Deference and the Separation of Powers: An Assessment of the Court's Constitutional and Institutional Competences

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One view among the judiciary in Hong Kong is that courts should defer to the government's position in adjudicating the constitutionality of policies, because courts are institutionally and constitutionally unequipped to pass judgment on policy issues. Using W v Registrar of Marriages as an example, this article examines some of the commonly cited institutional and constitutional reasons for deference, and argues that these reasons do not, generally speaking, provide valid grounds for Hong Kong courts to defer.

Introduction

> "*That* [reforming the institution of marriage], *it must be emphasized, lies outwith the court's constitutional remit and institutional capacity. It is a function that properly belongs to the Government and the Legislature…*"[1]

To what extent should courts interfere with the choices of policies made by the government[2] (i.e. the legislature or executive) when adjudicating claims of constitutional rights? One view among the judiciary in Hong Kong (HK) is that courts should defer, or accord a margin of appreciation, to the government because courts lack the institutional and constitutional capacity to pass judgment on such choices.

Drawing on *W v Registrar of Marriages*,[3] this article examines some of the commonly cited institutional and constitutional reasons for deference, and argues that these reasons do not, generally speaking, provide valid grounds for HK courts to defer.

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1 *W v Registrar of Marriages* [2010] 6 HKC 359, para 192 (Andrew Cheung J).

2 "Government" is used in this article to refer to the executive or legislature.

3 [2010] 6 HKC 359 (hereinafter "*W*" or the "*W* case")

Defining deference

There are at least two schools of thought on deference among the judiciary in HK. The first believes that courts should only defer to the government's policy choice *insofar* as it is, according to the court's *independent* judgment, within the range of constitutional options.[4] The second believes that in adjudicating the constitutionality of policies, on top of not substituting the government's choice when it is constitutional, courts should, *additionally*, *defer* to the government's view in assessing whether the policy is constitutional *in the first place*.[5]

One may take issue with calling the judicial attitude advocated by the first school of thought "deference". Arguably this term is only used in situations where the court has a right to intervene but chooses to exercise restraint. Courts do not have the right to intervene if the government's decisions are constitutional, hence the term "deference" seems inapplicable to such situations. Nevertheless, I will not delve into this terminology dispute with the first school, as I agree with its substantive proposition, namely, that the court should only respect policy choices that are, on the court's own assessment, constitutional. Thus my target of criticism is the second school of thought. *Unless otherwise stated, "deference" in this article refers to the additional deference advocated by the second school of thought.*

In constitutional rights review, courts usually exercise deference in one or both of two ways. Firstly, they may be "slow to intervene", exercising a leap of faith in trusting that the impugned measure satisfies one or more stage(s) of the proportionality test even if there is, on the face of it, insufficient evidence to show this. E.g. The court in *Kong Yun Ming* accepted, without evidence, that the 7-year residency requirement for applying for social welfare was "no more than necessary".[6] The court in *Fok Chun Wa* watered down the proportionality test, requiring only that the measure be shown to be "rationally justifiable".[7] This is unlike the

[4] See eg *Kwong Kwok Hay v Medical Council of Hong Kong* [2006] 4 HKC 157 (CFI), paras 127–137 and [2008] 3 HKLRD 524 (CA), paras 23–26; *Leung v Secretary for Justice* [2006] 4 HKLRD 211, paras 53–55; *Mok Charles Peter v Tam Wai Ho* [2011] 2 HKC 119, paras 53–68, 78–79.

[5] See eg *Kong Yun Ming v Director of Social Welfare* [2009] 4 HKLRD 382, paras 127–130; *Fok Chun Wa v Hospital Authority* (unrep., HCAL 94/2007, [2008] HKEC 2161), paras 72–77, 96–117; *Fok Chun Wa v Hospital Authority* (unrep., CACV 30/2009 [2010] HKEC 713), paras 78, 99; arguably, *Lau Cheong v HKSAR* (2002) 5 HKCFAR 415, paras 100–125; *Chan Kin Sum v Secretary for Justice* [2008] 6 HKC 486 seems to oscillate between the two schools of thought, paras 142–143, 148–149, 154; *W* case (see Section on "Deference in the W judgment").

[6] *Kong Yun Ming* (n 5 above), paras 127–130.

[7] *Fok Chun Wa* (CA) (n 5 above), paras 78, 99. See Karen Kong, "Adjudicating Social Welfare Rights in Hong Kong" *International Journal of Constitutional Law* (forthcoming).

approach advanced by the first school of thought, whereby courts must themselves be convinced by evidence and reason that the proportionality test is satisfied. Secondly, courts may simply allow the government to define the constitutional right in question, as the Court of First Instance (CFI) in *W* has done.[8]

Deference and the separation of powers

Deference is a form of judicial restraint, invented by courts to uphold the separation of powers. The point of the separation of powers is (1) to enhance efficiency: allocating functions to institutions that are most capable of performing them well (the institutional consideration for deference);[9] and (2) to uphold constitutional values of a particular society (eg respect for majority will; protecting liberties):[10] allocating functions in a way that best achieves these values and is hence most constitutionally legitimate (the constitutional consideration for deference).[11]

This article discusses institutional and constitutional grounds for deference in order to correspond to courts' categorizing reasons for deference in such a way. It must be noted that institutional capacity and constitutional competence are, contrary to common perception, not distinct. The answer to which institution best protects rights would depend on deeper, normative arguments about constitutional values, the nature of constitutional rights and the role of courts in a democracy. My arguments on institutional capacity will therefore to some extent depend on my positions on these deeper normative issues, some of which will be fully argued for in this article, others will be assumed to be uncontroversial.

