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The Courts, Public Opinion and the Rights of Lesbian, Gay, Bisexual and Transgender Persons: A Hong Kong Perspective

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In recent years, courts in many jurisdictions have considered the relevance of societal consensus when judicially reviewing policies that affect the rights of sexual orientation and gender identity minorities. This article focuses on three landmark cases concerning transgender marriage and the rights of same-sex couples in Hong Kong, where the apex court has produced relatively progressive rights jurisprudence. A study of these decisions offers comparative insights about the role of public opinion when judges resolve potentially controversial claims involving the rights of lesbian, gay, bisexual and transgender (LGBT) persons. It examines the lower courts' reliance on, and the Court of Final Appeal's ultimate rejection of, consensus as a factor when justifying limitations on fundamental rights. At the same time, this analysis suggests that a more nuanced approach—entailing both resistance and responsiveness to public opinion—may be warranted. The Hong Kong jurisprudence sets the stage for developing alternative understandings of consensus which could enhance judicial contributions toward broader discussions in support of LGBT rights protection.

In recent years, courts in many jurisdictions have considered the relevance of societal consensus when reviewing policies that affect the rights of sexual orientation and gender identity minorities. This article focuses on judicial reasoning about consensus in Hong Kong, where the apex court has produced relatively progressive rights jurisprudence in this area (Lau, 2020). An analysis of three landmark cases in particular allows for reflection on the appropriate role of public opinion when judges determine claims involving the rights of lesbian, gay, bisexual and transgender (LGBT)[1] persons. The first case concerned a transgender woman who had undergone sex reassignment surgery but was not permitted to marry her male partner (*W v Registrar of Marriages*). The other two involved the denial of certain benefits to committed same-sex couples that were available to different-sex married couples (*QT v Director of Immigration* (*QT*) and *Leung Chun Kwong v Secretary for the Civil Service and Commissioner of Inland Revenue* (*Leung Chun Kwong*)). Hong Kong's highest court, the Court of Final Appeal, ultimately held in favour of the applicants in all three cases, explaining that the 'prevailing views of the community' (*Leung Chun Kwong*, 2019: 57), or the absence of a majority consensus (*W v Registrar of Marriages*, 2013: 115), should have no bearing on the outcome of claims involving the rights of marginalised minorities. In doing so, the Court of Final Appeal departed from the lower courts' decisions which had relied – in part – on societal consensus

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1 While recognising debates about appropriate terminology (see, for example, Lau, 2018), for convenience, this article will refer to lesbian, gay, bisexual and transgender (LGBT) persons. The acronym 'LGBTI' (lesbian, gay, bisexual, transgender and intersex) is commonly used in international human rights materials, but this article adopts the shorter LGBT version since it does not directly discuss intersex issues. Citing the United Nations High Commissioner for Refugees and a United Nations Fact Sheet, the Inter-American Court of Human Rights, 2017: 20 helpfully explained in an Advisory Opinion that: 'The acronym LGBTI describes a diverse group who do not conform to conventional or traditional notions of male and female gender roles. Regarding this specific acronym, the Court recalls that the terminology relating to these human groups is not fixed and evolves rapidly, and that many other terms exist including asexual people, queers, transvestites and transsexuals, among others. In addition, in different cultures other terms may be used to describe people who form same-sex relationships and those who self-identify or exhibit non-binary gender identities …'

when scrutinising government justifications for limiting fundamental rights. In light of their controversial nature in many societies, LGBT rights cases often pose particular challenges for courts. A study of the Hong Kong jurisprudence, therefore, can contribute to comparative perspectives on the influence of consensus on judicial responses.

The article proceeds as follows. The next section summarises debates about the appropriate role of the courts and the relevance (or irrelevance) of consensus when exercising powers of judicial review. The third section briefly sets out relevant features of Hong Kong's constitutional framework before considering the selected cases in greater detail. It examines approaches to consensus taken by the first two levels of the judiciary, the Court of First Instance and the Court of Appeal, in *W v Registrar of Marriages* (2010 and 2012), *QT* (2017), and *Leung Chun Kwong* (2018). In the latter cases, the Court of Appeal held that societal consensus is relevant for 1) determining whether certain rights related to marriage should be entirely immune from judicial scrutiny; and 2) informing the proportionality test in cases involving *prima facie* encroachments on rights that have not been excluded under the first category. Finally, the article looks at the Court of Final Appeal's dismissal of this consensus reasoning in all three cases and its affirmation of the judiciary's duty to protect minority rights.[2]

Despite dismissing societal consensus, the Court of Final Appeal also planted seeds that could support a more nuanced understanding of the meaning and role of consensus in judicial decision making. The fourth part of this article examines these possibilities. It proposes an alternative approach that could contribute toward the resolution of tensions arising from unpopular, although rights-protective, decisions including any backlash that could threaten judicial legitimacy. The suggested methods reach beyond the judicial arena. If the courts' mandate is to protect fundamental rights, then judges' awareness of public opinion could enhance their ability to impact broader discussions in *support* of minority rights. I argue that adopting strategic remedial delays might be one appropriate method in limited circumstances, but that judges have additional tools. In particular, they can use the language of their decisions to build consensus, remind the wider community of the significance of constitutional rights, and emphasise common core values. Changes in societal views based on a more informed understanding of such values might then, in turn, feed back into the judicial process and further buttress judicial legitimacy. The Hong Kong Court of Final Appeal has moved in this direction by elaborating core values such as equality and dignity in its LGBT rights jurisprudence. It has emphasised that these values serve as the original - and ongoing - basis for constitutional rights, regardless of current majoritarian views on a given issue. In other words, a form of consensus in favour of the protection of fundamental rights is already built into the constitutional framework. Cappelletti expresses a similar idea in his classic work on comparative judicial review, noting that modern states, in a desire to protect 'the *permanent* will, rather than the *temporary* whims, of the people', have 'reasserted higher law principles through written constitutions' (1989: 131-32, emphasis added).

Experience from South Africa illustrates this potential. In 2005, despite intolerant public views, the Constitutional Court of South Africa decided in favour of same-sex marriage, based on the constitutional right to substantive equality (*Minister of Home Affairs v Fourie,* 2005 (*Fourie*); Goldblatt, 2006). Like the Hong Kong Court of Final Appeal in *W v Registrar of Marriages*, the South African court introduced a grace period. In South Africa, this encouraged public discussion and eventual legislative action toward more enduring rights protection (Christiansen, 2016; Lau, 2016). Significantly, the judgment's consensus-building text emphasised commonalities among groups and celebrated diversity. Rather than ignore consensus altogether, the court acknowledged the need to address attitudes and discrimination through a combination of engagement *and* a robust interpretation of constitutional rights. The Hong Kong Court of Final Appeal could learn from the South African experience and build on its own 'core values' framework in its equality jurisprudence.

[2] In *QT*, 2018 and *Leung Chun Kwong*, 2019, the court also advanced a right to substantive equality that recognises sexual orientation as a particularly invidious ground of discrimination, and required weighty reasons to justify differential treatment on that basis. See Loper, 2019. This equality doctrine, grounded in international human rights law, clearly dismisses consensus as a rationale for limiting rights. Indeed, evidence of negative public opinion and stigma toward LGBT persons might actually signal *de facto* discrimination that necessitates positive, effective remedies.

In this way the judiciary might play a more dynamic role in conversations about the meaning of dignity and equality in Hong Kong.

