

FOCUS ONE

LGBTI RIGHTS AND LEGAL REFORM: A COMPARATIVE APPROACH

SILENT CHANGES: TRANSEXUALS’ RIGHT TO MARRY IN CHINA’S MAINLAND AND HONG KONG

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**Abstract** In comparison to the arduous process of rights advocacy in Hong Kong, transsexuals in China’s mainland achieved their right to marry via some “silent changes”: there was no legal activism from transsexual communities, no debates or hearings in the legislature, and no landmark judgments made by the judiciary. From a perspective of comparative law, this article attempts to analyze the legal changes regarding transsexuals’ right to marry in China’s mainland in light of the struggles in Hong Kong. It endeavors to discuss to what extent the seemingly “smooth” and “unintended” way of opening up marriage to transsexuals in China’s mainland could be beneficial to trans rights and equality in general.

**Keywords** transgender rights, sex reassignment surgery, same-sex marriage, comparative law, colonization of lifeworld

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INTRODUCTION

This article is triggered by a court case in Hong Kong, namely, *W vs the Registrar of Marriages*.<sup>1</sup> W was born male, and was later diagnosed with gender dysphoria. In 2008, she successfully transitioned via sex reassignment surgery, and accordingly, she changed

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<sup>1</sup> *W vs the Registrar of Marriages* [2013] HKCFA 39; [2013] 3 HKLRD 90; (2013) 16 HKCFAR 112; [2013] 3 HKC 375; FACV 4/2012, available at <http://www.hklii.hk/eng/hk/cases/hkcfa/2013/39.html> (last visited May 13, 2013).

the information on her identity card and passport. In November 2008, she applied to get legally married with a male at the Registrar. Her application was denied because the government only referred to “the biological sexual constitution of an individual at birth”<sup>2</sup> to deal with marital issues, ignoring any operative intervention. W filed judicial review proceedings to challenge the decision, claiming that the Registrar had violated her right to marry and right to privacy. The challenge failed in the first instance and again in the Court of Appeal. W then appealed to the Court of Final Appeal, which overturned the decision of the Registrar, and decided that a post-operative transsexual is entitled to marry a person of the opposite sex.

In China’s mainland, in contrast, post-operative transsexuals have long been able to marry a person of the opposite sex after changing the information on the identity card. One might reasonably ask: Has this right been secured through a painstaking struggle, like it was in Hong Kong of China and in many other Western countries? As this article will show in its comparative legal inquiry, transsexuals’ right to marry in China seemed to be achieved “silently” — there was no legal advocacy from transsexual communities, no debates or hearings in the legislature, and no landmark cases decided by the judiciary. We could not even find a critical point from the time transsexuals obtained the right to marry, nor could we know what forces contributed to this change.

In China, there does not seem to be a generous accommodation of a new sort of subject — transsexuals — in the institution of marriage. The change occurred placidly: first, some local governments permitted the gender marker change on the identity card, and then came the news that transsexuals succeeded to enter into legal marriage. A relatively formal legal document in this regard is an official reply issued by the Ministry of Public Security to a request for “instructions on how citizens could change their gender markers as presented on their residence registration document (*hukou*) after sex reassignment operation.”<sup>3</sup> The Ministry spelt out the requirements: The applicant should provide a sex authentication certificate issued by a third-class hospital and, a notarization from a notary office or a certificate from a judicial accreditation bodies. Upon the approval of the public security bureau at the county level, the local police substation may change the person’s gender marker on the official documents.

The connection between the gender marker change on *hukou* and the recognition of transsexual persons’ right to marry appears to be seamless in China’s mainland. The change of the gender marker on *hukou* is simply dealt with as a technical issue, and the right to marry seems to be the “natural corollary” of the *hukou* change. As YANG Dawen, a legal expert on marriage law, pointed out, “As long as a person’s biological status is consistent with their *hukou*, there should be no legal problem to have a marriage

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<sup>2</sup> Id. at para. 20.

