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LW4635
Project/Research Paper:
Transsexual Marriage, Same Sex Marriage and Civil Partnership in Hong Kong

Abstract
This paper examines the reasons to support same-sex and transsexual marriage in Hong Kong. Three grounds, namely, the correct interpretation of ‘male’ and ‘female’, the right to privacy and the right to marry are discussed. The judgment of W v Registrar of Marriages means a temporary constrain on same-sex and transsexual marriage. Thus, the prospect of civil partnership is examined.

8th April 2011

1 LL.B. (City University of Hong Kong). The author gratefully acknowledges Dr. Vernon Nase as the supervisor of the research paper, Dr. Surya Deva as the course leader of LW4618 Law and Gender and the Research Paper Course that has provided significant insight into the issue of same-sex and transsexual marriage.
# Table of Contents

I. Introduction .................................................................................................................. 2

II. For Transsexual Marriage – The Interpretation of Male and Female .................. 3
   (a) The “Plain Meaning Rule” ............................................................................. 7
   (b) The Updating Construction Rule ................................................................. 8

III. The Right to Privacy ............................................................................................... 8

IV. Constitutional Right to Marry ............................................................................... 14

V. Increasing Movement towards Prohibition against Discrimination on Sexual
   Orientations ............................................................................................................. 16

VI. From Transsexual Marriage to Same-Sex Marriage ........................................... 17
   (a) Sex Discrimination because of Sexual Orientation .................................... 17
   (b) Social Debates and Objections .................................................................... 17
   (c) The Debates on Religious and Cultural Believes ....................................... 18
   (d) The Ability to Procreate .............................................................................. 20

VII. Alternatives to Marriage ....................................................................................... 22
   (a) W’s Judgment, Society’s Concern and the Impact on Allowing
       Transsexual and Same-sex Marriage .......................................................... 22
   (b) Civil Partnership ......................................................................................... 25
   (c) The Equal Opportunity Commission ......................................................... 28

VIII. Conclusion ............................................................................................................ 29

IX. Bibliography .......................................................................................................... 32
I. Introduction

Aristotle in *The Politics* had his famous quote:

“Justice is held to be equality, and it is, but for equals and not for all; (2) and inequality is held to be just and is indeed, but for unequals and not for all; but they disregard this element of persons and judge badly. The cause of this is that the judgment concerns themselves and most people are bad judges concerning their own things. (3) And so since justice is for certain persons, and is divided in the same manner with respect to objects and for persons, as was said previously in the [discourses on] ethics, they agree as to the equality of the object, but dispute about it for persons.”²

Justice means equality for the equals and unequal for the unequal. While marriage is widely recognized as between a male and a female, it is not available to people with same sex and transsexuals. From the perspective of them, lacking the right to marriage means an equal deprivation of promoting healthy family and the economic, social, emotional and interdependence between its members. Marriage laws in Hong Kong have almost lasted for 130 years, same-sex marriage is never recognized, let alone transsexual marriage. It is almost a common vision that elements of respect and protection of civil, political, economic and human rights shall exist in any activities, from individual, regional to national and Heads of different countries and governments have agreed in the United Nations Millennium Declaration³ they have a collective responsibility to “uphold the principles of human dignity, equality and equity at the global level”⁴, no positive steps are taken by the Hong Kong Government in relation to same-sex marriage and transsexual marriage.

⁴ ibid [2].
Kogan argues that “If our society is truly committed to successful marriage, we need to respect whatever sexual orientation a consenting adult couple may have.”\(^5\) While a lot of countries have taken their first steps towards recognition of same-sex marriage, it is still a topic that never reaches the end in Hong Kong. These countries include Argentina (2010), Belgium (2003), Canada (2005), Iceland (2010), The Netherlands (2000), Norway (2008), Portugal (2010), South Africa (2006), Spain (2005) and Sweden (2009). In Asia, transsexual marriage is allowed in China, Indonesia, Japan, Kazakhstan, Kyrgyzstan, South Korea and Singapore. In 2010, the landmark case of *W v Registrar of Marriage*\(^6\) in Hong Kong has triggered another debate with similar situations as same-sex marriage and transsexual marriage.

Civil partnership, which is derivatives from same-sex marriage, provides nearly all rights of marriage. This paper examines the possibility of transsexual and same-sex marriage from a purely equality and justice perspective. It provides the insufficiencies of the current system and the appropriate reform, i.e. civil partnership, for the recognitions of same-sex marriage and transsexual marriage.

II. **For Transsexual Marriage – The Interpretation of Male and Female**

In *W*, Cheung J relied heavily in *Corbett v Corbett (otherwise Ashley)*\(^7\). However, it may not be good law. In *Corbett*, a husband asked Ormrod J to grant a declaration that the marriage was null and void because his wife was a post-operative male to female transsexual person. Moreover, the wife cannot consummate in a natural way because she had only an artificial vagina. Omrod J considered that in the context of validity of a marriage under the Matrimonial Cause Act 1973, the “chromosomal, gonadal and genial tests”. At 106C-E of *Corbett*, Ormod J stated the following:

> “The question then becomes, what is meant by the word “woman” in the context of a marriage, for I am not concerned to determine the “legal sex” of the


\(^{6}\) *W v Registrar of Marriages* [2010] HKCU 2118 (CFI) [W].

\(^{7}\) *Corbett v Corbett (otherwise Ashley)* [1971] P 83 (HC) [Corbett].
respondent at large. Having regard to the essentially hetero-sexual character of the relationship which is called marriage, the criteria must, in my judgment, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage. In other words, the law should adopt in the first place, the first three of the doctors’ criteria, i.e., the chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention.”

Thus, for marriage purpose, only the biological factors should be taken into account. Natural heterosexual intercourse is the pillar to decide the case. The wife was in fact a man and a decree of nullity was given that the marriage was void *ab initio*.

Following the logic of *Corbett*, the question becomes how wide this case was recognized in Hong Kong in the Marriage Ordinance (“MO”). The legislative intent of s. 27 and s.28 of the MO provides guidance as to the definition of “woman” or “female”. S.27 and s.28 of the MO deals with the validity of marriage in Hong Kong. Neither is there any statutory definition” nor anything from the legislative history provide any meaning on “female” or “woman”.

