n 75 above), para 35. See also Whittle (n 66 above), pp 190–191.

¹²³ *Rees* (n 75 above), para 35.

¹²⁴ *B v France* (n 113 above), para 44.

¹²⁵ *Goodwin* (n 18 above), para 71. Emphasis added.

Perhaps significantly in this context, the right to privacy in Article 14 of the BORO is formulated differently from Article 8 of the European Convention. The positive arm of the right to privacy in the BORO (Article 14(2)), unlike Article 8(1) of the European Convention, does not require the state to “respect” the right to privacy, but rather only to provide “protection of the law *against ... interferences*” with privacy. This would appear to be a more limited positive duty than that contained in Article 8(1) of the European Convention. Certainly, in his commentary on Article 17 of the International Covenant on Civil and Political Rights (which is reproduced *verbatim* in Article 14 of the BORO), Nowak states that, whilst Article 17(2) does place a positive duty on the state to protect the right to privacy, this duty is limited to *protecting against interferences*. He further states that the positive duty does not alter the underlying negative nature of Article 17, which results from the non-interference formulation of Article 17(1). In particular, it does not oblige the state to promote or even to facilitate privacy. And, as with all positive duties to ensure rights, the legislature has relatively broad discretion in its implementation.¹²⁶ This certainly seems to offer a ground on which the Hong Kong courts could reasonably distinguish *Goodwin* if they were so minded, and hold that the Hong Kong authorities’ policy of refusing to amend the birth certificates of post-operative transsexual persons was not in breach of the right to protection against interferences with privacy, as guaranteed by the BORO.

Finally, the Hong Kong courts are likely, in practice, to be concerned by the potentially far-reaching ramifications of deciding in accordance with *Goodwin* in the privacy context. These implications undoubtedly would be far greater than those which would arise from applying *Goodwin* in the marriage context, since they would result in the wholesale legal recognition of the chosen gender of post-operative transsexual persons. Indeed, the ECHR was itself mindful in *Goodwin* of “the difficulties posed or the important repercussions which any major change in the system will inevitably have, not only in the field of birth registration, but also in the areas of access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance”.¹²⁷ Nevertheless, the ECHR concluded that these problems were “far from insuperable” and indeed “both manageable and acceptable if confined to the case of fully achieved and post-operative transsexuals”.¹²⁸ As domestic (rather than supranational) courts, whose decision would have immediate effect, it is not difficult to imagine that the Hong

¹²⁶ Manfred Nowak, “UN Covenant on Civil and Political Rights, CCPR Commentary” (Kehl am Rhein: NP Engel, 1993), pp 289–290.

¹²⁷ *Goodwin* (n 18 above), para 91.

¹²⁸ *Ibid.*

Kong courts would be more cautious in coming to such a conclusion. Borrowing Silke's VP words in *R v Sin Yau Ming*, they might therefore determine on this basis (in addition to the different formulation of the right to privacy in the European Convention and the BORO), that this is a case in which EHCR decisions "are helpful, but not always apposite"¹²⁹ and that the issues be best left to the legislature.

Challenging Marriage and Birth Certificate Policies as Unequal Treatment

For the sake of completeness, it should briefly be mentioned that a judicial review application could also be made on the grounds that the authorities' policies on marriage and birth certificates breach the right to equality, as enshrined in Articles 1 and 22 of BORO, and Article 25 of the Basic Law.¹³⁰ Both Articles in the BORO expressly prohibit discrimination on the grounds *inter alia* of "sex" or "other status". The Basic Law is silent in this regard, but it can safely be assumed that its prohibited grounds of discrimination are the same as those in the BORO.¹³¹

There is some international jurisprudence which supports a reading of the word "sex" in the prohibition of sex discrimination to include discrimination against transgender persons. In *P v S and Cornwall County Council* ("P v S"),¹³² the European Court of Justice ("ECJ") held that the Equal Treatment Directive, which prohibits discrimination in employment on the grounds of sex,¹³³ applied to discrimination against transsexual persons. Rejecting a

¹²⁹ *R v Sin Yau-ming* (n 22 above), at 108. See also *Attorney General v Lee Kwong-kut* (n 23 above), at 91.

¹³⁰ Although Art 1 of the BORO can only be invoked in conjunction with another right guaranteed by the BORO, Art 22 of the BORO and Art 25 of the Basic Law provide free-standing guarantees of equality.

¹³¹ This is because Art 39 of the Basic Law incorporates the ICCPR into domestic law, and the BORO, as the legislative enactment of the ICCPR, reproduces *verbatim* the equality provisions of the ICCPR. See *HKSAR v Ng Kung Sui and another* (n 34 above), in which the Court of Final Appeal, held on this basis (at 920–922) that the freedom of expression in Art 27 of the Basic Law was not absolute and identified the restrictions which may be placed on it by reference to those contained in Art 19 of the ICCPR. The case was applied in *HKSAR v Yeung May Wan and others*, HCMA 949/2002 (judgment of 10 Nov 2004) in which the Court of Appeal (para 22(4)), read into Art 27 of the Basic Law the various restrictions on the freedom of expression and assembly contained in Arts 19 and 21 of the ICCPR (reproduced in Arts 16 and 17 of the BORO). The Court of Appeal similarly read those restrictions into the freedom of assembly in Art 27 of the Basic Law in *HKSAR v Leung Kwok Hung and Others*, HCMA 16/2003 (judgment of 10 Nov 2004) paras 16–18.

¹³² *P v S and Cornwall County Council*, judgment of the European Court of Justice, 30 Apr 1996, Case C-13/94 (hereinafter "P v S"), at <http://www.curia.eu.int/en/> (visited 10 Nov 2004).

