

A COMPARATIVE LEGAL ANALYSIS FOR SAME-SEX MARRIAGE IN MAURITIUS



YOUNG QUEER ALLIANCE
JUNE 2026



ABOUT THE RESEARCH

This independent research was carried out by Sandy Christ Bhaganooa, Barrister-at-Law (Mauritius) and *Avocat à la Cour* at the Bar of *Paris* (France), on behalf of the Young Queer Alliance under the “*Sustaining development of LGBTQIA+ leaders in Mauritius*” Project, which is funded by The Other Foundation.

The **Young Queer Alliance** is a non-governmental and youth-led organisation in Mauritius for Lesbian, Gay, Bisexual, Trans, Queer, Intersex and Asexual (LGBTQIA+) people. The Young Queer Alliance envisions an inclusive and accepting society where being human is the sole prerequisite to having equal human rights and where LGBTQIA+ people are safe and free.

The Other Foundation is an African trust that advances equality and freedom in southern Africa with a particular focus on sexual orientation and gender identity. It gathers support to defend and advance the human rights and social inclusion of homosexual and bisexual women and men, as well as transgender and intersex people in southern Africa – and it gives support to groups in a smart way that enables them to work effectively for lasting change, recognizing the particular dynamics of race, poverty and inequality, sex, national origin, heritage, and politics in our part of the world. It does this by working both as a fundraiser and a grant maker.

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LIST OF PRINCIPAL ABBREVIATIONS AND ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
ASF	Avocats Sans Frontières
BBC	British Broadcasting Corporation
CAEC	Collectif Arc-en-Ciel
CAH	Congenital Adrenal Hyperplasia
CAT	Convention against Torture and other cruel, inhuman or degrading treatment or punishment
CCM	Code Civil Mauricien
CEDAW	Convention on the Elimination of Discrimination Against Women
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court on Human Rights
GBMSM	Gay and Bisexual men and boys and other Men who have Sex with Men
GL	Gender Links
HDT	Human Dignity Trust
HRC	United Nations Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights 1966
ICD	International Classification of Diseases
ICESCR	International Covenant on Economic, Social and Cultural Rights 1966
ILGA	The International Lesbian, Gay, Bisexual, Trans, and Intersex Association
JCPC	Judicial Committee of the Privy Council
KDI	Kolektif Drwa Imin
LGBT	Lesbian, gay, bisexual and transgender
LGBTI	Lesbian, gay, bisexual, transgender and intersex
LGBTQ+	Lesbian, gay, bisexual, transgender and queer
LGBTQIA+	Lesbian, gay, bisexual, transgender, queer, intersex and asexual
MOGEFW	Ministry of Gender Equality and Family Welfare
MOHW	Ministry of Health and Wellness
NGOs	Non-Governmental Organisations
NHS	National Health Services
OHCHR	Office of the United Nations High Commissioner for Human Rights
PILS	Prévention Information Lutte contre le SIDA

SCI	Supreme Court of India
SCJ	Supreme Court of Mauritius Judgment
SOGI	Sexual Orientation and Gender Identity
SOGIESC	Sexual Orientation, Gender Identity and Expression and Sex Characteristics
TAF	Tribunal Administratif Fédéral
UDHR	Universal Declaration on Human Rights 1948
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UPR	Universal Periodic Review
WHO	World Health Organization
YQA	Young Queer Alliance

FOREWORD

Article 1 of the Universal Declaration of Human Rights states that “*All human beings are born free and equal in dignity and rights.*” Yet, Lesbian, Gay, Bisexual, Trans, Queer, Intersex and Asexual (LGBTQIA+) people in Mauritius, and globally, continue to have their freedom curtailed, they face unequal and discriminatory treatment, and they are victims of violations of their dignity and rights.

This includes violations of their right to life in dignity, and discrimination based on their sexual orientation for how they express themselves, or simply for who they love.

In Mauritius, while same-sex unions are neither expressly recognised nor expressly prohibited in law, existing statutory provisions may permit a favourable interpretation, potentially leading to their acknowledgement. This possibility is strengthened by the application of a generous and purposive interpretation through a human rights lens, particularly in light of the constitutional-level protection against discrimination based on sexual orientation already achieved in Mauritius. Nevertheless, LGBTQIA+ persons in Mauritius continue to experience widespread discrimination on the basis of sexual orientation within its territory, while Mauritian same-sex couples remain systematically denied the right to the legal recognition of their union.

This research, commissioned by the Young Queer Alliance, was entrusted to Sandy Christ Bhaganooa, a law practitioner in Mauritius and France, to compare legislation from a purely legal perspective and through independent lenses across countries that have advanced same-sex marriage or ended discrimination against same-sex couples.

“*A Comparative Legal Analysis for Same-Sex Marriage in Mauritius*” was conducted under the “Sustaining development of LGBTQIA+ leaders in Mauritius” Project which is funded by The Other Foundation.

The YQA encourages organisations, policymakers, and various stakeholders to adopt and use the research findings to ensure that the inalienable human rights of LGBTQIA+ people are respected and uplifted in the Republic of Mauritius and globally.

Young Queer Alliance

INTRODUCTION

The legal recognition of same-sex unions has emerged as a significant subject of public and political discourse in recent decades, especially with the advent of human right norms which have led to the recognition of the right to protection from discrimination based on sexual orientation. In 2023, the Supreme Court of India expressed its concern over the persisting discrimination faced by the LGBTQIA+ community:

“The discrimination faced by the LGBTQIA+ community in various forms is, in so many ways, a product of social morality as much as it is a product of the lack of effort from the State to sensitize the general public about issues concerning queer rights. Social norms and beliefs which were internalised over centuries were not overhauled at the stroke of midnight when the nation became the source of its destiny and when the Constitution was adopted in 1950. Similarly, the stigma against the members of the LGBTQIA+ community did not end with a stroke of the pen when this Court decriminalized consensual homosexual sexual activity”¹.

The terms “gay” or “lesbian” refer to those individuals who have adopted a conscious social identity reflecting a desire to enter into predominantly or exclusively same-gender relationships. The term “bisexual” refers to individuals who engage in, or have an inclination to engage in, both heterosexual and homosexual relations.

Homosexuality was removed from the international classification of mental disorders in 1973 by the American Psychiatric Association² and the World Health Organization removed homosexuality from the International Classification of Diseases (ICD-10) in 1990³. Consequently, as rightly underlined by Jack Drescher, Clinical Professor of Psychiatry, Columbia University, *“debates about homosexuality gradually shifted away from medicine and psychiatry and into the moral and political realms as religious, governmental, military, media, and educational institutions were deprived of medical or scientific rationalization for discrimination”⁴.*

¹ Supriyo Chakraborty v. Union of India [2023 INSC 920] -Writ Petition n° 111 of 2022.,

² See “The legacy of medicalising ‘homosexuality’: A discussion on the historical effects of non-heterosexual diagnostic classifications” – Joel Anderson (Université de Genève) and Elise Holland (University of Melbourne)

³ <https://www.who.int/europe/news/item/17-05-2019-moving-one-step-closer-to-better-health-and-rights-for-transgender-people>

⁴ “Out of DSM: Depathologizing Homosexuality” – Jack Drescher (Department of Psychiatry, New York Medical College), National Library of Medicine, 4 Dec. 2015

Historical evidence from a diverse range of cultures and eras substantiates that homosexuality and same-sex relationships are not recent phenomena, but have been a consistent aspect of the human experience throughout recorded history. Professor Bonnie J. Morris of the University of California, Berkeley, traces the tumultuous history of societal tolerance toward homosexuality across various civilizations, analysing the subsequent efforts of white Christian colonialism to eradicate same-sex practices:

“We know that homosexuality existed in ancient Israel simply because it is prohibited in the Bible, whereas it flourished between both men and women in Ancient Greece. Substantial evidence also exists for individuals who lived at least part of their lives as a different gender than assigned at birth. From the lyrics of same-sex desire inscribed by Sappho in the seventh century BCE to youths raised as the opposite sex in cultures ranging from Albania to Afghanistan; from the “female husbands” of Kenya to the Native American “Two-Spirit,” alternatives to the Western male-female and heterosexual binaries thrived across millennia and culture.

These realities gradually became known to the West via travellers’ diaries, the church records of missionaries, diplomats’ journals, and in reports by medical anthropologists. Such eyewitness accounts in the era before other media were of course riddled with the biases of the (often) Western or White observer, and added to beliefs that homosexual practices were other, foreign, savage, a medical issue, or evidence of a lower racial hierarchy. The peaceful flowering of early trans or bisexual acceptance in different indigenous civilizations met with opposition from European and Christian colonizers.