The first marriage ordinance, the Marriage Ordinance 1875, was passed in 1875 to provide a general register of marriages. The Marriage Amendment Ordinance 1896 was passed in 22 July 1896 to “enable all parties who desire to do so to enter into a valid marriage before the Registrar-General, even though neither such parties professes the Christian religion.” On 27 October 1932, the Marriage Amendment Ordinance 1932 was passed to amendment the Marriage Ordinance 1875. Mr. J.P. Braga explained that:

“Since the publication of the first draft of the Bill in the Government Gazette of the 26th August last, Government has produced a second draft of the Bill. This revised edition includes a material addition. The addition contains the definition,
not included in the original draft, of the term ‘Christian marriage or its civil equivalent.’ It is borrowed from the definition of Marriage — the same principle holds in English law — laid down in the case Hyde v. Hyde and Woodmansee (1 P. and D. 130). A leading case in which this definition is applied is In re Bethell, Bethell v. Hildyard (38 ch. D. 220.) ‘Christian marriage,’ by the new section 2 of the Bill, is defined to mean: — ‘a formal ceremony recognised by the law of the place where the union was contracted as involving the voluntary union for life of one man and one woman to the exclusion of all others.’

Apparently, “voluntary union for life of one man and one woman” was borrowed from Ordinary J in Hyde v Hyde and Woodmansee\(^9\). The point to be made is that neither was there any definition on “man” or “woman” nor the criteria for determining a person’s sex.

Even going to 2005, when the Marriage (Introduction of Civil Celebrants of Marriages and General Amendments) Bill was introduced and passed to “modernize the drafting style of certain provisions of [the Marriage Ordinance] and to make related and consequential amendments to the Marriage Ordinance”\(^10\), no particular references were given to the definition of “male” or “female”. Thus, in any instance, the legislature of Hong Kong never amended the MO and put in any definition of “man” or “woman”.

The legislature of Hong Kong considered “woman” or “female” earliest in the 1932, it would not have in mind of the Corbett and the test of “chromosomal, gonadal, and genital”. It follows that as the legislative history did not mention “woman” or “female” in the MO and they are possible to carry other meaning instead of the one provided in Corbett.

To a large extent, Corbett has been widely criticized. In the United States, the Superior Court of New Jersey in M.T. v. J.T.\(^11\) held that Corbett was wrongly decided. Handler J held that if a post-operative transsexual person possessed the full capacity to function as either a male or a female, the post-operative sex is the sex for marriage. Handler J goes on to say:

\(^{9}\) *Hyde v Hyde and Woodmansee* [1866] L.R. 1 P & D 130, 133.
\(^{10}\) Marriage (Introduction of Civil Celebrants of Marriages and General Amendments) Bill, CL1315.
\(^{11}\) *M.T. v J.T.* [1976] 355 Ad 204 (Appellate Division).
“In the case of a transsexual following surgery, however, according to the expert testimony presented here, the dual tests of anatomy and gender are more significant. On this evidential demonstration, therefore, we are impelled to the conclusion that for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person’s gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards.”

Thus, Handler J agrees that a person’s sex or sexuality is the gender, i.e. “one's self-image, the deep psychological or emotional sense of sexual identity and character”, of an individual and rejects the idea that sex and gender are the disparate phenomenon.

More recently, in New Zealand, Ellis J in *Attorney-General v Otahuhu Family Court* held that a post-operative transsexual person is allowed to marry in his or her desired sex. In page 606 of the judgment, Ellis J ruled that:

“In my view, the law of New Zealand has changed to recognise a shift away from sexual activity and more emphasis being placed on psychological and social aspects of sex, sometimes referred to as gender issues.

This shift has been recognised by jurisdictions outside England and the approach of Ormrod J in Corbett’s case has not always been accepted. In our own Family Court in *M v M* and in the Appellate Division of the Superior Court of New Jersey in *MT v MT* 355 A 2d 204 (1976) Judges have held that post-operative transsexual male to female persons have been able to marry, or more precisely that their marriages were not void. Added to these is the powerful majority decision of the New South Wales Court of Appeal in *R v Harris* (1988) 17 NSWLR 158, a criminal case where the sex of the alleged offender was in issue … I find myself unable to accept the decision in Corbett’s case as governing the outcome of the present application.”

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12 ibid 209.
13 ibid 207.
14 *Attorney-General v Otahuhu Family Court* [1995]1 NZLR 60 [*Otahuhu*].
The logical extension from the abovementioned judgments is *Corbett* fails to recognise the legal relevance, policy and principle on reassignment surgery. The use of the “chromosomal, gonadal, and genital” test fails to create the appropriate impression that social and psychological matters are relevant. Thus, *Corbett* is quite unsupportive as it only focuses on one of the many aspects of determining the gender of a “female” or “male”.

The more appropriate approach to interpret “female” or male is the “Plain Meaning Rule” and the “Updating Construction Rule” identified by Francis Bennion\(^\text{15}\) to include post-operative transsexuals into the definition of “male” or “female”.

(a) The “Plain Meaning Rule”

In *Pinner v Everett*\(^\text{16}\), Lord Reid ruled that

“In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute. It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase.”\(^\text{17}\)

As medical intervention of a person with external genital features means that the person has assumed the other sex, it is difficult to see why such a change cannot be seen as a change of gender also. In *R v Harris*\(^\text{18}\), Black CJ said that:

“This usage reflects, in my view, not only the significant incidence of sex reassignment surgery but a growing awareness in the community of the position of transsexuals and, most importantly, a perception that a male-to-female transsexual who has had a ‘sex change operation’ or a ‘sex change’ may appropriately be described in ordinary English as female. That is to say, the person may properly be described by the word appropriate to the person’s

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\(^{16}\) *Pinner v Everett* [1969] 1 WLR 1266.

\(^{17}\) *ibid* 1273.

\(^{18}\) *R v Harris* [1988] 17 NSWLR 158.
psychological sex and to external genital features which are now in conformity with the person’s psychological sex. This is particularly the case where, as here, a choice has to be made between two categories, neither of which is qualified a choice between describing a person as, simply, either male or female.”