¹³³ Council Directive 76/207/EEC of 9 Feb 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p 40), Art 2(1).

semantic analysis, the ECJ regarded the Directive as “simply the expression ... of the principle of equality”. Given that the right not to be discriminated against on the ground of sex constituted a fundamental human right,¹³⁴ the scope of the Directive could not be confined to discrimination based on the fact that a person was of one or other sex, but must also apply to discrimination arising from the gender reassignment of a person.¹³⁵ Such discrimination, the ECJ held, was “based, essentially if not exclusively, on the sex of the person concerned”,¹³⁶ and to tolerate it “would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled”.¹³⁷

The prohibition of discrimination on the grounds of “other status” could also, arguably, include gender identity. However, there is as yet no international nor, to the author’s knowledge, comparative jurisprudence in support of such a reading. In April 2003, the Commission for Human Rights was asked to adopt a resolution denouncing discrimination on the grounds of sexual orientation and gender identity as contrary to the Universal Declaration of Human Rights,¹³⁸ which might have provided a useful anchor for such an argument, but unfortunately (due to its highly controversial nature), consideration of the draft resolution has now been postponed until 2005. Alternatively, it is widely accepted that discrimination on the basis of disability is included under the heading “other status” in the equality provision of the International Covenant on Civil and Political Rights,¹³⁹ which must therefore be the reading of the equality provisions in the Basic Law and the BORO.¹⁴⁰ Although this line of argument obviously has its drawbacks, in

¹³⁴ *P v S* (n 132 above), para 19.

¹³⁵ *Ibid.*, para 20.

¹³⁶ *Ibid.*, para 21. The Advocate-General’s opinion in the case makes particularly informative reading, see “Opinion of Advocate General Tesaro, delivered on 14 Dec 1995, Case C-13/94: *P v S and Cornwall County Council*,” para 17, at <http://www.pcf.org.uk/legal/pvs-ecjr.htm> (visited 10 Nov 2004). Whilst the Advocate-General noted (para 17) that “the law dislikes ambiguities and it is certainly simpler to think in terms of Adam and Eve”, he regarded as “obsolete the idea that the law should take into consideration, and protect, a woman who has suffered discrimination in comparison with a man, and *vice-versa*, but den[y] that protection to those who are also discriminated against, again by reason of sex, merely because they fall outside the traditional man/woman classification”. He stated further (para 20), that “to maintain that the unfavourable treatment suffered by P was not on account of sex because it was due to her change of sex or else because in such a case it is not possible to speak of discrimination between the two sexes would be a quibbling formalistic interpretation and a betrayal of the true essence of that fundamental and inalienable value which is equality”.

¹³⁷ *Ibid.*, para 22.

¹³⁸ “Human Rights and Sexual Orientation”, UN Doc. E/CN.4/2003/L.106-110.

¹³⁹ International Covenant on Civil and Political Rights, Art 26. See Office of High Commissioner for Human Rights, *Disability Instruments*, at <http://www.ohchr.org/english/issues/disability/instruments.htm> (visited 10 Nov 2004).

¹⁴⁰ See n 131 above.

that many transgender persons would prefer not to be regarded as disabled,¹⁴¹ the Hong Kong courts might be prepared to accept that gender identity disorder is a disability for these purposes.¹⁴² Certainly, Hong Kong's Equal Opportunities Commission has taken this view, and has recently successfully conciliated a case involving discrimination against a post-operative transsexual woman under the Disability Discrimination Ordinance (although its decisions have no legal standing).¹⁴³

The Likely Impact of P v S and Disability Arguments on the Hong Kong Courts' Interpretation of the Right to Equality

The reasoning in *P v S* is clearly relevant to the interpretation of the right to equality and non-discrimination in any context, but in practice, an argument based on an ECJ, rather than an ECHR, decision might stumble before the Hong Kong courts. Even Silke VP did not include the jurisprudence of the ECJ in his wide list of sources which could assist the court in their deliberations under the BORO in his enlightened judgment in *R v Sin Yau Ming*.¹⁴⁴ Whether it is expecting more or less of the Hong Kong courts to ask them to consider discrimination against transgender persons as discrimination on the grounds of disability is not clear. Certainly there is no international jurisprudence on this point, and the success of such an argument at the domestic level has been very mixed.¹⁴⁵ Further, despite the attractiveness of the equality approach, it has yet to meet any success in transgender jurisprudence before the ECHR.¹⁴⁶ It seems unlikely, therefore, that it would find refuge in the Hong Kong courts, particularly when the issues could be satisfactorily

¹⁴¹ Some of Hong Kong's transgender community are prepared to be classified as having a disability if this ultimately leads to the recognition of their rights. See, for example, *The Church of Jesus Christ of Latter-Day Saints Hong Kong Limited v Jessica Park* HCA001167/2001, in which a post-operative transsexual woman argued that a proposed injunction against her entering the premises of the relevant Church constituted disability discrimination under the Disability Discrimination Ordinance. As the case was settled out of court, this point was never judicially determined. See further, Emerton, "Neither Here Nor There" (n 7 above), at 272–273.

¹⁴² Particularly as it is a medically-classified psychiatric disorder, see American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, DSM IV*, 1994.

¹⁴³ Ravina Shamdasani, "Victory for woman in Sex Bias Dispute", SCMP, 14 Oct 2004, p 4. See further Emerton, "Neither Here Nor There" (n 7 above), at 272–273.

¹⁴⁴ *R v Sin Yau Ming* (n 22 above), at 107.