In the age of European exploration and empire-building, Native American, North African, and Pacific Islander cultures accepting of “Two-Spirit” people or same-sex love shocked European invaders who objected to any deviation from a limited understanding of “masculine” and “feminine” roles. The European powers enforced their own criminal codes against what was called sodomy in the New World: the first known case of homosexual activity receiving a death sentence in North America occurred in 1566, when the Spanish executed a Frenchman in Florida.

Against the emerging backdrop of national power and Christian faith, what might have been learned about same-sex love or gender identity was buried in scandal. Ironically, both wartime

conflict between emerging nations and the departure or deaths of male soldiers left women behind to live together and fostered strong alliances between men as well. Same-sex companionship thrived where it was frowned upon for unmarried, unrelated males and females to mingle or socialize freely. Women's relationships in particular escaped scrutiny since there was no threat of pregnancy. Nonetheless, in much of the world, female sexual activity and sensation were curtailed wherever genital circumcision practices made clitoridectomy an ongoing custom.

Where European dress - a clear marker of gender- was enforced by missionaries, we find another complicated history of both gender identity and resistance. Biblical interpretation made it illegal for a woman to wear pants or a man to adopt female dress, and sensationalized public trials warned against "deviants" but also made such martyrs and heroes popular: Joan of Arc is one example, and the chilling origins of the word "faggot" include a stick of wood used in public burnings of gay men."⁵

In 2016, the Supreme Court of India endorsed the opinion of the American Psychological Association about homosexuality as follows:

"144. The society cannot remain unmindful to the theory which several researches, conducted both in the field of biological and psychological science, have proven and reaffirmed time and again. To compel a person having a certain sexual orientation to proselytize to another is like asking a body part to perform a function it was never designed to perform in the first place. It is pure science, a certain manner in which the brain and genitals of an individual function and react. Whether one's sexual orientation is determined by genetic, hormonal, developmental, social and/or cultural influences (or a combination thereof), most people experience little or no sense of choice about their sexual orientation.

145. The statement of the American Psychological Association on homosexuality which was released in July 1994 reiterates this position in the following observations: -

The research on homosexuality is very clear. Homosexuality is neither mental illness nor moral depravity. It is simply the way a minority of our population expresses human love and sexuality. Study after study documents

⁵ "A brief history of lesbian, gay, bisexual, and transgender social movements" – Bonnie J. Morris, American Psychological Association., 21 July 2023

the mental health of gay men and lesbians. Studies of judgment, stability, reliability, and social and vocational adaptiveness all show that gay men and lesbians function every bit as well as heterosexuals. Nor is homosexuality a matter of individual choice. Research suggests that the homosexual orientation is in place very early in the life cycle, possibly even before birth. It is found in about ten percent of the population, a figure which is surprisingly constant across cultures, irrespective of the different moral values and standards of a particular culture. Contrary to what some imply, the incidence of homosexuality in a population does not appear to change with new moral codes or social mores. Research findings suggest that efforts to repair homosexuals are nothing more than social prejudice garbed in psychological accouterments.”⁶

In the same judgment, the apex court of India recognised that “*same-sex love has flourished, evolved and been embraced in various forms since ancient times*” in India, demonstrated by “*writings spanning over more than 2,000 years of Indian literature*”, until its criminalisation by British colonialism, leading to stigma, discrimination, violence against sexual minorities. Such a position echoed to a 2015 joint statement in which many UN agencies condemned violence, persecution and discrimination based on sexual orientation and gender identity. They called on all States to act urgently to end violence and discrimination against sexual minorities, namely lesbian, gay and bisexual adults, adolescents and children⁷.

In 2011, the report⁸ of the United Nations High Commissioner for Human Rights recalled that: “*The right to be free from discrimination is included in the Universal Declaration of Human Rights (art. 2) and core international human rights treaties, including the International Covenant on Economic, Social and Cultural Rights (art. 2) and the Convention on the Rights of the Child (art. 2). Article 26 of the International Covenant on Civil and Political Rights guarantees equality before the law, requiring States to prohibit discrimination. In their general comments, concluding observations and views on communications, human rights treaty bodies*

⁶ Navtej Singh Johar & Ors v. Union of India Ministry of Law., Writ Petition (CRL.) No. 76 of 2016, para. 145

⁷ “United Nations entities call on States to act urgently to end violence and discrimination against lesbian, gay, bisexual, transgender and intersex (LGBTI) adults, adolescents and children.”, September 2015 - https://www.ohchr.org/sites/default/files/Documents/Issues/Discrimination/Joint_LGBTI_Statement_ENG.PDF

⁸ Report of the United Nations High Commissioner for Human Rights on discriminatory laws and practices and acts of violence based on their sexual orientation and gender identity (A/HRC/19/41), 2011

have confirmed that States have an obligation to protect everyone from discrimination on grounds of sexual orientation or gender identity. The fact that someone is lesbian, gay, bisexual or transgender does not limit their entitlement to enjoy the full range of human rights.” Consequently, the report pointed out the obligation of States to protect individuals from discrimination on the basis of sexual orientation and that this protection “***extends to ensuring that unmarried same-sex couples are treated in the same way and entitled to the same benefits as unmarried opposite-sex couples***”. The report expressed concern over States who discriminate on the basis of sexual orientation by providing for benefits to heterosexual couples but denying these benefits to unmarried homosexual couples whose relationship are denied from any legal recognition, leading to discriminating based on sexual orientation in various spheres such as pension entitlements, ability to leave property to a surviving partner, opportunity to remain in public housing following a partner’s death, or the chance to secure residency for a foreign partner. The report further explained that “*lack of official recognition of same-sex relationships and absence of legal prohibition on discrimination can also result in same-sex partners being discriminated against by private actors, including health-care providers and insurance companies*”.

In 2019, the Office of the United Nations High Commissioner for Human Rights (OHCHR) reiterated its position, asserting that:

“States have a positive obligation to provide legal recognition to couples, regardless of sexual orientation, gender identity and sex characteristics, as well as to their children. Legal recognition may take various forms, ranging from civil unions and civil partnerships to marriage. Regardless of the form of relationship recognition, States are obliged to address discrimination in this area by, inter alia, ensuring that benefits traditionally accorded to married partners – including those related to benefits, pensions, and taxation and inheritance – are accorded on a non-discriminatory basis. States should ensure the right to legal recognition of gender without the requirement of dissolution of marriage or civil partnership. Legislation and procedures regulating marriage and civil unions should not be based on the sex assigned to a person at birth and States should also remove other restrictions on relationship recognition, parenting or adoption on the basis of a person’s sex, gender identity or expression, including for persons who are transgender, intersex and/or non-binary.”⁹

⁹ “Born free and equal” – Second Edition., United Nations High Commissioner for Human Rights (HR/PUB/12/06/Rev.1), 2019

Most of the secular States which have ratified or acceded to international human rights instruments have, since the past 35 years, progressed towards the legal recognition of the unions of same sex couples, starting with Denmark in 1989, which was the first country in the world to introduce a Registered Partnership Act for same-sex couples¹⁰. The effects of the Danish registered partnership were almost the same as the effects of a marriage. In June 2012, Denmark allowed same-sex persons to enter into marriage¹¹. From a religious perspective, Danish law explicitly provides that persons of the same sex have the right to be married in church in Denmark but leaving a liberty to the individual minister in question to decide whether or not he or she wants to conduct or to bless a marriage between two persons of the same gender¹².

Since then, significant progress has been achieved, marked by nearly 40 states recognising same-sex unions by mid-2025. This trend was further reinforced by the landmark judgment delivered by the Court of Justice of the European Union in November 2025, which obligated all EU member states to recognise same-sex marriages lawfully concluded in another EU Member State¹³. In Poland, where the Legislature has neither legalised same-sex marriage nor any form of recognised union for same-sex couples, the Supreme Administrative Court has, in March 2026, ruled that same-sex marriages performed in the European Union must be recognised. The decision concerned a Polish couple who married in Germany but were denied registration in Poland. The Court held that “*there are no grounds to assume that the transcription of a marriage certificate of persons of the same sex poses a threat to the fundamental principles of the legal order of the Republic of Poland*”. In delivering the judgment, Justice Leszek Kirnaszek underlined that “*the Polish constitution defines marriage as a union between a man and a woman [but] does not prohibit recognising marriages concluded in other EU countries*”, especially when EU regulations “*prohibit discrimination on the grounds of sex and sexual orientation*”¹⁴.

