

W v REGISTRAR OF MARRIAGES AND THE RIGHT TO EQUALITY IN HONG KONG

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Kelley Loper*

*This article contends that the Hong Kong government's decision to deny a transgender woman's application to marry her male partner, reviewed by the Court of First Instance in *W v Registrar of Marriages*, engages a right to equality and non-discrimination in Hong Kong constitutional law as well as anti-discrimination legislation. In light of the relative marginalization of the transgender community and Hong Kong's reasonably robust equality jurisprudence, framing *W*'s challenge more explicitly on equality grounds may have had some advantages. In particular, a focus on equality may have strengthened the court's resolve to exercise its duty to protect the rights of minorities against discriminatory social attitudes.*

Introduction

In *W v Registrar of Marriages (W)*,¹ the Hong Kong Court of First Instance considered, among other issues, the constitutionality of the government's refusal to allow the applicant, a post-operative transgender woman, to marry her male partner. The Registrar of Marriages based his decision on a narrow interpretation of the meaning of the term "woman" in the Marriage Ordinance which excluded a transgender woman from its ambit.² Although counsel for the applicant essentially limited the constitutional limb of his argument to whether this decision violated her right to marriage or privacy under the Basic Law, the Hong Kong Bill of Rights and the International Covenant on Civil and Political Rights (ICCPR), this article contends that *W*'s inability to marry also engages her right to equality and non-discrimination. In light of the relative marginalization of the transgender community in Hong Kong and Hong Kong's

* Assistant Professor, Director of the LLM in Human Rights Programme, Deputy Director of the Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong. The author would like to thank Denis Chang SC, Holning Lau, Carole J Petersen, and Po Jen Yap for their helpful comments.

¹ [2010] 6 HKC 359.

² (Cap 181). According to s 40, the Ordinance governs a Christian marriage or the civil equivalent which 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".

reasonably robust equality jurisprudence, framing W's challenge more explicitly on equality grounds may have had some advantages.

This article begins with a discussion of the content of a right to equality in Hong Kong law which has been influenced by international human rights standards and interpretive materials produced by the United Nations human rights treaty monitoring bodies (treaty bodies).³ It examines the tests developed by the courts for determining whether a distinction amounts to unconstitutional discrimination and the relevance of certain "grounds" of discrimination, including gender identity, gender, and disability all of which are implied within the non-exhaustive list of protected characteristics in Arts 1 and 22 of the Hong Kong Bill of Rights.⁴ It then applies these standards to W's case and argues that the decision to prevent her from marrying her boyfriend is an unjustifiable distinction which constitutes discrimination on one or more of these grounds.

While the right to marriage alone provides a solid foundation for W's constitutional challenge⁵ a more explicit assertion of her right to equality and non-discrimination may have strengthened her claim. Hong Kong courts have carefully scrutinized justifications for distinctions which are based on grounds that go to the core of a person's identity and dignity as a human being and a person's "gender identity" would certainly fall within this category. In addition, since the right to equality requires the realization of substantive as well as formal equality, the courts must assess the degree of disadvantage faced by a particular group when considering whether discriminatory treatment has occurred. Omitting a transgender woman from the definition of "woman" for the purposes of marriage arguably has the effect of targeting members of a marginalized group and may therefore be difficult to justify. An equality approach emphasizes that such an interpretation should not be conducted according to discriminatory values, even if such values are espoused by the majority in Hong Kong

³ Hong Kong courts have generally been willing to consider international human rights jurisprudence, including these types of extrinsic materials, when deliberating human rights cases under the Hong Kong Bill of Rights. See *R v Sin Yau Ming* [1992] 1 HKCLR 127. For further discussion, see for example Carole J. Petersen, "Embracing Universal Standards? The Role of International Human Rights Treaties in Hong Kong's Constitutional Jurisprudence", in Hualing Fu, Lison Harris, & Simon N.M. Young (eds), *Interpreting Hong Kong's Basic Law: The Struggle for Coherence*, 33–53 (Palgrave MacMillan, 2007); Anthony Mason, "The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong", (2007) 37 HKLJ 299; and Johannes M.M. Chan, "Hong Kong's Bill of Rights: Its Reception of and Contribution to International and Comparative Jurisprudence", (1998) 47 *Int'l Comp. L. Q.* 306.

⁴ The Hong Kong Bill of Rights is set out in s 8 of the Hong Kong Bill of Rights Ordinance (Cap 383). These provisions essentially duplicate Arts 2(1), 3 and 26 of the ICCPR.

⁵ Despite the negative decision by the Court of First Instance, these arguments may succeed on appeal. See discussion of various weaknesses in the judgment by other contributors to this issue of HKLJ.

society. A key tenet of the rule of law as it is understood and observed in Hong Kong is that the courts, when exercising their constitutional jurisdiction, have a duty to protect the rights of minorities against discriminatory treatment. A focus on equality in *W* may have reinforced and drawn the court's attention more resolutely toward its role in this regard.

