

A PRINCIPLED APPROACH TOWARDS JUDICIAL REVIEW: LESSONS FROM *W v REGISTRAR OF MARRIAGES*

■
Puja Kapaï*

*This article examines the role of deference in constitutional challenges in the context of minority rights claims. It reviews prevailing justifications against judicial activism, arguing that contextual considerations such as the existence of an institutional framework for inclusive governance are key to determining the appropriate role and indeed, duty of the court. Parting company with the court's emphasis on deference and social consensus in *W v Registrar of Marriages*, it argues that courts have an elevated responsibility to determine interpretive issues on substantial grounds based on principle or meta-principles rather than structural grounds like deferral to majority views in minority rights claims. This imposes a greater burden on the judicial branch to serve as a conduit for minority representation in contentious constitutional issues and more broadly as a forum for deliberative participation by marginalised communities. Whilst it is essential that the safeguards of checks and balances be rigorously observed, a heightened level of scrutiny in such instances complements, rather than undermines the rule of law.*

Introduction

The case of *W v Registrar of Marriages*¹ concerned the right of a post-operative transsexual woman to marry her male partner. The Registrar refused to register the marriage on the grounds that W's proposed union did not qualify as one between a man and a woman as required under the Marriage Ordinance.² The MO and the Matrimonial Causes Ordinance³ set out the terms against which a marriage can properly be registered and considered valid as a union. The Registrar was of the view that chromosomal markers were determinative of 'sex' for the purposes of the MO

* Assistant Professor, Deputy Director, Centre for Comparative and Public Law, Director, Summer Social Justice Internship, Faculty of Law, University of Hong Kong. The author is grateful to the reviewer and Cora Chan for comments on an earlier draft. The author would also like to thank Christine Yu and Martin Ho their research assistance.

¹ [2010] 6 HKC 359.

² (Cap181) (MO), ss 21 and 40(2).

³ (Cap179) (MCO), s 20(1)(d). The MO and the MCO are collectively referred to as "the Ordinances" in the remainder of this article.

despite W's sex-change operation as a result of which she is now, for all intents and purposes, characterized socially as a woman. As W's chromosomal markers remained those of a male, the sex she was born into and which, once recorded on a birth certificate, cannot lawfully be rectified to reflect a sex-change,⁴ she was ineligible for the purposes of marrying another man. Furthermore, the Registrar opined that such a union would have been void pursuant to the MCO. W applied for judicial review of this decision in the Court of First Instance, arguing that the Registrar had misconstrued her sex as a matter of law. She sought a declaration to the effect that she should be entitled to marry in her acquired sex as a matter of law; failing which, she sought a declaration that ss 21 and 40(2) of the MO and 20(1)(d) of the MCO are inconsistent with the Basic Law of the Hong Kong Special Administrative Region⁵ and the Hong Kong Bill of Rights Ordinance⁶ to the extent that they deprive her of her rights to marriage⁷ and privacy.⁸

Cheung J interpreted the applicable sections to determine whether W, as a post-operative transsexual woman, could be considered a female or woman under the Ordinances for the purposes of marriage. According to Cheung J, the words 'female' and 'woman' required a contextual interpretation as regarded in the institution of marriage which is embedded in cultural and religious values. Cheung J examined the historical development of the institution of marriage with a view to determining its institutional status in Hong Kong today in arriving at his determination of both questions against W.

Among other things, Cheung J heavily relied on the apparent lack of societal consensus to include transsexuals within the institution of marriage. Cheung J was of the view that it had not been demonstrated that there was a sufficient shift in social consensus in Hong Kong to reflect that the concept of marriage includes a post-operative transsexual woman.⁹ He derived this understanding through an interpretation of the terms 'woman' and 'female' to assess whether their plain and ordinary meaning included references to a post-operative transsexual woman. Furthermore, Cheung J relied on Ormrod J's judgment in *Corbett v Corbett*¹⁰

⁴ *W v Registrar of Marriages* (n 1), para 46.

⁵ Promulgated on 4 April 1990, entered into force on 1 July 1997 (HKBL).

⁶ (Cap383) (HKBORO). These articles are equivalent to Arts 17 and 23(2) of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁷ This right is guaranteed under Art 37 of the HKBL and Arts 14 and 19(2) of the HKBORO respectively.

⁸ Article 14 of the HKBORO.

⁹ *W v Registrar of Marriages* (n 1), paras 223–227.

¹⁰ [1971] P 83.

as indicative of the original intent of the provision in the MCO, which was enacted soon after that decision. Whilst recognizing that the HKBL and HKBORO both enshrine the right to marriage, Cheung J emphasized the need for judicial deference to the legislative intent and social consensus in determining the content of the right given the right's public interest dimension.¹¹ In determining the appropriate scope of the right to marriage as a constitutional right, Cheung J ultimately ruled that there were insufficient grounds (both social and legal) to justify an expanded reading of the right beyond the original intent.¹²

The decision itself is of critical importance given the numerous issues it raises on the facts.¹³ As with any rights-based challenge, a number of issues including matters of policy that affect similarly situated persons are activated although they are not within the immediate scope of the legal issues before the court. This essay does not propose to deal with the myriad and complex issues that the judgment gives rise to. Instead, it limits itself to the narrow question of how courts ought to approach constitutional challenges relating to fundamental rights, particularly the rights of minorities.

Minorities face prejudice for their membership in particular groups and are always at risk of being marginalized. In these circumstances, courts have often found themselves arbitrating disputes between the state and minorities or majorities and minorities.¹⁴ The role of the court and the boundaries of judicial activity are questions that have vexed numerous jurisdictions time and again. Ranging from the impropriety of judicial activism to the dangers of an overly deferential approach, academics, judges, legislators and various others have long debated the proper realm of judicial activity. These include nuanced interpretive debates about the proper remit of parliament's power to enact certain laws and the legitimate restraints against its exercise. In constitutional democracies, courts usually enforce these restrictions as guardians of the constitution or bill of rights. Tushnet refers to the debate as one between parliamentary supremacy and 'constrained parliamentarism.'¹⁵ There is a broad range of in-between gradations in terms of the level of judicial intervention thought permissible. These range from weak-form judicial review, which emphasizes an institutional or doctrinal view of judicial restraint, to strong-form judicial review that takes the Dworkinian view

¹¹ *W v Registrar of Marriages* (n 1), paras 195 and 223.

¹² *W v Registrar of Marriages* (n 1), paras 255–258.

¹³ *W v Registrar of Marriages* (n 1), paras 5–9.

¹⁴ The two are not mutually exclusive, of course.

¹⁵ Tushnet, 'New Forms of Judicial review and the Persistence of Rights' (2003) 38 *Wake Forest Law Review* 814. The term 'constrained parliamentarism' was coined by Bruce Ackerman in 'The New Separation of Powers' (2000) 113 *Harv. L. Rev.* 633, 664–87.

of rights as trumps, whereby courts are seen as rightful guardians tasked with scrutinizing the legitimacy of legislative acts against the terms of the constitution or bill of rights. It is this interpretive role of the court from institutional and competency perspectives that has been the source of constant controversy. The ubiquitous question as to the appropriate sphere of judicial activity demands a proper theorization of the role of the court in light of the inevitable dance it is engaged in with other branches of government.¹⁶

The role of the court is not fixed. Contextual considerations relating to the political and legal framework of the jurisdiction concerned are key to determining the appropriate role and indeed, duty of the court. Its role changes depending on the institutional framework of government and its allowance for different voices to penetrate law and policy-making processes. The reasons underpinning the legitimacy of a particular constitutional balance between the three branches must still hold true for institutional deference to bind. The justification for institutional and substantial deference¹⁷ is diluted where the legitimizing source of parliamentary supremacy does not exist. Where this legitimacy is purged, the courts have a duty to uphold the constitution and guard against any violations robustly. Whilst the court may be bound by institutional deference in terms of the substantive remedy it can offer to a claimant where the outcome relates to policy issues, a bifurcated approach enables it to exercise its evaluative powers to declare legislation unconstitutional nonetheless. This relegates the policy-making back to the branch concerned. The branch is directed as a result of a declaration of incompatibility to take appropriate steps to rectify the unconstitutionality through positive measures and amendments to the legislation.

