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TRANSGENDER PERSONS, LEGAL DISHARMONY
AND ATTITUDINAL CHANGE

The Hon. Michael Kirby AC CMG

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ABSTRACT

Nearly 50 years ago in *Corbett v Corbett* an influential English decision declared the immutability of physiological gender, as assigned at birth. Later decisions held that if changes were to be made, to accommodate the lived experiences of transgender persons, legislation was required. Some legislation for gender reassignment has been enacted. However, there remain urgent requirements of law reform; a universal requirement of radical surgery may not be proportionate or just. The need for many legal changes was recognised in the 2015 report of the UNDP Global Commission on HIV and the Law. It was also recognised that the Hong Kong Court of Final Appeal in its 2013 decision in *W v Registrar of Marriages*. In this article, based on a summation of a timely roundtable in Hong Kong, the author identifies ten propositions that need to be observed if effective reform of the law for transgender persons is to be adopted. Some recent court decisions in Australia, Pakistan, India and Malaysia give cause for optimism.

RECOGNISING GENDER IDENTITY

Transgender persons (TGP) are those whose experience of gender does not correspond to the sex assigned to them at birth, usually on the basis of bodily appearance. The situation facing such persons was

* Based on a summation provided by the author at the conclusion of a roundtable on Gender Identity, Rights and Law, held in Hong Kong convened by the United Nations Development Program (UNDP) in Hong Kong 2 October 2014.

** Commissioner UNAIDS/Lancet Commission From Defeating AIDS to Advancing Global Health (2013-14); Commissioner UNDP Global Commission on HIV and the Law (2011-12); Member, Eminent Persons Group on the Future of the Commonwealth of Nations (2010-11); Justice of the High Court of Australia (1996-2009); Honorary Professor, University of Hong Kong (2011-).

recently described in the unanimous opinion of the High Court of Australia:¹

“For many years the common law struggled with the question of the attribution of gender to persons who believe that they belong to the opposite sex. May such persons undertake surgical and other procedures to alter their bodies and their physical appearance in order to acquire gender characteristics of the sex which conforms with their perception of their gender. Self-perception is not the only difficulty with which transsexual persons must contend. They encounter legal and social difficulties, due in part to the official record of their gender at birth being variance with the gender identity which they have assumed.”

In recent years, courts in many countries “and international and regional courts” have struggles with issues presented by the attempts of TGP to overcome legal obstacles and to have the law adapted so that they might live in harmony with the world, their country, their community, employers, friends and lovers. Some of the cases have arisen in the context of official records (birth certificates, identity passes, passports and applications for marriage certificates) that need accommodation if the TGP is to enjoy rights and privileges taken for granted by most other people. As the International Commission of Jurists (ICJ) pointed out:²

“Legal recognition cases most commonly arise when individuals seek to change their sex on identity documents, such as birth certificates, passports and national identity cards. They may concern other documents, such as diplomas, driver’s licence, national health insurance

¹ *AB v Western Australia* (2011) 244 CLR 390 at 396; [2011] HCA 42 [1].

² *International Commission of Jurists Sexual Orientation, Gender Identity and Justice: a Comparative Law Case Book*, ICJ, Geneva, 2011, 173.

card or other certification or documentation related to identity or qualifications. Legal recognition cases also occur when individuals change their name to reflect a preferred gender. Since identification is required for most activities in daily life (enrolling in school, finding a job, opening a bank account, renting an apartment, or travelling across a border), the issue is one that is significant to the individuals concerned. An individual's right to change the sex of his or her identity documents protects privacy and prevents discrimination and stigma on the basis of gender identity or gender reassignment.”

A flashpoint for determining the legal rights of TGP arose in 1970 in the influential case in the United Kingdom, *Corbett v Corbett (otherwise Ashley)*³. That case, which arose in the English High Court, was decided by Justice Ormrod. It arose on a petition to annul the marriage between Arthur Corbett and April Ashley. Ms Ashley had been born male. That is what her original birth certificate provided. She had undergone hormonal treatment and gender reassignment surgery (GRS). That surgery included radical vaginoplasty. According to Justice Ormrod, the issue before him in the nullity petition was the “true sex” of Ms Ashley and whether she had capacity to consummate the marriage that she had entered with Mr Corbett. She claimed that she was psychologically, emotionally and in every relevant way a female. Certainly, she had done everything possible, by way of surgery, to bring her identity into line with her life experience. However, Justice Ormrod held that Ms Ashley's sex was determined by a congruence of chromosomal, gonadal and genital factors. It constituted a biological fact, determined at birth and forever thereafter immutable. He declared that Ms Ashley was physically incapable of consummating the ‘marriage’

³ [1971] P 83.

to Mr Corbett. This was because intercourse, using what the judge described as “the completely artificial cavity constructed” by a surgeon, could not possibly be described as “natural intercourse”. The petition was upheld; the marriage was annulled; Ms Ashley’s heroic efforts counted for nothing. She was legally still a male. The outcome of the decision in Corbett was codified by the enactment of the *Nullity of Marriage Act* 1971 (UK) and the *Matrimonial Causes Act* 1973 (UK). As the ICJ observed in its review of this decision “with is ruling, a single judge of the High Court [in England] set the terms of the debate for transgender marriage jurisprudence” in countries of the common law thereafter.⁴

However, in the decades that followed *Corbett*, and the similar decision in *Marr v Tan*,⁵ applying a purely biological test, large numbers of decisions responded with greater empathy to the courageous efforts of TGP to bring their legal status into line with their health identity, particularly after undergoing GRS.⁶ However, judges began to point out, that whilst legal decisions could affect the rights of the parties to a judgment, they could not easily, or at all, result in the alteration of public records. For such alteration (even where GRS had been undertaken) many judges felt that legislation would be required.⁷ Thus, legislation came to be enacted providing for registration of a change to official records. Commonly, such legislation provided for the issue of a certificate confirming that the person had undergone GRS and was “of the sex stated in the certificate”. In the cases where such legislation has

⁴ ICJ, above n. 2, 205.

⁵ [1983] 1QB 1053.

⁶ In Australia, the decisions of the Federal Court of Australia: *Secretary, Department of Social Security v SRA* (1993) 43 FCR 299 per Lockhart J; the Supreme Court of New South Wales *R v Harris* (1988) 17 NSWLR 158, per Mathews J; re Kevin (2001) FLC , Family Court of Australia, 12 October 2001 per Chisolm J. See also in New Zealand: *Attorney General (NZ) v Family Court at Otago* [1995] 1 NZLR 603 at 605-606.