Significantly, establishing whether the government's decision in relation to *W* amounted to a violation of her right to equality does not require a consideration of whether the relevant provisions in the Marriage Ordinance *themselves* contravene the right to equality. Instead it entails a determination of whether the decision maker applied the provisions as they are presently drafted in a discriminatory manner. Although the court in *W* seemed at times to incorrectly conflate the issues of "same-sex" marriage and transgender marriage, the facts of the case do not support a claim of sexual orientation discrimination or a right to same-sex marriage.⁶ A challenge by *W* argued on equality grounds could succeed without the need to decide on the constitutionality of the text of the Marriage Ordinance.

The right to equality in Hong Kong law and its application to *W*

Overview

Hong Kong courts have decided a number of equality cases under the Basic Law and the Hong Kong Bill of Rights as well as anti-discrimination statutes such as the Sex Discrimination Ordinance (SDO)⁷ and the Disability Discrimination Ordinance (DDO).⁸ The content of a right to equality – while still developing – is generally more settled than the right to marriage which was at the centre of the court's analysis in *W*.⁹ The courts have construed the right to "equality before the law", expressed in Arts 25 of the Basic Law, with reference to the more extensive language of Arts 1 and 22 of the Hong Kong Bill of Rights which duplicate

⁶ The Marriage Ordinance – which restricts the definition of marriage to a union between one man and one woman – arguably contravenes the equality guarantee because it discriminates on the basis of sexual orientation (i.e. a gay man cannot marry the partner of his choice because of his sexual orientation or sex). This question was not at issue in *W*. See Karen Lee Man Yee, "W v Registrar of Marriages: From Transsexual Marriage to Same-sex Marriage?" (2010) 40 HKLJ 549.

⁷ (Cap 480).

⁸ (Cap 487).

⁹ According to the judgment, *W* also advanced arguments based on a right to privacy but ultimately focused on the right to marry, an approach the court believed was appropriate. Cheung J decided that "[t]he applicant's argument will stand or fall with the Court's determination on the right to marry. Nothing will be gained by a separate consideration of the right to privacy under Art 14 of the Hong Kong Bill of Rights". See n 1 above, para 167.

Arts 2(1), 3 and 26 of the ICCPR.¹⁰ Article 2(1) of the ICCPR requires states to “respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. Article 3 emphasizes the equal rights of men and women and Art 26 provides for a freestanding guarantee of equality before the law, equal protection of the law, and non-discrimination. It mandates that “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 interpreting these provisions, Hong Kong courts have begun to clarify certain principles which apply when ascertaining the constitutionality of potentially discriminatory treatment. First, the Court of Final Appeal has declared that equality is “the antithesis of discrimination” and “[t]he right to equality is in essence the right not to be discriminated against”.¹¹ It has affirmed the importance and fundamental nature of equality, citing its widespread embodiment in national constitutions – including Hong Kong’s – and in international human rights instruments. Li CJ (as he then was) emphasized that “[d]iscriminatory law is unfair and violates the human dignity of those discriminated against. It is demeaning for them and generates ill-will and a sense of grievance on their part. It breeds tension and discord in society”.¹²

The courts have also elaborated a test based on international standards and comparative human rights case law to establish whether certain distinctions are justifiable and therefore not discriminatory.¹³ In addition, they have proposed theories for determining when the courts must intently scrutinize justifications for differential treatment and suggested that the rigor of analysis in this regard should depend in part on the nature of the “ground” on which the distinction has been made and whether the matter falls within the sphere of social and economic policy.¹⁴ Although this approach is controversial – especially the courts’

¹⁰ Article 39 of the Basic Law incorporates the ICCPR into Hong Kong law, effectively giving the Hong Kong Bill of Rights constitutional status.

¹¹ *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335.

¹² *Ibid.* para 2.

¹³ *Ibid.*

¹⁴ See, for example, *Yao Man Fai George v Director Social Welfare* (unrep., HCAL 69/2009, [2010] HKEC 968); *Kong Yun Ming v Director of Social Welfare* [2009] 4 HKLRD 382; *Fok Chun Wa v Hospital Authority* (unrep., HCAL 94/2007, [2008] HKEC 2161) (CFI); *Fok Chun Wa v Hospital Authority* (unrep., CACV 30/2009, [2010] HKEC 713) (CA); *Raza v Chief Executive-in-Council* [2005] 3 HKLRD 561, para 118. The applicants have challenged the court’s approaches to the categorization of grounds as well as economic and social rights on appeal in some of these cases. The doctrine may therefore be modified as the relevant cases work their way up the judicial hierarchy.

preferred categorization of “grounds” and its general unwillingness to deliberate claims involving social and economic rights – it is clear from the Hong Kong jurisprudence to date that any justification for a distinction based on a characteristic as fundamental as transgender identity must be carefully examined.¹⁵

Prohibited grounds of discrimination

The first stage when deciding whether a breach of the equality guarantee has occurred – before considering the justifiability test – is to ascertain whether a distinction or classification has been made. In addition, a determination of whether such a distinction amounts to unconstitutional discrimination depends, in part, on whether the differential treatment occurred on the basis of an invidious characteristic. In other words, the courts have recognized that the nature of the “ground” in question has a bearing on any assessment of the justifiability of a distinction based on that ground. The grounds listed in the ICCPR and the Hong Kong Bill of Rights, and those which can be read into the list by way of analogy, are fundamental characteristics which go to the heart of a person’s identity. Any discrimination on such a ground would impinge on an individual’s dignity and enjoyment of human rights.

