Clayton Comments

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CONTEMPORARY ISSUES IN PUBLIC LAW IN HONG KONG: THE RIGHT TO EQUALITY AND NON-DISCRIMINATION

INTRODUCTION

1. I would, again, like to thank you for the opportunity to speak to you on a subject which has such a central role to Hong Kong's democracy and governance. This evening I propose to discuss the right to equality. I shall examine these developments by making comparisons with developments in other relevant human rights jurisdictions and discuss their implications.

2. As I indicated yesterday, I propose to take my lead from the approach taken by the Final Court of Appeal in ***Hysan Development Co. Ltd. v Town Planning Board*** which reaffirmed the generous approach[1] that the Hong Kong courts have always taken to human rights decisions from other jurisdictions. For these purposes I shall look at cases from the UK, the Privy Council, the ECtHR, the US, Canada and Australia.

3. If you will forgive me for repeating what I said last night, I believe that there is great value when doing human rights work of examining the case law of different jurisdictions. So many human rights questions are universal in nature- and it is often illuminating to draw upon the collective wisdom emerging from different constitutional approaches to the same issue. Nevertheless, Courts when, applying comparative legal principles must always be astute to recognise the importance of different legal, political and cultural traditions, as well as, if appropriate giving effect to the particular language used in a particular rights instrument.

4. In preparing my paper I have been struck by how active the Hong Courts have been in addressing equality issues in 2017 dealing with three important decisions:
   - the haircut case concerning the activist, ***Leung Kwok Hung***;
   - two same sex marriage cases, ***Leung Chun Kwong a***nd the recent and important Court of Appeal decision in ***QT v Director of Immigration*** (2017) decided on 25 September 2017.

5. This evening I shall talk about how some key concepts in discrimination law could be re-analysed through the lens of international jurisprudence. I shall also look at a few important cases in specific areas:
   - same sex marriages;
   - disability discrimination;
   - discrimination and public housing

[1] [2016] HKCFA 66; (2016) 19 HKCFAR 372; [2016] 6 HKC 58; FACV 21/2015 (26 September 2016) para 50

General principles

6. **Article 25 of the Basic Law** states:

> *All Hong Kong residents shall be equal before the law.*

7. **Article 22 of the HKBOR** states:

> *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.*

8. In addition, there is various anti-discrimination Ordinances which prohibits direct discrimination on grounds of sex, marital status, pregnancy, disability, disability of an associate, family status, race, colour, descent, ethnic or national origins and the race of hear relative: see the Sex Discrimination Ordinance, the Disability Discrimination Ordinance, the Family Status Discrimination Ordinance and the Race Discrimination Ordinance. The constitutional guarantees are expressed in less specific language than these statutory provisions, but I do not propose to discuss them.

9. The constitutional prohibitions on discrimination cover direct or indirect discrimination and it is not necessary to show an intention to discriminate. If a distinction is made on prohibited grounds, then the burden falls on the public body to justify the differential treatment. A distinction is justifiable if it pursues a legitimate objective, is rationally connected to that aim and is no more than necessary to achieve that aim.[2]

10. Articles 25 and 22 contain identical non-exhaustive lists of prohibited grounds and "*other status*" has been widely interpreted both by the UNHRC and the ECtHR and I shall specifically discuss this question a little later.

KEY CONCEPTS IN DISCRIMINATION LAW

Direct discrimination ***Leung Kwok Hung*** (2017)

[2] ***Secretary of Justice v Yau Yock Lung*** (2007) 10 HKCFAR 335, para 20.

11. In ***Leung Kwok Hung v Commissioner of Correctional Services*** the well-known politician in Hong Kong known as "Long Hair" (because of his "iconic" long hair) was held in the Lai Chi Kok Reception Centre- after his conviction on a number of criminal charges, which were upheld on appeal with a sentence of four weeks imprisonment.[3] While in custody at the Centre, he was required by the prison officer to have his hair cut. The decision to cut his hair was made pursuant to Standing Order 41-05, which requires all male prisoners to have their hair cut "*sufficiently close, but not close clipped*" but allows female prisoners to have a choice to keep their hair unless they request to have them cut.

12. The applicant's case on direct discrimination was a simple one. The test to identify direct discrimination is the familiar "*but for*" test, ie there is direct discrimination if there is less favourable treatment on the ground of sex, in that, if the relevant girl or girls would have received the same treatment as the boys but for the sex. It is an objective test and the court is to ask the simple question: would the complainant have received the same treatment from the defendant but for his or her sex.[4] There is no question of justification as the SDO does not provide for that.[5] The intention, motive, reason or purpose in treating another person less favourably on a protected ground is also irrelevant.[6] SO 41-05 requires male prisoners' hair to be cut short but not female prisoners. The male prisoners were, therefore, treated less favourably than the female prisoners by the Commissioner since they were not given a choice about having their hair cut.

13. Au J rejected the Commissioner's reasons which he held were all based on stereotyped or generalised assumptions referable to the purported risks associated with male prisoners as a gender as a whole. In other words, these grounds were generally applicable to all male prisoners (when compared with female prisoners): and were not based on individual circumstances referable and peculiar to each male prisoner.

Grounds for discrimination

14. Under Article 14 of the European Convention discrimination is prohibited "*on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*". Since the

[3] [2017] HKCFI 65; [2017] 1 HKLRD 1041; HCAL 109/2014 (17 January 2017)

[4] See: ***Secretary for Justice v Chan Wah*** (2000) 3 HKCFAR 459 at 476B-E, per Li CJ; ***Equal Opportunities Commission v Director of Education*** [2001] HKCFI 880; [2001] 2 HKLRD 690 at paragraphs 10 - 12, per Hartmann J (as he then was) (adopting ***R v Birmingham City Council, ex p Equal Opportunities Commissio***n [1989] 1 AC 1155 and ***James v Eastleigh Borough Council*** [1990] UKHL 6; [1990] 2 AC 751 at 774).

[5] See also ***R(E) v Governing Body of JFS*** [2010] 3 AC 728 at paragraphs 20 - 22, 57, 61 - 62, 64, 69 - 70, 143 - 145, and 195 - 196.

[6] ***R v Birmingham City Council***, supra, at 1194A-C, per Lord Goff; ***Nagarajan v London Regional Transport*** [1999] UKHL 36; [2000] 1 AC 501 at 511C-D, per Lord Nicholls

grounds for discrimination under Articles 25 and 22 are open ended, it may be of interest to examine how the ECtHR and UK courts have treated the meaning of "*other status*", particularly because this issue has not been extensively considered by the Hong Kong courts.

15. '*Other status*' has been applied by the ECtHR in a wide variety of cases. It has often been interpreted by reference to the French text which uses the phrase '*toute autre situatio*n'.[7] In ***Kjeldsen Madsen and Petersen v D***enmark[8] the ECtHR said that discrimination had to be based upon a "*personal characteristic*" to fall within the scope of the right against discrimination, and this has been repeated in many subsequent cases.[9] However, "*personal characteristic*" does not just mean personal qualities, but also social characterisations like marital status,[10] legitimacy,[11] military rank,[12] professional status,[13] trade union status,[14] financial situation,[15] former membership of the KGB[16] and imprisonment.[17]

16. However, characteristically, the ECtHR has not been very analytical about the defining the limits of what is meant by "*other status*". It is a Court which avoids discursive and abstract analysis of the legal issues it considers.

17. In ***R(Clift) v Secretary of State for the Home Department*** the House of Lords considered a complaint that a prisoner had been subject to discrimination because Secretary of State's power to reject a recommendation of the Parole Board could be exercised only in relation to limited and defined categories of prisoners.[18] When the case came before the ECtHR in ***Clift v United Kingdom***, the ECtHR was asked by the UK Government to construe the words "*other status*" *ejusdem generis* with the other grounds listed in Article 14.[19] The Government also contended that differences of treatment based on different laws providing for criminal penalties and procedures, being necessarily impersonal, fell outside the scope of Article 14.

18. However, the ECtHR rejected these submissions, stating:

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[7] See ***Engel v Netherlands*** (1976) 1 EHRR 647, para 72.
[8] (1976) 1 EHRR 711 para 72
[9] See, in particular, the GC decision in ***Kafkaris*** *v* Cyprus Judgment, 5 December 2007 para 160
[10] See eg ***Rasmussen v Denmark*** (1984) 7 EHRR 371
[11] ***Ince v Austria*** (1987) 10 EHRR 394
[12] ***Engels v Netherlands*** above
[13] ***Van der Muselle*** *v* Belgium (1984) 6 EHRR 163
[14] ***National Union of Belgium Police v Belgium*** (1975) 1 EHRR 578
[15] ***C v Netherlands*** (1992) 15 EHHR CD 26
[16] ***Sidabras v Lithuania*** (2006) 42 EHRR 6
[17] ***RM v United Kingdom*** (1994) 77 A-DR 98
[18] [2007] 1 A.C. 484
[19] Judgment, 13 July 2010

*55. Article 14 does not prohibit all differences in treatment but only those differences based on an identifiable, objective or personal characteristic, or "status", by which persons or groups of persons are distinguishable from one another (see **Kjeldsen Busk Madsen and Pedersen;**[20] **Berezovskiy v. Ukrain**e;[21] and **Carson**.[22] Article 14 lists specific grounds which constitute "status" including, inter alia, sex, race and property. However, the list set out in Article 14 is illustrative and not exhaustive, as is shown by the words "any ground such as" (in French "notamment") (see **Engel**;[23] and **Carson**)[24] and the inclusion in the list of the phrase "any other status" (in French "toute autre situation") ….*

*56. The Court recalls that the words "other status" (and a fortiori the French "toute autre situation") have generally been given a wide meaning (see **Carson**).[25] The Government have argued for a more limited interpretation, calling in particular for the words to be construed ejusdem generis with the specific examples listed in Article 14. The Court observes at the outset that while a number of the specific examples relate to characteristics which can be said to be "personal" in the sense that they are innate characteristics or inherently linked to the identity or the personality of the individual, such as sex, race and religion, not all of the grounds listed can be thus characterised. In this regard, the Court highlights the inclusion of property as one of the prohibited grounds of discrimination. This ground has been construed broadly by the Court: in **James v the United Kingdom**, [26] the difference in treatment of which the applicant complained was between different categories of property owners; in **Chassagnou v. France** [GC] - the difference was between large and small landowners.[27] In both cases, the Court accepted that the provisions of Article 14 were applicable.*

*57. As to its interpretation of "other status", it is unsurprising that the Court has considered to constitute "other status" characteristics which, like some of the specific examples listed in the Article, can be said to be personal in the sense that they are innate or inherent. Thus in **Salgueiro da Silva Mouta v Portugual**,[28] it found that sexual orientation was "undoubtedly covered" by Article 14 and in **Glor v. Switzerland**, it held that physical disabilities fell within the phrase "other status".[29]*

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[20] Above § 56
[21] (dec.), no. 70908/01, 15 June 2004
[22] Above §§ 61 and 70).
[23] Above, § 72
[24] Above, , § 70
[25] Above § 70
[26] (1986) 98 § 74
[27] Nos. 25088/94, 28331/95 and 28443/95, §§ 90 and 95, ECHR 1999- III
[28] § 28, ECHR 1999-IX § 28
[29] § 80, ECHR 2009

58. However, in finding violations of Article 14 in a number of other cases, the Court has accepted that "status" existed where the distinction relied upon did not involve a characteristic which could be said to be innate or inherent, and thus "personal" in the sense discussed above. In ***Engel*** *the Court held that a distinction based on military rank could run counter to Article 14, the complaint in that case concerning a difference in treatment as regards provisional arrest between officers on the one hand and non-commissioned officers and ordinary servicemen on the other. In* ***Pine Valley Developments Ltd v Ireland****,[30] the Court found a violation where there was a difference in treatment between the applicants and other holders of planning permissions in the same category as theirs. Although the Court did not specifically address the question of the relevant "status" in that case, it would appear that the distinction of which the applicants complained was between holders of outline planning permission who benefited from new legislation and holders of outline planning permission who did not (in that case, by virtue of the fact that the applicants' planning complaint had already been determined by the Court and that the outline planning permission had been found to be invalid – see § 26 of the judgment). In* ***Larkos v. Cyprus*** *the Court found a violation of Article 14 as a result of a distinction between tenants of the State on the one hand and tenants of private landlords on the other, the parties did not dispute that Article 14 applied and the Court saw no reason to hold otherwise.[31] In* ***Shelley*** *the Court considered that being a convicted prisoner could fall within the notion of "other status" in Article 14.[32] In* ***Sidabras and Džiautas v. Lithuania*** *again the Court did not specifically address the question of "other status" but in finding a violation of Article 14 and Article 8 implicitly accepted that status as a former KGB officer fell within Article 14.[33] Most recently, in* ***Paulík v. Slovakia****, the Court accepted that the applicant, a father whose paternity had been established by judicial determination, had a resulting "status" which could be compared to putative fathers and mothers in situations where paternity was legally presumed but not judicially determined.[34]*

59. The Court therefore considers it clear that while it has consistently referred to the need for a distinction based on a "personal" characteristic in order to engage Article 14, as the above review of its case-law demonstrates, the protection conferred by that Article is not limited to different treatment based on characteristics which are personal in the sense that they are innate or inherent. Accordingly, even if, as the Government contended, a ejusdem generis construction were appropriate in the present case, this would not necessarily preclude the distinction upon which the applicant relies.

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30 § 64, (1991) A 222

31 ECHR 1999-I § 21

32 Judgment, 4 January 2008

33 Above

34 § 54, ECHR 2006-XI

> *60. Further, the Court is not persuaded that the Government's argument that the treatment of which the applicant complains must exist independently of the "other status" upon which it is based finds any clear support in its case-law ….*
>
> *62. The Court has frequently emphasised the fundamental importance of the guarantees contained in Article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities (see, for example,* ***Çakıcı v. Turkey*** *[GC].[35] Where an early release scheme applies differently to prisoners depending on the length of their sentences, there is a risk that, unless the difference in treatment is objectively justified, it will run counter to the very purpose of Article 5, namely to protect the individual from arbitrary detention. Accordingly, there is a need for careful scrutiny of differences of treatment in this field.*
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> *63. The Court accordingly concludes that, in light of all the above considerations, the applicant in the present case did enjoy "other status" for the purposes of Article 14.*

The need to demonstrate that comparators are in an 'analogous position'

19. A commonly used approach when Courts decide discrimination claims is to apply a two stage test:
    - first to identify the comparators with whom the complainant's situation is compared to see if their situations are analogous or relevantly different.
    - If the situations are analogous, whether the treatment be justified.

20. This two fold test has been abandoned by the UK courts in recent years and the Court of Appeal has very recently adopted the same approach in ***QT v Director of Immigration***.[36]

The UK Supreme Court's approach to discrimination

21. In ***R(SG) v Secretary of State for Work and Pensions*** the Supreme Court recently summarised the general principles for discrimination claims under Article 14. Lord Reed stated:[37]

> *67 The general approach followed by the European Court of Human Rights in the application of article 14 was explained by the Grand Chamber in* ***Carson v United Kingdom*** *(2010) 51 EHRR 369 , para 61:*
>
> > *"in order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations. Such a*

[35] § 104, ECHR 1999-IV
[36] CACV 117/2016
[37] [2015] 1 WLR 1449

> *difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised."*
>
> *8 A violation of article 14 therefore arises where there is: (1) a difference in treatment, (2) of persons in relevantly similar positions, (3) if it does not pursue a legitimate aim, or (4) if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.*
>
> *9 In practice, the analysis carried out by the European Court of Human Rights usually elides the second element—the comparability of the situations—and focuses on the question whether differential treatment is justified. This reflects the fact that an assessment of whether situations are "relevantly" similar is generally linked to the aims of the measure in question: see, for example,* ***Rasmussen v Denmark*** *(1984) 7 EHRR 371, para 37.*

22. In the passage in ***Rasmussen v Denmark***,[38] which Lord Reed stressed above in ***SG*** above, the ECtHR held as follows:

> ***III. Were the applicant and his former wife placed in analogous situations?***
>
> *35. Article 14 safeguards individuals who are 'placed in analogous situations' against discriminatory differences of treatment.*
>
> *36. The Government supported the conclusion of the minority of the Commission that husband and wife were not placed in analogous situations as far as a paternity suit was concerned, there being a number of distinguishing characteristics between their respective positions and interests. The majority of the Commission, on the other hand, found that those characteristics were not sufficiently fundamental to warrant that conclusion.*
>
> *37. The Court does not consider that it has to resolve this issue, especially as the positions and interests referred to are also of relevance in determining whether the difference of treatment was justified. It will proceed on the assumption that the difference was made between persons placed in analogous situations.*

23. So the short, but important point, is that the UK Supreme Court has deprecated advocates concentrating submissions on the question of whether the Applicant can compare himself to persons in a relevantly similar position.

The recent decision in ***QT v Director of Immigration***

[38] (1984) 7 EHRR 371

24. In ***QT*** Poon JA also held:

> *97 I have reservations if this two-stage approach should be adopted for present purposes.*
>
> *(a) In **Fok Chun Wa v v Hospital Authority**cautioned that while the two-stage approach is useful, it must not give rise to complex and unnecessary arguments.[39] He had no objection in adopting it as long as one firmly bears in mind :*
>
> > *" (1) The object of the exercise … 'is there enough of a relevant difference between X and Y [the comparators] to justify differential treatment?'*
> >
> > *(2) In the majority of cases where equality issues are involved, it will be necessary for the Court to look at the materials which go to the three facets of the justification test before this crucial question is answered. It will be a rare case, I daresay, where the court will comfortably be able to answer this question without any recourse to the issue of justification at all. Seen in this way, it may matter not at all whether the court's approach is seen as a two-stage one or not."*
>
> *Here, as rightly predicted by the Chief Justice, for my part I cannot comfortably be able to determine if there is discrimination based on sexual orientation under the Eligibility Requirement without going through the justification analysis.*
>
> *(b) Regarding marriage as different from civil partnership in the present context may suffer from the problem identified by Baroness Hale in **Rodriguez v Minister of Housing of the Government**:[40]*
>
> > *" The problem with that analysis is that the ground for the difference in treatment … is also the reason why the person treated differently is said not to be in an analogous situation. This can be dangerous. If the ground for the difference in treatment were a difference in sex, it would not be permissible to say that a man and a woman are not in an analogous situation because men and women are different."*
>
> *(c) Sexual orientation is now regarded as a personal characteristic inherent in an individual which cannot or should not be changed. And it may not be permissible to use the differences inherent in an individual's personal characteristics to determine*

[39] (2012) 15 HKCFAR 409 para 58

[40] [2009] UKPC 52, at para 17

*analogy : **Wilkinson v Kitzinger**.*[41] *As Baroness Hale explained in **AL(Serbia) v Home Secretary**:*[42]

> *" There are…dangers in regarding differences between two people, which are inherent in a prohibited ground and cannot or should not be changed, as meaning that the situations are not analogous. For example, it would be no answer to a claim of sex discrimination to say that a man and a woman are not in an analogous situation because one can get pregnant and the other cannot. This is something that neither can be expected to change. If it is wrong to discriminate between them as individuals, it is wrong to focus on the personal characteristics which are inherent in their protected status to argue that their situations are not analogous. That is the essential reason why, in **Ghaidan v Godin-Mendoza** the argument that same sex couples were not in an analogous position to opposite sex couples, because they could not have children together, did not succeed."*[43]

98. What then is the preferred approach for present purposes?

*99. I find what Ma CJ said in **Fok Chun Wa**, supra, instructive. After eschewing a rigid application of the two-stage approach, his Lordship at associated himself*[44] *with the principled approach of Lord Nicholls **in R(Carson) v Secretary of State for Works and Pensions**:*[45]

> *" the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."*

*100. I also derive guidance from Baroness Hale's judgment in **Rodriguez**, supra. There, it was the policy of the Gibraltar government to grant joint tenancies of government housing to couples only if they were married to one another or have a child in common. The policy excluded same-sex couples who could not marry nor have children together. The Privy Council held that the differential treatment imposed by the policy was*

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41 [2006] HRLR 36 *per* Sir Mark Potter at para 102

42 [2008] 1 WLR 1434, at para 27

43 [2004] 2 AC 557

44 Above, para 58(3)

45 [2006] 1 AC 173, at para 3

unconstitutional under the equality provision in the Gibraltar Constitution. After pointing out the danger of being bogged down in the problems of identifying the proper comparator (which is the first step of the two-stage approach referred to above), Baroness Hale adopted Lord Nicholls's approach in ***Carson*** *cited above:.*[46] *She further said:*[47]

> *" The benefit of a justification analysis is that it encourages structured thinking. A legitimate aim of the difference in treatment must first be identified. There must then be a rational connection between the aim and the difference in treatment. And the difference must be proportionate to the aim."*

101. Guided by Ma CJ's and Baroness Hale's judgments, I would also adopt the principled and structured approach of Lord Nicholls's in Carson in assessing if the differential treatment by reason of marital status under the Eligibility Requirement constitutes discrimination on account of sexual orientation as contended by QT.

Proportionality ***Yau Yuk Lung*** (2010)

25. ***Secretary for Justice v Yau Yuk Lung*** concerned a challenge to the constitutionality of charging individuals with the offence of homosexual buggery between men otherwise than in private under Section 118F(1) of the Crimes Ordinance, on the ground that it amounted to discrimination based on sexual orientation.[48] In the Court of Final Appeal, Li CJ set out the court's basic approach for determining whether a person's right to equality (or not to be discriminated against) had been infringed, in these terms:

> *19 In general, the law should usually accord identical treatment to comparable situations. As Lord Nicholls observed in* ***Ghaidan v Godin-Mendoza****:*[49]
> *'Like cases should be treated alike, unlike cases should not to be treated alike.'*
>
> *20 However, the guarantee of equality before the law does not invariably require exact equality. Differences in legal treatment may be justified for good reason. In order for differential treatment to be justified, it must be shown that:*

[46] Paras 17–18
[47] at para 25
[48] [2007] HKCFA 50; (2007) 10 HKCFAR 335
[49] [2004] 2 AC 557 at 566C

> (*1) The difference in treatment must pursue a legitimate aim. For any aim to be legitimate, a genuine need for such difference must be established.*
> *(2) The difference in treatment must be rationally connected to the legitimate aim.*
> *(3) The difference in treatment must be no more than is necessary to accomplish the legitimate aim.*

> *21 The burden is on the Government to satisfy the court that the justification test is satisfied. Where one is concerned with differential treatment based on grounds such as race, sex or sexual orientation, the court will scrutinize with intensity whether the difference in treatment is justified. See* ***Ghaidan v Godin-Mendoza****.*[50]

> *22 In requiring differential treatment to be justified, the view has been expressed that the difference in treatment in question is an infringement of the constitutional right to equality but that the infringement may be constitutionally justified. See the Court of Appeal's judgment in the present case*[51] *and in* ***Leung v Secretary for Justice****.*[52] *This approach is not appropriate. Where the difference in treatment satisfies the justification test, the correct approach is to regard the difference in treatment as not constituting discrimination and not infringing the constitutional right to equality. Unlike some other constitutional rights, such as the right of peaceful assembly, it is not a question of infringement of the right which may be constitutionally justified."*

26. As in the UK, the Hong Kong Court routinely apply the principle (imported from decisions of the US Supreme Court) that a stricter analysis to proportionality is appropriate when the court considers '*suspect categories*' of discrimination. Thus, ***in Kong Yunmin v Director of Social Welfare*** Ribeiro PJ for the CFA confirmed that:[53]

> *40. In some cases involving fundamental rights such as freedom of expression or freedom of peaceful assembly,*[54] *or rights bearing on criminal liability such as the presumption of innocence,*[55] *the Court has regarded the restriction as disproportionate unless it goes no further than necessary to achieve the legitimate objective in question. This is sometimes called the "minimal impairment" test. Similarly, in discrimination cases, where the differentiating inroad is based on certain personal characteristics sometimes referred to as "inherently suspect grounds" such as race, colour, sex or sexual orientation, the Court will subject the impugned*

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50 Above, see 568G (Lord Nicholls)
51 at 208B-C (Ma CJHC)
52 [2006] HKCA 360; [2006] 4 HKLRD 211 at 234G-H
53 [2013] HKCFA 107; (2013) 16 HKCFAR 950; [2014] 1 HKC 518
54 As in ***Leung Kwok Hung v HKSAR*** [2005] HKCFA 40; (2005) 8 HKCFAR 229.
55 As in ***HKSAR v Lam Kwong Wai*** [2006] HKCFA 84; (2006) 9 HKCFAR 574; and ***HKSAR v Ng Po*** On [2008] HKCFA 12; (2008) 11 HKCFAR 91.

measure to "intense scrutiny", requiring weighty evidence that it goes no further than necessary to achieve the legitimate objective in question.[56]

41. However, as the Chief Justice noted ***in Fok Chun Wah v Hospital Authority***[57] *"... it would not usually be within the province of the courts to adjudicate on the merits or demerits of government socio-economic policies". Where the disputed measure involves implementation of the Government's socio-economic policy choices regarding the allocation of limited public funds without impinging upon fundamental rights or involving possible discrimination on inherently suspect grounds, the Court has held that it has a duty to intervene only where the impugned measure is "manifestly without reasonable justification".*[58] *That is a test initially applied by the European Court of Human Rights while according a broad margin of appreciation to member States in setting and implementing their socio-economic policies.*[59] *As the Chief Justice points out, the margin of appreciation principle has previously been adapted to apply in the context of our domestic law.*[60] *It is appropriate similarly to apply the "manifestly without reasonable foundation" test in our domestic context.*

Equal protection of law

27. Article 22 of the HKBOR expressly ensures that a right "*without any discrimination to the equal protection of the law*". So far as I can tell, the Hong Kong courts have only rarely been required to consider the scope of this constitutional right. For example, in 1992 the Court of Appeal in ***R v Man Wai-keung (No.2)*** considered a statutory provision concerning costs in criminal appeals was inconsistent with Article 10 of the Hong Kong Bill of Rights Ordinance because it deprived a class of appellants, those ordered to be retried under a specific direction to access to the discretion of the courts to secure a costs order.[61] The Court of Appeal held that this restriction was not reasonable, rational, nor proportionate to the achievement of any legitimate purpose.

28. However, there have been some recent developments in international human rights law, which may illuminate this issue.

29. One striking element of human rights litigation is the speed at which new principles suddenly emerge. In 2008 I succeeded before the Privy Council in ***Surratt v A- G of Trinidad and Tobago*** where the Board decided that the Government's failure to implement anti-

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[56] As in ***Secretary for Justice v Yau Yuk Lung*** [2007] HKCFA 50; (2007) 10 HKCFAR 335 at §§19-22; ***Fok Chun Wa v Hospital Authority*** [2012] HKCFA 34; (2012) 15 HKCFAR 409 at paras 77-78.

[57] [2012] HKCFA 34; (2012) 15 HKCFAR 409 at para 66

[58] Ibid at paras71 and 76.

[59] The Strasbourg and United Kingdom case-law is reviewed in ***Humphreys v Revenue and Customs Commissioners*** [2012] 1 WLR 1545 at paras 16-22

[60] ***Fok Chun Wa v Hospital Authority*** [2012] HKCFA 34; (2012) 15 HKCFAR 409 at para 63.

[61] [1992] HKCLR 207

discrimination legislation was unlawful.[62] Nine months later no progress had been made and the Board were asked to grant a declaration that the appellants had been denied "*equal protection of the law*".[63] Although the Board took the view that this "*issue is plainly of great importance and its resolution by the Board would determine the position not just for Trinidad and Tobago but for most of the Caribbean States*", it declined to grapple with the problem.

30. However, there has been a recent Privy Council decision and Trinidad cases, which may merit your attention.

31. In ***Maharaj v Prime Minister of Trinidad and Tobago*** the Appellant sought constitutional damages against the Prime Minister and the Cabinet because the Cabinet had decided that Mr Maharaj should not be reappointed as a member of the Industrial Court.[64]

32. Section 4(b) of the Constitution of Trinidad and Tobago states:

> *It is hereby recognised and declared that in Trinidad and Tobago there [has] existed and shall continue to exist … the right of the individual to equality before the law and the protection of the law.*

33. Much of the argument before the Board focused on the claim that the failure of the Cabinet to check the allegations which were instrumental in preventing the appellant's reappointment constituted a breach of s 4(b). Lord Kerr held that:

> *25 …. In a series of cases where the protection of the law provision in constitutions in various Caribbean countries was considered, an expansive approach to its potential application has been taken. In **A-G of Barbados v Joseph and Boyce** de la Bastide P and Saunders J said in joint judgment for the Caribbean Court of Justice said at para 60:[65]*
>
> > *"… the right to the protection of the law is so broad and pervasive that it would be well-nigh impossible to encapsulate in a section of a Constitution all the ways in which it may be invoked or can be infringed."*
>
> *26. In **The Maya Leaders Alliance v A-G of Belize** the CCJ took a similar stance:[66]*
>
> *"The law is evidently in a state of evolution but we make the following observations. The right to protection of the law is a multi-dimensional, broad*

[62] [2008] 1 A.C. 655
[63] [2008] UKPC 38
[64] [2016] UKPC 37
[65] [2006] CCJ 3 (AJ) para 60
[66] [2015] CCJ 15 at para 47

> *and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law. The right to protection of the law prohibits acts by the Government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty or property. It encompasses the right of every citizen of access to the courts and other judicial bodies established by law to prosecute and demand effective relief to remedy any breaches of their constitutional rights. However, the concept goes beyond such questions of access and includes the right of the citizen to be afforded, 'adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power.' The right to protection of the law may, in appropriate cases, require the relevant organs of the state to take positive action in order to secure and ensure the enjoyment of basic constitutional rights. In appropriate cases, the action or failure of the state may result in a breach of the right to protection of the law. Where the citizen has been denied rights of access and the procedural fairness demanded by natural justice, or where the citizen's rights have otherwise been frustrated because of government action or omission, there may be ample grounds for finding a breach of the protection of the law for which damages may be an appropriate remedy."*
>
> *27. There is no reason to suppose that the courts in Trinidad and Tobago would have adopted a different approach. To the contrary, courts in that country have consistently favoured a wide-ranging interpretation of the "protection of the law" provision and, significantly, such an approach does not appear to have been opposed by state agencies who were parties to cases where the provision came under consideration.*
>
> *28. For the most part those cases have applied the decision of the Board in **Rees v Crane**.[67] In that case the respondent, a serving judge of the High Court of Trinidad and Tobago, had been the subject of a referral by the Judicial and Legal Service Commission to the President under section 137(3) of the Constitution. Section 137 sets out the procedure for the removal of a judge from office. One of the preliminary steps in the process is for the Commission to represent to the President that the question of removal from office be investigated. The Court of Appeal held that the decision to refer the question to the President was unlawful. That conclusion was upheld by the Board. Lord Slynn, who delivered the judgment of the Board, said that the protection of the law provision in section 4(b) included the right to natural justice.*

34. In first instance judgment in Trinidad last year, ***BS v A-G of Trinidad & Tobago***, Kokaram J reviewed the recent Caribbean authorities and summarised the position as follows:[68]

[67] [1994] 2 AC 173 at 188G

[68] Judgment 24 May 2016 para 285

> *Protection of the law includes the right to due process. It includes access to an appellate process. It prescribes executive action or inaction from rendering a legal appellate process nugatory. It can encompass delay in producing judgment. Non implementation of legislation may constitute a breach of a fundamental right.*

35. The principle of equal protection of law (as developed in the Caribbean) may not appear to add a great deal to the right to a fair hearing afforded by Article 35 of the Basic Law or by Article 10 of the HKBOR.

36. However, since there is no express right to a fair hearing under Article 35 and there are technical difficulties in squeezing out fair trial rights in relation to Article 10, particularly in relation to administrative processes, it may be valuable for Hong Kong lawyers to take a fresh approach to the right *"to the equal protection of the law*" under Article 22 of the HKBOR.

SPECIFIC TOPICS CONSIDERED IN RECENT DISCRIMINATION CASES

Same sex marriage

W v Registrar of Marriages (2010)
Leung Chun Kwong (2017)
QT v Director of Immigration (2017)

37. In 2010 the FCA decided the important case of ***W v Registrar of Marriages*** and this year the Hong Kong courts have considered two other important cases on same sex marriage.

W v Registrar of Marriages (2010)

38. In ***W v Registrar of Marriages*** the Court of Final Appeal considered a claim by a transsexual who lived and appeared in all respects to be a woman. She and her male partner wished to get married. However, the Registrar of Marriages has decided that she does not qualify as a "*woman*" under the Matrimonial Causes Ordinance, so that there is no power to celebrate a marriage between her and her male partner.[69]

39. The Appellant's constitutional claim relied on Article 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), Article 19(2) of the Hong Kong Bill of Rights (the right to marry) and Article 14(1) (the right not to be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation).

[69] [2013] 3 HKLRD 90; (2013) 16 HKCFAR 112; [2013] 3 HKC 375; FACV 4/2012 (13 May 2013)

40. The Court accepted that, if the statutory right excludes from the institution of marriage persons whose right to marry would be recognized under the Basic Law or Bill of Rights, the Court had to declare the statutory provision to such extent unconstitutional and to decide upon the appropriate constitutional remedy. It would in particular have to decide whether the validity of the infringing provisions can be preserved by giving them a remedial interpretation. The power to provide a remedial interpretation or to grant other forms of constitutional remedy was explained in the judgment of Sir Anthony Mason NPJ in ***HKSAR v Lam Kwong Wai***,[70] and summarised in ***HKSAR v Ng Po On***[71] in the following terms:

> ***Lam Kwong Wai*** *reiterates that the Basic Law impliedly confers upon the courts of the Region 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 (as held in* ***Leung Kwok Hung v HKSAR.***[72]
>
> *The Court recognizes that such remedial techniques necessarily have their limits. 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.*

41. Ma CJ and Ribeiro PJ took the view that the right to marriage was a strong right which may not be subjected to conditions which impair the essence of the right.[73] They drew attention to the way in which the ECtHR case law had developed,[74] and that the House of Lords in ***Bellinger v Bellinger*** held to the view that as a matter of statutory construction in domestic law,[75] the common law ***Corbett*** biological criteria,[76] fixed at the time of birth, remained determinative of who qualified as a "*man*" and a "*woman*" for the purposes of marriage, although this construction was incompatible with ECHR Articles 8 and 12.

42. They rejected the argument that when the relevant constitutional instruments were promulgated (the ECHR in 1950, Article 19(2) of the International Covenant on Civil and

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[70] [2006] HKCFA 84; (2006) 9 HKCFAR 574 at §§61-79.

[71] [2008] HKCFA 12; (2008) 11 HKCFAR 91 at §§46-47.

[72] [2005] HKCFA 40; (2005) 8 HKCFAR 229 at 265)

[73] ***Goodwin v United Kingdom*** (2002) 35 E.H.R.R. 18 ***; R(Baiai) v Secretary of State for Home Department*** [2009] 1 A.C. 287

[74] ***Rees v United Kingdom*** (1986) 9 EHRR 56; ***Cossey v United Kingdom*** (1990) 13 EHRR 622***; Sheffield and Horsham v United Kingdom*** (1998) 27 EHRR 163; and ***Goodwin v United Kingdom*** (2002) 35 E.H.R.R. 18.

[75] [2003] 2 A.C. 467

[76] ***Corbett v Corbett*** [1971] P 83.

Political Rights in 1966, the Joint Declaration in 1984, and the Basic Law in 1990) as meaning that the framers should be assumed to have adopted a traditional approach to the nature of marriage and to the question of who qualifies as a "*wom*an" for the purposes of the right to marry, along lines similar to those adopted by Ormrod J in ***Corbett***. Ma CJ and Ribeiro PJ held that it was not justifiable to confine the criteria for deciding who counts as "*a woman*" for marriage purposes to biological criteria fixed at birth, thereby ignoring the psychological, post-operative and social dimensions of the transsexual person's sexual identity viewed at the time of the proposed marriage. They concluded that legislation construed as endorsing the ***Corbett*** criteria would operate to prevent the Appellant from marrying and would unconstitutionally impair the very essence of the right to marry guaranteed by Article 37 and Article 19(2).

43. As you will know, the CFA recognized that there would be a whole series of issues that need to be addressed by the Legislative Council in the light of its judgment. It described some of those issues and ordered a stay of its judgment for a year to allow the Government to introduce remedial legislation. Instead of introducing a more comprehensive bill along the line of the English Gender Recognition Act 2003, the Government decided to introduce a relatively simple bill which was widely criticized. Those who supported transgender considered that the bill had not gone far enough, and those who opposed the ***W*** case considered that the bill was too radical.

44. In the end the bill was not enacted, most of the problems identified by the CFA in the judgment remain unresolved and will probably come up to the Court in the near future.

45. This raises the possibility of whether there also be a potential case against the Government or the Legislature for failure to introduce implementing legislation. In principle, there is no reason why a Court could not grant declaratory relief, if appropriate.

46. However, the Hong Kong courts have been careful to modify the range of judicial review remedies it will order in constitutional cases. For example, in ***Koo Sze Yiu v Chief Executive*** CFA controversially suspended its judgement from coming into force for 6 months, so as to preserve the Government's ability to perform covert surveillance, holding that the power to suspend a declaration is a concomitant of the power to make a declaration.[77] The question of whether a Court has the jurisdiction to make a prospective overruling so as to avoid affecting anything which happened before giving judgment is, equally, highly contentious. The Supreme Court of Canada has held that it can prospectively overrule in cases concerning

[77] (2006) 9 HKCFAR 441 paras 32-34.

the Canadian Charter of Rights and Freedoms,[78] but this concept has been rejected in the UK by the House of Lords[79] and by the High Court of Australia.[80]

47. Even accepting there is such a power, the rationale for invoking it in relation to issues concerning same sex marriage is not entirely convincing. The idea of shaping remedies in constitutional cases to principle of democratic dialogue with the legislature is not persuasive if previous experience suggests the legislature cannot resolve the debate in question. It may well be that the best approach is for the Court make a narrowly defined and very specific declaration.

Leung Chun Kwong

48. ***Leung Chun Kwong v Secretary of State for the Civil Service*** concerned two issues:[81]

- whether a civil servant who has entered into a same-sex marriage with a man in New Zealand, is entitled to the same benefits and allowances that the Government provides to the "*spouses*" of other married civil servants whose marriages are to persons of the opposite gender; and
- whether the same-sex marriage is a "*marriage*" for the purposes of the Inland Revenue Ordinance, which he rejected when construing the Ordinance.

49. Chow J applied the approach taken by the Court of Final Appeal in ***Secretary for Justice v Yau Yuk Lung***.[82] He went on to discuss the approach of Ma CJ in the Court of Final Appeal in ***Fok Chun Wa v Hospital Authority***[83], observing that this is sometimes been taken as specifying a two-stage test:-

> (1) The first stage is to identity the comparators and to ask: are these persons in comparable positions?
>
> (2) The second stage assumes that the court regards the comparators as being in comparable or analogous positions), and the question is: can the differences in treatment between the comparators be justified using the ***Yau Yuk Lung*** justification test.

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[78] See eg ***Re Manitoba Language Rights*** [1985] 1 SCR 711; ***R v Swain*** [1991] 1 SCR 933; ***Schachter v Canada*** [1992] 2 SCR 679***; Hislop v Canada*** [2007] 1 SCR 429

[79] ***Re Spectrum*** [2005] 2 AC 680

[80] Ha v New South Wales (1997) 189 CLR 465

[81] [2017] HKCFI 736; HCAL 258/2015 (28 April 2017)

[82] [2007] HKCFA 50; (2007) 10 HKCFAR 335

[83] [2012] HKCFA 34; (2012) 15 HKCFAR 409 para 57

50. However, Ma CJ, took the view that, although the two-stage approach can in some cases be neatly applied, it should not be regarded as if it were a statute and treated as such. In particular, it should not give rise to complicated and long-drawn out (but ultimately unproductive) arguments as to whether this step or that step has been overcome, or obscure the real issues in a case. It was vital to bear the principles stated in ***Fok Chun Wah***:[84]

> (*1) The object of the exercise (when considering issues of equality) is ultimately to ask a simple question and here, I would respectively adopt the way in which this was put by Lord Hoffmann in* ***Carson****,*[85] *'is there enough of a relevant difference between X and Y [the comparators] to justify differential treatment?'*
>
> *(2) In the majority of cases where equality issues are involved, it will be necessary for the Court to look at the materials which go to the three facets of the justification test before this crucial question is answered. It will be rare case, I daresay, where the court will comfortably be able to answer this question without any recourse to the issue of justification at all. Seen in this way, it may matter not at all whether the court's approach is seen as a two-stage one or not.*

Chow J then applied the approach of Lord Nicholls of Birkenhead in ***Carson***:

> 3. *For my part, in company with all your Lordships, I prefer to keep formulation of the relevant issues in these cases as simple and non-technical as possible. Article 14 [of the European Convention on Human Rights – the equipment of Article 22 of the Bill of Rights] does not apply unless the alleged discrimination is in connection with a Convention right and on a ground stated in article 14. If this prerequisite is satisfied, the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact.'*

51. Chow J concluded that the question to ask is whether there is enough of a relevant difference between the comparators to justify differential treatment. In some cases, the relevant differences between the comparators are so obvious that differential treatment can be justified without going through the ***Yau Yuk Lung*** justification test. Where, however, the

[84] Above, see para 58

[85] [2006] 1 A.C. 173 para 31

relevant differences between the comparators cannot be seen so clearly, the three facets of the justification test should be considered.

52. The Applicant argued that he had entered into a marriage which was lawful in New Zealand, that they should, therefore, be recognised as married, and the his partner was entitled to state benefit. The benefits decision manifested a difference in treatment to a person who has entered into a same-sex marriage, when compared to other civil servants who have entered into valid and legally recognised heterosexual marriages (whether in Hong Kong or overseas) under Hong Kong law. On the face of it, differential treatment was based simply on the marital status of the civil servant officer in question.

53. Chow J held that, however, the special legal status of being married as recognised by Hong Kong law would not be achievable by the Applicant since Hong Kong law does not recognise same-sex marriages. Furthermore, due to his sexual orientation, the Applicant could not, or could not be expected to, enter into a heterosexual marriage. Chow J found that the difference in treatment was based, at least indirectly, on his sexual orientation. He took the view that the Applicant's position was, therefore, similar to ***Rodriguez v Minister of Housing of Gibralta***r where the Privy Council held a same sex partner had been denied a joint tenancy in circumstances where a heterosexual couple would have been granted one.[86]

54. Similarly, in ***Bull v Hall*** a same-sex couple who had entered into a civil partnership in the UK complained that they were unlawfully discriminated against by devoted Christian hotel keepers who refused to rent a double-bedded room to them because they sincerely believed that "*the only divinely ordained sexual relationship is that between a man and a woman within the bonds of matrimony*". The Supreme Court decided that the couple had been subjected to indirect discrimination and Chow J adopted that analysis.

55. The Government argued that such differential treatment is justifiable for three reasons:-

> (1) in the absence of any legislation to recognise same-sex unions and regulate the rights and obligations of same-sex couples, it is legitimate and justified for the Secretary to act in line with the prevailing marriage law of Hong Kong;
> (2) any decision to the contrary would require the Secretary to have regard to same-sex marriages despite their invalidity under Hong Kong law, or to at least indirectly recognise same-sex marriages as valid in Hong Kong "through the backdoor", which cannot be right; and
> (3) the Secretary's policy is rationally connected to and is no more than reasonably necessary to achieve the legitimate aims of not undermining the integrity of the institution of marriage as understood in Hong Kong and of ensuring overall

[86] [2009] UKPC 52

consistency with Hong Kong matrimonial laws hence safeguarding "public order (ordre public")

56. Chow J rejected this defence of justification. The line, as drawn by the Secretary between those who are legally married under Hong Kong law and those who are not, begs the question of whether it is legitimate or justifiable to accord differential treatment based on sexual orientation, because homosexual couples are, by definition, unable to be legally married, or recognised as legally married, under Hong Kong law. He pointed out that there is nothing illegal or unlawful for the Secretary to accord the same spousal benefits to homosexual couples who are legally married under foreign laws. Nor was it inherently wrong or impermissible, from a legal point of view, for the Secretary to have regard to, or indirectly recognise, an overseas same-sex marriage which is legally valid under the law of the place at which the marriage is contracted or celebrated.

57. However, Chow J reached a different conclusion in relation to the claim made concerning the Inland Revenue Ordinance. In his view, there was a real distinction between (i) a contention that Mr Leung's same-sex marriage with Mr Adams "is" a marriage for the purposes of the IRO, and (b) a contention that the same-sex marriage should be "treated" as a marriage (even though it is not) for the purposes of the IRO. He decided that the former raises essentially a question of construction of statute, whereas the latter raises essentially a question of right.

58. He decided that the he was concerned with an application for judicial review of the Tax Decision, not the definition of the word "*marriage*" in the IRO, or the provisions in the IRO that provide for joint assessment of married couples and the married person's allowance, or any other provisions in that Ordinance. He went on to hold that the question of whether the equality provisions in the Basic Law or the Hong Kong Bill of Rights would require a different interpretation to be given to that word in the IRO, or the relevant provisions in the IRO to be struck down or amended, do not arise for determination in his present challenge and expressed no view on those questions.

59. Unfortunately, the rationale for Chow J's decision is not entirely clear, although the conclusion, itself, appears to be difficult to maintain.

60. Subsequently, , however, Chow J has extended time to allow the effect of his decision the administration of the CSRs in relation to spousal benefits until the resolution of the Government's appeal.[87]

The Court of Appeal decision in ***QT v Director of Immigration***

[87] [2017] HKCFI 1628; HCAL 258/2015 (11 September 2017)

61. In very recent decision in ***QT v Director of Immigration*** the Court of Appeal considered whether the Policy, as applied by the Director of Immigration constituted discrimination based on sexual orientation against the appellant, QT, who is a same-sex partner of her sponsor, SS, in a civil partnership which they contracted in England under the Civil Partnership Act 2004.[88] The applicant claimed that that he was subject to differential treatment concerning eligibility by reason of marital status. In applying the Policy, the Director maintains that "*spouse*" refers only to husband and wife in a heterosexual and monogamous marriage as it is the only form of valid marriage recognized under the law of Hong Kong. QT, therefore, complained that the Policy, as applied by the Director, constituted discrimination against her on account of her sexual orientation.

62. QT's judicial review claim was dismissed and the case she advanced to the Court of Appeal was that Au J erred in finding that she, by reason only of her being in a civil partnership with her same-sex partner, was in a relevantly different position to a straight applicant married to an opposite-sex partner.

63. QT submitted that the Policy and its application in the Decision is discriminatory on three alternative bases :
    - According to that interpretation, all heterosexual married couples benefit from the Policy but all same-sex married couples and civil partners, who are in a relevantly similarly situation, are less favourably treated. This constitutes discrimination on the ground of sexual orientation.
    - Alternatively, if the Policy is viewed as treating all those who are recognized as married for the purposes of the law of Hong Kong more favourably than those who are not, the Policy treats "*unmarried*" same-sex couples, who cannot be married under Hong Kong law, in the same way as unmarried heterosexual couples, who can choose to marry or not as they please. The circumstances of a same-sex couple whose marriage or civil partnership cannot be recognized in Hong Kong are significantly different from those of a heterosexual couple who have the choice to marry or not as they please. It is accordingly discriminatory to treat them in the same way.
    - Alternatively, if the Policy of granting dependant visas only to spouses as defined in the Policy is regarded as a factually-neutral policy of general application, it places same-sex couples at a serious and disproportionate disadvantage by comparison with heterosexual couples and is accordingly indirectly discriminatory.

64. Based on a series of international authorities, it was argued that in a situation in which same-sex couples are not permitted to marry or in which their partnerships are not legally recognized, it is discriminatory for the State to make access to benefits, such as the dependant visa, conditional on marriage because the effect of such a policy is to exclude

[88] CACV 117/2016

same-sex people, who cannot marry, from the benefit entirely because of their sexual orientation, and that would be unlawful unless it can be objectively justified. It was said that the burden therefore fell on the Director to show justification which he failed to do.

65. The main plank of Director's argument was that the Policy was not discriminatory because it draws the bright line on marriage and not on sexual orientation, anchoring the submission on the well-established proposition that marriage confers a special status on the married couple with a bundle of rights and obligations. Since the law of Hong Kong does not grant same-sex couples access to marriage, it follows that they does not have access to the core rights that go with marriage, including dependant status which underlies the application for a dependant visa under the Policy. As a fall back position, it was argued that, even if the Policy was discriminatory, it was justified in the way as the Director has done.

66. Both the Strasbourg and English authorities establish the proposition that a same-sex couple cannot validly complain that they have been discriminated against on the ground of sexual orientation because they are not legally granted the right or access to marry.

67. However, that even if in Hong Kong the denial of the right to marriage to a same-sex couple is entrenched in the Basic Law or authorized by statute, differential treatments based on marital status may still constitute discrimination on account of sexual orientation in other contexts- if not justified.[89]

68. Although in Hong Kong denial of the right to marry to same-sex couples alone does not constitute discrimination on account of sexual orientation, it does not necessarily follow that using marital status as a condition to access to other rights or benefits can never be discriminatory. The Court, therefore, had to access to assess whether a particular differential treatment by reason of marital status is discriminatory because of sexual orientation in a given context.

69. As stated above, the Court of Appeal rejected the two limbed test of searching for an analogous comparator- and applied the principled and structured approach of Lord Nicholls's in ***Carson*** to assess whether the differential treatment by reason of marital status under the Eligibility Requirement constituted discrimination on account of sexual orientation as contended by QT.

Disability discrimination ***Law Chi Yuen***

[89] ***James v Eastleigh Borough Council*** [1990] 2 AC 751 and ***R v Secretary of State for Health, ex parte Richardson*** [1995] 3 CMLR 376

70. In ***Law Chi Yuen v Secretary for Education*** the applicant suffered from mild grade intellectual disability.[90] In 2011 the Secretary of Education rejected his school's application for the Native-speaking English Teacher Scheme. The rejection letter stated that under its existing policy, the scheme does not cover special schools for intellectually disabled students in light of their special curriculum, different educational needs, and not being included as schools offering English Language as part of the Basic Education Curriculum. The Applicant claimed that the decision was unlawful and in breach of the Disability Discrimination Ordinance and succeeded.

71. The Applicant also presented a constitutional challenge, alleging a breach of Article 25 of the Basic Law and of Article 22 of the HKBOR. His contentions that the decision was not unconstitutional were similar to the submissions made on the Disability Discrimination Ordinance ground, that no relevant comparable circumstances can be made between the applicant and the proper comparator.

72. Au J applied the principles discussed Li CJ in ***Yau Yuk Lung***[91] and considered the justification advanced in relation to three elements of the proportionality question:

- the differential treatment seeks to achieve a legitimate aim;
- the differential treatment is rationally connected to that legitimate aim; and
- the treatment is proportionate (in the sense that it is no more than necessary) as a measure to achieve that aim.

73. The Government argued that:

- The differential treatment of not providing Native-speaking English Teacher Scheme to the Applicant pursued the legitimate aim of ensuring full-time Scheme was made available only to schools where there exist conditions for it to fully and meaningfully carry out their expected roles under the NET Scheme.
- The exclusion of intellectual disabled schools where the level and volume of English teaching fall short is clearly rationally connected to such legitimate aim.
- It is no more than is necessary to accomplish this aim.

74. The fundamental proposition the Government put forward was that the differential treatment (ie, not to provide full time NETs to ID Schools even if they are teaching English Language) was to achieve the legitimate aim of "*saving costs*".

75. However, Au J observed that Ribeiro PJ said in ***Kong Yun Ming v Director of Social Welfare*** that saving costs would not in itself be a legitimate aim to justify a restriction on a

[90] [2016] HKCFI 1617; [2016] 5 HKLRD 302; HCAL 91/2011 (30 September 2016)

[91] ***Secretary for Justice v Yau Yuk Lung*** (2007) HKCFAR 355

constitutional right.[92] The purpose and effect of the cut in expenditure would have to be taken into account before it can be properly seen whether the saving of costs constitutes a legitimate societal aim and that aim is rationally connected by the challenged measure.

76. Au J found that the Secretary has not explained in the evidence what are the purpose and effect of saving those costs in excluding intellectually disabled Schools from the Scheme. It is not the Secretary's case that the saving is necessary in order to maintain the sustainability of the Scheme, and the almost infinitesimal savings could not be readily show the legitimate purpose and effect the savings could have, which might justify a restriction on the constitutional right to equality. He also found that the Secretary has also not been able to show that there is sufficient relevant difference between the applicant and a mainstream student to justify the differential treatment.

Public housing and discrimination ***Chan Yeuk Ming*** (2012)

77. In ***Chan Yeuk Ming v Hong Kong Housing Authority*** the Applicant seeks to challenge the policy of the Housing Authority concerning the allocation of public rental housing unit for divorcees.[93] Both the wife and the Applicant wished to retain the benefit of a public rental housing unit in view of the huge difference between the rents and standards for a public rental housing and private tenancy in Hong Kong.

78. The current policy in respect of public rental housing units was that:

> *Under the prevailing Divorced Couples Policy …*
>
> *(1) Divorced couples living in PRH flats will not be allocated additional public housing resources simply on the ground that they have divorced. Tenants in PRH flats are expected to make their own accommodation arrangements upon divorce.*
>
> *(2) If an agreement cannot be reached between the divorced couple, the Respondent will generally favour the party having the custody of children by letting that party and the children have the flat to live in. If joint custody has been ordered by the court, only the party having the legal right to live with the offspring continuously and permanently will be granted the PRH tenancy. This also applies when there are other relatives living in the flat and they all choose to live with the party having custody.*

79. Lam JA took the view that the only question was whether the Policy discriminates the Applicant as a divorced person, as such- in contravention of Articles 25 and 36 of the Basic Law and/or Article 22 of the Hong Kong Bill of Rights. Article 36 of the Basic Law provides that Hong Kong residents shall have the right to social welfare in accordance with law and he

[92] [2013] HKCFA 107; (2013) 16 HKCFAR 950, paragraph 49

[93] [2012] HKCFI 1380; HCAL 25/2012 (7 September 2012)

found that in Hong Kong, subsidized public housing, including a public rental housing unit, is a form of social welfare.

80. The Applicant was not claiming that the eligibility criteria were discriminatory or the line drawn by such criteria is manifestly without reasonable foundation. His complaint was that he had to undergo the Comprehensive Means Test again because of his divorce. However, Lam JA held that this is only one part of the whole picture. The full picture is that due to divorce, there is a need for additional accommodation since the Applicant would live in a separate household. Members of what used to be one family need additional housing resources to cater for the situation occasioned by the divorce

81. It was argued that submitted that the Policy was discriminatory in three respects,

- It discriminates against him as the party not given custody of any child as compared with the wife.
- It discriminates against him as compared with a sitting tenant of public rental housing unit is not divorced but has the same current income level as the Applicant viz exceeding the Comprehensive Means Test limits.
- It discriminates against him as compared with a divorced person who is able to satisfy the Comprehensive Means.

82. Lam JA applied the approach in ***Fok Chun Wa v Hospital Authority***,[94] where Ma CJ endorsed the views of Lord Nicholls in ***R (Carson) v Secretary of State for Works and Pensions***:[95]

> *the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such obvious, relevant difference between the claimant and those with who he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact.*

83. Lam CJ found that this case was one of those rare instances where the difference in treatment is obviously attributable to relevant difference between the Applicant and those he sought to compare himself with. Nonetheless he went through the analysis of the justification test for the sake of comprehensiveness, and found against the Applicant on that ground as well.

CONCLUSION

[94] [2012] HKCFA 34; (2012) 15 HKCFAR 409; [2012] 2 HKC 413; FACV 10/2011 (2 April 2012) para 58(3)

[95] [2006] 1 AC 173 at para 3

84. You will have appreciated that the equality cases I have examined cover quite a period of time and discrimination claims appear to be a developing area of work. It is interesting to compare the number of Hong Kong cases litigated in the last 12 months with Human Rights Act claims. These comprise two Supreme Court decisions,[96] two decisions of the Court of Appeal[97]and three first instance decisions.[98]

85. Nevertheless, on any view the three equality claims before the Courts this year, ***Leung Kwok Hung*** and the two same sex marriage cases, ***Leung Chun Kwong*** and ***QT v Director of Immigration*** (2017) involve issues of fundamental significance and it will be interesting to see how this field of practice progresses over the next few years.

1 October 2017

[96] ***R(Johnson) v Secretary of State for the Home Department*** [2017] A.C. 365; ***McCann v State Hospitals Board for Scotland*** [2017] 1 W.L.R. 1455

[97] ***R. v Knights (James)*** [2017] 2 Cr. App. R. (S.) 33; ***Knights v Parole Board for England and Wales*** [2017] 4 W.L.R. 134

[98] ***R(McNiece) v Criminal Injuries Compensation Authority*** 2017] EWHC 2 (Admin); ***R(C) v Islington LBC*** [2017] H.L.R. 32; ***R(DA) v Secretary of State for Work and Pension*** [2017] EWHC 1446 (Admin)