¹⁴⁵ In the United States, for example, a number of state courts have interpreted their disability rights statutes to exclude transgender plaintiffs, see Paisley Currah and Shannon Minter, "Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People", 7 *Wm & Mary J of Women & L*, 37, 43–44 and accompanying notes.

¹⁴⁶ *Goodwin* (n 18 above), para 108; and *X, Y and Z* (n 75 above), which concerned the refusal to recognise the transsexual father of three children conceived to his partner by donor insemination on their birth certificates. The applicant argued that this violated his right to respect for family life, and that he was discriminated against in his right to family life, as compared with other non-biological fathers. See further Whittle (n 66 above), pp 191–193.

addressed (and perhaps more safely contained)¹⁴⁷ within the right to marry and the right to privacy, as they were in *Goodwin*.

Thus it must still be concluded that an argument based on the right to marry presents the greatest chance of success in judicial review proceedings against the current policies of the Hong Kong authorities, and that arguments invoking the right to privacy and equality, whilst potentially offering a much broader basis for achieving respect for, and recognition of, the chosen gender of transgender persons, are less likely to succeed before the Hong Kong courts. Nevertheless, providing a transgender person is willing to front a test case, the potential for litigation on all of the counts discussed above should not be underestimated. Given the current interest in transgender issues in Hong Kong, and the increasing confidence and activism of Hong Kong's transgender community in calling for their rights, litigation would be an excellent way to jump-start the debate on legislative reform. Indeed it was the very attempts to assert the rights of transgender persons through the courts in Singapore and Japan which, although they failed before the courts, nevertheless raised public awareness of the unjust situation of transgender persons in their countries, and acted as a catalyst for legislative reform.

Legislating for Change

Clearly, legislation offers the only certain and comprehensive road to reform. It is likely to be the only way in which to achieve the wholesale legal recognition of the chosen gender of transgender persons – not just for marriage purposes. In addition, it is probably the only way in which the rights of transgender persons other than post-operative transsexual persons are likely to be addressed, as the international and comparative law relied upon to advance the position of transgender persons in the above analysis is so far limited to the situation of post-operative transsexual persons.

Legislative Precedent

Importantly, Hong Kong would not be chartering new waters in legislating for the legal recognition of transgender persons in their chosen gender – there are numerous models from around the world which it could draw upon in this

¹⁴⁷ For once it is established that discrimination against transgender persons constitutes discrimination on the grounds of sex or other status, all acts of discrimination by the government and public authorities on these grounds are open to scrutiny under Art 22 of the BORO and Art 25 of the Basic Law.

task. Three models are outlined below as illustrations of the different approaches which might be adopted. Singapore and Japan are included as they are the only two countries in Asia which have specifically legislated in this area, although it is argued that both models are too restrictive for Hong Kong. The United Kingdom is chosen because of its historical legal connections with Hong Kong – indeed the similarity between the United Kingdom's and Hong Kong's legislation and birth registration system in this area make it the most obvious precedent for Hong Kong to follow. It also offers one of the most progressive models to date, and one which it is argued Hong Kong could and should aspire to.

Singapore: Partial Recognition Only

In 1996, overturning the High Court decision in *Lim Ying v Hiok Kian Ming Eric*,¹⁴⁸ Singapore amended its marriage laws to permit post-operative transsexual persons to be recognised in their chosen gender for marriage purposes (only).¹⁴⁹ Whilst s 12(1) of the Women's Charter states that "a marriage solemnised in Singapore or elsewhere between persons who, at the date of the marriage, are not respectively male and female shall be void", it now expressly stipulates that, for this purpose, "a person who has undergone a sex reassignment procedure shall be identified as being of the sex to which the person has been reassigned".¹⁵⁰ The position is further cemented by a provision declaring that a marriage solemnised "between a person who has undergone a sex reassignment procedure and any person of the opposite sex is and shall be deemed always to have been a valid marriage".¹⁵¹ It is not clear what extent of surgery is required in order for a person to be recognised as having undergone "a sex reassignment procedure" for the purposes of the law.¹⁵² However, far greater uncertainty is caused by the fact that Singapore has not legislated to recognise the chosen gender of transsexual persons in any area of the law, other than marriage.¹⁵³ This results in the highly unsatisfactory position that, for all legal purposes *except* marriage, a

¹⁴⁸ See above, p 528.

¹⁴⁹ Women's Charter Amendment Act 1996, s 12. This brought the law back into line with administrative policy, which, prior to the decision in *Lim Ying* had been to allow post-operative transsexuals to marry according to their chosen gender, as well as to change the particulars on their national identity cards. See further, Debbie S.L. Ong, "The Test of Sex for Marriage in Singapore", (1998) 12 *International Journal of Law, Policy and the Family*, 161; and K.L. Ter "Transsexual marriages in Singapore", (1988) Vol 148 *New Law Journal* 202.

¹⁵⁰ Singapore Women's Charter (Cap 353), Laws of Singapore, s 12(3)(b).

¹⁵¹ *Ibid.*, s 12(2).

¹⁵² See below, p 549.

¹⁵³ It was reported in 1997 that proposals were being considered by the Singaporean parliament to provide full legal recognition of transsexual persons' new status, see *Liberty Amicus Brief to the ECHR in Sheffield and Horsham*, at <http://www.pfc.org.uk/legal/liba-all.htm>, para 48.1 (visited 10 Nov 2004). However, the author has not been able to identify any further reports to this effect.

transsexual person is still regarded as their biological sex, as recorded on their birth certificate – as in Hong Kong, it still remains the case in Singapore that a person's birth certificate cannot be changed unless it can be shown that it contained an error of fact or substance.¹⁵⁴ By granting only limited legal recognition of reassigned sex, arguably this legislation further confuses and compounds the legal status of transgender persons. It must be rejected as a model for Hong Kong's reform.