In *Yau Yuk Lung*, the Court of Final Appeal indicated that differentiation on certain grounds may be more difficult to justify and therefore more likely to violate equality. Li CJ held that in cases where the differential treatment is “based on grounds such as race, sex or sexual orientation, the court will scrutinize with intensity whether the difference in treatment is justified”.¹⁶ He also stated that minority status is relevant: “Homosexuals constitute a minority in the community. The provision [in the Crimes Ordinance] has the effect of targeting them and is constitutionally invalid. The courts have the duty of enforcing the constitutional guarantee of equality before the law and of ensuring protection against discriminatory law”.¹⁷

¹⁵ For discussion of the Hong Kong courts’ approach to their role *vis-à-vis* executive and legislative decision makers when adjudicating human rights claims, see the contributions by Holning Lau and Derek Loh, “Misapplication of ECHR Jurisprudence in *W v Registrar of Marriages*” (2011) 41 HKLJ 75–87 (arguing that the court in *W* misapplied the “margin of appreciation” doctrine borrowed from the European Court of Human Rights when deferring to societal consensus) and Cora Chan, “Deference and the Separation of Powers: An Assessment of the Court’s Constitutional and Institutional Competencies” (2011) 41 HKLJ 7–25.

¹⁶ See n 11 above, at para 21, per Li CJ citing *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at p 568G (Lord Nicholls).

¹⁷ *Ibid.*, para 29.

In *Kong Yunming*,¹⁸ the claimant, a recent immigrant from mainland China whose husband (a Hong Kong permanent resident) died shortly after her arrival in Hong Kong, challenged the requirement that a person must have resided in Hong Kong for seven years before qualifying for Comprehensive Social Security Assistance. She argued that the residency rule was discriminatory because it distinguished on the basis of residency status.¹⁹ In its analysis of the equality guarantee, the Court of First Instance cited *R (Carson) v Secretary of State for Work and Pensions* in which Lord Hoffmann made a distinction between two different categories of grounds:²⁰ the first includes race, caste, noble birth, membership in a political party and gender; while the second includes ability, education, wealth and occupation.²¹ He distinguished between the two categories stating that discrimination on “category one” grounds would “prima facie appear to offend our notions of the respect due to the individual” whereas distinctions on “category two” grounds may “merely require some rational justification”.²² He explained that differential treatment on a first category ground would be difficult to justify but that whether a distinction made on a second category ground could be justified would “usually depend upon consideration of the general public interest.”²³ He explained that the “grounds that would probably fall within the first category are matters that go to the very make up or identity of the person in question as an individual; something that is basic, essential or fundamental to him/her and that goes to the core of his/her being as a human being; something that defines the person physically or intrinsically.”²⁴

There are three potentially relevant “grounds” – all of which would fall within Lord Hoffmann’s first category – on which W could claim she

¹⁸ See n 14 above.

¹⁹ The author has argued elsewhere that this case involved other grounds such as sex, gender or national origin since the policy has had an adverse, disproportionate impact on new immigrant women from mainland China married to Hong Kong permanent residents. See Kelley Loper “Constitutional Adjudication and Substantive Gender Equality in Hong Kong”, in Beverly Baines, Daphne Barak-Erez, and Tsvi Kahana (eds), *Feminist Constitutionalism: Global Perspectives* (Cambridge University Press, 2011, forthcoming). The court also arguably misapplied the categorization test and failed to consider the implications of residency status on a person’s dignity and ability to exercise fundamental rights. It therefore inappropriately dismissed the claim by classifying the ground within “category two”. It would be more appropriate and consistent with Hong Kong law for the courts to apply strict scrutiny to justifications on the basis of any of the grounds – or a combination of the grounds – listed in the ICCPR including “other status” as interpreted by the treaty bodies.

²⁰ *Ibid.*, paras 74–75 (citing *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173 [Carson], paras 14–17).

²¹ *Ibid.*, para 74 (citing *Carson* at para 15).

²² *Ibid.*, citing *Carson*, para 15 per Lord Hoffmann, citing *Massachusetts Board of Retirement v Murgia* 427 US 307 (1976).

²³ *Ibid.*, para 75 (citing *Carson* at para 16).

²⁴ *Ibid.*, para 79.

experienced discriminatory treatment and which are recognized as protected characteristics under the ICCPR's equality provisions and therefore under the Hong Kong Bill of Rights. These include gender identity or transgender identity, sex or gender, and disability. Discrimination on two of these grounds, sex and disability, are also prohibited by specific anti-discrimination legislation in Hong Kong: the SDO and DDO.

Gender identity or transgender status

The ICCPR and the International Covenant on Economic Social and Cultural Rights (ICESCR) contain the same open-ended list of "grounds" on which discrimination is prohibited. The Committee on Economic, Social and Cultural Rights – the treaty body which monitors states' implementation of their obligations under the ICESCR – recognizes that gender identity is a prohibited ground of discrimination falling within the category of "other status".²⁵ This approach is consistent with a legal model aimed at securing substantive or *de facto* equality for marginalized groups. Members of transgender communities in many societies face formal as well as systemic discrimination and severe harassment based on their transgender status.²⁶ Gender identity is a characteristic which cannot be changed, or which an individual should not be required to change and discrimination on that basis directly implicates human dignity and the enjoyment of human rights.

