PRINCE'S CHAMBERS

CACV 1 & 2 of 2026
King (Plaintiff) *and* Greater Bay Area University (Defendant)
King & Clarke (Applicants) *and* Secretary for Justice (Respondent)
(Joined Appeals)

BENCH MEMO

(You may not participate in this moot if you have read or been informed of the contents of this memo).

1. The familiar and recurring theme of this moot is: what balance should be struck between the consensus and expectations of society on the one hand, and the enjoyment of dignity and rights by a recognised minority, on the other?

2. The moot facts throw up four contexts in which that question is asked and may be answered differently: in supervising the legislative agenda; in developing tort law; in refining the scope of positive obligations in fundamental rights law; and in fashioning relief.

Issue 1: Whether to grant mandamus relief requiring the Secretary to introduce a bill providing for a same-sex alternative framework to marriage within 28 days?

3. The broad problem this issue gives rise to is: what does one do when the Government does not comply with declaratory relief (in this case the declaration in *Sham Tsz Kit*)?[1] This is not unrealistic *eg* provisions of the Crimes Ordinance were declared unconstitutional in 2005 and 2006 (*Leung*; *Zigo Yau*) but not repealed until the 2013/14 legislative session.

4. Two distinct questions are asked by the Moot CA. First *can* it grant relief? A question of jurisdiction or power. Second *should* it grant relief? A question of principle and discretion.

[1] There are two judgments; the reasons are in (2023) 26 HKCFAR 385 (05.09.2023), referred to as *Sham (Reasons)*. The subsequent order is in (2023) 26 HKCFAR 478 (27.10.2023), referred to as *Sham (Relief)*.

5. The CA has all the powers of the court below *ie* the CFI on JR (HCO (Cap 4) s.13(4)). So the questions are the same as 'could / should the Moot CFI on JR have made the order?' The CFI has jurisdiction to grant mandamus in 'cases in which it had power to do so immediately before the commencement of the Supreme Court (Amendment) Ordinance 1987' (HCO s.21I(1)).

6. The principles governing grant of mandamus are not controversial. It is used to require that a statutory body, decision maker or inferior tribunal comply with a public law obligation – usually a statutory duty – including where jurisdiction is wrongfully declined and (differently) where there is only one way in which a discretion can lawfully be exercised.[2] There is an oft-cited summary in *ex p National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617.[3] It may be refused on utility / necessity grounds for example where a declaration would suffice or an undertaking is offered by the public authority.[4]

7. The unusual factors here are that (i) the proposed order is to compel the Secretary to introduce a bill to LegCo, potentially at odds with the separation of powers, our executive led model of government and (it is said) the principle of non-intervention, and (ii) the obligation to introduce legislation arguably stems from the CFA's order in *Sham (Relief)* whereas mandamus is not orthodoxly used to enforce superior court orders, still less those of the CFA, for which the procedure / remedy of contempt exists. There is also a problem of (iii) utility, in that merely introducing a bill to LegCo will not make it law; will not render the Government's obligation to *provide for* an alternative framework for same sex couples, met; and in this instance will not entitle the Applicants to celebrate / formalise their relationship.

8. **SJ's power.** Can the Secretary even introduce a bill to LegCo? It would appear so, as a member of the 'government', under BL 62 ('The Government … shall

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2 *Eg Caltex Oil Hong Kong Limited v Deputy Judge Christie & Anor* HCMP 1542/1994 (28.10.1994); [1994] HKLY 27, §§22-23 (obiter); *Pang Chui Ping v Registrar of the High Court* [2024] HKCFI 2054, §53.

3 The passage that begins 'Mandamus is the most elusive …' (Lord Scarman, page 16).

4 Cf *R (ClientEarth)* [2015] UKSC 28, §31 (mandatory order granted requiring preparation of air quality plain in compliance with EU directive on air quality; defined timetable the only 'realistic' means of securing compliance given forthcoming election and possible change of government, against backdrop of legal / EU directive obligation to prepare 'as soon as possible').

exercise the following powers and functions: … (5) To draft and introduce bills, motions and subordinate legislation').[5] This does not feature in the Moot CFI's reasoning.

9. **Principle of non-intervention.** This was the first reason the Moot CFI gave for refusing relief (Moot Problem §17(1)). The leading authority is *Leung Kwok Hung v President of LegCo (No 1)* (2014) 17 HKCFAR 689, §§28-32.[6] The principle is that (i) the separation of powers informs construction of the BL (ii) pursuant to which the exclusive jurisdiction of the legislature in managing its own internal processes in the conduct of its business, is recognised by the court (iii) subject to constitutional requirements *ie* where relevant provisions of the BL apply.

10. Would the court be 'managing' LegCo's 'internal processes' in the conduct of its business by ordering the Secretary to introduce a bill? Perhaps not. Applicants may rely on *Leung Kwok Hung* [2007] 1 HKLRD 387, §65 ('the introduction of bills to LegCo is not dealt with as being part and parcel of the enacting process but rather as a preliminary and discrete process'). Respondents may cite §§67-68 ('Hong Kong has an executive-led government … it is for the executive … to formulate policy, expressing it in terms of legislation'). This is a CFI decision not binding on the CA; but not doubted in numerous subsequent cases of high authority.

