

## **Peter Allan Memorial Lecture 2020**

### **LGB HUMAN RIGHTS IN EUROPE, TAIWAN, AND HONG KONG**

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#### **I. Introduction**

Thank you, Marco. And thanks to the Faculty of Law and the Centre for Comparative and Public Law of the University of Hong Kong for the honour and pleasure of being invited to give the Peter Allan Memorial Lecture 2020.

I have visited Hong Kong six times since 1987. In 2007, Dr. Andy Chiu Man-Chung invited me to speak at Hong Kong Shue Yan University. I was delighted to learn that he is now a member of the Board of the Equal Opportunities Commission. In 2015 and 2016, Dr. Suen Yiu-tung arranged for me to speak, not only at the Chinese University of Hong Kong, but also at the Equal Opportunities Commission, the British Consulate-General, and the Asia OutNEXT Salon at Bloomberg. These visits helped me to understand the legal situation of lesbian, gay, and bisexual or LGB persons and same-sex couples in Hong Kong, and appreciate the remarkable decisions of the Hong Kong courts since my last visit in 2018, which I will discuss later.

My three attempts to visit Hong Kong since 2018 have been unsuccessful, because of protests or the pandemic. I hope to return when international travel is back to normal, and to visit the campus of the University of Hong Kong for the first time. At the latest, I hope to visit in November 2022 when, less than two years from now, Hong Kong will host the eleventh Gay Games, the first to be held in Asia. I discovered the first Gay Games by chance in August 1982, when I was on holiday in San Francisco, one month after sitting the New York Bar Examination. My experience as a spectator inspired me to return as an athlete. Since 1986, I

have participated in track and field or swimming or both at six Gay Games and four World Outgames. Next year, I will register to do the same in Hong Kong. I have already ordered my T-shirt!

**1<sup>st</sup> video:** [https://youtu.be/-bp6eL\\_HuLM](https://youtu.be/-bp6eL_HuLM)

## II. Legal Progress in the United Kingdom

With regard to legal protection of LGB human rights in Hong Kong, the message I can bring from the United Kingdom is: “It gets better.” In October 1987, after leaving the Milbank law firm in New York, I started my doctorate on *Sexual Orientation and Human Rights*<sup>1</sup> at Wolfson College, University of Oxford. My welcome to the United Kingdom was Margaret Thatcher’s speech to the Conservative Party conference on the 9<sup>th</sup> of October.

**2<sup>nd</sup> video:** <https://youtu.be/8VRRWuryb4k>

About education, she said: “Children who need to be taught to respect traditional moral values are being taught that they have an inalienable right to be gay. ... All of those children are being cheated of a sound start in life—yes cheated.”<sup>2</sup> Within six months of her political green light, and despite protest marches, the UK Parliament passed section 28 of the Local Government Act 1998,<sup>3</sup> prohibiting local governments from “promoting homosexuality” and, especially, “the teaching ... of the acceptability of homosexuality as a pretended family relationship”. The insult, stigma, and chilling effect of Section 28 were added to existing discrimination in the criminal law (including an unequal age of consent), no protection against discrimination in access to employment, education, or other goods and services, a ban on LGB members of the armed forces, and no recognition of same-sex couples. The legal situation was grim.

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<sup>1</sup> Robert Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter* (Oxford University Press, 1995).

<sup>2</sup> See <https://www.margaretthatcher.org/document/106941>.

<sup>3</sup> See <https://www.legislation.gov.uk/ukpga/1988/9/section/28/enacted> (Royal Assent on 24 March 1988).

Fortunately, LGB individuals could take cases to the European Court and Commission of Human Rights which, in a series of judgments or reports, made it clear that the UK was lagging behind “European consensus”, that is, the laws or policies of the majority of European countries. Violations of the European Convention on Human Rights included Northern Ireland’s blanket ban on sexual activity between men in *Dudgeon* in 1981,<sup>4</sup> the unequal age of consent in *Sutherland* in 1997,<sup>5</sup> the blanket ban on LGB members of the armed forces in *Smith & Grady* in 1999,<sup>6</sup> and the “no more than two persons” rule for sexual activity between men in *A.D.T.* in 2000.<sup>7</sup> The Sexual Offences (Amendment) Act 2000 and the Sexual Offences Act 2003 removed all sexual orientation discrimination from the criminal law. Equivalents of these reforms can be seen in Hong Kong’s Crimes (Amendment) Ordinance 1991, which removed the blanket ban on sexual activity between men, the 2006 *Leung* judgment of the Court of Appeal on the unequal age of consent,<sup>8</sup> and the 2007 *Yau* judgment of the Court of Final Appeal on discriminatory prosecution for sexual activity in a parked car.<sup>9</sup>

Equality in the criminal law is important, but what about the right to be openly LGB in the workplace, and equal treatment of same-sex couples, including the right to adopt children? In relation to these aspects of LGB equality, England and Wales saw a “revolution” from 2003 to 2013. In November 2003, Section 28 was repealed.<sup>10</sup> In December 2003, the UK implemented European Union Directive 2000/78, which prohibits sexual orientation

<sup>4</sup> See <http://hudoc.echr.coe.int/eng?i=001-57473> (Court, 22 October 1981).

<sup>5</sup> See <http://hudoc.echr.coe.int/eng?i=001-45912> (former Commission, 1 July 1997; the Sexual Offences (Amendment) Act 2000 equalised the age of consent; the case was therefore struck out of the Court’s list on 27 March 2001).

<sup>6</sup> See <http://hudoc.echr.coe.int/eng?i=001-58408> (Court, 27 September 1999).

<sup>7</sup> See <http://hudoc.echr.coe.int/eng?i=001-58922> (Court, 31 July 2000).

<sup>8</sup> *Leung T.C. William Roy v. Secretary for Justice*, [https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=54227&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=54227&QS=%2B&TP=JU) (20 September 2006).

<sup>9</sup> *Secretary for Justice v. Yau Yuk Lung Zigo*, [https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=57763&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=57763&QS=%2B&TP=JU) (17 July 2007). See also Statute Law (Miscellaneous Provisions) Ordinance 2014, ss. 3-6; *Yeung Chu Wing v. Secretary for Justice*, [2019] HKCFI 1431 [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=122165&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=122165&currpage=T) (30 May 2019).

