HCAL 1077/2018

[2019] HKCFI 2518

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO 1077 OF 2018

BETWEEN

MK	Applicant
and	
THE GOVERNMENT OF HKSAR	Respondent

Before: Hon Chow J in Court

Dates of Hearing: 28, 29 and 30 May 2019

Date of Further Written Submissions: 11 July 2019

Date of Judgment: 18 October 2019

J U D G M E N T

INTRODUCTION

1. Two principal issues arise for determination in this application for judicial review:

(1) whether the denial of the right to marriage to same-sex couples under Hong Kong law constitutes a violation of their constitutional rights; and

(2) whether the Government's failure to provide a legal framework for the recognition of same-sex relationships such as civil unions, registered partnerships or other legally recognised status for same-sex couples as an alternative to marriage also constitutes a violation of their constitutional rights.

2. For reasons which I shall explain in this judgment, I am of the view that the answers to both questions are "no". Accordingly, the present application for judicial review stands to be dismissed.

BASIC FACTS

3. The basic facts of this case can be shortly stated. MK is a female Hong Kong permanent resident. She was born and raised in Hong Kong, and has reached the age of majority. She is a lesbian, having realised her sexual orientation since childhood. Throughout the years, she has had a few same-sex relationships. She has been co-habiting with her current same-sex partner, who is also a Hong Kong permanent resident, for around two years. According to her, they have been in a stable relationship ever since their co-habitation.

4. In May 2018, the Applicant and her same-sex partner discussed the possibility of establishing a legal relationship in Hong Kong or elsewhere. They wished to marry in Hong Kong, or enter into a form of legally recognised civil union or registered partnership should such framework be available in Hong Kong. However, the law of Hong Kong did not permit the Applicant and her same-sex partner to marry and, furthermore, did not provide any framework such as civil union, registered partnership or other legally recognised status for the recognition of the Applicant and her same-sex partner's relationship.

5. It is MK's position that:

(1) the denial of the right of same-sex couples to marry under Hong Kong law is unconstitutional; and

(2) the failure of the Government to provide a legal framework for the recognition of same-sex relationships such as civil unions, registered partnerships or other legally recognised status as an alternative to marriage is also unconstitutional.

6. On 11 June 2018, MK made the present application for leave to apply for judicial review. Leave to apply for judicial review was granted on 13 June 2018 on consideration of papers alone. On 6 May 2019, MK gave notice of intention to amend the Form 86. In the draft Amended Form 86, MK seeks the following declarations:

(1) a declaration that the *Marriage Ordinance*, Cap 181, to the extent that it denies the right to marry to same-sex couples, is inconsistent with BL 25, 32, 37 and/or 39[1] and/or BOR 1, 14, 15, 19 and/or 22 and is unconstitutional;

(2) a declaration that the *Matrimonial Causes Ordinance*, Cap 179, to the extent that it denies the right to marry to same-sex couples, is inconsistent with BL 25, 32, 37 and/or 39 and/or BOR 1, 14, 15, 19 and/or 22 and is unconstitutional;

(3) a declaration that the failure on the part of the Government of the HKSAR to provide a legal framework under Hong Kong law for the recognition of same-sex relationships such as civil unions, registered partnerships or other legally recognised status for same-sex couples as an alternative to marriage under the *Marriage Ordinance* and the *Matrimonial Causes Ordinance*, constitutes a violation of BL 25, 32, 37 and/or 39 and/or BOR 1, 14, 15, 19 and/or 22.

MARRIAGE AS A STATUS AND ITS CONSEQUENCES

7. Marriage has been said to be "perhaps the most important and sensitive of human relationships"[2]. It has also been said that the legal recognition of marriage is "a matter of status and is not for the spouses alone to decide. It affects society and is a question of public policy. Status is not conferred only by a person upon himself, it has to be recognised by society"[3]. Marriage has deep-rooted social and cultural connotations which may differ largely from one society to another[4], and thus the status acquired by marriage varies according to the laws of different places.

8. It is generally recognised that the status of marriage gives the husband and wife a new legal position from which flows both rights and obligations with regard to the rest of the public which unmarried couples do not have[5]. In Hong Kong, the status of marriage brings with it a broad range of personal, social, economic and legal consequences for the husband and wife. Ms Gladys Li, SC (for MK) has provided the court with a useful table summarising 23 specific, non-exhaustive, areas in which legal consequences flow from the status of marriage in Hong Kong, including adoption, bigamy, compellability of spouse at criminal trial, damages for personal injuries, dispute between husband and wife as to the title to or possession of property, divorce, fatal accidents, inheritance, insurance benefits, maintenance, medical decision, no recognition of foreign same-sex marriage, organ transplant, paternity leave, pension for surviving spouses, private columbaria, public columbaria, public housing application, reproductive technology procedure, sex discrimination against married persons, spousal benefits for civil servants, tax benefits and working family allowance scheme. For the present purpose, it is not necessary to go into the details about the precise legal consequences flowing from the status of marriage, save to state that the ability to acquire such status is unquestionably a matter of singular importance to any Hong Kong resident.

THE RELEVANT CONSTITUTIONAL RIGHTS

9. MK relies on various articles in the Basic Law and the Hong Kong Bill of Rights in support of her application for judicial review. In particular, she relies on the following articles of the Basic Law:

(1) **BL 25** – "香港居民在法律面前一律平等 (All Hong Kong residents shall be equal before the law)."

(2) **BL 32** –

> "(1) 香港居民有信仰的自由 (Hong Kong residents shall have freedom of conscience).
>
> (2) 香港居民有宗教信仰的自由，有公開傳教和舉行、參加宗教活動的自由 (Hong Kong residents shall have freedom of religious belief and freedom to preach and to conduct and participate in religious activities in public)."

(3) **BL 37** – "香港居民的婚姻自由和自願生育的權利受法律保護 (The freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law)."

10. The articles of the Hong Kong Bill of Rights that MK relies on are:

(1) **BOR 1(1)** – "人人得享受人權法案所確認之權利，無分種族、膚色、性別、語言、宗教、政見或其他主張、民族本源或社會階級、財產、出生或其他身分等等 (The rights recognized in this Bill of Rights shall be enjoyed without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status)."

(2) **BOR 14** –

> "(1) 任何人之私生活、家庭、住宅或通信，不得無理或非法侵擾，其名譽及信用，亦不得非法破壞 (No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation).
>
> (2) 對於此種侵擾或破壞，人人有受法律保護之權利 (Everyone has the right to the protection of the law against such interference or attacks)."

(3) **BOR 15(1)** – "人人有思想、信念及宗教之自由。此種權利包括保有或採奉自擇之宗教或信仰之自由，及單獨或集體、公開或私自以禮拜、戒律、躬行及講授表示其宗教或信仰之自由 (Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching).

(4) **BOR 22** – "人人在法律上一律平等，且應受法律平等保護，無所歧視。在此方面，法律應禁止任何歧視，並保證人人享受平等而有效之保護，以防因種族、膚色、性別、語言、宗教、政見或其他主張、民族本源或社會階級、財產、出生或其他身分而生之歧視 (All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status)."

