

RETHINKING GENDER RECOGNITION IN HONG KONG AND THE WAY FORWARD

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Abstract: This article considers Hong Kong’s recent decision to eliminate mandatory full sex-reassignment surgery as a prerequisite for female-to-male transgender people to change their gender markers on their Hong Kong identity cards and the jurisdiction’s approach towards legal gender recognition more broadly. Through reflecting upon international and comparative case law, this article first discusses how Hong Kong’s current approach fails to provide sufficient protection for the transgender community’s fundamental rights and argues that it is imperative to enact a gender recognition law to rectify the situation. This article then examines whether the United Kingdom’s Gender Recognition Act 2004, which was described as a ‘compelling’ model by the Hong Kong Court of Final Appeal, confers a higher degree of protection towards transgender people. This article concludes by advocating for the enactment of legislation specifically targeting legal gender recognition in Hong Kong to better safeguard the rights of the transgender community.

A. INTRODUCTION

Seventeen years after the enactment of the Gender Recognition Act 2004 (the ‘GRA’) in the United Kingdom (the ‘UK’), our understanding of gender identity and the international landscape of legal gender recognition has undergone significant changes. The GRA is not that ground-breaking anymore in light of the modern approach of dispensing with sex-reassignment surgery (‘SRS’) as a prerequisite of legal gender recognition.¹ Other countries have adopted more progressive approaches compared to the UK in reforming laws concerning gender recognition. Argentina has led the way by passing a gender recognition law that removed medical prerequisites for gender recognition and adopted a self-declaration model, followed by countries such as Malta.²

Although LGBTQ+ rights advancements in Hong Kong have been encouraging,³ the jurisdiction has been isolated from the international legal minefield gradually regarding its legal position on gender recognition for transgender people. Until the recent landmark ruling *Q & Tse Henry Edward v Commissioner of Registration* (‘*Q & Tse*’),⁴ Hong Kong had long adopted a strict approach in requiring transgender people to undergo full SRS, which is in effect

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¹ Jens M Scherpe, ‘Changing One’s Legal Gender in Europe: The “W” Case in Comparative Perspective’ (2011) 41 Hong Kong Law Journal 109, 121–22.

² UNGA ‘Report of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity’ UNHRC 35th Session (2017) (A/HRC/35/36) 17.

³ Scherpe (n 1) 123.

⁴ *Q & Tse Henry Edward v Commissioner of Registration* [2023] HKCFA 4.

sterilisation, before they could change their genders indicated on their Hong Kong Identification Cards ('HKID'). Nonetheless, the victorious judgment is largely restricted to the limited context of HKID instead of legal gender recognition at large. Further, despite repeatedly mentioning the GRA in various cases as a 'compelling model' to follow for drafting Hong Kong's own gender recognition law, legislation to regulate legal gender recognition for transgender people is yet to be enacted. Accordingly, Hong Kong is currently falling at an extreme of the international spectrum that provides the most restrictive requirements for legal gender recognition for transgender people.⁵

To ascertain the right way forward, it is necessary to first comprehend the present. Through reflecting upon international and comparative case law, this article argues that Hong Kong's current approach to legal gender recognition confers limited protection towards transgender people's fundamental rights and explores the means by which Hong Kong should adopt for legal gender recognition. The rest of the article proceeds as follows. Section B provides an overview of the legal development and the current position of legal gender recognition in Hong Kong. Section C critically examines Hong Kong's current approach against international case law and submits that it fails to confer sufficient protection to transgender people's right to privacy and right not to be subject to torture, inhuman or degrading treatment. Section D article argues that the once-progressive GRA does not remain a 'compelling model' for Hong Kong anymore by examining how it failed to fully guarantee the aforementioned rights. This article concludes by advocating for the enactment of legislation targeting legal gender recognition in the jurisdiction.

B. CURRENT POSITION IN HONG KONG

This section forms a foundation for the article and examines (i) the landmark cases and events contributing to the development of Hong Kong's approach towards legal gender recognition, and (ii) Hong Kong's current requirement for gender recognition.

1. *W v Registrar of Marriage ('W')*⁶

The ground-breaking case *W* serves as a good starting point to discuss how transgender rights paved their way in Hong Kong. *W* had undergone full SRS (i.e., a 'post-operative transgender person'), and sought judicial review in challenging the Registrar of Marriages' rejection of approving her intended marriage. The refusal was on the basis that *W* does not qualify as 'a

⁵ Kai Yeung Wong, 'Taking a Transgender Rights Seriously: A Rights-Based Model of Gender Recognition in Hong Kong' (2015) 45 Hong Kong Law Journal 109, 113.

⁶ *W v Registrar of Marriages* [2013] HKCFA 39.

woman' for the purpose of marriage.⁷ Hence, W may not marry her boyfriend, who is also considered legally male, as same-sex marriage is not legalised in Hong Kong. At the Court of First Instance and upheld by the Hong Kong Court of Appeal (the 'HKCA'),⁸ both of W's claims were denied by Andrew Cheung J.⁹ He followed *Corbett v Corbett*¹⁰ in holding that W's gender is determined by only biological factors for marriage purposes.¹¹ The decision was overturned by the HKCFA,¹² which held that the *Corbett* criteria neglected the psychological and social aspects of one's gender identity and any sex reassignment surgeries that have been undergone.¹³ Deciding in W's favour, the HKCFA held that the legislation banning post-operative transgenders from marrying in their acquired gender infringed the constitutional right to marry as guaranteed by Article 37 of Basic Law ('HKBL') and Article 19(2) of Bill of Rights Ordinance ('HKBORO').¹⁴

The *W* case produced an encouraging precedent in affirming post-operative transgenders' rights. By rejecting the long-ingrained biological absolutism as good law,¹⁵ the HKCFA caught up with its common law counterparts in recognising psychological and social aspects' role in gender recognition. Even if the judgement is interpreted narrowly, the *W* case confers protection for post-operative transgenders' rights in a certain area, i.e. right to marry.¹⁶ The HKCFA also left open the question of whether such protection is extended to protecting transgender people who 'have undergone less extensive treatment' (i.e., 'pre-operative transgender people').¹⁷ Further, the importance of establishing a statutory scheme in regulating other valuable rights other than the right to marriage was acknowledged.¹⁸ Noting that whether such legislation should be enacted is ultimately a matter decided by the legislature,¹⁹ it recommended establishing a legislature comparable to the GRA.²⁰ By explicitly acknowledging

⁷ *W* (n 6) [1].

⁸ Athena Nga Chee Liu, 'Exacerbating Corbett: W v Registrar of Marriages' (2011) 41 Hong Kong Law Journal 759, 765.

⁹ W sought judicial review upon refusal of Registrar of Marriages and declaration that the Registrar of Marriages' refusal was wrongly regarded under Marriages Ordinance s 40(2) and inconsistent with Article 37 of Basic Law and Article 14 and 19(2) of Hong Kong Bill of Rights.

¹⁰ *Corbett v Corbett* [1970] 2 All ER 33.

¹¹ Athena Nga Chee Liu, 'Hong Kong Special Administrative Region' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 337.

¹² *ibid.*

¹³ *W* (n 6) [118].

¹⁴ *ibid* [118]–[119].

¹⁵ Wong (n 5) 110.

¹⁶ Liu (n 11) 338.

¹⁷ *W* (n 6) [124].

¹⁸ *ibid* [141]–[144].

¹⁹ *ibid* [156].

²⁰ *ibid* [138].

the liberal statute as a ‘compelling model’ to follow, the HKCFA laid a solid foundation for gender recognition law in the Hong Kong context.

2. *The defeat of the Marriage (Amendment) Bill 2014 (the ‘Bill’)*

Corresponding legislative efforts were seen nine months after *W*, in which the Bill was presented to the Legislative Council (‘LegCo’). It proposed to introduce a new provision under the Marriage Ordinance (Cap.181) that, in effect, allows post-operative transgender people to be regarded as being of their acquired genders for the purpose of marriage under s 30(2) of Marriage Ordinance (Cap.181) and s 20(1)(d) of Matrimonial Causes Ordinance (Cap.179).²¹ Only post-operative transgender people fall within the scope of the proposed provision. A ‘full SRS’ was defined as a surgical procedure that has the effect of re-assigning the sex of a person from (a) male to female by (i) removing the person’s penis and testes and (ii) constructing a vagina in the person, or (b) female to male by (i) removing the person’s uterus and ovaries and (ii) constructing a penis or some form of a penis in the person.²² In essence, it is a form of sterilisation.

The Bill was strongly opposed by legislators and was subsequently defeated.²³ Conservative legislators were cautious about the amendment and argued that the Bill was too progressive, considering the significant impact on Hong Kong’s current monogamous marriage tradition,²⁴ and an overwhelming majority of Hong Kong citizens who are not prepared to accept trans-marriage.²⁵ More liberal legislators argued that the Government took an overly conservative approach in which the ‘full SRS’ requirement confers an unreasonably high threshold. For example, Mr Chan Chi-chuen argued that the Bill adopted the ‘most restrictive definition’ and the ‘full SRS’ requirement is extremely inhumane,²⁶ and Mr Gary Fan argued that the Bill fails to acknowledge the psychological and psychiatric aspects of transgender people.²⁷

3. *Q, R, Tse Henry Edward v Commissioner of Registration (‘Q, R & T’)*²⁸

The aforementioned concerns of the more liberal legislators were proved not baseless, as similar concerns were brought up in the subsequent case *Q, R & T*. Three female-to-male transgender

²¹ Legislative Council (LegCo), ‘Paper for the House Committee Meeting on 21 March 2014: Legal Service Division Report on Marriage (Amendment) Bill 2014’ (LC Paper No. LS34/13-14) 4.

²² *ibid* 7.

²³ Per LegCo, amongst 57 present members, 40 were against the motion, 11 were in favour, and 5 abstained. See LegCo, ‘Official Record of Proceedings: Wednesday, 22 October 2014 – The Council Met at Eleven O’Clock’ (22 October 2014) 779.

²⁴ *ibid* 733.

²⁵ *ibid* 712.

²⁶ *ibid* 713.

²⁷ *ibid* 724.