Japan: Eligibility Requirements Too Stringent

In contrast to the situation in Singapore, Japan has recently legislated to grant *full* legal recognition to post-operative transsexual persons in their chosen gender. Its "Law concerning special cases in handling gender for people with Gender Identity Disorder" came into effect on 16 July 2004, which is quite an achievement since the first legally approved gender reassignment surgery in Japan was performed only in October 1998 (compared to 1981 in Hong Kong).¹⁵⁵ Indeed, the first case in which a person successfully applied to the court to change their legal gender under this new law was reported on 29 July 2004.¹⁵⁶

As in Singapore, the Japanese legislation was precipitated by the courts' refusal to recognise the chosen gender of post-operative transsexual persons. All Japanese citizens are required to be listed in a family register, which contains an official notarised record of birth, marriage, divorce and death, and also determines a person's legal identity. Like the position in Hong Kong and Singapore, Japan's Family Registration Law stipulates that a family register can be corrected only when a "mistake" has occurred in recording the relevant details. Japan's family courts have repeatedly rejected petitions from post-operative transsexuals to change the registration of their gender in their family register.¹⁵⁷ Immediately after the Supreme Court upheld the family courts' position in an appeal on 2 June 2003,¹⁵⁸ a group of Diet members from

¹⁵⁴ Registration of Births and Deaths Act (Cap 267), s 24.

¹⁵⁵ "Sex Change Marks First Legal Operation", *Japan Times*, 15 Oct 1998, p 3; "Nation's 1st Sex Change Carried Out", *The Daily Yomiuri*, 17 Oct 1998, reproduced at *Trans News: Japan* at http://transnews.at.infoseek.co.jp/english_index.htm (visited 10 Nov 2004).

¹⁵⁶ "Transsexual's 'Change' Recognized", CBSNEWS.com, Tokyo, 29 Jul 2004, at <http://www.cbsnews.com/stories/2004/07/29/world/main632792.shtml> (visited 10 Nov 2004).

¹⁵⁷ In May 2001, six Japanese transsexuals who had undergone gender reassignment surgery separately filed petitions at four different family courts to have their chosen gender legally recognised on their family register. None of the petitions were accepted, see "Court Rejects Transsexual's Demand to Alter Gender in Register", *Kyodo News*, 13 Jan 2003 (reproduced at http://transnews.at.infoseek.co.jp/english_index.htm) and "Transsexual's SOS Answered", *Japan Times*, 6 June 2003 (reproduced at <http://www.tg.connect.com/>) (visited 10 Nov 2004).

¹⁵⁸ The Supreme Court did not hand down a judgment in this case, nor, to the author's knowledge, has the case been given an official name or citation. The case was, however, widely referred to in the press. See, for example, "Transsexual's SOS Answered", *Japan Times*, 6 June 2003 (reproduced at <http://www.tg.connect.com/>); and "Bill Would Let People Change Registered Gender", *asahi.com*, 12 June 2003 (reproduced at <http://www.ftmaustralia.org/media/03/0612.html>) (visited 10 Nov 2004).

the ruling coalition party started to prepare a bill to grant legal recognition of the chosen gender of post-operative transsexuals. This would be by way of amendment to the family register, under the auspices of the family courts. Extraordinarily, the bill was approved by both houses only one month later, on 10 July 2003.¹⁵⁹

Although Japan's legislation is a first for Asia in granting *full* legal recognition to the chosen gender of post-operative transsexual persons, it is not recommended as a model for Hong Kong. This is due to the extremely restrictive criteria which it places on persons eligible to benefit from the legislation. Apart from the requirements that the applicant must have been medically diagnosed with gender dysphoria and be over 20 years of age, he or she must also be (a) single; (b) childless; (c) medically incapable of reproducing as a result of surgical procedures or other medical treatment; and (d) have the genital organs appropriate to persons of the biological sex that they associate with.¹⁶⁰ This raises a number of issues which would need to be considered in drafting similar legislation for Hong Kong, and which would need to be thoroughly debated in the Legislative Council.

The first requirement that a person must be single before they can be legally recognised in their chosen gender is very common and is even contained in the United Kingdom's Gender Recognition Act, which is otherwise very inclusive. This does not mean, however, that such a requirement, which discriminates against those few couples whose marriages have survived one spouse's transition, should be proposed or endorsed in Hong Kong. This particular issue will be discussed in detail below, in the context of the United Kingdom's Act.¹⁶¹

Second, the requirement that an applicant must not have any children can only be described as draconian. It is not at all unusual for transsexual persons to have attempted to live out the gender role ascribed to them by their biological sex and have married and/or had children before undergoing sex reassignment. All these persons will be barred from legal recognition under Japan's law. Unfortunately, the available literature does not elaborate on the reasoning behind this requirement,¹⁶² other than to make broad reference to the need to

¹⁵⁹ "Law Revision Allows Japanese to Officially Change Sex", *Mainichi Daily News*, 10 Jul 2003, at <http://mdn.mainichi.co.jp/news/archive/200307/10/index.html>, and also reproduced at FTMA, <http://www.ftmaustralia.org/media/03/0710.html> (visited 10 Nov 2004).

¹⁶⁰ Unofficial translation of the main body of the Japanese law, kindly provided by Koichi Taniguchi, JSPS Research Fellow, Graduate School of Law and Politics, the University of Tokyo (hereinafter "Unofficial Translation of Japan's Transgender Law"). See also, Yuka Ogaki, "New Japanese Law Concerning Special Cases in Handling Gender for People with Gender Identity Disorder (GID)", 14 Aug 2003 (reproduced at <http://transnews.at.infoseek.co.jp/japanlaw.htm>) (although Ogaki does not make reference to the requirement for appropriate genital organs) (visited 10 Nov 2004).