HONG KONG MARRIAGE LAW DOES NOT PERMIT SAME-SEX COUPLES TO MARRY

11. Subject to the possibility of an "undated" interpretation (which will be considered below), it is clear that the current Hong Kong marriage law does not permit same-sex couples to marry in Hong Kong. The following provisions in our statute books put the matter beyond doubt:

(1) Section 4 of the *Marriage Reform Ordinance*, Cap 178, which states that:

> "Marriages entered into in Hong Kong on or after [7 October 1971 [6]] shall imply the voluntary union for life of one man with one woman to the exclusion of all others and may be contracted only in accordance with the Marriage Ordinance."

(2) Section 40 of the *Marriage Ordinance*, Cap 181, which states that:

> "(1) Every marriage under this Ordinance shall be a Christian marriage or the civil equivalent of a Christian marriage.
>
> (2) The expression Christian marriage or the civil equivalent of a Christian marriage (基督教婚禮或相等的世俗婚禮) implies a formal ceremony recognized by the law as involving the voluntary union for life of one man and one woman to the exclusion of all others."

(3) Section 20(1) of the *Matrimonial Causes Ordinance*, Cap 179, which states that:

> "A marriage which takes place after 30 June 1972 shall be void on any of the following grounds only –
>
> > (d) that the parties are not respectively male and female."

12. It can be seen immediately that there are 4 essential elements of a valid marriage under the current statutory definition of marriage in Hong Kong, namely:

(1) voluntary union;

(2) for life;

(3) of one man and one woman;

(4) to the exclusion of all others.

13. For the purpose of this case, only the third element ("one man and one woman") requires consideration. This element of a valid marriage in Hong Kong has been an essential part of the statutory definition of marriage in Hong Kong even since a statutory definition of the same was first adopted in 1932[7]. Although the law of Hong Kong continues to recognise and/or provide for the validity and recognition of "customary marriages" and "modern marriages"[8] celebrated in Hong Kong before 7 October 1971, those marriages were also heterosexual marriages. In short, Hong Kong law has never recognised or permitted marriages by same-sex couples, and same-sex couples have never been able to lawfully marry in Hong Kong.

RIGHT TO MARRY UNDER BL 37 HAS NO APPLICATION TO SAME-SEX COUPLES

14. BL 37 states generally that the freedom[9] of "marriage" of Hong Kong residents shall be protected by law, without specifying whether the concept of marriage in that article refers to heterosexual marriage only or includes same-sex marriage. Nevertheless, it is, in my view, clear that the expression "marriage" in BL 37 is a reference to heterosexual marriage only, for the following reasons:

(1) The state of the domestic legislation at the time of the adoption of the Basic Law is an important aid to its proper interpretation[10], because it provides the context for a proper understanding of the Basic Law and because of the important theme of continuity of the Basic Law[11]. At the time of the promulgation of the Basic Law on 4 April 1990 and at the time that the Basic Law came into effect on 1 July 1997, Hong Kong law did not provide for or recognise same-sex marriage.

(2) At the time of the promulgation of the Basic Law and at the time that the Basic Law came into effect, no country in the world provided for or recognised same-sex marriage. Netherlands was the first country in the world to provide for same-sex marriage in 2001. It would be unreal to attribute to the draftsman of the Basic Law an intention that the word "marriage" in BL 37 would include a same-sex marriage.

(3) The fundamental rights provided for in Chapter III of the Basic Law should be read together with the Hong Kong Bill of Rights, which is incorporated as part of the Basic Law and given constitutional effect by BL 39, as a coherent whole[12]. BOR 19 states as follows:

> "(1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
>
> (2) The right of men and women of marriageable age to marry and to found a family shall be recognized."

It is clear that the Hong Kong Bill of Rights only protects the right of heterosexual couples to marry. BOR 19(2) is based on ICCPR 23(2), which has consistently and uniformly been interpreted to mean recognition and protection of a heterosexual marriage between a man and a woman, but not a same-sex marriage[13]. BL 37 and BOR 19 should be read consistently with one another.

15. In this connection, I should mention that the above interpretation of BOR19/ICCPR 23 is in line with ECHR 12, which states that: "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right". It has consistently been held that ECHR 12 enshrines "the traditional concept of marriage as being between a man and a woman"[14], but does not provide for the right of same-sex couples to marry. In *Schalk and Kopf v Austria* (2011) 53 EHRR 20, at paragraph 55, the European Court of Human Rights ("ECtHR") made the following telling observation:

> "…looked at in isolation, the wording of art.12 might be interpreted so as not to exclude the marriage between two men or two women. However, in contrast, all other substantive articles of the Convention grant rights and freedoms to 'everyone' or state that 'no one' is to be subjected to certain types of prohibited treatment. The choice of wording in art.12 must thus be regarded as deliberate. Moreover, regard must be had to the historical context in which the Convention was adopted. In the 1950s, marriage was clearly understood in the traditional sense of being a union between partners of different sex."

Although BL 37 refers to the freedom of marriage of "Hong Kong residents", instead of "men and women", as being protected by law, I do not consider this choice of words in BL 37 could lead to the conclusion that the article also protects the freedom (or right) of same-sex couples to marry, in view of the fact that "marriage" was, at the time of the promulgation of the Basic Law, clearly understood in the traditional sense of being a union between a man and a woman.

16. That the word "marriage" in BL 37 refers only to heterosexual marriage has been expressly recognised by both the Court of Final Appeal and the Court of Appeal.

(1) In *W v Registrar of Marriage* (2013) 16 HKCFAR 112, Ma CJ and Ribeiro PJ, in their joint judgment, stated that it was common ground that "a marriage for constitutional as for common law purposes is the voluntary union for life of one man and one woman to the exclusion of all others" (paragraph 63), and further that "[i]t is in the nature of the institution of marriage that it must be subject to legal regulation, for instance, as to marriage having to be monogamous and between a man and a woman …" (paragraph 65). Chan PJ, in his dissenting judgment, also stated as follows:

> "When the Basic Law was drafted in the 1980s and promulgated in 1990, the meaning of marriage in art 37 must have been informed by the state of the domestic legislation at the time. (See the relevance of the state of domestic law as part of the context for interpretation of a constitutional provision in *Chong Fung Yuen v Director of Immigration* (2001) 4 HKCFAR 211.) The right to marry under that article was clearly intended to refer to the right to marry of a man and woman as it was then understood… That was the basis of the right to marry intended to be protected under art 37 when it was drafted/adopted and promulgated" (paragraph 165).

(2) In *QT v Director of Immigration* (2018) HKCFAR 324, the following was stated by the Court of Final Appeal:

> "Article 37 of the Basic Law provides that the freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law. However, it has not been argued that this makes marriage available to same-sex couples. As the Director points out, the European Court of Human Rights ('ECtHR') has held in relation to the comparable right to marry under Article 12 of the European Convention on Human Rights ('ECHR'), that that provision 'does not impose an obligation on contracting states to grant same-sex couples access to marriage'. As the point has not been argued, it is unnecessary to say anything more" (paragraph 26).