<sup>3</sup> See 公安部治安管理局关于公民实施变性手术后变更户口登记性别项目有关问题的批复 (*Reply to the Questions Concerning Citizens’ Gender Marker Change on Hukou after Sex Reassignment Surgery by Bureau for Order Control of Ministry of Public Security*), issued and entered into effect on Sep. 4, 2002.

registration. In other words, since a transsexual person has already changed their biological status and accordingly has changed their gender markers on *hukou* through legal procedures, their marriage with a person of the opposite sex is of course valid. Law is reality-oriented; as long as the subjects in a legal marriage are a man and a woman, there should be no problem.”<sup>4</sup>

YANG's logic resonates with that of the authorities. There have been no debates on whether marriage should be granted on the basis of sex at birth or sex at the time of registration, let alone whether the purpose of marriage should be procreation. Nonetheless, these questions were under fervent moral, legal and political debates in Hong Kong. In this article, the authors try to analyze some reasons for the discrepancies between the two jurisdictions.

### I. TRANSSEXUALS' RIGHT TO MARRY AND THE FEAR OF SAME-SEX MARRIAGE

When dealing with transsexuals' right to marry, the authorities in Hong Kong have expressed certain fear of opening up Pandora's box, or creating a slippery slope for same-sex marriage, whereas such anxiety is absent in China's mainland. This section will try to explain the differences by discussing two court cases.

In the aforementioned *W vs the Registrar of Marriages* case, in 2010, the Court of Appeal in Hong Kong rejected W's claims. One of the Judges, Patrick Chan, gave two major reasons: First, allowing transsexuals to use their chosen gender to get married would affect the legality of same-sex marriage in Hong Kong;<sup>5</sup> and second, the essence of marriage is procreation, which is particularly important for Hong Kong people.<sup>6</sup> Therefore, transsexuals' right to marry should not be recognized because “it involves making changes to an important social institution.”<sup>7</sup> Indeed, if the marriage registrar only looked at the assigned sex at birth, then even if W had completed her transition into a female, her marriage would still be deemed as a marriage between two men; and in many countries, the infertility between two persons of the same sex has often been used as a strong argument against same-sex marriage. Therefore, those who oppose transsexuals' right to marriage may also be worried about the troubling implications upon the connotation of marriage, as well as the potential disturbance of the neatly defined dichotomy of men and women. Such fears can also be found amongst those who are against same-sex marriage. Therefore, the specter of same-sex marriage continues to

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<sup>4</sup> ZHANG Qian, 变性人权调查：一个比“艾滋更弱势的群体” (*Investigation in Transsexuals: A More Vulnerable Group than People Living with HIV/AIDS*), 青年周末 (*Youth Weekend*), Nov. 18, 2011.

<sup>5</sup> See fn. 1 at paras. 158–161.

<sup>6</sup> Id. at paras. 162–164.

<sup>7</sup> Id. at para. 196. For more analysis, see Chiu Man-chung, 是她/他也是你和我：由W诉婚姻登记处一案看香港跨性别法律机器 (*It Is about She/He, You and Me: Examining the Legal Mechanisms in Hong Kong from W vs the Registrar of Marriages*), 83 台湾社会研究季刊 (*Taiwan: A Radical Quarterly in Social Studies*) 329, 330–331 (2008).

affect transsexuals, even though they are only fighting for the right to marry a person of the opposite sex.

That is why the Hong Kong Court of Final Appeal keeps emphasizing that marriage in Christendom is still defined as a union of a man and a woman, which should not be interfered with by the fact that post-operative transsexuals are now entitled to marry in Hong Kong. In its merits, the Court meticulously circumvented the Equal Protection Clause. A possible explanation for the circumvention is that if equal protection was granted to transsexuals, it would offer more leeway for greater advocacy of same-sex marriage, another complicated issue the Court tried not to touch upon.<sup>8</sup> The Court seemed to take pains to prove that its decision was not groundbreaking: It had not subverted the institution of marriage, nor had it expressed any endorsement for same-sex marriage.