¹⁶¹ See below, pp 552–554.

¹⁶² The author has not been able to locate any academic articles written in English on this subject, and was still awaiting two articles in Japanese by Shuhei Ninomiya at the time of publication.

protect the best interests of the children of transsexual persons, without substantiating the concerns.¹⁶³ Members of Japan's Diet must certainly have felt strongly about the point, for it is reported that two transgender groups who intended to hold a press conference to criticise the bill, and the childlessness requirement in particular, were pressured not to take it further on the basis that the legislative team would otherwise stop working on the bill.¹⁶⁴ Notably, no other country's legislation makes childlessness a pre-condition for a legal change of gender.¹⁶⁵

Japan's law requires, thirdly, that a person must be sterile. This is also a pre-condition to legal recognition in some other countries, such as Germany, Sweden and the Netherlands.¹⁶⁶ Japan's requirement that a person be unable to reproduce, whether through "surgery or other medical treatment" (emphasis added) initially appears to encompass persons who have only undergone hormone therapy (which would for all practical purposes render them infertile after a certain period), but who have not undergone constructive genital surgery (which would render them permanently incapable of procreation). However, the fourth criteria, namely that the person has "the genital organs appropriate to persons of the biological sex that they associate with", makes it clear that genital surgery is in fact a pre-condition to legal recognition, and that hormonal treatment alone will not suffice.

Admittedly, the requirement to undergo some level of surgery is common, indeed it could be said to be the norm, in legislation of this kind. It is found for example, in the legislation of most European countries (except most notably the United Kingdom),¹⁶⁷ Australian states and territories,¹⁶⁸ Canadian provinces,¹⁶⁹ and in New Zealand.¹⁷⁰ The effect of this requirement, however, is to discriminate against persons who for health reasons cannot undergo major surgical intervention, and against persons who for other reasons do not wish to do so. The pertinent question, as Stephen Whittle succinctly puts it, is whether individuals should "be obliged to undergo specific surgical procedures and their associated health risks before they will be recognised by the law as the social man or woman that they are?"¹⁷¹

¹⁶³ For example, "Bill Would Let People Change Registered Gender" (n 158 above), which states rather crudely that "it would be very tough for a child with a father one day who the next day is suddenly a woman to deal with the reality".

¹⁶⁴ Ogaki (n 160 above), p 2.

¹⁶⁵ Stephen Whittle, *Why Support the Gender Recognition Bill?*, Press for Change, 4 Nov 2003, <http://www.pfc.org.uk/gr-bill/whysup.htm> (visited 10 Nov 2004).

¹⁶⁶ Home Office, *Report of the Interdepartmental Working Group on Transsexual People*, Apr 2000, p 21, at <http://www.dca.gov.uk/constitution/transsex/legs.htm> (hereinafter "Working Group Report") (visited 10 Nov 2004), Annex 4, pp 58–67.

¹⁶⁷ *Ibid.*

¹⁶⁸ For example, Australian Capital Territory, South Australia and New South Wales, *ibid.*, pp 58–59.

¹⁶⁹ For example, Alberta, Quebec and Ontario, *ibid.*, pp 59–60.

¹⁷⁰ Births, Deaths and Marriages Registration Act 1995, s 28, *ibid.*, pp 60–61.

¹⁷¹ Whittle (n 66 above), pp 162–163.

Moreover, particular concerns arise in the context of female-to-male transsexual persons due to the particular formulation adopted in Japan's law, which (like similar laws in Germany, Finland, Denmark and Holland for example),¹⁷² specifically requires surgery resulting in "the genital organs appropriate to persons of the biological sex that they associate with". Although not specifying which operations must be completed, this wording could be interpreted to require transsexual men to undergo a phalloplasty, that is, the surgical creation of the penis. Whilst surgical techniques are constantly improving, such surgery is still described as "very expensive" and it "can involve multiple surgical procedures, and is very variable in its results with little guarantee of success".¹⁷³ As a result, many transsexual men decide not to undergo the numerous operations that phalloplasty entails, but rather limit their surgery to a bilateral mastectomy (surgical removal of the breasts), oophorectomy (removal of the ovaries), hysterectomy (removal of the womb) and vaginal occlusion (closing of the vaginal entrance).¹⁷⁴ If Japan's law is interpreted as making phalloplastic surgery a pre-condition for legal recognition, it will put considerable pressure on transsexual men to go through with the surgery, when they might otherwise have chosen not to. This situation would be totally unacceptable and unnecessary, since many jurisdictions have successfully afforded legal recognition to transsexual men without requiring such genital surgery.¹⁷⁵ By leaving the point open to interpretation, the bill is likely to result in uncertainty amongst Japan's transgender community, and potentially lead to discrimination against female-to-male transsexual persons. Such uncertainty and discrimination should be avoided in Hong Kong's legislation.

Reports suggest that that the bill's proposers in Japan opted for the path of least resistance. They decided to propose a very conservative law which they knew they could get through parliament quickly (ultimately in less than a month). Whilst not ideal, it was felt that it would improve the lives of many, and could be strengthened at a later date. Indeed the law itself provides for a review three years after its formal introduction, and revisions if necessary.¹⁷⁶

¹⁷² Whittle (n 165 above), and *Working Group Report* (n 166 above), Annex 4.

¹⁷³ Whittle (n 66 above), pp 162–163 and further pp 247–248.

¹⁷⁴ *Ibid.*, p 248.