The Yogyakarta Principles, a non-binding but influential document which reflects the consensus of twenty-nine experts as to the "existing state of international human rights law in relation to issues of sexual orientation and gender identity", affirms that "[e]veryone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity" and to "equality before the law and the equal protection of the law without any such discrimination whether or

²⁵ Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in Economic, Social and Cultural Rights (art 2, para 2), E/C.12/GC/20, 10 June 2009, para 32.

²⁶ See, for example, Mark E. King, "Transprejudice in Hong Kong: Chinese Attitudes Toward Transgenderism and Transgender Civil Rights", Doctoral Thesis, The University of Hong Kong, 2008, available at: <http://hub.hku.hk/handle/10722/51070>; Sam J. Winter, Beverley J. Webster, and Pui Kei Eleanor Cheung, "Measuring Hong Kong Undergraduate Students' Attitudes Towards Transpeople", (2008) 59 *Sex Roles* 670; Mark E. King, Sam J. Winter, Beverley J. Webster, "Contact Reduces Transprejudice: A Study on Attitudes towards Transgenderism and Transgender Civil Rights in Hong Kong", (2009) 21 *International Journal of Sexual Health* 17; and Robyn Emerton, "Finding a Voice, Fighting for Rights: The Emergence of the Transgender Movement in Hong Kong", (2006) 7 *Inter-Asia Cultural Studies* 243. For a discussion of the extent of prejudice and discrimination against transgendered persons in Asia, see Sam Winter, "Lost in Translation: Transpeople, Transprejudice, and Pathology in Asia", (2009) 13 *The International Journal of Human Rights* 365.

not the enjoyment of another human right is also affected”.²⁷ The Principles clarify that “[t]he law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination”. They define discrimination, which includes both formal and substantive inequalities, as “any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms.”²⁸

There is also growing consensus in common law countries that discrimination on the grounds of gender identity is analogous to discrimination on other grounds which also manifest a characteristic fundamental to a person’s identity. Some countries have enacted laws which explicitly include gender identity as a prohibited ground of discrimination.²⁹

Outside the constitutional context, the courts have relied on particular doctrines to determine whether an act amounts to direct discrimination according to the definition in Hong Kong’s anti-discrimination statutes. A plaintiff must demonstrate that she was treated less favourably in an area which falls within the scope of the legislation, such as employment or education, on a prohibited ground than a similarly situated comparator who does not have the relevant status or has a different status. The relevant question is whether the plaintiff would have been treated in the same manner as a real or hypothetical comparator “but for” the plaintiff’s status (defined by the prohibited ground).³⁰

Although there is no specific anti-discrimination legislation that prohibits gender identity discrimination, applying the “but for” test to

²⁷ Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007, Principle 2, available at: <http://www.yogyakartaprinciples.org/> (last viewed, 6 March 2011).

²⁸ *Ibid.*

²⁹ For example, the UK Gender Recognition Act (2004) and Equality Act (2010). The Equality Act protects from discrimination on the grounds of “gender reassignment”. According to Part II, s 7 of the Act, “A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person’s sex by changing physiological or other attributes of sex.”

³⁰ See *Secretary for Justice v Chan Wah* (2000) 3 HKCFAR 459. In some cases, the courts appear to conflate the constitutional right to equality with the prohibition of discrimination under the anti-discrimination statutes, although the tests are different and the statutes do not allow for justification of direct discrimination unless there is a specific, applicable exception. See, for example, *Equal Opportunities Commission v Director of Education* [2001] 2 HKLRD 690. The statutes overlap with the constitutional provisions, however, since the prohibited grounds in the legislation would also be covered by the constitutional guarantees and because the SDO and DDO prohibit the government from discriminating in the performance of its functions and exercise of its powers. See SDO ss 21 and 38 and DDO ss 21 and 36.

the decision to prohibit W from marrying is a useful tool that demonstrates that even within the strict confines of a statutory definition of discrimination (which is narrower than the broader constitutional provisions),³¹ the decision would likely amount to unfavourable treatment based on W's transgender status. Applying the "but for" test and a comparator analysis it seems clear that W was treated less favourably than a woman without transgender identity would have been treated in a similar situation: i.e. when attempting to marry a man. In other words, she would have been treated the same as a non-transgender woman who had wanted to marry her male partner "but for" her gender identity or transgender status.

Sex and gender

Some jurisdictions have accepted that discrimination against transgendered persons is a form of gender or sex discrimination³² and international human rights treaty bodies have recognized the intersection between sex, gender and gender identity when interpreting the equality and non-discrimination provisions in key human rights instruments. The Hong Kong government's decision not to recognize the acquired gender of a post-operative, transsexual woman for the purposes of marriage is arguably rooted in discriminatory attitudes and stereotypes about gender and the nature of femininity and masculinity. Indeed, a decision to exclude a transgender woman from the definition of "woman" in Hong Kong law reflects discriminatory societal attitudes about what it means to be a "man" or a "woman" and may fall foul of the prohibition against sex or gender discrimination. This reading is consistent with Hong Kong's obligations under the Convention on the Elimination of all forms of

³¹ The definition of direct discrimination in the anti-discrimination legislation – which is the same across all four statutes – does not allow for justification of unfavourable treatment based on a prohibited ground, unless the statute contains a specific exception which would apply in the particular case.