²⁸ *Q, R & Tse Henry Edward v Commissioner of Registration* [2019] HKCFI 295.

people ('FtM') challenged the Commissioner of Registration's (the 'Commissioner') rejection to modify their legal gender as stated on their HKID cards to their acquired gender.²⁹ The Commissioner's rejection was on the basis that all three applicants had not undergone full SRS.³⁰ Notably, each applicant had their breasts removed, has been receiving hormonal treatments, has predominately masculine features, and has been living as a male.³¹

Although the Court of First Instance expressly acknowledged that the 'full SRS' requirement is 'a serious and significant infringement of a person's physical integrity',³² it ruled against the applicants on all three grounds with a recurring theme of protection of public interest. First, a full SRS was held to be the 'only objectively ascertainable model'³³ in administratively determining one's gender and hence the restriction of privacy was not disproportionate.³⁴ Second, it was observed that the full SRS requirement does not amount to any inhuman or degrading treatment as it is internationally accepted, and the applicants were well informed of the operation's content and risk before giving their valid consent to undertake an SRS.³⁵ Third, the Court found no issues of discrimination.³⁶

The decision was upheld by the HKCA in *Q & Tse Henry Edward v Commissioner of Registration* [2022] HKCA 172 ('*Q & Tse*'), which confirmed the adoption of a 'full SRS' requirement in Hong Kong and evidenced the Courts' conservative attitude in this respect. It is argued that this case goes against the spirit of the liberal *W* case and the GRA, which dropped surgical requirements for gender recognition. The Court placed immense emphasis on the protection of public interest in coming to such a result, repeatedly stressing that the traditional emphasis on biological features of genders persists, while psychological and social aspects only constitute a subordinate part of the decision.

4. *Q & Tse*

The HKCFA decision represents a significant, albeit delayed, victory for transgender rights. The policy of prohibiting the FtM applicants from altering their gender entries on their HKIDs was unanimously held unconstitutional since it 'imposed an unacceptably harsh burden'³⁷ on them. Given that the parties did not dispute that the rights protected under Article 14 of

²⁹ *ibid* [2], [4].

³⁰ *ibid* [8].

³¹ *ibid* [3].

³² *ibid* [50].

³³ *ibid* [54].

³⁴ *ibid* [76].

³⁵ *ibid* [82].

³⁶ *ibid* [109]–[114].

³⁷ *Q & Tse* (n 4) [107].

HKBORO include the rights to gender identity and physical integrity,³⁸ the crux of the appeal was whether the requirement of full SRS could be justified as proportionate.³⁹

The HKCFA rejected all three justifications advanced by the Commissioner for the proportionality of the policy. First, the Commissioner contended that a full SRS was ‘the only workable, objective and verifiable criterion’ that could be used to determine an application to amend the gender marker on their HKIDs.⁴⁰ The Court rejected this argument since other criteria would be plainly workable without causing administrative difficulties, as evidenced by a plethora of examples in other jurisdictions.⁴¹

Second, the Commissioner argued that the adoption of another criterion would result in practical administrative problems due to the incongruence between the transgender applicant’s external physical appearance and the gender marker on HKIDs.⁴² The Court disagreed on the basis that leaving the gender marker unamended solely based on incompleteness of full SRS would render greater confusion or embarrassment,⁴³ and would undermine its ability to serve as an identification tool.⁴⁴

Third, the Court rejected the Commissioner’s argument that there is a risk that a pre-operative FtM with an amended HKID would stop hormonal treatment and potentially become pregnant since hormonal and psychiatric treatments preceding full SRS are not absolutely irreversible.⁴⁵ The Court opined that such risk is ‘exceedingly small’ and would only occur in ‘obviously extremely rare’ factual circumstances.⁴⁶

While the HKCFA ruling represents a significant step forward in recognition of transgender rights in Hong Kong and brings it into line with international standards, there are several outstanding questions that limit its scope.

First, while the ruling effectively eliminates the requirement for FtMs to undergo full SRS to change the gender marker on their HKIDs, the Court has expressly left the male-to-female transgender people (‘MtF’) situation open.⁴⁷ Thus, the narrow scope of the ruling renders the extent to which MtFs can change their gender marker on their HKIDs without completing full SRS unsettled.

³⁸ *ibid* [43].

³⁹ *ibid* [47].

⁴⁰ *ibid* [63].

⁴¹ *ibid* [73]–[75].

⁴² *ibid* [63].

⁴³ *ibid* [89].

⁴⁴ *ibid* [92].

⁴⁵ *ibid* [63].

⁴⁶ *ibid* [101]–[102].

⁴⁷ *ibid* [4].

Second, it remains uncertain how the Immigration Department will respond to the ruling and what threshold it will adopt in amending the Commissioner's policy. While the Court recognised that the societal advantages of the concerned policy are 'illusory and are at best relatively slim',⁴⁸ it is not for the Court to rewrite such a policy.⁴⁹ To date (July 2023), the Immigration Department has not updated its policies in response to the ruling yet. It merely indicated that the Government is reviewing relevant policies and administrative measures in light of the ruling and is endeavouring to complete the review within a reasonable period while the full SRS requirement is still fully spelt out for the time being.⁵⁰

Third, it is important to note that this case only concerns the alteration of gender markers on HKIDs, which is a kind of identification document that has no effect on the legal status of an individual's gender.⁵¹ Such gender markers bear no relevance as a matter of law since it only functions as a verification element. Post-operative transgender people are prohibited from changing their gender markers on their birth certificates even after undergoing full SRS, unless there was a clerical or factual error when their genders were recorded at birth.⁵² Consequently, transgender people are in essence considered as having their original gender for all purposes in law despite a full SRS. Thus, *Q & Tse* represents a limited victory in the field of gender recognition since it fails to deal with legal gender recognition in a wider context.

Since the judgement was released, the Immigration Department has suspended applications for the alteration of gender markers on HKIDs, which affected approximately 2,000 transgender applicants.⁵³ Although the Immigration Department reassured the applicants that they would resume processing submissions filed by post-operation transgender applicants 'as soon as practicable',⁵⁴ how and when pre-operative transgender people's applications would be handled remained uncertain. Mr Henry Tse, one of the applicants of the *Q & Tse* case and a pre-operative FtM, has still not received his new HKID with an altered gender entry and has

⁴⁸ *ibid* [107].

⁴⁹ *ibid* [109].

⁵⁰ 'Frequently Asked Questions' (*Immigration Department of The Government of Hong Kong Special Administrative Region of the People's Republic of China*) <https://www.immd.gov.hk/eng/faq/faq_hkic.html> accessed 1 July 2023.

⁵¹ *Q & Tse* (n 4) [61].

⁵² Births and Deaths Registration Ordinance (Cap 184), s 27.

⁵³ 'Transgender Activists Call for Approval of Hong Kong ID Card Sex Change Requests' *South China Morning Post* (20 April 2023) <<https://www.scmp.com/news/hong-kong/society/article/3215575/transgender-activists-urge-authorities-approve-id-card-gender-change-requests-following-landmark>> accessed 1 July 2023.

⁵⁴ *ibid*.

condemned the Government for using ‘administrative tactics’ to delay the process.⁵⁵ In essence, the judgment has yet to be implemented and the extent of its implications remains uncertain.

5. Current Requirements in gender recognition

As aforementioned, the recent *Q & Tse* decision is fairly narrow since it focuses on FtM applicants instead of the broader transgender community. Hence, this sub-section gives a brief overview of the current requirements in gender recognition applicable to Hong Kong transgender people generally.

To date (July 2023), no laws have been enacted to specifically deal with gender recognition in Hong Kong. In general, post-operative transgender people are eligible to obtain a letter issued by the Hospital Authority and signed by the responsible surgeon certifying the transgender person’s ‘gender has been changed’,⁵⁶ and can accordingly apply to change their gender entry on their HKIDs. Transgender applicants should provide medical proof indicating that a full SRS has been performed on them. For FtMs, a full SRS requires (i) the removal of the uterus and ovaries and (ii) the construction of a penis or some form of a penis.⁵⁷ Although *Q & Tse* eliminated such a requirement, it remains to be seen how the Commissioner would formulate its policy and the full SRS requirement is still stipulated on the Immigration Department’s website. For MtFs, a full SRS requires (i) the removal of the penis and testes and (ii) the construction of a vagina.⁵⁸ The only exception is where the applicant can produce evidence that the applicant is not medically suitable to undergo a full SRS.⁵⁹

It is however noteworthy that transgender people have no automatic rights to access surgical treatments. To qualify for SRS, one shall (i) be medically diagnosed with gender dysphoria,⁶⁰ (ii) have undergone a variety of treatments by professional psychiatrists and clinical psychologists (e.g. psychotherapy), (iii) have experienced at least 12 months of real-life experience of the chosen gender, and (iv) have received recommendations from two mental health professionals.⁶¹

6. Conclusion

⁵⁵ ‘Transgender Protesters Say HK Is Not Abiding by Landmark Gender Reassignment Ruling’ *The Straits Times* (31 March 2023) <<https://www.straitstimes.com/asia/east-asia/transgender-protesters-say-hk-is-not-abiding-by-landmark-gender-reassignment-ruling>> accessed 1 July 2023.

⁵⁶ *W* (n 6) [15].

⁵⁷ Immigration Department (n 50); *Q & Tse* (n 4) [1].

⁵⁸ *ibid.*

⁵⁹ *Q, R & Tse* (n 28) [7].

⁶⁰ ‘LCQ7: Gender Identity Disorder-Related Services Provided by Public Hospitals’ (*Press Releases*, 9 December 2015) <<https://www.info.gov.hk/gia/general/201512/09/P201512090358.htm>> accessed 1 April 2022; *Q & Tse* (n 4) [1].

⁶¹ *Q & Tse* (n 4) [20].

To conclude, the current legal gender recognition landscape in Hong Kong is undergoing changes and many loose ends remain in sight. Although the defeat of the Marriage (Amendment) Bill in 2014 has underscored the conservative stance of the Hong Kong Government regarding transgender rights, the *Q & Tse* decision represents a significant leap forward since it endorses the abolition of the full SRS prerequisite for FtM applicants to modify their gender marker on their HKIDs. Whilst the landmark ruling is limited to FtMs instead of the transgender community generally, the author opines that the pyrrhic victory has brought Hong Kong into closer alignment with global standards since it signals a potential inclination to eliminate the mandatory full SRS requirement for the transgender community at large. Nonetheless, the precise nature of any new policies to be adopted by the Commissioner remains uncertain and the victorious judgement has not effectively accelerated existing FtM applicants to obtain HKIDs with a corrected gender marking. Despite the positive developments in jurisprudence, it must be noted that Hong Kong currently lacks specific legislation governing legal gender recognition, and transgender people who have undergone full SRS are still unable to modify their birth certificates.