(b) The Updating Construction Rule

According to Secretary for Justice v Chan Wah, there is a presumption that the wordings of the legislation shall be interpreted in the light of the present situations. If the laws in question concerns with marriage laws, a more flexible interpretation is necessary. Since the determination of sex by purely biological criteria as held in Corbett is no longer keeping with the present circumstances, the law shall be moved on in response to changes in times.

Because the laws in Hong Kong has neither ever had Corbett in mind nor any special circumstances requiring a departure from the ordinary language, the interpretation of “female” or “male” shall include post-operative transsexuals in the natural or ordinary language. Applying the “Plain Meaning Rule” and the “Updating Construction Rule”, the gender of post-operative transsexuals shall be included without any divergence from the ordinary meaning of “male” or “female”.

III. The Right to Privacy

The right to privacy is found in the BORO and the ICCPR. In Foy v An t-Ard Chláraitheoir, the respondents submitted that no findings should be made in respect of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms insofar as the applicant’s case was based on the failure to enact appropriate legislation, rather than an existing piece of legislation which prohibited the exercise of her rights. In response, the High Court of Ireland said at paragraph 108 that:

“In my view the failure by the State, through the absence of having any measure to honour the convention rights of its citizens, is every bit as much a breach of its

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19 ibid [304].
20 Secretary for Justice v Chan Wah [2000] 3 HKCFAR 459 (CFA), [40].
21 Bellinger v Bellinger [2002] Fam. 150, [160].
responsibility as if it had enacted a piece of prohibited legislation. On a daily basis the High Court sees constitution actions being successfully taken by reason of the State’s failure to have in place for example, proper educational facilities for its minors. Moreover in many of the cases dealt with by the European Court of Human Rights, and which are referred to above, the court has considered (and found) violations of articles 8 and 12 expressly on the grounds of the respondent’s State’s failure to have in place a system of law affording to a transsexual person proper respect of his or her Convention rights. I therefore do not believe that this submission is well-founded.”

In fact, there is no different between the right to privacy under BORO and the right to private life in the ECHR. In Democratic Party v The Secretary for Justice, Hartmann J rules that these two concepts are indistinguishable. It can even be expanded to include activities of a professional or business nature since they are opportunities to develop relationships outside the world. Thus, under article 14 of the BORO and article 17 of the ICCPR, they impose a positive obligation on the government to secure respect for private life, human dignity and the quality of life in certain aspects. In particular, article 14 of the BORO states that:

(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks.

The right to privacy encompasses the right to personal development, physical and moral security in the full sense and the right to establish and develop relationships with other human beings. It embraces aspects of an individual’s physical and social identity; and consists of elements including gender identification, sexual orientation and sexual life. When the laws conflicts with

23 The Democratic Party v The Secretary for Justice [2007] 2 HKLRD 804 (CFI) [The Democratic Party].
25 Pretty v United Kingdom [2002] 35 EHRR 1, [61].
a transsexual’s personal identity, interference with private life may arise. In Goodwin, it was held that:

“It must also be recognised that serious interference with private life can arise when the state of domestic law conflicts with an important aspect of personal identity (see, mutatis mutandis, Dudgeon v. the United Kingdom judgment of 22 October 1981, Series A no. 45, §41). The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court’s view, be regarded as a minor inconvenience arising from a formality. A conflict 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.”

It is beyond doubt that fundamental interference does exist to homosexual or transsexual couples because of the distinct identity they possess of and the failure to recognize their status in society. Thus, the right to privacy may be infringed. These interferences, as stated in Article 14 of the BORO, must not be ‘unlawful’ or ‘arbitrary’. The two terms were explained by General Comment No. 16 of the Human Rights Committee, which means no interference can be taken unless entrusted by law, which shall be in accordance with the aims and objectives of the ICCPR and must be reasonable in the particular circumstances. As commented by Hartmann J in The Democratic Party, it must balance the general interests of society and the requirement of the protection of an individual’s fundamental rights. The test to be employed is the proportionality test. He goes on to formulate the test as:

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26 Goodwin [77].
27 Office of the High Commissioner for Human Rights, ‘General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17): 04/08/1988. CCPR General Comment No. 16. (General Comments)’ [3]-[4].
28 The Democratic Party (n22) [61]-[65].
“(i) The restriction must be rationally connected with one or more of the legitimate purposes, and
(ii) the means used to impair the right of privacy must be no more than is necessary to accomplish the legitimate purpose in question.”\(^{29}\)

Not to allow same-sex marriage or transsexual marriage means that an impediment to pursuit for the development and fulfillment of her gender and social status. In \(B v \text{ France}^{30}\), the ECHR held that a violation of the right to privacy would arise if the transsexual couple had to suffer almost daily disclosure of her transsexual status right away to third parties. Similar situation is observed in \(Goodwin\), which the full legal recognition of the gender of the transsexual person affected the person’s entitlements to pension, life insurance, re-mortgage offer and winter fuel allowance. All these add up may “place the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety”.\(^{31}\) Gender reassignment is legal for around 30 years, and the Hong Kong government has provided public funding for it. It is surprised to see that it is not met with full recognition in law in Hong Kong.

Another fundamental principle underpinning human rights law is the respect for human dignity and human freedom. The implication is that a man is free to pave his way that fits his style. Transsexuals are very much as entitled as any other person to live the right. They have to undergo painful and dangerous surgery to make them to adapt to their new sex. In the earlier case of \(Cossey v \text{ United Kingdom}^{32}\) which the UK government was held not in breach of the right to privacy when transsexual applicants were refused to alter the register of birth certificates. The dissenting opinion of Martens J explained the significance to fully and in all respects recognize the status of transsexual person:

“After these ordeals, as a post-operative transsexual, he turns to the law and asks it to recognise the fait accompli he has created. He demands to be recognised and

\(^{29}\) \textit{The Democratic (n22) [65].}
\(^{30}\) \textit{B v France [1993] 16 EHRR 1.}
\(^{31}\) \textit{Goodwin (n23) [77].}
\(^{32}\) \textit{Cossey v United Kingdom [1990] 13 EHRR 622 [Cossey].}
to be treated by the law as a member of the sex he has won; he demands to be treated, without discrimination, on the same footing as all other females, or as the case may be, males. This is a request which the law should refuse to grant only if it truly has compelling reasons.”