Based on this analysis, the final section concludes that maintaining judicial legitimacy may depend on the courts' ability to protect minority rights through a combination of responsiveness and resistance to public opinion. This insight has implications for cases challenging the lack of full legal recognition of same-sex relationships that are currently working their way through the Hong Kong courts (*MK v Government of HKSAR*, 2019).

Debates about Consensus and the Role of the Courts

Constitutional scholars and political theorists have long debated normative and empirical questions about the proper role of the courts in a democratic society, especially when exercising powers of judicial review (Lustig and Weiler, 2018). Should – and, in practice, do - judges - take public opinion into consideration when deliberating politically controversial issues? The related literature is vast, and a complete overview is beyond the scope of this article. The following briefly summarises a few key issues, however, as background for the subsequent analysis of the Hong Kong experience.

The first problem is normative. Should courts respond to or ignore public opinion? The classic counter-majoritarian problem, identified by Bickel (1962: 16-23) in his study of the United States Supreme Court,[3] queries whether (or why) unelected judges should be allowed to strike down laws enacted by more representative branches of government. In many democratic societies, however, judges are distinctly tasked with protecting the rights of minorities against the 'tyranny of the majority' (Mill, 1859; Madison, 1788) in accordance with a separation of powers doctrine. They are expected, therefore, to impartially apply legal principles without regard to political motivations. In this sense, judicial review may actually reinforce democratic values since the courts' moral authority and legitimacy derive from their position above the political fray and resistance to populist criticism (Ginsburg and Versteeg, 2013: 593-94; Dworkin, 1977; Cappelletti, 1989: 211). Baroness Hale, President of the Supreme Court of the United Kingdom, recently rejected 'the suggestion that judicial processes are not also democratic processes', explaining that they are 'a necessary part of the checks and balances in any democratic Constitution' (Hale, 2019: 14). She added that 'the history of many countries teaches us that political processes, just as much as judicial ones, can be used to promote quite different values – oppressive or discriminatory ones' (Hale, 2019: 14).

Some commentators, even while accepting that the judiciary's democratic legitimacy derives from its independence from the political realm, nevertheless argue that courts should take societal consensus into consideration in certain circumstances. Judges do not operate in vacuum. As members of society, they are ostensibly aware of the social and political repercussions of their decisions. Stepping too far ahead of majority views could generate a negative response that actually undermines the courts' ability to advance the rights of members of minority groups, including LGBT persons (Sunstein, 2007;[4] Lau, 2016; Greenhouse and Siegel, 2011). Public opinion in many contexts remains divided and rulings in favour of granting LGBT rights, particularly same-sex marriage, may be especially susceptible to backlash. Evidence suggests that judicial overreach has sometimes, at least temporarily, weakened LGBT rights' advocacy (Lau, 2016; Klarman, 2013; Sant'Ambrogio and Law, 2011).[5] To be sure, majority opinion often does influence the trajectory and pace of change. In

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3 See also, for example, Dahl, 1957; Kramer, 2004; Tushnet, 1999; Waldron 2006. Significantly, Waldron's case against judicial review assumes functioning democratic institutions. This article is agnostic on whether judicial review should be allowed generally (it accepts as a matter of fact that Hong Kong courts exercise this power). It is worth noting, however, that the Hong Kong political system is only partially democratic. Not all members of the legislature are democratically elected, and the region's leader, the Chief Executive, is selected by a small, closed group and appointed by the central government in Beijing. It has been described by some as a hybrid system that may be characterised as either semi-democratic or semi-authoritarian. See Tai, 2019: 9.

4 Suggesting consequentialist and epistemic reasons for courts to consider 'public outrage'.

5 Discussing the impact of the Supreme Court of Hawaii's 1993 decision in favour of same-sex marriage in *Baehr v Lewin*. Siegel, 2016, argues, however, that although these decisions produced short-term set-backs, 'it was precisely by amplifying the claims of despised minorities in the legislative process that courts changed the shape of the conflict and infused it with new meanings. Opponents mobilised to ban same-sex marriage because they understood that court decisions recognising the claim had imbued it with increasing legitimacy'.

places where homophobic attitudes are prevalent, reform efforts may stall or even retrogress (Nuñez-Mietz and Iommi, 2017).[6] In other jurisdictions, such as Ireland (Murphy, 2016), Australia (Carson, Ratcliff and Dufresne, 2018;[7] Sloane and Robillard, 2018), and the United States (Morini, 2017; Pew Research Center, 2019), growing public support has coincided with rapid, progressive judicial and legislative developments. It is worth noting that recent surveys indicate increasingly positive public attitudes toward LGBT rights in Hong Kong.[8] The high level of support for granting same-sex couple rights, including same-sex marriage, may have affected the Court of Final Appeal's decisions in recent cases including *QT* and *Leung Chun Kwong*.[9]

Indeed, whatever the normative position on the role of public opinion in the context of rights adjudication, empirical data demonstrates that, in practice, judicial decisions often do reflect prevalent social norms, although the reasons for this are not always clear (for example, Friedman, 2010; Epstein & Martin, 2010; Casillas, Enns, and Wohlfarth, 2011; and Clark, 2009). Scholars have identified strategies used by courts (explicitly or implicitly) to balance competing interests and possibly to prevent backlash. For example, the European Court of Human Rights' deferential margin of appreciation doctrine narrows or widens according to the degree of consensus on a given issue across member states of the Council of Europe (Langford, 2017;[10] Benvenisti, 1999;[11] Legg, 2012; Wildhaber et al, 2013; Fenwick, 2016). Hong Kong courts have adapted this terminology when developing their own doctrine of judicial restraint or deference.[12] Other methods that allow courts to take consensus into account include various delay tactics. Lau (2016) has identified a 'typology of strategic delays' including the deferral of judgments, postponement of the recognition of rights, and the suspension of court orders and other grace periods. Some have argued, however, that an overly cautious approach could backfire; delayed justice can give rise to tactical as well as moral problems (Lau, 2016: 303; *Fourie*, 2005, O'Regan J in dissent).

These practical considerations about how courts can best protect the rights of minorities in the face of countervailing public opinion are often difficult to separate from normative positions when the overall objective is to protect fundamental rights. The question of whether courts should take account of public opinion cannot be reduced to a simple dichotomy (that is, should courts ignore societal consensus altogether or cater to the will of the majority at the expense of the minority?) Perhaps paradoxically, the judiciary's legitimacy and corresponding effectiveness in protecting human rights depends on both resistance to popular, majoritarian pressure as well as responsiveness to public opinion (to avoid backlash and contribute to consensus-building). In fact, the judiciary's

6 Discussing how more repressive legislation in Uganda was intended as a constraint (or 'immunisation') against the transnational diffusion of norms.

7 Although Carson, Ratcliff and Dufresne (2018) note the lack of congruence between growing public support for same-sex marriage and the relatively slow political response, they also observe that 'parliamentarians are responsive to public opinion once it reaches a critical level, and that very low opposition to same-sex marriage in an electorate predicts policy support from its MP, which varies by party and over time'.

8 Current attitudes are largely supportive of granting rights to LGBT persons. For example, a 2017 survey found that 78 per cent of Hong Kong people said that same-sex couples should have some or all of the rights enjoyed by different-sex couples and 50 per cent of Hong Kong people were in favour of same-sex marriage (an increase from 38 per cent in 2013). See Lau, Lau, Loper and Suen, 2018. The same survey found that 80 per cent of Hong Kong people are very accepting, moderately accepting, or a little accepting of transgender people. See Loper, Lau, Lau and Suen, 2018. The risk of backlash in reaction to robust judicial recognition of same-sex marriage, other forms of full relationship recognition, or self-determined gender identity, therefore, appears relatively low, although the government's approach to related law reform remains conservative. Interestingly, the level of public support for same-sex marriage in Hong Kong in 2017 (50 per cent) was similar to that in the United States in 2014 (52 per cent), not long before the US Supreme Court legalised same-sex marriage in *Obergefell v Hodges*. See Pew Research Center, 2019. For other studies of public attitudes in Hong Kong see, for example, Suen, 2017; Suen and Wong, 2017; Ho, 2013; Equal Opportunities Commission, 2016; Yeo and Chu, 2018.