[8] See Section on "Deference in the W judgment".

[9] N.W. Barber, "Prelude to the Separation of Powers", 60(1) CLJ 59, 65. *cf*. Jeffrey Jowell, "Judicial Deference and Human Rights: a Question of Competence" in Paul Craig and Richard Rawlings (eds), *Law and Administration in Europe: Essays in Honour of Carol Harlow* (Oxford: Oxford University Press, 2003) 67, 73; Neil K. Komesar, *Imperfect Alternatives: Choosing institutions in Law, Economics and Public Policy* (Chicago: University of Chicago Press, 1994).

[10] Madison emphasized checks and balances. Montesquieu emphasized the prevention of tyranny. See Eric Barendt, "Separation of Powers and Constitutional Government" (1995) *Public Law* 599.

[11] Often the question of constitutional competence is framed in a way that assumes that respect for majority rule is the overriding constitutional value. See eg Murray Hunt, "Sovereignty's Blight: Why Public Law Needs 'Due Deference'" in Nicholas Bamforth and Peter Leyland (eds) *Public Law in a Multi-Layered Constitution* (Oxford: Hart, 2003) 337, 354.

Relative institutional capacities and constitutional values necessarily vary with context. Hence the formula for separating powers, and for deference, should also vary with context.[12] It is extremely difficult to transplant one context's formula for allocating powers to another context without sacrificing some of its normative force. This, as we shall see, will partly explain why HK courts have relied on invalid reasons for deference.

Deference in the *W* judgment

Cheung J of the CFI in *W* displayed the second school of thought since it allowed the government to *define* the right to marry itself: what is marriage, who are entitled to the right. This effectively gave the government the power to define the requirements of constitutionality and hence call the shots over the question of whether policies on marriage are constitutional. The CFI suggested several reasons for deferring to the government:[13] (1) Courts should respect the democratic will. Thus the CFI should leave the task of reforming marriage to the HK legislature (Legco), which is elected. (2) As compared to the government, the court is constitutionally and institutionally unable to resolve issues which may have far-reaching implications. It should leave the task of introducing comprehensive legislation to the government. (3) As compared to Legco, the court is institutionally less capable of ascertaining what societal consensus on marriage is. It should defer to Legco's judgment of what this consensus is. These reasons will be examined in the following sections on "respect for democratic will", "polycentric issues", and "information, expertise and value judgments" respectively.

Although this article focuses on attacking reasons for deferring to the legislature or executive, my argument against (1) in the Section on "respect for democratic will" below can be conveniently applied to attack the court's reliance on societal consensus in defining the right to marry as well. This will defeat an underlying premise of (3), namely that societal consensus is to be relied on. Therefore my argument against (3) in the Section on "information, expertise and value judgments" below is an alternative argument: being that, *even if* we assume that societal consensus should be relied upon to define the right to marry, the court is institutionally competent to determine that consensus.

[12] Brian Foley, *Deference and the presumption of constitutionality* (Dublin, Ireland: Institute of Public Administration, 2008), 208.

[13] See notes 15, 16, 32, 38, 43 below for references to the relevant paragraphs of the judgment.

Constitutional ground for deference: respect for democratic will

The myth: Questions of policy should be decided by majority will. Courts being unelected lack the democratic mandate to decide questions of policy.[14] *The CFI in W applied this myth when it argued that changing the institution of marriage is beyond its constitutional remit, and is the job of the elected legislature.*[15] *The same concern for respecting majority will also triggered the CFI to rely on societal consensus in defining the right to marry.*[16]

This argument will be assessed in its best light. I assume in this section that Legco is representative of the will of the majority and the Executive is fully accountable to Legco. Even so, the argument overlooks the fact that judicial enforcement of constitutional entitlements has fundamentally altered the constitutional order of HK.[17] In the past, following the colonial tradition, *parliamentary sovereignty* might have been a value that informed the separation of powers. The formula for allocating powers that followed was that courts could only interfere with acts of the government if they exceeded parliamentary intent.[18] However, the introduction of the Basic Law (and before that, the entrenchment of the ICCPR in the Letters Patent) established *constitutional democracy* as the central constitutional value that informs the separation of powers. Legco, or majority will, is no longer sovereign in the old sense of the term, but is constrained by constitutional documents that embodied the requirements of a modern democracy such as that of individual rights. No area of policy is free from the "limiting framework" of our constitution.[19] Constitutional democracy admits of both the value of respect for majority will and the value of constitutionalism: majority will would still be respected by courts, *to the extent* that it is constitutional (the degree of respect advocated by the first school of thought).

HK courts are mandated to ensure, through adjudicating individual cases, that laws and policies returned by majoritarian preference comply with constitutional requirements, and to strike them down if they do not. Such mandate was unequivocally established by the courts immediately

[14] See eg *Secretary of State for the Home Department v Rehman* [2002] 1 All ER 122 (HL) para 62 (Lord Hoffmann); *R (Pro-Life Alliance) v BBC* [2004] 1 AC 185, paras 75–76; *Kong Yun Ming* (n 5 above), paras 57, 118, 129; *Lau Cheong* (n 5 above), paras 102–105.