Part II of this article examines prevailing justifications against judicial activism and the case for judicial deference. Part III considers whether the approach taken by the court in *W* is appropriate given Hong Kong's unique constitutional framework and institutional peculiarities. It is argued that Hong Kong's constitutional framework and its deficiencies impose a positive duty on the judge to rectify the political illegitimacy prevailing upon minorities in *W*'s position in systems where the reasons underpinning the legitimacy of parliamentary supremacy and judicial deference have been purged. A more nuanced and complex approach to interpreting and developing the content of constitutional rights is required in the context

¹⁶ I will not attempt to set out a full thesis for the proper conceptualization of the role of the judiciary in constitutional interpretation here but instead, focus on the narrower question of the realm of judicial engagement in cases involving minority rights.

¹⁷ Aileen Kavanagh, 'Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication' in Grant Huscroft (ed) *Expounding the Constitution: Essays in Constitutional Theory* (CUP, Cambridge 2008), p 184. Hereinafter, "Aileen Kavanagh, Deference or Defiance?"

of Hong Kong given its unique political and legal framework. Moreover, even where democracy is prevalent, given the imperfections of modern democracies, the democratic deficit and the politicization of minority issues, there is a need for some mechanism to guard against the risk of the tyranny of the majority. In making these arguments, the article focuses on Cheung J's reliance on the need for social consensus on the meaning of marriage. A judgment that so heavily depends on evidence of social consensus in interpreting the content of the right to marriage risks marginalizing communities at the hands of a decisional majority. For many such groups, the courts are the last recourse.

A critical review of the arguments suggests that the moral legitimacy undergirding the principles that demand judicial restraint and deference is not violated in every instance where the judge acts to declare a law unconstitutional or applies a robust interpretation to a constitutional provision. Indeed, judicial review should be viewed as a supplementary means for minorities to engage in the debate at a societal level, giving their voice the democratic capacity for equal influence they otherwise lack, as opposed to being viewed with suspicion as a vehicle that seeks to displace democratically determined outcomes. An overemphasis on institutionalism in these circumstances does a grave injustice to politically and socially marginalized communities, effectively disempowering them further. Instead, drawing on the very arguments that legitimize parliamentary sovereignty, Part IV in conclusion argues that the political and legal framework in Hong Kong warrants a context-specific approach to determining the role, and indeed, the duty of the courts in such cases. In these cases, it is argued that courts have an elevated responsibility to determine interpretive issues on substantial grounds relating to matters of principle or meta-principles rather than deferring to majority views. Whilst it is essential that the safeguards of checks and balances be rigorously observed, judicial review at a heightened level of scrutiny in some cases complements, rather than undermines the rule of law.

Interrogating Judicial Review: Democratic Legitimacy or Paradoxical Impropriety?

The Practice of Constitutionalism

The primary purpose of the constitutionalisation of government powers is to ensure that the branches act as checks against each other's excesses but also, to protect the subjects of the government against infringement of their constitutional rights. This delineation of powers also requires that a balance be struck where the different powers are in competition or at risk of being usurped by other branches.

The judiciary has been propelled to the forefront as the singular entity privileged with the task of constitutional interpretation to ensure that executive and legislative powers are exercised legitimately. The role of the judge is to impartially implement the law regardless of their personal moral convictions. In approaching adjudication, the courts are bound by the text and have been said to have no power to go beyond the written law.

Constitutional text however, remains fairly broad in most instances. As part of judicial practice, various rules of interpretation have been developed for use in the determination of the meaning and content of constitutional provisions. Although the rights enshrined in the constitution are entrenched in the sense that they withstand the test of time, the constitution itself is to be interpreted as a living instrument such that the content of these rights will continue to evolve as society changes.¹⁸ This call for flexibility, however, stands diametrically opposed to the requirement that judges refrain from legislating from the bench by reading into provisions meanings that were unintended by the drafters of the legislation or as some argue, displace the will of the people.

The practice of constitutionalism presupposes that there are 'second-order' reasons¹⁹ that cast doubt on the legitimacy of an otherwise legitimate act that would fall within the first-order reasons²⁰ of so behaving. Concomitantly, it presupposes that there are first-order reasons which prohibit acts that would otherwise have been permissible under second-order reasons.²¹ For example, one of the second-order reasons that raise a constitutional issue is the role that the identity of the actor plays in the determination of the constitutionality of the act. Thus, although an act may be constitutional if performed by one branch, if committed by the other, the very act becomes unconstitutional.²² Various reasons have been proffered for the delimitation of power along certain lines but they can broadly be grouped into three categories: legitimate authority, institutional competence, and superior expertise.²³

In the area of constitutional interpretation, the doctrine of deference has acquired salience as one of the second-order reasons that dictate the proper boundaries of judicial activity. Deference can be defined as an act which signifies the voluntary assumption of another's judgment in place

¹⁸ Aileen Kavanagh, 'The Idea of a Living Constitution' (2003) *Canadian Journal of Law and Jurisprudence* 55.

¹⁹ These refer to formal rule of law requirements relating to procedural regularity.

²⁰ These refer to substantively just principles that are applied to yield a morally just outcome.

²¹ Frederick Schauer, 'The Occasions of Constitutional Interpretation' (1992) 72 *Boston University Law Review*, 729, pp 731–732.

²² Frederick Schauer, *ibid.*, p 733.

²³ These categories are a combination of those described by Schauer, *ibid.* and Aileen Kavanagh, 'Deference or Defiance?' (n 17), p 192.

of one's own where one perceives another's judgment to be superior.²⁴ Deference can result either from inherent respect for the institutional authority of another's judgment on account of their expertise or otherwise, out of respect for their position in the hierarchy of judgment-dispensing institutions.²⁵ Kavanagh argues that constitutional interpretation incorporates the doctrine of deference in the form of *substantive evaluation* of the merits, and *institutional evaluation*, which refers to the institutional limitations of the judge's role in rendering a particular type of judgment.²⁶

In the context of constitutional adjudication, the doctrine of deference influences the substantive evaluation of the merits of the interpretation of a constitutional provision in a particular way and the institutional deference operates to ensure the judge's powers are limited by his institutional capacity to render particular types of decisions and remedies. An important question that the use of 'merit' and 'non-merit' reasons in exercising judicial power raises is what type of factors can feature in the legal reasoning of a judge. The answer to this is usually based on arguments relating to institutional competence for particular tasks and institutional legitimacy as derived from the constitutional framework. The arguments against a judge's powers of constitutional review of legislation have been canvassed in Waldron's 'Core Case Against Judicial Review'²⁷ where he examines the legitimacy of the court's 'interventions' in judicial review proceedings.