9 Counsel for the applicants in *Leung Chun Kwong* submitted these survey results to the CFA and also mentioned them in their oral arguments.

10 Suggesting that the European Court of Human Rights applied its consensus doctrine when deciding against a right to same-sex marriage (*Schalk and Kopf v Austria*, 2011) in order to mitigate challenges to its legitimacy arising from divisions between countries in Eastern and Western Europe.

11 Explaining that the consensus doctrine 'poses another serious obstacle to the international protection of minority values' (p. 852).

12 According to a study by C Chan, 2018, Hong Kong courts have been particularly deferential to other branches of government when asked to resolve claims involving politically sensitive issues such as public protests, the allocation of public resources, and some immigration control issues. See also Chan, 2011.

ability to maintain its independence, rule against the government when warranted, and ensure doctrinal consistency when interpreting fundamental rights often hinges on an awareness of societal views. Such complexity is evident in this review of Hong Kong jurisprudence. The next section looks more closely at these decisions after first providing some brief background on relevant features of Hong Kong's constitutional framework.

Societal Consensus and Hong Kong LGBT Rights' Jurisprudence

Hong Kong's Constitutional Framework

Hong Kong became a Special Administrative Region (SAR) of the People's Republic of China on 1 July 1997 after 150 years of British colonial rule. Its constitutional document, the Basic Law, grants the territory a high degree of autonomy, including judicial independence, except with regard to foreign affairs and defence (Basic Law, arts 2, 13, 14, 19).[13] The Court of Final Appeal is vested with the power of final adjudication (Basic Law, art 82) and the National People's Congress Standing Committee in Beijing has authorised the courts to interpret the Basic Law 'on their own' regarding issues that fall within the scope of the SAR's autonomy (Basic Law, art 158).[14]

The Basic Law's constitutional guarantee of judicial independence and separation of powers have been key factors supporting judicial legitimacy in Hong Kong (Chan, 2019).[15] The courts continue to rule against the government in controversial human rights cases and the executive has generally complied with these decisions. Other measures of legitimacy include the grounding of constitutional rights in international human rights law and judges' frequent citations of comparative human rights jurisprudence as persuasive authority (Young, 2011). The Basic Law (art 84) explicitly allows courts to cite precedents from other common law jurisdictions. Indeed, Hong Kong judges are aware of their contributions to a transnational judicial dialogue on the interpretation of human rights norms. For example, in *QT*, the Court of Final Appeal remarked on 'a notable convergence in the approaches of various courts, including our own, to what constitutes discrimination, influenced by international human rights instruments.' (*QT*, 2018: para 30; Loper, 2019).

Chapter III of the Basic Law enumerates fundamental rights, including the right to marry (art 37) and equality before the law (art 25). Article 39 provides that 'the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of [Hong Kong]'. The Bill of Rights Ordinance, which incorporates most of the ICCPR's provisions - including the rights to privacy, family life, marriage, and equality and non-discrimination (arts 14, 19, 1, and 22) - has attained constitutional status (Chen, 2009). Soon after the establishment of Hong Kong's post-colonial constitutional order, the Court of Final Appeal affirmed the courts' powers of constitutional review. It clarified the judiciary's duty to assess whether legislation and policy comply with fundamental rights and strike down any incompatible provisions (*Ng Ka Ling v Director of Immigration*, 1999). The Hong Kong courts applied relevant human rights provisions in the Basic Law and the Bill of Rights when reviewing government policy in the cases discussed in this article.

The following examines the consensus reasoning as developed – and dismissed - in the selected cases. Hong Kong's two lower courts, the Court of First Instance and the Court of Appeal[16] considered

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13 For an overview of Hong Kong's autonomy and the history of its development, see Ghai, 2013.

14 Article 158, however, also mandates that the courts seek an interpretation from the National People's Congress Standing Committee when interpreting provisions 'concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases'. Hong Kong courts must follow the NPCSC interpretations when applying the relevant provisions. See Ghai, 2013 and Chan, 2019. The NPCSC has rendered five interpretations of the Basic Law since 1997 but none have been related to LGBT rights, the right to marry, or the right to equality.

15 Chan, 2019, notes, however, growing concerns and potential threats to judicial independence, especially since the 2014 Umbrella Movement in Hong Kong, when thousands of people occupied major roads for almost three months in a largely peaceful campaign for democratic reform. See also J Chan, 2018. New concerns have arisen since the ongoing mass street protests began in June 2019.

16 Collectively referred to as the 'High Court'.

societal consensus when determining whether limitations on rights can be justified and when courts should defer to other branches of government. The Court of Final Appeal ultimately rejected this reasoning. Significantly, all three courts were careful to explain the limits of their remit when interpreting fundamental rights. The lower courts argued that societal consensus can restrict their ability to interpret the law in new ways. The Court of Final Appeal, however, clarified that courts are instead constrained by their duty to uphold fundamental rights even in the face of countervailing majority opinion.

Consensus and Transgender Marriage

The first case, *W v Registrar of Marriages,* involved a transgender woman who had undergone sex reassignment surgery but was unable to change her gender marker on her birth certificate. She was therefore not recognised as a woman for the purposes of marriage - which in Hong Kong is limited to a union between one man and one woman (Marriage Ordinance, s 40, Matrimonial Causes Ordinance, s 20(1)(d)). She sought judicial review of the government's decision to deny her application to marry her male partner.

When reaching its decision, the Court of First Instance considered whether: 1) as a matter of statutory interpretation, the word 'woman' in Hong Kong's marriage laws includes a post-operative male-female transsexual; and 2) the lack of recognition of W's acquired gender for the purposes of marriage violated her constitutional rights. In the judgment, Justice Andrew Cheung made several points about the relevance of societal consensus (or a lack of consensus) when deliberating the second, constitutional claim. Under the heading, 'close relationship between the right to marry and societal consensus', he explained that marriage is 'a social as well as a legal institution' and is therefore 'necessarily informed by the societal consensus and understanding regarding marriage … in that society' (*W v Registrar of Marriages*, 2010: para 188). Marriage laws must reflect current consensus, which is not static and 'evolves with time' (*W v Registrar of Marriages*, 2010, para 191). The law must not lag behind and the court must not look at past or anticipated future consensus or a determination of what consensus should be according to any particular view (*W v Registrar of Marriages*, 2010: paras 190-91).

While noting that evidence of broad receptiveness in society to transgender persons marrying in their acquired gender would be a 'strong reason' to expand the legal definition of marriage (*W v Registrar of Marriages*, 2010: para 214), Cheung J emphasised the court's limitations. He explained that if the court cannot determine the current state of consensus, it may not 'engineer a fundamental social and legal reform' but must defer to the other branches of government (*W v Registrar of Marriages*, 2010: paras 192-94, 223).[17] He referred to the influence of state consensus in the European Court of Human Rights' application of its margin of appreciation doctrine. He also commented that in the absence of a 'convergence of standards' among states parties to the ICCPR or 'societal consensus or understanding in Hong Kong (in relation to the Basic Law right), regarding marriage of transsexuals in their assigned gender, the Court must not rush to substitute its own judgment in place of … the Government or Legislature' (*W v Registrar of Marriages*, 2010: para 216).[18]

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17 The court explains in para 223 that 'where the relevant societal consensus is in a stage of transition or cannot otherwise be easily ascertained, generally the court should, in the absence of compelling reasons to the contrary, defer to the judgment of the legislature as reflected in the existing law of marriage, and be very slow to tamper with the status quo by giving the constitutional right to marry an expanded meaning not originally encompassed by the text. After all, at least institutionally speaking, the legislature is in a much better position than the court to determine the relevant contemporary societal consensus. In case where there is no clearly discernible societal consensus, the stance of the elected legislature, as is reflected in the existing law of marriage, should be taken as representative of society's view for the time being, pending the emergence of a clearer societal consensus'.

18 For a critique of the court's conflation of state consensus, as understood in the European Court of Human Rights jurisprudence, with societal consensus within a particular jurisdiction such as Hong Kong, see Lau and Loh, 2011. It is worth noting that the UN Human Rights Committee, the body that monitors states' implementation of the ICCPR, has rejected the margin of appreciation doctrine as inappropriate when interpreting states' obligations under that treaty. See *Länsman v Finland*, 1994: para 9.4.

Cheung J acknowledged 'that fundamental rights are an exception to the democratic principle of majority rule' and that '[s]ome rights are considered to be so fundamental that even the majority of a society cannot, or cannot without justification, take them away from the minority' (*W v Registrar of Marriages*, 2010: para 217). He distinguished the context of W's case, however, which, he claimed, was 'not concerned with determining whether a fundamental right may be restricted according to the wishes of the majority' (*W v Registrar of Marriages*, 2010: para 217). Instead, the court should 'discover the present day boundary of the social institution of marriage as is understood by society or a majority thereof, and to give the fundamental right to marry a contemporary context or meaning that conforms to the social institution as it is understood now' (*W v Registrar of Marriages*, 2010: para 217).

He concluded that evidence of societal acceptance of transgender marriage in Hong Kong at that point in time was insufficient to warrant a change in the previous legal position.[19] Indeed, he cited studies that showed ongoing negative attitudes about granting transgender rights (para 219). He explained that 'no matter how sensitive it is to social developments, which are by nature scarcely capable of direct proof' the court 'just cannot assume what the latest position in Hong Kong is and proceed to 'bring up to date' the traditional understanding and meaning of marriage on that assumed footing' (*W v Registrar of Marriages*, 2010: para 222).

In dismissing W's appeal, the Court of Appeal agreed and similarly found 'no evidence of societal consensus in Hong Kong, in respect of the constitutional right [to marry]' (*W v Registrar of Marriages*, 2010: para 142). The court seemed to suggest that a positive decision could generate a backlash, explaining 'that any substantive change to the institution of marriage, including the recognition of the new sex of a transsexual person for the purpose of marriage, would be likely to give rise to genuine public concern and spark wide public debate …' (*W v Registrar of Marriages*, 2010: para 142). As discussed below, the Court of Final Appeal ultimately rejects this reasoning and clarifies that the courts' role is actually limited in a different way: judges must *avoid* considering public opinion and restrict themselves to *legal* (rather than political) interpretations of constitutional rights. In this sense, perhaps paradoxically, the lower courts' 'cautious', deferential approach could be characterised as a type of judicial overreach.

Before looking at the Court of Final Appeal's decision in more detail, the next part will first examine the lower courts' references to societal consensus and public opinion in two, more recent, cases challenging the lack of access by committed same-sex couples to benefits accorded to heterosexual married couples.

Consensus and Differential Treatment of Same-sex Relationships

The lower courts also considered the relevance of societal consensus when adjudicating two cases involving the rights of same-sex couples. In both, the applicants argued that denying access by committed same-sex couples to certain benefits that are available to different-sex married couples amounted to unconstitutional indirect discrimination on the basis of sexual orientation. *QT* (2016 and 2017) concerned the rejection of an application for a dependent visa by the civil partner of a UK national working in Hong Kong. Such visas are generally granted to different-sex spouses of expatriates on employment visas. In *Leung Chun Kwong* (2017 and 2018), a civil servant challenged the Hong Kong authorities' failure to recognise his same-sex marriage, concluded in New Zealand, for the purposes of obtaining spousal benefits and filing joint tax returns.

In *QT* (2017), the Court of Appeal developed a theory—elaborated further in *Leung Chun Kwong* (2018)— that certain rights are 'core' to marriage and can therefore be shielded from judicial scrutiny. It explained that differential treatment involving such 'core rights and obligations related to the status of marriage' does not require justification 'because the difference in position between the

[19] He explained that '[f]or my part, I see insufficient changes that have taken place thus far, and I find insufficient arguments, to justify giving [the right to marry] a new and wider scope of operation than it was originally intended … The most important consideration … is the absence of sufficient evidence in the present case to demonstrate a shifted societal consensus in present day Hong Kong regarding marriage to encompass a post-operative transsexual. …' See *W v Registrar of Marriages*, 2010: para 255.

married and the unmarried is self-obvious' (*QT,* 2017: para 14).[20] Some 'areas of life, whether by nature or by tradition or long usage, are closely connected with marriage such that married couples should and do enjoy rights and shoulder obligations that are unique to them as married people' (*QT,* 2017: para 14). Although the court did not refer to consensus or public opinion directly, it emphasised the impact of societal traditions and beliefs which are of course shaped by - and evolve in response to - changing societal views. Chief Judge Cheung, now head of the High Court, explained that while 'fundamental human rights enjoy an overriding status in terms of the protection of individual's freedom and liberty, the court must, when enunciating and developing legal principles, have proper regard to *society's own history, traditions, culture, core values and beliefs*' (*QT*, 2017: para 18, emphasis added). He added that '[t]he court need not shy away from, or be ashamed of, this when what it is doing … is simply to reflect … these matters, [which] after all, do mould – albeit to varying extents and degrees and in different ways – all members of society including the court' (*QT*, 2017: para 18).

The Court of Appeal ultimately decided, however, that the benefits in question did not fall within the 'core rights of marriage' category. It therefore applied a strict test[21] to decide whether the exclusion of same-sex couples, based directly on marital status and indirectly on sexual orientation, could be justified. The government argued that excluding same-sex couples aimed to 'strike a balance between maintaining Hong Kong's continued ability to attract people of the right talent and skills to come to Hong Kong to work and the need for a system of effective, strict, and stringent immigration control' (*QT*, 2017: para 29). It claimed that to achieve this aim it must adopt 'a bright-line rule, based on marital status as defined' in Hong Kong law to ensure 'legal certainty and administrative workability and convenience' (*QT*, 2017: para 45). The court held in favour of the applicant, deciding that the differential treatment was not rationally connected to this aim (*QT*, 2017: para 148). Chief Judge Cheung, however, somewhat ominously observed that government counsel had not identified any aims related to upholding 'the traditional concept of (heterosexual) marriage, or the traditional family constituted by traditional (heterosexual) marriage, and the associated values.' (*QT*, 2017: para 34).

Perhaps not surprisingly, the government picked up on this point and attempted to justify other exclusionary policies on the basis that they were necessary to protect the traditional concept of marriage.[22] In *Leung Chun Kwong* (2018: para 101), the Court of Appeal more explicitly discussed the relevance of prevailing societal views and socio-moral values when applying both its 'core rights' of marriage theory and the proportionality test.[23]

The judgment first expounded on the rationale for carving out certain core rights from judicial scrutiny. In his concurring opinion, Lam VP explained that while he did not 'pre-empt changes in society to embrace homosexual marriages', when 'core rights and obligations' are at issue, he believed 'it is a matter for the *consensus of society to decide* if the unique status of marriage should be expanded to provide for homosexual marriages...' (*Leung Chun Kwong* 2018: para 31, emphasis added). In the main judgment, Poon JA also emphasised the relevance of societal views: '[b]y definition core rights and obligations are those that are accepted or perceived by society at large to

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20 According to the court, such areas include, 'Divorce, adoption and inheritance are obvious examples of these areas of life regarding which the status of marriage carries rights and obligations unique to married couples' (para 14).

21 Hong Kong courts have consistently affirmed that the right to equality requires strict review of any justifications put forward by the government for differential treatment based on a fundamental ground such as race, gender and sexual orientation. See *Secretary for Justice v Yau Yuk Lung Zigo & Anor*, 2006: para 21.

22 At first instance, the judge had ruled that the differential treatment in conferring civil service spousal benefits based on marital status discriminated indirectly on the grounds of sexual orientation. A same sex couple 'could not, or could not be expected to, enter into a heterosexual marriage' which is the only form of marriage recognised in Hong Kong. See *Leung Chun Kwong*, 2018: para 53. He rejected the government's justification that the 'differential measure … would serve to protect the traditional family'. See para 56, citing *Leung Chun Kwong*, 2017: para 71. Based on a construction of the Internal Revenue Ordinance, however, he rejected the applicant's second claim that failure to treat him as a spouse for the purposes of joint assessment was also discriminatory.

23 For cogent critiques of the court's approach in this case see Wan, 2018 and 2019 and Yap, 2018. Wan explains that the court mistakenly relied on what it deemed to be the prevailing societal views when determining the meaning of traditional marriage in Hong Kong. He also notes that the court's decision did not accurately reflect the diversity of forms of marriage in Hong Kong's history; in fact, the law allowed for polygamous arrangements based on Chinese traditional culture until as late as the 1970s.

be unique to marriage' (*Leung Chun Kwong*, 2018: para 98). He explained that 'such uniqueness may be derived from nature, traditions, practice or long usage, having regard to Hong Kong's own societal circumstances, including its history, traditions, and culture, and core values and beliefs, and *prevailing socio-moral values on marriage held by the local community generally*' (*Leung Chun Kwong*, 2018: para 97, emphasis added).

As in *QT*, the Court of Appeal in *Leung Chun Kwong* ultimately determined that the benefits at issue did not fall within the 'core rights of marriage' category. In reaching this decision, Poon JA first noted the government's argument that the implementation of the spousal benefits policy was based on 'the prevailing view of the community regarding marriage' (*Leung Chun Kwong*, 2018: para 109). Citing a government report that described surveys indicating relatively low public support for same-sex marriage,[24] he observed that '[t]he Government is the custodian of Hong Kong's prevailing socio-moral values' and is, therefore, 'perfectly entitled to take into account and follow the prevailing socio-moral values on marriage held by the community at large' (*Leung Chun Kwong*, 2018: para 110). The court noted that the government had consistently acted according to the 'the prevailing views of the community' when setting marital status as a criterion for granting spousal benefits. While asserting that such 'long usage' might support a strong case for spousal benefits as a core right, the court nevertheless opted for a more cautious approach since the benefits remained part of a 'contractual remuneration package' (*Leung Chun Kwong*, 2018: para 111). The court also concluded that the right to opt for a joint tax assessment is not a core right and proceeded to apply the proportionality test.[25]

In doing so, Poon JA explained that 'the prevailing socio-moral values of society' were relevant when determining whether the differential treatment was justified and, therefore, not discriminatory. First, he accepted that the policy aims in this case - 'protecting and not undermining the status of marriage in light of the prevailing views of the community on marriage' - were 'plainly' legitimate (*Leung Chun Kwong*, 2018: para 125). At the next stage of the test, however, the court distinguished from *QT*, where the restriction on rights was not deemed rationally connected to the legitimate aim. In *Leung Chun Kwong*, Poon JA instead accepted that 'using marital status to differentiate the treatments for Spousal Benefits and joint assessment' is rationally connected to the aim of protecting the status of marriage '[g]iven the local legal landscape and circumstances including the prevailing views of the community on marriage' (*Leung Chun Kwong*, 2018: para 126).

After establishing this rational connection, the third step queries whether the restrictions on rights (withholding of benefits and not allowing joint tax assessment) are no more than necessary to achieve the aim. In this regard, the court 'firmly' bore in mind the local context, including the legal definition of marriage and 'the prevailing socio-moral views of society' which 'still regard heterosexual marriage as the only acceptable form of marriage' (*Leung Chun Kwong*, 2018: para 128). Finally, the court held that the harm the applicant might suffer was 'reasonably balanced out by the immense public interests involved in protecting the status of marriage, bearing in mind the current legal landscape and local circumstances *including the community's prevailing views on marriage*' (*Leung Chun Kwong*, 2018: para 129, emphasis added).

The Court of Final Appeal's Rejection of Consensus Reasoning

In all three cases, the Hong Kong Court of Final Appeal allowed the applicants' appeals and rejected the lower courts' use of consensus.

In *W v Registrar of Marriages* (2013), the Court of Final Appeal agreed with the lower courts that, as a matter of statutory construction, the meaning of 'woman' in Hong Kong's marriage laws could not be construed to include a post-operative male-female transsexual. It decided in favour of

[24] It is worth noting that one of these surveys actually showed majority public support for granting other types of rights to same-sex couples short of marriage. See Loper, Lau, and Lau, 2014. Since counsel for the applicant in *Leung* accepted, and did not directly challenge, the definition of marriage in Hong Kong law, the court might have cited the survey results as evidence of positive societal views in support of policy change.

[25] The test, developed in earlier jurisprudence with reference to persuasive comparative human rights case law, is designed to ascertain whether restrictions on rights 1) pursue a legitimate aim; 2) are rationally connected to that aim; 3) are no more than necessary to achieve that aim; and 4) strike 'a reasonable balance' between 'the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual'. See *Hysan Development Co Ltd v Town Planning Board*, 2016: 424. For a critique of this test in the Hong Kong context, see Abeyratne, 2019.

the appellant on the constitutional question, however, ruling that the marriage provisions so construed were unconstitutional. In doing so, it clarified that it is not appropriate to rely on societal consensus when judicially reviewing legal provisions that affect the rights of marginalised minorities. In their jointly written opinion, Chief Justice Ma and Justice Ribeiro noted the 'important changes in the understanding of and social attitudes towards transsexual persons which have occurred over the last 40 odd years' but doubted that 'consensus can somehow be gauged' (*W v Registrar of Marriages,* 2013: para 90). Even if it could, it should not be taken into account for two reasons. First, the use of consensus in the manner employed by the European Court of Human Rights - a supranational body with judges elected by member states – is not appropriate in the Hong Kong domestic context which is a 'very different situation' (*W v Registrar of Marriages,* 2013: para 114). Therefore, 'the practice of the [European Court of Human Rights] in seeking a European consensus when considering the margin of appreciation' should not influence 'the Court's role in interpreting [Hong Kong's] constitution' (*W v Registrar of Marriages,* 2013: para 114).

At the same time, Ma CJ and Ribeiro PJ also identified 'a more fundamental objection to the consensus argument' (*W v Registrar of Marriages,* 2013: para 115). They agreed that the Basic Law and Bill of Rights are 'living instruments intended to meet changing needs and circumstances' (*W v Registrar of Marriages,* 2013: paras 84[26] and 115). They then explained, however, that 'it is one thing to have regard to such changes as a basis for accepting a more generous interpretation of a fundamental right and quite another to point to the absence of a majority consensus as a reason for denying recognition of minority rights' (*W v Registrar of Marriages,* 2013: para 115). While 'expanding the reach of the right … may be warranted "to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions"',[27] the '[r]eliance on the absence of a majority consensus as a reason for rejecting a minority's claim is inimical in principle to fundamental rights' (*W v Registrar of Marriages,* 2013: paras 115-16). In this regard, the judgment also cited the Chief Justice of Ireland who questioned '[t]he use of consensus as an interpretive tool' that is 'inherently problematic, not only because of any perceived inconsistency in the application of the doctrine by the [European Court of Human Rights], but fundamentally because the very application of a doctrine of consensus by a court required to adjudicate on fundamental rights *begs important questions of legitimacy*' (*W v Registrar of Marriages,* 2013: para 116 citing Murray, 2008, emphasis added). He asked, '[h]ow can resort to the will of the majority dictate the decisions of a court whose role is to interpret universal and indivisible human rights, especially minority rights?" (*W v Registrar of Marriages,* 2013: para 116 citing Murray, 2008).

Although the Court of Final Appeal did not mention consensus in its decision in *QT*, it did reject the Court of Appeal's argument that certain 'core rights of marriage' are immune from judicial scrutiny because of its circularity[28] and it 'gives rise to … subjective, fruitless debate as to what does or does not fall within the "core"' (*QT*, 2018, para 66). The court then emphasised the primary importance of the justification analysis, asking: '[i]s there a fair and rational reason for drawing' a distinction between married couples and same-sex partners? 'Differences in treatment to the prejudice of a particular group require justification and cannot rest on a categorical assertion.' (*QT,* 2018, para 66).[29] This emphasis on the justification test set the stage for its dismissal of consensus reasoning when applying the proportionality test nearly a year later in *Leung Chun Kwong* (2019).

In *Leung Chun Kwong*, the court quickly disposed of the Court of Appeal's argument that the 'prevailing views of the community on marriage are relevant to identifying a legitimate aim and justification of differential treatment' and that 'protecting and not undermining the status of

26 Citing *Ng Ka Ling v Director of Immigration*, 1999.

27 Citing the European Court of Human Rights's view in *Goodwin v United Kingdom*, 2002.

28 The core rights approach 'proposes that the question: "Why am I being treated differently from a married person to my disadvantage?" may be answered: "Because you are not married and the benefit you are claiming is a "core right" reserved uniquely for those who are married", without need for justification', para 66.

29 The court decided that determining the lawfulness of an administrative policy, such as denying a dependent visa to a same-sex partner, did not require the exercise of the court's powers of constitutional review. Instead demonstrating that 'unlawful discrimination … is irrational and unreasonable in a Wednesbury sense' was sufficient. See para 24. It noted, and the government conceded, that the four-step proportionality test for reviewing restrictions on constitutional rights was equally applicable in this context. See para 87.

marriage in light of the prevailing views of the community on marriage … is plainly a legitimate aim' (2019: para 55). The court reiterated its view in *W v Registrar of Marriages* (2013), that 'the absence of a majority consensus as a reason for rejecting a minority's claim' is 'inimical in principle to fundamental rights' (para 56) and favourably repeated Justice Murray's warning, as quoted above. Again, citing their *W* decision, the court held that 'the "prevailing views of the community on marriage" … even if this can confidently be gauged in the first place, are simply not relevant to a consideration of the justification exercise' (*Leung Chun-Kwong*, 2019: paras 55-57).

The court's approach is consistent with recent developments in international human rights law. For example, in a 2017 Advisory Opinion, the Inter-American Court of Human Rights (IACHR) explained that the American Convention on Human Rights requires legal recognition of a person's acquired gender and of same-sex relationships. In doing so, the court affirmed 'its consistent jurisprudence that the presumed lack of consensus within some countries regarding full respect for the rights of sexual minorities cannot be considered a valid argument to deny or restrict their human rights or to reproduce and perpetuate the historical and structural discrimination that such minorities have suffered' (IACHR, 2017: para 219). The court added that '[t]he fact that this issue could be controversial in some sectors and countries … cannot lead the Court to abstain from taking a decision, because when so issuing its opinion, the Court must refer only and exclusively to the stipulations of the international obligations that States have assumed …' (IACHR, 2017: para 83).

The Court as Consensus-builder

Although the Hong Kong Court of Final Appeal clearly rejected the lower courts' reasoning on consensus in all three cases, it may have taken public opinion into account in other ways. Indeed, consensus reasoning is not necessarily a zero-sum game. Choosing between 1) protecting minority rights even if such decisions would spark an outcry from certain segments of the community; or 2) yielding to more popular, but potentially rights-undermining, views, is a false dichotomy. Courts themselves can actually function as consensus-builders, managing competing interests while upholding judicial legitimacy and doctrinal integrity. The following considers how the Hong Kong judiciary might develop its capacity as a consensus-builder around LGBT rights. It identifies the CFA's (albeit indirect) acknowledgement of a form of consensus through an innovative approach to remedies and references to 'core values'. It then argues that judicial awareness of majority views could actually strengthen – rather than subvert – the court's role as custodian of minority rights. In doing so, it refers to the Constitutional Court of South Africa's 2005 same-sex marriage decision (*Fourie*), which goes even further, for comparative guidance.

While distinct in many ways, the Hong Kong and South African contexts share certain similarities that are pertinent to this discussion. Both are common law jurisdictions with strong constitutional rights frameworks, including the right to substantive equality (Loper, 2019). Both of their constitutions were adopted and have been interpreted in response to major transitional challenges (Gibson and Caldeira, 2003; Ghai, 2013). In 1996, South Africa designed a post-apartheid constitution with a robust rights framework aimed at healing a deeply divided society following its long history of apartheid. Around the same time, Hong Kong also experienced its own transition as it returned to Chinese sovereignty in July 1997. It also acquired a new constitutional document, the Basic Law, which attempted to bridge conflicting political, economic and social systems through its promise of a high degree of autonomy. Since then, the courts in both South Africa and Hong Kong have played important roles as guardians of human rights and the rule of law in challenging environments (Gibson and Caldeira, 2003; Chen, 2009).

Notably, each jurisdiction has developed a robust equality doctrine. In South Africa, the constitutional right to equality requires substantive responses, as expressed in the text of the provision itself as well as through judicial interpretation (Albertyn, 2007). It prohibits both direct and indirect 'unfair' discrimination and any discrimination on one of the enumerated grounds is unfair unless its fairness is established (Constitution of the Republic of South Africa, art 9). The right to equality in art 25 of the Hong Kong Basic Law simply provides that 'all Hong Kong residents shall be equal before the law'. When interpreting its content in conjunction with the right to equality in

the Bill of Rights, which duplicates the ICCPR and has attained constitutional status, the courts have confirmed a similar, if less textually explicit, substantive equality doctrine (Loper, 2019). The courts have affirmed that '[d]iscriminatory law is unfair and violates the human dignity of those discriminated against. It is demeaning for them and generates ill-will and a sense of grievance on their part. It breeds tension and discord in society.' (*Secretary for Justice v Yau Yuk Lung Zigo and Another*, 2007: para 2).

Remedial Delay

Concerns about public opinion and democratic legitimacy may have influenced both the Hong Kong and South African courts' innovative approach to remedies in particular landmark LGBT rights cases.[30]

In *W v Registrar of Marriages* (2013), the Hong Kong court declared that provisions in Hong Kong's marriage laws – construed to exclude a post-operative transgender woman – were unconstitutional. At the same time, however, the court suspended its declaration of constitutional invalidity for twelve months to allow the legislature time to implement the ruling. It explained in its subsequent decision on orders and costs that the court's order would indeed have 'ramifications going beyond the specific circumstances … making it desirable that the Government and Legislature be afforded a proper opportunity to put in place a constitutionally compliant scheme capable of addressing the position of broader classes of persons potentially affected' (*W v Registrar of Marriages* (Decision on Orders and Costs), 2013: para 7).[31] Although not explicitly stated in the judgment, the decision to allow for a remedial delay may have signalled the court's concern about potential backlash and perceptions that it had overstepped its powers of constitutional review.

At the same time, however, the court reaffirmed its role as the protector of constitutional rights. It explained that although it accepted that 'the legislature may potentially play a highly valuable and constructive role in making provision for certain legal consequences that flow from our ruling of unconstitutionality' it could not 'accept the argument that the Court should "leave it to the legislature" and should not itself decide upon the constitutional validity of the provisions' (*W v Registrar of Marriages*, 2013: para 122). While it was willing to suspend its ruling 'for an appropriate period to give time for the enactment of legislation', it still declared that the term 'woman' in the relevant provisions of Hong Kong marriage law must be constitutionally construed to include a post-operative transgender woman (*W v Registrar of Marriages*, 2013: para 123). In other words, although the court did not entirely defer, it also did not completely prevent a political solution.[32] Yap (2017) characterises this as a 'suspension order with bite' since the court would eventually read a rights-compliant interpretation into the impugned provision if lawmakers failed to take action by the imposed deadline.

The South African Constitutional Court took a similar approach when ruling that the right to equality in the South African Constitution mandates recognition of same-sex marriage (*Fourie*,

30 It is also worth noting that the Taiwan Constitutional Court similarly introduced a remedial grace period in its decision in favour of same-sex marriage, JY Interpretation No. 748, 2017, and this may have had some impact on broader public opinion. Although Taiwan is close to Hong Kong geographically and has some cultural similarities, I have chosen to focus on the South African decision for comparative purposes since Taiwan is a civil law jurisdiction where remedial delays play a different role. The judgments tend to be shorter and allow less space for elaborating consensus-building language. See Kuo, 2019; Kuo and Chen, 2017; and Lin, Kuo and Chen, 2018. I am grateful to Holning Lau for this insight.

31 The government had argued that the legal recognition of a post-operative transgender person's acquired gender for the purposes of marriage involved 'repercussions … so far reaching and complex that the Court should … refrain from intervening in a piecemeal fashion … and should instead leave any changes to be made systematically by the legislature'. See *W v Registrar of Marriages*, 2013: para 83.

32 To date, however, the Hong Kong Legislative Council (LegCo) has not enacted related legislation. A narrowly tailored Marriage (Amendment) Bill, introduced by the government in 2014 in an attempt to meet the court's deadline, was voted down by members on both sides of the debate. More liberal legislators felt the Bill was overly restrictive since it was limited to the context of marriage and transgender persons who had undergone full sex-reassignment surgery. More conservative LegCo members were opposed to the introduction of any gender recognition scheme. The government also established an Inter-departmental Working Group on Gender Recognition in January 2014 to advise on the matter. The Working Group conducted a public consultation in 2017 but has not yet reported the results. See: https://www.iwggr.gov.hk/eng/index.html. It is worth noting, however, that law reform in Hong Kong in many areas has been relatively slow in recent years. See, generally, Tilbury, Young and Ng (eds), 2014. Going forward, growing unrest and political turmoil in Hong Kong are likely to impede rights-related reform to an even greater extent.

2005).[33] Like the Hong Kong Court of Final Appeal, the South African court granted a one-year grace period to allow the legislature time to respond. At the time of that decision, homophobia was rife in South Africa and perceived societal divisions may explain the decision to grant such a grace period. Lau's 2016 study of the impact of the *Fourie* decision is instructive. It demonstrates that the breathing space allowed by the court likely contributed to constructive consensus-building processes around LGBT rights. It allowed for informed public discussion and, eventually, well-considered legislative action while taking some pressure off the judiciary (Lau, 2016).[34] In this way, the court may have strengthened its democratic legitimacy as a protector of minority rights by shifting the focus away from the judiciary and generating opportunities for deliberation in other forums. In other words, while the court still applied the robust constitutional equality doctrine, it contributed toward consensus-building in a broader sense. The court acknowledged and attempted to address tensions between seemingly conflicting values and mitigate potential backlash.

It is worth noting, however, that the South African decision occurred in an environment where public opinion was more hostile to LGBT rights than in present day Hong Kong (Thoreson, 2008; Vincent and Howell, 2014). In 2005 South Africa, the Constitutional Court may rightly have been concerned about the potential for public outcry.[35] As explained above, recent public opinion in Hong Kong largely supports granting rights to LGBT persons and, consistent with global trends, public views have become more positive over time (Lau, Lau, Loper and Suen, 2018; Loper, Lau, Lau and Suen, 2018). Therefore, progressive decisions on these issues – even the possibility of full legal recognition of same-sex relationships (*MK v Government of HKSAR*, 2019)[36] - are unlikely to create a backlash and a grace period may be less appropriate or necessary than it was in South Africa in 2005.[37] In the event that concerns about public opinion remain, a creative approach to remedies could mitigate any negative response. It could allow the courts to engage in constructive dialogue with the executive and legislature without abandoning their role as protectors of minority rights. Indeed, it may even enhance their function in this regard.

Other Consensus-building Strategies

Other aspects of the South African court's apparent awareness of public opinion could inform the Hong Kong judiciary's own attempts to shape its role as a consensus-builder around LGBT rights. For example, in addition to allowing a grace period, the South African court used the language of the judgment as a platform for bridging societal divisions. By deliberately and comprehensively explaining – even celebrating - diversity as a constitutional value, the court contributed more directly to democratic discussions aimed at building consensus in support of rights. The (mostly) unanimous decision,[38] written by Justice Albie Sachs, moved beyond strategic delays to carve out a more pro-active role for the court as a participant in rights-based conversations around same-sex marriage in a difficult context.[39]

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33 Yap, 2017 notes that, as of 2017, the South African and Hong Kong courts were the only judicial bodies in the common law world that had introduced this type of 'suspension order with bite'.

34 For a discussion of the legislative response see de Vos, 2008.

35 Even ten years after *Fourie*, South African views about homosexuality and same-sex marriage remained relatively conservative. According to a survey conducted in 2016 by the Other Foundation, 7 out of 10 South Africans felt strongly 'that homosexual sex and breaking gender dressing norms is simply "wrong" and "disgusting"'; only 1 in 10 South Africans strongly agreed with allowing same-sex marriage although this represented a substantial increase from 1 in 100 in 2012.

36 In October 2019, the Court of First Instance dismissed an application for judicial review challenging the lack of full recognition for same-sex relationships including same-sex marriage or civil partnerships that are equivalent to marriage. Although, the court ruled that the lack of same-sex relationship recognition did not violate the constitutional rights to equality and privacy, the case is expected to eventually reach the CFA.

37 In *QT* and *Leung Chun Kwong*, however, the CFA did not delay its orders of constitutional invalidity. It may be that the court was less concerned about potential backlash given recent positive trends in public opinion. It is worth noting that the public opinion data reported in Lau, Lau, Loper and Suen (2018) was submitted to the court by counsel for the appellant and mentioned in oral arguments before the court in *Leung Chun Kwong,* 2019.

38 Only one judge dissented and only on the question of remedies. Justice O'Regan argued that the ruling should have taken immediate effect. See Roux, 2008: 121-22.

39 It may be that in this way, the court sought to stave off threats to its legitimacy. See Christiansen, 2016. Indeed, such a considered attempt to create dialog might be viewed as a particularly cautious tactic, rather than a form of judicial

Several passages in the *Fourie* judgment illustrate this concern with societal consensus. First, Justice Sachs explained that ensuring equality for gays and lesbians involved society as whole. He also emphasised the profound importance of marriage and religion in society and the *consistency* between the values of freedom of religion and equality for sexual orientation minorities. In other words, recognition of the special status of marriage and the granting of rights, including the right to marry, to same-sex couples are not conflicting objectives. In fact, they are consistent with upholding rights in a democratic and plural society, which form the essence of - and foundation for - the court's consensus-building role.

This link between democracy, equality and dignity is clear from the following passage in the judgment:

> A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society (*Fourie*, 2005: para 60).

The denial of equality and dignity is undemocratic because it results in exclusion from democratic citizenship. By protecting the rights of minorities, the judiciary plays a democratic role; it contributes to a better functioning democracy because the core values of equality and dignity are aimed at ensuring inclusion: 'It is precisely those groups that cannot count on popular support and strong representation in the legislature that have a claim to vindicate their fundamental rights through application of the Bill of Rights' (*Fourie*, 2005: para 74).

The court's attempts to build bridges across different – seemingly competing – values and interests are also evident in the text. For example, the court took great pains to elaborate on the importance of religion in society. It affirmed that '[r]eligious organisations constitute important sectors of national life' (*Fourie*, 2005: para 90). As a result, they 'have a right to express themselves to government and the courts on the great issues of the day. They are active participants in public affairs fully entitled to have their say with regard to the way law is made and applied' (*Fourie*, 2005: para 90). It went on to explain that:

> In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other. Provided there is no prejudice to the fundamental rights of any person or group, the law will legitimately acknowledge a diversity of strongly-held opinions on matters of great public controversy. I stress the qualification that there must be no prejudice to basic rights. Majoritarian opinion can often be harsh to minorities that exist outside the mainstream. It is precisely the function of the law to step in and counteract rather than reinforce unfair discrimination against a minority. The test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom (*Fourie*, 2005: para 94).

It added that '[t]he hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held worldviews and lifestyles in a reasonable and fair manner' (*Fourie*, 2005: para 95). Indeed, according to the court, the aim of the Constitution 'is to allow different concepts to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all' (*Fourie*, 2005: para 95).

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activism. Elaborating on the nature of constitutionalism certainly falls squarely within the remit of apex courts in many legal systems, including those in South Africa and Hong Kong.

The Hong Kong Court of Final Appeal has adopted a similar understanding of the role of the courts and constitutional values in a way that could further support inclusion and consensus-building. Consensus in its broader, constitutional sense, is a reflection of – and is reflected in - core values. The violation of core values (according to the court, these are characteristics, such as sexual orientation, that engage individual dignity) through unfair, unjustifiable differential treatment, diminishes respect for constitutional rights. The need to safeguard these 'core values' – which enjoy societal acceptance in the wider sense - supports the court's legitimate constitutional role as the protector of minority rights.

In *QT* (2018), the Court of Final Appeal cites Lord Walker in *R Carson v Secretary of State for Work and Pensions* (2006), to explain that 'Discrimination on any of those grounds is regarded as especially pernicious because … "They are personal characteristics including sex, race and sexual orientation which an individual cannot change apart from the wholly exceptional case of transsexual gender reassignment and which, if used as a ground for discrimination, are recognised as particularly demeaning for the victim"' (*QT*, 2018: para 107). The court cites its previous judgment in *Fok Chun Wa v Hospital Authority,* 2007 when explaining that these are 'core values' and '[w]here core values or fundamental concepts are involved, these are areas where the courts have (for want of better terms) expertise and experience, and it is part of their constitutional duty to protect these values or concepts' (*Fok Chun Wa v Hospital Authority*, para 181). The Court of Final Appeal also quotes the Canadian Supreme Court in *Law v Canada Minister of Employment and Immigration* when clarifying the link between discrimination and the core value of dignity: '[h]uman dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits' (*QT*, 2018: fn 37).

As noted above, the Court of Final Appeal also clarified the connection between core rights, which are associated with equality and dignity, and exclusion that undermines consensus, in *Secretary for Justice v Yau Yuk Lung Zigo and Another,* a case challenging criminal provisions that directly discriminated against gay men. The court explained that discrimination and the violation of dignity 'is demeaning … generates ill-will and … breeds tension and discord in society' (2006: para 2). Therefore, by addressing discrimination, the court is also removing an obstacle that impedes efforts to foster societal consensus around LGBT rights.

The South African court, however, goes much further and provides a valuable example for Hong Kong courts to consider when strengthening their own consensus-building role. Although they have planted some seeds, the Hong Kong courts could still elaborate more fully on the connection between core values and consensus in its future jurisprudence. In this way, they might enhance their broader consensus-building function while remaining within the constraints of their constitutional mandate. It is also worth noting that building societal consensus around LGBT rights and other potentially controversial issues is a process that often takes time. Even if a remedial grace period or inspirational language in a judgment fails to entirely (or even partly) heal divisions, these methods may still contribute to growing awareness. They are likely to at least spark dialogue that could lead to progressive change over time. In other words, judicial efforts would not necessarily be futile even if law reform is not immediately forthcoming.[40]

Conclusions

This study of Hong Kong LGBT rights jurisprudence reflects on the relevance of public opinion and the appropriate function of the courts when adjudicating controversial issues. It argues that a more complex understanding of consensus that embraces a core values framework could provide the basis for enhanced participation by the judiciary that reinforces its role as a custodian of minority rights. If Hong Kong courts follow the lead of the South African court, they might more effectively influence discussions about rights beyond the courts in ways that advance judicial legitimacy. In other words,

[40] Although the legislature did not respond during the grace period allowed by the court in *W v Registrar of Marriages*, 2013, as discussed above in footnote 32, the decision (and the subsequent debate in the legislature) led to broader societal discussions. The Hong Kong survey mentioned above (Loper, Lau, Lau and Suen, 2018), indicates broad public support for the rights of transgender persons four years after the decision, although it is not possible to establish a direct connection between this trend and the CFA decision.

judicial awareness of consensus can strengthen – rather than subvert – the courts' duty to remedy unconstitutional restrictions on minority rights. The courts could elaborate on the meaning and implications of core constitutional values including equality, dignity and diversity in the text of their judgments in ways that mitigate tensions and facilitate judicial engagement with societal discourse.

These insights could inform the adjudication of LGBT rights in Hong Kong going forward. An alternative – or more developed - model of judicial contribution to consensus is especially important for new cases concerning full legal recognition of same-sex relationships that are now working their way through the Hong Kong courts (*MK v The Government of HKSAR*, 2019). In particular, a robust equality doctrine is likely to preclude the courts' reliance on deference to the legislature or the executive (Loper, 2019). When applying the justification test, any reasons the Hong Kong authorities might propose for restricting marriage to different sex couples - including preserving the traditional institution of marriage – would not likely withstand scrutiny. Nevertheless, a judicial decision that maintains doctrinal integrity in support of same-sex relationships might, at the same time, acknowledge the importance of – and contribute toward – an ongoing process of building consensus and better minority rights' protection.

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