11. Applicants may also contend that the principle (of non-intervention) gives way to constitutional requirements, since the obligation to introduce a bill albeit expressed in *Sham (Reasons)* ultimately stems from the government's BOR 14 obligations which are constitutional *via* BL 39. Respondents might be asked why, if the constitution requires a piece of legislation (per *Sham (Reasons)* §157, §257), the court cannot order that it be introduced?

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5 Government bills are given 'priority' by the President under BL 72(2).

6 (President's decision to curtail time for debate ending filibuster, involved internal process of legislature and was subject to principle of non-intervention and ought not to be reviewed by court). See also *Christine Fong* (2017) 20 HKCFAR 425, §§71-75 (principle not engaged by powers to admit persons to public gallery); *Yau Wai Ching* (2017) 20 HKCFAR 390, §§17-24 (principle subject to constitutional requirement of BL 104 that oath is valid); and *Leung Kwok Hung* (2021) 24 HKCFAR 234, §§32-37 (principle did not require courts decline to exercise criminal jurisdiction for offence of disturbing proceedings; LegCo had 'waived' exclusive competence by enacting criminal offence).

12. Thoughtful Applicants might contend / Respondents might be asked that one of the rationales of the principle of non-intervention is to avoid 'delays and uncertainties which could result from [the court's] intervention' (*Leung Kwok Hung (No 1)* (2014) 17 HKCFAR 689, §30) – which rationale does not appear to be served by invoking it in this instance.

13. **Utility #1: relief already granted.** This was part of the second reason the Moot CFI gave for refusing relief (Moot Problem §17(2) first two sentences). The problem is that the CFA in *Sham (Relief)* considered that the suspended declaration (not mandamus) was appropriate; and then in September 2025 declined to extend the suspension (Moot Problem §12). The consequences of the suspension having lapsed in October 2025 are that the declaration is 'not suspended' and the Government is at the time of the moot in 2026 in breach of its BOR 14 obligations (see *Chan Kin Sun Simon & Ors* HCAL 79, 82, 83/2008 (11.03.2009),[7] §64).[8] If breach is already established, the question arises: what purpose may be served by a further court order?

14. Respondents will be able to rely on numerous high authorities to the effect that mandamus ought not to be granted where it will not serve any discernible purpose. The challenge for Applicants will be to identify facts and law in support of a 'further order' and the imposition of a timeline:

    (1) Moot Problem §14 indicates that the Secretary might wait for 'societal consensus' notwithstanding that the Moot CFA rejected consultation as a basis for an extension in September 2025.

    (2) Moot Problem §14 also indicates that the Secretary is unwilling to commit to a specified timeline within which legislation may be introduced. There are rule of law arguments to be made here; it would be contrary to the good administration of justice to let the Government proceed in 'breach' of a

[7] Drawn to mooters' attention at Moot Problem §17(4); but incorrectly dated '**1**0.03.2009'.

[8] A Cheung J as the CJ then was: 'The temporary suspension of the declaration of unconstitutionality only prevents the Government from acting in contravention of a declaration in operation and removes the risk of the Government official's action amounting to a contempt of court …'.

declaration for an indefinite period of time. Compare *eg Chan Kin Sun Simon & Ors* HCAL 79, 82, 83/2008 (11.03.2009),[9] §45.[10]

(3) Applicants may contend that the utility in mandamus with a defined timeline is so that a contempt of court application may be made, since without a deadline for compliance contempt of court is unavailable (*Dr Q v The Health Committee of the Medical Council of Hong Kong* [2014] 2 HKLRD 57, §§35-45).[11] The *Dr Q* case also establishes / confirms that contempt applications may be brought against government departments: §33.

(4) There are analogies with *Greens & MT v UK* [2010] ECHR 1826, §115 in which the ECtHR (Fourth Chamber) concluded that the UK had to 'introduce legislative proposals … within six months' to amend a specific piece of UK legislation which banned prisoners from voting, so that the legislation complied with the previous judgment of the ECtHR (Grand Chamber) (a 'higher' court; *Hirst (No 2)* [2005] ECHR 681), which found that the legislative ban contravened ECHR fundamental rights.[12]

(5) As to the length of time sought by Mr King and Mr Clarke (a short 28 days), the problems of achieving societal consensus and 'legislative complexity' were not accepted by the Moot CFA in September 2025 (Moot Problem §12). Thoughtful Applicants might contend it to be implied by the Moot CFA's refusal to grant an extension of time in September 2025, past October 2025, that the Moot CFA considered one month would be sufficient. There is room for discussion as to how long the bill really needs to be – arguably it could be as short as a few lines.

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9 Drawn to mooters' attention at Moot Problem §17(4); but incorrectly dated '**1**0.03.2009'.

10 A Cheung J as the CJ then was: 'For obvious reasons, breaching the Court's declarations would be a most serious matter. Not only would it involve the risk of the Government official concerned … committing a contempt of court, it would also adversely affect the Government's credibility, weaken the governance of Hong Kong by the rule of law, and damage the credibility and integrity of the electoral process in Hong Kong'

11 In particular §45 ('Without a time specified for compliance in the order of mandamus, there is a reasonable doubt as to whether or not the [Committee] was in contempt of court'); the same might apply to the declaration in *Sham (Relief)* which does not impose a time for compliance.

12 Article 3 of protocol 1: the duty to hold free and fair elections.

15. **Utility #2: not the court's role to sanction delay / advise on legislation.** This was a further part of the second reason the Moot CFI gave for refusing relief (Moot Problem §17(2) third to fifth sentences). The Moot CFI ruled that it would be constitutionally inappropriate for the court to be involved in the introduction and drafting process of a bill to LegCo. This provides fodder for Respondents to resist relief and is for Applicants to overcome.