(3) In *Leung Chung Kwong v Secretary for Civil Service* [2018] 3 HKLRD 84 (CA), Cheung CJHC (as he then was) stated that the proposition that marriage in Hong Kong meant heterosexual marriage only was "self-evident" (paragraph 2), that the law was and had always been understood that in Hong Kong, BL 37 constitutionally guaranteed the right to heterosexual, but not, same-sex marriage (paragraph 7). In the same case, Lam VP said that "[t]he unique status of marriage, as the laws in Hong Kong presently stand, is only confined to heterosexual marriages" (paragraph 23). Lastly, Poon JA stated that "[o]nly heterosexual marriage is legally recognised at all levels of our laws. Other forms of union between adults, including same-sex marriage, are not" (paragraph 89).

17. While it is true that the question of whether the meaning of the word "marriage" in BL 37 could be extended to include same-sex marriage was not argued in those cases, I do not consider this fact weakens the strength of the aforesaid judicial pronouncements by the Court of Final Appeal and Court of Appeal that BL 37 only protects heterosexual marriage. I believe this proposition to be plainly and self-evidently correct, and the contrary proposition is simply not capable of serious argument.

18. In support of the argument that BL 37 should be construed to include the protection of the right of same-sex couples to marry, Ms Li relies on:

(1) the language of BL 37;

(2) the principle that fundamental rights must be interpreted generously;

(3) the context and purpose of BL 37;

(4) the principle that the Basic Law should be construed as a living instrument; and

(5) the protection of minorities against discrimination.

19. In respect of (1), Ms Li's focus is on the words "Hong Kong residents", and she argues that the right protected by that article is available to Hong Kong residents generally and not only to "Hong Kong residents who are heterosexuals". It is of course correct that BL 37 applies to Hong Kong residents generally and not only to the section of Hong Kong residents who are heterosexuals. However, the right protected by that article is the right or freedom of "marriage", which, as that concept is, and has always been, understood in Hong Kong, has no application to same-sex couples. While the word "marriage" may now be understood in some parts of the world as being applicable to same-sex couples, it is, I consider, how the word is, and has always been, understood in Hong Kong that is relevant for the purpose of interpretation of the Basic Law.

20. In respect of (2), there can be no quarrel with the principle that fundamental rights ought to be interpreted generously. However, Ms Li's submission begs the question of whether same-sex couples have a fundamental right to marry in the first place. Further, the principle that fundamental rights should be interpreted generously is subject to the qualification that it cannot lead to a construction which the language of the instrument is not capable of bearing[15]. The court's duty in the interpretation of the Basic Law is to ascertain what is meant by the language used and to give effect to the legislative intent as expressed in the language[16]. The word used by the draftsman of the Basic Law in BL 37 was "marriage" which, as earlier mentioned, was a well understood concept in Hong Kong at the time of the promulgation of the Basic Law. By using the word "marriage" in BL 37, the draftsman of the Basic Law clearly intended that the right protected by BL 37 would only be available to heterosexual couples. It cannot, in my view, seriously be argued that BL 37 was intended to protect the right of marriage of same-sex couples when such form of marriage was simply unknown at the time of the enactment of the Basic Law. I shall deal with the question of whether BL 37 should now be read more extensively in view of changing social needs or circumstances when I consider Ms Li's argument for "updating" the interpretation of that article below.

21. In respect of (3), I am unable to see anything in either the context or the purpose of BL 37 which would support a reading of that article as extending the right of marriage to same-sex couples. BL 37 is found in Chapter III of the Basic Law titled the "fundamental rights and duties of the residents" of Hong Kong. Apart from BL 24(1) and (2) (which define the "permanent residents" and "non-permanent residents" of the HKSAR), each article in that Chapter of the Basic Law sets out certain constitutionally protected right(s) of Hong Kong residents. The scope of the right(s) as protected by any article is defined by the language of that article. BL 37 refers to two different, but related, rights, namely (i) the "freedom of marriage" (婚姻自由) and (ii) the "right to raise a family" (自願生育的權利). The latter right, as expressed in the authentic Chinese text, plainly has no application to same-sex couples. In *Gurung Deu Kumari v Director of Immigration* [2010] 5 HKLRD 219, at paragraphs 54 to 58, A Cheung J (as he then was) interpreted Hong Kong residents' right to raise a family in BL 37 as exempting them from "the one child policy" practised on the Mainland under Article 49 of the Constitution of the People's Republic of China. In *Li Nim Han v Director of Immigration*, HCAL 36/2011 (unreported, 14 November 2011), Lam J (as he then was) agreed with A Cheung J's construction of BL 37. This interpretation of the second limb of BL 37 was affirmed by the Court of Appeal in *Comilang v Director of Immigration* [2018] 2 HKLRD 534, at paragraphs 61 to 70. In my view, the context and purpose of BL 37 is against the interpretation advanced by Ms Li that the article protects the right of same-sex couples to marry.

22. In respect of (4), Ms Li argues that the Basic Law is a living instrument intended to meet changing needs and circumstances[17], and as a constitutional document its meaning should not be defined by what was actually contemplated by its drafters. I accept as correct in principle that legislation, including the Basic Law, may, in appropriate circumstances, be given an "updated interpretation".

(1) In *W*, Chan PJ explained the relevant principles upon which the court may make an updated interpretation of legislation in the context of whether the word "marriage" in BL 37 should be understood based on the *Corbett* approach:

> "[170] Until the present case, the position has always been that the right to marry protected under art 37 is understood to refer to the right to marry under the current legislation which was based on the *Corbett* approach. While a constitutional provision can be given an updated meaning if the circumstances so require, there must be strong and compelling reasons for the Court now to depart from what has been generally understood to be the law on a matter as fundamental as the marriage institution which has its basis in the social attitudes of the community. A firm line has to be drawn between giving an updated interpretation to a constitutional provision to meet the needs of changing circumstances on the one hand and making a new policy on a social issue on the other. The latter is not the business of the court. For the former function, the court must be satisfied that there is sufficient evidence to show that the present circumstances in Hong Kong are such as to require the court to construe art 37 differently from the law which formed the basis on which this article was drafted/adopted. In my view, in the absence of such evidence, the Court should not invoke its power of constitutional interpretation to make such a radical change.
>
> [190] … Evidence of changing circumstances, especially changes in the social attitudes on controversial issues, is a very material factor in support of an updated interpretation. It is not the same as evidence of a consensus. Consensus is seldom relevant to interpretation and may never be achievable on these issues.
>
> [191] The Court's power to give an updated interpretation to meet changing needs and circumstances must be exercised with great caution, especially where such interpretation has far reaching ramifications…
>
> [192] … In my view, the court's power to give an updated interpretation is to react to changing circumstances and reflect changing social attitudes. The role of the court is to give effect to a change in an existing social policy, not to introduce any new social policy. The former is a judicial process but the latter is a matter for the democratic process. Social policy issues should not be decided by the court…"

Although the judgment of Chan PJ in *W* was a dissenting one, his statement of legal principles quoted above should not, I believe, be controversial.