In most countries, the legislative branch has been given the mantle of supremacy for the reason that the people have democratically elected the legislators to represent their views in law-making processes, thereby, legitimating all laws as representative of the will of the people.²⁸ This places the legislature in a position of superior political legitimacy as compared to any other institution seeking to elaborate legal principles. On this basis, unless judges are elected democratically, advocates of judicial deference argue that the case for judicial review is a weak one.

²⁴ Aileen Kavanagh, 'Deference or Defiance?' (n 17), p 188.

²⁵ Kavanagh calls this 'interinstitutional comity.' See Aileen Kavanagh, 'Deference or Defiance?' (n 17), p 188.

²⁶ These have also been referred to as merit and non-merit reasons by Joseph Raz in Joseph Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (OUP, Oxford 1999) 152, pp 173–4, 187–9.

²⁷ See Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2005–2006) 115 *Yale Law Journal* 1346, p 1371.

²⁸ John Locke, *The Second Treatise of Government*, in *Two Treatises of Government* 265, 366–367 (Peter Laslett (ed.) Cambridge University Press 1988) (1690).

Waldron's Process-Based Resolution: Superiorly Moral?

Liberal democracies represent what has been referred to as the democratic paradox. On the one hand, they are committed to the protection of fundamental rights; on the other, they are committed to a vision of legitimacy that prioritizes the will of the democratic majority. The paradox arises when the democratic majority renders a decision that is oppressive in that it contravenes the rights of minorities. Through this denial, democratic majorities deny the moral agency and autonomy of political minorities, thereby undermining the very same autonomy that legitimates their own rule. This has alternatively been referred to as the “tyranny of the majority” or the “counter-majoritarian difficulty.”²⁹

The central question is whether there are circumstances in which it may be legitimate for another institution to interfere with the decisions arrived at through the legislative process. If so, what are these circumstances and who should act as the intervener? Which principle legitimizes their intervention? The answers to these questions ultimately represent a view on the moral legitimacy of prioritizing the views of one institution over others and legitimize such interference for morally superior reasons.

Jeremy Waldron is one of the staunchest critics of the practice of judicial review. Waldron's objections against the practice of judicial review are threefold. First, he argues that as democrats committed to upholding rights, we should be skeptical about leaving the responsibility for the enforcement of such rights to the courts, a body of unelected officials. He argues that this power should remain firmly with the people so that they may on appropriate occasions, deliberate about their disagreements and authoritatively determine the content of particular rights. This objection is grounded in the idea that the most important right is the right to participation³⁰ and rests on the fundamental values of autonomy, political equality and responsibility. If judicial decisions displace the democratic will, they render the right to equal participation meaningless.³¹

Second, whilst he acknowledges that the legislative process is not perfect in that it may not adequately represent the popular view, he

²⁹ Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd edn, Yale University Press, New Haven 1986), pp 16–17, where he notes that, “judicial review is a counter-majoritarian force in our system... [W]hen the Supreme Court declares unconstitutional a legislative act... it thwarts the will of representatives of the actual people here and now.”

³⁰ Jeremy Waldron, *Law and Disagreement* (Clarendon Press, Oxford 1999), p 232. Indeed, Waldron refers to the right to democratic participation as ‘the right of all rights’.

³¹ Jeremy Waldron, ‘A Rights-Based Critique of Constitutional Rights’ (1993) 13 OJLS 18, p 19 (hereinafter Waldron, “A Rights-Based Critique”), p 45.

maintains that disagreements in the democratic process are ultimately disagreements on moral views.³² The basis for prioritizing the will of the people hinges on the assumption that we disagree upon fundamental moral principles.³³ However, in order to live together in a community, it is necessary to agree upon certain moral principles. Because we disagree about the correctness of certain moral outcomes, we should have the opportunity to continually deliberate on these critical questions so that our will reigns supreme ultimately. However, we need to find some means to settle these moral disputes for the time being. Since we cannot agree on ultimate outcomes, we legitimate the outcomes by authorizing the processes to determine those outcomes as just and moral.³⁴ For example, we all agree that everyone has the right to participate in government.³⁵ We agree that an appropriate way to enlist such participation is through voting for those who represent our views in the formulation of law and policy. For these reasons, we accept the outcomes of the legislative process as politically legitimate even though, in reality, the outcome differs from our personal views on the moral question.

Waldron emphasizes that where moral disagreements persist, any worthwhile theory of authority cannot accommodate the concept of rights as ‘trumps’ that override the decision of a majority.³⁶ When courts are charged with determining matters of ‘high principle’, commitment to democratic rights is seriously questioned since this involves a shift in the locus of decision-making power from the people to the courts.³⁷ He argues

³² To this end, he acknowledges that a democratic jurisprudence is bound to be a value-laden jurisprudence. Jeremy Waldron, ‘Can there be a Democratic Jurisprudence?’ Public Law and Legal Theory Research Paper Series Working Paper No. 08-35, New York University School of Law, Electronic copy available at: <http://ssrn.com/abstract=1280923>, p 10.

³³ This Section summarises Jeremy Waldron’s central objection to judicial review and his support for a participatory democratic government and its superiority over other institutions of government. See Jeremy Waldron, *Law and Disagreement* (n 30), pp 101–103, 246–247.

³⁴ I refer to this as Waldron’s ‘theory of authority’. See Waldron, *Law and Disagreement* (n 30), pp 239–243; Waldron, ‘A Rights-Based Critique’ (n 31), p 19 and Jeremy Waldron, ‘The Core of the Case Against Judicial Review’ (n 27), p 1371. However, as Waldon himself notes, citing Thomas Christiano, in ‘Waldron on Law and Disagreement’ (2000) 19 *Law & Philosophy* 513, p 521, this approach may be viewed as mere deferment to a regress of procedures. As Christiano states, “We can expect disagreement at every stage, if Waldron is right; so if we must have recourse to a higher order procedure to resolve each dispute as it arises, then we will be unable to stop the regress of procedures.” Waldron’s response is that this argument does not hold because Christiano does not show that this is a ‘vicious regress.’

³⁵ See Jeremy Waldron, ‘A Rights-Based Critique of Constitutional Rights’ (n 31), p 19 and Jeremy Waldron, *Law and Disagreement* (n 30), pp 239–243.

³⁶ Waldron, ‘A Rights-Based Critique’ (n 31), p 20. According to Waldron, this right to democratic participation is the ‘right of all rights’ and is most appropriate where rights-bearers disagree about the rights they have. Waldron, *Law and Disagreement* (n 30), p 232. See also, Aileen Kavanagh, ‘Participation and Judicial Review: A Reply to Jeremy Waldron’ (2003) *Law and Philosophy* 451, p 452.

³⁷ *Ibid.*, Waldron, *Law and Disagreement* (n 30), p 232. This amounts to the “disempowerment of ordinary citizens on matters of the highest moral and political importance.” See Waldron, ‘A Rights-Based Critique’ (n 21), p 45.

that majoritarian decision-making in the face of such disagreement about moral outcomes is more important than the results.³⁸ And this is his third point – that everyone should have an equal right to participate.³⁹

As Kavanagh explains, however, this is an entirely different thing from having everyone's views equally considered.⁴⁰ The right to have one's views equally considered is a "result-oriented" perspective that is ultimately concerned with the justness of the outcome, as opposed to Waldron's focus on procedural egalitarianism which legitimates the outcome *simpliciter* by virtue of the political authority of the process used to arrive at that outcome.⁴¹

Waldron also criticises the model of judicial review for methodological reasons in that moral disagreements within society are artificially canvassed as 'questions of interpretation' of vaguely worded rights.⁴² Waldron takes issue with the practice of placing judges at the apex of such decision-making. He argues that given that judges are appointed and not elected, and their decision in a case is the result of the same anomalous 'majoritarian decision-making procedure', which is advanced as the basis for interrogating the will of the popular majority in the first place, as the institution of judicial review itself draws on such a procedure it necessarily lacks moral and political legitimacy.