¹⁰ Act No. 372 of 7 June 1989, with effect from 1 October 1989. The Act is described by I. LUNDANDERSEN, ‘The Danish Registered Partnership Act’, in K. BOELE-WOELKI & A. FUCHS, *Legal Recognition of Same-Sex Couples in Europe*, Intersentia, Antwerp, 2003, pp. 13-23; and by I. LUNDANDERSEN, ‘The Nordic Countries: Same Direction – Different Speeds’, in K. BOELE-WOELKI & A. FUCHS (eds.), *Legal Recognition of Same-Sex Relationships in Europe*, Intersentia, Antwerp, 2012, pp. 3- 17.

¹¹ Act No. 532 of 6 June 2012 with effect from 15 June 2012

¹² Act No. 531 of 6 June 2012 with effect from 15 June 2012

¹³ Court of Justice of the European Union, 25 November 2025, n° C-713/23

¹⁴ “Polish court says same-sex marriages conducted in EU must be recognised” – Courthouse News Service, 23.03.2026 - <https://courthousenews.com/polish-court-says-same-sex-marriages-conducted-in-eu-must-be-recognized/>

In June 2026, the Supreme Court of Nepal ruled the country must extend full marriage rights to same-sex couples¹⁵. In the same judgment, Nepal's highest jurisdiction also ordered the government to update the civil code to remove any discriminatory language. It is here to be underlined that Nepal's National Human Rights Commission had consistently recommended the recognition of same-sex unions prior to the current legal developments, with a view to harmonising national legislation with the constitutional provisions on fundamental rights and non-discrimination¹⁶.

Same-sex unions have likewise started to gain significant recognition within the religious sphere, finding acceptance among a number of faith traditions. However, theological and doctrinal positions on homosexuality, and consequently on the solemnisation of such unions, vary significantly across religions.

Illustratively, Dr. Ruth Vanita - holding a doctorate from Delhi University and serving as a Professor of English and World Cultures at the University of Montana, United States - has conducted extensive research on Hinduism and homosexuality. In her 2009 monograph, *“Love's Rite: Same-Sex Marriage in India and the West”*, she documents the deliberation of Srinivasa Raghavachariar, a distinguished Sanskrit scholar and Hindu priest at the principal Vaishnava temple in Srirangam, India, who opined as follows: *“Same-sex lovers must have been cross-sex lovers in a former life. The sex may change but the soul remains the same in subsequent incarnations, hence the power of love impels these souls to seek one another.”*¹⁷

In an article published by Professor Supanki Kalanadan of University of Ottawa, Canada, the latter points out that *“Same-sex unions have been represented in ancient Indian texts in a celebratory manner, but homophobia developed in South Asia during the colonial period to erase indigenous practices. For example, the British, through the Indian Penal Code of 1860 criminalized intercourse “against the order of nature”. During the colonial period, there was deliberate heterosexualization of entire literary canons and genres (such as the Urdu ghazal,*

¹⁵ “Nepal Supreme Court delivers landmark ruling in favour of same-sex marriage” - Sarah Creighton Keogh - <https://gcn.ie/nepal-supreme-court-ruling-same-sex-marriage-2/>

¹⁶ “National Human Rights Commission recommends that Nepal legalise same-sex marriage” – The Kathmandu Post, 01 July 2020 - <https://kathmandupost.com/national/2020/07/01/national-human-rights-commission-recommends-that-nepal-legalise-same-sex-marriage>

¹⁷ “Love's Rite: Same-Sex Marriage in India and the West” – Dr Rith Vanita, 2009, P. 147

or love poem, which gendered both lovers as male)”. She also explains thoroughly the position of Hinduism on same-sex unions:

“Same-sex marriage between two gay men or two lesbians was classified under the ‘gandharva’ or celestial variety – ‘a union of love and cohabitation, without the need for parental approval.’ Gandharva marriages are often celebrated with symbolic Hindu rituals such as an exchange of garlands or walking around a fire together. Hindu sacred texts debate the status of Gandharva marriage; while it has a lower status in some texts, others consider it to be a superior form. For example, the fourth-century Kamasutra (the world’s first sex treatise), which is a sacred text, states that gandharva is the best form of marriage because it is based on mutual attraction (anuraga).”

Professor Kalanadan recalls that a chapter in the Kamasutra mentions that lesbians were called “*swarinis*”, that they often married other women, raised children together and were accepted by society. She points out that “*a popular God that is worshipped by Tamils today, Lord Ayappan, was born from the union of Shiva and Vishnu (as Mohini)*” and that “*in numerous Hindu temples, there are sculptures that celebrate homosexuality*”. She takes the example of the Khajuraho temple of Madhya Pradesh which is known for its overt homosexual imagery¹⁸.

In the holy epic *Mahābhārata*, Aravan (also known as Iravan), the son of Arjun and Nagakanya, sacrificed himself to the Hindu Goddess Kali to make Pandavas win the war. However, he put forth a condition to spend his last night as married. No woman agreed to marry him. So, Lord Krishna converted himself into a woman, Mohini, and got married to Aravan. Devotees from Tamil Nadu call themselves Aravanis, as they consider him their predecessor.

In 2023, Justice Sanjay Kishan Kaul of the Supreme Court of India also got the opportunity to illustrate that Hinduism does not abhor same-sex unions and that more generally, tolerance is part of the Indian culture and more generally, part of hinduism:

“A pluralistic social fabric has been an integral part of Indian culture and the cornerstone of our constitutional democracy. Non-heterosexual unions are well-known to ancient Indian civilisation as attested by various texts, practices, and depictions of art. These markers of discourse reflect that such unions are an inevitable presence across human experience. Hindu deities were multidimensional and multi-faceted and could appear in different forms. One of

¹⁸ “What does mainstream Hinduism say about same-sex marriages?” – Supanki Kalanadan, 27.04.2023 - <https://tamilculture.com/what-does-mainstream-hinduism-say-about-same-sex-marriages>

the earliest illustrations is from the Rig Veda itself. Agni, one of the most important deities, has been repeatedly described as the “child of two births” (dvijanman), “child of two mothers” (dvimatri), and occasionally, “child of three mothers” (the three worlds).

In Somdatta’s Kathasaritsagara, same-sex love is justified in the context of rebirth. Somaprabha falls in love with Princess Kalingasena and claims that she loved her in her previous birth as well. Hindu mythology is replete with several such examples. We need not be detained in an effort to capture each of them. The significant aspect is that same-sex unions were recognised in antiquity, not simply as unions that facilitate sexual activity, but as relationships that foster love, emotional support, and mutual care.

Even in the Sufi tradition, devotion is often constructed around the idea of love as expressed through music and poetry. In several instances, the human relationship with the divine was expressed by mystics through the metaphor of same-sex love. Love across genders is also reflected in the Rekhti tradition of Lucknow. This tradition is centred around the practice of male poets writing in a female voice and is characterised by its homoeroticism. Significantly, the depictions of same-sex relationships are charged with affects such as love, friendship, and companionship.”¹⁹

When it comes to Christianity, the ecclesiastical example drawn from the jurisdiction of Norway is deemed worthy of analysis. In 2015, the General Synod of the Church of Norway, the largest Christian denomination in the Scandinavian country, voted in favour of accepting same-sex marriage, opening the way for the first gay church marriages to be celebrated in Norway.²⁰ In October 2025, the highest representative of institutional Lutheranism apologised for not having changed the official doctrine earlier, which now allows gay couples to marry in its churches. He also apologised on behalf of his institution for not hiring homosexuals in the past or for “*excluding from church communities many who defied the norms regarding gender and relationships*”²¹.

¹⁹ Supriyo Chakraborty v. Union of India [2023 INSC 920] -Writ Petition n° 111 of 2022

²⁰ “Church of Norway opens doors to church gay weddings” – Evangelical Focus,03.11.2015 - <https://evangelicalfocus.com/europe/1114/Church-of-Norway-opens-doors-to-church-gay-weddings>

²¹ “The Lutheran Church of Norway apologises for not performing same-sex marriages sooner” - Evangelical Focus,03.11.2015 - <https://evangelicalfocus.com/europe/32810/the-lutheran-church-of-norway-apologises-for-not-performing-same-sex-marriages-sooner>

It has also been reported that an Episcopal Church, which is a branch of the worldwide Anglican Communion, “*codified theological support for same-sex marriage with two resolutions passed in 2015. The first (A054) formally approved gender-neutral and same-sex marriage ceremonies, while the second (A036) changed the current marriage “canons” to allow clergy to officiate same-sex marriages using either a marriage rite from the Episcopal Book of Common Prayer or a “trial” liturgy. In 2018, the Episcopal Church’s General Convention approved Resolution B012, expanding marriage rites for same-sex couples to all dioceses. One of the core compromises of B012 was to allow clergy who object to marriage equality on theological grounds to request that another bishop provide pastoral care and oversight for same-sex couples who wish to be married by priests in their home churches*”²².