⁷ *Re T* [1975] 2 NZLR 449 at 452.

been adopted, the primary duty of courts became the interpretation of the legislation, as beneficially as may be,⁸ whilst some judges, in some national and international courts, were willing to adopt approaches sympathetic to TGP, others felt that it was basically for the legislature to fix things up, not the judges.⁹ The extent to which judges would adopt such an approach appears to depend on multiple considerations such as:

- (1) Any ambiguity in the applicable legislation and any room for a broad or beneficial construction;
- (2) The existence or absence of any constitutional or human rights provisions binding on the court would permit or encourage advantageous rulings;
- (3) The governing legal culture and any rulings of superior courts binding upon the judges concerned; and
- (4) The personal religious, philosophical or societal views of the judges and any empathy or experience they might have with TGP.

An interesting phenomenon of very recent times on the law affecting TGP has been the willingness of courts, even in the usually legally conservative Asia/Pacific Region, to reach decisions favourable to TGP applicants. In Pakistan¹⁰ and more recently India¹¹ the existence of well recognised TGP minorities 'hijira', 'kothi' or 'eunuchs' is reflected in strong decisions, based on constitutional grounds, expressing the need to remove forms of legal discriminations against these well-known communities. Those decisions have, in turn, and perhaps more

⁸ *NSW Registrar of Births, Deaths and Marriages v Norrie* (2014) 88 ALJR 506; [2014] HCA 11.

⁹ *Bellinger v Bellinger* [2003] 2AC 467.

¹⁰ *Khaki v Raul Pindi*, Supreme Court of Pakistan, 12 December 2009 in ICJ, above n.2, 194-195.

¹¹ *National Legal Services Authority v Union of India*, Supreme Court of India, unreported, 15 April 2014.

surprisingly, influenced the decision of the Court of Appeal of Malaysia, operating in a community with strong elements of Islamic law.¹² But in Australia¹³ and Hong Kong¹⁴ recent judicial decisions have been strong and enlightened. They would have been surprising even a decade earlier.

This was the legal context in which the United Nations Development Program (UNDP) organised a roundtable in Hong Kong designed to address the desirable shape of TGP law in the Hong Kong SAR and in other countries of Asia and the Pacific. As will appear, the roundtable was well timed, and it may have proved influential.

ISSUES AND DIALOGUE

The advance of scientific knowledge and of human experience has contradicted this rigid taxonomy. At least it has done so in the case of a small minority of human beings. Whatever might be the state of their sexual organs at birth, this minority may feel a disharmony between the gender classification assigned to them and their deeply felt sense of their true identity. This disharmony is sometimes acute and intensely distressing. In some cases, it can lead the person to abandon the initial classification given to them so as to assume the wearing of different clothing; a new presentation of the self; and the formation of intimate and sexual relationships appropriate to the gender identity in which the person feels comfortable: opposite to that previously assigned to them.

¹² *Khamis v Government of Negeri Sembilan and Ors*, Court of Appeal of Malaysia, unreported, 7 November 2014.

¹³ *AB v Western Australia*.

¹⁴ *NSW Registrar of Births, Deaths and Marriages v Norrie*; and *Re Kevin* above nn 1, 8 and 6.

It is here that the law can sometimes provide serious obstacles to harmony. Harmony will require law reform if the individual is to be able to enjoy what most people take for granted: an accepted coincidence between the gender classification as experienced by them and the classification of their gender identity by others in the world, including by reference to their original genitals and other bodily features.

In some cases, TGP simply adopt clothing and manners appropriate to their experienced gender identity, rejecting the gender they do not accept or want. However, in some communities, an asserted switch of this kind is not so easily tolerated. Identity papers, passports, social security classification and other formalities may make informal change difficult, or even impossible, to maintain. In other cases, the person concerned may be deeply conflicted about their body image and desirous of obtaining hormonal or surgical intervention to bring their bodies (so far as possible) into harmony with the gender identity they regard as applicable to them. The possibility, from at least the 1990s, of radical hormone therapy and gender reassignment surgery (GRS) has presented options which a TGP might wish to undertake. However, such options are not, on any account, to be embarked upon lightly.¹⁵

- * The surgery is highly invasive;
- * The surgery results in sterilisation, destroying the possibility of subsequent genetically related children;
- * The surgery requires lifelong treatment, care and maintenance;

¹⁵ These conclusions are expressed in many sources. These include the United Nations Inter-Agency Statement, *Eliminating Enforced, Coercive and Otherwise Involuntary Sterilisation*, issued by the World Health Organisation (WHO) in conjunction with OHCHR, UNWomen, UNAIDS, UNDP, UNFPA and UNICEF, Geneva, 2014, 3 ff. The history of coercive sterilisation between 1960-1990, in many countries is outlined. The roundtable also had the explanation and testimony of Dr Stan Monstrey, a professor of plastic surgery at Gent University in Belgium and an experienced GRS surgeon.

- * A significant 1% risk of failure in the surgery is recorded with sometimes horrible and unsightly outcomes; and
- * Hormonal and non-invasive therapy has its own side effects and adverse consequences.

Notwithstanding these difficulties and dangers, some TGP are insistent on their wish, and entitlement, to undergo GRS. Moreover, a number of national laws demand that, to enjoy a recognised alteration of the unwanted gender classification (and documentation), the subject must undergo “reparative” surgery.

In Hong Kong, in a 2013 case before the Court of Final Appeal, *W v Registrar of Marriages*,¹⁶ a so called “post op” TGP, “W”- a transsexual woman who had earlier successfully undergone sex reassignment surgery – sought to be married to her boyfriend. Marriage was refused by the registrar on the basis that, despite the surgery, W was legally, as classified at birth, a man. Reversing earlier rulings, the Court of Final Appeal found in favour of W. However, it suspended its decision for 12 months to allow the Government of Hong Kong to propose legislative changes to the Legislative Council (LegCo), so as to address the legal issues presented by W.