[15] *W*, paras 192, 149, 243.

[16] *ibid*, and *W*, para 237.

[17] Jowell made a similar argument in the context of the UK, (n 9 above), p 80.

[18] The *ultra vires* principle was the orthodox rationale behind administrative law.

[19] *RJR-McDonald Inc v A-G of Canada* [1995] 3 SCR 199, paras 136. For criticisms of the approach of some HK courts in carving out subject areas that warrant deference, see Cora Chan, "Judicial Deference at Work: *Chan Kin Sum* and *Kong Yun Ming*" (2010) 40 HKLJ 1.

after the Handover, and was accepted by the government and reiterated by subsequent courts.[20] To fulfil this mandate, HK courts must properly scrutinize the government's policies and make an independent judgment on whether they are constitutional. If they defer to the government on the *very question* of whether a certain policy is constitutional, they would leave our constitutional entitlements unpoliced, hence abdicating their responsibility under a constitutional rights order.[21]

The clear endorsement of constitutional democracy and the role of courts as ultimate arbiters of constitutionality in HK, is unlike the contested significance of constitutional democracy and the ambiguous role of courts in the United Kingdom (UK) after the Human Rights Act 1998 (HRA) came into force. HK courts in certain cases[22] thus took the wrong turn when they imported almost word-for-word the mainstream English approach to deference, which frequently cites the court's lack of constitutional legitimacy as a ground for restraint, but which was developed against a unique constitutional backdrop in the UK. The introduction of constitutional rights adjudication in the UK has enhanced courts' powers of review over acts of Parliament, but it was not clear from the introduction of constitutional statutes that constitutional democracy was to *displace* the deep-rooted tradition of parliamentary sovereignty as foundational constitutional value; still less clear that courts as opposed to Parliament were to become the final arbiters of constitutionality.[23] There are debates over whether the HRA gives Parliament the final say over constitutionality by stopping short of giving courts the power to strike down legislation.[24] Moreover, parliamentary sovereignty is entrenched amongst the English judiciary and public and supported by strong normative grounds: that Parliament is democratically elected. English courts thus tried to apparently reconcile the court's enhanced powers of constitutional adjudication with the *preservation of parliamentary sovereignty as a key constitutional value*. Deference to the

[20] *HKSAR v Ma Wai Kwan David* [1997] HKLRD 761; *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4; see esp *Leung Kwok Hung v President of Legislative Council* [2007] 1 HKLRD 387, para 25.

[21] For a similar argument in the UK context, see Jowell, (n 9 above), 80.

[22] See eg *Kong Yun Ming* (n 5 above), paras 57, 127; *Lau Cheong* (n 5 above), para 102; *Chan Kin Sum* (n 5 above), paras 152–155.

[23] See eg the debates between Lord Steyn and Lord Hoffmann, and between Hunt and Jowell. Lord Hoffmann's judgment in *Rehman* (n 14 above) and his COMBAR Lecture 2001: Separation of Powers" (2002) *Judicial Review* 137; Lord Steyn, "Deference: a Tangled Story" [2005] *Public Law* 346; Hunt (n 11 above); Jowell (n 9 above).

[24] Alison L. Young, *Parliamentary sovereignty and the Human Rights Act* (Oxford; Portland, Or. Hart Publishing, 2009); *cf* Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge; New York: Cambridge University Press, 2009), chs 10–11.

Parliament's view of or definition of constitutionality was devised as a way of striking the balance.

Unlike the UK, HK never had a deep-rooted tradition of parliamentary sovereignty. The doctrine was imposed upon HK in the colonial days. Moreover it was imposed in form only; the normative basis of the doctrine – that of democratic governance – was absent, at least until recently. It was thus not surprising that shortly after our constitutional documents were introduced, the HK judiciary had no difficulty in discarding the doctrine and embracing its new role as "guardians of the constitution". The nuanced constitutional context that (arguably) necessitated deference in the UK is wholly absent in HK. It does not make sense for HK courts to defer on a constitutional ground that was homegrown in the UK.

The CFI in *W* seemed to recognise that the role of HK courts is to guard constitutional values against majoritarian intrusion. Yet it argued that this case is exceptional in that the right to marry is by nature defined by society: "Marriage as a social institution in any given society… is *necessarily* informed by the societal consensus and understanding regarding marriage… in that society."[25]

It is certainly true that marriage serves important functions in society, and is in this and many other respects, a *social* institution. Yet it is not clear why that would necessarily mean that it is defined by societal consensus, and is freed from the constraints of constitutional principles. Indeed, the fact that marriage is considered to be serving important functions in society – hence determining the distribution of important benefits, rights and obligations[26] – is a strong reason for subjecting it to independent principles of equality and fairness.[27]

HK courts have from time to time reformed social institutions to bring them in line with constitutional rights. Cheung J liberalized the election regime, allowing prisoners to exercise the right to vote.[28] Naturally, courts' independent assessment of the constitutionality of laws will sometimes diverge from the majority's judgment. But in a constitutional democracy, courts are mandated to depart from majority will if that is necessary to uphold constitutional values. Courts have played a role in leading changes in social values. HK courts' striking down of buggery

[25] *W*, para 188, emphasis added.
[26] As acknowledged by the CFI in *W*, para 87.
[27] Borrowing John Rawls' famous quote: "Justice is the first virtue of social institutions." John Rawls, *A Theory of Justice* (Cambridge, Massachusetts: Harvard University Press, 1999), 3. See also Kelley Loper's article in this issue of HKLJ.
[28] *Chan Kin Sum* (n 5 above).

laws that discriminated against homosexual men is one example.[29] In this and other judgments the court did not revert value judgments on rights back to the public. Indeed to do so would be to evade its duty to ensure that the majority does not trample upon constitutional rights. The court in *W* need not and should not defer to majority will in adjudicating the constitutionality of marriage laws.