<sup>10</sup> Local Government Act 2003, s. 128(2)(f)(ii), Schedule 8, Part 1 (Royal Assent on 18 September 2003, in force on 18 November 2003).

discrimination in employment and vocational training (including higher education).<sup>11</sup> Two years later, in December 2005, the Civil Partnership Act 2004 came into force, allowing same-sex couples to register their relationships for the first time.<sup>12</sup> Elton John and David Furnish did so on the first day it was possible. Later that month, the Adoption and Children Act 2002 came into force, allowing same-sex couples, living in a civil partnership or cohabiting, to adopt each other's children and to adopt unrelated children jointly.<sup>13</sup> It is worth stressing that this “family law revolution” in England and Wales took place only fifteen years ago this month.

The “revolution” was completed by the Human Fertilisation and Embryology Act 2008,<sup>14</sup> which granted same-sex couples equal rights and duties in relation to children born through donor insemination, as well as children born to surrogate mothers abroad, and by the Marriage (Same Sex Couples) Act 2013.<sup>15</sup> That Act allowed same-sex couples to choose to marry (or form a civil partnership)<sup>16</sup> from the 29<sup>th</sup> of March 2014. They may choose to be married by a civil registrar, or by an official of the small number of religious organisations (not including the Church of England or the Roman Catholic Church) that have decided to “opt in” to legal same-sex marriage.

### III. The case law of the European Court of Human Rights

In the autumn of 2002, a major political shift took place in the UK. The Conservative Party stopped opposing LGB equality, after realising that this was part of its image as “the nasty party”, and was causing it to lose votes and elections.<sup>17</sup> From 2003 on, the UK no longer

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<sup>11</sup> Employment Equality (Sexual Orientation) Regulations 2003 (in force on 1 December 2003), <https://www.legislation.gov.uk/ukxi/2003/1661/introduction/made> (replaced by the Equality Act 2010).

<sup>12</sup> In force on 5 December 2005. First ceremonies after full notice on 21 December 2005.

<sup>13</sup> Sections 50, 51, and 144(4) were brought into force by S.I. 2005/2213 on 30 December 2005.

<sup>14</sup> Section 42 on donor insemination in force on 6 April 2009. Section 54 on parental orders after surrogacy in force on 6 April 2010.

<sup>15</sup> In force on 13 March 2014. First ceremonies after full notice on 29 March 2014.

<sup>16</sup> This choice was extended to opposite-sex couples by *R (on the application of Steinfeld and Keidan) v. Secretary of State for International Development*, [2018] UKSC 32, which was followed by the Civil Partnership (Opposite-sex Couples) Regulations 2019.

<sup>17</sup> See <https://www.theguardian.com/politics/2002/oct/08/uk.conservatives2002>.

needed cases in the European Court of Human Rights in Strasbourg to force it to change its discriminatory laws. Instead of lagging behind “European consensus”, the UK began to contribute to the growth of that consensus, by adopting LGB-related law reforms long before they were required by the Strasbourg Court.

In July 2003, the Court decided *Karner v. Austria*,<sup>18</sup> its first case about the rights of same-sex couples. After Siegmund Karner’s male partner, the official tenant of their joint home, died of AIDS in 1994, the landlord sought to evict Mr. Karner as an unrelated person. The landlord succeeded, and Mr. Karner lost his home, after the Supreme Court of Austria interpreted a housing law as intended to protect a surviving opposite-sex partner (not married to the tenant), but not a same-sex partner. The Strasbourg Court found discrimination based on sexual orientation affecting Mr. Karner’s right to respect for his home, violating Articles 14 and 8 of the European Convention. The Court required Austria to show that “it was necessary ... to achieve [the] aim [of protecting the traditional family] to exclude ... persons living in a homosexual relationship – from the [housing law]”. Austria failed to provide “convincing and weighty reasons justifying the narrow interpretation of [the housing law] that prevented a [same-sex] surviving partner ... from relying on [it]”.<sup>19</sup> This burden of proof is difficult to meet, in Europe and in Hong Kong, because it is not obvious how discrimination against same-sex couples ever protects or benefits “traditional families”.

In *Karner*, the Court established a new principle requiring that same-sex couples be granted all the rights and duties of unmarried opposite-sex couples, whatever those rights and duties might be in a particular country. The Court’s principles have the potential to apply to 47 countries (the member states of the Council of Europe) with a combined population of 820 million people. In 2004, the UK House of Lords applied *Karner* in the housing succession case

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<sup>18</sup> See <http://hudoc.echr.coe.int/tur?i=001-61263> (24 July 2003).

<sup>19</sup> [41]-[42].

of *Ghaidan v. Godin-Mendoza*.<sup>20</sup> The Strasbourg Court has consistently maintained its *Karner* reasoning in subsequent cases involving social security,<sup>21</sup> immigration,<sup>22</sup> and adoption of children. In *X & Others v. Austria* in 2013, the Court ruled that Austria must allow same-sex couples to propose to adopt each other's children, through a second-parent adoption, if it would be in the best interests of the child, because Austria allows unmarried opposite-sex couples to do so.<sup>23</sup> The principle of *Karner* should also apply to access to donor insemination for lesbian couples, in countries (like France and Italy) that grant access to unmarried opposite-sex couples.<sup>24</sup>

What if a country grants no rights or duties to unmarried opposite-sex couples? An equal share of nothing is nothing. Do same-sex couples have a right to marry under the European Convention? This question has reached the Court twice. In each case, the Court has said no, but has awarded one or more “consolation prizes”. In 2010, in *Schalk & Kopf v. Austria*,<sup>25</sup> the Court held: “61. ... [A]s matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State. 62. ... [M]arriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court ... must not rush to substitute its own judgment in place of that of the national authorities ... 63. ... Article 12 ... does not impose an obligation ... to grant a same-sex couple ... access to marriage.”

The Court's first “consolation prize” in *Schalk & Kopf* was its interpreting the text of the Article 12 right to marry as permitting a different conclusion in the future, despite its reference to “men and women”: “61. Regard being had to Article 9 of the Charter [of

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<sup>20</sup> [2004] UKHL 30, <https://publications.parliament.uk/pa/ld200304/ldjudgmt/jd040621/gha-1.htm>. See also *Kozak v. Poland* (2 March 2010).

<sup>21</sup> *P.B. & J.S. v. Austria* (22 July 2010); *J.M. v. United Kingdom* (28 September 2010).

<sup>22</sup> *Pajić v. Croatia* (23 February 2016).

<sup>23</sup> See <http://hudoc.echr.coe.int/fre?i=001-116735> (19 February 2013).