(2) In *ZN v Secretary for Justice* [2018] 3 HKLRD 778, Cheung CJHC (as he then was) gave some further guidance on the circumstances in which an updated interpretation of legislation may be justified:

> "[75] Constitutional and human rights protection must move with the times to stay relevant to contemporary problems and needs. Very often, other possible ways of dealing with the contemporary situation, such as amending the constitutional or human rights instrument concerned, or making a supplemental or even new instrument, may prove to be too slow, too difficult or even impossible. In those circumstances, construing the instrument as a living one, giving its provisions meanings beyond what was originally intended, may be the only feasible solution. Therefore, within reasonable bounds, this approach to the interpretation of constitutional and human rights instruments as a living instrument should be embraced. I say 'within reasonable bounds' because it must be firmly borne in mind that what is involved is interpretation, not 'divination': *Matadeen v Pointu* [1999] 1 AC 98, 108 F/G, *per* Lord Hoffmann, quoting from Kentridge AJ in *State v Zuma* [1995] (4) BCLR 401, 412. A provision, even a provision in a living instrument, simply cannot be given a meaning that its language cannot bear. When that is the case, nothing short of an amendment of the instrument may do (apart from making a supplemental instrument or even a new one).
>
> [76] This brings me to this immediate point. Construing an instrument beyond its original intended meaning in the way described above is justified primarily by one consideration, that is, the contemporary situation, problem or issue. If possible, an instrument should be construed so as to preserve its relevance to the present day world. Giving a provision in a living instrument a generous interpretation in order to adequately meet the contemporary situation and needs of society provides both the justification for and limitation to the approach under discussion. In other words, it is a relevance-driven exercise, subject to the boundaries set by the language used which I have just described. Relevance, in this context, may be gauged primarily at two levels, that is, the contemporary need of society; and the relevant international developments…."

23. In summary, although an updated interpretation of legislation may be made to meet the changing or contemporary needs and circumstances of the society and relevant international developments:

(1) there must be shown strong and compelling local reasons for the court to depart from what has been generally understood to be the law on a matter as fundamental as the marriage institution which has its basis in the social attitudes of the community;

(2) the court should not use the technique of updating interpretation to introduce or make a new policy on a social issue;

(3) the court should exercise the power of updating interpretation with great caution where the new interpretation has far reaching consequences or ramifications; and

(4) the court should not make an updated interpretation if the language of the legislation is not capable of bearing the new meaning sought to be given.

24. In the present case, I accept that there have been some international developments recognising same-sex marriage. There are, I am told, currently 26 jurisdictions[18] which allow same-sex marriage, and an additional 16 which allow civil union or registered partnership. However, the evidence about changing or contemporary social needs or circumstances in Hong Kong is far from clear. What is clear is that there is a sharp division of public opinion on whether same-sex relationships should be recognised[19]. The evidence before the court is not, in my view, sufficiently strong or compelling to demonstrate that the changing or contemporary social needs and circumstances in Hong Kong are such as would require the word "marriage" in BL 37 to be read as including a marriage between two persons of the same sex. On the other hand, it is obvious that were the court to "update" the meaning of "marriage" to include a same-sex marriage, it would be introducing a new social policy on a fundamental issue with far reaching legal, social and economic consequences and ramifications. It is, I consider, beyond the proper scope of the functions or powers of the court, in the name of interpretation, to seek to effect a change of social policy on such a fundamental issue. In all, I am not convinced that an updated interpretation of the word "marriage" in BL 37 to include a same-sex marriage is justified.

25. In the course of her submissions, Ms Li has drawn the court's attention to the judgment of the High Court of Australia in *The Commonwealth of Australia v The Australian Capital Territory* [2013] HCA 55 (12 December 2013), where the High Court of Australia interpreted the word "marriage" in Section 51(xxi) of the Commonwealth Constitution to include a marriage between persons of the same sex. The High Court of Australia further held that (i) since Section 51 (xxi) of the Constitution gave the federal Parliament to make laws with respect to "marriage", the federal Parliament could (but did not) make a national law providing for same-sex marriage, and (ii) the *Marriage Equality (Same Sex) Act 2013* enacted by the Legislative Assembly for the Australian Capital Territory, which defined marriage as "the union of 2 people of the same sex to the exclusion of all others, voluntarily entered into for life but does not include a marriage within the meaning of the *Marriage Act 1961* (Cwlth)", was of no effect because it was inconsistent with the existing *Marriage Act 1961* (as amended in 2004) of the federal Parliament, which defined marriage as "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life".

26. To properly understand the actual decision reached by the High Court of Australia, it is important to take note of the question which the court considered required determination in that case, namely, whether Section 51(xxi) of the Constitution should be construed as referring only to the particular legal status of "marriage" which could be formed at the time of federation (having the legal content which it had according to English law at that time), or as using the word "marriage" in the sense of a "topic of juristic classification" (paragraph 14). The High Court of Australia held that the latter construction should be adopted because the status of marriage, the social institution which that status reflected, and the rights and obligations which attached to that status never had been, and were not then, immutable, and thus Section 51(xxi) of the Constitution was not to be construed as being tied to the state of the law with respect to marriage at federation (paragraphs 16 and 19).

27. The High Court of Australia went on to hold that the juristic concept of "marriage" embraced unions other than those between a man and a woman to the exclusion of all others, voluntarily entered into for life, and that it referred to a consensual union formed between natural persons in accordance with legally prescribed requirements which was not only a union the law recognised as intended to endure and be terminable only in accordance with law but also a union to which the law accorded a status affecting and defining mutual rights and obligations (paragraphs 33 and 37). In coming to that conclusion, the High Court of Australia took into account, amongst others, the following matters into consideration:

> (1) in both England and Australia, the law had recognized polygamous marriages for many purposes (paragraph 32); and
>
> (2) the social institution of marriage differed from country to country and it was no longer possible (if it ever was) to confine attention to jurisdictions whose law of marriage provided only for unions between a man and a woman. Some jurisdictions outside Australia permitted polygamy, while some other jurisdictions outside Australia, in a variety of constitutional settings, permitted marriage between same-sex couples (paragraph 35).

28. In my view, properly understood, the High Court of Australia's conclusion that the word "marriage" in Section 51(xxi) of the Constitution could include a marriage between persons of the same sex was not the result of any "updated" interpretation being given to the word "marriage" in that section. The High Court of Australia was not saying that a new meaning, or interpretation, of that word should now be adopted because of changing or contemporaneous social needs and circumstances. Rather, the High Court of Australia was saying that the word "marriage" as used in Section 51(xxi) of the Constitution was intended to refer to a broad "juristic concept" of marriage which was not confined to the only form of marriage which could be formed in Australia at the time of federation.

29. In any event, even if, contrary to my reading of the judgment, *The Commonwealth of Australia v The Australian Capital Territory* should be regarded as a case where the High Court of Australia made an updated interpretation of the word "marriage", the contemporaneous needs and circumstances in Australia in December 2013 are very different from those currently existing in Hong Kong. In particular, the Legislative Assembly for the Australian Capital Territory had already passed a law to provide for same-sex marriage in that jurisdiction in 2013. Alternative registration systems were available in five of eight states, and there was recognition of cohabiting same-sex couples at the federal level in all eight states and territories by March 2014 [20]. Further, in 2017, a non-binding referendum on marriage equality was held in Australia, which won the support of 61.6% of the voters, and the federal Parliament passed marriage equality legislation at the end 2017[21]. Although some of these developments might have occurred after the date of judgment of High Court of Australia (December 2013), in view of the closeness of time between those events and the date of the judgment, they are still relevant as evidence of the prevailing societal needs and circumstances in Australia at the material time.