Constitutional and institutional grounds for deference: polycentric issues

Myth (a): A court's decision on a policy issue will have far-reaching implications on other areas of policies and will affect the interests of other parties beyond the present case.[30] *Since the court lacks the information to assess those other policy areas, it is institutionally incapable of deciding a question that will impact upon these other areas. Also, since the other affected parties cannot participate in the court's decision, this renders the court's decision-making process constitutionally illegitimate.*[31]

Applying this myth, the CFI in W argued that if it interpreted "woman" to include the applicant, there would be far-reaching ramifications for issues beyond the case, such as same-sex marriage and the right of pre-operative transsexuals to marry. Courts are institutionally and constitutionally unable to decide all these issues, which are "self-evidently" a matter for the legislature.[32]

The starting point must be to remember that in constitutional review, courts are only asked to decide whether policies are constitutional *in adjudicating a particular case*. The court in *W* is only being asked to decide two specific issues: (1) whether the applicant, in *this particular* factual matrix, can marry under existing law; alternatively, (2) whether the existing law of marriage, *insofar* as it *completely* excludes the right of transsexual persons to marry in their desired gender, is constitutional. Courts are institutionally and constitutionally capable of deciding these specific questions.

The court's decision on these issues may have *implications* on other issues, and is in this sense, polycentric. Yet the court in *this* case is not

[29] *Leung* (see n 4 above).

[30] Lord Hoffmann's COMBAR Lecture (n 23 above); *Bellinger v Bellinger* (HL) [2003] 2 AC 467, paras 37–49; *Bellinger v Bellinger* (CA) [2002] Fam 150, paras 97–109; *Kong Yun Ming* (n 5 above), para 118.

[31] Lon Fuller, "The Forms and Limits of Adjudication" 92 *Harv. L. Rev.* 353, 394–397. Issues that impact upon resource allocation are often polycentric issues. See COMBAR Lecture (n 23 above), 141.

[32] *W*, paras 142–149.

being asked to *decide on* those other issues, nor is it being asked to draw up a comprehensive policy on all affected issues *from scratch*. The Executive and Legco retain ample room to design policies on these other issues even if the court decides on the two specific questions raised. Indeed, even if the court interprets "woman" to include the applicant, the government can still legislate on whether pre-operative transsexual persons should be included, and can still determine whether same-sex marriage should continued to be banned by, for example, confining the right to marry of post-operative transsexuals to that of marrying someone of a gender different from their *post-operative* sex. As Cheung J himself recognised in *Chan Kin Sum:*[33]

> The court is not asked… to settle the issue [of restrictions on the right to vote] by defining what the reasonable restrictions should be…. What the court is asked to do is to examine *the* restrictions imposed by the legislature/executive and to say whether *these particular restrictions* are *unreasonable*. The court is not here to perform the hypothetical task of settling a reasonable restriction. That is the task of the legislature and executive. (original emphasis)

Polycentricity is a pervasive feature of issues in adjudication.[34] It has not stopped courts from making a ruling in many cases. For example, Cheung J struck down the 1-year immediate residency requirement for applying for welfare benefits in *Yao Man Fai*, notwithstanding such ruling's potential ripple effects on the government's allocation of limited resources in non-welfare areas.[35] Whether polycentricity, like other shortcomings that granting the judiciary extensive powers may bring, should be a reason for curbing judicial power, is a question of balancing the pros and cons of such a course. For those societies that support constitutional rights review – such as HK – there is no question that the balance has been struck in favour of preserving the court's supervisory role over government policies. In these societies, polycentricity may be a reason for courts to confine their decisions as much as possible to the present case and avoid enunciating sweeping, broad principles, yet it is not a reason for courts to avoid deciding the claim of rights brought before them.[36] Indeed to do so would be to shirk their constitutional responsibility in a rights-based democracy.

[33] *Chan Kin Sum* (n 5 above), paras 148–149.
[34] Fuller (n 31 above), pp 397–404; Jeff A. King, The pervasiveness of polycentricity (2008) *Public Law* 101; Martin Chamberlain, Democracy and Deference in Resource Allocation Cases: A Riposte to Lord Hoffmann', [2003] *Judicial Review*, 12–20.
[35] *Yao Man Fai George v Director of Social Welfare* (unrep., HCAL 69/2009, [2010] HKEC 968).
[36] Foley (n 12 above), 283.

I am not saying that the court should interpret "woman" to cover the applicant. Whether it can do so would depend on other factors including rules of statutory interpretation. All I am saying is that fear of far-reaching implications in *itself* should not bar the court from interpreting the term in such a way, other things being equal.

Myth (b): It is desirable that changes in all affected areas are introduced through comprehensive legislation at one go, rather than in a piece-meal manner through litigation.[37] *The CFI in W stated that the law should be changed in a comprehensive manner to ensure coherence across all affected areas.*[38]

True, the ideal would be for the government to introduce the necessary comprehensive reforms to meet the requirements of constitutional rights. But the reality is, litigation on rights usually arises in cases where the government has been unwilling to introduce such comprehensive changes. This is definitely the case with rights of transsexual persons. As will be discussed in the next section, Legco has been most passive in addressing the rights of transsexual persons. The Executive is similarly inert. In 2005, it conducted a survey on public attitudes towards homosexuals. In response to some NGOs' concerns that transsexual persons suffer from discrimination too and should be included in the survey as well, the Executive promised to conduct another survey on attitudes towards transsexual persons shortly after.[39] As expected, such survey never took place.

In these situations where legislative reform is not forthcoming, piecemeal reform introduced through judicial decisions is a safety valve for providing rights protection in individual cases,[40] and a mechanism for triggering, though not substituting, legislative action. Indeed the government is still able to introduce comprehensive reform on the law of marriage even if (and after) the court decides in favour of the applicant on the specific issues. Courts are institutionally and constitutionally able to prompt legislation through adjudicating individual cases.

Some overseas judgments suggest that courts might be more intrusive where the government was passive in introducing rights-compliant legislation.[41] Without judging whether this varying degree of interference is defensible as a general rule, my point here is simply that given the

[37] Aileen Kavanagh, "Defending deference in public law and constitutional theory" (2010) 126 (Apr) LQR 236; *Bellinger* (n 30 above).

[38] *W*, paras 147, 157.

[39] Home Affairs Bureau, Legislative Council Panel on Home Affairs: Survey on Public Attitudes towards Homosexuals LC Paper No. CB(2)595/04-05(04), para 12.

[40] *cf* Barber (n 9 above), 79.

[41] See eg *Goodwin v United Kingdom* (2002) 35 EHRR 18; Thorpe LJ's dissent in *Bellinger* (CA) (n 30 above), paras 150–151.

courts' role as guardians of the constitution, their constitutional mandate to interfere with unconstitutional policies is stronger where the government is passive in introducing rights-compliant reforms.

Institutional grounds for deference: information, expertise, value judgments

The myth: As compared to the government, courts lack the information and expertise to judge policies or make value judgments.[42] *The CFI in W applied this myth when it argued that it is institutionally less capable than Legco in ascertaining what the social consensus on marriage is.*[43] *The CFI did not explain why this is the case but presumably the argument is that the elected Legco is in a better position to gauge public opinion and has better expertise in reading polls.*

I seek to dispel this myth by firstly, rebutting the argument that courts generally do not have as much information and expertise to judge the constitutionality of policies. This will show that courts are, generally, at least as capable as the government in passing such judgments. Secondly, I will raise two factors that plausibly suggest that the court is more capable than the government in judging the constitutionality of policies.

Rebuttals: courts are at least as capable as the government in adjudicating the constitutionality of policy

Courts' expertise and everyday function lies in evaluating the cogency of *reasons* and *evidence including expert opinion* adduced before the court, and then come to an independent conclusion on the merits of the case.[44] Courts have done this in cases involving complex medical, construction and commercial knowledge. It is not clear why this cannot be the case when courts assess the constitutionality of laws. Laws and policies will be considered constitutional to the extent that they are *demonstrated* to be so. The government's case fails to the extent that it cannot persuade the court:[45]

[42] Jowell (n 9 above), 73; *Rehman* (n 14 above); *Fok Chun Wa* (CFI) (n 5 above), para 76; *Lau Cheong* (n 5), para 105.

[43] *W*, para 195.

[44] See eg *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 (Lord Bingham), paras 14–16.

[45] *RJR-MacDonald Inc* (McLachlin J) (n 19 above), para 136; *Leung* (n 4 above), para 54; *Kwong Kwok Hay* (CFI) (n 4 above) para 130. T.R.S. Allan, "Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory" (2011) 127 LQR 96, 106–107, 115; T.R.S. Allan, "Human Rights and Judicial Review: A Critique of 'Due Deference'" (2006) 65 CLJ 671, 676, 683, 688, 689, 692. I do not see this position as significantly different from the positions of Hunt, Kavanagh, or Young. Hunt (n 11 above), 350–352; Kavanagh (n 37 above); Alison L. Young, "In Defence of Due Deference" (2009) 72(4) MLR 554.

> The question is whether it [the measure] can be justified by application of the processes of reason. In the legal context, reason imports the notion of inference from evidence or established truths. This is … to insist on a rational, reasoned defensibility.[46]

The government's information, and reasons generated by expertise, *can* generally be adduced in court to convince the judge. The government *should* generally adduce them for a reason that is assumed to be uncontroversial: the importance that a constitutional democracy attaches to rights demands that the government bears the burden of giving reasons and evidence to prove that any *prima facie* interference is justified. The court should generally not suffer from an information gap with the government, *in relation to* information that is necessary for grounding the government's claims in court.[47]

Information gap?

There may be narrow circumstances where the government, for reasons of national security, cannot reveal information to the court. In the UK for instance, it is mostly in contexts of national security involving secret intelligence that courts feel institutionally unequipped to judge policies.[48] Such circumstances seem extremely limited in HK (another point that cautions against the blind import of reasons for deference cited by UK courts). In fact there has yet to be any case in which the court deferred because the government had to conceal evidence to protect public order or national security. I am prepared to concede that in limited circumstances where the government cannot disclose evidence before the court for demonstrated national security or other overriding reasons of public interest, then the court could defer on institutional grounds on the particular question that depends on the confidential information. However, even in these cases courts

[46] *RJR-MacDonald Inc* (McLachlin J) (n 19 above), para 127.
[47] See eg Foley (n 12 above), 261–278.
[48] See for eg *R (Farrakhan) v Secretary of State for the Home Department* [2002] QB 1391; Aileen Kavanagh, "Judging the judges under the Human Rights Act: deference, disillusionment and the 'war on terror'" (2009) *Public Law*, 301. *Cf*. Recent decisions in which the English courts imposed restrictions on the use of undisclosed evidence: *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269; *Bank Mellat v Her Majesty's Treasury* [2010] 3 WLR 1090; *Tariq v Home Office* [2010] ICR 1034; Lord Neuberger, "Open Justice Unbound", Judicial Studies Board Annual Lecture 2011, available at http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-speech-jsb-lecture-march-2011.pdf.

should only defer if the government has proved its credibility and the overriding need for concealing information. Apart from such limited circumstances, the government should be able to adduce information to convince the court, leaving no room for deference on the ground of lack of information.

In *W*, the CFI argued that:

P1: we should follow contemporary societal consensus in defining the right to marry.
P2: the elected Legco is institutionally more equipped than the court in determining that consensus.
P3: the elected Legco has determined what that consensus is. Such determination, being that transsexual persons should not be allowed to marry in their desired gender, is reflected in the existing law of marriage.[49]
C: the court should defer to such determination.

P1–P3 are all disputed. My arguments in the Section on "respect for democratic will" above have shown that P1 is false. But even granting P1, P2 is false. Let us first compare the competence of courts and Legco at *this* point of time in determining societal consensus. Courts have occasionally determined what the social view is on certain issues. As Thorpe LJ in *Bellinger* put it, courts are to reflect social developments in their opinions.[50] Nothing prevents the presenting of information on public views to the court in *W* for it to ascertain social attitudes. In fact, the CFI suffered from no information *gap* with the government; it possessed as much (little) information for ascertaining societal consensus as the government did. Ironically, contrary to the CFI's own argument that it should defer to Legco on what the consensus was, the CFI *did* determine what it was: that it was "far from clear".[51]

I am not contending that the court should find that there is a social consensus in granting transsexual persons the right to marry in their desired gender. I am only arguing that the court is no less capable than the present government in determining that consensus. Nonetheless, I am inclined to think that the available information is sufficient for the court to find the necessary consensus, my explanation as follows.

[49] *W*, para 195.
[50] *Bellinger* (CA), n 30 above, para 157.
[51] *W*, para 223.

Expertise and value judgments

A determination of societal consensus is not a value-free judgment. How broadly to interpret consensus, and hence how much information to require to support such consensus, involve value judgments.[52] Courts elsewhere[53] were ready to infer the necessary consensus from factors that are also evidenced in HK (as recognized in *W*[54]): social changes in marriage, medical advancement in the field of transsexuality, government initiatives in recognising gender change, acceptance of the condition of gender identity disorder (GID) by health authorities, government funding of treatment of GID, more receptive attitudes towards transsexual persons generally. If courts, like the CFI, interpret consensus narrowly to mean consensus on whether a post-operative transsexual person should be allowed to marry in his desired gender,[55] then probably such evidence is not specific enough to support such consensus.[56] However, if courts, like certain courts elsewhere,[57] interpret consensus broadly to cover consensus on related issues, such as whether the public is generally more sympathetic or understanding towards transsexuals and whether the public no longer views procreation as a necessary feature of marriage - an interpretation which the CFI explicitly rejected[58] – then the above evidence is sufficient to point to a consensus.[59]

The fact is often courts are not faced with situations where they suffer from an information gap with the government. Rather they are faced with situations where information *runs out* for *both* the government and courts, and a value judgment and/or risk assessment has to be made in light of competing moral or expert opinions, or insufficient information.[60] Courts are familiar with and capable of making such judgments by evaluating the convincingness of the reasons proffered:[61] making a moral judgment on whether prisoners should be allowed to vote, assessing whether arresting certain demonstrators is necessary for upholding public order on a particular occasion. If the government wishes to argue that it has expertise in making such judgments, it should *demonstrate* the

[52] Foley (n 12 above), 116.
[53] Eg *A-G for the Commonwealth v Kevin* (2003) 172 FLR 300.; *Goodwin* (n 41 above).
[54] *W*, paras 24–25, 33–34, 36, 132, 198–206, 215–27
[55] *W*, para 219.
[56] Foley (n 12 above), 115–116.
[57] See n 53 above.
[58] *W*, paras 227 and 205.
[59] Foley, (n 12 above), 116.
[60] Foley (n 12 above), 264–278.
[61] Feldman argued that the UK government is no more capable than courts even in assessing the risks of terrorism. David Feldman, "Human rights, terrorism and risk: the roles of politicians and judges" (2006) *Public Law* 364, 373–382.

reasons generated by such expertise. Its expertise will only be relevant insofar as it generates convincing reasons.[62]

Whether post-operative transsexuals should be allowed to marry is ultimately a question of value judgment over competing moral and social views. The court in *W* is fully capable of exercising its everyday function to evaluate the convincingness of the reasons adduced, including the government's views, in making such a judgment. My preliminary view is that the court should exercise such judgment in favour of adopting a broad interpretation of consensus, because logically, public views on broader issues indirectly suggest their views on the narrower issue. Moreover, as HK courts have repeatedly emphasized, in interpreting fundamental rights, courts must adopt a liberal approach. There is no reason why consensus on highly relevant issues should not suffice to support granting transsexual persons the right to marry.

Positive case: factors that may render courts more capable than the government in adjudicating the constitutionality of policies

I suggest two factors that hint on courts having higher institutional capacity than the government. The first focuses on situations in which the government has not foreseen nor decided on the claim of rights in question; the second tackles situations in which the government has foreseen and decided on such claim.

Non-foreseeability

The government and courts are designed, respectively, in ways that allow them to think about issues of policies and rights in very different modes.[63] The government lays down general, broad policies. In doing so, it cannot have foreseen all the ways in which those policies would interact with rights, and certainly not the specific factual matrixes in which future rights claims arise.[64] On the contrary, the court focuses narrowly on the case before them.

There are situations where the government was unable to foresee and thus unable to decide on the specific issues raised by the rights claim in question. In these situations, if we accept the uncontroversial position that claims of rights are best viewed through the individual case, the court has an advantage over the government in adjudicating whether

[62] Allan (2006) (n 45 above), 689; Allan (2011) (n 45 above), 106–107.
[63] Barber (n 9 above), 74–87.
[64] Foley (n 12 above), 279–284.

policies comply with rights, since it is given all the facts for assessing the constitutionality of policies in the particular factual circumstances.[65]

W is on point. My arguments here are not concerned with establishing what the law is, applying rules of statutory interpretation, on the question of whether transsexual persons have the right to marry in their post-operative gender. Rather, I seek to dismiss an illusory burden of the CFI: namely, that the elected Legco *made* a determination on such question and this calls for deference. P3 (p 19 above) is false because Legco has *never*, *actually* made a determination on what the social view on transsexuals' right to marry is. At best, Legco can only be *presumed* to have made any such determination. *Any constitutional or institutional reason for deferring to Legco dissipates if we are merely relying on presumed determination*. Any supposed advantage of Legco in ascertaining societal consensus on marriage stems from it having gauged and/or reflected social views on the relevant issue and balanced relevant interests. *Legco will not have actually done all this*, and thus possesses no advantage that may call for deference, if it is only *presumed* to have made a determination. This was perhaps why some English courts suggested that they would only defer to a "positive or conscious decision" made by the government after balancing competing interests.[66]

The CFI's argument that the current law represents the elected Legco's view that transsexual persons should not be allowed to marry in their desired gender, relies on its assertion that Legco intended s 20(1)(d) of the Matrimonial Causes Ordinance (HK provision) to give statutory recognition to Ormrod J's decision in *Corbett*.[67] Arguably, that section's UK counterpart, s 1(c) of the Nullity of Marriage Act 1971 (UK provision) was adopted in the UK to give such statutory recognition.[68] It is also acknowledged that the HK provision is identical to the UK provision and in the explanatory memorandum of the HK provision, it was stated that the HK provision was introduced to "adopt" the corresponding UK provision.[69] However, the colonial Legco in 1972, in adopting the corresponding UK provision, could only at best be presumed to have adopted the legislative intent of the UK parliament, since, an examination of HK Hansard shows that the HK provision, like many other laws at that time, were passed almost blindly to adopt the UK counterpart. No reference

[65] *Ibid*, 279–292.

[66] Eg *R (N) v Secretary of State for the Home Department* [2003] HRLR 20 para 62; *Wilson v First County Trust Ltd (No 2)* [2002] QB 74 para 33.

[67] *Corbett v Corbett* [1971] P 83; *W*, para 118.

[68] Even this was disputed. See Thorpe LJ's dissent in *Bellinger* (CA), (n 30 above), paras 142–143.

[69] HK Hansard, second reading of the Matrimonial Causes (Amendment) (No 2) Bill 1972, 12 April 1972.

was made by the Executive nor Legco to the legislative intent behind the UK provision.[70] There was no actual intent on the part of Legco to give statutory recognition to Ormrod J's reasoning.[71]

In any case, the then Legco was not elected,[72] nor had its members gauged public views on the issue of transsexuals' right to marry. Thus the then Legco could not be taken to "represent… society's view" on the issue.[73]

Moreover, as far as its records show, Legco – both before, and more importantly, *after* elections thereof were introduced – has *never* discussed the issue of transsexuals' right to marry.[74] In fact, Legco has only discussed issues related to transgender persons on rare occasions which do not shed light on the question of marriage.[75] So if the court were to rely on the "stance of the elected legislature" on this question, as the CFI did, it had to first, presume that the colonial Legco in passing the HK provision intended to adopt the legislative intent behind the UK counterpart; and further, presume that the elected Legco intended to adopt such legislative intent.