<sup>24</sup> See *Charron & Merle-Montet v. France*, <http://hudoc.echr.coe.int/fre?i=001-180948> (16 January 2018) (inadmissible for failure to exhaust domestic remedies; a Bill pending in the French Parliament, the *Projet de loi relatif à la bioéthique*, would grant access).

<sup>25</sup> See <http://hudoc.echr.coe.int/eng?i=001-99605> (24 June 2010).

Fundamental Rights of the European Union, proclaimed in 2000, which does not refer to “men and women”], ... the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex.” When a larger number of Council of Europe member states allow same-sex couples to marry (only 6 of 47 did so in June 2010), the Court’s interpretation of Article 12 could change.

The second “consolation prize” concerned the Court’s interpretation of the Article 8 right to respect for “family life”. From 1983 to 2001, the Commission and the Court had consistently ruled that a same-sex couple enjoys a “private life”, but not a “family life”. In *Schalk & Kopf*, the Court overruled its past case law, reasoning that: “94. ... the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of ‘family life’, just as the relationship of a different-sex couple in the same situation would.” I call this declaration the “WE ARE FAM-I-LY!” moment for same-sex couples under the European Convention.

**3<sup>rd</sup> video:** <https://youtu.be/uyGY2NfYpeE> (from :25 to :50)

The third “consolation prize” came when, of its own motion, the Court raised the question of whether Article 8 imposes a positive obligation on governments to create an alternative to marriage for same-sex couples, in order to respect their family lives. In June 2010, three of seven judges were ready to impose such an obligation. The four judges in the majority ruled that Austria could not have been expected to introduce its registered partnership law for same-sex couples earlier than it did, on the 1<sup>st</sup> of January 2010.<sup>26</sup> Because Austria had introduced such a law, it was not necessary to decide: “103. ... whether the lack of any means of legal recognition for same-sex couples would constitute a violation of [the Convention] ... if it still obtained today.”

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<sup>26</sup> [104]-[106].

Five years later, this question could no longer be avoided. In July 2015, in *Oliari & Others v. Italy*, three same-sex couples challenged the absence for them in Italy of access to marriage or an alternative registration system.<sup>27</sup> With regard to marriage, the Court repeated its conclusion in *Schalk & Kopf*: “192. ... [D]espite the gradual evolution of States on the matter (today there are eleven [Council of Europe] states [out of 47] that have recognised same-sex marriage) ... the Court reiterates that Article 12 ... does not impose an obligation ... to grant a same-sex couple like the applicants access to marriage.”

However, with regard to an alternative registration system, the Court was as generous as it could be, perhaps seeking to come as close as it could to the same-sex marriage judgment of the United States Supreme Court in *Obergefell v. Hodges* the month before.<sup>28</sup> The Court began by noting “178. ... the movement towards legal recognition of same-sex couples which has continued to develop rapidly in Europe since the Court’s judgment in *Schalk and Kopf*. To date a thin majority of [Council of Europe] States (twenty-four out of forty-seven [51%] ...) have already legislated in favour of such recognition ... The same rapid development can be identified globally, with particular reference to countries in the Americas and Australasia ...” The Court concluded by finding a violation of the Article 8 right to respect for family life: “185. ... the Italian Government have ... failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions.”

Since 2015, the number of Council of Europe countries granting same-sex couples access to marriage or an alternative has risen to 30 of 47 (nearly 64%), including Italy, which passed a law on civil unions for same-sex couples in May 2016.<sup>29</sup> Pending cases seek to extend the *Oliari & Others* requirement of “a specific legal framework” to Poland and Romania. This

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<sup>27</sup> See <http://hudoc.echr.coe.int/eng?i=001-156265> (21 July 2015).

<sup>28</sup> 576 U.S. 644 (26 June 2015).

<sup>29</sup> *LEGGE 20 maggio 2016, n. 76: Regolamentazione delle unioni civili tra persone dello stesso sesso*, <https://www.gazzettaufficiale.it/eli/id/2016/05/21/16G00082/sg>.



requirement also applies to same-sex couples who have married outside their home country.<sup>30</sup> In Italy, foreign same-sex marriages are now recognised as civil unions.

Although the Court has said that the “specific legal framework” does not have to be identical to marriage,<sup>31</sup> certain minimum “core rights” must be included. In June 2016, in *Taddeucci & McCall v. Italy*,<sup>32</sup> the Court went beyond its *Karner* principle (equal treatment of unmarried opposite-sex and same-sex couples), by requiring Italy to treat same-sex couples differently, with regard to a family-member residence permit, because they are in a different situation. The Court held that: “98. ... by deciding to treat homosexual couples [who were unable to marry] ... in the same way as heterosexual couples [who had chosen not to marry] the State infringed the applicants’ [Article 14] right not to be discriminated against on grounds of sexual orientation in the enjoyment of their rights under Article 8 ...” Same-sex couples in Italy, in which one partner is not an EU citizen, may now qualify for a family-member residence permit by entering a civil union under the May 2016 law.

At the moment, there is at least one right attached to marriage that Council of Europe member states do not have to include in the “specific legal framework” for same-sex couples: the right to second-parent adoption of a partner’s child, or to joint adoption of an unrelated child, which some countries restrict to married opposite-sex couples, thereby avoiding the *Karner* principle. The Court upheld the exclusion of a lesbian couple from second-parent adoption in 2012, in *Gas & Dubois v. France*,<sup>33</sup> because unmarried opposite-sex couples were also excluded. However, in a pending case against Poland, third-party interveners have asked the Court to reconsider *Gas & Dubois*, in the light of two subsequent decisions.<sup>34</sup> One is *Taddeucci & McCall*, which went beyond the *Karner* principle. The other is a 2019 Advisory

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<sup>30</sup> *Orlandi & Others v. Italy*, <http://hudoc.echr.coe.int/eng?i=001-179547> (14 December 2017).

<sup>31</sup> *Chapin & Charpentier v. France*, <http://hudoc.echr.coe.int/eng?i=001-163436> (6 June 2016).

<sup>32</sup> See <http://hudoc.echr.coe.int/eng?i=001-164715> (30 June 2016).

<sup>33</sup> See <http://hudoc.echr.coe.int/eng?i=001-109572> (15 March 2012).

<sup>34</sup> See <https://www.ilga-europe.org/sites/default/files/AD-K%20v%20Poland%202019-07-25%20FINAL.pdf>.