The case of *W* was not an ordinary instance of a same-sex marriage. In a real sense, *W* had endeavoured to bring herself into conformity with the assumption of the law on marriage requiring complementary sex organs and opposite gender identities. The Court of Final Appeal commended, as a model for consideration in Hong Kong, legislation that

¹⁶ [2013] 3 HKLRD 90 (CFA). Discussed in S. Winter, “Identity recognition without the knife: Towards a Gender Recognition Ordinance for Hong Kong’s transsexual people”, (2014 HKLJ 115 at 116-117).

had been adopted in the United Kingdom in 2004.¹⁷ That legislation did not impose an obligation to undergo gender reassignment surgery as a legal precondition to marriage by TGP. The United Kingdom statute was described by the court as a “compelling model”. However, the model had to be read against the background of legislation already then adopted in Britain to permit civil unions between persons of the same gender. (Marriage between such persons was later permitted). No such law for same-sex marriage or civil unions has been enacted in Hong Kong. None is presently proposed.

Instead of returning to LegCo with a Bill modelled, as the Court had hinted, on the United Kingdom statute, the officials in Hong Kong proposed a draft that imposed, as a precondition to the right to marriage, the requirement of the applicant to submit to GRS. That draft legislation was awaiting consideration by LegCo shortly after the high level roundtable on gender identity was due to meet in Hong Kong. A purpose of the roundtable was to focus the attention of the legislators and policy advisers in Hong Kong (and elsewhere) on an earlier report of the UNDP Global Commission on HIV and the Law.¹⁸ That Commission had made recommendations on TGP; on the models that were being adopted on TPG law reform in various jurisdictions; and on the suggested disproportionality of demanding submission to “the knife” in order for TGP to enter into a lawful marriage. Whilst that was the only factual and legal circumstance that the Court of Final Appeal had considered in the matter of *W*, the amended legislation would, if adopted, put the Hong Kong LegCo out of line with the recommendations of the Global Commission and other UN bodies.

¹⁷ Ibid [138].

¹⁸ United Nations Development Programme, Global Commission on HIV and the Law, *Risks, Rights & Health* (UNDP, New York, 2012).

The UNDP Global Commission report dealt with a number of population groups specially vulnerable to HIV (including people who use drugs; sex workers; men who have sex with men; prisoners; and migrants)¹⁹. A specific chapter of the report, dealing with transgender persons²⁰ must be understood in the context of the key populations found to be at special risk of HIV infection. The key populations included groups of individuals mostly identified by reference to adult, consensual, private sexual conduct of various kinds. Nevertheless, TGP were singled out for particular treatment and a number of recommendations were made. These encouraged member countries of the United Nations to reform their legal approaches to TGP. Rather than punishing TGP for sexual activity normal to themselves and seemingly socially harmless, legislators were urged to offer TGP access to effective HIV and health services as well as repealing “all laws the criminalise transgender identity or associated behaviours”.²¹

The specific recommendation made by the UNDP Global Commission in this connection, addressed to UN member countries, were to:²²

- “1. Respect existing civil and religious laws and guarantees related to the right to privacy;
2. Repeal all laws that punish cross-dressing;
3. Remove legal regulatory or administrative barriers to the formation of community organisations by and for transgender people;

¹⁹ UNDP report, *ibid*, 26-62.

²⁰ UNDP report, *ibid*, 51.

²¹ UNDP Report, *ibid*, 53.

²² UNDP Report, *ibid*, 54.

4. Amend national anti-discrimination laws to explicitly prohibit discrimination on the ground of gender identity (as well as sexual orientation); and
5. Ensure transgender people are able to have their affirmed gender recognised in identification documents, without the need for prior medical procedures such as sterilisation, sex reassignment surgery or hormone therapy.”

The recommendations of the Global Commission constituted the starting point for the debates at the Hong Kong roundtable. Although TGP and their representative organisations were consulted, and took part in, the regional dialogues conducted by UNDP in the run up to the report of the Global Commission, the round table in Hong Kong stepped up the engagement. It involved TGP and representative organisations and those who work for and with TGP. Thus, it included various categories of TGP: young and old; male to female; female to male; “pre-op”, “non-op” and “post-op”; locals and internationals; celebrities and those not “out” in relation to their gender identity. Amongst the resource people attending the roundtable, about half identified themselves as TGP and half not. A number of those who were not, including the author, identified themselves as members of another sexual minority (LGB).

It was out of this dialogue in Hong Kong that the author, in providing a summation of the roundtable, propounded ten propositions to advance to process of law reform affecting transgender issues.

TEN PROPOSITIONS FOR TGP LAW REFORM

I. RECOGNISE TRANSGENDER IDENTITY IN LIFE AND IN LAW

Transgender persons (TGP) are a small minority in their communities who do not share a strictly binary (male/female) gender identity and heterosexual orientation defined by reference to their bodily features at birth. TGP experience some of the highest levels of hostility, violence and discrimination. This is because others regard the demand of TGP to be themselves, and to act in ways that appear normal and rational to themselves, as challenging to the heteronormative binary division of humanity into male and female categories, predetermined by their bodily attributes established at birth.

The opponents and critics of TGP regard this binary division of humanity as immutable – ordained by God or nature and thus not be denied or challenged by individual conduct, advocacy or law. At its worst, these attitudes deny any legal recognition to transgender identity, including variations bearing some similarities such as cross-dressing (transvestism); transsexualism; androgyny; hermaphrodite identity; intersex or other ‘non-specific’ sexual identity.²³ At the heart of the hostility and opposition towards TGP is an insistence that those who feel themselves TGP should either deny it; suppress it; pretend that they do not experience it; or go somewhere else where they will not confront others with the actuality of their lives as they claim to experience them.

Because transgender characteristics are a variation in nature, however caused, and are present in all societies and are recorded in ancient as well as modern times, the resulting identity is a form of gender or sex as such. It is therefore entitled to respect, recognition and protection, including by the law. The law should cease to oblige self-denial,

²³ There are other categories such as “non-binary” or “agender”. See M. Hesse, “Where no gender fits” in *Washington Post*, September 21, 2014, A1.

deception and pretence, extracted from TGP in many countries as a price of avoiding violence, hostility and discrimination. The law should provide protection to TGP from violence, hostility and discrimination. The object of the law should be to ensure individual harmony with society and the creation of a broader society that is in harmony of the lives experienced by all its people, including the TGP minority. Sexual and gender minorities are part of nature. They should be recognised, supported and protected, as such, by the law.