Waldron's Four Assumptions Regarding Liberal Democratic Systems

Waldron is of the view that if a democratic culture is truly in place, the people have a responsibility to take other peoples' rights seriously and to decide the matter without a personal stake in the issue. He also notes, citing public deliberations on abortion and affirmative action in the United States, United Kingdom, New Zealand, Australia and Canada⁴³ that people genuinely care about the rights of others and will set aside their own interests in rendering a decision they believe to be in the best interest of the community.⁴⁴ According to him, the quality of these deliberations is indicative of the fallacy of the pes-

³⁸ Kavanagh has leveled an extensive critique against Waldron's prioritization of the "political decision-making of majoritarian institutions" above the outcomes of the decision-making process. See Aileen Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (n 36), p 452.

³⁹ *Ibid.* Waldron, *Law and Disagreement* (n 30), p 213. See also, Kavanagh, *ibid.*, p 453.

⁴⁰ Charles Beitz, 'Procedural Equality in Democratic Theory: A Preliminary Examination' in Roland Pennock and John Chapman (eds), *Nomos XXV: Liberal Democracy* (New York University Press, New York 1983), p 71.

⁴¹ Aileen Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (n 36), p 453.

⁴² Jeremy Waldron, 'The Core of the Case Against Judicial Review' (n 27), p 1369.

⁴³ Jeremy Waldron, 'The Core of the Case Against Judicial Review' (n 27), p 1401.

⁴⁴ *Ibid.*, pp 1360, 1398.

simistic view that popular majorities do not uphold the rights of minorities.⁴⁵ The viability of Waldron's challenge to judicial review rests on the veracity of these assumptions that he claims underlie a liberal democratic model of government. One of Waldron's main objections to judicial review therefore is its inherent assumption of the failure of or distrust in the democratic process.⁴⁶ Waldron does however, note that judicial review proceedings have resulted in landmark decisions such as *Lawrence v Texas*,⁴⁷ *Brown v Board of Education*⁴⁸ and *Roe v Wade*⁴⁹ in the face of oppressive legislation or unequal treatment.⁵⁰

According to Waldron, the objection to judicial review is clearest in the case of a well-functioning, albeit imperfect, liberal democracy. Here, four assumptions apply for his case against judicial review to hold.⁵¹ First, society has to have reasonably well-functioning democratic institutions which include a representative legislature elected through the regular exercise of universal suffrage for all adults. The legislative process is equipped with procedural safeguards, such as committee systems to scrutinize bills through multi-level deliberation, bicameralism⁵² and widespread public consultation processes before voting.⁵³ It regularly deals with issues of public interest and social and legal policies.⁵⁴

Second, the legal framework includes a reasonably well-functioning judiciary, members of which are unelected and appointed to uphold the rule of law. Thus, principles of judicial independence and powers of reviewability of executive action are key to enabling them to deliberate on important moral principles independently and impartially.⁵⁵ Judicial reasoning is characterized by reference to precedents for authority in similar prior cases.⁵⁶ Waldron emphasizes the importance of appointing

⁴⁵ *Ibid.*, pp 1349–1350.

⁴⁶ Jeremy Waldron, 'A Rights-Based Critique' (n 31).

⁴⁷ 539 US 558 (2003). *See also, ibid.*, p 1349.

⁴⁸ 347 US 483 (1954).

⁴⁹ 410 US 113 (1973).

⁵⁰ Jeremy Waldron, 'The Core of the Case Against Judicial Review' (n 27), p 1348.

⁵¹ Where these assumptions are met, Waldron argues that disagreements pertaining to rights ought to be resolved through the legislative mandate because that would best ensure that all voices are heard. Consigning these cases to an unelected judiciary for resolution is unsupported by the rights-based theory Waldron proposes as such unelected officials would lack the political mandate to make such decisions and therefore, should not be in a position to impose their ruling on the politically legitimated outcomes derived from the legislative process. *Ibid.* p 1360.

⁵² Waldron draws on New Zealand's experience as an example of how unicameral legislative arrangements, although they have worked well in the Scandinavian countries, can aggravate certain legislative pathologies. *See* Jeremy Waldron, 'Compared to What? – Judicial Activism and the New Zealand Parliament' (2005) NZLJ 441.

⁵³ Jeremy Waldron, 'The Core of the Case Against Judicial Review' (n 27), p 1361.

⁵⁴ Jeremy Waldron, 'The Core of the Case Against Judicial Review' (n 27), p 1361.

⁵⁵ *Ibid.*, p 1363.

⁵⁶ *Ibid.*, p 1364.

professionally eminent and well-educated judges to ensure a heightened awareness of the court's institutional limitations in a democratic setting.⁵⁷

Third, in the society Waldron envisages, respect for rights has been concretised in some official document such as a constitution or bill of rights.⁵⁸ The members of the society believe in the justness of majority rule but also value individual autonomy. He assumes that the society is serious in its commitment to rights, debating them constantly and having equal regard for all views to ensure protection against their encroachment.⁵⁹ They recognize that individuals may have certain interests that do not affect others and that these liberties should be protected despite their lack of political weightage.⁶⁰ Clearly, on this view, the case against judicial review does not entail an attack on or the lack of commitment to rights. Rather, the debate centers on the political morality of the *approach* to protecting these rights, i.e. institutionally through courts' review of legislation or through other procedures. Waldron also highlights a set of 'non-core cases societies' where the commitment to individual and minority rights is weak. He argues that his core case against judicial review does not apply to these societies.⁶¹

Fourth, there is an ongoing, good-faith disagreement about the content of rights and how these disputes are to be resolved despite the society's commitment to a core set of rights.⁶² As such, society as a whole should have a chance to revisit democratic decisions with a view to improving on them without having this prerogative usurped by the judiciary.

Talking Politics: Mapping the Realities of Democratic Practice

A number of criticisms can be made of Waldron's core position.⁶³ First, Waldron's commitment to democracy as the singular basis for authority and legitimacy of outcomes is questionable given the various obstacles that stand in the way of a genuinely enfranchised community. Numerous

⁵⁷ *Ibid.* This, according to Waldron, brings to the fore another paradox concerning the propriety of a majoritarian democratic procedure used to overturn another decision derived through just such a majoritarian democratic procedure. See *ibid.*, pp 1386–1394.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, p 1364.

⁶¹ *Ibid.*, p 1366.

⁶² *Ibid.* See also, pp 1367 and 1369.

⁶³ Each of the arguments warrant a more substantial critique. However, for present purposes, this section confines itself to the discussion of the weaknesses in Waldron's case with a view to simply highlighting that the conditions underlying his presumption against the propriety of judicial review do not apply in the Hong Kong context. Therefore, this section only presents an overview of the main arguments against Waldron's core assumptions.

scholars have noted the imperfections of a democratic model of government, noting that minority voices go unheard unless a specific process which requires equal or greater weight to be given to their views is in place.