Opinion requiring France to recognise a non-genetic parent as a legal parent: the wife of the genetic father of a child, conceived with the father's sperm and a donor egg, and born to a surrogate mother in California.<sup>35</sup>

To summarise, under the European Convention, same-sex couples are entitled to:

- (1) all the rights of unmarried opposite-sex couples under *Karner*;
- (2) some of the rights of married opposite-sex couples under *Taddeucci & McCall*; and
- (3) “a specific legal framework providing for the recognition and protection of their same-sex unions”, under *Oliari & Others*, the content of which is, at the moment, mainly left to the discretion of national governments.

#### **IV. Marriage equality in Taiwan**

The most persuasive example of law reform is the example of one's neighbour, whether it involves the legislature or the highest court. It is no coincidence that the second country to introduce same-sex marriage was Belgium in 2003, after its neighbour, the Netherlands, became the first country to do so in 2001. Spain took the step in 2005, Portugal in 2010. Argentina did so in 2010, Brazil and Uruguay in 2013. New Zealand followed in 2013, Australia in 2017.

We have seen that the European Court of Human Rights is not ready to require equal access to marriage for same-sex couples. As of today, only 16 of 47 Council of Europe countries (34%) provide equal access. This number could increase soon, with reform under discussion in Andorra, the Czech Republic, Slovenia, and Switzerland. But a majority of at least 24 of 47 countries will probably be necessary, as in *Oliari & Others*, before the Court will change its position.

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<sup>35</sup> See <http://hudoc.echr.coe.int/eng?i=003-6380464-8364383> (10 April 2019).

Appellate courts at the national or regional level have been requiring equal access since 2003, because they do not have to wait for a continental majority to form. The first to do so were the Ontario and British Columbia Courts of Appeal, and the Massachusetts Supreme Judicial Court, all in 2003. They were followed by the Constitutional Court of South Africa in 2006, the Supreme Courts of California and Connecticut in 2008, the Supreme Courts of Iowa, New Mexico, and the United States in 2009, 2013, and 2015, and the Constitutional Courts of Austria, Costa Rica, and Ecuador in 2017, 2018, and 2019. The latter two courts were inspired by an Advisory Opinion of the Inter-American Court of Human Rights in 2017.<sup>36</sup>

Once again, in a list of decisions of national or regional courts, the most persuasive one is from a neighbour's court. In the case of Hong Kong, this means the 2017 same-sex marriage decision of the Constitutional Court of Taiwan. This decision had a long gestation period. The possibility of same-sex marriage in Taiwan received international media coverage as long ago as 2004. But it took many years of hard work by activists, lawyers, and politicians to prepare Taiwanese society for this change. A key moment was the death by suicide, on the 16th of October 2016, of Jacques Picoux, who taught French at National Taiwan University. His male partner, Tseng Ching-chao, had died of cancer in 2015. Mr. Picoux's grief was aggravated by the fact that he had no right to participate in medical decisions concerning his partner and, like Mr. Karner in Austria, no right to their joint home.<sup>37</sup>

Just over seven months after Mr. Picoux's death, on the 24<sup>th</sup> of May 2017, the Constitutional Court ruled on cases brought by activist Chi Chia-Wei<sup>38</sup> and the Taipei City Government. The Court noted that, “[f]or more than three decades [since 1986], [Mr.] CHI has been appealing to the legislative, executive, and judicial departments for the right to same-

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<sup>36</sup> For citations, see <https://www.ilga-europe.org/sites/default/files/Written%20Comments%202020-09-15%20FINAL.pdf>. See also Robert Wintemute, “Same-Sex Marriage in National and International Courts: ‘Apply Principle Now’ or ‘Wait for Consensus?’”, [2020] *Public Law* 134.

<sup>37</sup> See <https://www.theguardian.com/world/2016/oct/28/professors-death-could-see-taiwan-become-first-asian-country-to-allow-same-sex-marriage>.

<sup>38</sup> See <https://time.com/collection/100-most-influential-people-2020/5888257/chi-chia-wei/>.

sex marriage.” In its Interpretation No. 748,<sup>39</sup> the Court found the Marriage Chapter of the Civil Code incompatible with two rights in Taiwan’s Constitution: the Article 22 freedom to marry, and the Article 7 right to equality. Under Article 22, the Court was confident that “the freedom of marriage for two persons of the same sex ... will constitute the bedrock of a stable society, together with opposite-sex marriage. The need, capability, willingness, and longing, in both physical and psychological senses, for creating such permanent unions of intimate and exclusive nature are equally essential to homosexuals and heterosexuals ...”

As for the Article 7 right to equality, the Court observed: “... [S]exual orientation is an immutable characteristic that is resistant to change. ... In our country, homosexuals were ... denied by social tradition and custom in the past. As a result, they have long been locked in the closet and suffered various forms of ... discrimination. ... [T]hey have been among those lacking political power ..., unable to overturn their legally disadvantaged status through ordinary democratic processes. Accordingly, to determine the constitutionality of different treatment based on sexual orientation, a heightened standard shall be applied. Such different treatment must be aimed at furthering an important public interest by means that are substantially related to that interest ...”

The Court rejected the Ministry of Justice’s two justifications for excluding same-sex couples from marriage: “[First], [t]he Marriage Chapter ... does not set forth the capability to procreate as a requirement for concluding an opposite-sex marriage. Nor does it provide that a marriage shall be void or voidable, or a divorce decree may be issued, if either party is unable or unwilling to procreate after marriage. Accordingly, reproduction is obviously not an essential element to marriage. ... [Second], the basic ethical orders built upon the existing institution of opposite-sex marriage [minimum age, monogamy, no marriage between close relatives, obligations of fidelity and maintenance] will remain unaffected, even if two persons

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<sup>39</sup> See <https://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=748> (24 May 2017).

of the same sex are allowed to [marry] ... Disallowing [their] marriage ... for the sake of safeguarding basic ethical orders is a different treatment also having no apparent rational basis.”

The Court’s constitutional remedy was clear: “... the authorities ... shall amend or enact the laws as appropriate in accordance with ... this Interpretation within two years ... It is within the discretion of the authorities concerned to determine the formality (for example, amendment of the Marriage Chapter, enactment of a special Chapter in ... the Civil Code, enactment of a special law ..) for achieving the equal protection of the freedom of marriage for two persons of the same sex .... If the amendment or enactment ... is not completed within the ... two-year timeframe, two persons of the same sex ... may, pursuant to the provisions of the Marriage Chapter, apply for marriage registration ...”

Unlike in California in 2008,<sup>40</sup> a referendum could not be used to amend Taiwan’s Constitution, by inserting a man-woman definition of marriage that would override the Constitutional Court’s decision. However, a referendum was used to indicate majority opinion on the choice left by the Court to the legislature: whether to allow same-sex couples to marry under the Civil Code or under a special law. On the 24<sup>th</sup> of November 2018, Question 10 asked voters: “Do you agree that marriage defined in the Civil Code should be restricted to the union between one man and one woman?” 72.5% of voters agreed, while only 27.5% disagreed.<sup>41</sup> The result demonstrates the danger of putting the rights of a minority to a vote. The legislature respected the heterosexual majority’s clear preference for “separate but equal” in marriage laws. On the 17<sup>th</sup> of May 2019, Taiwan’s Legislative Yuan approved the Enforcement Act of

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<sup>40</sup> The Supreme Court of California’s decision, *In re Marriage Cases*, 183 P.3d 384 (2008), allowed same-sex couples to marry in California from 16 June 2008 until 4 November 2008, when 52% of voters in a referendum supported an amendment to the California Constitution (Proposition 8): Art. I, Sec. 7.5: “Only marriage between a man and a woman is valid or recognized in California.” The California Court’s decision was reinstated, and Proposition 8 struck down, by the procedural effect of *Hollingsworth v. Perry*, 570 U.S. 693 (26 June 2013).

<sup>41</sup> See [https://en.wikipedia.org/wiki/2018\\_Taiwanese\\_referendum](https://en.wikipedia.org/wiki/2018_Taiwanese_referendum).

Judicial Yuan Interpretation No. 748, a special law legalising same-sex marriage in Taiwan.<sup>42</sup> Interestingly, South Africa has one marriage law that is only for opposite-sex couples, and another law that allows both opposite-sex and same-sex couples to marry.<sup>43</sup>

On the 24<sup>th</sup> of May 2019, the first same-sex marriages in Asia took place. After Europe (the Netherlands in 2001), North America (Ontario in 2003), Africa (South Africa in 2006), South America (Argentina in 2010), Australasia and the Pacific Islands (New Zealand in 2013), same-sex marriage had at last reached the continent that is home to 60% of human beings. At a conference at the Jurisprudence Institute of the Chinese Academy in Taipei in October 2019, where Prof. Marco Wan also spoke, I reassured activists that the law's exclusion of joint adoption of children, and foreigners who could not marry in their own countries, would be temporary, as it was in Belgium.<sup>44</sup> After the conference, I attended Taipei Pride, celebrated the new law, and acquired another T-shirt.

## V. LGB equality in Hong Kong

In Hong Kong, LGB individuals do not yet have any legal protection against discrimination in access to private-sector employment, education, or other goods and services. Legal recognition of same-sex couples has begun, but it still limited. Are future reforms likely to come from the legislature or the judiciary?<sup>45</sup>

Judicial decisions since 2018, combined with the Legislative Council's continuing refusal to pass an anti-discrimination ordinance that includes sexual orientation, suggest that

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<sup>42</sup> See <https://www.loc.gov/law/foreign-news/article/taiwan-same-sex-marriage-law-enters-into-effect/>.

<sup>43</sup> Marriage Act 25 of 1961, Civil Union Act 17 of 2006.

<sup>44</sup> Robert Wintemute, "Global Trends in Legal Recognition of Same-Sex Couples: Cohabitation Rights, Registered Partnership, Marriage, and Joint Parenting", forthcoming in *National Taiwan University Law Review* (2021).

<sup>45</sup> See Kai Yeung Wong, "An Incomplete Victory: The Implications of *QT v Director of Immigration* for the Protection of Gay Rights in Hong Kong", (2018) 81 *Modern Law Review* 874; Amy Barrow, "Sexual Orientation, Gender Identity, and Equality in Hong Kong: Rights, Resistance, and Possibilities for Reform", (2020) 15 *Asian Journal of Comparative Law* 126; Marco Wan, "The invention of tradition: Same-sex marriage and its discontents in Hong Kong", (2020) 18 *International Journal of Constitutional Law* 539.

the courts are more likely than the legislature to defy popular prejudice and protect the LGB minority. This is not unusual. The federal Congress in the United States has done very little for the LGB minority, apart from lifting the ban on LGB members of the armed forces in 2010.<sup>46</sup> It was the Supreme Court that struck down the federal law prohibiting recognition of same-sex marriages at the federal level (including under immigration law) in 2013, and interpreted the federal law on sex discrimination as covering sexual orientation in 2020. Similarly, in 34 of 50 states, it was federal judicial decisions, not the state legislature or state courts, that introduced same-sex marriage.<sup>47</sup> The political situation is the same in Brazil, where most reforms have come from the courts, rather than the federal Congress.

Turning to the very impressive decisions of the Hong Kong courts since July 2018, let us consider them by asking the three questions that have been addressed by the case law of the European Court of Human Rights. First, are same-sex couples in Hong Kong granted the same rights as unmarried opposite-sex couples? Yes, but this would appear to be an equal share of nothing. One exception might be a claim to the rights of a pre-1971 opposite-sex concubine by a pre-1971 same-sex concubine!<sup>48</sup>

Second, are some of the rights of married opposite-sex couples available to same-sex couples in Hong Kong? The first case to grant such a right involved a dependant visa or family-member residence permit, as in *Taddeucci & McCall*. In July 2018, in *Q.T. v. Director of Immigration*, the Court of Final Appeal ruled that “[t]he Director has not justified the differential treatment in the present case”.<sup>49</sup> The differential treatment was the refusal of a dependant visa to a British woman sponsored by a South African-British woman with an employment visa, despite their UK civil partnership certificate. A man married to a woman

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<sup>46</sup> See [https://en.wikipedia.org/wiki/Don%27t\\_Ask,\\_Don%27t\\_Tell\\_Repeal\\_Act\\_of\\_2010](https://en.wikipedia.org/wiki/Don%27t_Ask,_Don%27t_Tell_Repeal_Act_of_2010).

<sup>47</sup> See Wintemute, *Public Law*, note 36 above.

<sup>48</sup> See, eg, Inheritance (Provision for Family and Dependants) Ordinance, s. 3: <https://www.hkllii.hk/eng/hk/legis/ord/481/s3.html>.

<sup>49</sup> [2018] HKCFA 28, [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=116049](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=116049) (4 July 2018), [110].

with an employment visa, in the UK or Hong Kong or elsewhere, would have been eligible for a dependant visa.

The *Q.T.* judgment is both strikingly broad and disappointingly narrow. It begins by rejecting the idea of a category of “‘core right[s]’ reserved uniquely for those who are married”, and raising the possibility that any right restricted to married opposite-sex couples could be claimed by same-sex couples: “66. ... The real question is: Why should that benefit be reserved uniquely for married couples? Is there a fair and rational reason for drawing that distinction? ... 67. ... [I]t is by no means clear that persons other than married couples may fairly or rationally be excluded from other benefits, such as ... rights of adoption or succession ...” In the case of a dependant visa, the Court rejected each of the Director’s justifications. A same-sex civil partner might bring talent to Hong Kong, would increase Hong Kong’s population by the same number (one) as an opposite-sex spouse, and would not cause administrative inconvenience, because she could present her UK civil partnership certificate.<sup>50</sup>

The Court also announced that future cases of differential treatment based on sexual orientation, a “suspect ground” included in “other status” in Article 22 of the Bill of Rights, will be subjected to “particularly severe scrutiny”: the government will have to provide “very weighty reasons” (the same test as the European Court of Human Rights), and a standard of “reasonable necessity” will be applied to the government’s choice of means.<sup>51</sup>

*Q.T.* is a landmark judgment with huge potential for same-sex couples in Hong Kong, but is disappointingly narrow, because of its focus on same-sex couples in possession of a foreign certificate. The Hong Kong Government’s response to the judgment was to announce that: “from September 19, 2018, a person who has entered into a same-sex civil partnership, same-sex civil union, ‘same-sex marriage’ [in quotation marks], opposite-sex civil partnership

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<sup>50</sup> [90]-[99].

<sup>51</sup> [106]-[109].



or opposite-sex civil union outside Hong Kong with an eligible sponsor ... will become eligible to apply for a dependant visa ...”<sup>52</sup> What about same-sex couples in Hong Kong who are unable (possibly for financial reasons) or unwilling (on principle) to register their relationships outside Hong Kong? In *Taddeucci & McCall*, which involved a cohabiting same-sex couple with no certificate, the European Court of Human Rights required Italy to provide a solution to all same-sex couples living in Italy. This solution could not involve a requirement that they leave Italy to obtain a foreign certificate.

Strangely, *Taddeucci & McCall*, a judgment on point from a court deciding cases for 47 countries with 820 million people, was not discussed by the Court of Final Appeal, and was cited only once in footnote 139. This was perhaps because the Court of Appeal had decided not to rely on it. Why? Because a barrister flown in from London boldly claimed that a majority of six of seven judges “was wrong”, and that the dissenting judge should be followed.<sup>53</sup> I would very respectfully ask why barristers are so frequently flown in from London, when Hong Kong barristers are just as good. And I would very respectfully suggest that Hong Kong courts should take judgments of the European Court of Human Rights just as seriously as they do judgments of the UK Supreme Court or the UK Privy Council. Of course, if Hong Kong courts decide that law professors should be flown in from London to serve as expert witnesses, I am all in favour!

In June 2019, the Court of Final Appeal decided a second case, this time involving the New Zealand marriage certificate of two men. In *Leung Chun Kwong v. Secretary for the Civil Service*, the Court applied the principles outlined in its *Q.T.* judgment to new facts: a denial of medical and dental benefits to the same-sex spouse of a civil servant, and a refusal to accept a

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<sup>52</sup> See <https://www.info.gov.hk/gia/general/201809/18/P2018091800579.htm> (18 September 2018, emphasis added).

<sup>53</sup> See Hong Kong Court of Appeal, [https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=111447&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=111447&QS=%2B&TP=JU) (25 September 2017), [130]-[131].

joint tax return from a married same-sex couple.<sup>54</sup> The Court rejected the government’s justification for denying these benefits: “66. ... [H]aving concluded that the appellant has been subject to differential treatment [on the ground of his sexual orientation] because he is in a same-sex marriage rather than an opposite-sex marriage, one looks to see how denying the appellant ... [these two benefits] is rationally connected to the legitimate aim of protecting or not undermining the institution of marriage in Hong Kong. 67. ... It cannot logically be argued that any person is encouraged to enter into an opposite-sex marriage in Hong Kong because a same-sex spouse is denied those benefits ... 68. As Lady Hale said, in *Rodriguez* ...: ‘... [I]t is difficult to see how heterosexuals will be encouraged to marry by the knowledge that some associated benefit is being denied to homosexuals. They will not be saying to one another ‘let’s get married because we will get this benefit and our gay friends won’t’.’”

Since the *Leung Chun Kwong* judgment of the Court of Final Appeal, two claims by same-sex couples, who married outside of Hong Kong, to rights attached to marriage in Hong Kong, have succeeded. In March 2020, in *Infinger v. Hong Kong Housing Authority*,<sup>55</sup> which involved the British Columbia marriage certificate of two men, the Court of First Instance (the Hon. Mr Justice Anderson Chow Ka-ming) granted “a declaration that the Spousal Policy of the Housing Authority to exclude same-sex couples who have entered into ... marriages overseas from eligibility to apply for Public Rental Housing as Ordinary Families under the General Application category is unlawful and unconstitutional for being in violation of [Basic Law Article 25] and [Bill of Rights Article 22]”. In September 2020, in *Ng Hon Lam Edgar v. Secretary for Justice*,<sup>56</sup> which involved the UK marriage certificate of two men (one of whom owned a Home Ownership Scheme flat, which he wanted his husband to be able to inherit if

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<sup>54</sup> [2019] HKCFA 19, [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=122337](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=122337) (6 June 2019).

<sup>55</sup> [2020] HKCFI 329, [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=126959&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=126959&currpage=T) (4 March 2020).

<sup>56</sup> [2020] HKCFI 2412, [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=130884&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=130884&currpage=T) (18 September 2020).

he died without a will), Mr. Justice Chow ruled that: “48 ... the differential treatment accorded to same-sex married couples and opposite-sex married couples under the [Intestates’ Estates Ordinance] and [the Inheritance (Provision for Family and Dependents) Ordinance] cannot be justified, and constitutes unlawful discrimination.” The judge also held that Mr. Ng: “51. ... has no standing to ask the court to declare that for the purpose of the [two Ordinances], references to ‘marriage’ shall be read to include civil partnerships and civil unions between persons of the same sex.”