¹⁷⁵ *Working Group Report*, Annex 2, p 36. Courts in Germany have held that a similarly-worded requirement does not require phalloplasty and vaginal occlusion, case of OLG Zweibrücken (1992), see *Liberty Amicus Brief to the ECHR in Sheffield and Horsham* (n 153 above), para 12.13. The same conclusion was reached by the State Appeal Court in Ontario, Canada in 1997, see Whittle (n 66 above), pp 247–248. Similar issues arise through the possible requirement of a vaginectomy, that is the removal of the vagina, which again most transsexual men, even those who have had full phalloplastic surgery, choose not to undergo, since it involves major surgery and can result in the loss of sexual sensation. Moreover, for those who choose not to undergo phalloplastic surgery, the retention of the vaginal tissues is imperative if surgical procedures improve and phalloplasty becomes a more likely option, see Whittle (n 66 above), p 247.

¹⁷⁶ Unofficial Translation of Japan's Transgender Law (n 160 above) and "Bill Would Let People Change Registered Gender" (n 158 above).

Taking such a shortcut, however, should be strongly resisted in Hong Kong. It is far better for the legislative process to take longer, if it means that the resulting legislation is properly informed and well thought-out, and as a result hopefully more inclusive than the Japanese model. Time pressures on the Legislative Council also render a two-stage process impractical and inefficient.

The United Kingdom: Best Practice Model

It is the United Kingdom's Gender Recognition Act,¹⁷⁷ which received Royal Assent on 1 July 2004, which provides the most attractive model for Hong Kong to adopt, since its provisions would take effect in substantially the same administrative and legal framework as Hong Kong. In addition, the Gender Recognition Act offers one of the most progressive models in the world in terms of its inclusiveness and comprehensiveness, addressing most of the limitations of Singapore's and Japan's models, as discussed above. This undoubtedly owes a great deal to the commitment of the United Kingdom's transgender community in informing and educating the legislative process. It is a fitting model for the times, and one which Hong Kong should be proud to follow.

In April 1999, the UK government set up an Interdepartmental Working Group on Transsexual People tasked with considering "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".¹⁷⁸ The establishment of the Working Group was in direct response to the ECHR's criticisms of the UK government for failing to take any steps to keep this area of the law under review, despite repeated requests by the ECHR for it to do so.¹⁷⁹ Although the Working Group presented its report to parliament in July 2000,¹⁸⁰ the report still remained under "active consideration within government" (ie nothing at all had come of it) in August 2002.¹⁸¹

In finally ruling against the United Kingdom in *Goodwin* in July 2002, the ECHR took the view that the "sands of time" had run out.¹⁸² The Working Group was reconvened to urgently consider the implications of the ECHR

¹⁷⁷ The Bill applies to England, Wales and Northern Ireland and, by virtue of a "Sewel Motion", which was passed by the Scottish Parliament on 5 Feb 2004, also to Scotland. For the text of the Gender Recognition Act and documentation relating to its legislative passage, see *UK Department of Constitutional Affairs* at <http://www.dca.gov.uk/constitution/transsex/legs.htm>; and for other useful background information, <http://www.dca.gov.uk/constitution/transsex/> (visited 10 Nov 2004).

¹⁷⁸ Terms of reference cited in *Working Group Report* (n 166 above), p (i).

¹⁷⁹ *Sheffield and Horsham* (n 75 above), para 60, referring to its previous requests to this effect in *Rees and Cossey*.

¹⁸⁰ *Ibid.*

¹⁸¹ Department for Constitutional Affairs, *Transsexual People: Update, August 2002*, at <http://www.dca.gov.uk/constitution/transsex/tpeople.htm> (visited 10 Nov 2004).

¹⁸² *Bellinger (HofL)* (n 52 above), para 21.

judgment.¹⁸³ Bringing fruition to many years of judicial and political activism by the United Kingdom's transgender community, the UK government finally published its draft Gender Recognition Bill on 11 July 2003, exactly one year after the *Goodwin* decision.¹⁸⁴ Having passed its final reading before the House of Lords on 8 June 2004, the Bill received Royal Assent on 1 July 2004. However, it will not come into full force until all the necessary regulations have been passed, and all the administrative and procedural details put in place to fully implement the law. This is expected to have been achieved by early 2005.¹⁸⁵

The Gender Recognition Act provides for the *full* legal recognition of transgender persons in their chosen gender (or "acquired gender", as this is referred to in the Act). In this way, it is far more satisfactory than the Singaporean legislation which only grants legal recognition for the purpose of marriage. Under the Act, transgender persons living in their acquired gender, or having changed gender under the law of a country or territory outside the United Kingdom,¹⁸⁶ will be able to apply to a Gender Recognition Panel for a Gender Recognition Certificate,¹⁸⁷ which will afford them all the legal rights and responsibilities appropriate to their acquired gender.¹⁸⁸ The Gender Recognition Certificate will also entitle them to a new birth certificate if their birth was recorded in the United Kingdom, which will reflect their new name and acquired gender.¹⁸⁹ Neither copies of the birth register entry nor the new birth certificate will contain any indication of their transgender history,¹⁹⁰ and whilst the original birth certificate will be retained as a historical record, stringent provisions are included in the Act to protect the privacy of all applicants.¹⁹¹

The Act is very comprehensive, ensuring absolute certainty across all relevant fields of law – provisions are made, for example, regarding the

¹⁸³ Department for Constitutional Affairs, *Transsexual People: Update, August 2002*, *ibid.*, as also referred to in *Bellinger (HofL)*, *ibid.*, para 25.

¹⁸⁴ Note that this was not the first bill to be introduced on the subject; an earlier private member's bill, the "Alex Carlisle Bill", introduced in 1996, was unsuccessful, *Working Group Report* (n 166 above), p 34.