Second, Waldron's reference to non-core cases is revelatory as it is idealistic. What he terms as 'non-core cases countries' are those where a self-interested majority makes a decision without adequate concern for individual rights and autonomy. It is arguable whether these can really be referred to as 'non-core case countries'. These circumstances are the norm even in well-established democracies where there is a rights-oriented culture generally. Finally, even Waldron concedes that where his four assumptions are not met, the case against judicial review needs to be reconsidered in light of those weaknesses.⁶⁴

This is not to say that there are no fully functioning democracies. However, most functioning democracies currently suffer from the triple vices of a lack of representativeness (in Beitz's terms of substantive representation that provides an equal opportunity to influence democratic outcomes), lack of quality deliberation (the democratic deficit) and the counter-majoritarian difficulty, or at least, some combination of these factors. In these circumstances, the reality is sadly not one of a less than perfect democratic practice, but rather, a fairly simplistic application of the principles of democratic theory. This fact depletes the overall authority and thereby, the legitimacy of democratic outcomes based on majority-rule, particularly where minority rights are at issue. The risk of the tyranny of the majority is far more pronounced in these circumstances. Finally, although there is indeed persistent disagreement within the community about the content of certain rights, it lacks an accompanying process that is aimed at a genuine resolution of the issue. Rather, parties have been known to stick to their original positions and sometimes, adopt extreme positions to emphasise the extent of their disagreement and refusal to compromise. In these circumstances, an impoverished discourse and politics often end up dictating the terms of the debate.

Reconceptualising the Role of the Courts in Hong Kong

The Hong Kong Legal System and Democratic Legitimacy

Waldron's core case against judicial review is based upon a very specific conception of society and its institutional framework. Waldron acknowledges that there may be a need for judicial review where the four

⁶⁴ See, Jeremy Waldron, 'The Core of the Case Against Judicial Review' (n 27), p 1366.

assumptions are not met⁶⁵ to militate against the risks of injustice.⁶⁶ This Section considers whether Waldron's objections to judicial review apply to Hong Kong.

Hong Kong has a unique constitutional history. Whilst its political framework is set out by the HKBL, Hong Kong has inherited various legal traditions from its common law heritage as a former colony. The HKBL entrenches the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights⁶⁷ and protects a variation of the rights enshrined in the two documents in Chapter III. Moreover, the HKBORO, based largely on the ICCPR, supplements this armory of provisions. Despite this extensive commitment to an array of internationally protected human rights, Hong Kong is not yet a democratic society where citizens can exercise the right of universal suffrage equally. Hong Kong's Legislative Council (LegCo) is a body comprised of representatives drawn from a combination of procedures. Only half of its members are directly elected, whereas half of them are elected under a functional constituency system based on professional and business sector representation. This system effectively entitles some people to two votes entrenching the muscle of powerful elites in setting the agenda for law reform. The lack of progress in Hong Kong's democratic reform has come under fire locally and internationally for failing to achieve the constitutionalized targets for universal suffrage in Hong Kong by 2007. One only needs to consider the rising number of protests in Hong Kong as indicative of the desire for inclusion in politics and the governability crisis the city faces.⁶⁸

Pursuant to the HKBL and Hong Kong's unique one-country-two systems set-up, Hong Kong is run by an executive-led government who is also the primary proposer of legislation. Under this system, a fee is imposed on private members seeking to introduce bills into LegCo.⁶⁹

⁶⁵ In fact, Waldron suggests that even if one of these assumptions is not met, then the arguments against judicial review may not hold. *Ibid.*, p 1360.

⁶⁶ *Ibid.*, p 1359.

⁶⁷ HKBL, Art 39.

⁶⁸ See Sonny Lo, 'Oppositional Protests, Citizenship and Governability: The Cases of Hong Kong and Macao, Conference Paper, presented at the *International Conference on Governance and Citizenship in Asia: Paradigms and Practices*, 18–19 March 2011. Draft on file with author. Recent protests against the West-Rail Link project development requiring the evacuation of residents of Choi Yuen Tsuen and the time it has taken the government to reform the rules pertaining to the calculation of saleable area of flats to address concerns that developers are exploiting buyers of flats by including unusable common area in these calculations leading to price inflation that is incommensurate with net usable area of the flat are significant instances showcasing the short shrift treatment of minority interest groups seeking to mobilise action through LegCo and their persistent defeats in successfully engaging these processes to express their concerns.

⁶⁹ Private Bills Ordinance (Cap.69) s 3(1).

These institutional features are responsible for the significant under-representation of minority voices in politics. In light of this, the practicality of and the burdens associated with the mobilization of legislative reform on specific issues are apparent from a rough survey of the fate of minority-related bills tabled in LegCo. The likelihood of proposals concerning minorities meeting with success is circumspect in light of the stronghold of functional constituencies and pro-government personnel within LegCo.⁷⁰ The lack of a democratically elected legislature and an executive head elected by a small circle election strengthens the argument for strong-form judicial review in cases where minority rights are at a heightened risk of oppression. This is a formidable obstacle given the lack of universal and equal suffrage and clearly dislodges Waldron's first assumption in his core case against judicial review. A case in point illustrating the fundamental obstacles that stand in the way of reasoned and responsible decision-making of the kind Waldron refers to is the tumultuous process that resulted in the passage of the Race Discrimination Ordinance⁷¹ to protect ethnic minorities in Hong Kong against discrimination after nearly two decades of lobbying the need for such legislation despite Hong Kong's status as a party to the International Convention for the Elimination of All Forms of Racial Discrimination.⁷² The circumstances surrounding the passage of the RDO are depictive of the highly politicized climate of Hong Kong politics when minority rights are the subject of deliberation.⁷³ Indeed, the initial rounds of public consultations and the government's representation of the public's views on the need for such legislation highlights the deeply rooted nature of prejudice against certain groups in Hong Kong. This bodes ill for hopes of quality deliberation on minority rights.

Hong Kong fails the test of the basic assumptions Waldron applies to his 'core case against judicial review'. The first assumption relating

⁷⁰ Numerous examples signal the power of these two groups to block out reform relating to areas that are not considered to be directly related to the interests of these groups. Moreover, where functional constituency members find the bill to be of no interest to their constituents, members have been known to vote in the negative, as opposed to abstain from voting. In these circumstances, legislation concerning minority interests is often voted down without good reason. This is illustrative of the 'tenuous' commitment to rights that Waldron referred to.

⁷¹ Hereinafter "RDO." Despite the passage of the ordinance, numerous exemptions apply to the government, effectively undermining the very need for such an ordinance to guard against discrimination in the public sector. RDO.

⁷² Adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD).

⁷³ For example, the Domestic Violence Amendment Bill seeking to include same-sex couples within the remit of the constituents of the Domestic Violence Ordinance (Cap 189) faced tremendous opposition from religious groups and government camps initially. See Puja Kapai, 'The Same Difference: Protecting Same-Sex Couples under the Domestic Violence Ordinance' *Asian Journal of Comparative Law*: Vol. 4: Iss. 1, Art 9.

to the need for reasonably well-functioning democratic institutions, including a representative legislature, is almost central to Waldron's case against judicial review. His point is that once you have such a system, what would justify reviewing or overriding the outcomes of such a democratic process through the use of a body which has been set up non-democratically?⁷⁴

Reflections on the W Decision

The case of *W* and the failure of laws to address the needs of Hong Kong's growing transgender community are illustrative of the prejudice and indifference towards the needs of minorities. The lack of a coherent policy to address the needs of this group and those suffering from gender identity disorders (GID) with a view to ensuring equal treatment is depictive of the inherent failings of a system tailored to the values and needs of the majority.⁷⁵ Despite numerous calls for the government to allow rectification of biological sex on the birth register and certificate, the government's failure to align its medical policies with the natural social and legal consequences of sex reassignment surgery is an example of the oppressive nature of majority politics. This, in turn, has translated into inaction in terms of the development of suitable law and policy.

W's challenge against the status quo represents a call for progress on this front. In her claim, *W* relied on the fundamental rights to marriage and privacy. In rendering his judgment against *W* on both counts, Cheung J considered and applied *Corbett*, a High Court decision interpreting and applying similarly worded legislation in England as a matter of binding or persuasive precedent in Hong Kong. *Corbett* emphasized biological sex as the determinant of sex for the purposes of marriage. Although Cheung J conducted an extensive review of case law from other jurisdictions and their reception towards *Corbett*, he held that *Corbett* continued to be applicable to Hong Kong given that insufficient changes had occurred since that decision to warrant a change in approach. The social consensus on whether the ordinary and plain usage of the terms

⁷⁴ Waldron, "The Core of the Case Against Judicial Review", (note 27) p 1364.

⁷⁵ The fact that the Hong Kong government has recognized the need for medical and mental health needs of people suffering from GID does not go far enough to help individuals deal with the social implications of their changing physical and mental conditions and how they affect access to certain rights. The state of legal limbo with regard to a vast array of such rights is unacceptable in light of Hong Kong's international commitment to human rights and the strides that the courts have taken to safeguard these rights in the past.

'man', 'woman', 'female' and 'male' included references to post-operative transsexuals in their acquired gender was dispositive of the question of interpretation according to Cheung J.⁷⁶ That the more recent authorities⁷⁷ within judicial knowledge did not serve as compelling reasons to determine the issue differently is indicative of the overriding nature this consideration.

However, Cheung J's emphasis on social consensus to determine whether the terms include references to the post-operative transsexual male or female to assess the content of the constitutional right to marriage is flawed for three reasons. First, Hong Kong's legal position on transsexuals is not the result of a democratic decision on the question of factors that are determinative of sex for the purposes of the MO and the MCO, nor has the content of the right to marriage pursuant to the Art 37, HKBL or Art 19, HKBORO, been the subject of such democratic deliberation. Instead, Hong Kong has merely inherited the position that was prevalent in the United Kingdom at the time of the handover in 1997 by virtue of its duplication of the equivalent legislation and case law interpreting the relevant sections that have come up for decision in the case of *W*. This law was clearly not drafted with transsexuals and their unique predicament in mind. For both these reasons, to the extent that the law excludes them, there is a legislative gap that needs remedying. Pending such legislative reform, the argument that judicial reinterpretation of the scope of the relevant sections would undermine democratic legitimacy is not as strong as it might be where the Hong Kong people had specifically considered the issue as part of its legislative process and determined the issue one way or another.

The requirements that underpin the validity of a marriage in law are influenced by their historically influenced origins in the ideals of a Christian marriage. The relevance of social consensus in this context is certainly important in light of marriage being an institution that confers a social status to individuals. It is also therefore, unavoidable that this makes marriage and its characteristics a question of public interest and policy. However, in light of changing social, moral and cultural values relating to marriage and the advance of medicine today, these characteristics must be revisited to determine the appropriate remit of the law⁷⁸ as

⁷⁶ *W v Registrar of Marriages* (n 1), para 215ff.

⁷⁷ *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603, *Bellinger v Bellinger* [2002] Fam 150 (CA), *Attorney-General for the Commonwealth v Kevin* (2003) 172 FLR 300, High Court of Australia and *Goodwin v United Kingdom* (2002) 35 EHRR 447 from the European Court of Human Rights.

⁷⁸ This broadly defines Thorpe J's view as the dissenting Judge in the *Bellinger v Bellinger* decision in England's Court of Appeal (n 77).

well as the basis for excluding certain groups from its purview. This is a matter of particular importance when concerning the denial of a constitutional right.

The merits of opting for interpretation rather than fashioning a remedy in the nature of the *Koo Sze Yiu v Chief Executive*⁷⁹ where a judicial moratorium was issued against the exercise of executive powers to order covert surveillance in light of the then unconstitutionally exercised powers to allow the government to propose suitable legislation and for it to be enacted in LegCo relates to the second flaw in Cheung J's reasoning. Given that Hong Kong's legislature is not fully representative and the power of initiating legislation is skewed in favour of those with the political and economic clout to do so, it is unlikely that the issue will be tabled before the LegCo any time soon without requisite government support. Moreover, even if it is tabled, it is unlikely to receive a fair deliberation in the first instance given the conservative nature of political voting in LegCo. This is demonstrated by the difficulties experienced in the passage of the RDO and the Domestic Violence Amendment Bill.⁸⁰ These issues go directly to Waldron's third and fourth assumptions, requiring societal commitment to the interests of minorities generally and a persistent but genuine disagreement regarding moral principles which the community will revisit.

These examples show the third assumption is clearly endangered by the unequal representation of citizens in the political process and the lack of quality deliberation on the needs of underrepresented groups. This filters into the nature of persistent disagreement on moral principles, which, though prevalent in Hong Kong, do not necessarily meet the standards of genuine concern for minority rights and deliberation based on reasoned principles. The political authority of legislative resolutions with respect to problems of this nature is therefore, somewhat questionable. Hong Kong society has not only demonstrated a failure for its appreciation of the wrongfulness and the harmful impact that stereotyping can have on the lives of individuals concerned, but has also revealed a deep

⁷⁹ (2006) 9 HKCFAR 441. This remedy has subsequently been applied by Reyes J in *Ocean Technology Ltd v Secretary for Justice* [2009] 2 HKC 157 where he held that a magistrate may lawfully suspend the effect of his judicial determination of a law's unconstitutionality pending appeal.

⁸⁰ Hereinafter, DVAB. The DVAB, which concerned the expansion of the remit of the Domestic Violence Ordinance (Cap189) to apply to couples in a same sex relationship was met with considerable resistance from religious and other groups. It took several rounds of deliberation and negotiation to ultimately pass the amendment. The discussions revealed the misconceptions in the community about how legislation protecting such a person in a same-sex relationship is tantamount to a "public endorsement" of same-sex marriage. For further information on the debate surrounding the passage of the bill, see Puja Kapai, 'The Same Difference: Protecting Same-Sex Couples under the Domestic Violence Ordinance' (n 73).

attachment to values it characterises as the ‘norm’ and therefore, reflects an inherent bias against nonconforming individuals and groups. The fact that the lobbying efforts regarding the protection against violence for victims from a same-sex relationship met with opposition on the grounds that such protection indirectly endorsed same-sex marriage through law only goes to show the extent to which the majority is threatened by the winds of change in social values. Whilst that is understandable, it does not and cannot serve as a legitimate and rational argument against an ‘updating’ interpretation of a constitutional right, which would have been the more appropriate course in *W*.

Third, the lack of political and therefore, moral legitimacy of the legislative process necessarily means that any recourse to evidence of a general social consensus as traditionally thought to be manifested in legislative directives is missing. Any other evidence of social consensus in this regard that the judge may have been minded to consider if it were produced is unlikely to be forthcoming unless the state of political representation in Hong Kong is improved. This makes the judge’s reliance on social consensus inherently circular. Ultimately, interpretive approaches are subject to pull and push factors. In this case, the push factor would have been the need for a more suitable mechanism to respond to the silenced minority voices and to use the judicial review process to trigger legislative reform. Although Cheung J does indicate the need for such a comprehensive review of the rights of transsexuals in Hong Kong in his judgment, unfortunately, this ‘soft’ reprise is disappointing and undermines the rights of minorities by not going far enough. The Judge could instead have relied on *Koo Sze Yiu* to suspend the effect of declaring the sections unlawful to allow legislative reform within a certain period of time. Alternatively, Cheung J might have opted for a *Leung*-style⁸¹ remedy of an updating construction to read into the constitution or the HKBORO the necessary meaning as Hartmann J did in his reading of ‘sex.’⁸²

Contextualising Judicial Review in the Hong Kong Context

Judges are not superior moral arbitrators. They are legal experts. Judges are in the best position to assess the political legitimacy of the law concerned given their experience and skills. Having a sound understand-

⁸¹ *Leung v Secretary of Justice* [2006] 4 HKLRD 211.

⁸² In the *Leung* case, the court read protection against discrimination on grounds of ‘sex’ as including ‘sexual orientation’.

ing of the importance of certain values in the constitution and the legal system generally, a judge is in a position to better understand the complexities of the issues brought to light in court. He has an additional perspective which complements what the legislature views to be salient considerations in a matter of legal regulation and beyond what a claimant understands to be the role of the law. In these circumstances, it is all the more incumbent that judges assume the responsibility of scrutinizing the morality of legal norms in light of an under-representative political framework.

The peculiarities of Hong Kong's political framework which inherently limit democratic input in legislative proposals by virtue of the legislature's unrepresentativeness and procedural flaws that enable powerful groups to dominate legislative agenda, call for the court to move away from a blanket practice of institutional deference given the impoverished democratic authority of legislative decisions. Each case for judicial review ought to be carefully scrutinized with a view to its unique context to determine whether the status quo is the result of institutional inertia, the lack of adequate channels for minority voices to be heard or taken seriously or the result of a protracted political debate characteristic of an oppressive majority.

In these circumstances, the court has a distinct role that is cut out for it. For many people who find themselves excluded by the law, the court is usually their only and often, last recourse for protection. The decision rendered is likely to have a lasting impact given the finality of the adjudicated outcome. This calls for the judge to adopt a different role that reflects an understanding of the lack of other political recourse for the complainant and the responsibility that courts shoulder in these cases.

Indeed, the judicial obligation to declare legislation that is oppressive or discriminatory unconstitutional is triggered in these cases and is more morally compelling than the political illegitimacy of judicial activism that holds a judge back from substituting the legislature's view with his own.

In view of the critique of Waldron's core assumptions, the process of judicial review in fact opens up a previously unavailable space for a more guided deliberation of the issues that affect the interests of the party seeking judicial review and the overall interests of society. The authority for the decision rendered as a result of this process of guided deliberation is derived from the avenues for democratic deliberation and public discourse that the process generates such as the public gallery, the press, schools and civil society organisations. The outcome of the judicial process can be seen as a form of democratic experimentalism⁸³

⁸³ Michael C Dorf & Charles F Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98 *Colum. L Rev.* 267.

and a component of the very same continuum of ongoing but genuine disagreements which Waldron alludes to as necessary conditions for a functioning democratic society that revisits its previous decisions from time to time.

Just as the democratic process does not include every person directly in the decision-making process relating to every law but engages citizens at regular intervals to elect representatives who then act as proxies in the democratic process, courts are but one of the many sites of ongoing moral disagreements where such deliberation occurs. Second, the majority-minority dynamic which often results in the marginalization of minority voices makes judicial review proceedings a welcome avenue as a form of substantive representation to equally influence the outcome of democratic deliberation. Although the moment for decision-making might have passed, judicial review presents itself as the singular opportunity to help equalize the playing field for deliberation, authority and process- and results-oriented legitimacy. Moreover, such proceedings often serve as a forum for raising awareness to impress upon majorities the importance of taking minority rights seriously.

For all these reasons, the role of the judge in constitutional interpretation exercises hinges on the nature of the right in question, its history in society and the context in which legislative processes and political decision-making operate and the implications for individual autonomy if the right is denied. For this reason, purely process-oriented and institutional approaches to determining the appropriate role of the court are fundamentally problematic and undercut the very arguments against judicial review that are based on liberal democratic theory.

Reeves argues that what it is referred to as the 'umpire model' of judicial reasoning is a gross oversimplification of judicial responsibility.⁸⁴ He questions whether the judge has a moral obligation of fidelity to the law.⁸⁵ Judicial ethics have often taken this position for granted and have primarily based this obligation on the judicial oath and the holding of this office in trust.⁸⁶ He argues that where there is a risk of a serious moral wrong likely to be perpetrated by the polity, there is a judicial responsibility to account for moral norms which may or may not be incorporated into the legal corpus and such considerations ought to feature as part

⁸⁴ Anthony Reeves, 'Do Judges Have an Obligation to Enforce the Law?: Moral Responsibility and Judicial Reasoning' (2010) 29 *Law and Philosophy* 159, p 161.

⁸⁵ Anthony Reeves, 'Do Judges Have an Obligation to Enforce the Law?: Moral Responsibility and Judicial Reasoning' (n 84), p 160.

⁸⁶ Melvin Eisenberg, *The Nature of the Common Law* (Harvard University Press, Cambridge MA 1988), p 160.

of the judicial reasoning and determination in such a case.⁸⁷ HLA Hart himself identified a gap in positivist theory in stating that, ‘an essential connection between law and morals emerges if we examine how laws, the meanings of which are in dispute, are interpreted and applied in particular cases.’⁸⁸ This gap opens up routinely in judicial adjudication of issues where the legal meaning of particular text is in dispute. In these hard cases, judges may need to account for moral considerations, thereby blurring the distinction between law and morality.⁸⁹ Reeves concludes that judges do not have a special obligation of fidelity to the law which justifies their oversight of the moral quality of the legal norms being enforced.⁹⁰ The fact that the rules determined by the legislature were derived of a democratic process is not a good enough reason to relieve judges of the responsibility to ensure that those rules themselves are politically legitimate.⁹¹

Considerations about the separation of powers and encroachment beyond predefined boundaries of political institutions are only applicable where there is in fact a democratic government that maintains a strong commitment to inclusive, democratic and participatory government.⁹² In the case of Hong Kong, this political climate is yet to materialise. Reliance on the political legitimacy of an elusive concept of ideal democratic conditions that do not exist in Hong Kong should not override the judicial duty to inquire into the moral propriety of the law subject to review where there is a risk of fundamental rights being infringed.

On both counts therefore, it appears that judges in fact *ought* to account for the morality of the legal norms they enforce for their decision to be politically legitimate. Indeed, Hart very much saw judges as needing to make important judgments about social policy in difficult cases.⁹³ Ultimately, even democratic will must be kept under check with certain immutable principles. This requires the entrenchment of certain

⁸⁷ *Ibid.*

⁸⁸ HLA Hart, ‘Positivism and the Separation of Law and Morals’ reprinted in HLA Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press Oxford 1983), pp 56–57.

⁸⁹ David Dyzenhaus, ‘Judicial Obligation and the Rule of Law’ in David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (OUP, Oxford 2010), p 11.

⁹⁰ Melvin Eisenberg, *The Nature of the Common Law* (Harvard University Press, Cambridge MA 1988), p 162.