16. There is helpful discussion in the *Chester* case before the EWCA and UKSC, in which the applicants sought a 'reading down' of the UK legislative provisions to comply with the *Hirst* and *Greens* line of authorities or alternatively a further declaration of incompatibility:

    (1) In *Chester* [2011] WLR 1436 (CA), §4, §§30-35 the court accepted the respondent's submissions that (i) the UK Government was considering legislative amendments to comply with *Hirst*, (ii) there were 'deep philosophical differences' between 'reasonable people' as to which classes of prisoners should enjoy suffrage, (iii) there was a wide margin of appreciation as to how exactly the *Hirst* obligation should be met *ie* what classes of prisoners should get the vote, and (iv) it would be constitutionally improper for the court to 'advise' the government on where within that margin the legislation should fall.

    (2) In *Chester* [2014] AC 271 (UKSC), the court broadly agreed, adding that there was 'no point in making a further declaration of incompatibility' (§39) and that '[in] the domestic legal context, it is … therefore for Parliament as the democratically elected legislature to complete its consideration of the position in relation [amendment of the offending primary legislation]. There is no further current role for this court' (§42).

    (3) (Notably, at neither stage was mandamus relief sought).

17. Compare also *Vallejos v Commissioner of Registration & Anor* [2011] 6 HKC 469, §17 (§200 of the HKC report) discussing government conduct pending appeal ('the court should recognize that the primary responsibility for administration falls on the Government and such responsibility include making

decisions as to how to deal with a situation occasioned by a first instance judgment striking down a legislative provision. In cases where the Government decides to appeal against such judgment, it would have to decide what policy or policies to adopt in different aspects of public administration bearing in mind that there is yet to be a final determination as to what the law is … it is not for this court to advise the Government what can or cannot be done').

18. Respondents may rely on these points (and the observations in *Leung Kwok Hung* [2007] 1 HKLRD 387, §§67-68 above); Applicants might note material differences including that the Secretary has no discretion as to the mere obligation to introduce *some* form of legislation (Moot Problem §12(iii)), and contend that *Greens & MT* provides the better analogy (than *Chester* or *Vallejos*).

19. **Utility #3: relief sought will not bring about enactment.** This was a further part of the second reason the Moot CFI gave for refusing relief (Moot Problem §17(2) sixth to eighth sentences on page 7). The Moot CFI observed that (i) the Secretary would only be ordered to 'introduce' a bill, which would not change the law (and the passage of which would not be interfered with pursuant to the principle of non-intervention), and (ii) the bill would not become law in any event until the CE signed and promulgated it under BL 76[13] (relief about which was / is not sought).

20. The question is whether mandamus will prove useful notwithstanding these limitations. Respondents might contend for an inference that decisions about the scope of the bill to be made within Government prior to introduction, will simply be deferred to the legislative chamber if drafting is 'rushed', serving no useful purpose.

21. Applicants might contend that mandamus will (i) avoid the problem of 'indefinite breach', which is at odds with the rule of law,[14] and (ii) permit a

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[13] 'A bill passed by the Legislative Council of the Hong Kong Special Administrative Region may take effect only after it is signed and promulgated by the Chief Executive'.

[14] Cf breach pending resolve as in the case of appeal or actively progressing legal amendment: *Vallejos* [2011] 6 HKC 469 (Moot Problem §17(4)), §18 (or §201 of the HKC report) (Lam J, as Lam PJ then was): 'From time to time, actions to implement a first instance judgment would be put on hold by the Government … to afford opportunity to a losing applicant to exercise his right of appeal … I have never heard any suggestion that in those circumstances the rule of law is compromised … By the same token,

contempt application to be made in the event of subsequent default, which itself 'vindicates the requirements of justice' and is of 'great importance' (see quotes from *M v Home Office*[15] extracted in *Dr Q v The Health Committee of the Medical Council of Hong Kong* [2014] 2 HKLRD 57, §33.

22. Whether the existence of the CE's power of promulgation under BL 76 ought to deprive the Applicants of further relief will turn on whether the Moot Court considers that there is utility in mandamus to prevent indefinite contravention, or 'get the ball rolling' as it were. The Moot Court might think that mandamus compelling the SJ to (merely) introduce legislation offers a happy marriage between the (i) Government's ongoing breach on the one hand and (ii) the constitutional impropriety of the court legislating on the other.

23. **No duty to 'spring clean' the statute book.** This was the third reason the CFI gave for refusing relief (Moot Problem §17(4)), relying on the comments in *Rusbridger* [2004] AC 357 (UKHL), §36, §58, §61. Applicants should be able to identify material differences between that case and the present indicating that the comments have limited application. In *Rusbridger* the question was whether old law should be repealed; the answer was it need not have been since new law rendered it clearly inoperative; in *that* context there was no need to 'spring clean' the statute book. Here by contrast the question is whether new law should be enacted pursuant to a recent CFA determination that it is required. This is not a situation of 'spring cleaning' old law but of giving effect to new law in the first place.

24. **Mandamus inappropriate relief (cf contempt)?** This was the fourth reason the CFI gave for refusing relief (Moot Problem §17(4)), ruling that a contempt application was available and the appropriate relief. There is old law that mandamus does not lie where other relief is available (*R v Trustees of the Vicarage of Orton* (1851) 14 QB 39). Indeed it is a pervasive principle of modern judicial review that JR is a 'remedy of last resort' and will not normally

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in cases where the Government is the appellant, the rule of law is not compromised simply because in the meantime it does not give full effect to a judgment pending appeal.'

15 Itself referred to mooters at Moot Problem §17(4).

be granted where there is an alternative remedy (*Lee Chick Choi v Director of Legal Aid* [2019] HKCA 275, §16).

25. The question is therefore whether the Moot CFI was right in ruling that contempt was available as matters stand (for example because breach of the declaration in *Sham (Relief)* is ongoing despite no deadline for compliance having been set); or whether a further failure to comply with a mandamus order which requires compliance within a specified time is required, before contempt is available:

    (1) Respondents may rely on *Chan Kin Sun Simon & Ors* HCAL 79, 82, 83/2008 (11.03.2009), §64 (mentioned above) which implies that the Government falls in breach of a declaration 'at risk of' contempt when suspension expires.

    (2) Applicants may rely on *Vallejos v Commissioner of Registration & Anor* [2011] 6 HKC 469, §11 (§194 of the HKC report): 'A declaration is not a coercive judgment and the grant of declaration per se does not require the Government to take any action. Thus, the failure on the part of the Government to take any action to implement the law in accordance with the declaration is not a contempt of court'.

    (3) Applicants may also rely on *Dr Q v The Health Committee of the Medical Council of Hong Kong* [2014] 2 HKLRD 57, §§35-41 (also mentioned above) where the mandamus order did not specify the time by which compliance had to be achieved, leaving reasonable doubt as to whether it had been breached – Applicants may reason that a similar ambiguity is latent in the CFA's declaration in *Sham (Relief)*, such that contempt is not presently available.

26. Mooters should be able to navigate the (different) contexts in which these *dicta* were given. In *Chan Kin Sun* the context was the decision of whether or not to grant a suspended declaration (a decision already taken in our case, by the CFA in *Sham (Relief)* and Moot CFA in September 2025). In *Vallejos* the context was whether the Government would be in breach pending appeal against the declaration in question (whereas here there is and can be no appeal against *Sham*

(Relief)). In *Dr Q* the context included that the Committee might have acted promptly in compliance with the mandamus order (§45) (whereas here the Secretary has not indicated any 'rush' on his part, and indeed may be pursuing conduct admonished by the Moot CFA in seeking consensus, see Moot Problem §14). In other words, none of the above *dictum* is exactly on point.

Issue 2: Whether the tort of harassment does / should include less favourable treatment inflicted on the grounds of sexual orientation.

27. This issue asks mooters to deal head-on with the question of whether a tort should be 'developed'. Interestingly, the tort of harassment was itself only recently developed.

28. The development sought is that that only 'less favourable' (not 'unreasonable or unacceptable') conduct be required for the tort of harassment where that conduct was meted out on grounds of sexual orientation (Moot Problem §10(3), §19(2)).

29. In England and Wales there was statutory intervention (the Protection of Harassment Act 1997) and it has since been held that, prior to the Act, there was no established tort of harassment at English common law: *Wong v Parkside Health NHS Trust & Anor* [2003] 3 All ER 932 (CA), §29.

30. The HKCA in 2003 (A Cheung J) considered it 'arguable' that the tort exists and noted that 'little guidance' could be obtained from English authorities following the 1997 Act: *Wong Tai Wai David v The HKSAR Government* (CACV 19/2003, 07.09.2004), §36.

31. The tort was probably then established in Hong Kong in *Lau Tat Wai v Yip Lai Kuen Joey* [2013] 2 HKLRD 1197, which gave reasons for the development at §§56-61, namely (i) harassment occurs in Hong Kong and is a problem that the court has had to deal with, (ii) intrusion of privacy is difficult to prevent in Hong Kong which is a 'small place' with fast moving 'technological advances', (iii) there are analogous social conditions in Singapore which has developed the tort, and (iv) existing causes of action including private nuisance do not adequately 'fit' the circumstances of harassment.

32. Mooters should be able to discuss whether and which of those reasons might be extrapolated over to these circumstances in support of or against the development of the elements of the tort (to engage on merely less favourable treatment that is meted out for discriminatory reasons).

33. Applicants may rely on intrusions to privacy as a factual and juridical basis for the tort.[16] Ambitious Applicants may analogise from the reasons given by Wright J in *Wilkinson v Downton* [1897] 2 QB 57[17] (a 'right to personal safety' begs the question of the source of such rights and, if that source is the constitution, might be replaced with a 'right to non-discriminatory treatment').

34. Respondents may note the novelty of Mr King's claims and that moving from 'harassment' to 'discrimination' is not an intuitively 'incremental' development.

35. Respondents may also rely on a 'constitutional impropriety' argument, noting that legislative protection for sexual orientation discrimination was in fact ventilated in the legislature but not favoured (cf Moot Problem §10(4) regarding recent amendments):

    (1) the 'Equal Opportunities Bill' as it was introduced to LegCo by Anna Wu in July 1994 (see Hansard 06.07.1994 from p.5290) included protection against discrimination on the grounds of 'sexuality', defined to mean 'heterosexuality, homosexuality (including lesbianism) or bisexuality' (clause 3);

    (2) as is well known the Government opposed the Bill and introduced a 'compromise' being the what is now the Sex Discrimination Ordinance, in October 1994 (see Hansard 26.10.1994 from p.568);

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16 Compare *eg* Lord Hoffmann in the minority in *Campbell* [2004] 2 AC 457, para 43 '…the right to privacy is in a general sense one of the values, and sometimes the most important value, which underlies a number of more specific causes of action, both at common law and under various statutes.'.