³² For example, in *Schroer v Billington* 577 E Supp. 2d 293, 295 (D.D.C. 2008) a US Federal Court held that the Library of Congress unlawfully discriminated on the basis of sex – construed to include gender – by rescinding an offer of employment to Schroer, a transgendered woman, after she informed them that she would be transitioning to her acquired gender at the time she took up the position. The court recognized that the employer's decision amounted to sex discrimination against Schroer because she failed to conform to gender stereotypes. The court held that "[s]ex stereotyping based on a person's gender nonconforming behavior is impermissible discrimination, irrespective of the cause of that behavior". See also *P v S and Cornwall County Council* [1996] IRLR 347, a decision of the European Court of Justice, and discussion of this case in Robyn Emerton, "Time for Change: A Call for the Legal Recognition of Transsexual and Other Transgender Persons in Hong Kong" (2004) 34 HKLJ 515.

Discrimination against Women (CEDAW) and Hong Kong case law under the SDO which refers to provisions in CEDAW.³³

The Convention's monitoring body notes that the term "gender" "refers to socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men ..."³⁴ The Committee has commented on the impact of traditional stereotypes about the role of women and men in society on the rights of transgendered persons. For example, in its concluding comments on Panama's state report in February 2010, it expressed grave concern "that certain groups of women, in addition to being affected by gender stereotypes, face multiple forms of discrimination as well as violence on grounds such as sexual orientation and gender identity."³⁵

Similarly, in his 2009 report, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism observed that "gender is not synonymous with women but rather encompasses the social constructions that underlie how women's and men's roles, functions and responsibilities, including in relation to sexual orientation and gender identity are defined and understood."³⁶

Disability

The treatment of W could also potentially amount to "disability discrimination" as understood in the DDO.³⁷ Disability is defined broadly and includes a variety of physical and mental conditions such as "the total or partial loss of a part of the person's body" and "a disorder, illness or disease that affects a person's thought processes, perception of

³³ See *Equal Opportunities Commission v Director of Education* (n 30 above), Hartmann J held that "the words of the [SDO] are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligations contained in CEDAW rather than being inconsistent with them."

³⁴ CEDAW, General Recommendation No. 28 on the Core Obligations of States Parties under Art 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/2010/47/GC.2, 19 Oct 2010, para 5.

³⁵ CEDAW/C/PAN/CO/7, para 22.

³⁶ A/64/211, 3 August 2009, para 52.

³⁷ See DDO Cap 487, s 6. Disability also falls within the category of "other status" in Arts 2(1) and 26 of the ICCPR and thus W could have also argued that the Registrar of Marriages' decision to deny her application to marry contravened her constitutional right to equality. See Committee on Economic Social and Cultural Rights, n 25 above, at para 28. For a persuasive argument for the increased use of disability nondiscrimination laws in the United States to protect transgender people from discrimination see Jennifer L. Levi and Bennett H. Klein, "Pursuing Protection for Transgender People through Disability Laws", in Paisley Currah, Richard M. Juang, and Shannon Price Minter, (eds), *Transgender Rights* (University of Minnesota Press, 2006). See also Emerton n 32 above.

reality, emotions or judgment or that results in disturbed behavior”.³⁸ Controversially, many transpeople have been diagnosed with “diseases”, such as “gender identity disorder” or “gender dysphoria”, which would fall within this definition of disability allowing them to challenge discriminatory conduct on that basis.³⁹ Some have resisted attempts to label transgender identity as a medical ailment and argue that reliance on the DDO’s definition may serve to reinforce rather than alleviate prejudice against members of the transgender community. Instead the preference is to comprehend transgender as a natural part of human diversity.⁴⁰

More recent conceptions of disability may serve to mitigate such concerns, however. Indeed, the disability rights movement has advanced the discourse on disability beyond a model that defines disability strictly as a medical condition with a focus on the limitations of the individual. It has instead moved toward acceptance of a social model that understands disability as a function of the environment. In other words, disability arises from society and is not inherent in the individual. Persons with disabilities are not “burdens” or “ill” – on the contrary, their increasing visibility adds to human diversity in a positive way and therefore undercuts the stigma attached to the term. Since the adoption in 2006 and the subsequent wide ratification of the UN Convention on the Rights of Persons with Disabilities, this social or human rights model of disability has eclipsed the medical model. For example, the preamble of the Convention acknowledges that disability is an evolving concept that “results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.” The definition of disability in the DDO reflects this approach to some extent since it also includes a disability that is “imputed” to a person in addition to a list of impairments and medical conditions.⁴¹ If the courts interpret the Hong Kong DDO and/or the constitutional guarantee of disability equality in accordance with this human rights paradigm, the transgender community may be willing to conceptualize transgender discrimination

³⁸ DDO (n 8 above) s 2.

³⁹ In 2001, Jessica Park, a transgender woman who was excommunicated from the Church of Jesus Christ of Latter-day Saints in Hong Kong, attempted to rely on the DDO to argue that the church had unlawfully discriminated against her on the basis of her disability. See *Church of Jesus Christ of Latter-Day Saints Hong Kong Ltd v Stewart JC Park* (unrep., HCA 1167/2001, [2001] HKCU 1100) and Sara Bradford, “Sex-change Mormon Sues Church”, *South China Morning Post*, 16 March 2001.

