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Intimate equality and transparent selves: Legalising transgender marriage in Hong Kong

Howard Chiang

Department of History, University of Waterloo, Waterloo, Canada

ABSTRACT

In May 2013, the Court of Final Appeal in Hong Kong ruled in favour of granting transgender individuals the right to marry in their post-transition gender rather than their biological sex at birth. This landmark judgment, *W v Registrar of Marriages*, has been considered by many as an important milestone in the LGBT rights movement in Sinophone communities. In scrutinising both the majority and dissenting statements, a critical analysis of the parameters of queerness in this ruling shows that the liberal framing of transgender marriage rights engenders what I call 'the polite residuals of heteronormativity', which figures the advancement of queer interest by perpetuating certain implicit forms of gender and sexual oppression. Moreover, these residuals – concealed within a broader outlook of political progressiveness – were conditional upon a rhetoric of imperial citationality that renders giant global superpowers, especially Britain and China, as the normative frames of legal authorisation.

Ms W, a Hong Kong resident, entered the world as a boy but was subsequently diagnosed with gender identity disorder. She started receiving medical treatments in 2005 and underwent sex reassignment surgery in 2008. As a result of her gender transitioning, the government issued her a new identity card and a new passport reflecting her sex now as female. In 2008, she hired a lawyer to approach the Registrar of Marriages to inquire about her right to marry in her acquired gender rather than biological sex at birth. The Registrar denied W the right to marry her male partner on the ground that same-sex marriage was not (and is still not) recognised in Hong Kong. For the purposes of marriage at the time, the legal attribution of gender for transsexuals remained decisive around the biological sex indicated on the birth certificate regardless of the new identity card or passport.

Believing that the Registrar's refusal had violated her constitutional right to marry as well as her right to privacy, W brought the case to court for judicial review. However, both the Court of First Instance and the Court of Appeal upheld the Registrar's decision in 2010 and 2011 respectively (*W v Registrar of Marriages* 2010; *W v Registrar of Marriages* 2012). This outcome attracted a serious measure of scholarly attention critiquing the judgment from various perspectives in its aftermath (Chan 2011; Hutton 2011; Kapai 2011; Lau and Loh 2011; Liu 2011, 2012; Loper 2011; Petersen 2013; Scherpe 2011; Wan

CONTACT Howard Chiang howard.chiang@uwaterloo.ca

2011a, 2011b; Winter 2011; Yee 2010). Moreover, it did not stop W from pushing the envelope further. She subsequently appealed her case to the Court of Final Appeal and, on 13 May 2013 in a four to one decision, the Court of Final Appeal overturned the Registrar's decision and held that W could marry her boyfriend. This has been widely perceived as a landmark judgment that gives transgender people in Hong Kong the right to marry in their identified gender rather than their biological sex at birth.

Although there is much to be commended about the *W v Registrar of Marriages* ruling, this essay aims to open up discussions about what it forecloses, especially in light of how its narrative of success strikingly rests on a presumed irrelevance of gay and lesbian political ambition. Queering *W* in such a way subverts the pervasive usage of 'transgender', to borrow Susan Stryker's astute insight, 'as the site in which to contain all gender trouble, thereby helping secure both homosexuality and heterosexuality as stable categories of personhood' (2004: 214). In fact, it is not difficult to discern that the question of same-sex marriage was implicated in this judicial consideration from the start. The Registrar initially denied W the right to marry her male partner because same-sex marriage is not legally sanctioned in Hong Kong; the Court of Final Appeal overturned that decision on the basis that the relationship between W and her spouse represents a strictly heterosexual union, disavowing – if not evading altogether – any ancillary space for destabilising the co-production of gender and sexual subject positions.

The issue of same-sex marriage has drawn a divisive line within the lesbian, gay, bisexual, and transgender (LGBT) community, and this essay is far from the place to claim a resolution to that debate (Bower 1997; Butler 2002; Duggan 2003; Kaplan 1994; Warner 1999). Nonetheless, to assess the ramifications of *W*, I believe there is much to be gained from turning that debate on its head: if gay marriage has been critiqued vociferously on the ground of its exclusionary blind spots that further marginalise under-privileged social groups and bolster the heteronormative power of the state, can the legitimation of nonheterosexual partnership be similarly conceived as a vital oversight in the intelligibility of transgender marriage?

Building on a growing body of literature that brings the issue of queer kinship to the heart of discussions about global political configurations, this essay proposes an alternative reading of *W* that foregrounds the geopolitical positioning of Hong Kong (Eng 2010; Engebretsen 2013; Freeman 2007; Kam 2013; Tan 2013; Wesling 2011; Wong 2013). This reading underscores the danger of eclipsing the reciprocal masking of homophobia and transphobia when the state's interest in setting them apart as mutually distinct political agendas rearticulates itself in powerful ways behind definitive court decisions.[1] The first part of the essay sheds light on Hong Kong's geopolitical salience by exploring the international jurisprudence history within which the *W* judgment is nested. In many ways, my global and comparative perspective simply adds further weight to Marco Wan's claim that 'giving transsexuals the right to marry in Hong Kong at the present time represents a logical development in [the history of marriage]' (2011a: 126). My analysis also extends John Erni's insight that in ruling the position of the Registrar of Marriages unconstitutional, the Court of Final Appeal 'has sent a strong message of anti-discrimination to society' (2014: 210).

[1]For an analysis of how wider transphobic social structures disenfranchise transgender persons through multiple forms of 'imprisonment', including gender and sexual essentialism, see Erni (2013).

Yet I also go beyond these observations by suggesting that neither England nor Europe alone deserves a taken-for-granted place in this process of historical referentiality. Our interrogation must take into account the increasingly charged relationship between the Hong Kong Special Administrative Region (HKSAR) and the People's Republic of China (PRC), one that is frequently neglected in Anglocentric critical legal analyses.[2] Accordingly, in the second part of the essay, I expand on the mutual imbrication of juridical conservatism and gender/sexual geopolitics through a critical reappraisal of the *W* judgment. Concluding with the transnational affinity between Hong Kong and Taiwan, this essay argues that the liberal framing of transgender marriage rights engenders what we may call 'the polite residuals of heteronormativity', which figures the advancement of queer interest by concealing certain implicit forms of gender and sexual oppression within a broader outlook of political progressiveness.[3]

The weight of a fairer past

The majority opinion in favour of W's appeal, delivered by Chief Justice Geoffrey Ma and Permanent Judge Robert Ribeiro, raises a longstanding subject of contention in the history of marriage rights: the separation of procreation from the legal definition of marriage. Specifically, a leading assumption of Hong Kong Basic Law that the judges wished to overturn was the idea that procreation is a necessary condition for defining 'a man and a woman' and, therefore, the legitimation of marriage. Similar to most judicial rulings, the *W* case had a long history of related court battles from which to infer, albeit mainly outside Hong Kong, in order to arrive at a compelling conclusion about the nature of the relationship between procreation and marriage deemed most appropriate for contemporary Hong Kong society. The issue of whether marriage ought to be legally inclusive of procreation, however, was from the outset conflated with a narrow understanding of sexual intercourse. One could reasonably claim that the right of transsexuals to marry in their acquired gender became a possible question only after gender reassignment was made available.[4] Indeed, both Justices Ma and Ribeiro made this poignant observation in their statement (2013: § 26). Nonetheless, the first time that a European court faced the challenge of resolving this issue goes back to 1969 in the case of *Corbett v Corbett (Otherwise Ashley)*. Since this case served as the starting point for the unfolding of the *W* judgment, it is also where I like to begin our historical contextualisation.

Heard in late 1969 with a decision delivered in February 1970, *Corbett* was a divorce case in which the plaintiff Arthur Corbett, a British aristocrat, petitioned to nullify his marriage to the transsexual model April Ashley. Corbett sought to dissolve his marriage based on two grounds: first, at the time of their marriage ceremony in 1963 Ashley was still a person of the male sex (whereas the legal definition of marriage involved the union of a man and a woman); and second, the marriage was never consummated due

[2]For an excellent treatment of this intricate relation through the lens of queer cultural production in postcolonial Hong Kong, see Leung (2008). As cultural studies scholars such as Leung have already begun to give this realm of theoretical critique its due, this essay supplements their effort by utilising legal history and case studies to explore the overlapping social ramifications of queer activism and trans recognition, especially in transnational Sinophone contexts. For an overview of the transgender movement in Hong Kong, see Cheung (2012).

[3]I borrow the descriptor 'polite' from Takashi Fujitani's comparative work on the 'polite racism' of the Japanese and Americans in the context of the Asia–Pacific War (2011).

[4]On the medical history of transsexuality, see Hausman 1995; Meyerowitz 2002; Najmabadi 2013.

to Ashley's incapacity or her intentional refusal to consummate the marriage. Though Ashley brought a petition under the Matrimonial Causes Act 1965 for maintenance, the court ultimately ruled in favour of Corbett. The judge who presided this case, Justice Roger Ormrod, explained that since it was impossible to change a person's biological sex, and yet marriage was by definition a union between a man and a woman, their marriage was void *ab initio*. His decision rested on a biologistic understanding of sex in relation to marriage:

> sex is clearly an essential determinant of the relationship called marriage, because it is and always has been recognised as the union of man and woman. It is the institution on which the family is built, and in which the capacity for natural heterosexual intercourse is an essential element …
>
> Having regard to the essentially heterosexual 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 … My conclusion, therefore, is that the respondent is not a woman for the purposes of marriage but is a biological male and has been so since birth. It follows that the so-called marriage of 10th September 1963 is void. (1971)

In defining procreative intercourse as the essential constituent of marriage at common law, Justice Ormrod laid down four foundational criteria for determining the legal sex of transsexuals: chromosomal factors, gonadal factors, genital factors (including internal sex organs), and psychological factors to which transsexualism was understood to belong. This definition was endorsed as the 'present state of English law regarding the sex of transsexual people' until as late as 2003 in *Bellinger v Bellinger*, and it was overturned only with the introduction of the Gender Recognition Act 2004 – to which we will return (2003: § 11).

In drawing on the *Corbett* case, Justices Ma and Ribeiro distinguished two layers in the definition of legal sex central to Justice Ormrod's decision: consummation and the four psychobiological factors. However, they were quick to reject non-consummation as a reasonable ground for voiding a marriage:

> We will content ourselves with saying that we are not convinced that the existence of non-consummation as a ground for voidability has any necessary connection with procreation as an essential purpose of marriage. The test for consummation has traditionally been regarded as full coital penetration but without any requirement of emission, far less of conception. Moreover, there is in any event authority to support the view that consummation can be achieved where the woman has had a surgically constructed vagina, suggesting that there is no legal impediment to consummating a marriage with a post-operative transsexual woman who is able to engage in sexual intercourse. We are therefore not persuaded that the existence or otherwise of non-consummation as a ground for avoiding a marriage is of any present relevance. (2013: § 55)

In other words, the focus of their attention immediately shifted to the question of who qualifies as a 'man' or a 'woman' for the purposes of marriage irrespective of

consummation. In the case of W, more specifically, could a post-operative male-to-female (MTF) transsexual person be treated as a 'woman' for those purposes?

In establishing their decision, Justices Ma and Ribeiro acknowledged three considerable challenges to the UK's adherence to the *Corbett* approach in the 12 years between 1986 and 1998. In 1986, the European Court of Human Rights (ECHR) interpreted the right of transsexuals to marry in the case of *Rees v UK* in a way similar to *Corbett*.[5] Mark Rees was a post-operative transsexual man who had been refused the alteration of his birth certificate so as to reflect his post-transition sex. The ECHR ruled against Rees on the ground that it did not consider his marriage right infringed: 'In the Court's opinion, the right to marry guaranteed by Article 12 (art. 12) refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 is mainly concerned to protect marriage as the basis of the family' (1986: § 49). The 15 judges presiding the *Rees v UK* case held *unanimously* that there was no violation of Article 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter 'the Convention'). Four years later, the ECHR considered a similar case, *Cossey v UK*, but this time involving a post-operative transsexual woman, 'Miss Cossey', who had been engaged with two men sequentially by the time of her application. In viewing the issues confronting her case akin to those arising in the Rees case, the ECHR again held (by 14 votes to four) that there was no violation of Article 12 (1990).

The question of whether a transsexual's right to marry is violated under Article 12 resurfaced again in 1998, when the European Commission of Human Rights referred two complaints to the ECHR, together constituting the case of *Sheffield and Horsham v UK*. MTF Kristina Sheffield and Rachel Horsham objected to the nullity of their potential marriage with a male partner under English Law since a MTF transsexual was still considered a man for legal purposes (and since same-sex marriage is not recognised). In holding (by 18 votes to two) again that there was no violation of Article 12, the Court recalled that

> in its Cossey judgement it found that the attachment to the traditional concept of marriage which underpins Article 12 of the Convention provides sufficient reason for the continued adoption by the respondent State of biological criteria for determining a person's sex for the purposes of marriage, this being a matter encompassed within the power of the Contracting States to regulate by national law the exercise of the right to marry. (1998: § 67)

Again, by 'the traditional concept of marriage', the ECHR was referring to the original formulation of legal sexual criteria first articulated in *Corbett*. In the 12 years from *Rees* to *Sheffield and Horsham*, the ECHR maintained that the biological characteristics of sex fixed at the time of birth provided the sufficient measures for determining an individual's right to marry. Yet 'in each of those cases', Justices Ma and Ribeiro observed, 'the Court noted that questions regarding the rights of transsexual persons arose in an area of legal, social and scientific change, acknowledging the need to keep the position under review' (2013: § 75).

The opportunity for a watershed turning point came in 2002, when the ECHR sat as a Grand Chamber in the landmark judgment of *Goodwin v UK*. The post-operative MTF Christine Goodwin claimed a violation of Articles 8, 12, 13 and 14 of the Convention

[5]For an analysis of the European Court of Human Rights' jurisprudence in respect of sexual orientation, see Johnson (2012).

and applied (under Article 41) for just satisfaction. Overturning the decisions in *Rees*, *Cossey*, and *Sheffield and Horsham*, the ECHR decided on this occasion that, despite the absence of a common European approach to the legal resolution of the practical problems faced by transsexuals, the time has come to take on board 'the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals' (2002: § 85). As such,

> The Court is not persuaded that at the date of this case it can still be assumed that these terms must refer to a determination of gender by purely biological criteria (as held by Ormrod J. in the case of *Corbett v. Corbett*, paragraph 21 above). There have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality. The Court has found above, under Article 8 of the Convention, that a test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual. There are other important factors – the acceptance of the condition of gender identity disorder by the medical professions and health authorities within Contracting States, the provision of treatment including surgery to assimilate the individual as closely as possible to the gender in which they perceive that they properly belong and the assumption by the transsexual of the social role of the assigned gender. (2002: § 100)

By the same measure, the ECHR held that the right to found a family was not a necessary condition of the right to marry, and it also no longer considered the chromosomal element or a congruent test of biological factors decisive in denying the legal recognition to the gender change of a post-operative transsexual. Incorporating these revolutionary amendments, the judges now assessed Goodwin's right to marry in the following light: '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' (2002: § 101). For the first time in the history of transsexual rights, the ECHR held unanimously that transgender people's right to marry has been infringed upon under Article 12 of the Convention.

By referencing three decades of European jurisprudence history from *Corbett* to *Goodwin* to explain how they arrived at their position, Justices Ma and Ribeiro highlighted the flexibility of British law, mediated by the ECHR decisions, especially as it adapted to the evolving international social environment. According to their judgment, Hong Kong must be placed squarely within this context of historical legal transformation.

> the Basic Law [of Hong Kong] … are living instruments intended to meet changing needs and circumstances … When the position in Hong Kong in 2013 is examined, it is in our view clear that there have been significant changes which call into question the concept of marriage adopted as a premise by Ormrod J and also the criteria which he deduced therefrom. (2013: § 84)

In order to drive home their conclusion that procreation was no longer an essential criterion for the legal legitimation of marriage, Justices Ma and Ribeiro pointed to the changing social conditions in Hong Kong, with an emphasis on its increasing openness and cultural diversity.

> In present-day multi-cultural Hong Kong where people profess many different religious faiths or none at all and where the social conditions described by Thorpe LJ by and large prevail, *procreation is no longer (if it ever was) regarded as essential to marriage*. There is certainly no justification for regarding the ability to engage in procreative sexual intercourse as a sine qua non of marriage and thus as the premise for deducing purely biological criteria for ascertaining a person's sex for marriage purposes. (2013: § 89, emphasis added)

Their strategic decision to echo the ECHR's approach in *Goodwin* underscores an important feature that sets HKSAR apart from the rest of the PRC, the evolving Portuguese civil law system in Macau notwithstanding: namely, the region's unique legal system resulting from its former British colonial status. In contrast to Mainland China's civil law system, Hong Kong continues to follow the English Common Law tradition established under British rule.[6] By transposing the flexibility of British law onto the suppleness of Hong Kong Basic Law, Justices Ma and Ribeiro executed a set of juridical practices that extended the lingering shadow of the British imperial reach, rendering 'Europe' as a goal to catch up with for a region situated precisely at the interstitial space between China and the West (Chakrabarty 2000; Chen 2010).

The irony here is that the Mainland Chinese government had already granted a marriage license to Zhang Lin, an MTF from Chengdu, Sichuan, in 2004 (Hao 2004). Xiaofei Guo has recently highlighted British colonial legacy in Hong Kong as a reason for the sharp contrast between the disquieting jurisprudence transformations occasioned by *W* and the relatively 'silent and subtle' legalisation of marriage rights for gender reassigned individuals in present day PRC (2015). Therefore, it is interesting to note that the non-permanent judge Kemal Bockhary, concurring with the majority's decision in *W*, was the only member of the court to point out the fact of Hong Kong's lagging behind in the area of transsexual marriage rights: 'This country China, of which Hong Kong is a part, will be fully within the international trend to which Lord Nicholls referred if we in Hong Kong uphold the right of a post-operative transsexual to marry in the reassigned capacity. I say that because such a right is recognized in the Mainland' (2013: § 203). Yet whether the alibi for taking the transformation of the legal system in Hong Kong seriously is Europe or China, the message remains clear: the extraordinary geopolitical position of Hong Kong makes a seemingly straightforward issue of human right (i.e., marriage) fundamentally difficult to grasp without assigning global giant powers such as China or Britain an epistemologically and ontologically privileged position.

The veil of queer interpellations

Although the ruling of *W* allows ample room for inferring radical implications about the separation of procreation from the legal definition of marriage, I wish to suggest that the court decision ultimately reauthorises certain heteronormative assumptions about gender and sexuality. Despite its queer potential and legalisation of transsexual marriage rights, the outcome of *W* engenders what I call the 'polite residuals of heteronormativity' for three reasons. First, the decision rested on the ideological perpetuation, rather than troubling, of the heterosexual–homosexual binary that has endemically fractured our

[6]Petersen has observed that due to its 'lack of democracy', Hong Kong in the colonial period lagged behind England with respect to promoting human rights through legal reform (2013: 32).

epistemological organisation of sexuality, rendering marriage as an entirely straight institution (Sedgwick 1990; Butler 2002). From the outset, Justices Ma and Ribeiro foreclosed the potential of using this case to transform the institution of marriage and its meaning through the possible prism of homo-intimacy: 'We should make it clear that nothing in this judgment is intended to address the question of same sex marriage' (2013: § 2). Even from W's perspective, 'it is not part of the appellant's case that same sex marriage should be permitted. The contention advanced is that she is for legal purposes a woman and entitled to marry a person of the opposite sex' (2013: § 2). Although the debate on gay marriage is far from settled in the LGBT community, both at the grassroot level and within scholarly discourses, what remains unchallenged in the successful appeal of W is the strict definition of marriage as a union between a man and a woman. Though the legal criteria for who qualifies as a man or a woman may have undergone a drastic transformation (and this should certainly be lauded in its own right), the broader heterosexist framework of marriage has not. The predicament of cross-sex desires continues to be *naturalised* through these judicial conversations about transgender rights (Kogan 2003).

Second, by reinforcing a heterosexist institutionalisation of marriage, the *W* case elides the radical queer potential of the category of *trans* itself.[7] In striving to convince the judges that the category of woman includes post-operative MTF transsexuals, the arguments put forth by W and her legal representatives essentially absorbs the immensely disruptive power of 'trans' into an epistemic fixity and boundedness of gender. Perhaps this is the flip side of the same coin with respect to my last critique, in which a consideration of *sexuality* (gay, straight, etc.) in the legal reconceptualisation of marriage sheds light on where transsexual rights may have fallen short in obscuring the possible horizons of queerness. Here, the turning of our analytic lens to *gender* addresses the problem of 'homonormativity' in the strategic queering of marriage, but it fails to adjure what such queering can do to expose the pluralistic and inclusive spectrum of gender expressions.[8] As Susan Stryker, Paisley Currah and Lisa Jean Moore have argued, a compelling purchase of 'trans' resists 'seeing gender as classes or categories that by definition contains only one kind of thing' and instead 'understand[s] genders as potentially porous and permeable spatial territories (arguable numbering more than two), each capable of supporting rich and rapidly proliferating ecologies of embodied difference' (2008: 12). Through its contrived intervention in the regulatory governmentality of Hong Kong Basic Law, the *W* case ultimately fails to bring the fluid ecologies of gender embodiment to bear on the juridical lexicon of marriage rights beyond redressing the question of who qualifies as a man or a woman. In fact, its success precisely reconsolidates this question in the subsequent jurisprudence importance of the case.

A potential counterpoint to my argument may be identified in the judges' decision to endorse the United Kingdom's Gender Recognition Act 2004 (GRA). The Act

[7]For a historical overview of the tensions between gender pluralism and the umbrella coherence of the transgender rights movement in the US, see Currah (2006).

[8]Although the concept of homonormativity has been invoked by queer theorists such as Duggan (2003) to denote the imitative constructs of heterosexual norms within mainstream neoliberal gay and lesbian politics, my usage in this essay sides with the transgender scholar-activist Stryker (2008), who adopts the term to describe the normative imposition of a gay and lesbian agenda over the concerns of transgender people on the margins of sexual politics and history.