17 'The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical harm to the plaintiff — that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action'

(3) the 1995 Report of the Bills Committee on the Government Bill (LegCo paper HB910/94-95; HB/C/61/1) did not record discussion of sexual orientation protection.

36. Applicants are also prompted by Moot Problem §10(4) to rely on fundamental rights guarantees as a juridical basis for development of the tort. In *Campbell* [2004] 2 AC 457 (UKHL) the House of Lords considered that fundamental rights norms (i) did not themselves create causes of action, but (ii) ought to be 'absorbed' into applicable existing causes of action. Thus, fundamental rights to privacy and expression were to be considered and balanced in determining whether the cause of action for breach of confidence in equity (or the modern tort of misuse of private information) was made out.[18] Question / consider how far fundamental rights to non-discrimination on grounds of sexual orientation might (should / should not) be 'absorbed' into the tort of harassment, so as to expand its scope to protect against discrimination.

Issue 3: Whether the Government is in breach of its constitutional obligations in not having enacted legislation protecting individuals against sexual orientation discrimination by employers.

37. Mooters should appreciate that Mr Kin and Mr Clarke are making arguments analogous to those advanced as regards Question 2 in *Sham (Reasons)*, §3(2), that: 'the absence of any alternative means of legal recognition of same-sex partnership constitutes a violation of [BOR 14] (on privacy) and / or [BL 25 and BOR 22] (on equality)'.

38. The overarching questions are therefore whether the analysis of the majority[19] in *Sham (Reason)* can be extrapolated from that context (non-recognition of same-sex partnerships) to this context (non-prohibition of sexual orientation discrimination) using BOR 14 / privacy rights; and whether alternatively the

[18] Mooters may note that this was in part because section 6 of the Human Rights Act included 'courts' within the definition of 'public authorities' which are bound by the Convention, a landscape not replicated in Hong Kong: *HKSAR v Ng Ngoi Yee Margaret & Ors* [2024] HKCFA 24, §35.

[19] Ribeiro PJ, Fok PJ and Keane NPJ.

Applicants can succeed using BL 25 / BOR 22 / equality rights. We are in the Moot Court of Appeal so bound by *Sham (Reasons)*.

39. Beginning with privacy, Applicants may 'plug in' the facts and legal context here to the analysis of the majority, whereas Respondents may try to distinguish them:

(1) **Is there a need for protection to avoid indignity?** In *Sham (Reasons)*: there was a need for legal recognition of same-sex relationships (i) to meet those persons' basic social needs and (ii) to avoid demeaning them by comparison with opposite-sex couples who are free to marry (§§128-135); further the absence of a legal framework 'demeaned' same-sex couples and engages BOR 14, and interfered with or hindered those rights since same-sex couples (i) were unable to regulate their legal affairs as couples relating to property and engagement with public authorities, (ii) as shown by *QT* and *Leung Chun Kwong*, had to expose themselves to the uncertainty of litigation to achieve equal treatment in the 'ordinary course of their relationships' (§§142-145):

(a) Is there (authority for) a similar need in this context (*ie* a need to be protected by a statutory tort against sexual orientation discrimination)?

(b) See *eg* the Human Rights Committee's 2013 Concluding Observations on Hong Kong's Third Periodic Report (CCPR/C/CHN-HKG/CO/3), §23, [20] described as 'deserving of respect' though far from binding, in *Sham (Reasons)* §208.

(c) Or is (there authority that) the absence of such protection demeaning persons with same-sex sexual orientation?

(d) Moot Problem §19(1) refers to *Macdonald* [2003] ICR 937 (UKHL), which only briefly mentions 'perceived deficiencies' in legislation protecting on grounds of gender but not orientation, which were soon

[20] 'The Committee is concerned about the absence of legislation explicitly prohibiting discrimination on the basis of sexual orientation and reported discrimination against lesbian, gay, bisexual and transgender persons in the private sector'

to be remedied by the UK's implementation of an EU Directive covering sexual orientation discrimination (§7 , §106). But the House (of Lords) did refer to sexual orientation discrimination as 'disgraceful' (§8); and §52 refers to 'significant' changes in EU law toward requiring equal treatment on grounds of sexual orientation: question how far those developments (or analogous developments in Asia) may assist the Applicants in this instance in identifying a 'need' for protection in a similar way that there was a need for recognition of same-sex relationship status in *Sham (Reasons)*?

(2) **Does 'practical and effective' protection require positive obligations covering private treatment?** In *Sham (Reasons)*: BOR 14 (like ECHR 8) imposed positive obligations, to guarantee the substantive right of privacy against interferences from public authorities and from private persons / entities, the incidence and scope of which were to be determined by requirements that fundamental rights norms provide 'practical and effective' (not theoretical or illusory) protection (§§152-178):

(a) This would seemingly address the Moot CFI's concern that *Sham (Reasons)* concerned marriage and its 'public' elements unlike this case which concerns treatment by private individuals (Moot Problem §18(1)): in fact the private treatment is 'caught' so far as its regulation is required to render rights guarantees practical and effective.

(b) Is the BOR 14 right to privacy 'practical and effective' if employers such as the University in this case can treat employees less favourably on account of their same-sex sexual orientation? Mooters ought to be alive to this central question. Well researched Applicants will be able to draw from ECtHR authorities.

(c) *Nb* 'privacy' can likely encompass one's professional or business life or employment: *HKSAR v Fung Ka Chun & Anor* [2023] 1 HKLRD 1265 (CA), §§105-106.

(3) **Is the relief sought unworkable or is the absence of protection justified?** In *Sham (Reasons)*: recognition of the BOR 14 breach would not be 'unworkable' / uncertain for the government to comply with, noting the ECtHR's distinction between 'core rules' of marriage (as to eligibility, formalities, property, agency, dissolution including property adjustments) which had to be provided for and 'supplementary rights' of marriage (as to inheritance, labour, social security, fiscal matters, administrative procedure, data protection, public administration) about which the government enjoyed a wide margin of discretion (§§179-188);

(4) As to justification: in *Sham (Reasons)*, providing alternative legal recognition to same-sex couples was not likely to threaten or undermine the institution of marriage, since (i) it was an alternative regime, not an equivalent one, that was sought, (ii) the argument was circular (simply asserting that *because* marriage is for opposite sex couples *therefore* same-sex couples cannot enjoy similar rights), (iii) there was no rational connection between granting an alternative framework and the undermining of marriage, since opposite sex couples would still be free to marry (or: the grant of one set of rights does not restrict the other) (§§193-196):

(a) Here, 'unworkability' and 'justification' arguments for the Respondents would likely be that *all* (nor merely some, or merely 'core') aspects of sexual orientation discrimination, enjoy a wide margin of appreciation. In other words, it should be for the legislature to determine in what fields and circumstances the protection exists.

(b) Respondents may also note the variety of 'choices' made in each of the discrimination ordinances – as regards the fields in which they apply (employment, goods, services, etc) and the various technical exceptions (*eg* the permanent resident carve outs in section 8(3) of the Race Discrimination Ordinance) – to contend that relief is unworkable.

(c) One answer for the Applicants is that in this case they seek only the narrow relief regarding employment benefits, which is fairly central any non-discrimination scheme, and might similarly be described as 'core'. The CFA in *Sham (Reasons)* felt comfortable identifying a BOR 14 shortfall without going so far as to 'legislate' (compare §186[21] and §256.[22]

40. As regards equality the considerations are slightly different. There are (at least) two different ways in which Applicants might run their equality case:

(1) On the premise that orthodox equality analysis applies, showing first that the absence of sexual orientation discrimination legislation amounts to one of the three types of discrimination (direct; *Thlimmenos* and indirect) and second that the treatment is not justified *ie* that it is not a rational and proportionate means of pursuing a legitimate aim: *QT* (2018) 21 HKCFAR 324, §33, §37; *Leung Chun Kwong* (2019) 22 HKCFAR 127, §§18-22.

(2) Alternatively, on the premise that the equality guarantees impose positive obligations on the Government to enact sexual orientation discrimination legislation so as to ensure real and effective (not theoretical and illusory protection), there being a real need for protection in this instance allowing for the margin of discretion that the Government has in positive obligation contexts and striking a fair balance between the competing interests of the individual and of the community as a whole; compare *Sham (Reasons)* §§161-163.

41. There is an analytical difference between the two approaches. On the first, the Applicants do not need to rely on a constitutional obligation to enact same sex

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[21] Ribeiro and Fok PJJ: '… the foregoing discussion is intended only to be illustrative of possible features of a legal framework, and not prescriptive. Such rules suggest the broad parameters of core rights and obligations that are likely to require consideration, always accepting that the executive and legislative authorities will have a margin of discretion in deciding on their content, subject to the requirement that the BOR14 rights be effectively recognised and protected'.

[22] Keane NPJ: '…The narrowing of the appellant's argument in this Court meant that the issue to be addressed is whether BOR14 requires some irreducible legal recognition of same-sex partnerships. It is accepted that the determination of the substantive content of the legislation appropriate to provide that recognition is necessarily a matter for the legislative arm of government rather than the judiciary'.

discrimination protection legislation. They can make the argument from comparison instead, reasoning that '*because* protection is extended to others on *eg* grounds of sex and race, and *because* there is an equal treatment obligation, *therefore* the protection must also extend to sexual orientation'. This is unusual however in that it implies some form of agency or *animus* in the legislature, which is said to have 'failed' or 'omitted' to act comprehensively (cf Moot Problem §18(5)). The second approach, by contrast, begins with the premise that the constitution requires some form of legislation.

42. **Orthodox premise issue #1: Type of discrimination?** Beginning with the orthodox approach: the first and second types of discrimination might be relied upon:

(1) Direct discrimination (failure to treat like with like) since persons whose employment is terminated due to their race, sex or disability are 'like' Mr King in that they are treated because of immutable characteristics,[23] yet Mr King is treated differently in that he is not protected by the statutory tort, and not entitled to (*eg*) damages for injury to feelings. In short: because the legislation is nakedly discriminatory in having omitted sexual orientation protection from its scope. (Mooters should be careful to recall that the attack is not on *the treatment* by the university but *the treatment by the limited scope* of the legislation).