In contrast, the discussion of transsexuals in China's mainland has rarely been linked with the fear of same-sex marriage. GAO Tingting, born male, longed for sex reassignment surgery since "he" was 20 years old, even though "he" had already been married with a woman and had twin daughters. At the age of thirty, GAO filed a lawsuit against a hospital. As the judgment of the case is not published, we could only rely on some media coverage to sketch the facts of the case. In 2005, the Oriental Hospital in Nanjing offered GAO free sex reassignment surgery. In the contract they signed, the hospital agreed to provide GAO free surgeries by phase, while GAO was responsible for preparing all the necessary legal documents. However, after GAO provided the certificate from the villagers' committee, the consent form of her next of kin, and the diagnosis from the Shandong Mental Health Center, the Oriental Hospital refused GAO in the name of "documents incomplete."<sup>9</sup> On August 25, 2005, GAO sued the hospital and requested the Qinhuai trial court to force the hospital to fulfill its contractual obligations, and to perform the surgery as soon as possible. The court held that, according to medical professional standards, a divorce certificate is needed before sex reassignment surgery can be done. Until GAO provided such a certificate, the Oriental Hospital could postpone the fulfillment of the contract. Therefore, the trial court did not support GAO's claims.

GAO then appealed to the intermediate court, which overturned the lower court's judgment. It argued that according to the contract between GAO and the Oriental Hospital, GAO did not have to provide a divorce certificate before going through the surgery. Moreover, the hospital had no legal basis in arguing that divorce was a precondition for sex reassignment surgery. Therefore, the court decided that the hospital should compensate GAO for RMB50,000.

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<sup>8</sup> ZHAO Dan, 变性人的结婚权之合法化: 对香港《基本法》中“平等保护”条款缺位的思考 (*The Legal Recognition of Transsexual Persons' Right to Marry: On the Absence of the Equal Protection Clause*), 12 中国检察官(*The Chinese Procurators*), 74 (2013).

<sup>9</sup> ZHU Xiaolu, 变性人不离婚也可手术变性, 市中院改判高婷婷胜诉 (*Transsexuals can Have Operation without Divorce; GAO Tingting Wins in the Appeal*), 南京日报 (*Nanjing Daily*), May 17, 2005.

It is true that under current Chinese law married people are not prohibited from undergoing sex reassignment surgery. According to the 2002 Reply of the Ministry of Civil Affairs on the Questions concerning the Dissolution of Marriage after One Spouse Changed Sex,<sup>10</sup> if the parties have met the substantial and formal requirements at the time of marriage registration, the registration is then lawful and valid, and therefore the request for revoking the marriage shall be dismissed. If there was no dispute on the division of property, the registration authority shall treat the application like any other divorce by agreement; if there was disagreement and the parties went to court, the court should dissolve the marriage and divide the property according to the Marriage Law.

The appellate court in GAO's case was aware of the entangled issue of same-sex marriage, however, it still maintained that one does not have to divorce before transition. It reasoned:

*The Marriage Law recognizes a man and a woman as subjects of marriage. If one spouse changed his or her sex during a lawful marriage, such a same-sex marriage is not protected. However, the fact that same-sex marriage is not protected should not be used as an excuse to prevent a married person from undergoing sex reassignment surgery. Law regulates behaviors instead of the consequences of them. When the law does not prohibit a certain behavior, its legality as such should not be negated simply because its consequence is illegal. GAO decided to change her sex, which is a lawful disposal of her own body, and is not part of spousal rights. In other words, the right to dispose one's body should not be derogated by the claim that his or her spouse's marital interests might be influenced.*<sup>11</sup>

The court realized the subtle link between protecting transsexuals' right to marry and recognizing same-sex marriage, but did not seem overly concerned. As YANG Dawen argued, "These two issues are completely irrelevant. Homosexuals desire people of the same sex, so it is unlikely that they would change their own sex in order to marry someone they like."<sup>12</sup> For those who are informed about the difference and connection between sexual orientation and gender identity, transsexuals' right to marry and same-sex marriage are obviously not "completely irrelevant."<sup>13</sup> However, we should further investigate: In what context would they be deemed as "completely irrelevant"? Or, to

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<sup>10</sup> 民政部 (Department of Civil Affairs), 关于婚姻当事人一方变性后如何解除婚姻关系问题的答复 (民办函 (2002) 127号) (*Reply on How to Dissolve Marriage after A Spouse Changed Sex, 2002, No. 127*).