II. APPLY THE GOLDEN RULE TO TPG

Because the law of most societies has developed without a full awareness of the existence and nature of the variations involved in transgender identity, most societies, and the people who make them up, develop social attitudes and laws that are oppressive and that disregard the fundamental human rights of TGP, their families, friends and sexual partners. Law has commonly re-enforced a strict binary division of humanity. This is oppressive and discriminatory towards TGP and those in their circle. Reflecting common attitudes and assumptions, the law has re-enforced the binary stereotype. Whilst this may be comfortable for a majority of society, it has been burdensome and discriminatory towards TGP.

Examples of oppressive laws are those that require the classification as human beings from the time of birth into strict and unchangeable categories as “male” or “female”. Where such laws provide no basis (or only a restrictive basis dependent on disproportionate requirements) to change the birth classification, the result is a denial of fundamental

human rights; the imposition of legally supported discrimination; and the encouragement of violence and hostility in society.

To comply with human rights norms, to prevent and redress discrimination and to encourage social attitudes based on science and reality, law reform is necessary. Such reform should reflect the truth of the lives of TGP as lived by them. An appreciation of the need for law reform derives from the “Golden Rule”. This is a moral principle common to the world’s major religious and ethical traditions.²⁴ It has both a positive and a negative expression. The positive holds that one should treat others as one would wish to be treated oneself. The negative is that one should not treat others in ways that one would not wish to be treated. Awareness of the obligations of these moral requirements arises from an appreciation of the harm and pain inflicted on TPG and others in consequence of, hostile and oppressive laws.

In some cases, the law re-enforces a sense of discomfort of others with the felt inappropriateness of the TGP’s anatomical features. In some cases, this discomfort (“gender dysphoria”) will increase the need experienced by TGP to affirm the sex or gender that is felt to be truthful and appropriate to that person. In some cases, it will produce a wish to undergo hormonal therapy and surgery to render the body as congruent as possible to the desired or experienced identity.²⁵ In other cases, TGP may have no difficulty in accepting their own identity. They may regard the “problem” (if any) as one which other people feel and which those

²⁴ In Buddhism: *Sutta Nipata*, 705; in Christianity in *St Matthew’s Gospel* 7:12; *St Luke’s Gospel* 10, 25-28; in Judaism: *Leviticus* 19:18; *Talmud, Shabbat* 31a; in Confucianism: *Analects*, xv 24; in Hinduism, *Brihaspati, Mahabharata* (Anushasana, Parva, xiii in 8); in Islam: *Holy Qur’an, Surah*, 24v22, *Surah* 83, vv 1-4.

²⁵ S. Winter, above n2, 118-119 citing World Health Organisation, *International Statistical Classification of Disease and Related Health Problems* (Geneva, WHO, 10th Ed, 1990).

others need to overcome. They may insist that it is others (and laws reflecting their opinions and demands) who need to be changed, so that society becomes unconcerned with the anatomical parts that people have under their skirts or trousers. Let them truly remain “private parts”.

To the TGP who experience discordance, the law should proceed and facilitate treatment, including surgery, for those of full capacity who express an informed consent to undergo such treatment, given its radical character and risks of failure. For those who have no problem or dysphoria, the law should provide protection from violence, hostility and discrimination. It should not impose requirements to undergo surgery as a price of securing official recognition of change to gender identity initially classified by reference to anatomical features. Essentially, law reform should facilitate comfort with each person’s experienced gender identity. It should not impose violence, discrimination or disproportionate obligations such as undesired or unnecessary subjection to gender reassignment surgery (GRS).

III. RECOGNISE AND LEARN FROM TGP

As in the case of other minorities in society, including those defined by sexual orientation or gender identity, an important advocacy role must be played by TGP. By describing and explaining their life experiences to those who are comfortable in the heteronormative majority of society (but also to those who are comfortable in other minority categories of sexual orientation), TGP are essential educators. They interpret to others the varied life experiences of TGP. As examples and role models, TGP leaders carry particular responsibilities and burdens. They also face special challenges and risks. These including the risks of

purporting to speak for TGP generally when individual cases will frequently involve unique characteristics special to each person concerned:

- * Particular challenges may be experienced by male to female transsexuals different from those experienced by female to male transsexuals;
- * Special challenges may be faced by “pre-op”, as distinct from “post-op” TGP or “non-op” TGP who reject the need for surgery altogether; and
- * Particular challenges may be faced by older TGP, when compared to younger TGP or TGP having additional characteristics that occasion public hostility and discrimination.

All human beings, whatever their sexual orientation or gender identity, should acknowledge the important work of TGP role models, leaders and educators. A number of such leaders in TGP communities in different countries participated in the UNDP Hong Kong roundtable. They deserve, and should receive, acknowledgement and thanks for their part in challenging ignorance, misunderstanding, prejudice, hostility and discrimination. As earlier with the categories of race, ethnicity, aboriginality, gender, disability and sexual orientation, those who identify as TGP and participate in public explanations of their life experiences, play a disproportionate role in promoting and securing law reform. It is harder to hate a minority when one knows individual examples of that minority. Especially where those individuals command respect and admiration.

IV. GLBIQ ADVOCATES SHOULD WORK WITH TGP

Classifications of non-heteronormative sexuality are commonly expressed as “LGBT”. This refers to Lesbian, Gay, Bisexual orientation and Transgender identity. These common categories are today sometimes expanded to include “I” (intersex) and “Q” (queer- a catch all category). The category “homosexual” (itself first used only in the 19th Century) is sometimes deployed to express the *genus* of same-sex attraction. However, this may beg the question as to the sex of one or both persons who experience the attraction. Nevertheless, many LGB persons regard the categories of “T” and also “I” as distinct and different. Some LGB persons exhibit attitudes towards TGP that are similar to those displayed by some members of the heterosexual majority. Some LGBT persons regard TGP as having unresolved issues with their sexual orientation. They may view them more accurately as lesbian, gay or bisexual persons unwilling to embrace that orientation and to accept their body image accordingly as other LGB persons do.

This attitude is a presumptuous one. It involves the attempted imposition by others on TGP of a demand for conformity which LGB persons resist for themselves. LGB persons share with TGP the violence, hostility and discrimination that arises from a denial of their dignity and the legitimacy of their human feelings, in lives as lived. All of the foregoing categories are subject to insistence that they should disguise those feelings in order to appear to conform to binary assumptions or other social norms and expectations held by others. LGB persons and TGP are equally entitled to resist demands that they conform to a binary classification, simply to make others, in their lives, feel more comfortable in the false belief that society conforms to a two

category taxonomy which is contradicted by the reality of their experience and much scientific research.²⁶

Both LGB persons and TGP have been subjected to criminalisation, discrimination and inequality in the law. They have also been subject to violence, hostility and denial of their basic rights in society. The oppressive laws and social attitudes towards GLBT persons have been remarkably similar in all categories, even if the hostility reserved for TGP has often been more violent and aggressive because that category is viewed as specially challenging. Thus LGB persons were earlier subjected to attempted compulsory transformative medical treatment. This included surgical lobotomy, chemical castration and radical surgical intervention without consent or after forced consent. The famous British scientist Alan Turing, recently granted a posthumous royal pardon, was convicted of sexual ‘offences’ that occurred with an adult, consensually in private. Turing elected for hormone suppression treatment as a price for avoiding imprisonment. His outstanding war service as a code breaker and status as a great scientist meant nothing to those responsible for these acts of oppression. TGP today should not have to wait 50 years for posthumous pardons. Nor should they be subjected today to surgery or therapy that is not wholly their independent choice, afforded with full capacity, knowledge and consent.²⁷

Because GBT persons became the focus for law reform earlier, it behoves them to make greater efforts to open dialogue, find common

²⁶ This is a point made by Lord [John] Browne, *The Glass Closet – Why Coming Out is Good for Business* (Harper, New York, 2014), 93, 127.

²⁷ The unconsensual conduct of lobotomy and other psychosurgery is now ordinarily strictly regulated and subject to both medical and legal supervision and control. On the position in Australia see: Ian Freckleton QC, ‘Mental Health law’ (ch16) in B White, F. McDonald and L. Willmott *Health Law in Australia*, Law Book, Sydney, 2010. 557 at 571 ff.

ground and give appropriate support to TGP now that they too are making reasonable requests to have their identity, disadvantages and difficulties in law and society recognised and addressed. Essentially, the demand of each sexual minority (LGBTI) is that they should be allowed to be themselves and to achieve their full potential as human beings and citizens, without the historical burdens of violence, hostility, discrimination and inequality. Where these disadvantages are derived from attitudes in society, supported by laws that serve only to oppress and discriminate, it is the duty of society and its law makers, to remove the discrimination and inequality. And to replace such laws with laws that recognise the reality of the lives of TGP and provide protection to them from violence, hostility and discrimination.

V. REJECT THE FALSE SPECTRE OF FRAUD

One objection, sometimes raised by opponents to the provision of gender identity recognition for TGP, is that easy recognition of TGP, without GRS will give rise to fraudulent or dishonest changes of identity. Thus, people could assume new identities in order to escape family or other legal obligations: by effectively becoming different persons or just to be contrary. This, it is suggested, is why identity documents are required for use within most nations and for crossing national borders. Opponents thus claim that introduction of a new identity (either M or F) or a different identity (either X or T) would needlessly inject uncertainty into the useful legal classification of gender as the most basic of all human categories. For this reason (or other reasons linked to religious perceptions or views about nature) they demand that change or the introduction of a new, intermediate or different category, or ease of change, should be resisted.

Specific mention may be made in this connection to the suggested potential of gender change as a way around the resistance in some communities to the idea of same-sex marriage. Indeed, this was the issue that arose in case of *W* in Hong Kong.²⁸ Hong Kong has not introduced a law for marriage equality (same-sex marriage). Such a move is said to be resisted by the “socially conservative” community of Hong Kong, although this proposition has not been democratically tested.²⁹ If no requirement to undergo GRS were imposed, as a precondition to marriage of a pre-op TGP, and if that marriage involved another person of the same sex, this could be used to circumvent “the democratic will” of the population that same-sex marriage should not be introduced. It would effectively allow a person, pretending to TGP status, to secure a same-sex marriage without conforming to the social requirement that such status should be restricted to persons of the opposite gender (M or F) as identified by anatomical features. The surgical precondition, at least, maintained equality and clarity in the operation of the law. It provided an objective criterion by which to determine eligibility to marriage.

In most places people can, of course, live together, whatever their sexual orientation or gender identity. In Hong Kong, they are no longer liable to prosecution for criminal offence for sexual acts between consenting adults in private, following the repeal of the anti-sodomy and similar laws. However, a common feature of East Asian societies,³⁰

²⁸*W v Registrar of Marriages* [2013] 3HKLRD 90 (CFA).

²⁹ The rapid change in popular attitudes to homosexuality generally and same sex marriages in particular. In many countries was the subject of a lead article in *The Economist* in the weeks after the roundtable: “The Gay divide” in *The Economist* (vol. 413 No 8908), 11 October 2014, 9.

³⁰ Sterilisation and GRS are required as a precondition in China, Japan, Singapore and Taiwan. Likewise under statute law in the Republic of Korea, although court cases are pending challenging the requirement. The

requiring GRS as the precondition to change of identity, reflected the views of those societies, so it is claimed, resistant to same-sex marriage, whatever the sexual orientation or gender identity of the parties might be. Such societies are entitled, so it is claimed, to respond to such views in any law reforms that are introduced in respect of TGP.

This is not the occasion for a full debate about laws on same-sex marriage. Upon that issue, swift and widespread acceptance of the idea has been remarkable, since the first such legislation was introduced in the Netherlands in 2000.³¹ It is true that there is some overlap between the arguments relating to marriage equality for LGBT persons and those concerned with legal recognition of TGP. Thus, a clear question is presented about the role of the state in enforcing the opinions of third parties in relation to the most intimate personal relationships and activities of others which cannot, as such, impinge upon the lives of those third parties in any direct, physical or practical way. The feelings of others, even feelings of revulsion, are not normally the foundation for legal restrictions and laws that inhibit the wellbeing and happiness of third parties. Normally, something more, tangible and concrete is required, especially when the inhibition seriously impedes the attainment of comfort, happiness and support in respect of a feature of nature that is not chosen and cannot readily, or at all, be changed.³²

requirement also exists in most CIS countries: Azerbaijan, Georgia, Moldova, Russian Federation and Ukraine. Yet it is also still present in the law of some European countries: Belgium, Finland, France, Greece, Luxemburg, Montenegro and Turkey.