¹⁸⁵ Department for Constitutional Affairs, "Transsexual People: Legislation", at <http://www.dca.gov.uk/constitution/transsex/legs.htm> (visited 10 Nov 2004).

¹⁸⁶ Gender Recognition Act, s 1.

¹⁸⁷ The Gender Recognition Panel, which is comprised of legal and medical experts (*see* Sch 1), offers an alternative to the model adopted in many other countries, including Japan, under which applications are vetted by the court.

¹⁸⁸ On issue of the Gender Recognition Certificate, "the person's gender becomes for all purposes the acquired gender", Gender Recognition Act, s 9.

¹⁸⁹ *Ibid.*, s 10.

¹⁹⁰ *Ibid.*, Sch 3, ss 3(3) and 6.

¹⁹¹ *Ibid.*, *see* in particular Sch 3. Section 22(1) also makes it an offence for a person who has acquired information regarding a person's application in an official capacity to disclose it to others except in limited circumstances.

availability of social security benefits and pensions, succession, participation in competitive sports, and the interpretation of gender-specific offences where the accused is involved in sexual activity. Minor consequential amendments are also made to various statutes, including the Marriage Act 1949, the Matrimonial Causes Act 1973 and the Sex Discrimination Act 1976.

The most progressive element of the Act, however, is its inclusiveness in terms of who is eligible to apply for legal recognition. The Act applies to all persons over 18 years of age who are living in their acquired gender, *whether or not they have had gender reassignment surgery*. The Act therefore requires Gender Recognition Certificates to be granted to applicants who have, or have had, gender dysphoria (as confirmed by medical evidence) and who have lived in their acquired gender throughout the two-year period before their application is made and intend to continue to do so until death (as evidenced by statutory declaration).¹⁹² No surgical or medical pre-conditions are imposed, although in practice, proof of medical treatment and/or surgery may aid the application process. There is also no requirement for a person to be sterile or childless (as in Japan, for example);¹⁹³ in fact the Act specifically states that transgender persons shall retain all parental rights and responsibilities.¹⁹⁴

One aspect of the Act which has caused particular disappointment amongst the transgender community, however, is the requirement that transgender persons who are married must dissolve their marriage if they wish to obtain a full Gender Recognition Certificate,¹⁹⁵ that is they must be single before being legally recognised in their acquired gender. This is not uncommon – married persons are also barred from registration in their chosen gender in, for example, New Zealand, New South Wales, Australia, Quebec, Canada, Japan, and many countries in Europe (including Austria, Belgium, Finland and Germany).¹⁹⁶

The issue that has dogged the debate is that if a pre-existing marriage were allowed to continue after one of the parties had received legal recognition in their chosen gender, it would in effect become a gay or lesbian marriage. Such marriages are currently not permissible under UK law (nor under Hong Kong law). No real purpose seems to be served by insisting that a couple should divorce in order for the chosen gender of the transgender spouse to be

¹⁹² *Ibid.*, ss 2 and 3.

¹⁹³ See above, pp 547–548.

¹⁹⁴ Gender Recognition Act, s 12.

¹⁹⁵ Applicants who are married are therefore issued with an interim Gender Recognition Certificate (s 4(3)). They only receive a full Gender Recognition Certificate if their marriage is annulled by the court or the marriage is otherwise dissolved, annulled or terminated on the death of one's spouse, within six months of the issue of the interim certificate (ss 5(1) and 5(2) respectively).

¹⁹⁶ *Working Group Report* (n 166 above), Annex 4, pp 58–67.

recognised. The rights and interests of the non-transgender spouse should also not be ignored, who will lose security, as well as financial and tax benefits upon divorce.¹⁹⁷ However, the UK government felt that if the pre-existing marriages of transgender persons were permitted to remain in place despite one party's legal change of gender, then this would be granting them "special allowances which do not apply to other groups in society".¹⁹⁸ As some commentators have argued, it would be entirely possible for such marriages – which in numerical terms are likely to be extremely small – to be recognised as an accepted anomaly, without creating a precedent for marriage between gay or lesbian persons.¹⁹⁹

This issue troubled the Joint Committee of Human Rights when it reviewed the draft Bill, and it recommended in its report that the government reconsider the requirement for subsisting marriages to be dissolved as a pre-condition to legal recognition.²⁰⁰ A motion was also made to the House of Commons on 25 May 2004 to amend the Bill so as to allow for the issue of a full Gender Recognition Certificate despite the continuation of a pre-existing marriage if neither party wished the marriage to be dissolved and both parties could show that they intended to continue to live together. However, the motion was defeated by 303 to 94 votes.²⁰¹

The Act therefore greatly disadvantages the small number of transgender persons who married in accordance with their biological sex and whose marriages have survived, despite their transition. They will now have to decide whether to remain married or to dissolve their marriage so as to obtain legal recognition in their chosen gender. However, the Civil Partnership Act, which became law on 18 November 2004 (and under which the first partnership registrations are expected to take place by the end of 2005),²⁰² will give such

¹⁹⁷ Press for Change, *Submission to the Working Group*, cited in *Working Group Report* (n 166 above), p 22. Interestingly, the Joint Committee on Human Rights proposed that the legislation should relieve parties to the marriage of any adverse financial and tax consequences of the ending of the marriage by reason of the provisions of the legislation, as long as the parties enter into a civil partnership within a reasonable time if and when the civil partnership legislation is in force, House of Lords, House of Commons, *Joint Committee on Human Rights: Fourth Report* (20 Nov 2003), <http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/34/3402.htm> (hereinafter "Joint Committee Report"), para 91 (visited 10 Nov 2004).