⁴⁰ See King, n 26 above. Article 23 of the Convention on the Rights of Persons with Disabilities provides for the right to respect for home and family, including marriage.

⁴¹ DDO (n 8 above) s 2. For a discussion of this concept, see *K v Secretary for Justice* [2000] 3 HKLRD 777.

claims as disability claims, especially in the absence of a gender identity discrimination statute.⁴²

Justification of distinctions and substantive equality

Once a distinction on a prohibited ground has been identified – and it is clear that W was treated differently on the basis of one or more of the grounds discussed above – the next step is to consider whether such a distinction is justifiable and therefore not discriminatory.

In developing the justification test, the courts have favourably cited the Human Rights Committee's General Comment on non-discrimination in which the Committee observes that “not every differentiation of treatment will constitute discrimination if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [ICCPR]”.⁴³ In an early equality case, Bokhary J (as he then was) referred to this passage and acknowledged that “[c]learly, there is no requirement of literal equality in the sense of unrelentingly identical treatment always. For such rigidity would subvert rather than promote true even-handedness. So that, in certain circumstances, a departure from literal equality would be a legitimate course and, indeed, the only legitimate course.”⁴⁴ At the same time, however, “the starting point is identical treatment. And any departure therefrom must be justified.”⁴⁵ To justify a distinction, “it must be shown: one, that sensible and fair-minded people would recognize a genuine need for some difference of treatment; two, that the difference embodied in the particular departure selected to meet that need is itself rational; and, three, that such departure is proportionate to such need”.⁴⁶

In *Secretary for Justice v Yau Yuk Lung*,⁴⁷ Li CJ confirmed the basic character of this test when considering whether certain provisions in the Crimes Ordinance amounted to discrimination on the basis of sexual orientation – which he accepted as a prohibited ground of discrimination within the meaning of “other status” in the ICCPR and the Bill of Rights. To satisfy the test, the difference in treatment must pursue a legitimate aim, must be rationally connected to that aim, and must be

⁴² The author is grateful to Carole J Petersen for sharing her reflections on this point.

⁴³ Human Rights Committee, “General Comment No. 18: Non-discrimination”, UN Doc. CCPR/C/21/Rev 1/Add 1 (1989), para 13.

⁴⁴ *R v Man Wai Keung (No 2)* [1992] 2 HKCLR 207, p 217.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ See n 11 above.

no more than necessary to achieve the aim.⁴⁸ He then explained that if distinctions can be justified then they would not amount to unconstitutional discrimination: “Where the difference in treatment satisfies the justification test, the correct approach is to regard the difference in treatment as not constituting discrimination and not infringing the constitutional right to equality”.⁴⁹ In this sense, the justifiability test as applied to equality and non-discrimination claims differs somewhat from similar tests used to ascertain the justifiability of breaches – or limitations on the exercise – of other human rights. In other human rights cases, justification often provides a means of balancing rights with competing interests or conflicting rights.⁵⁰ In relation to equality, however, since a distinction does not amount to discrimination if it survives the test, the analysis does not involve first deciding whether the right to non-discrimination has been violated and then justifying that violation. A right to non-discrimination has been violated only if the distinction *fails* the justifiability test.

This difference is significant and not merely a matter of semantics. It signals recognition by the courts that the right to equality in Hong Kong law is not only formal but also substantive in nature since justifiable distinctions are consistent with – not regarded as exceptions to – the equality principle. In other words, a formal application of an equal treatment principle – treating like cases alike – is not sufficient when determining the existence of discrimination. For example, distinctions or special measures aimed at benefitting members of a particularly marginalized group but which seemingly violate formal equality could be justified and therefore not discriminatory. In fact, they may be necessary to achieve *de facto* or substantive equality.

An understanding that the right to equality is underpinned by a substantive concept is consistent with international human rights standards and their interpretation by the Human Rights Committee and other treaty bodies. For example, the Committee on Economic, Social and Cultural Rights, which oversees implementation of the ICESCR, interprets the right to equality in Art 2(2), which essentially mirrors ICCPR Art 2(1), as a right to both formal and substantive equality:

The effective enjoyment of Covenant rights is often influenced by whether a person is a member of a group characterized by the prohibited grounds of discrimination. Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent

⁴⁸ *Ibid.*, para 20.

⁴⁹ *Ibid.*, para 22.

⁵⁰ See, for example, *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442.

prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or *de facto* discrimination.⁵¹

The Committee on the Elimination of Discrimination against Women, the treaty body which oversees CEDAW explains that:

a purely formal legal or programmatic approach is not sufficient to achieve women's *de facto* equality with men, which the Committee interprets as substantive equality ... The lives of women and men must be considered in a contextual way, and measures adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns.⁵²

These passages and other relevant interpretive materials produced by the human rights treaty bodies⁵³ clarify that substantive equality requires a deliberation of the actual situation of disadvantage including a group's degree of marginalization and minority status. This approach is critical when establishing whether a seemingly formal violation of equality in fact amounts to unconstitutional discrimination or if it is a legitimate means of ensuring equality in a substantive sense. It also mandates careful scrutiny by the court of any justification for a formal distinction which *negatively* impacts such a group. If the court applied such a contextual, substantive analysis when evaluating whether differential treatment toward W is justifiable in relation to her ability to marry, it would need to take into account the reality of considerable past and ongoing discrimination against transpeople in Hong Kong.⁵⁴ Given this group's relative disadvantage, it would be appropriate to carefully scrutinize any justification for differential treatment, including the relevance, if any, of an apparent lack of societal consensus regarding marriage.

