

Guide to the Moot Problem

The moot problem case raises questions about equality before the law, including the recognition of same-sex relationships and same-sex couples' access to goods, facilities and services. To date, marriage equality has not been recognised by the Hong Kong SAR Government, and an alternative legal framework to recognise same-sex relationships has not been initiated.

In the 2019 case of *MK v Government of the Hong Kong SAR*,¹ the Court of First Instance upheld the Government's policy to deny recognition of same-sex marriage or to provide an alternative legal framework such as civil unions.

Significantly however, Justice Chow stated that:

*...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.*²

In the moot problem, I wanted to draw attention to the differential treatment experienced by LGBTI people in accessing reproductive technology procedures. Currently, reproductive technology procedures are only accessible to heterosexual, married couples in Hong Kong. If a fertility specialist were to provide reproductive technology procedures to unmarried couples, LGBTI couples or single women, they could be fined or face imprisonment under the Human Reproductive Technology Ordinance Cap. 561.³

The Human Reproductive Technology Ordinance Cap. 561 is an example of legislation, which could potentially be challenged on the ground of discrimination. Prima facie, the legislation does not appear to be directly discriminatory against same-sex couples, as the requirement of marriage applies to everyone. Although same-sex couples are unable to marry in Hong Kong,

¹ *MK v The Government of Hong Kong SAR* [2019] HKCFI 2518.

² *Ibid* at para. 57.

³ s. 39, Human Reproductive Technology Ordinance (Cap. 561) 2000.

unmarried, heterosexual couples are also excluded from accessing reproductive technology procedures.

s.15 (5) of the Human Reproductive Technology Ordinance (Cap. 561) clearly states that, ‘subject to subsections (6), (7) and (8), no person shall provide a reproductive technology procedure to persons who are **not the parties to a marriage.**’

However, is the requirement of ‘marriage’ justifiable? Even if the requirement of marriage applies to everyone, if the requirement is not justifiable, and it adversely affects same-sex couples, it could amount to indirect discrimination given that same-sex couples do not currently enjoy marriage equality in Hong Kong. Same-sex couples are denied the opportunity to marry, a requirement for accessing reproductive technology procedures.

An absence of anti-discrimination legislation on the grounds of sexual orientation and gender identity also means that same-sex couples are not be able to seek statutory redress for discrimination that has occurred in relation to access to goods, facilities and services.

While the wording of ‘marriage’ in s. 15(5) of the Human Reproductive Technology Ordinance Cap. 561 appears neutral, the courts have interpreted art. 37 of the Basic Law, when read together with art. 19 of the Hong Kong Bill of Rights Ordinance Cap. 383, as protecting only the right of heterosexual couples to marry.⁴ It is important to note that ‘marriage’ is not explicitly defined in art. 37 of the Basic Law:

The freedom of **marriage** of Hong Kong residents and their right to raise a family freely shall be protected by law.

The wording of art. 19 of the Hong Kong Bill of Rights Ordinance Cap. 383 regarding rights in respect of marriage and family, particularly art. 19(2) is more circumspect:

(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.

In *MK v The Government of Hong Kong*, the court explained that art. 19(2) is based on International Covenant on Civil and Political Rights (ICCPR) art. 23(2),⁵ which has been

⁴ *MK v The Government of Hong Kong SAR* [2019] HKCFI 2518, para. 14(3).

⁵ *Ibid.*

interpreted to include only heterosexual marriage between a man and a woman as in the Human Rights Committee case of *Joslin v New Zealand*.⁶ It is unclear whether the case of *Joslin v New Zealand* would be decided differently if it came before the Human Rights Committee today. Same sex marriage is now legal in 29 countries, and other jurisdictions have adopted alternative legal frameworks recognising same-sex relationships such as civil unions.⁷

Other relevant legal protections on non-discrimination include:

Basic Law, art. 25:

All Hong Kong residents shall be equal before the law.

Art. 1, Bill of Rights Ordinance:

1(1). 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.

1(2). Men and women shall have an equal right to the enjoyment of all civil and political rights set forth in this Bill of Rights. [*cf. ICCPR Art. 2 & 3*]

Art. 22, Bill of Rights Ordinance:

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. [*cf. ICCPR Art. 26*]

The scope and content of these respective provisions should be examined by moot teams.

Art. 22 of the Bill of Rights Ordinance codifies ICCPR, art. 26 into Hong Kong's domestic law. In *Toonen v Australia*,⁸ a case concerning privacy and the criminalisation of consensual sex between gay men in Tasmania, Australia, the Human Rights Committee explained that the reference to 'sex' in art. 2(1) and art. 26 of the ICCPR included 'sexual orientation.'

⁶ *Joslin v New Zealand* (2003) 10 IHRR 40, at paragraph 8.2 (Human Rights Committee).

⁷ Human Rights Campaign, 'Marriage Equality Around the World,' <https://www.hrc.org/resources/marriage-equality-around-the-world> (last accessed 24 July 2021).

⁸ *Toonen v Australia* Human Rights Committee Communication No. 488/1992.

In accordance with this international human rights jurisprudence, the scope of art. 22 of BORO on the prohibition of discrimination and guarantee to all persons equal and effective protection against discrimination includes the ground of sexual orientation.

There are a number of points to note in this regard. As discussed, the Hong Kong SAR Government has not proactively legislated anti-discrimination laws on the grounds of sexual orientation and gender identity, which would guarantee to all LGBTI persons equal and effective protection against discrimination similar to other anti-discrimination legislation on the grounds of sex, disability, family status and race. This means that LGBTI rights claims have primarily been advanced through the courts.

In the case of *Secretary for Justice v Yau Yuk Lung Zigo*,⁹ ‘other status’ in both art. 25 of the Basic Law and art. 22 of BORO was interpreted to include discrimination on the grounds of sexual orientation. However, the Court of Final Appeal did not explore whether sexual orientation can be recognized as implicit within the grounds of ‘sex’. It is important to note that the court ruled that differential treatment on the grounds of sexual orientation must be subjected to higher levels of scrutiny. In examining the moot problem, any differential treatment on the ground of sexual orientation must be subjected to a high level of scrutiny by the court.

A number of landmark judgments are important to the development of LGBTI rights in Hong Kong and may be drawn upon to examine differential treatment on the basis of sexual orientation. In *Leung TC William Roy v Secretary of Justice*, the Court of Appeal recognised that s118C of the Crimes Ordinance adversely affected same-sex couples. The differential age of consent between heterosexual and homosexual couples, effectively denied gay couples ‘from a similar expression of their shared desires until each of them has reached 21 years of age.’¹⁰

In the Court of Final Appeal case, *QT v Director of Immigration*,¹¹ the court did not accept that differential treatment does not require justification if based on marital status. An attempt to ring-fence ‘core rights’ associated with marital status will not prevent judicial review.

⁹ *Secretary for Justice v Yau Yuk Lung Zigo* (2007) 10 HKCFAR 335 (Court of Final Appeal), para 11.

¹⁰ *Leung TC William Roy v Secretary for Justice* HCAL 160/2004 para.3.

¹¹ *QT v Director of Immigration* [2018] HKCFA 28, para. 110 (b).

Accordingly, any differential treatment based on marital status in the Human Reproductive Technology Ordinance Cap. 561 needs to be justified.

In the Court of Final Appeal case, *Leung Chun Kwong v Secretary for Civil Service*,¹² Justice Ma determined that granting a same-sex couple access to employee benefits comparable to that of heterosexual married couples did not, in effect, weaken the institution of marriage.

In examining the moot problem, would granting same-sex couples' access to reproductive technology procedures comparable to those accessed by heterosexual, married couples weaken the institution of marriage?

In the 2013 case of *W v Registrar of Marriages* it was acknowledged that procreation is no longer considered to underpin the institution of marriage, and that, 'while many in society will still no doubt regard procreation as of great importance to a marriage, many others will take a different view. Many people now marry without having children, while many others have children without getting married, neither group attracting social opprobrium.'¹³

If the purpose of the Human Reproductive Technology Ordinance Cap. 561 is to protect the institution of marriage and limit procreation to marriage this appears to be at odds with how the institution of marriage has evolved. The question is whether the denial of same-sex couples' access to reproductive technology procedures can be justified, particularly if this is the only means by which same-sex couples can share a similar expression of their shared desires to found a family as heterosexual, married couples.

It is clear that CK is in a stable, loving relationship and would marry her partner if she were able to do so. CK and her partner have gone to considerable lengths and expense to try to start a family together by accessing fertility treatment overseas. The moot problem also highlights how access to fertility treatment is often determined by socio-economic factors, and not all couples, irrespective of their sexual orientation, will have the financial means to pursue prolonged, expensive fertility treatments.

Teams may consider case law from other jurisdictions when developing their arguments. In overseas jurisdictions, the question of access to IVF treatment for all women has been

¹² *Leung Chun Kwong v Secretary for Civil Service* [2019] HKCFA 19.

¹³ *W v Registrar of Marriages* [2013] HKCFA 39, para. 86.

considered by the courts. In *McBain v State of Victoria*¹⁴ for example, The Infertility Treatment Act 1995 limited IVF to women who were either married or in a de facto relationship with a man, excluding single and lesbian women.

In Australia, s. 22 of the Sex Discrimination Act 1984 (Cth) prohibits discrimination in the provision of goods and services on the grounds of sex or marital status. According to the Sex Discrimination Act 'marital status' is defined as including the status of being single, married, separated, divorced, or in a de facto relationship. The court held that IVF were 'services' provided by medical practitioners in line with s. 22 of the Sex Discrimination Act 1984. The court concluded that discrimination on the ground of marital status had been established.

In Hong Kong, however, the Family Status Discrimination Ordinance Cap. 527 defines 'family status' narrowly 'in relation to a person, means the status of having responsibility for the care of an immediate family member.' An immediate family member is considered to be 'a person who is related to the person by blood, marriage, adoption or affinity.' Therefore it is unclear whether a legal challenge against the Human Reproductive Technology Ordinance Cap. 561 on the basis of family status discrimination would succeed even for heterosexual couples in a de facto relationship or single women.

More broadly, moot teams may also consider international human rights jurisprudence. The Committee on Economic, Social and Cultural Rights has indicated that the right to sexual and reproductive health applies to all individuals and groups including lesbian, gay, bisexual, and transgender and intersex persons:

*Article 2 (2) of the Covenant provides that all individuals and groups shall not be discriminated against and shall enjoy equal rights. **All individuals and groups** should be able to enjoy equal access to the same range, quality and standard of sexual and reproductive health facilities, information, **goods and services**, and to exercise their rights to sexual and reproductive health without experiencing any discrimination.*¹⁵

¹⁴ *McBain v State of Victoria* [2000] FCA 1009.

¹⁵ Committee on Economic, Social and Cultural Rights, General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), para. 22

*Non-discrimination, in the context of the right to sexual and reproductive health, also encompasses the right of all persons, **including lesbian, gay, bisexual, transgender and intersex persons**, to be fully respected for their sexual orientation, gender identity and intersex status.*¹⁶

However, on the question of access to reproductive technology procedures, the Human Rights Committee is less clear.

Dr Amy Barrow

Macquarie Law School

Macquarie University

¹⁶ Ibid, para. 23.