C. CRITICAL EXAMINATION OF HONG KONG'S CURRENT APPROACH

Before discussing how the law should react, this section critically examines how Hong Kong's current approach interacts with judgments of the European Court of Human Rights ('ECtHR'). In particular, this section focuses on (i) the right to privacy and (ii) the right not to be subjected to torture, inhuman or degrading treatments or punishments, which are the rights underpinning the claims advanced by the applications in *Q, R & T*.

It is submitted that the *Q & Tse* ruling steers Hong Kong's current approach in the right direction, but missing pieces still exist. The first sub-section critically examines how well Hong Kong's current approach sits with the right to privacy (as protected under Article 8 of the European Convention on Human Rights ('ECHR') and Article 14 of HKBORO): first, it is submitted that the *Q & Tse* decision is a correct one since the longstanding mandatory full SRS requirement infringes Article 8 of ECHR by denying pre-operative transgender people and transgender minors their right to gender identity. Second, even if the full SRS requirement was eliminated for the transgender community at large, the jurisdiction still lacks a clear legislative framework regulating legal gender recognition and hence failed in its positive obligation to protect the right to privacy of transgender people.

The second sub-section focuses on the right not to be subject to torture, inhuman or degrading treatment (as protected under Article 3 of the ECHR and Article 3 of HKBORO).

Although the applicants in *Q & Tse* did not pursue the claim based on Article 3 of the ECHR in the appeal, this ground has been extensively discussed in the lower courts. The author opines that a thorough analysis based on Article 3 of the ECHR would be instructive in arguing that a mandatory full SRS requirement would contravene such a right: first, a mandatory surgical requirement amounting to sterilisation puts transgender applicants in an ‘impossible dilemma’ where voluntary consent is impossible to be given. Second, a full SRS requirement constitutes degrading treatment for diminishing the transgender applicants’ dignity and causing humiliating treatment.

The discussion under this section is not merely theoretical as the ECtHR has played a significant role in the development of gender recognition,⁶² and the HKCFA has referred to its decisions as highly persuasive authorities regularly.⁶³

1. *Right to privacy*

Article 8 of the ECHR provides the right to respect one’s privacy and prohibits any interference by public authorities with the exercise of this right.⁶⁴ It is a fundamental right forming the basis of democratic societies⁶⁵ and is reiterated in various instruments.⁶⁶ However, it is not absolute and is subject to lawful restrictions that satisfy the proportionality assessment.⁶⁷

a) Pre-operative transgender people and transgender minors’ right to gender identity denied

The right to ‘private life’ under Article 8 of ECHR is a broad concept insusceptible to an exhaustive definition,⁶⁸ covering different aspects of one’s ‘physical, psychological and social

⁶² Harper Jean Tobin, ‘Against the Surgical Requirement for Change of Legal Sex’ (2007) 38 Case Western Reserve Journal of International Law 393, 407.

⁶³ Note that, however, that there are three caveats in considering the persuasiveness of the ECtHR decisions: (1) the ECtHR as an international tribunal functions differently to HKCFA as a domestic court, (2) the ECtHR judges are elected from contracting European states, and (3) the ECtHR cases are fact-sensitive. See *Q & Tse* (HKCA) (n 4) [74].

⁶⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 8 (‘1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others’) See also International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 17.

⁶⁵ UNGA ‘Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin’ UNHRC 13th Session (2009) (A/HRC/13/37).

⁶⁶ See, for instance, American Convention on Human Rights (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

⁶⁷ *Liebscher v Austria* (App no 5434/17) ECHR 6 April 2021 [64]–[69]. Note that in Hong Kong, lawful restrictions should be subject to proportionality test under *Hysan Development Co Ltd and Others v Town Planning Board* FACV 21/2015: *Kwok Wing Hang & Others v Chief Executive in Council* [2020] HKCFA 42 [100]–[101].

⁶⁸ *Niemietz v Germany* (App no 13710/88) (1992) Series A no 251-B [29]; *Pretty v the United Kingdom* (2002) 35 EHRR 1 [61].

identity'⁶⁹ which includes a right to personal autonomy and personal development.⁷⁰ A fundamental aspect of the right to personal autonomy is to preserve individuals' freedom to determine and establish details of their own identity.⁷¹ Claims with respect to self-determination of gender are particularly strong as the decisions are 'socially constructed as being salient to intersubjective identity'.⁷² Hong Kong Courts also view gender identity as a crucial aspect of an individual's identity since

[I]t concerns who people are and what sort of people they identify with, directs their personal development and behaviour, governs their relationships and interactions with others and underpins most of their societal arrangements.⁷³

In the context of gender identity recognition, it was well established that protection conferred by Article 8 of ECHR is applicable to post-operative transgender people.⁷⁴ In *Christine Goodwin v the United Kingdom*,⁷⁵ a post-operative transgender person complained about the failure to provide legal recognition of her acquired gender, and treatments in aspects such as employment, social security, pension rights and marriage.⁷⁶ The Court unanimously found a violation of Article 8 of the ECHR where an absence of significant public interest factors weighing against the interests of the applicant in obtaining legal recognition for her acquired gender renders the case falling out of the UK Government's margin of appreciation.⁷⁷ Similarly, it may be argued that Hong Kong has provided protection for post-operative transgender people likewise, at least in the context of the right to marriage (as in the *W* case) and allowing them to change particulars on official documents.

Nonetheless, it is submitted that Hong Kong departs from the ECtHR standard regarding protection conferred to pre-operative transgender people generally. In *A.P., Garçon and Nicot v France*,⁷⁸ three transgender applicants failed and refused to submit mandatory medical documents and certificates in support of their request to change the gender entry on their

⁶⁹ *Denisov v Ukraine* (App no 76639/11) ECHR 25 September 2018 [95].

⁷⁰ *V.C. v Slovakia* (App no 18968/07) ECHR 8 November 2011 [138].

⁷¹ *Christine Goodwin v the United Kingdom* (App no 28957/95) ECHR 11 July 2002 [90]; *Van Kück v Germany* (App no 35968/97) ECHR 12 June 2003 [73].

⁷² Holning Lau, 'Gender Recognition as a Human Right' in Andreas von Arnould, Kerstin von der Decken and Mart Susi (eds), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (CUP 2020) 195.

⁷³ *Q & Tse* (n 4) [43].

⁷⁴ For instance, *Goodwin* (n 71); *Rees v the United Kingdom* (App no 9532/81) ECHR 17 October 1986; *Sheffield and Horsham v the United Kingdom* (App no 31-32/1997/815-816/1018-1019) ECHR 30 July 1998.

⁷⁵ *Goodwin* (n 71).

⁷⁶ *ibid* [1].

⁷⁷ *ibid* [93].

⁷⁸ *A.P., Garçon and Nicot v France* (App nos 79885/12, 52471/13, 52596/13) ECHR 6 April 2017. It is noted that the sterilisation requirement for gender recognition in this case is extensively assessed under the scope of Article 8 of ECHR instead of Article 3.

respective birth certificates. In granting a narrow margin of appreciation,⁷⁹ the Court held that there was a violation of Article 8 of ECHR as the respondent State made gender recognition conditional upon sterilisation and irreversible changes in applicants' appearances.⁸⁰ Although the Judge in the lower courts of *Q & Tse* likewise accorded a narrow margin of appreciation in scrutinising the Commissioner's decision,⁸¹ it reached an opposite result as against the *AP* case. Ultimately, it held that the mandatory full SRS requirement (which is in effect sterilisation) had proportionately restricted the applicants' privacy right for being the 'only workable model' in establishing 'fair, clear, consistent, certain, and objective administrative guidelines'.⁸²

Accordingly, this article argues that a mandatory full SRS requirement for changing gender marks forcibly excludes pre-operative transgender people from enjoying their right to gender recognition, and hence deprives their right to privacy. Foisting substantive surgical requirements splits prospective transgender applicants into two groups: (i) post-operative transgender people applicants and (ii) pre-operative transgender people applicants who had not yet, or had no intention to undergo full SRS.⁸³ In effect, the latter group is denied the rights to gender recognition and associated benefits that they deserve. It is incorrect to assume that all transgender people want and have the necessary resources to undergo full SRS, which contains multiple surgical procedures. For instance, *AB v Western Australia*⁸⁴ concerns two transgender people who were born as female but identified as male,⁸⁵ had undergone some gender reassignment surgeries and had lived their lives as a male.⁸⁶ However, they had no desire to undertake any further surgeries as they did not consider these procedures necessary to identify as male and they had concerns regarding medical risks.⁸⁷ The *AB* case demonstrated well that full medical transition is not a necessary precondition contributing to transgender people's acquired gender identity. There is also a range of reasons for pre-operative transgender people to reject full SRS, such as health, financial, religious concerns, etc.

Further, Hong Kong's current approach amounts to the *de facto* exclusion of transgender minors as SRS has an age limit of 21 years old.⁸⁸ Again, it is incorrect to assume children are

⁷⁹ *ibid* [123].

⁸⁰ *ibid* [135].

⁸¹ *Q, R & T* (n 28) [47], confirmed in *Q & Tse* (n 4) [49]–[50].

⁸² *Q, R & T* (n 28) [52].

⁸³ Sam Winter, 'Identity Recognition without the Knife: Towards a Gender Recognition Ordinance for Hong Kong's Transsexual People' (2014) 44 *Hong Kong Law Journal* 115, 126.

⁸⁴ *AB v Western Australia* [2011] HCA 42.

⁸⁵ *ibid* [11].

⁸⁶ *ibid*. The gender reassignment surgeries included bilateral mastectomy and testosterone therapy.

⁸⁷ *ibid* [11], [14]–[16].