⁵¹ Committee on Economic Social and Cultural Rights, n 25 above, para 8.

⁵² Committee on the Elimination of Discrimination against Women, General Recommendation No. 28 on the Core Obligations of States Parties under Art 2 of [CEDAW], CEDAW/C/2010/47/GC.2, 19 October 2010, paras 8 and 10. The Committee also clarifies that "States parties are under an obligation to respect, protect and fulfil the right to non-discrimination of women and to ensure the development and advancement of women in order to improve their position and implement their right of *de jure* and *de facto* or substantive equality with men" (para 16). See also paras 20 and 24.

⁵³ See, for example, Committee on the Elimination of Racial Discrimination, General Recommendation No. 32, The meaning and scope of special measures in the ICERD, August 2009.

⁵⁴ See n 26 above.

If W were able to demonstrate that the decision to exclude a transgender woman from the definition of woman is a distinction on a prohibited ground – i.e. treating W differently because of her transgender status or on the basis of gender stereotypes or disability, as contended above – the onus would then be on the government to justify the difference in treatment according to the test outlined above. First, as mentioned, the court would be required to examine such justifications with a high degree of scrutiny in this context because of the existence of *de facto* discrimination faced by transgender people in Hong Kong as well as the fundamental nature of the applicable prohibited grounds (i.e. transgender status, sex, gender, or disability). It would therefore be difficult – if not impossible – to justify any reasons put forward for an interpretation of the Marriage Ordinance which reflect a discriminatory notion of the term “woman”.

For example, the Registrar of Marriages may have attempted to defend the decision to continue to interpret “woman” as exclusive of a transgender woman by arguing that it serves the aim of preserving the traditional procreative function of marriage. The first step would require the government to demonstrate that this purpose is legitimate. It may have maintained that the institution of marriage plays an important social role by providing the framework of a family unit in which to bear and raise children. This understanding of marriage, however, has changed – a fact acknowledged by Cheung J in *W*⁵⁵ – and is arguably based on discriminatory assumptions about the proper role of men and women within the family and society and stereotypes about gender and child rearing. Indeed, it may be that the presumed role of the woman within marriage has changed in part because of efforts to eliminate discrimination against women within families and society through legal measures in recent decades.

CEDAW and its monitoring body recognize that such assumptions and stereotypes amount to – and perpetuate – discrimination against women both within the private realm as well as in society at large. Article 5 therefore obligates states to take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on

⁵⁵ See n 1 above para 130. Cheung J notes that “[i]n terms of the nature and purpose of marriage, certainly the emphasis on procreation has shifted”. He cites Lord Nicholls’ observation in *Bellinger v Bellinger* [2003] 2 AC 467 at para 46 that “[f]or a long time now the emphasis [of the purpose of marriage] has been different’ ... Various expressed, there is now much more emphasis on the ‘mutual society, help and comfort that the one ought to have of the other’”.

- the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;
- (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.⁵⁶

An understanding of marriage based on notions of the roles of women in marriage defined primarily according to their reproductive utility would thus contravene the Convention's obligations.⁵⁷

It is clear that such an aim cannot be legitimate if it is grounded on, or reflects, discriminatory attitudes and assumptions⁵⁸ even if these attitudes are not recognized by the decision-maker and there is no intention to discriminate. Indeed such values are often so entrenched in social expectations that they may not be apparent to most people. It is difficult to conceive of any other purpose for continuing to interpret the word woman as excluding a transgender woman in the context of marriage which is not founded on a characterization of the role of women within the family as a producer of children. The government would therefore be unable to satisfy even the first limb of the justification test and it would not be necessary to consider the second and third steps.

Equality, societal consensus, and the role of the courts

Although *W* did not involve issues related to sexual orientation – she was a transsexual *woman* who wanted to marry a *man* – the court's analysis of

⁵⁶ The Committee on the Elimination of Discrimination against Women has noted that in the extreme, prejudiced and stereotypical notions about the roles of women in the family can even lead to violent practices against women which have been justified “as a form of protection or control of women.” See General Recommendation No. 19, “Violence against Women”, 1992, para 11.

⁵⁷ The Hong Kong Court of First Instance relied on Art 10 of CEDAW – which addresses stereotyped concepts of the roles of men and women in education – for interpretive guidance in *Equal Opportunities Commission v Director of Education* (n 30 above) at para 88 when determining that the secondary school placement allocation scheme discriminated against girls and breached the SDO. Hartmann J (as he then was) noted that “Article 10 of the Convention makes it plain that stereotyped concepts of both men and women are in themselves, if not discriminatory, at least the wellspring from which discrimination flows.” He added that the definition of discrimination in the SDO “is not to be deflected by broad assumptions ... that categorise women according to stereotypes” at paras 90 and 91.