³¹ The *Law of the Opening Up of Marriage* of the Netherlands was enacted in December 2000 and came into force on 1 April 2001. Such laws have now been enacted, or determined by court decision, in Argentina, Belgium, Brazil, Canada, Denmark, France, Iceland, Luxemburg, Mexico (3 provinces), Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, United Kingdom (England and Wales and Scotland), Uruguay, and thirty six states of the United States of America.

³² Cf. *Perry v Schwarzenegger* 704 F Supp 2d 921 at 931, 949, 998 (2010). This case was ultimately considered, in part, by the US Supreme Court: *Hollingsworth v Perry* 133 SCt 2652 (2013).

Confining attention strictly to the supposed possibility that easy change might be liable to use for fraudulent or dishonesty purposes or just to defy society, it is sufficient to call attention to the realities. The numbers of persons everywhere identifying as TGP are extremely small. Already, there are high social, familial and employment inhibitions that impede any such attempted change of identity. Given also the administrative and other practical steps that would be necessary (even without GRS as a precondition) the transformation is never going to be one that is lightly taken. If persons have fraudulent changes of identity in mind, there would be many much easier ways to effect the purpose. History, and the experience in the courts, suggests that change of gender would ordinarily be a last option chosen to pursue that objective.

Moreover, there are strong additional reasons why GRS should be confined to the comparatively small number of persons within the TGP community who cannot tolerate their own anatomical identity. To impose obligations of hormone radical surgery; invasive therapy; sterilisation; submission to intrusive procedures (medical and judicial panels) and psychiatric inspection is gravely disproportionate to the change that most TGP seek. All that most TGP ask for is that other people, in their own community, accept their reality and cease worrying intrusively about the anatomical features with which they were born. If other citizens are concerned about such matters, they should be told, in clear but firm language, that it is not their business. Once it is accepted that the model for relative ease of change of gender identity, permitted in the law of the United Kingdom, is a “compelling model”,³³ any more

³³ [2013] 3HKLRD 90 at [138]. Referring to the *Gender Recognition Act 2004* (UK). Other facultative such legislation has been adopted in Argentina and, on 1 September 2014, in Denmark.

intrusive law must be viewed as excessive and disproportionate to any reasonable state interest.

The suggestion that a state interest arises because of a risk of fraud in the use of the transfer of gender identity is negligible, or even non-existent. Far greater reasons would need to be shown to persist with the requirement of “the knife”.³⁴ Especially so as a percentage (at least 1%) of GRS has been demonstrated to be a failure, with grotesque instances of “botched surgery” evident in the objective illustrations provided to the Hong Kong roundtable. Such cases are bad enough if the surgery is chosen with informed consent and to fulfil the strong health needs and desires of the patient. But it is particularly objectionable where the surgery must be performed only to meet a legal requirement imposed by a legislature as a precondition to recognition of the gender identity or personal relationships that this class of citizens desire, in order to reflect truthfully their lived reality. Of all the arguments raised to resist the attainment of an integrity, that most citizens just take for granted in their lives, the requirement of serious GRS is the most excessive. Particularly so where it is allegedly supported by a chimerical fear about fraudulent change of identity or status or contrarian conduct to defy society.

VI. ACCEPT THAT THERE ARE LEGAL CONSEQUENCES TO ADDRESS

Notwithstanding the foregoing, it is clear that a provision in the law affording a right to change a person’s gender identity, will necessarily involve some consequential legal changes that need to be addressed by law reform.

³⁴ S. Winter “Identity Recognition without the Knife” (2014) HKLJ 115.

This is not a reason for inaction, in the case of TGP, any more than for other sections and minorities in the community. Where science demonstrates that a fundamental premise of an earlier law is contradicted by the legitimate needs or desires of some citizens, consequential law reform is both common and normal. The extent of such consequences will depend upon the presuppositions upon which the previous law was based.

It was impossible to introduce a right to marry for LGBT people whilst sexual activity between them (however adult, private and properly consented to) was criminal. The logic of removing the criminal barrier was felt in some jurisdictions to require removal of other discriminatory inhibitions. Yet consequential legislation did not follow quickly. Thus, although the French Republic (and the Netherlands copying its law) were amongst the first to abolish criminal penalties on same same-sex activity after 1791, the enactment of civil unions and equal marriage rights took more than 200 years to be adopted. At least in many countries of Western Europe, North America, South America and Australasia, a momentum has now arisen to follow through the essential logic of the recommendations of the Wolfenden Royal Commission in the United Kingdom.³⁵ If criminal laws could not be justified socially and legally in the case of LGBT persons, a question is then presented as to the justifiability of other differentiations and inequalities in the laws sustaining them.

In the specific case of TGP, several laws spring to mind as potentially affected by the recognition of the reality of TGP lives and the

³⁵ United Kingdom Royal Commission on Homosexuality and Prostitution (Sir John Wolfenden, Chair), HMSO, 1957

unjustifiability of discriminating on that ground in ways that are unjust, unequal and contrary to universal human rights. Relevantly affected laws include:

- * Laws governing the registration of births, deaths and marriages;³⁶
- * The entitlement of TGP (pre, non or post-op) to be married to a person who identifies as of the 'opposite' gender;³⁷
- * Laws governing the obligation to perform national military service;³⁸
- * Laws governing the adoption of children;
- * Laws governing the use of gender identified public toilets and like facilities;
- * Laws for identity documents; passports; drivers' licences and other identity documents;
- * Laws governing a change of trust, credit, financial and other documents;
- * Laws governing change of name reflecting ethnic or religious affiliation;³⁹
- * Laws prohibiting discrimination; protecting religious expression; practice of religion and beliefs;
- * Laws governing employment and particularly protecting particular groups;⁴⁰
- * Laws or policies governing inflammatory, denegratory or other hate speech;⁴¹

³⁶ *Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11; (2014) 88 ALJR 506.

³⁷ *W v Registrar of Marriages* [2013] 3HKLRD 90 (CFA).

³⁸ In Singapore, TGP must perform National Military Service but can be exempted and will be excluded from certain sensitive areas.

³⁹ M.D. Kirby, "Fundamental Human Rights and Religious Apostasy: the Malaysian Case of Lina Joy" (2008)

17 *Griffith Law Review* 151.

⁴⁰ Noted in the *Times of India*, 15 April 2014.

- * Provisions in anti-discrimination law for TGP and possible exemptions for particular religious and educational bodies, clubs and the like.

Consequential law reform is often required following a significant change in the law concerning groups and communities in society. The case of the legal status of TGP is no different. It does not justify the imposition of grossly disproportionate preconditions. Courts in many countries have lately taken significant steps in recognising the status of TGP and reflecting the proposition that a person's sex or gender is unequivocally "male" or "female".⁴²

VII. ACCEPT THAT LAW REFORM IS URGENT

There is extensive evidence available to society and its legislators today that LGBT people, and TGP in particular, suffer life endangering disadvantages against which they need effective protection, the adoption of law reform and policy improvement. The areas in which such disadvantages arise in the case of TGP include:

- * The prevalence of murders affecting TGP in many countries;
- * The frequency of acts of violence and hatred;
- * The higher levels of HIV infection caused by isolation and hostility;⁴³ and

⁴¹ Gender identity discrimination in employment and healthcare insurance has been prohibited in the United States since 2012 and is included in Federal hate crime laws since 2009.

⁴² *AB v Western Australia* (2011) 244 CLR 390; [2011] HCA 42 (Australia); *Khaki v Rawalpindi* Supreme Court of Pakistan, 12 December 2009; *Khamis v Government of Negeri Sembilan & Ors*, Court of Appeal of Malaysia, 7 November 2014 (Malaysia, ban on cross dressing overturned) following *National Legal Services Authority v Union of India* (Supreme Court of India, 15 April 2014).

⁴³ S. Winter, "Identity Recognition without the Knife" (2014) HKLJ 115 at 123-124 where the research on the incidence of murder and HIV prevalence is documented.

- * The difficulties of securing stable employment, relationships and disproportionate engagement with undesired involvement in commercial sex work.⁴⁴

The achievement of change in the law to remove elements of inequality, to provide anti-discrimination and other protection and to advance non-discrimination is thus necessary and urgent. It should have priority and be supported by efforts of media and other means of communication and public education.

VIII. ADOPT WORLD'S BEST PRACTICE

In the introduction of law reform, a question may arise, in this context as in others, as to whether a step-by-step process of reform should be taken. Or might this approach result in the enactment of reforms already outdated elsewhere, making the attainment of true equality and the full removal of inequality, more difficult. This is not an unusual controversy in law reform. It arose earlier in relation to the wave of reform on LGB relationship laws, in the form of successive laws on civil partnerships, laws on civil union and laws on marriage of persons of the same sex.

Once the wave of reform on civil unions began to be enacted for LGB persons and gathered momentum, a serious question was presented after an increasing number of countries moved to enact laws on marriage. In Australia, for example, successive endeavours had been made by the legislature of in the Australian Capital Territory, to adopt legislation successively for civil unions, civil partnerships and marriage. The civil union law was disallowed by the Australian Parliament during a

⁴⁴ UNDP, Global Commission on HIV and the Law, above n 4 at 52

Coalition (conservative) government as unacceptably purporting to “mimic” marriage. Indeed, a prohibition in federal legislation was enacted forbidding recognition of the status of same-sex marriage.⁴⁵ Thereafter, a civil partnership act was enacted by the Territory Assembly in the Territory. It was likewise disallowed by the Federal Parliament during a Labor Government, ostensibly because of an electoral commitment to religious lobby groups. Eventually, a law providing for “marriage” was enacted by the Legislative Assembly of the Australian Capital Territory on the basis that the Federal Parliament had ‘abandoned’ the field of same-sex marriage. However, that law was declared unconstitutional by the High Court of Australia because of the broad ambit of the federal legislative power over the “jurisdictic classification” of “marriage” and the exercise of that power to forbid same-sex marriage recognition. The High Court of Australia, nonetheless, made it plain that the adoption of an amendment to the *Federal Marriage Act*, to permit same-sex marriage, was open to the Federal Parliament.⁴⁶ The advance of thinking on this issue in Australia, and the background of legal change in so many other countries, make it highly unlikely that a compromise on the issue could now be struck providing for civil unions or civil partnerships and avoiding the “marriage” word. What might have been feasible at an earlier time, has now been overtaken by fast moving events.

A similar question is presented concerning the law on TGP. On one view, the common East Asian-model, imposing an obligation for TGP to

⁴⁵ *Marriage Amendment Act* 2004 (Aust). This law followed the principle of the *Defence of Marriage Act* (DOMA) of the United States of America. S.Chordia, “The High Court Same-Sex Marriage and Federalism” (2014) 39 *Alternative LJ* 84 at 86.

⁴⁶ *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441; [2013] HCA 55.. The decision declared that the *Marriage Equality (Same-Sex Act)* 2013 (ACT) was inconsistent with the *Marriage Act* 1961 (Aust) and of no effect. For commentary, see Ann Twomey, “Same-Sex Marriage and Constitutional Interpretation” (2014) 88 *Australian Law Journal* 613.

submit to GRS, with its radical surgical and other interventions, would at least meet the needs of TGP who make informed decisions to undergo sex-reassignment surgery. However, this would be achieved at the expense of TGP who, having considered such serious obligations and the risks and burdens of the intervention it entails (with the lifelong necessity of medical care, not to say very considerable costs), but still wish to proceed. Still, the consequence would be to introduce some reform but to deny the basic needs and human rights of a large proportion of the TGP population. Whilst the proportions might differ from one society to the next, the question remains whether the radical surgery precondition should be accepted as a worthwhile reform. Or would it impede or delay, the more “compelling” permissive reform mentioned in the *W* case by the Hong Kong Court of Final Appeal?

Resolving this question is a matter of political and practical judgment. Given the pace at which reform is occurring in the law affecting LGBT people, including TGP, in so many jurisdictions, and considering the disproportionality of the precondition imposed to the benefits secured, the better view would appear to be to await a more satisfactory reforming measure.

In default of legislation, the logic of recent judicial reasoning, as for example in Hong Kong of the Court of Final Appeal might point to possible further judicial intervention, where legislative intervention has failed to meet the stipulated requirements. In several of the countries of the Asian Sub-Continent (Pakistan, Nepal, Bangladesh and India) it has been judicial rather than legislative intervention that has addressed the

rights of TGP (traditional Hijira).⁴⁷ Although this has also had disadvantages as sometimes subsuming all TGP into the ancient and traditional temple-related category of *Hijira*, with whom globally most TGPs today do not identify.

IX. ENGAGE STRATEGICALLY WITH LAW REFORM

A strength of the Hong Kong roundtable was the involvement in discussions of large numbers of TGP themselves. This has been a feature of the international strategy to address the HIV epidemic through national and international efforts. It has involved law and policy makers listening to, and learning from, those who are most closely involved and therefore most able to speak effectively on the direction and content of law reform.

Such roundtables should operate strategically. Whilst engagement of TGP with LGB persons and groups is valuable, as providing knowledge on initiatives that have worked and those that have failed, care must be taken to avoid constantly speaking to the converted. Although this can sometimes add conviction and confidence to advocates of law reform, it is important that a strategy of engagement with actual law-makers must be attempted. This means engagement with legislators, senior officials and judicial officers. It also means involvement with the organised legal

⁴⁷ A so called “third sex” or “Hijira” appear in all countries of the Indian Sub-Continent and there are similar categories in other countries including the Fa’afafine in Samoa. The judicial decisions in Australia, Pakistan, India and Malaysia referred to above are examples of enlightened decisions. See, however, *Silverio v Philippines*, Supreme Court of the Philippines, 22 October 2007 which refused to order change of the name and sex on a birth certificate of a TGP. International Commission of Jurists, *Sexual Orientation, Gender Identity and Justice – A Comparative Law Casebook*, Geneva, 2011, 183.

profession, law schools, medical faculties and community groups. Before and during the UNDP roundtable in Hong Kong in 2014, attempts were made to alert legislators in Hong Kong to the meeting. Although a relevant Bill was under consideration by LegCo, no direct engagement with any of the law-makers was achieved. Consideration must be given to ways in which such roundtables can be made more congenial and useful to law-makers. This may include timing, venue, paper distribution, electronic analysis and advocacy; and other means of spreading knowledge, experience and wisdom.

It is also essential that experts, with relevant knowledge, should be invited to such events who can speak from disciplines other than law. These may include expert surgeons, anthropologists, religious leaders, as well as experts in economics, philosophy and social science. The collection of precise data on the number, variety and experiences of TGP would be useful in framing sensible policies based upon empirical data. This has also been the general strategy adopted in responding to the HIV epidemic. Because that epidemic falls disproportionately on TGP, its lessons should be extrapolated to the wider questions of justice, equality and law reform that the position of TGP in every society evoke.

Despite the lack of direct engagement in Hong Kong with legislators then considering the proposed legislative reform, it was announced very shortly after that the Bill was being withdrawn. The UNDP workshop and the publicity it attracted might have been one of the factors that led to that welcome development.

X. ENGAGE WITH THE INTERNATIONAL COMMUNITY

The TGP group in any population will only ever be very small in number. Such a group and the individuals within it, are quite easily overlooked, ignored or dismissed by people who are hostile or antipathetic to their objectives.

Progress has been made in the past three decades in respect of LGB issues, in part because of the advance of universal human rights law; in part, because of the growing impact of scientific knowledge about those communities; in part, because of the unexpected advent of the HIV epidemic and the fact that LGB people, especially young gay men, were active, vocal and politically adept. They were able to point to the linkages between their exposure to HIV and the dangers of transmission of HIV to the entire community. Other considerations have included the role of international media in spreading knowledge and advocacy for basic matters of justice and equality.⁴⁸

Very important has been the strong leadership on LGBT issues in the statements of the Secretary-General of the United Nations (Ban Ki-moon); the Administrator of United Nations Development Programme (Helen Clark); successive High-Commissioners for Human Rights (Mary Robinson, Louise Arbour, Navi Pillay and Prince Zeid Ra'ad Al Hussein) and the advocacy of successive executive directors of GPA, WHO and UNAIDS (Jonathan Mann, Peter Piot and Michel Sidibé). Initiatives of the World Bank (Dr Jim Chin, Executive Head of the World Bank) and of the Global Fund against AIDS, Malaria and Tuberculosis (Dr Mark

⁴⁸ See for example the editorial “Transgender Rights in India” in the *International New York Times*, 26 April 2014, 10 referring to “a welcome ruling by the nation’s Supreme Court ensures fundamental protections”. The article called for the abolition of Section 377 of the *Indian Penal Code*. That provision had been declared partly unconstitutional and read down in the decision of the Delhi High Court in *Naz Foundation v Delhi* (2009) 4 LRC 838. However, that decision was later reversed by the Supreme Court of India in *Suresh Kumar Koushal v Naz Foundation*, 2013 (15) SCALE 55: (2014) 1 SCC 1. The decision in *Koushal* is now under further consideration by the Supreme Court of India following a ‘curative’ petition.

Dybul) and other bodies have also been supportive and influential. The World Bank, for example, is now addressing directly the significant economic cost that is inflicted on societies by their discriminatory laws and policies against LGBT persons and groups. Where ethical and human rights arguments are ignored, it will be less easy for countries that discriminate against LGBT to justify and sustain their strategies when regard is had to the opportunity costs that this conduct imposes on their economies and population.

TGP are a minority within a minority. They can therefore easily be overlooked. For many of them, the journey through life is amongst the hardest taken by any human being. In the aftermath of the suffering of military and civilian populations in the Second World War and the revelations of genocide, crimes against humanity and nuclear dangers that followed, the inclusion amongst the primary objectives of the United Nations, stated in the *Charter* of 1945, of the commitment to universal human rights has been vindicated. As elaborated in the *Universal Declaration for Human Rights* and the United Nations human rights treaties, such human rights undoubtedly extend to TGP.⁴⁹ International human rights law provides the context in which national and sub-national law reforms, court decisions and international initiatives must commonly be formulated and often judged. By listening to the stories of TGP, all human beings can begin to empathise with, and understand, the wrongs they have suffered. Such understanding will advance the achievement of law reforms that conform to these suggestions.

⁴⁹An analysis of the applicable provisions of international human rights laws is briefly noted in Winter, above n 2 (2014) HKLJ 115 at 124: referring to the ICCPR, Arts 10, 16, 17, 23 and the ICESR Art 6. See also the *Yogyakarta Principles of the International Commission of Jurists* (2007). Dr Winter sets out statements by the High-Commissioner for Human Rights, Special Rapporteur on Torture and other Cruel Inhuman and Degrading Treatment and Punishment as well as the decisions of final courts and other bodies.