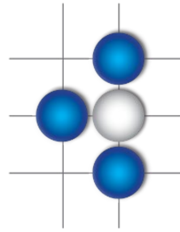

Resolution Chambers

<u>BENCH MEMORANDUM</u>

LM v PK and SS

Version 1.2,
13 July 2022

<u>Authors</u>
Azan Marwah
Shaphan Marwah

<u>CONFIDENTIAL</u>

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1. Purpose of the Bench Memorandum

The Bench Memorandum provides judges with basic factual and legal information to evaluate the written memorials and oral pleadings of participating teams. It should be read in conjunction with the Moot Problem.

The Problem was designed to present the competitors with legal issues that have strengths and weaknesses on each side. Teams should be able to construct logical arguments as both Applicant and Respondent. As a judge, your task is to evaluate the quality of each team's analysis, knowledge of Hong Kong law regarding discrimination and LGBT+ rights, and advocacy skills. Please make sure not to confuse this task with your own personal evaluation of the merits of the case.

The Bench Memorandum is not meant to be an exhaustive treatise on the legal issues raised in the Problem. Judges should be aware that this document has been condensed in favor of breadth. It does not purport to cover every last detail, though we do aim to contextualize the law both within society and within the events of the Problem. In many instances, relevant case law and practice is alluded to, but not discussed in depth. The participants should address cases and principles of law. The practice and legal authorities cited herein are illustrative and not intended to be a comprehensive review of all relevant sources of law. As such, judges should not be surprised when participants present arguments or cite authorities that may not be discussed in this memorandum. This is perfectly appropriate and does not suggest that such arguments are not relevant or credible.

As always, judges are encouraged to engage in their own independent research on the issues or examine the suggested research materials cited below.

One of the most rewarding parts of moots for students is being asked questions during oral arguments. This Bench Memorandum provides two tools to help you ask questions:

- There are sample questions embedded throughout the Bench Memorandum.
- There are occasions where there are bullet points outlining the principal arguments for, respectively, LM (the Applicant) and SS (the 2nd Respondent). When an oralist representing LM is speaking, you may consider interjecting with arguments and questions from SS's bullet points. And when an oralist representing SS is speaking, you may consider interjecting with arguments and questions from LM's bullet points.

2. Summary of Facts

2.1. Overview

The 2022 Moot Problem involves an interlocutory appeal and cross-appeal to the Court of Final Appeal ("**CFA**") against a decision of the Family Court in relation to an application for domestic violence injunctions under the Domestic and Cohabitation Relationships Violence Ordinance (Cap 189) ("**DVO**"). The two parties, LM and SS, are only related by affinity, i.e. the same-sex marriage of LM to PK. As such, this Problem concerns five issues: (1) availability of divorce to same-sex married couples; (2) the availability of ancillary relief to same-sex married couples; (3) the availability of ouster and non-molestation injunction orders to same-sex married couples; (4) the rights of children of same-sex married couples; and (5) the effect of recognition of same-sex marriage on third parties.

2.2. Background

LM was in a long-term same-sex relationship with PK, whom she met at graduate school. Both are nationals of jurisdictions that recognize same-sex marriage (South Africa and Ireland, respectively). In 2017, they married whilst they were both domiciled in a jurisdiction that recognizes same-sex marriage (i.e. South Africa). LM was a teacher and PK worked in finance.

PK is also a Hong Kong permanent resident, whose parents still live in Hong Kong. In 2018, PK's parents gave her as a gift a flat near their own in Tsuen Wan to encourage her to return to Hong Kong.

In October 2019, PK and LM agreed that they would raise a family, and LM underwent IVF treatment with donated sperm and her own eggs. LM became pregnant in February 2020. Though it is not mentioned in the Problem, under the South African National Health Act (2003) such procedures are lawful and the sperm donor has no legal rights or status in respect of the child and he is entitled to confidentiality (i.e. his name cannot be disclosed to the parties). Also, under South African law, LM and PK would both now be automatically considered parents of RMS (see V & Anor v Minister of Social Development & Anor [2022] ZAGPPHC 114).

In March 2020, PK was headhunted to a senior position at an international bank in Hong Kong. LM was reluctant to travel during the pregnancy but, owing to the Pandemic and the difficulties of travel back and forth, LM and PK agreed that their child would be born in Hong Kong. In April, LM obtained a 7-year dependent visa, on the basis of her

marriage to PK, and they both and arrived shortly thereafter. LM and PK immediately moved into the Tsuen Wan flat.

Due to the move and her pregnancy, LM had given up her job as a public-school teacher and was unable to work when she arrived in Hong Kong. LM had spent all her savings on the IVF treatment and so was entirely financially dependent upon PK.

Although PK's relationship with her parents significantly improved after her arrival, PK and LM's relationship rapidly deteriorated. PK began to chastise, insult and occasionally physically assault LM.

After the birth of their child, RMS, in November 2020, PK's mistreatment of LM intensified. PK substantially reduced the family budget and fired the foreign domestic worker that had been hired to assist LM in caring for RMS and the Tsuen Wan flat. PK cancelled LM's mobile telephone contract and cancelled Internet access at home, effectively cutting LM off from her family in South Africa. LM had difficulty obtaining sufficient daily necessities and began to psychologically deteriorate. LM was effectively isolated.

After speaking with an NGO social worker, LM obtained legal aid and filed a petition for divorce against PK citing the latter's unreasonable behaviour, and seeking maintenance pending suit and interim maintenance for RMS.

Upon being served with the petition, PK returned to the Tsuen Wan flat together with her father, SS. PK told LM that she had to leave the flat and that it had been given back to SS. When LM refused to leave, SS began to throw LM's belongings out of the door of the flat, breaking several of her football trophies. SS also used derogatory and homophobic slurs, screaming at LM that she and her "*bastard*" had to leave immediately. During this altercation, LM's social worker arrived at the home and telephoned the police, who arrive and separate the parties, advising them to take legal action and not to engage in further violence. The police took no further action.

The next day, LM's solicitors filed an application by summons within the divorce proceedings under section 17 of the Matrimonial Proceedings and Property Ordinance (Cap 192) ("**MPPO**"), seeking to set aside the gift by PK to SS of the beneficial ownership in the Tsuen Wan flat ("**the s.17 summons**"), and filing a *lis pendens* with the Lands Registry. They also filed a separate summons within the divorce proceedings under sections 3 and 3A of the DVO, seeking non-molestation orders and against both PK and SS, and their ouster from the Tsuen Wan flat ("**the DV summons**").

2.3. Legal Proceedings

The divorce petition proceedings began before the Family Court (a division of the District Court) with a 'First Appointment Hearing' ("**FA hearing**") (i.e. a directions hearing) pursuant to §1 of Practice Direction 15.11 on the Financial Dispute Resolution Scheme. The handling judge, HHJ Varadkar then immediately directed that the call-over hearings of the DV summons and the s.17 summons be heard together with the FA hearing. Prior to the hearing, it was ordered by consent that SS be added as a respondent to the proceedings for the purposes of the s.17 summons and the DV summons.

At the FA hearing, LM sought and obtained 'interim interim' orders for child maintenance and maintenance pending suit against PK (see PD15.11 at §5(b)(i)). These orders assumed that LM and RMS would continue to live in the Tsuen Wan flat. The judge then directed that the petition be stayed pending the determination at a preliminary-issues hearing as to whether there was jurisdiction for divorce proceedings in cases of same-sex marriages.

With respect to the DV summons, LM's applications against PK were resolved by mutual non-molestation undertakings, and an undertaking that she would not return to the Tsuen Wan flat. However, SS refused to provide such undertakings and requested the matter be set down for trial. PK took no further part in the determination of the DV summons.

At the trial of the DV summons, SS did not dispute the facts alleged by LM but argued that the Family Court lacked jurisdiction as PK and LM were (i) not 'spouses' within the meaning of the DVO, and further that (ii) the Family Court could not make an ouster order in respect of the Tsuen Wan flat since the Family Court lacked jurisdiction to entertain divorce proceedings under the Matrimonial Causes Ordinance (Cap 179) ("**MCO**") because their marriage is not a 'monogamous marriage' as required by MCO section 9 and (iii) for the same reason, neither could it make a set aside order under the MPPO.

After considering the matter, HHJ Varadkar made a non-molestation order against SS. Applying the decisions of the Court of Final Appeal in *Leung Chun Kwong v Secretary for the Civil Service* and *Director of Immigration v QT*, the judge held that a restrictive definition of 'spouse' to exclude same-sex partners would result in unjustifiable discrimination against LM. Therefore, applying a constitutional reading, 'spouse' should be defined to include "*any party to a marriage entered into outside Hong Kong according to the law of the place where it was entered into and between persons having*

the capacity to do so, provided that where the persons are of the same sex and such a marriage between them would have been a marriage recognised in Hong Kong but for the fact only that they are persons of the same sex, they shall be deemed for the purposes of such a marriage to have the capacity to do so".

However, HHJ Varadkar dismissed LM's application for an ouster order, reasoning that section 9 and 2 of the MCO, together with Article 37 of the Basic Law, read together with article 19 of the Hong Kong Bill of Rights ("**BOR**"), limit the institution of marriage and the availability of divorce in Hong Kong to persons of the opposite sex. The judge referred to the *obiter dicta* of the *per curiam* judgment in *QT* at §67 and reasoned that since their marriage was void there was no need to extend divorce law to include same-sex couples, and accordingly there was no jurisdiction to set aside transactions under s.17. If there was no jurisdiction for the court to set aside the re-gift of the Tsuen Wan flat to SS, then the court could not reasonably make an ouster order.

SS immediately appealed against the non-molestation order. LM then filed a respondent's notice seeking to contend by cross-appeal that the Court of Appeal should make an ouster order. On appeal, the Court of Appeal agreed with the Family Court and refused the appeal and cross-appeal. The parties were granted leave to appeal further to the Court of Final Appeal.

2.4. Questions of Great and General Public Importance ("**GGPI**")

The questions approved by the Appeal Committee of the Court of Final Appeal are as follows:

(i) Should the word 'spouse' be interpreted within the DVO to include a party to a same-sex marriage performed abroad?

(ii) Do Article 25 of the Basic Law and Articles 1 and 22 of the BOR require that the words "monogamous marriage", "spouse", "husband" and "wife" in the MCO and MPPO be interpreted to include same-sex couples married celebrated outside of Hong Kong according to the law of the place where it was entered into and between persons having the capacity to do so?

3. Analysis of the Moot Problem

The appeal and cross-appeal both concern challenges to the jurisdiction of the Family Court to grant relief in respect of same-sex marriages in relation to (i) ancillary relief in divorce proceedings under the MPPO, and (ii) domestic violence injunctions under the DVO in relation to relatives of spouses. These are two distinct circumstances (divorce and domestic violence) where the constitutional protections for equality conflict with the statutory schemes. In respect of both, mooters will have to apply the test for discrimination.

3.1. Procedure: domestic violence

Both applications that are the subject of the appeal were made within divorce proceedings. Normally, domestic violence proceedings under the DVO are begun by originating summons. However, not in this case because of PD15.12 'Matrimonial Proceedings and Family Proceedings' at Part H §11, which provides that where there are pending divorce proceedings any application under section 3 of the DVO may be made by summons within the divorce proceedings. The applicant's DV summons therefore piggybacked her section 3 (spousal) application to bring the 3A (relative) application.

Mooters are not expected to raise procedural issues, and judges are discouraged from raising this matter given that it was not raised earlier in the proceedings.

Judges may wish to ask mooters whether the word "spouse" should be interpreted consistently between the DVO and the MPPO/MCO.

3.2. Molestation

The threshold for injunctions (both non-molestation and ouster) under section 3A of the DVO is that the court is satisfied that the applicant has been *molested* by a *relative* of the applicant.

Molestation is not defined in the DVO but the principles are now well settled. Case law suggests that the Court has given molestation a wide interpretation. A helpful summary of the meaning of molestation was provided in the leading case of *P v C (Ouster and Domestic Violence)* [2007] HKFLR 195 by HHJ Melloy at 202:

> "*22. Molestation has been defined widely and in the wife's solicitors closing submissions I was referred in particular to the following definitions:*
> *"... molestation may take place without the threat or use of physical violence*

> *and still be serious and inimical to mental and physical health" (Viscount Dilhorne in Davis v Johnson [1979] AC 264)*
> *"It applies to any conduct which can properly be regarded as such a degree of harassment as to call for the intervention of the court". (Ormrod LJ in Horner v Horner [1982] Fam 90)*
> *"Molest is a wide, plain word which I would be reluctant to define or paraphrase. If I had to find one synonym for it, I would select 'pester'." (Stephenson LJ in Vaughan v Vaughan [1973] 3 All ER 449)*"

The authors of Hotten & Ho on Family and Divorce Law, (2018) at Chapter VI §130, summarize the case law as confirming:

> "*Molestation may cover, inter alia: physical violence, threats of physical violence, psychological violence, sexual abuse, financial abuse, emotional abuse, verbal abuse, bullying, nuisance telephone calls, text messages, emails, unwelcome visits, following, watching, damaging to property, publishing insulting material, scolding, and making improper reports to authorities.*"

Judges may wish to ask mooters whether the allegations against SS (i.e. destruction of property, foul and insulting language) amount to molestation.

3.3. Ouster

An ouster order under section 3A(4)(b) is an injunction that may prohibit the respondent from entering or remaining in the residence of the applicant (or part thereof) or some specified area whether or not the residence of the applicant.

Generally, ouster orders are serious and draconian. They should only be made in cases of real necessity. In considering an ouster application against a non-resident respondent, the court is required to consider under section 3A(6): (i) the conduct of the applicant and the respondent, both in relation to each other and otherwise; (ii) the respective needs and financial resources of the applicant and the respondent; and (iii) all the circumstances of the case. However, none of these factors is to be given decisive weight: see *P v L* [2007] 1 HKLRD 26 at §§76, 77; and see Hotten & Ho on Family and Divorce Law, (2018) at Chapter VI §160. It seems clear that "*all the circumstances of the case*" must include consideration of who has a legal, beneficial, contractual or other interest in or right to occupy the premises (see s.3A(6)(a)).

In the present case, there are several factors weighing in favour of and against an ouster:

- In favour:
  - The flat is LM's home and only residence;
  - LM cares for young son, RMS, and requires the flat for this purpose;
  - SS does not live in the flat, he also has alternative accommodation and no need for the flat; and
  - SS has demonstrated clear animus towards LM, and ouster is necessary to prevent future molestation.
- Against:
  - SS is the legal owner and the beneficial owner of the flat.

There is an issue as to whether LM has an interest in the Tsuen Wan flat. Normally, the former matrimonial home is treated by the courts as a family asset (even if brought into the family by inheritance or gift at the outset of the marriage) and is available for sharing and distribution between the parties in ancillary relief: see *LKW v DD* (2010) 13 HKCFAR 537 §98. LM has filed a *lis pendens* with the Lands Registry, which has the practical effect of preventing any sale by giving notice of the possible set aside in the ancillary relief proceedings. However, if there is no jurisdiction for divorce (see discussion below) then there is no basis for the Court to set aside the re-gifting of the flat to SS, and LM has no possible claim to the flat in ancillary relief and the *lis pendens* is liable to be vacated.

Judges may wish to ask mooters:

- ***Is an ouster order justified on the facts?***
- ***On what basis could the transfer of the flat to SS be set aside?***

3.4. <u>'Relative' and 'spouse', approach to statutory interpretation</u>

Relative is defined in section 3A(2) to include:

> "*the applicant's father-in-law or mother-in-law who is the natural parent, adoptive parent or step-parent of the applicant's spouse;*"

Section 3A was added to the DVO in 2008 by the Government because (summarized at §28 of the Legislative Council Brief for the Domestic Violence (Amendment) Bill 2009):

> "*After considering that similar special power interface, dynamics and risk factors might exist among relatives (such as parents and sons/daughters or mothers-in-law and daughters-in-law), and having regard to the strong request of the community to provide civil protection for victims of domestic violence in*

> *relationships other than spouses or heterosexual cohabitants, e.g. elderly abuse, we proposed to further extend the scope of the DVO to cover persons in other immediate and extended familial relationships so as to enhance the legal protection for victims of domestic violence such as abused elders.*"

'Spouse' is not defined under the DVO, nor is marriage. The question arising is, therefore, whether the definition of 'spouse' encompasses parties to same-sex marriages performed abroad. This is a question of statutory interpretation.

The principles of statutory construction are well established in the common law. "Words are construed in their context and purpose. They are given their natural and ordinary meaning with context and purpose to be considered alongside the express wording from the start, and not merely at some later stage when an ambiguity is thought to arise. It is, however, important to emphasise that a purposive and contextual interpretation does not mean that one can disregard the actual words used in a statute. To the contrary, the court is to ascertain the intention of the legislature as expressed in the language of the statute. One cannot give a provision a meaning which the language of the statute, understood in the light of its context and purpose, cannot bear." See *Chan Ka Lam v Country and Marine Parks Authority* (2020) 23 HKCFAR 414 at §§26, 27.

It is clear from the legislative history of the DVO that it was the administration's intention that no legal recognition should be given to same-sex couples married abroad, and that such relationships would instead be treated as 'cohabitation relationships'. The 2009 LegCo Brief at §2 explains that: "*The DVO has since its enactment excluded from its coverage cohabitation between persons of the same sex.*" Paragraph 13 of the LegCo brief explains that the purpose of section 3B was to extend coverage to homosexual couples but to "*allay the concern over the treatment of cohabitation relationship (whether heterosexual or homosexual) as equivalent to marriage*". The Legislative Council Secretariat paper summarizing the debates on the DVO amendments (LC Paper No. CB(2)1982/08-09(02)) confirmed the same:

> "*In the course of the scrutiny of the 2007 Bill, members of the Bills Committee were of the view that the scope of DVO should be extended to cover same-sex cohabitants and urged the Administration to re-visit its position of not covering same sex cohabitants under DVO. They were of the view that extending the protection under DVO to persons in same sex cohabitation merely sought to protect such persons from being molested by their partners, and should not be regarded as equivalent to giving legal recognition to same sex relationships or providing legal entitlements to persons in such relationships.*

> *Having regard to members' views, the Administration had re-examined the matter and came to the view that the protection under DVO should be extended to cover cohabitation between persons of the same sex. It however emphasized that the proposed extension of the scope of DVO to cover such cohabitation was only introduced in response to the distinct and unique context of domestic violence. It remained the Administration's clear policy not to recognize same sex relationships. Any change to this policy stance should not be introduced unless a consensus or a majority view was reached within the society.*"

Judges may wish to ask mooters about the legislative intent behind sections 3, 3A and 3B of the DVO:

- ***Is there any indication in the legislative history as to whether the Legislative Council or the Government intended to recognise same-sex marriages for the purposes of domestic violence injunctions?***
- ***Why did the Legislative Council or the Government exclude spouses in same-sex marriages from protection under section 3 of the DVO?***
- ***What was the legislative purpose of extending domestic violence injunctions to cover relatives?***
- ***Did the Legislative Council or the Government give any reason for excluding relatives of same-sex spouses?***

3.5. <u>Procedure: divorce, ancillary relief</u>

The applicant, LM, has applied for divorce against PK by petition. In general, a petition for divorce requires the petitioner to show: (i) jurisdiction over the dissolution of the marriage (domicile, habitual residence or substantial connection: see section 3, MCO); (ii) the marriage has broken down irretrievably (section 11, MCO); and (iii) proof by one of the five facts in section 11A of the MCO. Here there is no dispute that there is a substantial connection between the marriage and Hong Kong, and that the marriage has broken down irretrievably due to the unreasonable behaviour of PK (see section 11A(2)(b), MCO).

The procedure followed by the Family Court is not in dispute and falls within the guidance of PD 15.11. The judge properly considered the welfare of the child and the urgent needs of LM in giving interim interim financial relief. Such relief could plausibly have been obtained from PK by alternative sources of jurisdiction (e.g. section 10 of the Guardianship of Minors Ordinance (Cap 13)). It is likely for this reason that the interim interim financial orders were not appealed by PK.

The judge also sensibly stayed the remainder of the divorce proceedings pending a preliminary-issues hearing on jurisdiction for divorce for same-sex marriages. This issue goes to the jurisdiction of the court and discussed at length below.

Mooters are not expected to deal with the general requirements for divorce set out above, and judges are discouraged from raising this matter given that it was not raised earlier in the proceedings.

3.6. Jurisdiction for divorce: 'monogamous marriage'

The applicant's petition is in effect seeking: (i) divorce[1] pursuant to section 3 of the MCO; (ii) financial provision under sections 4, 5, 6 and 6A of the MPPO; (iii) interim periodical payments, i.e. 'maintenance pending suit' for herself under section 3 of the MPPO and 'interim child maintenance' for RMS under section 5(1)(a) of the MPPO; and by her s.17 summons (iv) a setting aside order against SS under section 17 of the MPPO, to undo the transfer of the Tsuen Wan flat, and preserve the same to satisfy her claims for financial provision.

The language of the MPPO makes clear that financial provision / relief ancillary claims are explicitly contingent upon there being proceedings for divorce (or nullity or judicial separation). However, if the court finds that the marriage to be dissolved falls outside of the jurisdiction for divorce, then the underlying proceedings are liable to be dismissed.

SS contends that there is no jurisdiction for the court to grant relief in cases of same-sex marriage. The statutory basis for this question is section 9 of the MCO, which reads:

> "***Nothing in this Ordinance shall authorize the court to pronounce a decree of divorce****, nullity, judicial separation or presumption of death and dissolution of marriage or to make any other order* ***unless the marriage to or in respect of which the decree or order relates*** *was a customary marriage celebrated in accordance with section 7 of the Marriage Reform Ordinance (Cap. 178) and registered in accordance with Part IV of that Ordinance or* ***was a monogamous marriage****.*" (Emphasis added)

As such, the applicant must show jurisdiction by establishing that her marriage to PK was a "*monogamous marriage*". Monogamous marriage is defined by section 2 of the MCO

[1] I.e. the legal dissolution of a marriage.

as follows:

> "*In this Ordinance, unless the context otherwise requires—*
> ...
> ***monogamous marriage*** *(一夫一妻制婚姻) means a marriage which was—*
> *(a) if it took place in Hong Kong—*
> *(i) celebrated or contracted in accordance with the provisions of the Marriage Ordinance (Cap. 181);*
> *(ii) a modern marriage validated by section 8 of the Marriage Reform Ordinance (Cap. 178) and registered under Part IV of that Ordinance; or*
> (b) *if it took place outside Hong Kong, celebrated or contracted in accordance with the law in force at the time and in the place where the marriage was performed and recognized by such law as involving the voluntary union for life of one man and one woman to the exclusion of all others;*"

The language of this section (and indeed the language of section 40 of the Marriage Ordinance (Cap 181)) adopts the 'Christian' definition of marriage from *Hyde v Hyde* (1866) LR 1 P&D 130 and appears to exclude same-sex marriages.

Furthermore, ancillary relief against another party to a marriage for the benefit of children is restricted to "*a child of the family*" under section 5 of the MPPO. Child of the family and "child" are defined by section 2 of the MPPO as follows:

> "***child*** *(子女), in relation to one or both parties to a marriage, includes an illegitimate or adopted child of that party or, as the case may be, of both parties;*
>
> ***child of the family*** *(家庭子女), in relation to the parties to a marriage, means—*
> *(a) a child of both those parties; and*
> *(b) any other child who has been treated by both those parties as a child of their family;*"

Therefore, the applicant must show that RMS is either the lawful child of both parties or that they are a party to a marriage and that he has been treated as a child of their family. The issue of the status of their marriage merely repeats the question of the application of section 9 of the MCO. The issue of the legal relationship between RMS and PK, however, raises the application of sections 9 and 10 of the Parent and Child Ordinance (Cap 429) ("**PCO**"). Under a literal reading of both of the PCO, the only person who is

considered the mother of a child born through the assistance of medical treatment (e.g. IVF) is the gestational mother (here, LM). Furthermore, because PK is a woman and their marriage is a same-sex marriage, PK cannot be the 'father' of RMS.

Judges may wish to ask mooters:

- ***Does the marriage in this case fall within the definition of monogamous marriage under the MCO?***
- ***Has RMS been treated by both LM and PK as a 'child of the family'?***
- ***Is RMS the lawful child of both spouses?***
- ***Who are the father and the mother or parents of RMS?***

3.7. Discrimination, remedial interpretation

The applicant's case is that exclusion of same-sex married persons from relief under the DVO, the MPPO and the MCO is discriminatory and contrary to Articles 25 and 39 of the Basic Law together with articles 1 and 22 of the BOR. The test for discrimination was recently summarized by Chow JA in *Ng Hon Lam Edgar v The Hong Kong Housing Authority* [2021] HKCFI 1812 at §§39 to 43.

The general principles and forms of discrimination are summarized by the CFA in *Leung Chun Kwong* at §§15 to 22. In general, there are three forms of differential treatment, which may be described as discriminatory: (i) direct discrimination where like cases are not treated alike; (ii) direct discrimination where unlike cases are treated in the same way; and (iii) indirect discrimination where an ostensibly neutral criterion is applied which operates to the significant prejudice of a particular group.

To show differential treatment on a prohibited ground in any case, the complainant must establish that he/she has been treated differently to a person in a comparable, or analogous, position, and that the reason for the differential treatment is based on the prohibited ground. The protected grounds explicitly include (see BOR articles 1 and 22): "*race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*". It is well established that sexual orientation is a protected category under both 'sex' and 'other status': see e.g. *Leung Chun Kwong* and *QT*. However, the question of whether same-sex marriages are truly comparable to opposite-sex marriages has been the subject of debate before the courts: see e.g. the discussion in *Ng Hong Lam Edgar v HKHA*, which is currently under appeal.

The next issue is whether the differential treatment can be justified. For this purpose, the well-established approach of the court is to apply what is commonly referred to as the four-step justification test, as explained by the CFA in *Leung Chun Kwong*, at §§21-22:

> "*[21] In order to determine whether differential treatment is unlawful, the courts apply the same test used to determine if incursions into constitutionally protected rights are lawful (QT at [84]-[86]). When applied in the context of an analysis of constitutionality, that test is usually referred to as the 'proportionality' test. When applied in the context of determining whether differential treatment is unlawful, that test is usually referred to as the 'justification' test.*
> *[22] The justification test consists of four steps or elements: (i) does the differential treatment pursue a legitimate aim; (ii) is the differential treatment rationally connected to that legitimate aim; (iii) is the differential treatment no more than necessary to accomplish the legitimate aim; and (iv) has a reasonable balance been struck between the societal benefits arising from the application of differential treatment and the interference with the individual's equality rights (QT at [86]-[87]).*"

If the court reaches the third step of the justification test, the court should normally consider what is the appropriate standard of review. This is a subject of considerable debate in cases involving same-sex marriage: see *Ng Hong Lam Edgar v HKHA* at §§62 to 66.

Judges may wish to ask mooters:

- ***Are same-sex couples really comparable to heterosexual married couples if their marriages are not recognised in the general law?***
- ***What is the legitimate aim for the exclusion of same-sex couples [under the DVO/MCO/MPPO]?***
- ***What is the appropriate standard of review for the court to apply?***

3.8. Relief

The Basic Law impliedly confers upon the courts a power to apply a remedial interpretation to provisions which may otherwise be struck down as constitutionally invalid with a view, if possible, to preserving their validity. A remedial interpretation is capable of going beyond ordinary common law interpretation and may involve the use of judicial techniques such as reading down and reading in. The remedial techniques open to the court also include the severance or striking out of parts or the whole of the offending provision. However, such remedial techniques necessarily have their limits, and the court cannot take up a curative measure which is so fundamentally at odds with the intent of the legislation in question that adoption of such a measure properly calls for legislative deliberation. See *W v The Registrar Marriages* (2013) 16 HKCFAR 112 §§61, 62.

It is important to note that neither the Secretary for Justice nor any other branch of Government is a party to these proceedings. Normally, where the courts are considering relief that would interfere with the constitutionality of legislation or with the legal status of a large group (e.g. same-sex married persons), the courts would have invited the intervention of the Secretary for Justice. In the latter *W* decision on relief, [2013] HKCFA 57, the court gave declaratory relief but then suspended the effect of its judgment to allow the Government to consider appropriate reforms.

Judges may wish to ask mooters:

- ***If the exclusion of same-sex couples is discriminatory:***
  - ***What is the appropriate relief?***
  - ***Should the court suspend the effect of its judgment to allow time for the legislature to deliberate about reform?***
  - ***Should the court adjourn to allow for the intervention of the Secretary for Justice to be heard on relief?***

END