⁵⁸ See the discussion of *Cho Man Kit v Broadcasting Authority* (unrep., HCAL 69/2007, [2008] HKEC 783) below.

sexual orientation discrimination in *Cho Man Kit v Broadcasting Authority*⁵⁹ is especially instructive since it ponders the relevance of public opinion as well as the role of the courts in protecting members of minority communities who are not generally accepted by society. It also further supports the argument presented above that any reasons put forward to justify decisions which restrict fundamental rights, such as the right to freedom of expression (and by analogy the right to marriage in *W*) cannot be founded on discriminatory values.

Cho Man Kit challenged the Broadcasting Authority's (BA) conclusion that the content of a documentary about the lives of two gay couples ("Gay Lovers") which aired on Radio Television Hong Kong violated its Code of Practice. The court recognized that the BA's decision "resulted in an impermissible restriction on the freedom of speech, a restriction founded materially on a discriminatory factor; namely homosexuality, as a form of sexual orientation, may be offensive to certain viewers". In reflecting on the relevance of public opinion the court acknowledged that "it is for the [BA], as the primary decision maker, to come to its determination for its own reasons, deciding for itself how best to weigh the various broad and often imprecise considerations that are contained in the prevailing code of practice".⁶⁰ Hartmann J favourably cited Lord Hoffmann's opinion in *R (Profile Alliance) v BBC* that it is proper for Parliament to resolve how broadcasts can be subject to taste and decency requirements and that "public opinion cannot be totally disregarded in the pursuit of liberty".⁶¹ He ultimately held, however, that "public opinion must be taken to be the opinion of reasonable members of the Hong Kong community, those who understand that in a democratic society a restriction of fundamental freedoms can never be justified by a consensus of opinion based on 'prejudices, personal aversions and [dubious] rationalisations'".⁶² He also cited a passage from Ronald Dworkin's *Taking Rights Seriously*:

Even if it is true that most men think homosexuality an abominable vice and cannot tolerate its presence, it remains possible that this common opinion is a compound of prejudice . . . rationalization . . . and personal aversion . . . It remains possible that the ordinary man could produce no reasons for his view, but would simply parrot his neighbor who in turn parrots him, or that he would produce a reason which presupposes a general moral position he

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, para 65.

⁶¹ *Ibid.*, para 65 citing *R (Prolife Alliance) v British Broadcasting Corporation* [2003] 2 WLR 1403, p 1422 per Lord Hoffmann.

⁶² *Ibid.* para 66.

could not sincerely or consistently claim to hold. If so, the principles of democracy we follow do not call for the enforcement of a consensus, for the belief that prejudices, personal aversions and rationalizations do not justify restricting another's freedom, itself occupies a critical and fundamental position in our popular morality.⁶³

By analogy, this reasoning could also apply to societal views related to transgender persons. Reinforcing an apparent societal consensus that transgender marriage is wrong based on prejudice, personal aversions, and gender stereotypes would similarly fall foul of the democratic principles Dworkin espouses. In *Cho Man Kit*, an equality lens helped illuminate the problems associated with relying on a societal consensus when the fundamental rights of minorities were at stake and underscored the court's role in protecting disadvantaged groups from discrimination.⁶⁴ Such a lens – especially one based on a substantive equality principle – could also highlight the difficulties and inappropriateness of deference to majority views in *W*.

Conclusion

This analysis of the potential applicability of a right to equality to *W*'s claim demonstrates that denying a transgender woman's right to marry engages the right to equality in Hong Kong law as informed by international human rights standards. A denial of equality was central to *W*'s experience and the essence of her claim involved the negative, discriminatory impact that the decision by the Registrar of Marriages – which arguably reflected discriminatory societal values and gender stereotypes – had on her dignity as a human being.

Although equality was not at the forefront of *W*'s constitutional challenge, Cheung J alludes to the minority status of the transgender community, the importance of the rights associated with marriage, and the connection between gender identity, equality and human dignity.

⁶³ Ronald Dworkin, *Taking Rights Seriously*, as cited at *Ibid.*, para 66. Hartmann J acknowledged the Court of Appeal's citation of the same passage in *Secretary for Justice v Yau Yuk Lung* [2006] 4 HKLRD 196 (CFI), at 202.

⁶⁴ In *Leung v Secretary for Justice* [2006] 4 HKLRD 211, para 53, Ma CJHC (as he then was) also reflected on the role of the courts: "Where the court does not see any justification for the alleged infringement of fundamental rights, it would be its duty to strike down unconstitutional laws, for while there must be deference to the Legislature as it represents the views of the majority in a society, the court must also be acutely aware of its role which is to protect minorities from the excesses of the majority. In short, the court's duty is to apply the law; in constitutional matters, it must apply the letter and spirit of the Basic Law and the Bill of Rights".

He acknowledges the argument that “allowing a post-operative transsexual to marry in his or her newly acquired sex is of great significance to the individual, as many other rights, interests and privileges as well as status in our society are dependent on the status of marriage. Still more importantly, it concerns the individual’s inherent human dignity, equality and respect”.⁶⁵ Perhaps this passage could serve as the starting point for a more focused consideration of equality in *W* going forward and/or in other cases related to the rights of members of the transgender community in Hong Kong.

⁶⁵ See n 1 above, para 252. The author is grateful to Denis Chang, SC for pointing out this passage as the only direct mention of equality in the judgment.