30. I shall deal with the last matter relied upon by Ms Li, namely, protection of minorities, which, in substance, is an argument based on the right not to be subject to unlawful discrimination, together with the Government's argument on *lex specialis*.

31. Finally, I should mention that although BL 37 protects only heterosexual marriage, it does not mean that same-sex marriage in Hong Kong is necessarily prohibited. BL 37 is protective, but not prohibitive. What it means is that same-sex couples do not enjoy any constitutional right of marriage but, as pointed out by Mr Steward Wong, SC (for the Government), it is open to the legislature to recognise and provide for same-sex marriage by legislation if it chooses to do so.

LEX SPECIALIS

32. If, as I consider it to be the case, MK does not enjoy any right of marriage under BL 37, being the article in the Basic Law which deals specifically with the marriage right of Hong Kong residents, she cannot derive such right from other articles of the Basic Law or Hong Kong Bill of Rights which concern other rights such as the right to equality under BL 25/BOR 1/BOR 22, the right of privacy, family and home under BOR 14, or the freedom of thought, conscience and religion under BL 32/BOR 15. *Generalia specialisbus non derogant* is a maxim which is applicable to the interpretation of constitutions [22]. Accordingly, if a specific marriage protection clause (*lex specialis*) in a constitution or human rights instrument does not confer the right of marriage on same-sex couples, other general articles in that constitution or human rights instrument providing for other rights cannot give rise to such right.

33. This principle was clearly stated by Thorpe LJ in *Bellinger v Bellinger (Attorney General intervening)* [2002] Fam 150, at paragraph 117, in the context of a discussion of the inter-relationship between ECHR 8 (right to respect for private and family life) and ECHR 12 (right to marry), in the following words:

> "I accept Mr Moylan's submission that, since the right to marry is the very subject of article 12, it is impermissible to introduce the right to marry as an ingredient of article 8 rights. The consistent judgments of the court in relation to article 12 do not demonstrate the same evolution in approach as do the judgments in relation to article 8. Member states are accorded a wide latitude in defining the right to marriage and it remains permissible for states to restrict the definition to the conventional union between man and woman."

34. The same view has also been consistently held and adopted by the European Court of Human Rights and the UN Human Rights Committee ("HRC").

35. In *Schalk and Kopf v Austria* (2011) 53 EHRR 20, at paragraph 101, the ECtHR stated as follows:

"Insofar as the applicants appear to contend that, if not included in art.12, the right to marry might be derived from art.14[23] taken in conjunction with art.8 [24], the Court is unable to share their view. It reiterates that the Convention is to be read as a whole, and its articles should therefore be construed in harmony with one and another. Having regard to the conclusion reached above, namely that art.12 does not impose an obligation on contracting states to grant same-sex couples access to marriage, art.14 taken in conjunction with art.8, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation either."

36. More recently, in *Oliari v Italy* (2017) 65 EHRR 26, the ECtHR reiterated the following:

"[191] The Court notes that in Schalk and Kopf the Court found under Article 12 that it would no longer consider that the right to marry must in all circumstances be limited to marriage between two persons of the opposite sex. However, as matters stood (at the time only six out of forty-seven CoE member States allowed same-sex marriage), the question whether or not to allow same-sex marriage was left to regulation by the national law of the Contracting State. The Court felt it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society. It followed that Article 12 of the Convention did not impose an obligation on the respondent Government to grant a same-sex couple like the applicants access to marriage (§§ 61-63). The same conclusion was reiterated in the more recent Hämäläinen (cited above, § 96), where the Court held that while it is true that some Contracting States have extended marriage to same-sex partners, Article 12 cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples.

[192] The Court notes that despite the gradual evolution of States on the matter (today there are eleven CoE states that have recognised same-sex marriage) the findings reached in the cases mentioned above remain pertinent. In consequence the Court reiterates that Article 12 of the Convention does not impose an obligation on the respondent Government to grant a same-sex couple like the applicants access to marriage.

[193] Similarly, in Schalk and Kopf, the Court held that Article 14 taken in conjunction with Article 8, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation either. The Court considers that the same can be said of Article 14 in conjunction with Article 12.

[194] It follows that both the complaint under Article 12 alone, and that under Article 14 in conjunction with Article 12 are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention."

37. In *Joslin v New Zealand* (2003) 10 IHRR 40, the HRC stated as follows:

"[8.2] The authors' essential claim is that the Covenant obligates States parties to confer upon homosexual couples the capacity to marry and that by denying the authors this capacity the State party violates their rights under articles 16, 17, 23, paragraphs 1 and 2, and 26 of the Covenant[25]. The Committee notes that article 23, paragraph 2, of the Covenant expressly addresses the issue of the right to marry.

> Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision. Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term 'men and women', rather than 'every human being', 'everyone' and 'all persons'. Use of the term 'men and women', rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.
>
> [8.3] In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant."

38. In the recent case of *Comilang v Director of Immigration* [2019] HKCFA 10, the Court of Final Appeal emphasised that the provisions in the Basic Law and/or Hong Kong Bill of Rights which guaranteed various constitutional rights to Hong Kong residents should be read as a coherent and consistent scheme (see paragraphs 30, 33, 35, 45 and 61 of that judgment). This approach to the interpretation of the Basic Law strongly supports the Government's position that if BL 37 and/or BOR 19, which specifically relate to the right of marriage, do not give same-sex couples the right to marry, such right cannot be derived from other general, non-specific provisions in the Basic Law or Hong Kong Bill of Rights, such as BL 25 and 32, and BOR 1, 14, 15 and 22.

39. In support of her argument that same-sex couples is entitled to the right of marriage under those general articles of the Basic Law and/or Hong Kong Bill of Rights, Ms Li has referred the court to various overseas authorities, including (i) *Halpern v Attorney General of Canada* (2003) 65 OR (3d) 161, (ii) *Minister of Home Affairs v Fourie* (Case CCT 60/04, 1 December 2005), (iii) *Obergefell v Hodges* 576 US (2015) 41 BHRC 160, (iv) *Ferguson v Attorney General* (2018) 45 BHRC 305, and (v) *Day and Bush v The Governor of the Cayman Islands* (Civil Cause No 111/2018 and 184/2018, 29 March 2019).

40. The first 4 cases relied upon by Ms Li can be dealt with shortly.

(1) *Halpern* was a decision of the Court of Appeal of Ontario, Canada, in 2003[26], which held that the exclusion of same-sex couples from the common law definition of marriage breached s.15 (1) (right to equality) of the *Canadian Charter of Rights and Freedom* in a manner which could not be justified in a free and democratic society under s.1 of the Charter. Incidentally, it may be noted that the Ontario Court of Appeal also held that the case did not engage the religious rights and freedoms as protected by s.2(a) of the Charter because, although marriage was a legal, as well as religious and social, institution, the issue raised in that case was solely about the legal institution of marriage.

(2) *Fourie* was a decision of the Constitutional Court of South Africa in 2005[27], which held that the failure of common law and the Marriage Act to provide means whereby same-sex couples could marry constituted unfair discrimination against them.

(3) *Obergefell* was a decision of the US Supreme Court in 2015, which held that the right of marriage of same-sex couples could be derived from the Fourteenth Amendment's Due Process Clause and Equal Protection Clause, and required a State to licence a marriage between two persons of the same sex.

(4) *Ferguson* was a decision of the Court of Appeal of Bermuda in 2018 concerning the validity of a provision in a legislation, namely, Section 53 of the Domestic Partnership Act 2018, which was enacted to reverse the effect of an earlier decision of the Supreme Court (*Godwin and DeRoche*) holding that the Human Rights Act 1981, which prohibited discrimination on the grounds of sexual orientation, guaranteed same-sex couples the right to marry. The Court of Appeal held that the revocation provision was invalid because (i) it was passed for a mainly religious purpose which Parliament had no power to pass because Bermuda had a secular Constitution (paragraphs 7, 42 and 77) and (ii) it breached Section 8 of the Constitution which guaranteed the right to freedom of conscience (paragraphs 71 and 77).

As rightly pointed out by Mr Wong, it would appear that there was no marriage protection clause, or *lex specialis* concerning or relating to the right of marriage, in the relevant constitutions under consideration by the courts in the above cases, and thus those courts did not have to consider the impact that a marriage protection clause would have on the argument that the denial of right of same-sex couples to marry breached various constitutional rights which did not relate specifically to the right of marriage.

41. Incidentally, it is of note that in the first instance judgment of Kawaley CJ in *Ferguson* ([2018] SC (Bda) 46 Civ, 6 June 2018), at paragraph 84, the Chief Justice of the Supreme Court of Bermuda recognized that "various decisions on the ECHR have held that because the right to marry is expressly dealt with by art 12 which defines marriage as between a man and a woman, it is not possible to complain of a breach of other articles in the Convention in relation to the denial of access to same-sex marriage".

42. The 5th case, *Day and Bush*, a recent decision of Chief Justice Smellie of the Grand Court of the Cayman Islands given on 29 March 2019, cannot be disposed on the above basis because the Cayman Bill of Rights, enshrined by the Constitution of the Cayman Islands, does contain a *les specialis* for marriage, namely, Section 14(1), which reads as follows: "Government shall respect the right of every unmarried man and woman of marriageable age (as determined by law) freely to marry a person of the opposite sex and found a family". That case concerned a constitutional challenge to Section 2 of the 2008 Marriage (Amendment) Law which defined marriage to mean "the union between a man and a woman as husband and wife". One of the arguments raised on behalf of the Governor of the Cayman Islands to resist the challenge was that Section 14(1) of the Bill of Rights was not only "an express recognition and protection of the right of opposite-sex couples to marry" but was also "utterly preclusive of any such right or the development of any such right, for same-sex couples" (paragraph 151). Chief Justice Smellie's attention was also drawn to the relevant jurisprudence from the ECtHR concerning the interpretation and effect of ECHR 12, including *Schalk & Koff* and *Hamalainen* (paragraphs 154 to 156), as well as the relevant jurisprudence from the HCR concerning the interpretation and effect of ICCPR 23 (equivalent to our BOR 19), including General Comment No 19 and *Joslin* (paragraphs 165 to 166), in support of that argument. Nevertheless, Chief Justice Smellie considered that Section 14(1) did not expressly "confine the right to marry to opposite-sex couples"; it merely required the Government of Cayman Islands to "respect the right of men and women to marry". Chief Justice Smellie also considered it significant that the word "*only*" was not used, as it could readily have been used, to delimit the meaning of Section 14(1) as confining the right to marry to opposite-sex couples (paragraphs 159 and 163). Chief Justice Smellie proceeded to find that the present state of the law in the Cayman Islands which denied same-sex couples to marry was inconsistent with the right to private and family life under Section 9(1) of the Bill of Rights (paragraphs 235 and 236) and also the right against discrimination under Section 16 of the Bill of Rights (paragraphs 326 and 330), and could not be justified. In the end, he declared

that the definition of marriage in Section 2 of the 2008 Marriage (Amendment) Law was to be amended to mean "the union between two people as one another's spouses" (paragraph 381).

43. It is of course not for this court to comment on how Section 14 of the Cayman Bills of Right ought to be interpreted. In so far as BL 37 and BOR 19 are concerned, I consider it to be clear that they protect only the right of opposite-sex couples to marry, and those articles constitute the relevant *lex specialis* precluding the right to marriage from being accorded to same-sex couples under other articles of the Basic Law and/or the Hong Kong Bill of Rights. I am not persuaded by the reasoning of the Grand Court of the Cayman Islands in *Day and Bush* that a different conclusion should be reached.

44. Having reached this conclusion, it is not necessary for me to consider separately the scope of the various constitutionally guaranteed rights under BL 25 and 32, and BOR 1, 14, 15 and 22 relied upon by MK in support of the argument that same-sex couples enjoy the right of marriage under the Basic Law and/or Hong Kong Bill of Rights.

NO POSITIVE OBLIGATION ON GOVERNMENT TO PROVIDE LEGAL FRAMEWORK FOR RECOGNITION OF SAME-SEX RELATIONSHIPS

45. Ms Li argues that even if the court were to reject MK's primary case concerning same-sex marriage, MK is still entitled to the same legal protection as conferred by marriage on opposite-sex couples, and the Government is under a positive obligation to provide an alternative, "functional equivalent", legal framework to same-sex couples[28]. The basis of this obligation, according to Ms Li, is essentially the right not to be subjected to unlawful discrimination [29].

46. What MK is contending for is tantamount to a right to same-sex couples to marriage in all but name. In paragraph 14 of the draft Amended Form 86, it is said that the absence of any alternative mean(s) of legal recognition of same-sex relationships means that same-sex couples "have no way of obtaining the legal status of a married couple along with all the benefits accorded under the law or in accordance with law which are enjoyed by married couples nor is there any alternative legal provision which enables them to enjoy such benefits". Also, at paragraph 50 of the Skeleton Submissions for the Applicant dated 21 May 2019, it is stated that "[s]hould the Court reject the Applicant's primary case (ie Ground 2 under the Amended Form 86[30]), we submit that the Government is under a positive obligation to provide a legal status for same-sex couples with exactly the same legal benefits and protections as are enjoyed by married opposite-sex couples …" [emphasis added].

47. The contention that the Government is under a positive legal obligation to provide an alternative legal framework giving same-sex couples the same rights and benefits enjoyed by opposite-sex married couples seems to me to be unsound, for the following reasons:

> (1) In matters concerning rights, the court should look at "substance" and not "form". If the Government is under no legal obligation to provide same-sex couples with the relevant rights and benefits through the institution of marriage, I consider it to be wrong in principle for the court to seek to achieve the same result through the use of another label or institution.

(2) Whether there should, or should not, be a legal framework for the recognition of same-sex relationships is quintessentially a matter for legislation. For the court to declare that the Government is under a positive obligation to provide an alternative legal framework to same-sex couples so that they can enjoy the same rights and benefits enjoyed by opposite-sex married couples would be very close to the court exercising legislative powers which are outside the proper province of judicial functions.

(3) It would also be wrong in principle, for the court to declare generally that the Government is under a positive obligation to provide to same-sex couples an alternative legal framework carrying all the rights and benefits enjoyed by opposite-sex married couples without examining whether any particular right or benefit ought to be available to same-sex couples, eg the right of same-sex couples to adopt a child may have to be restricted or modified in order to protect the interests of the child to be adopted.

48. The main authority relied upon by MK in support of the contention that the Government is under a positive legal obligation to provide an alternative, "functional equivalent", legal framework to same-sex couples is the decision of the ECtHR in *Oliari v Italy* (2017) 65 EHRR 26 (21 July 2015)[31]. In that case, the ECtHR held that the Italian Government's failure to ensure that same-sex couples had available a specific legal framework providing for the recognition and protection of their same-sex unions was in violation of ECHR 8. That article states as follows:

> "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 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."

49. The majority of the ECtHR came to that conclusion having regard to, *inter alia*, the following factors:

> (1) the need of legal recognition and protection of same-sex relationship had been expressed by the Parliamentary Assembly of the Council of Europe (paragraph 166);
>
> (2) the circumstances of same-sex couples under the Italian domestic system (paragraphs 168 to 172);
>
> (3) the existence of a conflict between the social reality of same-sex couples, who for the most part lived their relationship openly in Italy, and the law (paragraph 173);
>
> (4) the movement towards legal recognition of same-sex couples which had continued to develop rapidly in Europe since the court's judgment in *Schalk* and globally, with particular reference to countries in the Americas and Australasia (paragraph 178); and
>
> (5) the fact that the Constitutional Court in Italy had notably and repeatedly called for a juridical recognition of the relevant rights and duties of homosexual unions (paragraph 180), which the ECtHR considered reflected the sentiments of a majority of the Italian population (paragraph 181).

50. At paragraph 186, the ECtHR concluded that to find otherwise (ie, the Italian Government did not have an obligation to make available a specific legal framework providing for the recognition and protection of same-sex unions), the court would have to be unwilling to take note of the changing condition in Italy and be reluctant to apply the convention in a way which was practical and effective.

51. It is, in my view, apparent from the reasoning of the majority of the ECtHR in *Oliari* that their decision was based on an assessment of the particular prevailing legal, social and political circumstances in Italy in the context of the relevant on-going developments in Europe and globally (particularly in the Americas and Australasia). That the majority decision was based on a combination of factors not necessarily found in other contracting states was expressly mentioned in paragraph 10 of the concurring opinion of Judge Mahoney (joined by Judges Tsotsoria and Vehabović), who agreed with the result reached by the majority but on the basis of a different, narrower reasoning (namely, that the Italian State had already chosen, voluntarily, through its highest court, notably the Constitutional Court, to declare that two people of the same sex living in stable cohabitation were invested by the Italian Constitution with a fundamental right to obtain judicial recognition of the relevant rights and duties attaching to their union)[32]. I do not consider that the factors which the majority of the ECtHR relied upon to reach their conclusion are present, or applicable to the prevailing circumstances, in Hong Kong. The subsequent decision of the ECtHK in *Orlandi v Italy* (Applications No 26431/12, 26742/12, 44057/12 and 60088/12, 14 December 2017) does not take the matter any further.

52. Besides, as pointed out by Mr Wong, the relevant article in the Hong Kong Bill of Rights, namely, BOR 14, is expressed differently from ECHR 8. BOR 14 states as follows:

> "(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> (2) Everyone has the right to the protection of the law against such interference or attacks."

53. Instead of providing for a "positive" right to respect for his private and family life, BOR 14 is "negative" in nature. As has been observed judicially, the two articles are couched in very different terms[33]. In relation to ICCPR 17 (equivalent to our BOR 14), it has been stated by the HRC in General Comment No 16 (1988), that the article imposes an obligation on a State party not to engage in interferences inconsistent with the right to privacy, family and home, etc[34]. Although the HRC also states that "the obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right"[35] [emphasis added], the underlined words must be read as referring to ICCPR 17(2), which provides for "the right to protection of the law against such interferences or attacks". I am unable to see how the absence of legislation to give legal recognition or protection of the status of same-sex relationship can be said to amount to *arbitrary or unlawful interference* with the right to "family"[36] (even assuming that, in the Hong Kong context, a family can include a same-sex couple[37]) or "privacy" or "home".

54. In short, I am not prepared to find, on the basis of *Oliari* or otherwise, that the Government is under a positive legal obligation to provide an alternative legal framework such as civil unions, registered partnerships or other legally recognised status giving same-sex couples the same rights and benefits enjoyed by opposite-sex married couples.

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55. After the conclusion of the hearing on 30 May 2019, the Court of Final Appeal handed down its judgment in *Leung Chun Kwong v Secretary for Civil Service* in FACV 8/2018 on 6 June 2019, and the parties made further written submissions on the impact that the Court of Final Appeal's judgment might have on the present case. It is not with disrespect that I do not propose to deal with the parties' further submissions arising out of the judgment of the Court of Final Appeal in any detail here because it is clear, from paragraph 27 of that judgment, that there was no argument before their Lordships that the constitutional freedom to marry and raise a family made marriage available to same-sex couples. In other words, the critical issue raised in the present case was not argued or considered by the Court of Final Appeal. On the other hand, the major issues considered by the Court of Final Appeal all related to the question of "justification" which do not, in my view, arise for determination in the present case.

DISPOSITION

56. The application to amend the Form 86 is allowed, with costs to the Respondent, on the ground that the new issues raised are reasonably arguable, although the court ultimately decides those issues against the Applicant. The application for judicial review is dismissed with costs (including all reserved costs) to the Respondent. All costs in favour of the Respondent are to be taxed if not agreed, with certificate for 3 counsel. The Applicant's own costs, to the extent that they are covered by legal aid, shall be taxed in accordance with Legal Aid Regulations.

POSTSCRIPT

57. The court is acutely aware of the fact that there are diverse and even diametrically opposed views, based on social, moral and/or religious grounds, held by different people or groups in the society in respect of the question of whether same-sex couples should be accorded recognition of their relationship by being allowed to marry or enter into civil unions, registered partnerships or other legally recognised status. The court expresses no view on the associated social, moral and/or religious issues, and has adopted a strict legal approach in the determination of the 2 questions posed at the beginning of this judgment. Nevertheless, the court believes that there is much to be said for the Government to undertake a comprehensive review on this matter. The failure to do so will inevitably lead to specific legislations, or policies or decisions of the Government or other public bodies, being challenged in the court on the ground of discrimination (and possibly other grounds) on an *ad-hoc* basis, resulting in an incoherent state of the law at different times as well as much time and costs being incurred or wasted in the process.

58. Lastly, it remains for me to thank counsel on both sides for their assistance rendered to the court.

(Anderson Chow)
Judge of the Court of First Instance
High Court

Ms Gladys Li, SC, Ms Linda Wong and Ms Tina Mok, instructed by Bond Ng Solicitors, for the Applicant

Mr Stewart Wong, SC, Mr Johnny Ma and Ms Grace Chow, instructed by Department of Justice, for the Respondent

[1] In this judgment, references to (i) "BL" shall be to the Basic Law, (ii) "BOR" shall be to the Hong Kong Bill of Rights, (iii) "ICCPR" shall be to the International Covenant on Civil and Political Rights, and (iv) "ECHR" shall be to the European Convention on Human Rights.

[2] See *Chief Constable of West Yorkshire v A* [2005] 1 AC 51, at paragraph 12 *per* Lord Bingham of Cornhill.

[3] See *Bellinger v Bellinger* [2002] Fam 150, at paragraph 99 *per* Dame Elizabeth Butler-Sloss P and Robert Walker LJ.

[4] See *Schalk v Austria* (2011) 53 EHRR 20, at paragraph 62.

[5] See *Re G (Adoption: Unmarried Couple)* [2009] 1 AC 173, at paragraph 7 *per* Lord Hoffmann and at paragraph 108 *per* Baroness Hale of Richmond.

[6] Being the "appointed day" as defined in Section 2(1) of the *Marriage Reform Ordinance*.

[7] By Section 3 of the *Marriage (Amendment Ordinance) 1932*, a new Section 38 of the *Marriage Ordinance*, 1875 was substituted which now becomes Section 40 of the *Marriage Ordinance*, Cap 181.

[8] See Sections 7 and 8 of the *Marriage Reform Ordinance*.

[9] The use of the expression "freedom" (自由), instead of "right" (權利or權), has no significance for the present purpose. See *W v Registrar of Marriage* (2013) 16 HKCFAR 112, at paragraph 63.

[10] See *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211 at 224F-G.

[11] See *HKSAR v Ma Wai Kwan David* [1997] HKLRD 761, at 323G-H *per* Chan CJHC (as he then was) and at 361E-G *per* Mortimer VP; *SJ v Lau Kwok Fai* (2005) 8 HKCFAR 304, at paragraph 35 *per* Sir Anthony Mason NPJ; *Catholic Diocese of Hong Kong v Secretary for Justice* [2007] 4 HKLRD 483, at paragraph 119 *per* Andrew Chung J (as he then was). The theme of continuity reflected in the Basic Law was recently affirmed by the Court of Final Appeal in *Comilang v Director of Immigration* [2019] HKCFA 10, at paragraph 64.

[12] See *Comilang v Director of Immigration* [2019] HKCFA 10, at paragraphs 30 and 61 *per* Ribeiro and Fok PJJ.

[13] See *Joslin v New Zealand* (2003) 10 IHRR 40, at paragraph 8.2 (Human Rights Committee); Report of the Office of UNHCHR, "Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law", HR/PUB/12/06 (2012), at 53; Report of the Office of UNHCHR, "Discrimination and violence against individuals based on their sexual orientation and gender identity", A/HRC/29/23 (2015), at paragraph 67; Nowak, UN Covenant on Civil and Political Rights, 2nd revised edition (2005), at page 525; see also UN Human Rights Committee, General Comment No 19, at paragraphs 4 and 5.

[14] See *Parry v United Kingdom* (Application No 42971/05, 28 November 2006), ECHR 2006-XV, at 287-288; *Hamalainen v Finland* (2014) 37 BHRC 55, at paragraphs 71 and 96; *Gas v France* (2014) 59 EHRR 22, at paragraph 66; *Aldeguer Tomás v Spain* (2017) 65 EHRR 24, at paragraph 90; *Oliari v Italy* (2017) 65 EHRR 26, at paragraphs 191 to 193 of the lead judgment; *Orlandi v Italy* (Application No 26431/12, 26742/12; 44057/12 and 60088/12, 14 December 2017), at paragraph 192.

[15] See *T v Commissioner of Police* (2014) 17 HKCFAR 593, at paragraph 195 *per* Fok PJ and at paragraph 278 *per* Lord Neuberger NPJ; *China Field Ltd v Appeal Tribunal (Buildings) (No 2)* (2009) 12 HKCFAR 342, at paragraph 36 *per* Lord Millet NPJ.

[16] See *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211 at 223H-224B; *HKSAR v Cheung Kwun Yin* (2009) 12 HKCFAR 568, at paragraphs 11 and 12 *per* Li CJ; *Leung Chun Ying v Ho Chun Yan Albert* (2013) 16 HKCFAR 517, at paragraph 12 *per* Ma CJ.

[17] See *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, at 28D; *W v Registrar of Marriage* (2013) 16 HKCFAR 112, at paragraphs 84 and 115.

[18] With Taiwan being the only jurisdiction in Asia which allows same-sex marriage.

[19] See the Affirmation of Lum Kwok Keung Jacky, Principal Assistant Secretary for Constitutional and Mainland Affairs, dated 4 February 2019, at paragraphs 44 to 55.

[20] See *Oliari v Italy*, at paragraph 134.

[21] See Human Rights Watch's "New Map Shows Marriage Equality, Civil Unions and Registered Partnership Worldwide" ("HRW Map", exhibit "NGB-33" to the Affirmation of Bond Ng).

[22] *Endell Thomas v Attorney-General of Trinidad and Tobago* [1982] AC 113, at 135D-F *per* Lord Diplock.

[23] ECHR 14 concerns prohibition of discrimination.

[24] ECHR 8 concerns the right to respect for private and family life.

[25] ICCPR 16, 17, 23 and 26 relates to (i) right to recognition as person before law, (ii) protection of privacy, family, home, correspondence, honour and reputation, (iii) rights in respect of marriage and family, and (iv) equality before and equal protection of law respectively.

[26] In 2005, the Civil Marriage Act recognised same-sex marriage nationwide (see HRW Map, "NGB-33").

[27] In 2006, the South African Parliament approved marriage equality legislation recognising same-sex marriage, making South Africa the first and only African country with marriage equality (see HRW Map, "NGB-33").

[28] See paragraph 68 of the Skeleton Submissions for the Applicant dated 21 May 2019.

[29] See paragraphs 69 to 70 the Skeleton Submissions for the Applicant dated 21 May 2019.

[30] Ground 2 relates to the right to marry under BL 37.

[31] See paragraph 116 of the Draft Amended Form 86.

[32] See paragraphs 1, 5, 10 and 11 of the Concurring Opinion of Judge Mahoney (joined by Judges Tsotsoria and Vehabović).

[33] See *Pagtama v Director of Immigration*, HCAL 13/2014 (12 January 2016), at paragraph 140 *per* Au J (as he then was); see also *Comilang v Commissioner of Registration*, HCAL 28/2011 (15 June 2012), at paragraphs 94 and 95 *per* Lam J (as he then was).

[34] See paragraph 9 of General Comment 16.

[35] See paragraph 1 of General Comment 16.

[36] See paragraphs 9 to 11 of the Dissenting Opinion of Judges Pejchal and Wojtyczek in *Orlandi*.

[37] In paragraph 5 of General Comment 16, it is stated that the term "family" should be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned.