

立法會

Legislative Council

LC Paper No. LS33/08-09

Paper for the Panel on Welfare Services

Information Note on the definition of "marriage" and "family" in the legislation of Hong Kong

At the meeting of the Panel on Welfare Services on 8 December 2008, the Panel discussed the Administration's proposal to amend to the Domestic Violence Ordinance (Cap. 189) (DVO), and a member requested the Legal Service Division to provide information on whether there is any definition of "marriage" and "family" in the legislation of Hong Kong. This paper sets out the information requested.

2. Before reviewing the definition of "marriage" and "family" in the legislation of Hong Kong, it may be worthy to note that freedom of marriage and right to found a family are guaranteed by the Basic Law and the Hong Kong Bill of Rights Ordinance (Cap. 383) (BORO). Article 37 of the Basic Law provides that *"the freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law."* Article 19 of the Hong Kong Bill of Rights also refers to family and marriage, it provides that:-

- "(1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*
- (2) The right of men and women of marriageable age to marry and to found a family shall be recognised.*
- (3) No marriage shall be entered into without the free and full consent of the intending spouses.*
- (4) Spouses shall have rights and responsibilities as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."*

3. Despite their references to "marriage" and "family", the Basic Law and the BORO do not contain any definition of these two terms. The provision *"the right of men and women of marriageable age to marry and to found a family"* in article 19(2) of the Hong Kong Bill of Rights is the same as that in article 23(2) of the International Covenant on Civil and Political Rights (ICCPR). There is a decision relating to *"the right of men and women of marriage age to marry"* under article 23(2) of the ICCPR made by the Human Rights Committee of the United Nations (UNHRC) in the case of *Ms. Juliet Joslin et al. v. New Zealand (Communication No. 902/1999, U.N. Doc. A/57/40 at 214 (2002))*. In that case, Ms. Juliet Joslin's essential claim was that the Covenant obligates States parties to confer upon homosexual couples the capacity to

marry and by denying such capacity the State party violates their rights under articles 16, 17 and 23 of the ICCPR. The UNHRC was of the view that:-

"... article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term "men and women", rather than "every human being", "everyone" and "all persons". Use of the term "men and women", rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.

8.3 In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant ..."

Accordingly, the UNHRC decided that the facts before it did not disclose a violation of any provision of the ICCPR.

4. The UNHRC made the said decision under the Optional Protocol to the ICCPR. Article 1 of the Optional Protocol authorises the UNHRC *"to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant."*; whilst article 5 of the Optional Protocol stipulates, inter alia, that the UNHRC shall consider "communications" received under the Protocol in the light of all written information made available to it and shall forward its views to the State Party and to the individual concerned. Members may wish to note that the UNHRC is not a court of international law, and under the Optional Protocol, the UNHRC only has competence to receive and consider the "communication" from individuals who claim to be victims of a violation of any of the rights set forth in the ICCPR by a State Party which is also a party to the Optional Protocol. Hence, the above decision of the UNHRC is not binding on the courts in Hong Kong. It only reflects the UNHRC's view that a mere refusal to provide for marriage between homosexual couples would not violate their rights under the ICCPR. When the courts of Hong Kong come to construe article 19(2) of the BORO in future, they may consider the grounds raised by the UNHRC in the decision without being bound by the decision.

Definition of "Marriage" in Legislation of Hong Kong

5. Section 40 of the Marriage Ordinance (Cap. 181) (MO) provides that:-

"(1) Every marriage under this Ordinance shall be a Christian marriage or the civil equivalent of a Christian marriage. (2) The

expression "Christian marriage or the civil equivalent of a Christian marriage" implies a formal ceremony recognized by the law as involving the voluntary union for life of one man and one woman to the exclusion of all others. "

The expression of a "Christian marriage" in section 40 of the MO is based on the common law definition in the English case of *Hyde v Hyde (1866) LR 1 P&D, at p.133*. In *Hyde v Hyde*, Lord Penzance said that "*I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.*" This definition has been adopted in the MO, and reflects that a marriage is a formal, monogamous and heterosexual union for life. In another English case *Mordaunt v Mordaunt (1870) LR 2 P & D 109 at 126*, Lord Penzance further remarked that:-

"Marriage is an institution. It confers a status on the parties to it, and upon the children that issue from it. Though entered into by individuals, it has a public character. It is the basis upon which the framework of civilised society is built; and, as such, is subject in all countries to general laws which dictate and control its obligations and incidents, independently of the volition of those who enter upon it."

The principle stated by the court in this case is that a marriage has a public character and in this light is subject to laws which dictate and control its obligations and incidents independently of the volition of the parties to it. In Hong Kong a marriage is required to be celebrated and registered in accordance with Part 5 and Part 6 of the MO.

6. Apart from the definition in the MO, the Marriage Reform Ordinance (Cap.178) (MRO) and the Matrimonial Causes Ordinance (Cap. 179) (MCO) also set out the heterosexual nature of a marriage. Section 4 of MRO provides that:-

"Marriages entered into in Hong Kong on or after the appointed day shall imply the voluntary union for life of one man with one woman to the exclusion of all others and may be contracted only in accordance with the Marriage Ordinance (Cap.181)".

According to this section, a marriage under the MO is the only form of marriage that persons can enter into in Hong Kong on or after 7 October 1971 (the appointed day). Moreover, section 20 of the MCO stipulates that a marriage shall be void if, inter alia, the parties are not respectively male and female.

Definition of "Marriage" and the DVO

7. Section 2(2) of the DVO stipulates that "*subject to section 6(3) this Ordinance shall apply to the cohabitation of a man and a woman as it applies to marriage and references in this Ordinance to "marriage", "matrimonial home" and*

"spouse" (except in section 3A(2)) shall be construed accordingly." As it now stands, the effect of section 2(2) is extending the injunctive relief made available to married persons by the DVO to couples in cohabitation. In itself section 2(2) should have no implication to other ordinances relating to marriage. As the DVO does not provide for a definition of marriage, when construing the terms "marriage" and "parties to marriage" in the DVO, it could be reasonable to argue that the meaning of marriage may have to be construed in the context of the MO and the MRO.

Definition of "Family"

8. A clear definition of "family" is not provided in any legislation of Hong Kong. The UNHRC has stated (in *General Comment 19* of the Human Rights Committee of the United Nations) that "*the Committee notes that the **concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition.** However, the Committee emphasises that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23...*" (emphasis added)

9. In absence of a definition in the legislation, it would be reasonable to construe "family" in accordance with its plain and ordinary meaning in the context of the relevant legislation. According to Webster's Dictionary, "family" means a social unit living together, primary social group, parents and children, people descended from a common ancestor or a person having kinship with another or others.

10. In Hong Kong legislation, the term "family" may mean various groups or combination of people in the context of various ordinances. For example, section 15 of the New Territories Ordinances (Cap. 97) (NTO) provides that "*whenever any land is held from the Government under lease or other grant, agreement or licence in the name of a clan, **family** or t'ong, such clan, **family** or t'ong shall appoint a manager to represent it...*" (emphasis added) In the context of section 15 of the NTO, "family" is ranked in parallel with the "clan" and "t'ong" which usually refer to a large group of people related by blood with a clan head and a long history of settlement in villages at the New Territories. Therefore, in such context, "family" in section 15 should imply a group of people related by blood or an extended family with a common ancestor.

11. Another example may be found in the Family Status Discrimination Ordinance (Cap. 527) (FSDO), "family status" means the status of having responsibility for the care of an immediate family member. In that Ordinance, an "immediate family member" means "a person who is related to another person by blood, marriage, adoption or affinity". In the context of the FSDO, "family" is likely to imply an immediate or a nuclear family but not a large group of people or an extended family as in the NTO.

12. Despite the absence of a definition of "family", some ordinances have provided a definition of "member of the family". For instance, section 3 of the Employees' Compensation Ordinance (Cap. 282) (ECO) defines "member of the family"

as "a person who has any of the following relationships in respect of the employee concerned, whether by blood or an adoption specified in subsection (2)-

- (a) a spouse or cohabitee;
- (b) a child;
- (c) a parent or grandparent; or
- (d) a grandson, granddaughter, stepfather, stepmother, stepson, stepdaughter, son-in-law, daughter-in-law, brother, sister, half-brother, half-sister, father-in-law, mother-in-law, brother-in-law, sister-in-law, and child of a brother or sister of the whole blood, any of whom has been living with the employee as a member of the same household and has been so living for the period of 24 months immediately preceding the accident concerned;"

In the ECO, a member of the family is provided for according to specified classes of relationships. The definition in the ECO would seem to be a necessity in the context of the Ordinance, because if an employee dies as a result of an accident at work, it would be necessary to determine who is entitled to the compensation paid in accordance with the ECO.

13. By the above examples, members may note that "family" is not a fixed concept and its meaning is to be determined by the context and purpose of the relevant legislation.

Definition of "Family" and the DVO

14. As regards the DVO, it does not provide a definition of "family" or "member of the family". Members may wish to note that only section 3A(6) of the DVO does refer to "family members", but the context of this reference is limited in the sense that section 3A(6) only caters for the situation where the applicant of an injunction resides with the respondent and, when the District Court is deciding whether the injunction should be granted, it shall have regard to the impact of the injunction on the relationship between the applicant, the respondent and their **other family members** who reside with them. Apart from that, no provision in the DVO refers to "family", "family members" or "family relationship".

Conclusion

15. The freedom of marriage and right to found a family are among the fundamental rights enshrined in the Basic Law and the BORO. The DVO itself does not provide any definition of the "marriage" and "family". The definition of "marriage" in the MO and the MRO is adopted from the common law definition of marriage as "*the voluntary union for life of one man with one woman to the exclusion of all others*". The meaning of "marriage" in the DVO has to be construed in the context of the MO and the

MRO. Before the Administration introduces the amendment bill to the Legislative Council, it would be difficult to ascertain whether the amendments proposed by the Administration would have any implication to the meaning of marriage in the DVO and other ordinances. As regards the term "family", a clear definition of "family" is not provided in any legislation of Hong Kong. However, the term "family" is not used in any provisions of the DVO and does not play a role in the operation of the DVO.

Prepared by

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20 January 2009