Narrow decisions of this kind, strictly tied to the facts of the case, put same-sex couples in the onerous position of having to litigate, one by one, every right, benefit, or duty that Hong Kong law attaches to marriage. This brings us to the third question addressed by the case law of the European Court of Human Rights: do same-sex couples in Hong Kong have access to marriage or “a specific legal framework”? In October 2019, in *M.K. v. Government of the Hong Kong Special Administrative Region*, Mr. Justice Chow of the Court of First Instance declared that neither “the denial of the right to marriage to same-sex couples under Hong Kong law” nor “the Government’s failure to provide a legal framework for the recognition of same-sex relationships ... as an alternative to marriage” constitutes a violation of the constitutional rights of same-sex couples.<sup>57</sup>

The Court began by noting that: “8. ... Ms Gladys Li, SC ... has provided ... a useful table summarising 23 ... areas in which legal consequences flow from the status of marriage in Hong Kong, including adoption, bigamy, compellability of spouse at criminal trial, damages for personal injuries, dispute ... as to the title to or possession of property, divorce, fatal accidents, inheritance, insurance benefits, maintenance, medical decision, ... organ transplant, paternity leave, pension for surviving spouses, [storage of urns holding cremated remains], ...

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<sup>57</sup> [2019] HKCFI 2518, [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=124943&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=124943&currpage=T) (18 October 2019), [1].

reproductive technology procedure, ... and working family allowance scheme.” But this list did not sway the Court: “47(2) ... [A] legal framework for the recognition of same-sex relationships is quintessentially a matter for legislation.”<sup>58</sup> For example, in designing the legal framework, “47(3) ... the right of same-sex couples to adopt a child may have to be restricted or modified in order to protect the interests of the child to be adopted”. Mr. Justice Chow concluded with this observation: “57. ... [T]he court believes that there is much to be said for the Government to undertake a comprehensive review on this matter. The failure to do so will inevitably lead to specific legislations, or policies or decisions ... being challenged ... on the ground of discrimination ... on an ad-hoc basis, resulting in an incoherent state of the law at different times as well as much time and costs being incurred or wasted in the process.”

There are at least four aspects of Mr. Justice Chow’s reasoning that can be challenged on appeal. First, there is no “marriage protection clause” in Article 37 of the Basic Law or Article 19 of the Bill of Rights. The word “marriage” in Article 37 is not enough. Nor is the phrase “[t]he right of men and women of marriageable age to marry” in Article 19. In 2010, in *Schalk & Kopf*, the European Court of Human Rights declared, despite similar wording, that it “would no longer consider that the right to marry enshrined in Article 12 [of the Convention] must in all circumstances be limited to marriage between two persons of the opposite sex”.<sup>59</sup> A “marriage protection clause” would have to be as explicit as California’s Proposition 8 (struck down by a federal court from 2013): “Only marriage between a man and a woman is valid or recognized in California.” Or as explicit as Article 112 of the Constitution of Honduras: “Marriage and de facto union between persons of the same sex is prohibited.”

Second, Mr. Justice Chow’s preference for the conclusions of the European Court of Human Rights over those of the Ontario Court of Appeal, the Constitutional Court of South

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<sup>58</sup> See also [31].

<sup>59</sup> [61].

Africa, and the Supreme Court of the United States<sup>60</sup> fails to acknowledge that the Strasbourg Court is an international court ruling on the question of same-sex marriage for 47 countries, which constrains its decisions.<sup>61</sup> The Ontario, South African, and US courts only rule for one province or country, just as Hong Kong courts only rule for the Hong Kong region.

Third, it is true that *Oliari & Others* appears to have been “based on an assessment of the particular prevailing legal, social and political circumstances in Italy”.<sup>62</sup> However, in a pending case against Romania, third-party interveners have argued that the Strasbourg Court should abandon this assessment of local circumstances and apply its reasoning in *Oliari & Others* to countries in Eastern Europe that are much less “LGB-friendly” than Italy.<sup>63</sup>

Fourth, there is no reason why Article 19 of the Bill of Rights cannot be interpreted as imposing positive obligations with regard to respect for family life, especially in conjunction with Article 22 on discrimination, in the same way as Article 8 of the European Convention.<sup>64</sup>

Having closed two doors in *M.K.* (a constitutional right to marriage or an alternative in Hong Kong), Mr. Justice Chow closed a third door in *Sham Tsz Kit v. Secretary for Justice*,<sup>65</sup> which concerned the New York State marriage certificate of two men. The judge refused to make: “1. ... [A] declaration that ‘the laws of Hong Kong, in so far as they do not recognize foreign same-sex marriage, constitute a violation of Article 25 of the Basic Law ... and Article 22 of the ... Bill of Rights’”. ... 18. It remains open to the Applicant to challenge any particular decision (including a matter of policy or a statutory provision) which accords differential treatment based on sexual orientation as a violation of his constitutional right to equality. ... 26. ... [But his] attempt ... to achieve complete parity of legal recognition of foreign same-sex

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<sup>60</sup> [40].

<sup>61</sup> See Wintemute, *Public Law*, note 36 above.

<sup>62</sup> [51].

<sup>63</sup> See <https://www.ilga-europe.org/sites/default/files/Written%20Comments%202020-09-15%20FINAL.pdf>.

<sup>64</sup> [52]-[53].

<sup>65</sup> [2020] HKCFI 2411, [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=130883&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=130883&currpage=T) (18 September 2020).

marriages and foreign opposite-sex marriages ... [through a general declaration] is too ambitious.”

If and when *M.K.* reaches the Court of Final Appeal, and if the Court were to find sexual orientation discrimination warranting a constitutional remedy, here is a possible formulation. The Court could declare that the absence of a “specific legal framework” violates the constitutional rights of same-sex couples in Hong Kong, and give the Legislative Council one or two years to act. If at the end of that period a suitable legal framework for same-sex couples had not been adopted, the wording of the Marriage Reform Ordinance, the Marriage Ordinance, and the Matrimonial Causes Ordinance that excludes same-sex couples would cease to be constitutional. The references to “one man with one woman” and “one man and one woman” would be replaced by “two persons” (as in Canada’s Civil Marriage Act 2005), while the rule that a marriage is void if “the parties are not respectively male and female” would be struck out (as it has been repealed in the UK). Precedents for this kind of judicial remedy, which would not go as far as the Constitutional Court of Taiwan, which did not allow an alternative to marriage, can be found in decisions of the Supreme Court of Vermont and the Constitutional Court of South Africa,<sup>66</sup> as well as in *Oliari & Others*. The UK Supreme Court and the UK Privy Council have yet to rule on equal access to marriage for same-sex couples. But this could change in 2021. The Privy Council will hear same-sex marriage cases from Bermuda and the Cayman Islands in February.<sup>67</sup>

Logically, legal protection against sexual orientation discrimination in the private sector should exist before same-sex couples are granted access to marriage or an alternative. Otherwise, an anomalous situation results, as in the United States between 2015 and 2020. A same-sex couple has the right to marry, or to seek an alternative form of registration. But if

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<sup>66</sup> *Baker v. State*, 744 A.2d 864 (1999); *Minister of Home Affairs v. Fourie*; *Lesbian & Gay Equality Project* (Cases CCT60/04, CCT10/05) (1 December 2005).

<sup>67</sup> *Ferguson* (Bermuda); *Day & Boddan* (Cayman Islands).

they post their photos of the happy occasion on social media, or share their joy with co-workers over coffee the following Monday, they can be dismissed!

Two recent decisions offer a route to legal protection in Hong Kong, through judicial interpretation rather than new legislation. In a *Modern Law Review* article in 1997,<sup>68</sup> I argued: first, that direct sexual orientation discrimination, correctly analysed, is also direct sex discrimination; and second, that dress codes with different rules regarding hairstyles, clothing, or makeup for women and men are direct sex discrimination. The first argument was rejected by the Court of Justice of the European Union in 1998,<sup>69</sup> and by the UK House of Lords in 2003.<sup>70</sup> The inclusion of sexual orientation in the European Union's Directive 2000/78 made the argument no longer necessary in the EU or the UK. But it remained an important argument under Title VII of the federal Civil Rights Act of 1964 in the United States, and was finally accepted (without citation) by the Supreme Court in its *Bostock* judgment in June 2020.<sup>71</sup>

The second argument had not, to my knowledge, been accepted by any appellate court anywhere in the world until Friday when, in *Leung Kwok Hung v. Commissioner of Correctional Services*,<sup>72</sup> the Court of Final Appeal found direct sex discrimination, contrary to the Sex Discrimination Ordinance, in a standing order requiring male but not female prisoners to have their hair cut short upon entering prison. After twenty-three years in which no final appellate court had cited any part of my 1997 *Modern Law Review* article with approval, I was thrilled to see a quotation in paragraph 29 of the Court's judgment: "29. ... 'Sex distinctions applying to different choices cannot be lumped together and their net effect examined. Courts

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<sup>68</sup> Robert Wintemute, "Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes", (1997) 60 *Modern Law Review* 334.

<sup>69</sup> Case C-249/96, *Grant v. South-West Trains* (Court of Justice of the EU, 17 February 1998).

<sup>70</sup> *Macdonald v. Advocate General for Scotland*, [2003] UKHL 34. See also Robert Wintemute, "Sex Discrimination in *MacDonald and Pearce*: Why the Law Lords Chose the Wrong Comparators", (2003) 14 *King's College Law Journal* 267.

<sup>71</sup> *Bostock v. Clayton County*, Georgia (15 June 2020), [https://www.supremecourt.gov/opinions/19pdf/17-1618\\_hfci.pdf](https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf).

<sup>72</sup> [2020] HKCFA 37, [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=132118](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=132118) (27 November 2020).

must look instead at their effect on the ability of individuals to make each specific choice. For the woman who wants badminton at the same price as a man, free swimming is no consolation. For the man who wants to wear a pony-tail or a skirt, it is no consolation that women are prohibited from wearing short hair or trousers.”

Given that the Court of Final Appeal has agreed in *Leung Kwok Hung* that rules regarding hair length can constitute direct sex discrimination, the Court might be willing to interpret the Sex Discrimination Ordinance, in light of the US Supreme Court’s *Bostock* judgment, as prohibiting private-sector employment and other discrimination against LGB individuals because of their sexual orientation. The main difference from a constitutional law argument based on sexual orientation discrimination will be the comparator. A lesbian or bisexual woman attracted to women will compare herself, not with a heterosexual woman, but with a heterosexual man attracted to men. A gay or bisexual man attracted to men will compare himself, not with a heterosexual man, but with a heterosexual woman attracted to men.

## **VI. Conclusion**

Full legal equality for LGB individuals and same-sex couples in Hong Kong is only a matter of time. I would say the same (but would allow more time) for every country or region in Asia. What will eventually change hearts, minds, societies, and laws will be brave lesbian and gay individuals coming out to their parents, grandparents, aunts, uncles, sisters, brothers, and cousins, and explaining to them that an opposite-sex marriage would be bad for the lesbian woman or gay man, and bad for their opposite-sex spouse.

I would recommend that any relative insisting on an opposite-sex marriage watch one of my favourite films, “Brokeback Mountain”, by the Taiwanese director Ang Lee. Filmed in the Rocky Mountains and the small towns near my home city of Calgary, Alberta, Canada, it was released in the United States fifteen years ago, on 9 December 2005, during the “family



law revolution” in England and Wales I described earlier. I attended the civil partnership of my Pakistani friend Adnan and his Belgian-Swiss civil partner (now husband) Eric on 21 December 2005. I saw “Brokeback Mountain” with them on 31 December 2005, six weeks before my first visit to India. Let’s watch the trailer:

**4<sup>th</sup> video:** <https://youtu.be/kMA30rThECg>

While in India, I was interviewed by *Daily News and Analysis* in Mumbai. They published the interview with this title: “Love rights: 'India still has a Brokeback Mountain to climb’”. India has made great legal and social progress since 2006, with the reading down of section 377 of the Indian Penal Code by the Supreme Court in 2018,<sup>73</sup> and two recent Bollywood films in which opposite-sex marriages were successfully avoided. The first film is a 2019 lesbian romance entitled “How I Felt When I Saw That Girl” (“Ek Ladki Ko Dekha Toh Aisa Laga”):

**5<sup>th</sup> video:** <https://youtu.be/pKcamCgBvMo> (1:25 to 2:20)

The trailer does not give us a good shot of the two women in love, so here is a still image of them. <https://ekladkikodekha.tumblr.com/image/184787927281>

The second film is a 2020 gay romance entitled “Be Extra Careful About Marriage” (“Shubh Mangal Zyada Saavdhan”):

**6<sup>th</sup> video:** <https://youtu.be/r6r8UYU7Zcs>, 1:40 to 2:20)

As you can see, Asia is changing. LGB equality is on its way! Thank you.

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<sup>73</sup> *Navtej Singh Johar v. Union of India* (Supreme Court of India, 6 September 2018), [https://main.sci.gov.in/supremecourt/2016/14961/14961\\_2016\\_Judgement\\_06-Sep-2018.pdf](https://main.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf).