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She is a he – even on paper

Posters for transgender rights often read: Some men are born in their bodies... others have to fight for it. XYZ, born a female, lived as a male and underwent a sex-change, did just that – he took his fight to court, and won. Experts and stakeholders weigh in on what the ruling could mean for the community.

By SHAILA KOSHY

koshy@thestar.com.my

REMEMBER that time your parents made you wear a shirt or dress to a function and you were uncomfortable the entire time – maybe it was scratchy or it was the wrong size or it was out of fashion.

Whatever it was, when you came home, you peeled that “outer skin” off.

Now, imagine living inside a female body 24/7 when you feel like a male or vice versa and not being able to peel your skin off.

Science has advanced so much one can reassign one’s gender surgically but the Legislature and Courts in many countries still refuse to let a person who has had a sex-change change his/her name/sex on a piece of paper if his/her chromosome was the same as at birth.

The High Courts in Malaysia have been unsettled on whether to recognise gender reassignment on an applicant’s birth certificate or MyKad the last 15 years, there are more decisions “against” than “for”.

In 2013, the Court of Appeal’s decision re *Kristie Chan* ruled in favour of “against” and it seemed to settle the law.

However, XYZ, who was represented by counsel William Lim and Muhammad Izzat Md Jonid, had a stab at it and on July 18, the Kuala Lumpur High Court scored one for the trans community.

XYZ, who was born a female, obtained a declaration that he was now a man.

Justice S. Nantha Balan also ordered the National Registration Department (NRD) to change XYZ’s name and the digit of his MyKad to reflect the male gender.

“The Plaintiff has a precious constitutional right to life under Article 5(1) of the Federal Constitution and the concept of ‘life’ under Article 5 must necessarily encompass the Plaintiff’s right to live with dignity as a male and be legally accorded judicial recognition as a male,” he said, in his 41-page written grounds of judgment which were released three weeks later.

Justice Nantha Balan pshawed the NRD’s argument that a person who has sought the change of gender might later seek a restoration.

“I find that it is not just far-fetched, but is also reflective of an alarmist mindset”.

The judge said XYZ – who was born a female and had grown up behaving and living like a male, underwent gender re-assignment surgery and obtained the validation of the medical profession that he is a male person – has “satisfied the threshold that was set out in *Kristie Chan*’s case”.

He disputed NRD’s suggestion that there would be confusion, arguing instead that recognising XYZ’s reassigned gender would only contribute to certainty and avoid conflict, for example, if XYZ were compelled to use the female washroom.

“It all boils down to the quality and persuasiveness of the medical and psychiatric evidence and factual matrix that is presented to the court as the application for a declaration must be for genuine reasons and not for spurious or suspicious reasons.

“In my view, the chromosomal requirement is archaic and should be discarded because scientifically, it is impossible for a biological male to have female chromosomes and vice versa.

“The male XY and female XX chromosome will remain static throughout the individual’s natural life. To insist on the “chromosomal requirement is to ask for the impossible”, he added.

Does this decision change the current legal position?

Lawyer Aston Paiva says yes, because Malaysia has largely followed the English courts from the 1970s, that is, the gender which a post-operative transsexual is living in is not legally recognised.

With XYZ, he says there is now recognition that post-operative transsexuals have a constitutional right to live with dignity and this includes being able to live in the gender they identify with and be legally accorded judicial recognition.

Lawyer Nizam Bashir agrees, saying this decision is a departure from the previous trend of the court (*Wong Chiou Yong; Aleesha Farhana Abdul Aziz; Fan En Ji; and Kristie*).

Lawyer Honey Tan disagrees: “The judge is merely applying the principles laid down in *Kristie*. He also aligned himself with the decision in *JG* (a 2005 case seen as the landmark decision for transsexuals), and took a rights-based approach.”

Tan says Justice Nantha Balan relied on the right to life, which was to be read expansively to mean a right to live with dignity.

“From the 2007 NRD circular, it shows that even the NRD knew a person’s gender may be changed in the IC – they just need a court order.

“In *Wong*, he was trying to change his gender in the birth certificate. The judge there had a harder time because the Births and Deaths Registration Act provide for change to the birth certificate only when there is an

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error. The Act is silent as to the IC.”