<sup>11</sup> WU Yuanhao, 权益纷争 (*Disputable Rights*), Shanghai People's Publishing House (Shanghai), at 10–11 (2009).

<sup>12</sup> WU Guoping, 变性人的结婚权利研究——以婚前变性为视角 (*On the Right to Marry of Transsexual Persons — From the Perspective of Pre-Marital Sex Reassignment*), 3 福州大学学报(哲学社会科学版) [*Journal of Fuzhou University (Philosophy and Social Sciences Edition)*], 81 (2012). In this article, the author expresses his concern about a homosexual marrying his or her same-sex partner by changing his or her sex, which is an implicit opening up of same-sex marriage, and he proposes the legislation should prohibit those marriages.

<sup>13</sup> See, e.g. Judith Butler, *Undoing Gender*, Routledge (New York), at 5–10 (2004); Talia Mae Bettcher, *When Selves Have Sex: What the Phenomenology of Trans Sexuality Can Teach about Sexual Orientation*, 61(5) *Journal of Homosexuality*, 605–620 (2014).

reverse the question: In what context is transsexuals' right to marry closely intertwined with same-sex marriage?

The silent legal recognition of transsexuals' right to marry and the judgment in GAO's case have shown that the fear of same-sex marriage has not yet acted as a barrier to transsexual rights in China. This might be because transsexuals' right to marry still falls within the matrix of heterosexual monogamous marriage.<sup>14</sup> It is also likely that the same-sex marriage campaign in China's mainland has not been strong enough to provoke the authorities to defend the traditional marriage. Another explanation is, unlike that in some Western countries, the fundamentalist religious ideology against same-sex marriage in China's mainland has not been fully mobilized.

In addition to the above-mentioned reasons, the difference between the two legal systems also elucidates why the recognition of transsexuals' right to marry in China's mainland has not gone through the arduous judicial procedures and heated debates as seen in Hong Kong. The next section will focus on Hong Kong's legal system.

## II. THE INFLUENCE OF CASE LAW SYSTEM ON HONG KONG

Hong Kong of China has inherited the common law legal system from the UK, its former colonizer. After the handover of sovereignty to China in 1997, the legal system has been reformed and localized: Only the High Court and the Court of Final Appeal can make binding precedents. However, the case law in the UK and other common law countries are still used as important references. In *W vs the Registrar of Marriages*, we could discern the influence of UK case law.

When arguing against W's right to marry, the Registrar referred to the *Corbett vs Corbett* case from the UK in 1970, in which the court decided that "marriage [is] essentially a relationship between man and woman," and that "the biological sexual constitution of an individual is fixed at birth."<sup>15</sup> The Registrar also argued that the legislative intention of the Hong Kong Matrimonial Causes Ordinance is coherent with the *Corbett* criteria.<sup>16</sup> Trans communities in the UK have made significant efforts to challenge the *Corbett* decision, however, have not been successful for three decades. In 2002, the European Court of Human Rights decided in *Goodwin vs the United Kingdom*,

...that continued adoption of biological criteria in domestic law for determining a person's sex for the purpose of marriage...could not be regarded as restricting or reducing

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<sup>14</sup> For a discussion of such a matrix and the hierarchy of sexual values therein, see Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity*, Routledge (New York), (1990); Gayle S. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in Carole S. Vance eds. *Pleasure and Danger: Exploring Female Sexuality*, Routledge & Kegan Paul (Boston, London, Melbourne and Henley), at 267-319 (1984).

<sup>15</sup> United Kingdom (1970) *Corbett vs Corbett* (otherwise Ashley), Probate, Divorce and Admiralty of UK Courts, Feb. 2, 1970.

<sup>16</sup> See fn. 1 at paras. 45-59.

*the right of a transsexual to marry in such a way or to such an extent that the very essence of the right was impaired.*<sup>17</sup>

However, in the 2003 case *Bellinger vs Bellinger*, the House of Lords insisted upon its previous opinions, and dismissed the appeal of a male-to-female person who wanted to become legally married with a cohabiting male partner. It was these decisions and debates that finally pushed for the revision of the legislation on the right to marry of transsexual people. The UK Gender Recognition Act promulgated in 2004 fundamentally broke the link between gender registration and one's biological traits. Insofar as one is diagnosed with gender dysphoria, alongside certain procedural requirements, he or she may apply for a gender recognition certificate, which no longer requires complete surgical treatment.<sup>18</sup>

Case law and legislation in the UK made a noteworthy impact upon the judgment of the Hong Kong Court of Final Appeal in favor of transsexuals. The Court also recommended the government to use the Gender Recognition Act 2004 as an adaptable model example when drafting relevant legislation.<sup>19</sup> In contrast, it is hardly possible that the adjudicative and policy-making bodies in China's mainland would refer to case law and legislation from any common law countries.

Another relevant comparison lies in the equalization of the age of consent between same-sex and different-sex conducts. Hong Kong decriminalized consensual homosexual conducts between two adults in 1991, but the age of consent for male-to-male sex was made twenty-one, whereas that for female-to-female sex and heterosexual sex was sixteen. The unequal age of consent in Hong Kong catalyzed debates similar to that in the UK and many other European countries, where the inequality has been gradually removed owing to the lesbian, gay, bisexual, transgender and intersex (LGBTI) movements in recent years. In 2005, the Court of the First Instance of the High Court of Hong Kong decided that the unequal age of consent contravened the right to equality and the right to privacy. Some religious groups condemned this judgment and pushed the government to appeal, and the Court of Appeal of the Hong Kong handed down a judgment on September 20, 2006, unanimously dismissing the appeal.<sup>20</sup> In China's mainland however, the decriminalization of homosexuality and the equalization of age of consent was rarely examined in the legislative or judicial processes.<sup>21</sup>

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<sup>17</sup> *Case of Christine Goodwin vs the United Kingdom*, (Application no. 28957/95) Judgment, Jul. 11, 2002, at para. 97.

<sup>18</sup> Gender Recognition Act 2004, Parliament of the United Kingdom, passed on Jul. 1, 2004, entry into effect on Apr. 5, 2005.

<sup>19</sup> See fn. 1 at para. 146.

<sup>20</sup> See *Leung T C William Roy vs Secretary for Justice*, Court of Appeal, Civil Appeal No. 317 of 2005 (On Appeal from HCAL No. 160 of 2004), available at [http://legalref.judiciary.gov.hk/lrs/common/ju/ju\\_body.jsp?DIS=54227&AH=&QS=&FN=&currpage](http://legalref.judiciary.gov.hk/lrs/common/ju/ju_body.jsp?DIS=54227&AH=&QS=&FN=&currpage) (last visited May 15, 2016).

<sup>21</sup> GUO Xiaofei, 中国有过同性恋的非罪化吗? (*Did China Ever Decriminalize Homosexuality?*), 4 法治与社会发展 (*Rule of Law and Social Development*) 51, 51-65 (2007).

### III. THE COLONIZATION OF THE LEIFEWORLD BY THE SYSTEM

There is another crucial difference between Hong Kong and China's mainland on LGBTI rights. In March 2014, the UK government introduced the Consular Marriage and Marriages under Foreign Law Order 2014. This meant that same-sex marriages could take place at British Consulates in twenty-three countries that do not recognize same-sex marriage, including China and Russia, as long as one of the spouses is a British national. However, the Hong Kong government has raised an objection to the solemnization of same-sex marriages in Hong Kong. While China's mainland allowed same-sex consular marriage without hesitation, Hong Kong seemed significantly more wary about its legal and moral consequences.

Should we then conclude from the above-mentioned three issues — transsexuals' right to marry, equal age of consent for same-sex behaviors, and same-sex consular marriage — that China's mainland is more progressive in protecting LGBTI rights than Hong Kong, since there are much fewer objections and backlashes in China's mainland? Or, should we perceive Hong Kong as more progressive, because LGBTI rights are achieved through democratic discussion and legal mobilization, whereas in China's mainland the communities are rather inactive?

These two contradictory statements have revealed the paradox of "progress." Hong Kong went through lengthy and rigorous judicial and legislative debates before it finally recognized some LGBTI rights. Hong Kong is often considered to be the best example among Greater Chinese societies that follows legal professionalism, where marginalized groups are able to use strategic litigation or legislative participation to challenge oppressive laws. However, at the same time, conservative forces can also use media and law to resist the movement, which hinders any changes to the law. Moreover, the Hong Kong government may justify its refusal to recognize same-sex consular marriage as not picking side in the absence of societal consensus on same-sex marriage. Such justification seems to be consistent with the "progressive" liberal assumptions of neutrality, rationality, democracy and bureaucracy in modern governance, but these assumptions have increasingly fallen short in responding to the LGBTI human rights movements in Hong Kong of China and abroad.<sup>22</sup>

In contrast, positive changes to LGBTI rights in China's mainland seem to occur more efficiently, as they are often enforced in a top-down fashion, with few public quarrels. However, the downside is that activists in China's mainland, a jurisdiction that has not yet achieved the rule of law, are generally rather inexperienced with advocacy through

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<sup>22</sup> For the discussion of government's neutrality on moral-related issues, see, e.g. Michael J. Sandel, *Justice: What's the Right Thing to Do?*, Farrar, Straus and Giroux (New York), (2009).



engagement with the law,<sup>23</sup> with the exceptions of a number of victories in homosexuality-related cases concerning conversion therapy and film censorship in recent years.<sup>24</sup> Moreover, the arguably easily gained legal rights may have recursive effects on building and strengthening a sense of citizenship and community.<sup>25</sup> Therefore, one may argue that the Hong Kong model, albeit tediously slow and arduous, is more desirable in a modern world that values civil society's prosperity.

However, transsexual issues have exposed some dark sides of "progress" and modern governmentality. In the UK and other countries in the West, biological knowledge has played a major role in the legal recognition of transsexuals' right to marriage, making the right only available after the sex change of one's body. Although the Gender Recognition Act 2004 is often deemed as progressive because it does not require complete sex reassignment surgery, an applicant still has to provide two documents made by medical and/or psychological practitioners.<sup>26</sup> Psychology and psychiatry have thus become a professional force through which the power of knowledge operates to determine if one could change his or her sex in the residence registration system. This is not juridical power, but, in Foucault's terms, a micro power that produces sex and truth through the body.<sup>27</sup> Such medical-psychological power not only pathologizes and oppresses transsexuals, but also takes part in reassigning and thus reproducing sex for trans people, in the name of emancipation and respect for individual choice. The fact that the diagnosis of gender dysphoria is full of binaries and stereotypes has already subjected trans people to a series of medical examinations and bodily transformations before they can gain legitimacy before the law to live differently from their sex assigned at birth.<sup>28</sup>

In addition to a Foucauldian analysis of the power dynamics of scientific knowledge-discourse, the theory of system and lifeworld also provides critical insights. The notion of

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<sup>23</sup> However, changes occurred in recent years. There have been some attempts to secure LGBTI rights via litigation. See, e.g. *Chinese Gay Man Has Blood Donation Lawsuit Rejected*, *Pink News*, Jul. 8, 2010, available at <http://www.pinknews.co.uk/2010/07/08/chinese-gay-man-has-blood-donation-lawsuit-rejected/> (last visited May 15, 2016); see also, *Chinese Court Rules Against Gay Conversion Therapy*, *VOA*, Dec. 19, 2014, available at <http://www.voanews.com/content/chinese-court-rules-against-gay-conversion-therapy/2566103.html> (last visited May 15, 2016).

<sup>24</sup> See *China Orders Clinic that Shocked Gay Man to "Cure" Him to Pay up*, *Gaystar News*, Dec. 19, 2014, available at <http://www.gaystarnews.com/article/china-orders-clinic-shocked-gay-man-cure-him-pay191214/> (last visited May 15, 2016); *Film-Maker Sues Chinese Censors over "Ban" on Gay-Themed Movie*, *The Guardian*, Sep. 24, 2015, available at <http://www.theguardian.com/film/2015/sep/24/mama-rainbow-film-maker-sues-chinese-censors-over-ban-on-gay-themed-movie> (last visited May 15, 2016).

<sup>25</sup> A similar argument has been made in Timothy Hildebrandt, *Same-Sex Marriage in China? The Strategic Promulgation of a Progressive Policy and Its Impact on LGBT Activism*, 37 *Review of International Studies* 1313, 1313–1333 (2011).

<sup>26</sup> See fn. 18, Art. 3(1).

<sup>27</sup> Michel Foucault, *The History of Sexuality*, Pantheon Books (New York), at 145–146 (1978).

<sup>28</sup> For further discussion, see Kate Bornstein, *Gender Outlaw: On Men, Women, and the Rest of Us*, Vintage Books (New York), (1995).

lifeworld was first articulated by Edmund Husserl, who criticized modern positivist thinking for reducing the idea of science to mere factual science. Husserl argued that science was under a crisis of losing its meaning for life.<sup>29</sup> The rigorous, fact-oriented scientific character requires that “the scholar carefully exclude all valuative positions, all questions of the reason or unreason of their human subject matter and its cultural configurations.”<sup>30</sup> The rigid dichotomy of sex has been reconstructed into a scientific language of psychology and psychiatry. The ridicules of “sissy” or “tomboy” are then translated into a discourse of “gender dysphoria,” which not only echoes prejudices in the colloquial, but also justifies and solemnifies them. The cold medical terms may impose greater stress upon those who cannot fit neatly into the binary of masculinity or femininity, partly because “the diagnosed person is affected by forces he or she does not understand.”<sup>31</sup>

However, unlike the depathologization of homosexuality, people’s attitudes on the diagnosis of gender dysphoria is much more ambivalent. Judith Butler shrewdly described the complexity: “on the one hand, the diagnosis continues to be valued because it facilitates an economically feasible way of transitioning. On the other hand, the diagnosis is adamantly opposed because it continues to pathologize as a mental disorder what ought to be understood instead as one among many human possibilities of determining one’s gender for oneself.”<sup>32</sup> In other words, legal rights and status, entitlements to insurance benefits, medical treatments, and cultural intelligibility are all entangled in trans politics.<sup>33</sup> Therefore, the criticism on science must go hand-in-hand with the neoliberal state, the medical industry, the insurance market, sexism, homophobia and transphobia, as well as the inherently gendered legal system.<sup>34</sup>

Jürgen Habermas extended Husserl’s discussion by looking at languages, which decide what we say and how we say in our lifeworld. Habermas perceived society as constitutive of system and lifeworld: Whereas lifeworld is culturally transmitted and linguistically organized,<sup>35</sup> system is increasingly mediated by delinguistified media, such as money

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<sup>29</sup> Edmund Husserl, *From Introduction to the Logical Investigations and from the Crisis of European Sciences and Transcendental Phenomenology*, Northwestern University Press (Evanston), at 5 (1970).

<sup>30</sup> *Id.* at 6.

<sup>31</sup> See Butler, fn. 13 at 77.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* See also, Liza Khan, *Transgender Health at the Crossroads: Legal Norms, Insurance Markets, and the Threat of Healthcare Reform*, 11(2) *Yale Journal of Health Policy, Law & Ethics* 375, 387 (2011); Shannon L. Sennott, *Gender Disorder as Gender Oppression: A Transfeminist Approach to Rethinking the Pathologization of Gender Non-Conformity*, 34(1–2) *Women & Therapy* 93, 96 (2010).

<sup>34</sup> For how the law is inbuilt with gender stereotypes, see Anna Grear, *Law’s Entities: Complexity, Plasticity and Justice*, 4(1) *Jurisprudence* 76 (2013). For radical trans coalition politics, see Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law*, South End Press (New York), (2011).

