

Next, the right to marry

Robyn Emerton

Courts all around the world have grappled with the question of whether post-operative transsexual people should be allowed to marry in their reassigned sex. Mainland China, Malaysia, Singapore, Taiwan, South Korea and Japan already allow such marriages, as do Australia, New Zealand, the vast majority of European countries, including Britain, and many states and provinces in the United States and Canada. Last week, it was Hong Kong's turn to determine this important issue, in a judicial review application brought by "W", a post-operative transsexual woman who wishes to marry her male fiancé.

The Court of First Instance delivered a thorough and measured judgment. Disappointingly, however, it held, first, that the Registrar of Marriages was legally right in refusing to recognise "W" in her reassigned sex for the purpose of the Marriage Ordinance, and further, that the government had not breached W's constitutional right to marry. While Mr Justice Andrew Cheung Kui-nung noted in a postscript to the judgment that he was "acutely conscious" of the suffering and plight of transsexual people such as W, and the prejudice and discrimination they face "as a minority group in our society", he held that it was beyond his judicial powers to interpret Hong Kong's marriage laws in her favour.

The Marriage Ordinance recognises "the voluntary union between a man and a woman", but fails to define who is a "man" or a "woman" for this purpose. In these circumstances, the courts' duty is to look to the "plain" and "ordinary" meaning of the words. Here, Cheung was not persuaded to depart from

the traditional legal position that a person's sex is determined by their biological sex at birth. The judge found insufficient evidence to demonstrate that a general consensus had emerged in Hong Kong that a transsexual woman should now be regarded as a woman for marriage purposes.

This part of the judgment did not come as a great surprise. There was always more potential in the second argument, that the government had infringed W's constitutional right to marry, as guaranteed by the Basic Law and Hong Kong Bill of Rights Ordinance. In 2002, the European Court of Human Rights held that Britain had breached the "very essence" of the right to marry, by refusing to recognise the marriage of a post-operative transsexual woman in her reassigned sex. This led to the passing of Britain's Gender Recognition Act, which gives full legal recognition to post-operative and other transsexual people.

Unfortunately, the Hong Kong court did not follow the European Court's ruling. It was of course not obliged to do so, but it is highly persuasive, as the only international human rights ruling on this issue. Rather, in interpreting W's constitutional right to marry, Cheung looked again for evidence of a "contemporary societal consensus" on the issue, and again found such evidence lacking in Hong Kong.

This part of the judgment is troublesome. The courts are required to interpret fundamental rights and freedoms "generously", so as to ensure that individuals are given the full measure of those rights and freedoms. General public opinion surely has no place here. Indeed, the judge expressly notes that fundamental rights are an

exception to majority rule. Yet, by deferring to Hong Kong's general consensus on the scope of the constitutional right to marry, he lets majority rule in by the back door.

But all is not lost. W intends to appeal. The Court of Appeal should be urged to adopt a more robust interpretation of the right to marry, and declare that Hong Kong's marriage law is unconstitutional vis-à-vis post-operative transsexuals. This would guarantee swift legislative reform.

In the meantime, W's case has done a great deal to inform the general public about the difficulties faced by transsexual people in Hong Kong. The ruling seems to have tapped into the public conscience, arguably igniting a general sense of injustice in denying W the right to marry.

The government already recognises transsexualism, medically and administratively. It provides hormone therapy and sex reassignment to transsexual people, and also issues identity cards, passports and driving licences in their reassigned sex. Granting them the legal right to marry in their reassigned sex is the natural and logical extension of this process, and one that would give Hong Kong's transsexual minority the respect and dignity they deserve.

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