

A march over the years towards choice

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Marco Wan

In the anticipated judgment earlier this month on the case of "W", the High Court has denied transsexuals the right to marry. In doing so, the court imposed a conservative understanding of marriage that overlooks how the idea of such union has changed.

In his judgment, Mr Justice Andrew Cheung Kui-nung notes that "marriage as a social institution has existed for thousands of years. Whilst different marriage laws have come and gone, the institution, as evolved, remains". The court seems to assume that the institution of marriage is a relatively static one, and presents the case as a challenge to millennia of conjugal orthodoxy.

Let's take a historical perspective. The reality is that the institution of marriage has never been static; its practices, values and structures have been constantly changing over time. The application by a transsexual woman to marry is simply the latest stage in a long process of evolution.

Look at the changes in the relationship between husband and wife. Once upon a time, a woman was assumed to relinquish her own legal identity to her husband upon marriage. She was considered to be one with her spouse. As such, she was forbidden to open a bank account in her own name, she could not represent herself in court, and she could not execute legal documents in her own capacity.

In fact, throughout the 19th century, marital rape was not regarded as a crime because a woman was deemed to have given her body to her husband when she consented to the marriage.

Remembering the legal status of married women two centuries ago

serves as a powerful reminder of how much our conception of marriage has altered over the years.

Or take the case of interracial marriage. Once upon a time, the law forbade marriages across racial lines. Marriages between white people and black people were regarded as unnatural in America. The idea of such legal proscription would of course now seem odious.

Finally, take the link between procreation and marriage. In the first half of the 20th century, procreation was still widely assumed to be the *raison d'être* of marriage. As Cheung himself recognised, this assumption can no longer be taken for granted today, as an increasing number of couples exercise the choice not to have children.

Far from being underpinned by the same values for thousands of years, the institution of marriage has changed. Specifically, it has granted more freedom to people who wish to participate in it: greater freedom for women to establish their own identity, greater freedom for people to form unions across racial lines, greater freedom for couples to choose whether to have children.

The application by W, and other transsexual people who seek to assert their right to marry, should be considered as part of this historical process. The institution of marriage should continue extending this freedom to the transsexuals seeking to be part of it. If the court manages to look beyond its immediate historical circumstances and rethink what a marriage is in historical context, it may be able to find the societal consensus to transsexual marriage that it seeks.

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Marco Wan is assistant professor of law at the University of Hong Kong