<sup>35</sup> Jürgen Habermas, *The Theory of Communicative Action, Volume 2: Lifeworld and System: A Critique of Functionalist Reason*, Beacon Press (Boston), at 124–125 (1987).

and power.<sup>36</sup> Habermas explained how the media-steered system has colonized our lifeworld,

*The transfer of action coordination from language over to steering media means an uncoupling of interaction from lifeworld contexts. Media such as money and power attach to empirical ties; they encode a purposive-rational attitude toward calculable amounts of value and make it possible to exert generalized, strategic influence on the decisions of other participants while bypassing processes of consensus-oriented communication. Inasmuch as they do not merely simplify linguistic communication, but replace it with a symbolic generalization of rewards and punishments, the lifeworld contexts in which processes of reaching understanding are always embedded are devalued in favor of media-steered interactions; the lifeworld is no longer needed for the coordination of action.<sup>37</sup>*

For Habermas, law is one of the most powerful media that bridges the lifeworld and system, and connects everyday language and professional codes. He also noticed the power of juridification: An increasing number of formal laws are created in the sociocultural sphere, the private sphere, and the body-related sphere, the density of which leaves little social space outside the reach and definition of the law.<sup>38</sup> In terms of transsexuals' right to marry in Hong Kong and China's mainland, one may perceive law as an overarching steering medium, meticulously communicating the marital needs of transsexuals in their daily life with the professional codes of law.

However, one should not romanticize Habermas's "ideal speech situation." Habermas has been criticized as homogenizing differences, "ignoring the contingent, historical and affective circumstances which made individuals adopt a universal-ethical standpoint in the first place."<sup>39</sup> This critique is pertinent to our discussion — after all, many transsexual people are hardly able to communicate with judges in legal languages; the tedious litigation process is time- and money- consuming; transsexuality is still discussed as a mental illness within and outside of courts; and losing a case might result in further pain and suffering of transsexual plaintiffs.

In this sense, the legal recognition of transsexual persons' right to marry is arguably "double colonization": the legal and medical professional knowledge colonizes the lifeworld, and the mainstream gender stereotypes colonize the lived experience of transsexual bodies. Both China's mainland and Hong Kong are witnessing these tendencies. Perhaps there is even a third dimension of colonization in Hong Kong; the heavy reliance on common law traditions in this post-colonial jurisdiction.

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<sup>36</sup> Id. at 182–184.

<sup>37</sup> Id. at 183.

<sup>38</sup> Id. at 357–373.

<sup>39</sup> Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics*, Polity Press (Oxford), (1992).

## CONCLUSION

Albeit having critically read the transsexual cases in Hong Kong and China's mainland, we have no intention to categorically deny the values of professionalization of law and medicine. In fact, notwithstanding some conveniences, the chaotic status quo of the market and law in relation to sex reassignment surgery in China's mainland have already brought about certain problems. For instance, in China's mainland, one does not have to answer a series of gender-stereotypical questions before going through the surgery — those humiliating questions were harshly criticized by radical trans activists in the West. However, numerous unqualified hospitals and doctors are irresponsibly promising to be able to perform sex reassignment surgery: “as long as you have RMB100,000 to RMB500,000 you can be whatever you want!”<sup>40</sup>

The lack of legal debates on transsexual persons' right to marry in China's mainland also obliterates other dilemmas facing this largely invisible group: There continues to be no legal procedure through which transsexuals can change the gender markers on their diplomas, which leads to enormous barriers when seeking jobs. They also face various types of discrimination, from employment to goods and services. Moreover, even if the law appears to have secured their right to marry, the practices vary significantly at the local level.

In conclusion, the future of trans activism in China's mainland should neither uncritically exalt the narratives of rationality, progress and rule of law, nor should it have a rosy vision of a legally ambiguous and practically convenient environment. The lesson we can tentatively draw from this comparative study is that we should embrace the paradoxes and tactically obey, engage or defy the law in every specific scenario.

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<sup>40</sup> WANG Deli, 只要给 10–50 万, 就可帮你变性 (*Changing Sex with RMB100,000 to RMB500,000*), 重庆晚报 (*Chongqing Evening News*), Jun. 18, 2009.

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