⁹¹ Anthony Reeves, ‘Do Judges Have an Obligation to Enforce the Law?: Moral Responsibility and Judicial Reasoning’ (n 84), p 166.

⁹² See *ibid.*, Anthony Reeves, ‘Do Judges Have an Obligation to Enforce the Law?: Moral Responsibility and Judicial Reasoning’ (n 84), p 166. Indeed, this is one of Waldron’s four assumptions in his core arguments against judicial review. See, Jeremy Waldron, ‘The Core of the Case Against Judicial Review’ (n 27), p 1366.

⁹³ HLA Hart, ‘Positivism and the Separation of Law and Morals’ reprinted in HLA Hart, *Essays in Jurisprudence and Philosophy* (n 88), pp 63–70.

principles, procedural and substantive in nature to facilitate more mature decision-making in the end.⁹⁴

However, this begs the question of what these ‘extra-legal’ moral norms are and how and when are they to be applied.⁹⁵ The response at least for Hong Kong is supplied by an entrenched bill of rights in the HKBL. The HKBL and the HKBORO provide the meta-level or higher order principles that judges ought to incorporate into their reasoning as a legitimate basis for inferring the content of other rights.

Conclusion

Judges must be wary of stepping into the realm of policy. However, the fact that rights that are attendant upon the conferral of the legal status of marriage, for example, housing, welfare, succession, etc., are activated and have not been legislated specifically with this group of people in mind is not a rational reason based on which to deny a person the right to marriage. Nor can the absence of legislative consideration of such groups be grounds for inferring the unavailability of the essence of the right to marriage.⁹⁶ Although the policy-aspects are clearly matters that are necessarily within the legitimate authority of the legislature, they should not affect the substantive right of access to the institution of marriage.

The quest for social consensus in Hong Kong is likely to be an elusive pursuit given its present democratic deficiencies. Furthermore, although Cheung J’s call for a government-initiated consultation within the community on the question of sexual minorities is laudable, it does not in anyway impose upon the government a duty to do so in fact. Furthermore, as Cheung J notes, the advances in society over the course of the last forty years may simply have opened up a legislative gap that was unapparent before this case.⁹⁷ However, he stops short of using updating or remedial interpretation techniques to fill that gap, leaving the community of post-operative transsexual persons in a continued state of legal limbo until the government, the legislature and then, society decides their fate. Certainly, there must be something problematic, indeed oppressive, about resigning the fate of a powerless group to the whims of

⁹⁴ Larry Alexander, ‘Introduction’ in Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (n 26), p 13.

⁹⁵ Reeves raises this question at the end of his account of the judicial obligation of legal enforcement in Anthony Reeves, ‘Do Judges Have an Obligation to Enforce the Law?: Moral Responsibility and Judicial Reasoning’ (n 84), p 185.

⁹⁶ This view is echoed in *Goodwin v United Kingdom* (n 77), para 103.

⁹⁷ *W v Registrar of Marriages* (n 1), paras 158–159.

the powerful groups and tasking them with the moral duty to ensure that minority needs and interests are protected. Hong Kong's historical record of dealing with minority rights does not bode well for such an approach.

In light of the social advances and the international support for the position of recognizing transsexuals in their acquired sex for the purposes of marriage, Cheung J's search for an emerging international consensus should have been duly satisfied.⁹⁸ However, he set the bar even higher, seeking an emerging international consensus on the question among state parties to the ICCPR. This instrument is binding on almost all countries in the world, which represent a myriad of traditions, cultures and values. Given that even the more 'routine' rights that are constantly the subject of litigation in the countries concerned, for example the freedom of expression and religion or the right to equality have thus far failed to find an emerging international consensus on these questions, this is indeed a high, lest I say, unachievable, quest for consensus. In these circumstances, it is arguably the wrong measure for the determination of the content of a constitutional right. In any event, Cheung J went on to state that the fact that such consensus was emergent in China and Singapore, culturally similar to Hong Kong, was not sufficient because it failed to show a sufficient nexus with the likely social views on the question in Hong Kong. This suggests that even if an international consensus were to emerge, the only satisfactory evidence in favour of inferring such a right to marriage to include transsexuals in their acquired sex would be social consensus in Hong Kong.

This is the inherent circularity that afflicts the argument of democrats staunchly opposed to any version of judicial review. It cannot be right that the interpretative scope of a provision in a piece of legislation is limited by what those who supported the enactment of the law say is within the intended scope of the original terms of the legislation in the first place. This is all the more so when the issue concerns the content of a constitutional right and one which has been internationally considered and expanded upon in response to social and scientific advances.

As Reeves notes, judges are at least in a position to assess whether the legal processes actually exhibit the kind of democratic law-making characteristics that warrant deference to that institution or government. If these features fail to adequately uphold the will of the people, then judges are in a position to reconsider the degree of deference warranted. Furthermore, even where the practice is such that would warrant

⁹⁸ *Ibid.*, paras 95–103.

deference in most cases, the judges are still required to determine whether certain regulations are politically legitimate under the constitution.⁹⁹ The logical extension of this is that even the most democratically organized government may enact law that is politically and morally questionable. As such, it cannot be that simply because that is what has been democratically ordained, it must be enforced.¹⁰⁰ Indeed, that is the very reason that courts are in place to scrutinize the legitimacy of the norms enacted. The judge cannot be bound unquestionably by the duty to enforce the law in its current state at all times. Indeed, in these situations, the judge's 'social' or 'institutional' role is outweighed by other ethical considerations which warrant a determination that rectifies the indiscretion or oppression.¹⁰¹

What Cheung J might have done is to interpret the provisions as he has in accordance with the principles of statutory interpretation. However, in order to observe the limitations of his own institutional role, he could have issued a declaration of incompatibility with the constitutional right to marriage. This would have put the ball squarely in the hands of the executive and legislative branches to take the next course of action with a view to rectifying the legislative provisions. This could provide a more compelling trigger for democratic debate and deliberation and perhaps one of an improved quality in light of the clear message the judgment sends.

It is no doubt important to bear in mind the relationship between the branches of government and the implicit dance they are engaged in as they seek to govern society in accordance with the norms that have been agreed upon and in deference to each branch's demarcated realms of authority. We abide by the rules of the dance so as to avoid the chaos that may result if one of the branches falls out of step and the impact this may have on the integrity of the performance. At the same time, however, it is equally critical that we do not overlook some of the built-in failings of the techniques we employ and their ability to undermine the beauty of the dance as a whole.

With a view to ensuring that justice is not held ransom to the preferences of the majority, the courts must step in to protect the marginalized. In these circumstances, the courts ought to be conceptualized as an arena for democratic experimentalism and deliberation of the issues at a level of heightened scrutiny. It goes without saying, that in *W*, the

⁹⁹ Anthony Reeves, 'Do Judges Have an Obligation to Enforce the Law?: Moral Responsibility and Judicial Reasoning' (n 84), pp 166–167.

¹⁰⁰ *Ibid.*, p 167.

¹⁰¹ *Ibid.*, p 179.

court had just such an opportunity which has been missed. A merely formal approach to equality and the rule of law may only lead us to outcomes that may be *necessary* for justice but not ones that are *sufficient* for justice.¹⁰² It is hoped that the Court of Appeal will deliver an outcome that meets the objectives of sufficient justice in light of the heightened responsibility of the courts in these cases.

¹⁰² *Ibid.*, p 184.