(2) *Thlimmenos* discrimination: failure to treat differently persons whose situations are relevantly / significantly different. The argument here would be that excluding Mr King from the protection of the statutory discrimination tort treats him the same as someone terminated from their employment for an offensive but non-discriminatory reason, whereas of course Mr King's circumstances were relevantly different in that he was terminated for his sexual orientation which strikes at his dignity and ought to be respected differently.[24]

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23 Or 'especially pernicious' characteristics, which an individual cannot change, and which when used against victims are 'particularly demeaning': *QT*, §107.

24 In *Thlimmenos* itself 'an individual who had been convicted of insubordination for refusing, because of his pacifist religious beliefs, to wear military uniform when mobilised, complained that he was wrongly equated with convicted felons in subsequently being refused appointment as a chartered accountant. He

43. (It would seem to be difficult to rely on indirect discrimination (imposition of neutral criteria to the significant prejudice of a particular group), since there is no obvious 'neutral criteria'.)

44. **Orthodox premise issue #2: Can an omission (still more: a conscious decision to exclude) of the legislature amount to differential treatment for discrimination purposes?** Applicants ought to rely on *Vriend v Alberta* [1998] 1 SCR 493 (mentioned in Moot Problem §18(4)), in which a well-performing college employee was fired for being gay; the Supreme Court of Canada held a statutory provision prohibiting employment discrimination on grounds of 'race, religious beliefs, colour, gender, physical disability, mental disability, marital status, age, ancestry or place of origin', to be unconstitutional for failing to include 'sexual orientation' amongst those grounds, read against section 15(1) of the Canadian *Charter* ('Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination …').

45. Respondents might contend that *Vriend* is materially different in that the statutory provisions there were intended to confer broader protection to as part of a 'general protection scheme', unlike in Hong Kong where LegCo specifically opted to limit the scope of protection, rejecting the 'Equal Opportunities Bill' in favour of piecemeal legislation. Similar reasoning found support of a minority in the subsequent Canadian case of *Centrale des syndicats du Québec v Quebec (Attorney General)* [2018] 1 SCR 522, §151 (also mentioned at Moot Problem §18(4)). Question however whether the motives of a legislature (so far as they can be discerned and reliably invoked) ought to affect objective discrimination analysis? The majority in *Vriend* avoided this problem by reasoning that 'legislative intentions' were irrelevant.

46. Respondents may also rely on the discussion in *Sham (Reasons)* §§189-192 to the effect that discrimination analysis does not fit well to an absence-of-legislative-protection situation. There is discussion to be had as regards the applicability of that reasoning to this scenario.

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successfully argued that the felons were in a materially different situation and that he should not be equated with them to his disadvantage' (summary from *QT*, §33(b).

47. **Orthodox premise issue #3: Justification.** The next question is whether the absence of sexual orientation protection rationally serves a legitimate aim interfering no more than is necessary.

48. The facts do not lend themselves well to the Applicants' position since it is difficult to fit the 'absence of statutory protection' matrix into the orthodox mould of 'was that treatment rationally connected and proportionate?'. Respondents will further be on strong ground (and likely able to adduce much *dicta*) contending that that the exact scope of legislation of this sort is primarily for the legislative branch, not the judicial, and that consequently what the Applicants ought to establish is that there is a free-standing obligation to enact sexual orientation discrimination legislation.

49. **Positive obligations premise issue #1: do equality guarantees impose positive obligations?** That takes the analysis neatly to the question of whether BL 25 / BOR 1 / BOR 22 impose positive obligations on the government to enact legal frameworks regulating the private discriminatory treatment (compare Moot Problem §18(1))? This is largely unchartered territory in the case law as well as the literature, leaving room for discussion from first principles:

    (1) Mooters should appreciate the *legal* difference between negative and positive obligations. 'Negative' obligations of equality and non-discrimination have been used in Hong Kong and elsewhere to decriminalise same-sex acts, equalise the age of consent, and prohibit public authorities from themselves indulging in discriminatory treatment. But positive obligations are different in that they would require the government to positively act, by policy or legal framework, in order to protect individuals from treatment by other individuals

    (2) Mooters should also be able to discuss the *theoretical* or *juridical* differences between positive and negative obligations in an equality context. Negative obligations (or duties of restraint) are understood to meet requirements of formal equality *ie* the norm that like cases should be treated alike unless there are good reasons for the differential treatment in question. Positive obligation by contrast are often understood to meet

requirements of *substantive* equality *ie* to redress historical or innate disadvantages and to include minorities within legal frameworks – to provide equality of opportunity (not merely equalisation of treatment).

(3) Respondents will be able to point to much local case law in which equality guarantees have been deployed negatively but not positively, in support of an argument that there is no positive aspect to equality guarantees in Hong Kong. *Leung TC William Roy*, *Yau Yuk Lung Zigo*, *QT*, *Leung Chun Kwong*, *Infinger* and *Edgar Ng* all involved 'negative' conceptions of equality, in that legislative provisions or public authorities were prevented from treating, whether directly or indirectly, sexual minorities differently without good reason.

(4) Applicants will have to analogise from other areas. There is ECtHR authority that ECHR 14[25] read with other rights can impose positive obligations to protect sexual minorities, including: to offer protection against counter protesters on an LGBT protest (*Identoba & Ors v Georgia* [2015] ECHR 474);[26] and to protect from hate speech (*Beizaras and Levickas v Lithuania* [2020] ECHR 19).[27]

(5) There is a (perhaps better) argument available to Applicants in that BOR 22 provides a 'free standing' or 'autonomous' right to equal treatment which unlike ECHR 14 / BOR 1 does not require engagement of another right: *Sham (Reasons)* §136. Textually, BOR 22 confers rights to 'equal and effective protection' of the law and prohibition of 'any' discrimination on grounds that must impliedly include sexual orientation.[28] The absence

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25 'The enjoyment of the rights and freedoms set forth in the European Convention on Human Rights and the Human Rights Act shall be secured without discrimination on any ground such as …'. Compare BOR 1: 'The rights recognized in this Bill of Rights shall be enjoyed without distinction of any kind, such as …'

26 ECHR 14 read with ECHR 3 (ill-treatment) and ECHR 11 (assembly).

27 ECHR 14 read with ECHR 8 (privacy and family).

28 The text arguably provides for three distinct entitlements: '**[1]** All persons are equal before the law and are **[2]** entitled without any discrimination to the equal protection of the law. In this respect, **[3]** 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.'

of a 'sexual orientation discrimination ordinance' might amount *simpliciter* to a breach of BOR 22.

50. **Positive obligations premise issue #2: is legislation required for practical and effective protection of rights?** The next logical question (assuming positive guarantees may be established) is whether the practical and effective protection of equality rights calls for legislation prohibiting sexual orientation discrimination, bearing in mind the margin of discretion and a fair balance between the competing interests of the individual and of the community as a whole. The discussion will likely overlaps with that under BOR 14.

51. Mooters might be asked to discuss the anomalies that arise across the present legal landscape: if the university was a public authority, there can be no doubt that Mr King would have succeeded in a public law / breach of human rights claim, as for example happened in *AK v Russia* (49014/16, 07.08.2024) (termination of employment of teacher on sexual orientation grounds, violation of ECHR 8 and 14). Compare also Lord Hoffmann in the minority in *Campbell* [2004] 2 AC 457, §§50-51: 'I can see no logical ground for saying that a person should have less protection against a private individual than he would have against the state for the publication of personal information for which there is no justification … the cause of action … focuses upon the protection of human autonomy and dignity- the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.'

Issue 4: Relief as regards issues 2 and 3 (the tort of harassment and the absence of sexual orientation discrimination legislation)

52. These are minor issues designed to promote discussion on (i) the declaratory theory of law, pursuant to which developments in tort are 'discerned' and appear to apply retrospectively to applicants whose conduct pre-dates such discerning and (ii) the question of what relief is appropriate as regards issue 3.

53. The declaratory method would appear to be satisfactory in human rights terms, read against the prohibition on retrospective penalties. The ECtHR in *SW v UK* [1995] ECHR 52, §36 accepted as non-objectionable the 'the progressive

development of the criminal law through judicial law-making', provided that the development was 'consistent with the essence of the offence and could reasonably be foreseen' (as regards the criminalisation of marital rape, brought about by a House of Lords decision).

54. As regards issue 3, the relief granted will depend on which arguments (if any) the Applicants succeed on. If they get up under BOR 14 or a 'positive obligation' argument under BL 25 / BOR 22, then arguably a declaration suffices. The court would simply declare the Government to be in breach of positive obligations, as it did in *Sham (Reasons)*. If however the Applicants succeed on an orthodox equality argument, arguably provisions of the Sex Discrimination Ordinance are unconstitutional. This gives rise to the question of what to do with them. It would seem counter-intuitive to 'strike them down'. Mooters should be able to discuss the 'necessity' for a suspended declaration (*Koo Sze Yiu v Chief Executive of the HKSAR* (2006) 9 HKCFAR 441). Of interest is the decision in *Minister for Home Affairs v Fourie* [2005] ZACC 19, §§157-159 to give the legislature time to make amends, failing which words would be 'read in' to the statute to make it constitutionally compliant.

References

55. There are references in the moot to persons involved in the history of law and gay rights:

    (1) tennis champion 'Billie Jean King' made CNN's 2019 list of most influential LGBTQ activists;

    (2) gaussian error function was the topic of Alan Turing's dissertation;

    (3) 'Edgar' Ng challenged restrictive housing and inheritance law in Hong Kong;

    (4) the mah-jong table in Temple Street is where Pak and Hoi met meet in the Hong Kong film 'Suk Suk' – Ray Yeung's story of two married men who meet later in life;

(5) 'Clarke' was the name of Alan Turing's (opposite sex) partner;

(6) The Kylie Minogue concert was one of the 'trivial examples' of stereotypes given by Lord Hope in *HJ (Iran)* [2010] UKSC 31, §78, rejecting the argument that gay men could 'hide' their sexuality on return to intolerant countries and avoid persecution;[29] and

(7) 'A[lbie] Sachs' is of the course the ground-breaking former judge of the South African Constitutional Court who wrote the majority judgment in *Minister for Home Affairs v Fourie* [2005] ZACC 19 finding legislative provisions confining marriage to opposite sex couples unconstitutional.

Josh Baker
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[29] '…just as male heterosexuals are free to enjoy themselves playing rugby, drinking beer and talking about girls with their mates, so male homosexuals are to be free to enjoy themselves going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates … the same must apply to other societies. In other words, gay men are to be as free as their straight equivalents in the society concerned to live their lives in the way that is natural to them as gay men, without the fear of persecution.'