The CFI therefore at best deferred to a presumed determination of societal consensus by the elected Legco, and because the determination was presumed, the normative basis for deference was lacking. The court is in fact faced with a question on which Legco had not actually spoken. Whilst the CFI thought that it deferred to Legco on *W*'s claim of rights, in reality it left such claim undecided.[76]

The relevance of this to the point of institutional capacity which I was making is this: for the CFI's logic to stand (P1-C [p 19 above]), the real comparison should be done between the competence of Legco *at the time* of passing the relevant marriage laws VS competence of courts *now* in adjudicating this case. My hypothesis from the above observations is that at the time of passing the relevant laws, the question of transsexuals' right to marry probably did not cross the minds of HK legislators. The then Legco was unable to foresee how the proposed law would

[70] *Ibid*.

[71] See s 168 in F.A.R. Bennion, *Bennion on statutory interpretation: a code* (London: LexisNexis, c2008, 5th Ed) for principles guiding the court when no actual intention existed in relation to the application of the law to the kind of situation in the present case.

[72] Elections to Legco were first introduced in 1985.

[73] *W*, para 195.

[74] A search through the records of Legco on its website reveals this.

[75] Eg. review of the police's policies on searching detainees (Minutes of Meeting of Panel on Security held on 16 July 2008, LC Paper CB(2)2791/07-08); setting up of a Gender Identity and Sexual Orientation Unit and Sexual Minorities Forum (eg Minutes of Meeting of Panel on Constitutional Affairs held on 18 January 2010, LC Paper No. CB(2)2068/09-10); domestic violence (eg Paper prepared by the Legislative Council Secretariat, 18 June 2008, RP09/07-08).

[76] Foley (n 12 above), 282.

interact with the rights of someone in the applicant's position, and was thus unable to decide on related issues and gauge public views thereon. The court in *W* now, on the other hand, has all the specific information (including evidence of social attitudes on related issues) for assessing the constitutionality of the relevant laws in this particular case, and is comparatively more capable of deciding the question of constitutionality.

Protection of individual rights

Even if the government has foreseen and decided on the claim of rights in question, and the case does not raise any issues specific to the facts, at least one factor still suggests that the court may be more capable in judging the constitutionality of policies.

My argument is based on the uncontroversial assumption that constitutional rights are important individual entitlements and any inroads should only be made to the extent necessary for attaining compelling public interests.

Electoral pressure gives legislators a powerful incentive to decide in favour of majoritarian interest or welfare, at the cost of individuals, in particular those from minority groups (such as sexual minorities), who are less likely to be able to sway electoral results. In contrast, courts are immune from majoritarian pressure. Their mandate is to resolve questions of individual rights based on reason and evidence.[77] They have every incentive to adjudicate such claims impartially, giving rights the serious attention that they deserve. Judging from their institutional designs, courts are more likely than legislatures to enforce rights well.[78] This is one reason why in constitutional democracies courts are charged with adjudicating claims of rights.

Where does that leave the role of the government?

The government and the courts are designed in ways that make their roles complementary in a constitutional democracy. The elected Legco, and the executive which is accountable to Legco, have the primary responsibility for formulating general solutions in accordance with social needs

[77] *cf* Feldman (n 61 above), 374–375.

[78] *cf* Joseph Raz, "Disagreement in Politics" (1998) 43 *Am. J.Juris* 25, 45–46; Kavanagh, (n 24 above), 344–380; Jeremy Waldron, "A Rights-based Critique of Constitutional Rights" (1993) 13(1) OJLS 18. See also Puja Kapai's article in this issue of HKLJ.

and views, while courts exercise a secondary responsibility for ensuring that these policies comply with constitutional requirements through adjudicating individual cases.[79] The government's *exclusive* ambit is to formulate policies within the four corners of the constitution. In many cases constitutional requirements admit of a range of policy decisions. The government's choice over this constitutional range will be fully respected (respect advocated by the first school of thought). The constitutional ground for this respect is the upholding of the value of respecting majority rule within the confines of constitutionalism. The institutional ground for such respect is the recognition of the government's capability in devising policies from scratch. It is in this sense that the government's role in "solving political, social or economic issues"[80] cannot and should not be replicated by the courts. For us to fulfil the imperatives of a constitutional democracy, it is vital for both the government and the courts to perform and respect these roles faithfully, no more, no less.

Conclusion

This article has not addressed other possible reasons for deference – such as pragmatism i.e. fear of upsetting the public or government;[81] or other institutional or constitutional considerations that were not discussed. Yet the dispelling of the most common myths about the court's institutional and constitutional inability to pass judgments on the government's policies should at least make us skeptical of any proclaimed need for deference. Nothing short of an explication by the court of the logic behind deference – an explication that goes beyond vague presumptions of relative (in)competence – would suffice to justify the court's attempt to give away the constitutional game.

[79] Hunt (n 11 above), 342.

[80] Ma CJ's speech at the ceremony for the opening of the legal year 2011: http://www.info.gov.hk/gia/general/201101/10/P201101100201.htm.

[81] Kavanagh (n 24 above) 193–201; Alexander M. Bickel, *The least dangerous branch: the Supreme Court at the bar of politics* (New Haven: Yale University Press, c1986).