⁸⁸ *W* (n 6) [15].

incapable of establishing their own gender identity and expressing their identity properly.⁸⁹ Gender dysphoria⁹⁰ can be diagnosed at any age⁹¹ and young adults were able to be clinically diagnosed with gender dysphoria.⁹² It is also estimated that there are two to three percent of adolescents identify themselves as transgender people.⁹³

b) *Lack of a clear legal framework*

Under Article 8 of ECHR, States bear a ‘negative obligation’ to refrain from interfering with one’s private life, and a ‘positive obligation’ to adopt protective measures in protecting such rights,⁹⁴ where a fair balance between competing individual and societal interests must be struck.⁹⁵ In the context of gender recognition, States shall adopt and adhere to ‘a sufficient and clear legislative framework’ for gender recognition in discharging their positive obligation.⁹⁶ For instance, the Court in *X v the former Yugoslav Republic of Macedonia* pointed out that the respondent State lacks a regulatory framework regarding the legal recognition of gender reassignment and fails to specify the nature of evidence needed for changing one’s gender in official records.⁹⁷ Hence, the respondent State fails to provide ‘quick, transparent and accessible procedures’⁹⁸ for applicants to rectify their gender entry on birth certificates. The Yogyakarta Principle also obliges States to ‘take all necessary legislative, administrative and other measures to fully respect and legally recognise each person’s self-defined gender identity’.⁹⁹

This article argues that lacking a clear legal framework governing legal recognition, the Hong Kong Government has breached its positive obligation to protect transgender people’s right to privacy by providing ‘quick, transparent and accessible procedures’ in legal recognition. There is no specific legislation nor any regulatory scheme that governs applications for gender recognition in Hong Kong. Instead of having clear and objective requirements stated in the legislation, the Commissioner is currently adopting a restrictive policy in handling legal

⁸⁹ Ilana Sherer, ‘Social Transition: Supporting Our Youngest Transgender Children’ (2016) 137 *Pediatrics*.

⁹⁰ ‘What is Gender Dysphoria?’ (*American Psychiatric Association*) <<https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria>> accessed 1 April 2022.

⁹¹ ‘Expert Q&A: Gender Dysphoria’ (*American Psychiatric Association*) <<https://www.psychiatry.org/patients-families/gender-dysphoria/expert-q-and-a>> accessed 1 April 2022.

⁹² Per Riittakerttu Kaltiala-Heino et al, ‘Gender Dysphoria in Adolescence: Current Perspectives’ (2018) 9 *Adolescent Health, Medicine and Therapeutics* 31, 32 (a school-based survey suggesting that ‘1.3% of 16–19-year-olds had potentially clinically significant gender dysphoria’).

⁹³ Calina Ouliaris, ‘Consent for Treatment of Gender Dysphoria in Minors: Evolving Clinical and Legal Frameworks’ (2022) 216 *Medical Journal of Australia* 230.

⁹⁴ *Goodwin* (n 71) [72].

⁹⁵ *Rees* (n 74) [37]; *Hämäläinen v. Finland* (App no 37359/09) ECHR 16 July 2014 [65].

⁹⁶ *X and Y v Romania* (App nos 2145/16, 20607/16) ECHR 19 January 2021; *S.V. v Italy* (App no 55216/08) ECHR 11 October 2018.

⁹⁷ *X and the Former Yugoslav Republic of Macedonia* (App no 29683/16) ECHR 17 January 2019 [68]–[69].

⁹⁸ *ibid* [90].

⁹⁹ ‘Principle 3’ (*The Yogyakarta Principles*) <<http://yogyakartaprinciples.org/principle-3/>> accessed 1 April 2022.

recognition requests.¹⁰⁰ The only legal basis that can be relied on by applicants is the broad provisions under the Registration of Persons Ordinance that concerns a replacement of HKID.¹⁰¹ Further, it is noteworthy that the gender marker on an HKID only operates for a verification function since the document itself does not bear any relevance to the legal status of one's gender.¹⁰² Accordingly, there are currently no specific provisions in Hong Kong law explicitly governing a right to change legal gender on official documents. It is argued that such a legislative gap under the Hong Kong statutory framework posited pre-operative transgender people in a dilemmatic position where their physical appearances and social identity were long adopted in a gender inaccurately reflected in official documents for an unreasonable period of time.¹⁰³

Further, this article condemns a lack of Governmental effort in establishing a clear legal framework to regulate gender recognition. In drafting a separate provision in response to *W*, the proposed Bill adopted restrictive definitions and procedures in the context of trans-marriage, which goes against the liberal spirit of *W*.¹⁰⁴ There has been a lapse of 9 years since the defeat of the amendment ordinance, and the Government has yet to announce any plans regarding gender recognition laws. Although an Inter-departmental Working Group ('IWG') on Gender Recognition was formed in 2014, there have been no further updates announced since a consultation paper was published in 2017.¹⁰⁵ Local groups advocating for transgender rights have also expressed their dissatisfaction with such a delay and have submitted a petition demanding a prompt restart of the work on gender recognition legislation.¹⁰⁶

2. Right not to be subject to torture, inhuman or degrading treatment

Article 3 of ECHR provides the right not to 'be subjected to torture or to inhuman or degrading treatment or punishment'¹⁰⁷ and Article 7 of ICCPR further prevents any medical or scientific experiment without free consent.¹⁰⁸ Such prohibition is absolute and shall not be deprived at any time.¹⁰⁹ In the context of gender recognition, States bear an obligation to protect 'all people,

¹⁰⁰ *Q, R & T* (n 28) [5]; *Q & Tse* (n 4) [1].

¹⁰¹ *Liu* (n 11) 343.

¹⁰² *Q & Tse* (n 4) [61].

¹⁰³ *S.V.* (n 96) [72].

¹⁰⁴ See discussions in Section B.2.

¹⁰⁵ See more at 'Inter-Departmental Working Group on Gender Recognition' (*Inter-departmental Working Group on Gender Recognition*) <<https://www.iwggr.gov.hk/eng/index.html>> accessed 1 April 2022.

¹⁰⁶ South China Morning Post (n 53).

¹⁰⁷ ECHR (n 64) art 3 ('no one shall be subjected to torture or to inhuman or degrading treatment or punishment').

¹⁰⁸ ICCPR (n 64) art 7 ('no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation').

¹⁰⁹ ICCPR (n 64) art 4.2 ('[n]o derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision').

regardless of sexual orientation or transgender identity' from torture and other forms of ill-treatment.¹¹⁰ This obligation extends to the private domain, including torture or ill-treatment performed by private individuals, such as doctors and health professionals.¹¹¹

a) *Deprivation of free and informed consent*

It is established in medical law that measures of therapeutic necessity are not characterised as inhuman and degrading.¹¹² Only treatments 'convincingly shown' to be of therapeutic or medical necessity can be justified without free and informed consent.¹¹³ To give free consent, the concerned person should have the capacity to consent and be in a position to exercise his free choice voluntarily, without any intervention of 'force, deceit, overreaching or other ulterior form of constraint or coercion'.¹¹⁴ Informed consent, according to the Special Rapporteur, is 'not mere acceptance of medical intervention, but a voluntary and sufficiently informed decision'.¹¹⁵ Accordingly, medical practitioners should provide objective and thorough information about the anticipated surgery, such as its consequences and risks.¹¹⁶

This article argues that a mandatory full SRS requirement deprives transgender applicants of exercising their 'free and informed consent' in deciding whether or not to undertake the said surgery. The ECtHR had found sterilisation to be a severe interference with a person's reproductive health status and has unreasonably restricted one's reproductive capability, which is considered a basic bodily function.¹¹⁷ The landmark case in this respect is *V.C. v Slovakia*. At the time of consent, the applicant was in labour for several hours and was suffering excruciating pain, whilst hospital staff suggested that if she weren't sterilised, any future pregnancy would be deadly to her or any future child.¹¹⁸ Out of fear, the applicant signed a consent form despite not understanding what sterilisation meant.¹¹⁹ It was held that the

¹¹⁰ UNGA 'Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity: Report of the United Nations High Commissioner for Human Rights' 19th Session (2011) (A/HRC/19/41).

¹¹¹ *Opuz v Turkey* (App no 33401/02) ECHR 9 June 2009 [3].

¹¹² *Herczegfalvy v Austria* (App no 10533/83) ECHR 24 September 1992 [82]; Emily Jackson, *Medical Law: Text, Cases, and Materials* (OUP 2013) 330.

¹¹³ Jackson (n 111) 332.

¹¹⁴ David Frenkel, 'Consent of Incompetents (Minors and the Mentally Ill) To Medical Treatment' (1977) 1 *Legal Medical Quarterly* 187.

¹¹⁵ UNHRC, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez—Observations on Communications Transmitted to Governments and Replies Received' 22nd Session (2013) (A/HRC/22/53/Add.4) [28]–[32].

¹¹⁶ Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (Oviedo Convention) art 5.

¹¹⁷ *V.C.* (n 70) [106], [116]; *N.B. v Slovakia* (App no 29518/10) ECHR, 12 June 2012 [79].

¹¹⁸ *V.C.* (n 70) [15].

¹¹⁹ *ibid.*

applicant had not given any free and informed consent to sterilisation and her right to autonomy and choice as a patient was grossly disregarded.¹²⁰

In the Hong Kong context, it was expressly recognised in *Q & Tse* that a complete SRS constitutes removal of genitals, and is in effect permanent sterilisation,¹²¹ whilst both are not generally viewed as a life-saving nor necessary medical intervention.¹²² Adopting the reasoning of *V.C.*, it can be argued that a compulsory surgical requirement amounting to sterilisation could hardly be justified based on a medical emergency or therapeutic necessity.¹²³ Nevertheless, the Judge in *Q, R & T* opined that transgender applicants had given their free and informed consent as they were fully informed of the medical and health risks associated with the contemplated SRS, and had been given a reasonable amount of time to evaluate and make a final choice.¹²⁴ As opposed to the emergent situation in *V.C.*, transgender applicants in Hong Kong are considered to be able to make a ‘free and considerate choice’ to eliminate a non-life-threatening condition.¹²⁵

Following the reasoning of *A.P.*, this article argues that even though informed consent might be offered, a mandatory full SRS requirement renders transgender applicants unable to give their voluntary consent since they are placed in an impossible dilemma.¹²⁶ Since the current framework of gender recognition is governed by administrative policies and guidelines, administrative authorities in Hong Kong (as ‘agents of influence’)¹²⁷ can significantly impact the behaviour of those seeking gender recognition by upholding a full SRS as a prerequisite for legal gender recognition.¹²⁸ Transgender applicants, as the right recipient, are placed in a disadvantaged position for being fully dependent on the administrative authorities to obtain gender recognition. Accordingly, transgender applicants are forced to choose between two fundamental rights: the right to respect for private life and respect for physical integrity.¹²⁹ They shall either give up their reproductive capabilities through sterilisation or refuse a full SRS by giving up the right to be legally recognised in their chosen gender. Although not expressly

¹²⁰ *ibid* [117], [119].

¹²¹ *Q & Tse* (n 4) [5].

¹²² *N.B.* (n 117) [74]; *V.C.* (n 70) [110].

¹²³ *V.C.* (n 70) [103], [106].

¹²⁴ *Q, R & T* (n 28) [96].

¹²⁵ *ibid* [103].

¹²⁶ *A.P.* (n 78) [132].

¹²⁷ Peter Dunne, ‘The Conditions for Obtaining Legal Gender Recognition: A Human Rights Evaluation’ (PhD thesis, Trinity College Dublin, School of Law 2018) 151.

¹²⁸ Matteo E Bassetti, ‘Human Rights Bodies’ Adjudication of Trans People’s Rights : Shifting the Narrative from the Right to Private Life to Cruel and Inhuman or Degrading Treatment’ (2020) 12 *European Journal of Legal Studies* 291, 310.

¹²⁹ *A.P.* (n 78) [131].

discussed, the reasoning in *Q & Tse* decision echoes with the reasoning above, since the Court acknowledged that transgender applicants might feel pressurised to undergo a full SRS to ‘avoid the frequent experience of discrimination, humiliation, violation of their dignity and invasion of their privacy’.¹³⁰

b) *Full SRS as an ill-treatment*

The ECHR has acknowledged a three-tier hierarchy of ill-treatment that reaches ‘a minimum level of severity’.¹³¹ First, torture is the most ‘serious and cruel’ infliction of bodily and mental suffering¹³² inflicted deliberately and on purpose.¹³³ Second, inhuman treatment is ‘premeditated [and] applied for hours at a stretch and causing either actual bodily injury or intense physical and mental suffering’.¹³⁴ The absence of purposely inflicted pain¹³⁵ and the degree of pain produced¹³⁶ differentiates such ill-treatments from torture. Third, degrading treatment ‘humiliates or debases an individual’¹³⁷ by showing a lack of respect or diminishing one’s dignity, and arouses one’s ‘feelings of fear, anguish and inferiority’.¹³⁸

i) Inhuman treatment

This article argues that a mandatory full SRS requirement reaches ‘a minimum level of severity’ and amounts to inhuman treatment. First, a full SRS is an extremely intrusive procedure that alters one’s physical condition significantly.¹³⁹ Before undergoing SRS, applicants are required to undergo hormonal treatment associated with clinical pain,¹⁴⁰ resulting in the alteration of body forms and sex characteristics.¹⁴¹ SRS itself also entails irreversible bodily changes. As discussed above, applicants are required to remove the reproductive features of their original gender and construct organs corresponding to their acquired gender.¹⁴² This leads to a permanent change in applicants’ physical appearances through alterations of their most intimate body parts.

¹³⁰ *Q & Tse* (n 4) [65].

¹³¹ *Ireland v the United Kingdom* (App no 5310/71) ECHR 20 March 2018 [162]; *Tyrer v the United Kingdom* (App no 5856/72) ECHR 25 April 1978 [30].

¹³² *Ireland* (n 131) [167].

¹³³ *Mahmut Kaya v Turkey* (App no 22535/93) ECHR 28 March 2000 [117].

¹³⁴ *Kudla v Poland* (App no 30210/96) ECHR 26 October 2000 [92].

¹³⁵ UNHRC (n 115) [186].

¹³⁶ Dunne (n 127) 94; David Harris, Michael O’Boyle and Carla Buckley, *Law of the European Convention on Human Rights* (OUP 2014) 235.

¹³⁷ *Pretty* (n 68) [52].

¹³⁸ *Gäfgen v Germany* (App no 22978/05) ECHR 1 June 2010 [89].

¹³⁹ *Q & Tse* (n 4) [18].

¹⁴⁰ Roger Fillingim and others, ‘Sex, Gender, and Pain: A Review of Recent Clinical and Experimental Findings’ (2009) 10 *The Journal of Pain* 447.

¹⁴¹ *Q & Tse* (n 4) [14]–[18].

¹⁴² *ibid.*

Second, SRS is a risky procedure and it exposes applicants to post-operation physical complications, which causes further suffering. Although the innate risks of SRS carried out by highly skilled surgeons are usually low,¹⁴³ those suffering from certain health conditions (e.g. diabetes, hypertension) face higher health risks in receiving such treatments.¹⁴⁴ Post-surgical complications are also commonly reported. For instance, some MtFs reported post-operative abdominal pain, infections, and bleeding in their bladders.¹⁴⁵

Further, mandating a full SRS with multiple procedures amounts to prolonged suffering and hence is argued as inhuman treatment. As discussed above, transgender applicants have to undergo multiple steps before receiving SRS. FtMs must go through more rigorous procedures for a complete SRS, which includes the removal of the breast, ovaries and uterus, sewing up the vagina, creation of the male chest, and construction of the penis and scrotum.¹⁴⁶ Receiving an SRS is not the end of one's transition journey as transgender people also have to go through post-surgery complications. For instance, MtFs have to use vaginal dilators to prevent their constructed vaginas from closing.¹⁴⁷ It is thus inferred that a substantive period of time is involved in completing a full SRS.

It would nevertheless be difficult to argue that the mandatory full SRS requirement amounts to torture as the Hong Kong Government did not construct such requirements with the intention to inflict pain or suffering on applicants. The objective of mandating a full SRS in gender recognition is to establish a procedure that can provide an 'objectively ascertainable criterion' for gender recognition.¹⁴⁸ The ultimate objective of SRS treatment is to alleviate uneasiness brought by gender dysphoria and assist transgender people in embracing their physical bodies.¹⁴⁹ Nevertheless, this article does not fully rule out the possibility that an approach predicating gender recognition on sterilisation and multiple invasive procedures could constitute torture. The three-tier category is largely fluid where conduct considered 'inhuman' may amount to 'torture' in the future.¹⁵⁰

¹⁴³ Tobin (n 62) 399.

¹⁴⁴ 'General Anesthesia' (*Mayo Clinic*) <<https://www.mayoclinic.org/tests-procedures/anesthesia/about/pac-20384568>> accessed 1 April 2022 (discussing various conditions associated with an increased risk for surgical complications).

¹⁴⁵ Tobin (n 62) 400; Lynn Conway, 'How Frequently Does Transsexualism Occur?' (*University of Michigan*, 30 January 2001) <<http://ai.eecs.umich.edu/people/conway/TS/TSpredvalence.html>> accessed 1 April 2022.

¹⁴⁶ 'Gender Affirmation Surgery: What Happens, Risks & Benefits' (*Cleveland Clinic*) <<https://my.clevelandclinic.org/health/treatments/21526-gender-affirmation-confirmation-or-sex-reassignment-surgery>> accessed 1 April 2022.

¹⁴⁷ *ibid.*

¹⁴⁸ *Q, R & T* (n 28) [54].

¹⁴⁹ *Q & Tse* (n 4) [16].

¹⁵⁰ Yutaka Arai-Yokoi, 'Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment under Article 3 ECHR' (2003) 21 *Netherlands Quarterly of Human Rights* 385, 387.

ii) Degrading treatment: dignity and humiliation

It is argued that a mandatory full SRS requirement amounts to degrading treatment for diminishing transgender applicants' dignity and causing humiliating treatment.

First, it is acknowledged that there is a direct linkage between the prohibition of torture, inhuman or degrading treatment and dignity.¹⁵¹ For instance, the Court held that Article 3 of the ECHR was breached when the applicant in *Yankov v Bulgaria*¹⁵² was forced to shave his head in prison. His dignity was harmed as he has undergone an 'involuntary change of appearance' and has to carry a 'visible physical mark'.¹⁵³ As discussed above, hormonal treatments and SRS incur a change of appearance that may not be necessary nor desired by all transgender applicants. Obliging them to bear such visible physical marks permanently arguably extends beyond the 'inevitable element of suffering' resulting from a legitimate treatment.¹⁵⁴

Second, it is argued that the psychological burden caused by the mandatory requirements exposes transgender applicants to humiliation treatments. Following the reasoning of *Bouyid v Belgium*¹⁵⁵ to assess transgender applicants' subjective experience holistically,¹⁵⁶ it is argued that transgender applicants in Hong Kong are likely stressed by the fact that they have to change their physical traits to obtain legal recognition. Not having an HKID with a gender accurate to reflect their internal self may give rise to 'feelings of anguish, fear and inferiority' when their transgender status is exposed whenever they have to reveal their HKID. Further, following the analysis above that administrative authorities are acting as 'agents of influence', it is argued that transgender applicants may feel morally inferior to them under this imbalance of power when their personal autonomy is not respected,¹⁵⁷ and hence experience a feeling of humiliation.

iii) Bodily integrity

Bodily integrity is a long-held cornerstone of human rights and it protects individuals' freedom to make decisions about their own bodies and prevents States from enforcing undesired medical interventions.¹⁵⁸ The ECtHR has established that the right to bodily integrity derives

¹⁵¹ David Harris D et al, *International Human Rights Law* (OUP 2014).

¹⁵² *Yankov v Bulgaria* (App no 39084/97) ECHR 11 December 2003.

¹⁵³ *ibid* [113].

¹⁵⁴ *ibid* [107].

¹⁵⁵ *Bouyid v Belgium* (App no 23380/09) ECHR 28 September 2015. In this case, it was held that a slap on the applicant's face by a police officer amounts to degrading treatment for disrespecting a part of his body that 'expresses his individuality' and 'manifests his social identity'.

¹⁵⁶ Pau Pérez-Salez, *Psychological Torture: Definition, Evaluation and Measurement* (Routledge 2017) 78.

¹⁵⁷ *Bouyid* (n 155) [106].

¹⁵⁸ Lau (n 72) 198; Alastair Mowbray, *Cases, Materials, and Commentary on the European Convention on Human Rights* (OUP 2014).

from the right to privacy (Article 8 of the ECHR)¹⁵⁹ and, in extreme cases, from the right not to be subject to torture, inhuman, or degrading treatment and punishments (Article 3 of the ECHR).¹⁶⁰

Recall that the previous sub-section argues that Hong Kong's current approach likely breaches the right protected under Article 3 of the ECHR. This sub-section further submits that, alternatively, even if it does not constitute a violation of Article 3, a mandatory full SRS requirement may nonetheless be in breach of Article 8.¹⁶¹ Expressly acknowledged in *Q, R & T*, surgeries removing one's uterus and ovaries is a 'serious and significant infringement of the person's bodily integrity'.¹⁶² The sterilisation effect also deprives one of the fundamental physical functions of transgender applicants', hence infringing their right to bodily integrity.¹⁶³

Nevertheless, the practical benefits of SRS and accordingly, a full SRS approach, shall not be understated. SRS is beneficial in aspects such as health, well-being, and quality of life. In addition to alleviating the suffering of gender dysphoria, post-operative transgender people are proven to have gained better self-esteem and their sexual function and satisfaction have been improved.¹⁶⁴

3. Conclusion

To conclude, this section submitted that a mandatory full SRS requirement likely runs afoul of transgender people's right to privacy and right not to be subject to torture, inhuman and degrading treatment. Accordingly, Hong Kong's current approach to legal gender recognition after the *Q & Tse* decision is a step in the right direction, albeit with gaps yet to be addressed.

First, mandating a full SRS requirement in essence denies pre-operative transgender people and transgender minors their right to gender identity given their vulnerability status under the current Hong Kong gender recognition scheme. Moreover, beyond the mandatory full SRS requirement as a prerequisite for a change of gender markers on HKIDs, the jurisdiction regrettably lacks a clear legislative framework governing legal gender recognition in a wider context. It is hence argued that Hong Kong has failed in its positive obligation to safeguard the right to privacy of transgender people.

Secondly, it is submitted that a mandatory full SRS requirement in essence places transgender applicants in an 'impossible dilemma' by rendering their provision of voluntary

¹⁵⁹ Lau (n 72) 199.

¹⁶⁰ *ibid.*

¹⁶¹ For instance, in cases of strip-searches, see *Wainwright v the United Kingdom* (App no 12350/04) ECHR 26 September 2006 [49].

¹⁶² *Q, R & T* (n 28) [50].

¹⁶³ *V.C.* (n 70) [106].

¹⁶⁴ *Q & Tse* (n 4) [16]–[18].

consent impossible. It is further argued that full SRS likely qualifies as an ‘ill-treatment’ for transgender applicants since it is a risky procedure that might expose them to physical suffering. Lastly, it posited that a mandatory full SRS requirement amounts to degrading treatment since it erodes the dignity of transgender applicants and subjects them to humiliating treatment.

D. THE GRA AS A ‘COMPELLING MODEL’

In light of the evaluation above, a positive advancement has been observed within Hong Kong courtrooms since a requirement that likely goes against the rights protected under Articles 3 and 8 of the ECHR has been eliminated. Nonetheless, developments outside the courtroom are yet to be seen. In particular, progress has been incremental even subsequent to the *Q & Tse* decision. Even if a generous interpretation is adopted, the landmark ruling only pertains to the alteration of gender markers on identification documents rather than legal gender recognition more broadly. Consequentially, more unified and comprehensive legislative effort is evident and preferred to guarantee a more coherent scheme of legal protection for the Hong Kong transgender community. This article sees the necessity to enact a separate legislation that could effectively address legal gender recognition in Hong Kong in order to ensure that the rights of the transgender community are safeguarded and to bring Hong Kong’s legal gender recognition regime into alignment with international standards. The GRA provides an appropriate example for discussion in this regard since it was endorsed by Hong Kong Courts as a ‘compelling model’ when suggesting a legislature in relation to legal gender recognition.¹⁶⁵

Enacted on 1 July 2004, the GRA was celebrated as a ground-breaking piece of legislation as the first gender identity recognition system that suits the twenty-first century.¹⁶⁶ Prior to the GRA, gender in the UK’s legal minefield was determined on biological grounds, including factors such as chromosomes, gonads, and genital features at one’s time of birth.¹⁶⁷ As a response to *Goodwin*, the GRA is particularly remarkable for departing from the *Corbett* criteria and seeking to maximise trans-liberties by acknowledging their acquired gender without demanding any surgical procedures. Bringing the UK to the ‘forefront of global transgender

¹⁶⁵ *W* (n 6) [138], [141]–[146].

¹⁶⁶ Andrew Sharpe, ‘Gender Recognition in the UK: A Great Leap Forward’ (2009) 18 *Social and Legal Studies* 241; Stephen Whittle and Fiona Simkiss, ‘A Perfect Storm: The UK Governments Failed Consultation on the Gender Recognition Act 2004’ [2020] *Research Handbook on Gender, Sexuality and the Law* 211.

¹⁶⁷ *Corbett* (n 10).

law reform’,¹⁶⁸ the GRA was once regarded a comprehensive legislation for extending gender recognition in areas other than marriage, such as social welfare, discrimination, etc.¹⁶⁹

However, it is noted that the GRA is not without criticisms. As a 19-year-old legislation with little change over time, it can no longer be called ‘a model of international best practice’¹⁷⁰ for its alleged outdated procedures. In 2016, the House of Commons Select Committee on Women and Equalities published a report pinpointing deficiencies of the GRA, including its practical operation and the rights and values enshrined.¹⁷¹ A public consultation was launched in 2018 on the reformation of the GRA to adopt a self-identification model, and yet the plan was dropped in 2020.¹⁷²

Considering the controversies surrounding this once-so-called radical legislation, this section focuses on discussing whether the GRA still stands as a ‘compelling model’ for Hong Kong to make reference to when establishing a gender recognition law. This article argues that the GRA should only serve as a starting point for Hong Kong lawmakers to refer to since it does not fully guarantee transgender people’s right to privacy and right not to be subject to torture, inhuman, or degrading treatments due to (i) the perseverance of surgical requirements and (ii) its exclusive nature. This article further argues that the self-declaration model, despite being a more progressive approach, is not suitable for implementation in Hong Kong.

1. Perseverance of surgical requirements

Judging on the face of the GRA, one may argue that it successfully preserves transgender people’s right to bodily integrity and the right not to be subject to torture, inhuman, or degrading treatment for dispensing with surgical requirements and forced medication without transgender applicants’ consent. The GRA grants transgender people legal status in their acquired gender by allowing them to apply for a Gender Recognition Certificate (‘GRC’) issued by the Gender Recognition Panel (‘GRP’).¹⁷³ Through the standard route, those desiring to apply for a GRC must (i) be at least of at least 18 years old,¹⁷⁴ (ii) provide evidence of a diagnosis of gender

¹⁶⁸ Andrew Sharpe, ‘A Critique of the Gender Recognition Act 2004’ (2007) 4 *Journal of Bioethical Inquiry* 33, 37.

¹⁶⁹ *ibid.*

¹⁷⁰ Peter Dunne, ‘Reforming the Gender Recognition Act’ (*Democratic Audit*, 8 May 2018) <<https://www.democraticaudit.com/2018/05/08/reforming-the-gender-recognition-act/>> accessed 1 April 2022.

¹⁷¹ Women and Equalities Committee, ‘Transgender Equality’ HC (2015-16) 390.

¹⁷² Government Equalities Office and Elizabeth Truss, ‘Written Ministerial Statement: Response to Gender Recognition Act (2004) Consultation’ (*Gov.UK*, 22 September 2020) <<https://www.gov.uk/government/speeches/response-to-gender-recognition-act-2004-consultation>> accessed 1 April 2022.

¹⁷³ GRA 2004, s 1.

¹⁷⁴ GRA 2004 s 1(1); Women and Equalities Committee, ‘Reform of the Gender Recognition Act’ HC (2021-22) 977.

dysphoria,¹⁷⁵ (iii) provide evidence of living in the acquired gender for two years prior to the application,¹⁷⁶ and (iv) intend to live in the acquired gender until death.¹⁷⁷ A full GRC¹⁷⁸ entitles transgender people to be treated as the acquired gender for all practical legal purposes.¹⁷⁹

In contrast to Hong Kong's current approach where gender recognition is only limited to identification purposes instead of all purposes of law, the GRA provides legal gender recognition independent of any physical or medical interventions. Amongst the four requirements listed above, any physical transition requirements remain unspoken.¹⁸⁰ Instead of ensuring a transgender person is physically conformed to the acquired gender by demanding gender reassignment surgeries or hormonal treatments, the statute requires a social transition. This is beneficial in the sense that applicants do not have to sacrifice their reproductive capacity, nor undergo medical procedures that inherently carry risks, which cures the possibility of placing them in an 'impossible dilemma' situation in giving up fundamental rights. The GRA also recognises that not all transgender people desire to alter their physical features, and some may not be able to undergo medical treatment for financial or medical reasons.¹⁸¹ Accordingly, it does not arbitrarily divide transgender applicants into subgroups according to their operative status. For transgender people who have not completed, or have no desire to complete, a full SRS, their bodily integrity will not be deprived as a precondition to legal gender recognition, and the absence of any coerced treatments also prevents a breach of the right not to subject to ill-treatment.

Nonetheless, this article submits that while the legislation appears silent on surgical requirements, the substance of the GRA suggests otherwise. The importance of surgical requirements was explained in the House of Commons by David Lammy, 'ultimately [transgender people] have surgical treatment if it is triable'.¹⁸² Even when a transgender applicant has not undertaken any surgeries or treatments, they are expected to send a report detailing any contemplated surgeries or treatments as part of their application.¹⁸³ Accordingly, Professor Sharpe has correctly pointed out that the UK Government sees a transformation of

¹⁷⁵ GRA 2004, s 2(1)(a).

¹⁷⁶ *ibid* s 2(1)(b).

¹⁷⁷ *ibid* s 2(1)(c).

¹⁷⁸ Per the Women and Equalities Committee, a full GRC is opposed to an interim GRC, which is a conditional document for applicants who are in the process of dissolving their legal marriages. See Women and Equalities Committee (n 174) [111].

¹⁷⁹ GRA 2004 s 9(1).

¹⁸⁰ GRA 2004 s 2; Winter (n 83) 122.

¹⁸¹ Sharpe (n 166) 242.

¹⁸² Sharpe (n 166) 39.

¹⁸³ 'Apply for a Gender Recognition Certificate' (*GOV.UK*, 19 December 2014) <<https://www.gov.uk/apply-gender-recognition-certificate/documents-you-must-provide>> accessed 1 April 2022.

genitals as the ‘proper end of the transsexual journey’ and ultimately a surgical outcome.¹⁸⁴ Further, gender reassignment surgeries and medical treatments remain a vital area of consideration for the GRP in approving GRC applications. Evidence of medical treatments forms part of the supporting evidence of GRC applications, where applicants who are unable to provide such evidence are expected to explain the reason for not undertaking any treatments.¹⁸⁵ The fact that an applicant has not undergone any surgeries or treatments may also jeopardise the applicant’s candidacy by hindering a diagnosis of gender dysphoria and bearing negatively on the applicant’s perceived serious intent to live permanently in his or her acquired gender.¹⁸⁶ In light of the implicit yet important role of surgical and medical treatment in the context of gender recognition in the UK, it submits that the GRA in substance bears an expectation to deprive applicants of fundamental rights.

2. Exclusive nature of the GRA

This section argues that three worrying features of the GRA contribute to its innate exclusive nature by blocking some potential candidates from the legal gender recognition framework and accordingly depriving their right to self-determination.

a) Gender dysphoria

The GRA requires applicants to submit two medical reports which include evidence of a psychiatric diagnosis of gender dysphoria,¹⁸⁷ which refers to ‘psychological distress that results from an incongruence between one’s sex assigned at birth and one’s gender identity’,¹⁸⁸ and has generated controversies amongst transgender people for placing emphasis on mental illness over ontology. Accordingly, the requirement under the GRA is said to be problematic as it fosters a stereotype that trans are disordered and in need of protection.¹⁸⁹ Gender recognition conferred by the GRA would be considered as a mere instrumental element to ‘cure’ the transgender person, instead of enshrining their fundamental rights.¹⁹⁰ Nevertheless, this concept retains some support from the transgender community for practical purposes of gaining access to a range of medical procedures and health insurance coverage.¹⁹¹

¹⁸⁴ Sharpe (n 168) 39.

¹⁸⁵ Women and Equalities Committee (n 171) 12.

¹⁸⁶ HL Deb 13 Jan 2004, cols 551.

¹⁸⁷ Per GRA 2004, s 2(1)(a), the two medical reports must be made by (i) a medical practitioner or psychologist practicing in the field of gender dysphoria and (ii) a medical practitioner or psychologist may or may not be practicing in the field of gender dysphoria. See Women and Equalities Committee (n 174) 7.

¹⁸⁸ American Psychiatric Association (n 90).

¹⁸⁹ Senthoran Raj and Peter Dunne, ‘Coming inside and/or Playing Outside: The (Legal) Futures of LGBTIQ Rights in the United Kingdom’ [2020] *The Queer Outside in Law* 233, 240.

¹⁹⁰ Jens Scherpe and Peter Dunne, ‘Comparative Analysis and Recommendations’ in Scherpe (ed) (n 11) 615.

¹⁹¹ Sharpe (n 169) 38.

More importantly, WHO has reframed ‘gender identity disorder’ as ‘gender incongruence’ in a resolution approved in 2018.¹⁹² It was celebrated for having a ‘liberating effect on transgender people worldwide’¹⁹³ as gender nonconformity is now considered a sexual health condition instead of a mental health disorder under the International Classification of Diseases. Despite having 64.1% of respondents supporting the removal of the requirement for a diagnosis of gender dysphoria in the public consultation conducted in 2018,¹⁹⁴ the UK Government decided not to alter this arguably incorrect diagnosis.

However, this article argues that it is incorrect to assume that all transgender people view their gender identity in medical terms and suffer from psychological distress due to their experience of gender, as not all transgender people experience gender dysphoria.¹⁹⁵ Practically speaking, this requirement also excludes trans who suffer from gender dysphoria but fails to be diagnosed due to insufficient healthcare resources by the UK Government.¹⁹⁶ Although the Government agreed to establish three new gender clinics in 2020,¹⁹⁷ the exclusion problem was not remedied as the gender dysphoria requirement was not removed.

b) *Binary gender structure*

The GRA only guarantees legal gender recognition for applicants who fit into the binary gender structure. Although the current statutory regime is a response to the landmark *Goodwin* case which dispenses with a sole biological understanding of genders, it is surprisingly not devoid of *Corbett*’s influence and preserves a fixed binary concept of gender.¹⁹⁸ Under the GRA s 1(1), it stated that ‘a person of *either gender*...may make an application for a GRC on the basis of – (a) living in the *other gender*, or (b) having changed gender under the law of a country or territory outside the UK’.¹⁹⁹ In other words, the GRA only caters for applications by those who are either male or female, and seeking to legally transit to another gender. This fixated view on

¹⁹² ‘ICD-11 for Mortality and Morbidity Statistics’ (*World Health Organization*) <<https://icd.who.int/browse11/l-m/en>> accessed 1 April 2022; ‘International Classification of Diseases (ICD)’ (*World Health Organization*) <<https://www.who.int/classifications/classification-of-diseases>> accessed 1 April 2022.

¹⁹³ ‘New Health Guidelines Propel Transgender Rights’ (*Human Rights Watch*, 27 May 2019) <<https://www.hrw.org/news/2019/05/27/new-health-guidelines-propel-transgender-rights>> accessed 1 April 2022.

¹⁹⁴ Daniel King, Carrie Paechter and Maranda Ridgway, ‘Gender Recognition Act: Analysis of Consultation Responses’ (2020) 8.

¹⁹⁵ American Psychiatric Association (n 91).

¹⁹⁶ King, Paechter and Ridgway (n 194) 46.

¹⁹⁷ Government Equalities Office and Elizabeth Truss (n 172).

¹⁹⁸ Flora Renz, ‘Genders That Don’t Matter: Non-Binary People and the Gender Recognition Act 2004’ in Senthoran Raj and Peter Dunne (eds), *The Queer Outside in Law, Palgrave Socio-Legal Studies* (Palgrave 2020) 143, 145.

¹⁹⁹ GRA 2004 s 1(1) (emphasis added).

gender ‘does not allow room for changing notions and perceptions of sex and gender’,²⁰⁰ which renders it contradictory to the international standard. For instance, Resolution 2048(2015) of the Parliamentary Assembly of the Council of Europe provides that states are recommended to ‘consider including a third gender option in identity documents for those who seek it’.²⁰¹

As a result, those who do not fit perfectly in the purely binary gender system are excluded, where they are ‘made to fit’ within existing sex and gender structures²⁰² shall they wish to obtain legal gender recognition. The existence of a non-binary understanding of gender has been acknowledged by the House of Commons by stating that the current legal regime lacks ‘legal provision for non-binary people’,²⁰³ and there has been an increasing number of people falling within this category.²⁰⁴ For instance, the applicant in *R (on application of Christie Elan-Cane)* was born female but identified as non-gendered.²⁰⁵ This rigid approach has led to ‘negative results for transsexual individuals who do not fit within the rigid legal gender regime’²⁰⁶ as the GRA fails to accommodate their lived experience and internal understanding of gender.²⁰⁷

c) *Age requirements*

The GRA requires applicants to be ‘aged at least 18’ and whoever fails to meet this age requirement is excluded from this gender recognition framework. Similar to the aforementioned requirements, the 18-year-old requirement is not without concerns. It was suggested by Daiute that age is often used as an excuse to limit children’s rights and conceal the underlying reason behind the limitation.²⁰⁸ Resolution 2048(2015) also calls on states to ensure children do not lose rights²⁰⁹ and ‘ensure that the best interests of the child are a primary consideration in all decisions concerning children.’²¹⁰ It is doubtful that the best interests of transgender minors

²⁰⁰ Megan Bell, ‘Transsexuals and the Law’ (2004) 98 *Northwestern University Law Review* 1709 cited in Carolynn Gray, ‘A Critique of the Legal Recognition of Transsexuals in UK Law’ (University of Glasgow PhD thesis 2016) 201.

²⁰¹ Parliamentary Assembly of the Council of Europe, Resolution 2048(2015): Discrimination against Transgender People in Europe (22 April 2015) [6.2.4].

²⁰² Sharon Cowan, ‘“Gender Is No Substitute for Sex”: A Comparative Human Rights Analysis of the Legal Regulation of Sexual Identity’ (2005) 13 *Feminist Legal Studies* 67.

²⁰³ Women and Equalities Committee (n 171) 79.

²⁰⁴ Lau (n 72) 199.

²⁰⁵ *R (on application of Christie Elan-Cane) v Secretary of State for the Home Department, Human Rights Watch intervening* [2020] EWCA Civ 363. In this case, the female-born appellant identifies as ‘non-gendered’ unsuccessfully tried to obtain a passport reflecting her non-gendered status. She initiated a judicial review to challenge the failure to acknowledge an alternative gender option. At first instance, it was held that there were no unlawful breaches against Article 8 and 14 of the ECHR. The Court of Appeal dismissed the appellant’s appeal.

²⁰⁶ Gray (n 200) 201.

²⁰⁷ Raj and Dunne (n 189) 242.

²⁰⁸ Colette Daiute, ‘The Rights of Children, the Rights of Nations: Developmental Theory and the Politics of Children’s Rights’ (2008) 64 *Journal of Social Issues* 701.

²⁰⁹ Parliament Assembly of the Council of Europe (n 201) [6.2.3].