Asked if the NRD’s circular that a gender change is not allowed unless by court order need to be changed now to reflect this decision, Nizam says it is tempting to think the circular can remain unchanged – it did not preclude decisions like that by Justice Nantha Balan.

“However, the State should not impose unnecessary disabilities on citizens in matters like this and compel them to go to Court so long as similar supporting documents can be presented to the Registrar.

“Perhaps, we can take our cue from guidelines on sex and gender as issued by other countries. That said, nuances may abound for Muslim citizens and this is a matter that needs to be worked out in time.”

Former United Nations Cedaw (Convention on the Elimination of Discrimination against Women) Committee member Shanthi Dairiam says XYZ is a progressive decision that “moves forward the possibility of the right to identify oneself with a gender that one is not born with.”

“Without this right, individuals who do not identify with the gender assigned to them at birth for biological reasons have no legal gender identity.”

She says the judge has set a precedent that will add to the “scarce body of human rights based jurisprudence” in Malaysia.

Shanthi adds that the judge is cognizant of theological objections and dismisses this line of thinking saying, “it stems from the old or orthodox school which holds the view that the gender which is determined at birth is fossilised and incapable of change or re-assignment.”

On whether Parliament should enact a law, like UK, to state clearly the legal position, Paiva, Nizam and Tan say it is oppressive to expect all post-operative transsexuals to file a case just to have the gender in which they are living in recognised.

Not many people can afford to engage a lawyer to fight for their rights, and there are even fewer lawyers who would do the work pro bono, adds Tan.

Given the social and health implications to the lives of transgender people, Paiva says Parliament must table a Bill to prescribe procedures to recognise the gender of a person other than the one assigned to him at the time of birth (which is dependent upon medical evaluation of a child’s genitals).

“A good model would be the UK’s Gender Recognition Act 2004, which has alleviated a lot of the problems faced by transgender people there. The same Bill should also render it unlawful for States to penalise transgender people for their choice of attire, or to coerce them to wear a particular attire, given the psychological harm this would cause to them.”

Nizam says clarity in our laws is always a good thing but as for whether there would be religious objections, he says it “all depends on

how the law in question is phrased”.

“Either way, let stakeholders express their views. Malaysia is made all the more richer because of the diversity of views and communities that it has to offer.”

Justice for Sisters’ S. Thilaga says the legal precedents used in Malaysia are outdated and “inconsistent with science and lived experiences of trans people”.

“Chromosomes do not determine our gender identity; this has been scientifically proven. Chromosomes determine our sex, which refers to our body. Gender is determined by our brain – who we are, how we see ourselves,” she adds.

XYZ’s lawyers confirmed on Friday that the NRD has filed a notice of appeal.

“I think it’s unfortunate the Government wants to appeal,” says Thilaga, who adds that gender recognition processes in many countries, including Malta and Argentina are quick, accessible and transparent.

Tan is more positive: “Last month, the Federal Court created a new tort of sexual harassment in Malaysia.”

She says it showed the Judiciary understood the need to “take a leap on occasions in order to uphold the rights of those who are vulnerable”.

“I am optimistic,” says Tan, adding, “*Kristie’s* decision already set the precedent that all factors must be considered – the Court of Appeal there appreciated that to be human is to be more than just the sum of our bodily parts and chromosomes.

“To be human, we must also be able to express ourselves in the gender to which we are psychologically aligned.”

As Thilaga notes, the refusal to allow trans people to change their name and gender marker has a profound impact on the lives of trans people.

This includes a denial of employment opportunities, increased vulnerability in relation to harassment and arrests at roadblocks and public places, humiliating experiences at healthcare settings and banks, being treated and placed in wards that do not reflect the individual’s authentic gender identity, she adds.

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Justice S. Nantha Balan

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Tan: 'To be human is to be more than just the sum of our bodily parts.'



A new chapter: Transgender activists celebrating outside the Court of Appeal in Putrajaya on Nov 7, 2014, when three Malaysian transgender women won a landmark bid to overturn an Islamic anti-crossdressing law. — AFP