> does not lay down a bright line test for when a transsexual person does or does not qualify for recognition in his or her acquired gender. Instead, the Act sets up a panel with legal and medical members which hears applications for gender recognition and requires the panel to grant a gender recognition certificate. (2013: § 139)

In other words, rather than drawing an arbitrary line at some point in transitioning (usually in the sex reassignment process) to serve as a universal litmus test for the judicial recognition of gender change, this approach determines legal gender status on a case-by-case basis via an expert panel without imposing an undesirable coercive effect on persons who may not wish to undergo surgery (2013: § 136). In transferring this method of 'sex' determination from Britain to Hong Kong, the majority of *W* judges have certainly allowed for more flexibility in the proper recognition of wide-ranging transgender expressions not preemptively axed by the fulcrum of sex change operations or by the biological determinism of *Corbett*.

However, two problems arising from this approach form the basis of my third critique of the *W* judgment. The first problem with this approach is that it reauthorises the same legal and medical regimes that have subjected transgender individuals to oppressive scrutiny in the first place (Butler 2006). Calling the state determination to establish a trans person's gender status a process of 'getting sex right', David Cruz has argued that this

> 'getting sex right' approach fails to appreciate how legal sex is a normative, regulatory tool, not a natural fact. 'Getting sex right' risks unaccountable legal decision-making and transfers of power to an alternative regime, that of medicine, that may seem more congenial than the legal arena at the current moment, but which is not guaranteed to promote the liberty and equality of transgender, or indeed any, persons. (2010: 203)

Instead of supporting the equal existence of gender diverseness without the systematic intrusion of the state, the GRA approach reaffirms the importance for pertinent legal, medical and scientific experts to ensure 'getting sex right' and prioritises the power of these authorities over the voice of gender variant people in legal sex determination, if legal sex determination is even a desirable and necessary precondition.

Secondly, the appropriation of the GRA method undermines the subversive geopolitical potential of Hong Kong as a region situated at the intersections of British postcolonialism and the PRC's growing global dominance. If Hong Kong has indeed become increasingly incorporated into the geocultural Sinosphere (and increasingly steered away from the Anglosphere), and if the Mainland Chinese state has already legalised trans people's right to marry in their identified gender, why is it still necessary to codify a legislative intervention in the form of gender recognition panel for future considerations of transgender legal claims? Again, from the perspective of cultural critique, it is not going too far to suggest that such a strategic resolution to recentering the GRA approach in future judicial conversations about transgender rights merely reinforces the West as a normative frame of intelligibility in a region commonly deemed to be a territorial propriety of China. In some ways, the ensuing articulation of proximate British legal practices in a Chinese-speaking region resuscitates the static binary of 'China versus the West' and, by extension, obscures an immensely powerful realisation of Hong Kong's queer regionalism (Chiang and Wong 2016). It significantly diminishes the profound potential of flexible gender expression – and recognition – for accounting transparent selves in the name of sensible law.

Ironically, despite its troublesome agenda, the dissenting opinion of Justice Chan illustrates a potentially *queerer* intervention in comparison to the majority judgment. (However, as I shall also point out, his heterosexist and transphobic motives preclude the realisation of such queer potential.) First, this can be inferred from Justice Chan's invention of a new category called 'transsexual marriage' in his opening declaration: 'I am not persuaded that there is justification for extending the meaning of "marriage" in art 37 of the Basic Law to include a transsexual marriage' (2013: § 152). This statement implies that the traditional institution of marriage excludes this type of union that Justice Chan calls 'transsexual marriage' and that the prospect of including the latter would merely be an extension of the former reflecting their presumed mutual exclusivity. Yet what exactly does 'transsexual marriage' refer to, and what work is it actually doing for judicial reasoning?

In fact, Justice Chan's remark leaves room for two diverging interpretations, and a queerness of some sorts can be inferred from such interpretive instability. On the one hand, his comment is an utterly transphobic statement in its failure to respect why the legal and medical acceptance of transsexuality is important. By confining transsexuals to a legal position relative to the institution of marriage as that distinct from cisgender men and women, it dismisses the legal acknowledgement of full gender transitioning as a serious advancement in the interest of trans people. On the other hand, this depiction of transgender exceptionalism accentuates the liminal autonomy of the *trans* category itself, rather than the normative purchase of gender binaries. In this sense, trans operates as a mediating conceptual anchor that exceeds those hegemonic definitions of gender that have traditionally consolidated the cultural traction of heterosexual marriage. The conceptual ambiguity around the idea of transsexual marriage, if mobilised strategically so as to destabilise the coherence and expose the artifice of gender, provides a potentially radical space for broadening and transforming the very meaning of marriage itself. Unfortunately, this was the opposite of what Justice Chan intended to accomplish with his newly invented label. By transsexual marriage, he merely referred to those unions involving gender nonconforming individuals whose intimate desires do not deserve to be sanctioned by the state.

In addition to inventing the category of transsexual marriage, Justice Chan bases his dissenting judgment on the queer geopolitical relationality of Hong Kong, a way to unravel the politicity of Hong Kong overshadowed in the majority reasoning. Specifically, he distinguishes Hong Kong from other major nation-states that have advanced the legal interest of transsexuals to marry in their acquired gender. This formulation construes HKSAR as a minor region – minor in the Deleuzian sense. In their decisive characterisation of minor literature, Deleuze and Guattari argue that 'a minor literature doesn't come from a minor language; it is rather that which a minority constructs within a major language' (1986: 16). Similarly, the minor regionalism of Hong Kong is not derived from a minor statist polity per se; it is rather that which a minority constructs within and between major statist polities such as the British empire and the PRC. Hong Kong society, incidentally, continues to be geographically situated in *marginal relations* to the cultural spheres of such major languages as English or Mandarin Chinese.

The queer peripheral realism of Hong Kong is most powerfully articulated in Justice Chan's explanation for why he refuses to follow the logic of international human rights

rulings.[9] All other members of the judgment team agreed with W's legal representative that an increasing trend of tolerance in international jurisprudence has been evident of late: Australia, New Zealand, Singapore, Canada, parts of the United States, and, above all, the United Kingdom in the aftermath of *Goodwin*. Justice Chan responded to by dismissing these discerning references: 'With respect, I would approach these authorities and legislative changes with caution since the social conditions in different countries are obviously not the same' (2013: § 171). On the question of applying the principles behind these changes from abroad to Hong Kong, he continued:

> While the situations overseas are clearly relevant and must be taken into account in the interpretation of art 37, one must bear in mind that the culture and social conditions in each place are not the same. For the purpose of the interpretation and application of the Basic Law, I think the principal consideration must be the circumstances in Hong Kong, just as the ECHR was more concerned with the situations among its member states.
>
> In my view, the present position in Hong Kong is quite different from that in Europe and the UK when *Goodwin* was decided. While there was evidence of the changing attitudes in both Europe and the UK, I do not think there is sufficient evidence to show that the circumstances in Hong Kong are such as to justify the Court giving an interpretation to art 37 to include transsexual men and women for the purpose of marriage. As pointed out earlier, there is no evidence showing that for the purpose of marriage, the ordinary meanings of man and woman in Hong Kong have changed to accommodate a transsexual man and woman. More importantly, there is no evidence that the social attitudes in Hong Kong towards the traditional concept of marriage and the marriage institution have fundamentally altered. Nor is there evidence on the degree of social acceptance of transsexualism. (2013: § 187–188)

Whereas the other judges stressed the need for Hong Kong to be made legislatively similar to overseas nation-states, Justice Chan precisely used Hong Kong's difference to back transphobic assumptions about the virtue of holding onto enduring vestiges of social discrimination. Similar to what the category of transsexual marriage could have done for the subversion of gender norms, the queer/minor regionalism of Hong Kong carries the prospect of being productively mobilised to contest the critical operation of the West (or China for that matter) as an object of imperial citationality (Chiang and Wong 2016). But instead, Justice Chan's delineation turned it into a mere arbiter of difference for displacing the privileged status of global superpowers as a pedagogical model. The vision of Hong Kong nativism expressed in his judgment ends up reinforcing the widespread disapproval of transsexuality in Hong Kong society.

Coda: Queer Sinophone politics

China's image in mainstream Western discourses often withstands an oxymoronic curse: as a growing yet threatening international superpower on the one hand, and as the antithesis of human rights on the other (Eng, Ruskola, and Shen 2011). Critics frequently bring up Taiwan as a reference point for lateral comparisons with Hong Kong, especially in light of their shared resistance to Beijing political hegemony (Shih and Liao 2014). Using Taiwan as a case study, Petrus Liu has argued against the popular perception of Taiwan as epitomising a more progressive sexual politics than Mainland China. Although Liu is correct to note that the movement behind the legalisation of same-sex marriage in

[9]On peripheral realism, see Esty and Lye (2012).

Taiwan 'reveals the complexity of the discourse of queer human rights when it is compounded with the "China question"', his reading often fails to intervene at the pivotal conjuncture where transgender and gay rights intersect so as to overcome a homonormative framing of queerness (2012: 81). In contrast, the union between two MTF individuals, Yi-ting Wu and Zhi-yi Wu, as examined in depth by Friedman (forthcoming) and Chen (2013), promises a more fruitful lens for understanding the state response to the *mutual constructions of gender and sexuality* as codified through the legislation of marriage in Sinophone communities, for which a historically embedded and politically contested relationship to the PRC remains a central component.[10]

Both born male, Wu and Wu got married in Taiwan after one of them, Yi-ting, received MTF reassignment, which ensured that their union was heterosexual by definition in congruence with their opposite legal gender status. However, later when Zhi-yi also underwent full gender transition, they received a letter from the Ministry of Interior Affairs (MIA) requesting them to de-register their marriage. Facing immense pressure from experts and activists, the MIA decided in August 2013 to allow Yi-ting and Zhi-yi to retain their marriage certificate as long as the legality of their marriage was defined as a union between a man and a woman at the time of registration. This prepared the historical context for a watershed event taking place two months later in October 2013, when the Civil Partnership Rights Petition (the first part of which included a Marriage Equality Act) gained sufficient support and signatures and was successfully delivered to the Legislative Yuan of the Republic of China for consideration. Many have considered this petition delivery a landmark achievement in the march towards the legalisation of gay marriage in Taiwan. Evidently, the issue of transgender marriage rights and that of same-sex marriage rights have been intertwined in state logic from the start. This entanglement led the MIA, for instance, to attempt retrieving the certification of the Wu–Wu union in order to preserve a heterosexualised institution of marriage in Taiwan. Above all, what this example reveals is a broader transnational context in which Sinophone communities such as Hong Kong and Taiwan articulate a vision of sexual politics that is grounded in both a Western conception of liberalism and a shared geopolitical 'difference' from Mainland China.[11] In effect, the geopolitics of sexuality in the Sinophone world complicates the superpower vs anti-human rights polarising image of Chinese culture within prevailing Western discourses (Chiang and Heinrich 2013).

The *W v Registrar of Marriages* case brings our attention to another iteration where the adhesion of such projected allegorical dualism collapses. Above all, the 2013 court decision, heralded as an important milestone in LGBT rights, highlights the ways in which queer agendas and the unique political position of Hong Kong are articulated in and through one another. By borrowing European jurisprudence history as an excuse, the legal reasoning behind the *W* judgment provincialises China from the strategic geopolitical standpoint of Hong Kong (Chiang 2013). Since the Mainland government had already legalised transsexuals' right to marry in their post-transition gender nearly a decade prior, such legible right seems to come rather late and far behind in Hong Kong even as the *W* ruling maintains European legal frameworks as useful models from which to emulate. Precisely due to the post/colonial historicity of Hong Kong (interceded

[10]On the formations of Sinophone communities, see Chiang (2013); Shih (2007); Shih (2011); Shih, Tsai, and Bernards (2013).
[11]This context exemplifies what Françoise Lionnet and Shu-mei Shih have called 'minor transnationalism' (2005).

between the waning British empire and the expanding PRC power), the judges' recommendation to endorse the GRA approach in future legal attributions of gender identity aims to keep separate the issue of transgender marriage rights from that of same-sex marriage rights, which is still non-existent in the PRC (and Asia more broadly).

Yet, as I have been arguing through the *W* case, a neat conceptual separation of gender from sexuality is not only impractical, but it merely reproduces the biopolitical apparatus of the heteronormative state that deliberately distinguishes transgender from gay political aspirations. This would further exacerbate the implicit ways in which homophobia and transphobia conceal one another, as well as the fragility of certain geopolitical bodies lingering as derivatives or afterthoughts under the threatening shadow of contending global superpowers. As *W* makes clear, minor transnational regions such as Hong Kong and Taiwan can operate as ontological sites for voicing diverging legal opinions about privacy interest, all the meanwhile providing a powerful ground around which different forms of queer rights acquire uneven valence throughout the Sinophone world.

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Notes on contributor

Howard Chiang is Assistant Professor in the Department of History at the University of Waterloo. He is the editor of *Transgender China* (2012), *Queer Sinophone Cultures* (2013, with Ari Larissa Heinrich), *Psychiatry and Chinese History* (2014), *Historical Epistemology and the Making of Modern Chinese Medicine* (2015), and *Perverse Taiwan* (2016, with Yin Wang).

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