¹⁹⁸ Department for Constitutional Affairs, *Gender Recognition Bill, Frequently Asked Questions, Revised January 2004*, available at <http://www.dca.gov.uk/constitution/transsex/faqs.htm> (visited 10 Nov 2004).

¹⁹⁹ *Working Group Report* (n 166 above), p 51.

²⁰⁰ *Joint Committee Report* (n 197 above), para 89.

²⁰¹ Hansard *House of Commons Daily Debates for 25 May 2004* (Pt 30), Column 1521, at <http://www.publications.parliament.uk/pa/cm/cmhansrd.htm> (visited 10 Nov 2004).

²⁰² "Stonewall hails 'historic step forward' as House of Lords backs Civil Partnership", Stonewall, 17 Nov 2004, at http://www.stonewall.org.uk/stonewall/news/victory_civil_pa.html (visited 1 Dec 2004). For the text of the Civil Partnership Bill and related documents, see the United Kingdom Parliament, at <http://www.parliament.the-stationery-office.co.uk/pa/ld200304/ldbills/053/2004053.htm> (visited 1 Dec 2004).

transgender persons in the United Kingdom the option of being able to dissolve their marriage and then enter to into a civil partnership. Whilst it is no doubt time-consuming, costly and distressing to oblige such transgender persons to go through this procedure in order to safeguard their legal and financial position, the Civil Partnership Act is generally to be welcomed as providing gay and lesbian couples with the opportunity to secure almost the same rights and responsibilities as are available through marriage. However as there is likely to be only a handful of couples in Hong Kong in this situation, and the possibility of "same-sex" marriage or civil partnership being permitted in Hong Kong is still rather remote,²⁰³ the Hong Kong government should be urged not to follow the United Kingdom's Gender Recognition Act in this respect.

An additional requirement in Hong Kong (it is already provided in the United Kingdom)²⁰⁴ is some form of protection against discrimination and harassment on the grounds of a person's transition (including gender reassignment surgery) or transgender history. Whilst detailed discussion of this issue is beyond the scope of this article, ideally, this would take the form of an amendment to the Sex Discrimination Ordinance, so as to encompass discrimination due to a person's transition or transgender status within the meaning of discrimination on the grounds of sex.²⁰⁵ Alternatively (as, perhaps surprisingly, many in the transgender community in Hong Kong seem to prefer)²⁰⁶ protection might be achieved through specific anti-discrimination legislation. Legislation is currently under consideration by the Hong Kong government in relation to discrimination on the grounds of sexual orientation.²⁰⁷ This could be extended to include discrimination on the grounds of gender identity, if lobbying by transgender activists within the Home Affairs Bureau's recently established Sexual Minorities Forum is successful. This would complete the legislative package.

²⁰³ The Hong Kong government has announced that it intends to launch a survey on public attitudes towards the introduction of anti-discrimination legislation on the grounds of sexual orientation and on possible recognition of same-sex civil partnerships by the end of 2004/early 2005, but has stated that it will not proceed on these issues unless at least 50% of the public is support; see Tim Cribb, "Quest for Equality", SCMP, 27 Jul 2004, p 14.

²⁰⁴ Sex Discrimination (Gender Reassignment) Regulations 1999. Note that the United Kingdom provisions provide no protection as regards discrimination in the field of goods and services; see Whittle (n 66 above), p 120. However, these fields are covered by the Sex Discrimination Ordinance, as well as the Disability Discrimination Ordinance and Family Status Discrimination Ordinance, and can therefore reasonably be expected to be covered by a revised Sex Discrimination Ordinance or to be included in any new anti-discrimination legislation.

²⁰⁵ For an excellent discussion of transgenderism's engagement with sex discrimination law, focusing on the operation and effect of anti-discrimination laws in relation to transgender claimants in the courts in the United States, Europe and Canada, see Laura Grenfell, "Embracing Law's Categories: Anti-Discrimination Laws and Transgenderism", 15 *Yale Journal of Law and Feminism*, 51.

²⁰⁶ Based on the author's discussions with members of the transgender community in Hong Kong.

²⁰⁷ Tim Cribb, "Survey to Test the Water for Gay Law", SCMP, 27 Jul 2004, p 3.

Conclusion

The time has come for Hong Kong's transgender persons to be granted their due respect and dignity in society. This can only be realised through the full recognition of their chosen gender in law, as has already been achieved in many other parts of the world. In the Asia-Pacific region alone, Hong Kong is lagging behind Australia, New Zealand, Japan, Singapore, Taiwan and even China in not granting any legal recognition at all to its transgender population, despite funding gender reassignment surgery and recognising the chosen gender of those who have undergone such surgery for administrative purposes. Invoking human rights guarantees in the BORO and the Basic Law to challenge the current policies of the Hong Kong authorities offers one route to reform. Although success might be limited to the area of marriage and to the situation of post-operative transsexual persons, this in itself would be a significant achievement. Litigation could also play an important role in educating the public of the inhumane situation in which Hong Kong's transgender persons find themselves, and help to push forward the debate on their rights. Meanwhile, Hong Kong's legislators should be lobbied to take up the matter, and should be urged to work towards the prompt introduction of legislation in this area. This route would hopefully lead to more comprehensive coverage of the issues than can realistically be achieved in the courts, and to more inclusiveness in terms of the range of transgender persons who would benefit from the legislation. The task is greatly aided by the availability of legislative models from around the world and in particular the UK Gender Recognition Act, which will take effect in the same legislative and administrative framework as Hong Kong. Although Hong Kong's transgender population is only a very small minority, this makes legislative protection even more important. The time is surely ripe for change.