Martens J goes on to say about the conditions of transsexual recognition:

“If a transsexual is to achieve any degree of well-being, two conditions must be fulfilled:

1. by means of hormone treatment and gender reassignment surgery his (outward) physical sex must be brought into harmony with his psychological sex;
2. the new sexual identity which he has thus acquired must be recognised not only socially but also legally.

… As to the second of the above conditions, it should be stressed that (medical) experts in this field have time and again stated that for a transsexual the ‘rebirth’ he seeks to achieve with the assistance of medical science is only successfully completed when his newly acquired sexual identity is fully and in all respects recognised by law. This urge for full legal recognition is part of the transsexual’s plight. That explains why so many transsexuals, after having suffered the medical ordeals they have to endure, still muster the courage to start and keep up the often long and humiliating fight for a new legal identity.

That explains also why neither Mr Rees nor Miss Cossey nor the various other transsexuals who had raised complaints against the United Kingdom were willing to be content with the comparatively advantageous situation which obtains in the United Kingdom as to the possibilities of changing one’s

33 Cossey (n31) [2.7].
first name and the relevant prefixes on such official documents as passports and driving licences. Both Mr Rees and Miss Cossey made it abundantly clear that what they were seeking was full legal recognition of their newly acquired sexual identity.”

As said by Martens J, transsexuals’ perception of self-worth is closely connected to them being given full recognition of their gender identity. Therefore, it is very unlikely non-recognition of transsexuals’ gender identity for the purpose of marriage is only a minimal interference with their private life. Such discordance will impede them to enjoy their full right to privacy.

The Supreme Court of New Jersey in *M.T. v J.T.* reached the same conclusion. It pointed out that the recognition of transsexual’s capacity to enter into marriage could promote personal happiness and in no means disserves any societal interests and public order.

The flip side of this argument is that the interference was justified. The test of it is the proportionality test as mentioned earlier. The burden is on the government to justify itself. In determining whether the interference was justified, the crucial question is whether it satisfies the proportionality test. It is difficult to see any concrete or substantial hardship to the public interest just because the recognition of the status of transsexuals. As argued, Hong Kong society may possibly be expected to tolerate some inconvenience to ensure that transsexuals can live in dignity and in the identity they have chosen to live with. As commented by the Grand Chamber in *Goodwin* that the problems associated with transsexual marriage are “are far from insuperable” and concluded that there were “no significant factors of public interest to weigh against the interest of this applicant in obtaining legal recognition of her gender reassignment”. Accordingly, the restriction is not rationally connected with one or more of the legitimate purposes and the means impairing the right to privacy is not no more than is necessary to accomplish one or more of the legitimate purposes.

34 *Cossey* (n31) [2.1] – [2.4].
Therefore, to recognize the post-operative sex is just a confirmation of the factual reality. As there are no any general interests of society and no social advantage for non-recognition, failure to recognize the gender of post-operative transsexual violates the right to privacy.

IV. **Constitutional Right to Marry**

S.40 of the Marriage Ordinance (Cap 181) ("MO") is the statutory provisions for marriage. It provides that:

> Every marriage under this Ordinance shall be a Christian marriage or the civil equivalent of a Christian marriage.

The expression "Christian marriage or the civil equivalent of a Christian marriage" implies a formal ceremony recognized by the law as involving the voluntary union for life of one man and one woman to the exclusion of all others. Such statutory right of marriage guaranteed to Hong Kong residents is found under Art.37 of the Basic Law. It reads

> “The freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law.”

Similar provisions are found under art.19(2) of s. 8 of the Bill of Rights Ordinance (Cap 383) ("BORO") and art.23(2) of the International Convention on Civil and Political Rights ("ICCPR"):

Art. 19(2) of s.8 of BORO:
> The right of men and women of marriageable age to marry and to found a family shall be recognized.

Art. 23(2) of ICCPR:
> The right of men and women of marriageable age to marry and to found a family shall be recognized.
In *W*, Cheung J ruled that all these provisions “are all concerned with opposite sex marriage.”\(^{36}\)

However, there are two points to be noted. First, signatories to the ICCPR can introduce instruments to recognize same-sex relationships. Second, the sole reason that same-sex marriage is not recognized under constitutional instruments does not mean that it does not contravene some of the most fundamental pillars of human rights – equality, right to marry and right to privacy.

In *R (Baiai) v Home Secretary*\(^{37}\), it was held that the right to marry is a strong and unqualified right even it is not an absolute one. Such right has an important role to play with person’s dignity and is significant to many people. In *Goodwin*, the Grand Chamber held that the right to marry under article 12 of the ECHR gives rise to social, personal and legal consequence and so it cannot be impaired fundamentally.\(^{38}\)

As any less favourable treatment to transsexual or same-sex marriage couples on their status or sexual orientation would offend the principle of equality under the Basic Law, they are entitled to the same degree of protection as other Hong Kong resident of marriageable age irrespective of their sexual status as a post-operative transsexual or sexual orientation.\(^{39}\)

Moreover, in *Goodwin*, it stated that transsexuals’ right to marry is infringed if they are not allowed to marry to the opposite sex. The Grand Chamber stated that “The applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court's view, she may therefore claim that the very essence of her right to marry has been infringed.”\(^{40}\)

Although it may be argued that the capacity to have genital intercourse may be different from that of a biological female, it is not a condition precedent that is relevant capacity to marry at

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\(^{36}\) ibid [176].

\(^{37}\) *R (Baiai) v Home Secretary* [2009] 1 A.C. 287 (HL).

\(^{38}\) *Goodwin* (n23) [98] – [99].


\(^{40}\) *Goodwin* [101].
all. In fact, in *Kevin and Jennifer*, it was held that a finding of the applicant was a man at the
time of the marriage for the purposes of the Marriage Act in Australia was clearly a consistent
finding with international law and humanity to allow the confirm the applicant’s capacity to
marry. A contrary finding means considerable injustice for no apparent purpose. In *Otahuhu*,
there is a parallel line of judgment with *Kevin and Jennifer* that it is not properly proscribed and
manageable in accordance with the legal framework to say that society will be adversely affected.
Therefore, on similar analogy to the right to private life, the right to marriage shall not be
infringed.

V. Increasing Movement towards Prohibition against Discrimination on Sexual
Orientations

Another issue is on same-sex marriage. In many jurisdictions, homosexual groups have initiated
movements to avoid discrimination based on sexual orientations. These include calling upon the
governments to forbid discriminations in most areas of laws like housing, employment and
taxation.

There are numerous decisions throughout the world to demonstrate this. In 1999, the English
House of Lords held in *Fitzpatrick v Sterling Housing Association Ltd* that a same-sex couple
that cohabitated qualified as the member of the original tenant’s family with the right to inherit a
tenancy previously held by the deceased male partner. Prior to enactment of the Civil Partnership
Act in 2004, some English cities such as Liverpool, London, Birmingham and Brighton already
provided informal registration services for same-sex couples. In Canada, the Metropolitan
Community Church conducted extralegal marriage between same-sex couples. Another landmark
decision was made by Gavin Newsom, the Major of San Francisco in 2004 that he had
authorized the celebration of marriage between same-sex couples.

[171], [195]; *Bellinger* [130].
42 *Kevin and Jennifer* [380].
43 *Fitzpatrick v Sterling Housing Association Ltd* [1999] 3 WLR 1113 (HL).
VI. From Transsexual Marriage to Same-Sex Marriage

Fundamentally, the reasoning for same-sex marriage and transsexual marriage is very similar. The problem of privacy, equality, right to marriage and discrimination exist. Cheung J in W said that the challenge posed by post-operative transsexual marriage was part of a larger problem and raised the question of same-sex marriage, and even hinted that civil partnership may be a possible solution.

(a) Sex Discrimination because of Sexual Orientation

Art. 26 of ICCPR states that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In Leung T.C. William Roy v Secretary of Justice, the court held that the legal restriction on sodomy in Hong Kong violates the BORO. It further held that ‘sex’ in article 26 includes sexual orientation. The logical extension is that the MO may discriminate against homosexual couples. Such differential treatment may only be justified if it satisfies “prescribed by law” and “not contravening the ICCPR provision” under article 39 of the Basic Law. As article 26 does not provide the mechanism for justification, we have to look into society’s dimension to determine whether there is justification for discrimination against same-sex couples.

(b) Social Debates and Objections

44 W (n5) [89].
45 W (n5) [254].
46 Leung TV William Roy v Secretary of Justice [2005] 3 HKC 77 (CA).
The arguments put forward by the Law Reform Commission of Hong Kong laid down a few objections against same sex marriage in 1983. These arguments, mainly circles traditional Chinese morality, religious and procreation, remain the same for the past decades. Similar arguments are observed world-wide. In particular, the Marriage Legislation Amendment Bill in Australia commented that these arguments are “No rational reason is offered for this blatant discrimination. All that is put forward is that ‘the vast majority of Australians’ believe that marriage is exclusively heterosexual.” In short, these arguments can be summarized as the protection of religious beliefs, cultural morals and the inability to procreate.

(c) The Debates on Religious and Cultural Believes

Religious communities oppose the proposition of same-sex marriage. Stanton and Maier argued that “the larger story is the historic Christian reality, which has something unique and profound to say about the issue at hand”. In particular, they view that marriage become the fullest representation of the Trinitarian God on Earth, so the fulfillment of the sociability depends on fellowship with the opposite sex. They insist marriage is a divine institution for between the opposite sexes. To propose otherwise is blasphemous and a violation of god’s will. This means that the combination must be men and women only. They insist marriage is a divine institution for between the opposite sexes. To propose otherwise is blasphemous and a violation of god’s will.

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49 Phillip Ruddock, ‘Commonwealth, Parliamentary Debates in the House of Representatives of Australia on 27 May 2004’. See also, Emma-Kate Symons, ‘Young-old rift on family value’ The Australian (Sydney 14 April 2004) 3.
51 Ibid (n7).
52 Glenn T. Stanton and Bill Maier, Marriage on Trial: The Case Against Same-Sex Marriage and Parenting (InterVarsity Press, Illinoi 2004) 172.
54 Mary Steward Van Leeuwen, Gender & Grace (Downers Grove, Ill.: InterVarsity Press, Illinoi 1990) 41.
From the cultural perspective, Stanton and Maier give the example of the Native American Berdache that they are the very rare cases which same-sex marriage is found in aboriginal tribes to prove that only very rare and uncivilized cultures have accepted same-sex marriage. It is never part of the normal tribal life for marriage between same-sex and is never encouraged as well.

Nonetheless, the proposition of the religious requirements, formalities and cultural oppositions falls short. In *Re Kevin*, Chisholm J said that the religious believe are no longer as important as the history has demonstrated. He added

“…there was no evidence or submission about how ancient Christian law might have regarded people like Kevin. The question is somewhat unreal, since chromosomes were unknown, as was the treatment that Kevin has undergone. Nor were there any submissions about the relevance of any particular theological or doctrinal Christian positions that might have supported the argument… There is another problem with the argument. If, as I have held, the question is to find the current meaning of an ordinary word, “man”, I do not see any reason why resort should be had to ancient law rather than contemporary understandings. There is a separation of church and state in this country, and there is no basis for determining the legal question by reference to any particular set of religious beliefs. No doubt the definition of marriage has its origin in Christian beliefs, and this may have been part of the history that resulted in marriage being defined as between a man and a woman. But I do not see how resort to ancient Christian law or beliefs can assist in determining the meaning of the word “man” for the purpose of the law of marriage in the year 2001”

In *Otahuhu*, Ellis J held,

55 *ibid.*, 51.
“I can see no socially adverse effects from allowing such transsexuals to marry in their adopted sex, I cannot see any harm to others, children in particular, that is not properly proscribed and manageable in accordance with the existing framework of the law. I refer for example to my decision on a proposed adoption by two women of the child of one of them: Re T (High Court, Wellington, AP 55/89, 10 April 1992), where the best interests of the child were determinative. In this I find myself of the same persuasion as the Court of Appeal of New Jersey in MT v JT and the majority of the Court of Criminal Appeal of New South Wales in Harris. Further, I find myself of the same view as Judge Aubin in M v M, the case that prompted this application.”56

In scientific research has shown that sexual oriental of a person is determined by the biological nature and the environment.57 Sigmund Freud has argued that sexual orientation is much determined in infantile stage, and this argument has lasted for a century.58 Therefore, the cultural arguments may not be justified for the differential treatment under the Basic Law.

(d) The Ability to Procreate

One of the most used argument to oppose transsexual marriage and same-sex marriage is the inability to procreate. In W, Cheung J distinguishes the situation of inability to procreate and unwilling to procreate. He said that, “The fact that the law allows those who are unable or unwilling to procreate to get married can be easily explained by reference to society's history, traditional practice and culture. However, all these cases involve couples of the opposite biological sex.”59 Be that as it may, Cheung J also observed that the reality is changing and said,

56 Otahuhu (n13) 607.
59 W (n5) [124].
“However, I have not lost sight of the real point made in support of a transsexual's
case here, ie that even within the institution of marriage, procreation has lost
much of its previous significance as the, or a, major purpose for the institution.
Some people marry with no ability to procreate (because of health, age or other
reasons). More importantly, many people marry with no intention to having
children. Stripped of procreation as its, or its main, purpose, the argument runs,
m with more a legally recognised relationship to afford mutual society,
help and comfort that the one ought to have of the other. Moreover, a family can
be founded without having natural children. Children may be adopted. Children
from former marriages and relationships would become members of the same
family after a new marriage. And children may be conceived by artificial
insemination - this is possible with a couple involving a post-operative
transsexual man."\(^{60}\)

In fact, the proposition the ability to procreate is no longer a requirement of marriage is well-
founded. In the Canada case of *Barbeau v. British Columbia*\(^{61}\), Blair J reasoned:

If the courts are to examine the common law definition of marriage through the
prism of Charter rights and values, it seems to me they must recognize and
appreciate the changes that have occurred over the centuries, and more rapidly in
recent years, in the attitudes of society towards the family, marriage and
relationships, as outlined above. To do otherwise is to abandon the purpose of s.
15 -- which is to promote equality and prevent discrimination arising from such
ills as stereotyping, prejudice and historical wrongs -- and to fail to consider the
common law principle under review in a contextual fashion. As noted already, the
Courts are mandated to take a purposive and contextual approach to the analysis
and interpretation of s. 15 equality rights: *Law v. Ontario* (Minister of
Employment and Immigration), supra.

\(^{60}\) *W* (n5) [205].

\(^{61}\) *Barbeau v. British Columbia* [2003] BCCA 251 (Court of Appeal of British Columbia).
Given this background and dramatically shifting attitudes towards marriage and the family, I have a great deal of difficulty accepting that heteroerosexual procreation is such a compelling and central aspect of marriage in 21st century post-Charter Canadian society that it -- and it alone -- gives marriage its defining characteristic and justifies the exclusion of same-sex couples from that institution. It is, of course, the only characteristic with which such couples are unable to conform (and even that inability is changing).

Thus, procreation is not a hindrance to civil partnership when society’s perception tells us that procreation no longer is a fundamental element in marriage. Even on the assumption that it is, technology is developing that it is no longer impossible for same-sex couples to procreate.

VII. Alternatives to Marriage

(a) W’s Judgment, Society’s Concern and the Impact on Allowing Transsexual and Same-sex Marriage

From the abovementioned, Hong Kong violates the equality provision under art.37 of the Basic Law, the right to privacy and right to marry under the ICCPR in not recognizing same-sex marriage and transsexual marriage. In W, Cheung J rules that “Corbett does represent the present state of the law in Hong Kong”.62 So, according to Schalk and Kopf v Austria63, the Court cannot rush to substitute its own judgment in place of the authority which represents the social needs. In commenting on the relationship between the right to marry and societal consensus, Cheung J laid down the principles on balancing them:

“…generally speaking, in the absence of any compelling reason to the contrary, the constitutional right to marry requires the law of marriage not to lag behind the general societal consensus for the time being. The former cannot be more

62 W (n5) [125].
63 Schalk and Kopf v Austria No (2010) 30141/04 (ECtHR).
restrictive than the latter, for otherwise, generally speaking, the "essence" of the right would be impaired and the law would be unconstitutional. (The converse is, however, not true - in a democracy, the legislature is at liberty to enact, by a simple majority or otherwise in accordance with the relevant legislative requirements, a law of marriage that is more liberal than the general societal consensus and understanding.)\(^{64}\)

However, it is observed that gender recognition on transsexuals in different countries and territories are common. For example, in Australia, the Birth, Deaths and Marriages Registration Act 1997\(^{65}\) allows for a person who is not married and who has undergone sexual reassignment surgery to apply to alter the record of that person’s sex in the registration of the persons birth. In Singapore, the Women’s Charter\(^{66}\) allows transsexual marriage if sex re-assignment procedure has undergone. In United Kingdom, the Gender Recognition Act 2004, application may be made by a person to the Gender Recognition Panel for gender recognition certificate on the basis of living in the other gender. If the application is allowed, marriage is allowed as it is marriage just a typical one. There are detailed provisions on birth register entries, parenthood, social benefits etc.

Although in \(W\), Cheung J ruled that the societal consensus elsewhere shall not be an indicator of what shall be in Hong Kong, the reasons of why the laws are changed in these countries are, in a holistic view, important considerations to be contemplated. These practices, in the European Union and some Asia countries, do represent a trend of recognition and the willingness of their governments to recognize and legalize transsexual and same-sex marriage.

Even if the present Hong Kong situation may be skeptical as to take an immediate step to define marriage to include same-sex and transsexual marriage, the need for the public to accept same-

\(^{64}\) \(W\) (n5) [189].

\(^{65}\) Australia Birth, Deaths and Marriages Registration Act 1997.

\(^{66}\) Singapore Women’s Charter (Cap 353).
sex couples is undeniable and more important than a fundamental change in law is still beyond doubt. If these steps are not taken, same-sex couples may be marginalized by society.\footnote{ibid (n7); See also Chiu Man Chung, ‘Contextualizing the Same-sex Erotic Relationship: Post-colonial Tongzhi and Transgender Political Discourse on Hong Kong and PRC Law of Marriage’ in Wintemute, Robert (ed), Legal Recognition of Same Sex Partnership: National Law, European Law and International Law’ (Hart, Oxford 2001).}

Given the constrain of the case of $W$, the government, to the least extent, is obliged to introduce a form of recognition to same-sex partnership and confers the same rights and benefits to same-sex couples. In the post-script of $W$, Cheung J noted that

\begin{quote}
“266. Before parting with the case, the Court wishes to highlight several matters. First, the Court fully recognises that we live in a rapidly changing world. Social mores and societal practices, like almost everything else, are not immune from gradual or even swift change. The law, and in particular, the fundamental rights guaranteed under our constitutional instruments, must evolve and keep up with these changes, in order to be and to remain relevant. The result in the present litigation is not necessarily determinative of the same or similar issues in future. Any future challenge must be dealt with and decided according to the circumstances then prevailing. However, at least for the time being, the Court has spoken on the issues according to present day circumstances.

267. Secondly, the Court is acutely conscious of the suffering and plight of those who suffer from transsexualism, and the prejudice and discrimination they face as a minority group in our society, even though there are signs that people are becoming more sympathetic and accepting in attitude generally. That alone, however, is quite insufficient to found the fundamental change in the law sought by the applicant in the present case.

268. Thirdly, it is certainly hoped that the Government would not view the result of this litigation as simply a victory, particularly not as a victory over those who have the misfortune to be suffering from transsexualism. Rather, it is hoped that
this case would serve as a catalyst for the Government to conduct general public consultation on gender identity, sexual orientation and the specific problems and difficulties faced by transsexual people, including their right to marry. The Government might wish to consider including in the consultation related issues and problems, such as same sex marriage, civil partnerships and the rights and difficulties of those involved, and to find out generally what members of our society think in relation to these sensitive matters and where the public good lies.\textsuperscript{68}

Thus, it is propose that new reform shall be made to same-sex couples – the civil partnership.

(b) Civil Partnership

In the United Kingdom Parliament has legislated for civil partnerships in 2004, which entered into force in 2005. The Civil Partnership Act 2004 (“CPA”) provides extensive insights as to the context of civil partnership in Hong Kong. A civil partnership is defined under s.1 of the CPA that it is a relationship between two people of the same sex when they registered as civil partners of each other. Chapter 2 to 6 provides the legal status of dissolution, nullity, property and financial arrangements, civil partnership agreement and children respectively. In particular, s.3(b) of the CPA provides that “two people are not eligible to register as civil partners of each other if – either of them is already a civil partner or lawfully married”. This shall be seen as civil partnership and marriage have the same legal status as it mirrors the legal concept of prohibiting bigamy in both Hong Kong and United Kingdom.

The ending of civil partnership is dealt under CPA s.37 to 64. As suggested by scholars and practitioners, the procedures of separation of civil union are very similar to marriage that “The orders that the court can make are very similar to those made ... on the breakdown of a marriage, and divorce practitioners will readily recognise the language and concepts”.\textsuperscript{69} Hong Kong adopts

\textsuperscript{68} W (n5) [266] – [268].
similar laws to divorce in marriage in United Kingdom. Divorce must be based solely on marriage that has broken down irretrievably, which is found in s.11 of the Matrimonial Causes Ordinance (Cap. 179) (“MCO”). S.11A of the MCO further elaborates that marriage breaks down irretrievably when there is adultery, unreasonable behavior or both parties to the marriage have lived apart for at least 1 year. It is suggested that similar laws shall be introduced to civil partnership in Hong Kong to grant them equal status to marriage between opposite sexes.

Problems may be associated with not only same-sex marriage but also the recognition of a change of gender of a post-operative transsexual. Some areas of laws may be affected and requires redefinition and reconsideration by the legislature. One example is in relation to tax-related provisions where “spouse” is defined under section 2 of the Inland Revenue Ordinance\(^70\) to mean “a husband or wife”. “Husband” and “wife” in turn are defined to mean a “married man” or a “married woman” whose marriage is a marriage within the meaning of that section. A husband-and-wife relationship would thus have a bearing on one’s entitlement to a married person’s allowance or the couple’s entitlement to elect for joint assessment for salaries tax purposes or for personal assessment. Another example is in the family law context, the determination of one’s position as the mother or father, or one’s entitlement to parental responsibilities and rights and child care. If a transsexual is recognized in the acquired sex, that entails questions as to whether a transsexual retains his/her parental responsibility after changing gender and so the male-to-female transsexual remains a “father” to the child.\(^71\)

Besides, there are also some distinctions between civil partnership and marriage. These distinctions are subtle. First, adultery is not a basis for divorce in civil partnership. Adultery is a legal concept in which either a married person and an unmarried person or both persons which are married not to each other undergoes a partial or complete penetration between a man and a

\(^70\) S. 2 of the Inland Revenue Ordinance (Cap 112).

\(^71\) See S. 10 of the Parent and Child Ordinance (Cap. 429); Some other areas that may be affected include the Married Person Status Ordinance (Cap. 182); Domestic and Cohabitation Relationships Ordinance (Cap. 189); Matrimonial Causes Ordinance (Cap. 179); Adoption Ordinance (Cap. 290).
woman. However, the term “adultery” can be replaced by concepts analogous to “adultery” in the context of civil partnership and sexual infidelity shall be incorporated into the laws that relates to civil partnership.

While a marriage may be religious, a civil partnership can only be civil. However, this is not a fundamental flaw to disallow same-sex partnership. Baroness Deech commented on religious and formalities that “it seems that people no longer care for these types of formalities, because religion is a waning force, women have financial independence, there is state support for lone parents, children are no longer classified as illegitimate, divorce is easy and there is no recrimination over sex and birth out of wedlock.” As society changes rapidly, there is an undeniable trend that marriage now has less formalities. Some marriages now also involve no religious ceremony. Thus, civil partnership remains civil is indeed coping with society’s changes.

Furthermore, some scholars argue that by providing legal protection to same-sex couples under the name of “civil partnership” has a negative labeling impact on them. “By not allowing homosexuals to marry, the message is that the homosexual relationship is valued less highly than any heterosexual one”. This may not be true. Given that if there are laws that protect the rights of same-sex couples, it represents a big leap towards the recognition of the rights and acceptance of same-sex couples. This may aid society to start accepting the existence and understanding the needs and problems encountered by same-sex couples. In a holistic view, it provides more security to same-sex couples than to none under the current legislation framework.

In spite of the fact that there are problems and difference between civil partnerships and marriages, it is for the legislature to demonstrate justice to merge the laws into a piece of fair, just and reasonable legislation. After all, problems with definitions can be solved by the government and it is only a matter of technical constructions of how the laws shall be worded. Therefore, there shall be no obstacles to legislate laws that relates to civil partnerships as the law

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is an instrument to do justice and equality instead of staying black and white. The solution is both legal and practical to solve the problems.

(c) The Equal Opportunity Commission

The Hong Kong Equal Opportunity Commission is an independent body which receives and investigates complaints of discriminations because of sex, disability, family status and race under the Sex Discrimination Ordinance (“SDO”) in 1996.\(^75\) S. 64 of the SDO lists out the functions and powers of EOC, the objectives include “the elimination of discrimination on grounds of sex, marital status, disability, pregnancy, family status and race,” “the elimination of sexual harassment, and harassment and vilification on grounds of disability and race,” the promotion of “equality of opportunities between the men and women, between persons with a disability and persons without a disability, irrespective of family status and race,” and receiving complaints and investigating them with a view to the resolution of disputes through conciliation.\(^77\)\(^78\)

As observed by Kapai, more active role shall be taken by EOC because it is the intermediary between the government and its people as it represents the interests of people that imposes strict standard and also the voices of complying with international and constitutional equality.\(^79\)

The former Chairman of the EOC, Raymond Tang, once commented on some love motels turn away homosexual couples, “While [not to discriminate against] disabilities reflect[s] societal values, sexual orientation touches on personal values, religious values and different community values. So it becomes more difficult.”\(^80\) This may be seen as discriminatory against same-sex and transsexual marriage because literally all discrimination shares similar ethics behind.

In any event, the EOC shall act as the role model to avoid receiving complains on discrimination so that same-sex and transsexual person may wish to complain to EOC with full confidence. A

\(^{75}\) S. 63 of the Hong Kong Sex Discrimination Ordinance (Cap 480).
\(^{77}\) SDO, s 84(3); DDO, s 80(3); FSDO, s 62(3); and RDO, s 78(3).
\(^{79}\) ibid 349.
\(^{80}\) Vivienne Chow and Yau Chui-yan, “Lack of Legal Recourse Leaves Homosexuals Open to Discrimination” (2008) SCMP, 13 July.
case which reflects EOC’s indiscretion is *Sit Ka Yin Priscilla v EOC* 81 as the applicant was dismissed by the EOC on the ground that no proper and fair hearing was given prior to any disciplinary action was taken. Although the case did not go to trial, Kapai argued that “suffice it to say that the perception that the EOC itself discriminates on certain grounds against the people it deals with is one which needs to be worked on and eventually, it is hoped, eradicated. Such an impression, alone, can be damaging for the morale of the people and their desires for a more just and equal society.” 82

Moreover, the EOC has stated that Hong Kong is not ready for any legislation that deals with same-sex and transsexual marriage because of the conservative nature of society. 83 As a body which is set up to regulate any discriminatory acts in Hong Kong, EOC has to maintain its transparency, independency and accountability without any compromise to the government. It was argued by Kapai that “the degree of control and influence that the Home Affairs Bureau … exercises over the EOC undermines the independence of the institution”. 84 It may deter homosexuals and transsexuals to lodge any complaints towards any entities because the process is typically “close-door” which no nominations are available and the general lack of suitable candidates may reduce the chance of them of getting a fair protection of rights.

To combat this problem, the EOC needs to be representative and to include delegates from different organizations, and members from the government shall only be one of the many members of the EOC to ensure investigations are conducted in a fair and reasonable manner to avoid any undue influence is exerted on the EOC. Any proposed draft bills is then more dynamic.

**VIII. Conclusion**

All in all, as argued, the recognition of transsexual and same-sex marriage has its grounds by facts and by laws. The constitutionality of including them in “marriage” under the Hong Kong laws and Basic Laws are fundamentally backed either by the literal interpretation of the Marriage

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81 *Sit Ka Yin Priscilla v EOC* [1998] 1 HKC 278 (CFI).
82 ibid (n70) 352.
84 ibid (n72) 354.
Ordinance or by decisions of other jurisdictions. In the above-mentioned, it has been illustrated that there are three grounds that support same-sex and transsexual marriage, namely the correct interpretation of “male” and “female”, the right to privacy and the right to marriage. The decision of $W$ suggests the notion of societal consensus, which this paper does not agree to because just to say that Hong Kong people are “not ready” for these changes is detriment to homosexuals and transsexuals. It undermines the foundational ideals of dignity and equality when the question at hand is just purely social and moral principles.

Although $W$ has restricted the present recognition, this paper suggests that the future is still towards the inclusion of them into “marriage”. This can be achieved by first to allow something to happen. If the government fails to do so is infringing the equality principle under the Basic Law. It is the responsibility for the government to give legal recognition and protection to same-sex couples. It may be too problematic for the government to include same-sex and transsexual marriage into the definition of marriage under the current legal system. Thus, an alternative to marriage – the civil partnership can help the government to fulfill its constitutional responsibility. It is further argued that the laws that relates to civil partnership shall bear all equivalent provisions as marriage. They shall not in it discriminatory towards transsexuals and homosexuals and must provide them with the exact benefits and protections under the legal framework in Hong Kong.

Moreover, the EOC shall also ensure transparency, integrity and independency exist in advising Hong Kong society to the issue of same-sex and transsexual marriage. The EOC shall act as the role-model to combat the problem of discriminations on all these problems.

On a purely equality and justice perspective, there is no any strong reason to oppose the inclusion of homosexuals and transsexuals. No matter what the court has ruled in $W$, the discussion on this issue shall have to be started. As the House of Lords in Ghaidan v Godin-Mendoza said, “it is the purpose of all human rights instruments to secure the protection of the essential rights of members of minority groups, even when they are unpopular with the majority.
Democracy values everyone equally even if the majority does not.” Taking into account of the other jurisdictions, it seems almost certain that the rights of homosexuals and transsexuals must be protected without any further delay.

85 Ghaidan v Godin-Mendoza [2004] 2 ac 477, [132].
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