²¹⁰ *ibid.*

aged below 18 years old are well protected when they are wholly excluded from the gender recognition framework without any appeal mechanisms. Further, it is incorrect to assume transgender minors under 18 years old lacks the capacity to identify their own gender and express their identity properly. Discussions on this account has been addressed in Section C.1.a.

d) *Discussion*

Accordingly, it is argued that the GRA excludes prospective applicants in the UK who fail to meet the restrictive criteria, and yet they do not necessarily identify less than those who can meet the criteria. Similar to Hong Kong's pre-*Q & Tse* approach in excluding pre-operative transgender people and transgender minors, people falling in the excluded categories only possess an outsider status for failing to fit within the current legal framework despite their needs.²¹¹ Accordingly, these prospective applicants' right to privacy is deprived as they cannot freely determine their own gender identity, and the UK Government fails to fulfil their positive obligation to provide 'quick, transparent and accessible procedures' for gender recognition for them. In particular, non-binary individuals are placed in a struggle where they have to either live with an incorrect gender status given at birth, or succumb to a binary gender classification system that incorrectly reflects their identified gender. Hence, the GRA could hardly be argued as a 'compelling model' for Hong Kong to take full reference when drafting its gender recognition law.

3. *Self-declaration model*

Noting the aforementioned gaps and deficiencies of the GRA, it is apparent that it shall only serve as a starting point instead of being a definitive solution for Hong Kong lawmakers to consider in drafting a gender recognition law. The question then arises as to whether there are any suitable alternatives to the GRA. One potential alternative is the self-declaration model, which has been introduced by the UK Government in a public consultation in response to vocal human rights activist groups and the transgender community against the outdated GRA.²¹² This sub-section aims to provide a brief introduction to the self-declaration model and argues that it is not suitable in the Hong Kong context at the current phase despite its progressive nature and widespread global adoption.

A self-declaration model of gender recognition allows applicants to change their legal gender status without any medical evidence, by signing statutory declaration(s) that proves self-identification in the acquired gender. It is the current 'gold standard'²¹³ for international gender

²¹¹ Renz (n 198) 145.

²¹² Women and Equalities Committee (n 174).

²¹³ Women and Equalities Committee (n 171) 15.

recognition laws, where countries such as Argentina and Norway have approved legislation adopting a self-declaration model.²¹⁴ It also aligns with the recommendations stated under Resolution 2048(2015), which urges states to ‘develop quick, transparent and accessible procedures, based on self-determination’ for changing particulars including genders on official documents.²¹⁵ Nonetheless, plans to adopt a self-declaratory system were rejected by the UK Government in 2020.²¹⁶ Although the UK Government acknowledged the need to make the GRC application process ‘kinder and more straightforward’, it believed that the balance struck in the GRA was correct.²¹⁷ On the contrary, the Scottish Government took a step further in adopting a self-declaration model and removing the gender dysphoria requirement in the recent Gender Recognition Reform (Scotland) Bill.²¹⁸

From the perspective of transgender people, the self-declaration model is appealing as it does not require any surgical or medical treatment, as opposed to requirements for gender reassignment surgeries, nor any medical diagnosis evidence. As discussed in Section D.2.a., a gender dysphoria diagnosis requirement enforces a wrong stereotype in considering transgender identities as medical illnesses, and poses practical barriers for those who are unable to access healthcare services and obtain relevant medical evidence.²¹⁹ Accordingly, the self-declaration model avoids the possibility of breaching one’s bodily integrity as no forced surgeries or treatments are required. Nor does it pose a threat to one’s right to privacy, as it respects transgender people’s autonomy.²²⁰ As an evidenced-based model, it allows applicants to take an active role in deciding one’s gender, as opposed to the medical model requiring evidence of gender dysphoria which in essence depends on third-party produced evidence.

In the Hong Kong context, the Hong Kong Law Society had opined a legislation based on the self-declaratory model as ‘highly beneficial’ in its response to IWG’s consultation paper in 2017.²²¹ This article however submits that the adoption of the self-declaratory model in Hong Kong, which is still in its very preliminary phase of gender recognition, may not be a suitable

²¹⁴ Gender Identity Law (Law No 26.743) of Argentina; Gender Recognition Act 2016 (Lovvedtak 71) of Norway.

²¹⁵ Parliament Assembly of the Council of Europe (n 201) [6.2.1].

²¹⁶ Government Equalities Office and Elizabeth Truss (n 172).

²¹⁷ *ibid.*

²¹⁸ Scottish Government, ‘Gender Recognition Reform (Scotland) Bill: Consultation Analysis’ (*Scottish Government*, 2 September 2021) <<https://www.gov.scot/publications/gender-recognition-reform-scotland-bill-analysis-responses-public-consultation-exercise/>> accessed 1 April 2022.

²¹⁹ Dunne (n 170).

²²⁰ *ibid.*

²²¹ The Law Society of Hong Kong, ‘Consultation Paper: Part 1 Gender Recognition Submission’ (*The Law Society of Hong Kong*, 28 December 2021) <https://www.hklawsoc.org.hk/-/media/HKLS/pub_e/news/submissions/20171229.pdf?rev=e41f76e00b1745d99b655fa34a4c249a> accessed 1 July 2023 [15].

approach in light of its controversial nature. Although adopted in foreign jurisdictions, a proposal adopting the self-declaration model sparked a firestorm of controversy in the UK. Particularly, public interest issues became the source of the major critiques. For instance, feminist groups such as Mayday4women, Fair Play for Women and Woman's Place UK opposed the reformation of the GRA on the basis that men may take advantage of the self-declaration model to gain access to enter women-only spaces and commit sexual assaults,²²² and fundamental rights that women had battled hard to achieve over centuries might risk being overwritten.²²³ The transgender community also voiced similar concerns, and they 'fear that these proposals will not only put women's rights at risk but also damage [their] credibility in society.'²²⁴ Further, scholars argued that while a self-declaration model is advantageous in achieving practical goals such as reducing complexities and time needed for the recognition process, it is still fundamentally based on a 'dialectical and close mechanism' of recognition that 'is apt to protect and reproduce sameness', and is not able to tackle equality issues faced by non-binary individuals.²²⁵

To conclude, the article contends that Hong Kong is not ready to adopt a self-declaratory model, which is not without controversies, as the basis of its gender recognition law. It may be prudent to consider a more transitional approach, such as the adoption of a model focusing on transgender people's psychological states,²²⁶ with an ultimate goal of self-declaration. This would grant Hong Kong sufficient time to build up its jurisprudence in the area of gender recognition and in the long term develop a regulatory scheme that is tailored to its unique social context. It is however noted that this article is primarily concerned with the existing deficiency with regards to legal gender recognition in Hong Kong. How the line should be drawn as to when a person can by law be regarded to have altered their gender is a question for the legislature after gathering public consensus. The legislative approaches adopted in foreign jurisdictions, such as the GRA adopted in the UK or the self-declaration model in other jurisdictions, only serve to illustrate a natural progression in legislative effort in this domain.

²²² Whittle and Simkiss (n 166) 227.

²²³ Caterina Nirta, 'A Critique of the Model of Gender Recognition and the Limits of Self-Declaration for Non-Binary Trans Individuals' (2021) 32 *Law and Critique* 217, 224.

²²⁴ Kristina Harrison et al, 'Standing up for Transsexual Rights | Letters' (*The Guardian*, 4 May 2018) <<https://www.theguardian.com/society/2018/may/04/standing-up-for-transsexual-rights>> accessed 1 April 2022.

²²⁵ Nirta (n 223) 218.

²²⁶ Wong (n 5) 125.

E. THE WAY FORWARD

Following the conclusion that Hong Kong's current approach on legal gender recognition is far from satisfactory, this article strongly advocates for the enactment of legislation dedicated to legal gender recognition. Hong Kong transgenders' fundamental rights shall not be ignored although they remain a community of limited size in society,²²⁷ and it is indisputable that a clear and accessible gender recognition law is needed to remedy this pressing situation. Accordingly, the major issue left uncertain would be deciding how a gender recognition law can be drafted to fit in the Hong Kong context. In response to this issue, this article argued that the GRA could hardly be taken as a perfect referencing model for Hong Kong to draft a comparable law since it is not without its own limitations and controversies.

It is suggested that the GRA should only serve as a point of departure for Hong Kong lawmakers to draft a gender recognition law. The prime objective would be to inherit the GRA's liberal spirit and to draft a comprehensive legislation to prevent transgender people from being left in a legal limbo between living in their acquired gender and having a biologically determined legal gender. In balancing the cultural context of Hong Kong and avoiding the weaknesses of the GRA, Hong Kong should follow its most celebrated feature in wholly dispensing with surgical requirements and avoid any requirements or expectations in the removal of genitals. Alternatively, a model focusing on transgender people's psychological states may be more desirable.²²⁸ This article further suggests avoiding setting a strict age requirement and instead adopting a case-by-case approach in catering for the 'best interest' of transgender minors.²²⁹

Although the article opines that the GRA has apparent flaws, it further argues that a self-declaration model, which is viewed as a progressive model compared to the GRA, would not be suitable in the Hong Kong context. Despite being considered a 'gold standard' in foreign jurisdictions, it would definitely be difficult to persuade an adoption of the progressive self-declaration model in the jurisdiction. Although Hong Kong citizens are considered open-minded towards LGBTQ+ issues,²³⁰ traditional Chinese gender norms are still valued in society. Any laws trying to dismantle a binary understanding of gender would undoubtedly ignite heated

²²⁷ 0.3% of respondents identified as trans. See the University of Hong Kong Public Opinion Programme, 'Hong Kong LGBT Climate Study 2011-12 – Survey Report' (14 May 2012) <https://www.hkpop.hku.hk/english/report/LGBT2011_12/content/resources/report.pdf> accessed 4 May 2022.

²²⁸ Wong (n 5) 125.

²²⁹ Peter Dunne and Stephen Clark, 'Comparative Legal Review of Gender Recognition Laws Across the Commonwealth' (2019) 48.

²³⁰ 58% of respondents adopted an 'accepting' attitude towards LGBT individuals. See the University of Hong Kong (n 227) 5.

controversies in Hong Kong. This article is, however, not undermining possibilities of any legislative reformation in Hong Kong to be moving in such a direction in the future. It is nevertheless believed that enacting a gender recognition legislation through a balanced approach would be a practical middle-ground in facilitating Hong Kong to catch up with its common law counterparts in providing sufficient protection for the transgender community's fundamental rights.