In 2022, it was unrebutted before the Judicial Committee of the Privy Council that, in some Caribbean territories, religious bodies such as the Pentecostal Church and the Wesley Methodist Church of Bermuda which emphasise on inclusivity and the welcoming of all people, uphold and officiate same-sex marriage. The Wesley Methodist Church even appoints gay ministers and to celebrate the marriage of same-sex couples²³.

In Mauritius, while same-sex unions are neither expressly recognised nor expressly prohibited in law, existing statutory provisions may accommodate a favourable interpretation, potentially leading to their acknowledgment just like in Poland. This possibility is strengthened by the application of a generous and purposive interpretation under human rights lens, particularly in light of the constitutional-level protection against discrimination based on sexual orientation already achieved in Mauritius²⁴. Nevertheless, Mauritius continues to experience widespread discrimination on the basis of sexual orientation within its territory, while Mauritian same-sex couples remain systematically denied the right to the legal recognition of their union. Nonetheless, it is worth conceding that a 2024 survey²⁵ of public attitudes toward sexual orientation and gender non-conformity in Mauritius commissioned by The Other Foundation (an African trust whose mission is to advance freedom and equality in Southern Africa) and conducted by AfricaScope demonstrates that societal attitudes towards sexual minorities are evolving favourably. The said survey, subsequent to the 2023 judgments in *Ah-Seek v. State of*

²² See <https://www.hrc.org/resources/stances-of-faiths-on-lgbt-issues-episcopal-church>

²³ *Attorney General for Bermuda v. Roderick Ferguson and Others* – 14.03.2022 - [2022] UKPC 5

²⁴ *Ah-Seek v. State of Mauritius* (2023 SCJ 399)

²⁵ “A Survey of public attitudes to sexual orientation and gender non-conformity in Mauritius” – 2024, The Other Foundation.

Mauritius and Fokeerbux & Ors. v. State of Mauritius, provides the first comprehensive insights into public opinion on sexual orientation and gender non-conformity as follows:

- 82% of the Mauritian population support equality for lesbian women;
- 78% support equality for gay men;
- 76% support equality for bisexual people;
- Nearly 90% agrees that intersex people should have equal rights
- 85% support equality for transgender and gender non-conforming people;
- 80% believe the courts should use the Constitution, namely the Protection of Fundamental Rights and Freedoms Chapter, to uphold the human rights of sexual minorities and gender non-conforming people;
- More than 75% believes that communities should protect sexual minorities from violence;
- About 97% say they have never been and would never be violent towards transgender or gender non-conforming people;
- About 82% of Mauritians want communities to be encouraged to protect transgender and gender non-conforming people;
- 86% follow a religion and 53% define themselves as being highly religious;
- 9% say that religion plays a key role in influencing their attitudes to homosexuality and gender non-conformity;
- 43% believe that God loves people in a same-sex relationship;
- 63% think that giving LGBTI people equal opportunities will empower them;
- 4% identify themselves as homosexual or bisexual.

This Study will therefore go into the insights of Mauritian law and the legal status of same-sex unions. Given the absence of specific legislative instruments and definitions pertaining to such recognition in domestic law, the analysis will proceed through a comparative legal examination. This will involve juxtaposing relevant aspects of Mauritian law with the legislation of selected jurisdictions that share significant historical, cultural, or colonial ties with Mauritius or similar laws. The focus will be on British and French legal systems, as they provide the foundational inspiration for the primary sources of Mauritian law, namely *the Code Civil Mauricien* (CCM)

This Study aims to analyse the challenges and human rights violations confronting same-sex couples in Mauritius. Furthermore, it will demonstrate how, in numerous jurisdictions,

fundamental rights guaranteed by supreme legal instruments, including national constitutions, are frequently disregarded, even by law enforcement authorities. It is often only through judicial intervention that these foundational principles are reaffirmed and constitutional order restored. Given that Mauritian law recognises only marriage as a formal union, this Study will primarily seek to address the following questions:

- 1. Is the legal definition of marriage in Mauritius explicitly restricted to a union between a man and a woman?**
- 2. Does Mauritian law prohibit same-sex marriage?**
- 3. Can same-sex unions benefit from a legal recognition under the prevailing legal framework?**

CHAPTER 1: AN OUTLINE OF THE EVOLUTION OF MAURITIAN LAW ON MARRIAGE

Mauritius has acceded to independence in 1968 with a written Constitution which constitutes the supreme law of the land but which operates within a hybrid legal system with civil law provisions co-existing with Common law. This system is a historical inheritance from successive French and British colonial administrations before 1968. Its contemporary jurisprudence is characterised by a conjugation of legal provisions derived from multiple sources: the civil law tradition of French origin, the Common Law tradition imported during the British era, and subsequent autochthonous legal developments of purely Mauritian origin.

Mauritian law on marriage finds its primary source in the Code Civil Mauricien which is of French origin. Indeed, the French Civil Code of 1804 was extended to Mauritius by decree of *Capitaine-Général* Decaen on 21 April 1808²⁶ when Mauritius was still a French colony. The Code Civil Mauricien (CCM), originally promulgated in the French language, remains the foundational civil law statute in force and even its newly enacted provisions are fundamentally in French medium.

The legal institution of marriage in Mauritius derives from civil law principles, rather than the Common Law tradition. Its foundational statutory framework is now established in Articles 144 to 200 of the Mauritian Civil Code, which comprehensively prescribe the conditions, prohibitions, and grounds for nullity governing marriage, and Part IV of the Civil Status Act 1981 which establishes the procedures for the celebration of marriages and for some additional conditions in some specific circumstances (namely when it comes to marriage between a citizen and a non-citizen).

It is therefore useful to analyse the historic evolution of the law in Mauritius before 1981 (I) before going into the details of the actual legal framework with regard to marriage in Mauritius (II).

²⁶ French Civil Code Re-Promulgation Act 1808 – “Code Napoléon”

I. The evolution of the law on marriage in Mauritius before 1981

A. The provisions of the CCM before 1890

Between 1808 and 1890, Article 144 of the *Code Napoléon* (Code Civil Mauricien) provided as follows for the primary condition to marriage as being of “the male of at least 18 years old with the female of at least 15 years old”:

“L’homme avant dix-huit ans révolus, la femme avant quinze ans révolus, ne peuvent contracter mariage.”

The age requirement, however, was not considered a matter of public order, as Article 145 explicitly provided for the possibility of dispensation, which could be granted by the Emperor: *“Néanmoins, il est loisible à l’Empereur d’accorder des dispenses pour des motifs graves”*.

The *Code Napoléon* provided however for some specific prohibitions at that time:

- Prohibition of marriage when there is no consent of the parties – Article 146:
 - *“Il n’y a pas de mariage lorsqu’il n’y a point de consentement”*.
- Prohibition of bigamy – Article 147:
 - *“On ne peut contracter un second mariage avant la dissolution du premier.”*
- Prohibition of incestuous marriage but some degrees of this affinity-based prohibition were subject to dispensation, a prerogative power vested solely in the Emperor – Articles 161 to 164:

“161. En ligne directe, le mariage est prohibé entre tous les ascendants et descendants légitimes ou naturels, et les alliés dans la même ligne.

162. En ligne collatérale, le mariage est prohibé entre le frère et la sœur légitime ou naturels, et les alliés au même degré.

163. Le mariage est encore prohibé entre l’oncle et la nièce, la tante et le neveu.

164. Néanmoins, il est loisible à l’Empereur de lever, pour des causes graves, les prohibitions portées au précédent article.”

Therefore, if the parties to the intended marriage fitted in the general conditions of Article 144 and were not concerned by the prohibitions of Articles 146 to 147 and 161 to 164, they could get married. However, the primary conditions were to be of opposite sex and of the prescribed age (the male of at least 18 years with the female of at least 15 years).

B. Ordinance No. 26 of 1890

In 1810 Mauritius became a British colony and the British colonial administration started a process of repealing many French provisions in the Mauritian legal system and replacing them by English provisions. The provisions on marriage found in the *Code Napoléon* were repealed and the British administration promulgated Ordinance No. 26 of 1890 titled “***To consolidate and amend the Law relating to the Civil Status***”²⁷ (also known as the “Civil Status Ordinance”) which addressed various facets of civil status, establishing, *inter alia*, the requisite qualifications and conditions for contracting a valid marriage. The repeal was explained by the Supreme Court in *Wong Fun Tai*²⁸:

“If we turn to the first schedule to the Ordinance we find that: Title 2 of Book I of the Code Napoléon-“Des Actes de l'Etat Civil”-(articles 34 to 101-both inclusive)-is repealed. As regards marriage: Chapters 1, 2 and 3 of Title V (articles 144 to 179, both inclusive), which deal with “Qualités et conditions requises pour contracter mariage, formalités relatives à la célébration du mariage” and “oppositions au mariage”, have equally been repealed. Chapter 4 of that Title (Title V) headed “Des demandes en nullité de mariage” (articles 180-202, both inclusive) has however (save for one article which has been repealed) been left intact. The article repealed in that Chapter is article 192 which provides for a penalty in case of neglect of duty by a public officer.”

In substance, the new provisions enacted under British administration, which set forth the “new” conditions and prohibitions for marriage, constituted a direct English translation of the repealed French articles originally derived from the *Code Napoléon*. The main sections of the Ordinance setting out the qualifications and conditions for contracting marriage are found in its Part IV and are hereunder reproduced:

²⁷ Ordinance No. 26 of 1890, 30th December 1890.

²⁸ *Wong Fun Tai* 1949 MR 183 (see also *Choppy v. Choppy* 1966 MR 1)

“Age of parties to marriage.

46. - *A male person under the age of eighteen or a female under the age of fifteen cannot contract marriage. But the Governor may for serious reasons authorise any person under the age above required to contract marriage.*

Consent.

47. - *There is no marriage, when there is no consent.*

Previous marriage a bar.

48. - *No second marriage can be contracted before the dissolution of the first marriage.*

Marriage prohibited between relatives in direct line.

49. - *In the direct line, marriage is prohibited between all ascendants and descendants whether legitimate or natural, and between persons related by marriage in the same line.*

Collateral Line.

50. - *In the collateral line, marriage is prohibited between a brother and sister whether legitimate or natural, and between persons related by marriage in the same degree.*

But marriage may be legally contracted between a man and the sister of his deceased wife, and no such marriage celebrated after the commencement of Ordinance 20 of 1880 shall be in any wise impracticable upon the ground of such affinity between the parties.

Marriage prohibited between male & niece, &c.

51. - *Marriage is further prohibited between a man and his niece, or a woman and her nephew. But the Governor may for grave causes authorise any such marriage.”*

Under this 1890 Ordinance, the solemnisation of civil marriage in Mauritius was still restricted to the “male of at least 18 years with the female of at least 15 years”, that is, the condition that the intended parties to marriage be male and female respectively and having attained the prescribed age.

II. The 1981 Act and subsequent laws on marriage in Mauritius

A. The advent of the 1981 legislation and subsequent Acts

Mauritius gained independence in 1968 and in 1981, the Mauritian legislature carried out a profound reform with regard to marriage legislations in Mauritius. The substantive conditions for marriages were imported back into the CCM in French language and the Civil Status Act 1981 was enacted in parallel, repealing Ordinance No. 26 of 1890 and its subsequent “amendment ordinances”. In the course of this reform, the Mauritian legislature drew profound inspiration from the French Civil Code. Consequently, a substantial majority of its articles were transposed into the Mauritian Civil Code, albeit with certain notable distinctions. As resumed in the case of *Francoeur v. Francoeur*²⁹:

“Article 144 of the original Code Napoléon provided that “l’homme avant dix-huit ans révolus, la femme avant quinze ans révolus, ne peuvent contracter mariage”.

[...]

articles 144, 145 et 148 of the Code were repealed and replaced by more or less similar provisions in the Civil Status Ordinance.

[...]

In 1981, the provisions of the Civil Status Ordinance relating to the marriage of minors were repealed and the legislature thought it wise to reintroduce whatever concerned marriage into the Code Napoléon, the new articles 145 to 147 of which read as follows-

144. Nul ne peut contracter mariage avant dix-huit ans révolus.

145. Néanmoins il est loisible au Juge en Chambre d'accorder, à la requête du Ministère Public, une dispense d'âge au mineur lorsqu'elle est nécessaire à l'intérêt de celui-ci.

146. Toute personne intéressée peut saisir le Ministère Public d'une demande en vue de l'octroi, par le juge en Chambre d'une dispense d'âge au mineur.

La demande est instruite par le Ministère Public. Si la demande paraît fondée, le Ministère Public saisit le Juge en Chambre qui statue conformément aux dispositions de l'article 145.

147. La dispense d'âge accordée par le Juge en Chambre exempte le mineur de toute autre autorisation ; celui-ci peut contracter mariage sans le consentement de ses père et mère ou autres membres de sa famille.

²⁹ *Francoeur v. Francoeur* - 1989 SCJ 74

Thus, after 1981, marriage was only possible between adults of age (article 144). Where one of the parties was below the age of 18 and was therefore an "incapable", marriage was only possible where the Ministère Public considering that it was in the interest of the minor to obtain a dispensation of age applied to the Judge in Chambers who could, independently of the parents' wishes, grant a dispensation of age where he considered such a dispensation "nécessaire à l'intérêt" of the minor. "

In 1981, the Article 144 of the French Civil Code still restricted marriage to different-sex couples as it provided as follows:

"L'homme avant dix-huit ans révolus, la femme avant quinze ans révolus, ne peuvent contracter mariage. "

Had the Mauritian legislature intended to incorporate such a provision within the CCM, he would have expressly done so. To the contrary, the legislature enacted a substantively distinct Article 144 within the CCM, which is drafted in expressly prohibitory terms with solely an age restriction.

In 1984, the CCM was again amended with regard to marriage of minors in Mauritius and in 2020, the Mauritian legislature formally prohibited marriage between people under 18 years of age and introduced a new Article 149A providing for rules of public order when it comes to the celebration of marriage. The legislature:

- repealed articles 145 to 148 in the CCM which concerned the marriage of minors in Mauritius;
- inserted a new section 149A in the CCM which now provides that the following sections are of public order:
 - Article 144 (age condition of 18 for the intended parties to marriage;
 - Article 149 (consent of the parties)
 - Article 150 (prohibition of bigamy)
 - Article 151 (prohibition of marriage between ascendants and descendants)
 - Article 152 (prohibition of marriage between siblings).

Article 149A of the CCM reads as follows : “*Les dispositions des articles 144, 149, 150, 151 et 152 sont d’ordre public.*”

Further, section 12 of the Children’s Act 2020 also prohibits marriage (whether civil or religious) and marital cohabitation with a minor.

B. The current legal framework

The CCM and the Civil Status Act 1981 (the “CSA”) provide for the conditions for marriage (a), the prohibitions for marriage (b) and the nullity of a celebrated marriage (c). Prior to a more detailed examination, it is pertinent to note that Mauritian law provides for two distinct categories of marriage: civil marriage and religious marriage, both of which are found within the CCM and the CSA and which have been explained by the Supreme Court in **Bhewa and Alladeen v Government of Mauritius and DPP**³⁰, underlining on the same occasion that bigamy is contrary to public order in Mauritius since it is criminally sanctioned by article 257 of the Criminal Code (up to 20 years of penal servitude):

“(1) First, a uniform regime of civil marriage is maintained and further consolidated as, except for Muslim religious marriages where the parties expressly state that they wish to be governed by Muslim personal law, it is no longer possible to marry religiously unless one also marries civilly. This uniform regime is characterised by the continued maintenance of monogamy as a matter of public order (still protected as in the past by the criminal sanction of bigamy in article 257 of our Criminal Code), by a great measure of equality in the rights and obligations of spouses as to marriage, during marriage and at its dissolution, as well as by provisions for the protection of the children of the marriage.

[...]

(2) A second regime is established. It applies to religious marriages of whatever denomination celebrated before 1982 provided that neither of the parties was already civilly married. In this regime, the religious "marriage" or union has no civil effect, but has on registration under section 74 of the Civil Status Act, such limited juridical effect as is specifically provided in

³⁰ Bhewa & Alladeen v. Government of Mauritius and DPP – 1990 SCJ 126

article 228 of the Civil Code. The "marriage" here is not a marriage as the civil law understands it but is, juridically, a contract governed by a mixed regime comprising certain overriding provisions of the civil law and some religious rules which are not in conflict with those provisions. Those overriding provisions relate to certain obligations of the husband with regard to maintenance among other things (228-4), the recognition of the spouses as such vis-à-vis third parties and public authorities (228-5) [...]".

The present study will focus primarily upon civil marriage; however, certain pertinent aspects of religious marriage might also be examined. The issue of same-sex marriage will also be raised.

1. The current conditions for civil marriage in Mauritius

Articles 144 to 154 of the CCM deal with the qualities and conditions for marriage in Mauritius. Section 18 of the CSA provides that a civil marriage shall be governed by the CCM and Sub-Part A of Part IV of the CSA (sections 18 to 24 of the CSA). Neither the preceding conditions and impediments to marriage, nor the grounds for its nullity, are provided for within the CSA which rather provides for the procedures for celebration of marriage such as publication prior to the marriage (section 19), specific procedures and additional conditions for marriage of a non-citizen with a citizen (section 20), the procedure for objection to marriage (section 22), proceeding at celebration (section 24), procedure for marriage between non-citizens (section 24A) and for marriage within prison compound (section 24B).

The CCM is therefore the legal foundation for the preconditions, impediments, and annulment of civil marriage in Mauritius.

2. The primary conditions for marriage in Mauritius: Age and consent

Articles 144 and 145 of the CCM provide as follows:

“144. Nul ne peut contracter mariage avant dix-huit ans révolus.

149. Il n’y a pas de mariage lorsqu’il n’y a point de consentement. ”

These provisions, which are still in force since 1981 can be translated as follows:

- 144 - No person may contract marriage before having attained the age of eighteen years.
- 149 - There is no marriage without consent.

Article 144 of the Civil Code of Mauritius is of extensive application, being formulated in proscriptive terms. It provides solely that no person may contract marriage prior to attaining the age of eighteen. This provision unequivocally establishes that every individual in Mauritius above the age of eighteen possesses the civil right to enter into marriage. This fundamental right, however, is subject to the eventual statutory impediments to marriage, should the prospective parties find themselves within the prohibited degrees of relationship or other disqualifying situations expressly enumerated in the Civil Code. Unless they fall within the statutory disqualifications to marriage, their right to marry remains inviolable.

Article 144 of the CCM is gender neutral and free from discrimination based on sex. It is indigenous to Mauritius and has not been inspired from the French Civil Code neither during the 1981 reform nor during the subsequent reforms which took place between 1984 and 2020 in Mauritius. For the sake of clarity, article 144 of the French Civil Code, after the French reform of 2006³¹, still provided for the “different-sex” precondition for marriage until 2013³² “144 - *L'homme et la femme ne peuvent contracter mariage avant dix-huit ans révolus.*”

This section, which has been repealed since 2013 in France, can be translated as follows:

“The man and the woman may not contract marriage before having fully attained the age of eighteen years.”

The aforementioned provision of the pre-2013 French Civil Code explicitly confined the legal institution of marriage to persons of the opposite sex (by specifically providing for marriage as a union between a male and a female). In 2013, the French legislature repealed this restriction and replaced it with two articles in the French Civil Code, stating that marriage can be contracted between any 2 persons, whether of different sex or of same sex, and that no marriage can be celebrated unless the parties are at least 18 years old. Consent remains a precondition

³¹ Loi n°. 2006-300 du 4 avril 2006

³² “Loi n° 2013-404 du 17 mai 2013”

for marriage³³. However, it is still possible in France for a minor to get married if he gets a specific dispensation for serious reasons³⁴.

Such a precondition for marriage expressly confined as a union between the male and the female as it existed in France before 2013 was not imported in Mauritius during the 1981 reform (repealing Ordinance No. 26 of 1890 which restricted marriage to opposite-sex couples). Rather, the Mauritian legislature enacted a free-standing, gender-neutral non-discriminatory provision on marriage.

Furthermore, since the 1981 reform, the legislation governing marriage in Mauritius has undergone multiple amendments, namely in 1984³⁵ and 2020³⁶. At no juncture has the legislature subsequently enacted any provision to reintroduce the explicit restriction of marriage to "*the male with the female*", a limitation that existed prior to 1981 under the authority of Ordinance No. 26 of 1890. Neither has the Mauritian legislature prohibited same-sex marriages as it will be hereafter demonstrated.

3. Prohibitions to marriage in Mauritius: Minors, forced marriage, bigamy, family marriage

The CCM expressly enumerates impediments to marriage. Certain of these impediments are deemed to be of public order (*ordre public*), meaning they are not subject to validation or admission by the parties. The prohibitions to marriage are exhaustively listed in the CCM and are:

- Marriage of minors (under 18 years old)
- Forced marriage (lack of consent)
- Bigamy
- Family / incestuous marriage between ascendants and descendants
- Family / incestuous marriage between siblings

³³ Article 146 of the French Civil Code

³⁴ Article 145 of the French Civil Code

³⁵ Act no. 12 of 1984 [The Code Napoléon (Amendment) Act 1984]

³⁶ Act no. 13 of 2020

- Family / incestuous marriage between third degree collaterals (uncle, niece, aunt, nephew)

i. Prohibition of the marriage of minors

Since 2020³⁷, the marriage of any minor (under 18 years old) in Mauritius is strictly prohibited. Such a prohibition derives directly from the wording of article 144 of the CCM which is the substantive law providing for marriage in Mauritius. All derogations have been removed in 2020 and Article 149A of the CCM now declares that the provisions of articles 144 are of public order. In addition, section 12 of the Children’s Act 2020 also prohibits marriage (whether civil or religious) and marital cohabitation with a minor. Contravention to this section constitutes a criminal offence punishable, upon conviction, by a fine not exceeding one million rupees and by a term of imprisonment not exceeding ten years. As explained by the Supreme Court, the public order characteristic of a law is reinforced by the criminalisation of its contravention³⁸. The Interpretation of General Clauses Act 1974 confirms this prohibition since its section 5(4)(a) provides that “*The word "shall" may be read as imperative*” and section 12 (1) of the Children’s Act expressly provides as follows:

“(1) No person shall –
 (a) marry a child civilly or religiously; or
 (b) cause or force a child to marry civilly or religiously.”

ii. Prohibition of forced marriage (lack of consent)

Article 146 of the CCM provides that there can be no marriage without consent. The requirement of consent from the intended parties to a marriage constitutes a matter of public order, as expressly provided by Article 149A of the CCM. Consequently, a marriage is prohibited in the absence of consent from either party.

³⁷ Act 13 of 2020

³⁸ Bhewa & Alladeen v. Government of Mauritius and DPP – 1990 SCJ 126

**iii. Prohibition of marriage in the absence of dissolution of the first marriage
(which would result in a situation of bigamy)**

Marriage to a person already married and without dissolution of the first marriage is also strictly prohibited in Mauritius as this would lead to a situation of bigamy. This prohibition is of public order as stated by Article 149A of the CCM. Article 150 of the CCM provides as follows:

« 150. On ne peut contracter un second mariage avant la dissolution du premier. »

Bigamy is also a criminal offence in Mauritius under section 257 of the Criminal Code Act 1838 which reads as follows:

“257. Bigamy

<i>(1) Quiconque étant engagé dans les liens du mariage, en aura contracté un autre avant la dissolution du précédent,</i>	<i>(1) Any person who, being married, marries another person before the dissolution of the first marriage,</i>
<i>shall be punished by penal servitude for a term not exceeding 20 years.</i>	
<i>(2) L'officier public qui aura prêté à son ministère à ce mariage, connaissant l'existence du précédent, sera condamné à la même peine.</i>	<i>(2) Any public officer who lends his aid and assistance for such subsequent marriage, knowing the existence of the first, shall suffer the like punishment.</i>
<i>(3) Pour l'application des dispositions de la présente section, le terme 'mariage' s'entend uniquement du mariage civil prévu dans la section 24 du Civil Status Act ou d'un mariage religieux ayant des effets civils conformément aux sections 27 et 28 du Civil Status Act.</i>	<i>(3) In this section, 'marriage' means a civil marriage under section 24 of the Civil Status Act and a religious marriage having civil effect under sections 27 and 28 of the Civil Status Act.”</i>

It is therefore strictly prohibited in Mauritius to get married again in the absence of dissolution of the first marriage. The Supreme Court has also already declared that monogamy is of public order in Mauritius³⁹.

³⁹ Bhewa & Alladeen v. Government of Mauritius and DPP – 1990 SCJ 126

iv. Prohibition of marriage between family members (incestuous marriage)

Articles 151, 152 and 153 of the CCM prohibit marriage between ascendants and descendants, between siblings and also between collateral family members of the third degree (uncle-niece, aunt and nephew). With regard to family members, Article 149A provides that the prohibitions set out in articles 151 and 152 are of public order.

However, it is to be noted that Article 154 provides for some exceptional derogations to the prohibitions set out in Article 151 of the CCM. For instance, the Judge in Chambers can lift, for a serious cause, the prohibitions established by Article 151 regarding marriages between relatives by marriage in the direct line, provided that the person who created the affinity is deceased.

The Judge in Chambers can also lift the prohibitions set out in Article 153 of the CCM which are however not of public order. Articles 151 to 154 are hereunder reproduced:

« 151. En ligne directe, le mariage est prohibé entre tous les ascendants et descendants légitimes ou naturels, et les alliés dans la même ligne.

152. En ligne collatérale, le mariage est prohibé entre le frère et la soeur légitimes ou naturels.

153. Le mariage est encore prohibé entre l'oncle et la nièce, la tante et le neveu, que la parenté soit légitime ou naturelle.

154. Néanmoins, il est loisible au Juge en Chambre à la requête de la personne intéressée de lever, pour des causes graves, les prohibitions portées par l'article 151 aux mariages entre alliés en ligne directe lorsque la personne qui a créé l'alliance est décédée et par l'article 153 aux mariages entre l'oncle et la nièce, la tante et le neveu. »

Pursuant to the provision contained in Section 5(1) of the Interpretation of General Clauses Act 1974, which provides that “Words importing the masculine shall include the feminine and the neuter”, the marital prohibitions applicable to familial relations are to be construed as applying irrespective of gender. It is thus established that, from the year 1974, the Mauritian legislature has provided for the inclusion of the “neuter” within the ambit of such legal prescription.

4. The nullity of marriage in Mauritius

When prohibited marriages have been celebrated, articles 180 to 200 of the CCM establish the grounds upon which such a marriage may be challenged, as well as the legal consequences attendant upon its nullity. For instance, Article 180 of the CCM provides for the possibility to attack a marriage celebrated without the consent of at least one of the parties and obtain a declaration of nullity of such a marriage. Article 184 of the CCM provides that a declaration of nullity can also be sought against a marriage celebrated in violation of the following articles of the CCM:

- Article 149 (marriage celebrated in the absence of consent of at least one of the parties)
- Article 150 (marriage solemnised while at least one of the parties' first marriage was not yet dissolved, thereby creating a situation of bigamy)⁴⁰;
- Article 151 (marriage solemnised between ascendants and descendants)
- Article 152 (marriage celebrated between siblings);
- Article 153 (marriage between 3rd degree collateral family members – uncle, niece, aunt and nephew);
- In the landmark case of *Collet v. Collet*⁴¹, the Supreme Court declared null and void a prohibited marriage which had been celebrated with a minor.

This legal reasoning extends directly to the principal subject of this study, namely the issue of same-sex marriage, given that the quality of being of the same sex does not constitute a prohibition to marriage prescribed under the laws of Mauritius.

5. The issue of same-sex marriage in Mauritius

Marriage, being the only form of union recognised in Mauritius, the issue of same-sex marriage has started to be put forward by citizens of the LGBTQ+ community. It has been reported that in July 2015, a same-sex couple approached the Civil Status Office (CSO) to solemnise their marriage⁴². The contracting parties, both of whom were of the male gender and possessed

⁴⁰ *Muthy v. Gooly* – 2010 SCJ 21

⁴¹ *Collet v. Collet* – 2018 SCJ

⁴² <https://youngqueeralliance.com/wp-content/uploads/2020/12/2020.12.15-Demandeurs-dasile-LGBTI-de-Ille-Maurice.pdf> - p. 11

Mauritian nationality, had attained the age of majority and mutually consented to enter into matrimony with one another. Each party was confirmed to be unmarried at the time, establishing their legal capacity to contract a marriage. Furthermore, no prohibitive degree of consanguinity existed between them, as they were neither ascendants nor descendants of each other, nor siblings, nor collateral relatives within the third degree. The parties consequently satisfied all statutory prerequisites for contracting a valid civil marriage, and no legal impediment to their union existed.

Instead of complying strictly with the provisions of the CCM, the CSO declined to publish the notice of the intended marriage. Instead, it issued an oral denial of the marriage application on a ground not provided by law, namely the absence of sex difference. The said couple seized the Equal Opportunity Commission (EOC) which is a statutory body under the Equal Opportunity Act 2008, and complained they had been discriminated against on the basis of their sexual orientation and denied to the service of civil marriage. The Equal Opportunity Act 2008 indeed prohibits discrimination on the basis of sexual orientation to accede a service, with the explicit meaning that sexual orientation includes homosexuality. Surprisingly, the EOC confirmed the decision of the CSO in the following terms:

“An examination of your complaint has revealed that same does not comply with section 30 of the Equal Opportunities Act as there is no provision in our laws for civil marriage of two persons of the same sex.”⁴³

The decision of the EOC, along with the invoked ground for refusal, was particularly stunning from a legal perspective, as a closer examination of the CCM and the Civil Status Act would have revealed the absence of any specific statutory provision within Mauritian law prohibiting marriage between adults of the same-sex or restricting civil marriage to “opposite-sex” couples. Surely, the fundamental legal provision governing marriage in Mauritius, namely Article 144 of the CCM, does not expressly provide for the civil marriage of two persons of the same sex. However, it similarly does not provide for the civil marriage of two persons of different sexes.

The precise drafting of the statutory provisions governing marriage under Mauritian law necessitates inquiry into the legislative rationale for omitting an express restriction of civil

⁴³ EOC/15/138

marriage to a union between “a man and a woman” during the 1981 legal reform. Two questions can here be raised:

- a. Was the Mauritian legislature unaware of the revendications of same-sex couples?
- b. What has, since then, been the position of the State of Mauritius with regard to discrimination based on sex and sexual orientation?

a. Was the Mauritian legislature unaware of the revendications of same-sex couples in 1981?

During the 1980s, the Mauritian legislature enacted a series of amendments to the CCM with the express purpose of eliminating numerous discriminatory provisions entrenched within the civil law. A substantial number of these provisions were vestiges of the prior French and British colonial legal regimes. While the legislature drew inspiration from the French Civil Code for the broader modernisation of the CCM, it deliberately and unequivocally refrained from perpetuating or transposing the then still existing discriminatory provisions of the French Civil Code into the CCM.

Regarding the legislature’s deliberate omission of a restriction defining marriage as a union between “a man and a woman” within the CCM, a legitimate inquiry arises: whether this formulation was enacted due to an unawareness of the existence and claims of same-sex couples, or whether it was a prospective enactment, drafted in anticipation of an issue foreseeable within the Mauritian context?

The Mauritian legislature was definitely not unaware of the existence and claims of same-sex couples in the world, namely in the United Kingdom and western countries. To this effect, it must here be recalled that Mauritius was not a republic in 1981 and shared its Head of State with the United Kingdom until 1992. Same-sex unions and same-sex sexual activities was already a matter of significant contemporaneous debate in the UK. For instance, it was in 1971 that the United Kingdom enacted the Nullity of Marriage Act 1971 to expressly provide, *inter alia*, for a marriage to be void *ab initio* if the parties are not respectively male and female⁴⁴ but attitudes towards same-sex activities progressively changed afterwards and homosexuality

⁴⁴ Section 1(c) of the Nullity of Marriage Act 1971

started to become widely accepted in most democracies and secular States. For instance, following a proposal before the Swedish Parliament in 1973, the latter declared that homosexuality was a fully acceptable life⁴⁵. In December 1973, the American Psychiatric Association removed homosexuality from its list of mental disorders⁴⁶. In 1977, the province of Quebec in Canada expressly prohibited discrimination based on sexual orientation in the public and private sectors⁴⁷. This was followed by many other States and countries in the world, which also started decriminalising homosexuality. The question of decriminalisation of homosexuality precipitated impassioned and, on occasion, violent debates within numerous Western jurisdictions, resulting in public demonstrations, civil unrest, and incidents of physical altercations and casualties among opposing factions⁴⁸. As a matter of relevance, it should here be noted that in Mauritius, homosexuality has never been an offence. The Mauritian legislature probably did not want to import such an intolerance in Mauritian law which would have sooner or later, given rise to passionate debates for its repeal and make such a repeal cumbersome.

Parades and marches also started to be organised in many cities to voice out for the abolition of all forms of discrimination based on sexual orientation and gender identity. In 1981, after such a first parade in Paris, homosexuality was removed from the list of mental disorders (while the World Health Organisation did same only in 1990) and in 1982, France abolished all sexual offences based on the sole homosexual nature⁴⁹. Such a decision was triggered by a judgment delivered by the European Court of Human Rights in October 1981⁵⁰ condemning the United Kingdom for violation of the right of the individual to private life enshrined in article 8 of the European Convention on Human Rights. The said judgment considered that criminalising consensual sexual conducts of adults in private was a blatant violation of the right of the individual to his private life. Gradually, not only States started to recognise same-sex unions but many of them also started to apologise formally for the State-sponsored homophobia and discrimination which previously existed⁵¹.

⁴⁵ “A History of Gay Marriage in Scandanavia”, Jens Rydström, p. 50 – Amsterdam University Press

⁴⁶ <https://www.psychiatry.org/psychiatrists/diversity/education/best-practice-highlights/working-with-lgbtq-patients>

⁴⁷ Smith, Miriam (January 10, 2019). "Homophobia and Homonationalism: LGBTQ Law Reform in Canada

⁴⁸ See the “Save our Children” campaign in 1977 – Georgia State University Press - <https://exhibits.library.gsu.edu/out-in-the-archives/the-power-of-protest/anita-bryant/>

⁴⁹ <https://www.cairn.info/revue-deviance-et-societe-2019-3-page-421.htm#no88>

⁵⁰ *Dudgeon v. The United Kingdom* – ECtHR – 22.10.1981, n° 7525/76

⁵¹ “Decades after ‘Massive Injustice’ repealed, Scotland will offer pardons to gay men” – Colin Dwner, in NPR, 06.06.2018

Had the Mauritian legislator intended to restrict marriage to a union between a man and a woman, he would have expressly enacted a specific statutory provision to that effect. Alternatively, it could have declared “same-sex” status as a distinct statutory prohibition to marriage, just as it had expressly done in the case of bigamy, child marriage, and marriage between blood-related parties.

A critical judicial observation was made by the Supreme Court concerning the discernible intent of the Mauritian legislature in 1981. The Court noted the legislature’s deliberate purpose to establish a distinctive legal framework for marriage, consciously departing from both French civil law and British common law models. It is therefore a misconstruction to presume that the legislative overhaul of matrimonial law in CCM that year was intended to fully adopt French laws. As highlighted by the Court:

“Our new article 145 Code Napoléon differs from its French equivalent. [...] One may or may not agree with the policy of the legislature but one cannot ignore the clear intentions of prohibiting marriages of persons who are not yet of age.”⁵² [Emphasis added]

Had the legislature further determined that same-sex marriage contravened public order in Mauritius, it would have explicitly criminalised such unions, as it has previously done with the offences of bigamy and, more recently, child marriage through the 2020 reform. He would have taken inspiration from the provisions of the repealed “Nullity of Marriage Act 1971” or the “Matrimonial Causes Act 1973” in the UK which expressly provided for marriage to be automatically void if the parties were not “respectively male and female”, or he would have been inspired from more recent legislations enacted, for example, in Nigeria, Burundi, Uganda, Burkina Faso or Zambia (which sought inspiration from the UK “Matrimonial Causes Act 1971”).

For instance, the “Same Sex Marriage (Prohibition) Act 2013” (SSMPA) enacted in Nigeria provides expressly that:

- A marriage contract or civil union entered into between persons of same sex: (a) is prohibited in Nigeria; and (b) shall not be recognised as entitled to the benefits of a valid marriage⁵³.

⁵² Ministère Pub. Dispensation of age to X to contract marriage with Mr Y. - 1984 SCJ 39

⁵³ Section 1 (1) of the SSMPA

- A marriage contract or civil union entered into between persons of same sex by virtue of a certificate issued by a foreign country is void in Nigeria, and any benefit accruing there-from by virtue of the certificate shall not be enforced by any court of law⁵⁴.
- Only a marriage contracted between a man and a woman shall be recognized as valid in Nigeria⁵⁵.
- A person who enters into a same-sex marriage contract or civil union commits an offence and is liable on conviction to a term of 14 years imprisonment⁵⁶.

In Burundi's new 2005 Constitution, article 29 formally prohibits marriage between people of the same sex and reads as follows: "*Le mariage entre deux personnes de même sexe est interdit*"⁵⁷.

In Uganda, the Anti-Homosexuality Act 2023 (AHA) expressly provides for "*prohibition of marriage between persons of the same sex*"⁵⁸. Any person who contravenes this section commits an offence and is liable, on conviction, to imprisonment for a period not exceeding 10 years (similar to the offence of child marriage in Mauritius⁵⁹).

While amending legislation in 2020 to prohibit child marriage, the Mauritian legislature had the opportunity to enact a specific prohibition against same-sex unions. However, he refrained himself from introducing any such prohibition or from defining marriage in restrictive terms, such as a union between "a man and a woman". Contemporaneously, the legislature demonstrated a progressive approach by enacting a provision to legally recognise an "undetermined" gender, defined as pertaining to a newborn whose sex cannot be determined due to congenital anomalies at birth or at the time of stillbirth.⁶⁰ The legislation does not impose a compulsory temporal limitation upon the classification of "undetermined" gender. Consequently, an individual assigned this status may retain it indefinitely if their gender cannot be medically or legally determined during their lifetime. This can be a good solution for intersex people who are "*Persons with innate variations in sex characteristics, born with sex*

⁵⁴ Section 1 (2) of the SSMPA

⁵⁵ Section 3 of the SSMPA

⁵⁶ Section 5 (1) of the SSMPA

⁵⁷ Constitution of Burundi – Article 29

⁵⁸ Section 10 of the AHA

⁵⁹ Section 12 (2) of the Children's Act in Mauritius

⁶⁰ Section 13B of the Civil Status Act 1981

characteristics that do not fit typical definitions for male or female bodies, including sexual anatomy, reproductive organs and hormonal or chromosome patterns”⁶¹.

Had the Mauritian legislature intended to restrict matrimony exclusively to a union between “*a man and a woman*”, or to expressly prohibit all other conjugal arrangements, such a legislative action would have precipitated a particularly untenable and discriminatory situation. Individuals legally recognised as being of “*undetermined*” gender would have been effectively and permanently barred from exercising the fundamental right to enter into marriage irrespective of their sexual orientation. This cannot have been the intention of the Mauritian legislature.

Based on a plain reading of the statutory language and its inherent flexibility, it is mostly probable that the Mauritian legislature, in its foresight, deliberately and thoughtfully adopted a definition of marriage that is procedurally and definitionally expansive. This strategic legislative drafting enables the accommodation of future developments in societal norms and medical understanding., thereby intentionally avoiding a peremptory exclusion of the potential recognition of same-sex unions or unions involving an intersex person (or person with undetermined gender).

This interpretation is further substantiated by a *contrario* analysis of the statute’s explicit prohibitions. The CCM meticulously enumerates specific grounds that prohibit the celebration of marriage or renders it voidable, such as bigamy, lack of age (child marriage), and consanguinity within prohibited degrees. The legislature’s deliberate articulation of these express nullities underscores a conscious choice to delineate the boundaries of invalidity. The conspicuous absence of any parallel prohibition or nullity clause pertaining to the sex or gender of the spouses is legally significant. It contrasts to the explicit bars established elsewhere, reinforcing the conclusion that the legislature did not intend to prohibit same-sex marriage in Mauritius. This conclusion is further reinforced by the State’s established domestic and international legal posture regarding discrimination on the basis of sexual orientation. Specifically, since 2008, the State of Mauritius has formally been adopting a policy direction

⁶¹ “Discriminatory laws and policies, acts of violence and harmful practices against intersex persons” - Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, August 2025

aimed at the abolition of such discrimination, as evidenced by its commitments and reforms within domestic legislation and its engagements at the international level.

Moreover, in 2011, Honourable Paul Bérenger, Leader of the Opposition (who is also a member of the opposition today) sitting in the Mauritian National Assembly, enquired from the Prime Minister on the position of Mauritius on the rights of homosexual people following the Resolution on “*Human rights, sexual orientation and gender identity*” which was adopted on 17 June 2011 by the 17th Session of the Human Rights Council which affirms the universality of human rights and expresses concern about acts of violence and discrimination based on sexual orientation and gender identity which was supported by Mauritius. Mr Bérenger asked whether domestic legislation would be further amended to eradicate discrimination on the ground of sexual orientation and whether, considering the religious sensitivities, Mauritius “*should have abstained like Burkina Faso or Zambia instead of voting for the resolution*”.

In a very instructive statement, the Prime Minister, Dr Navinchandra Ramgoolam (who is also the current Prime Minister of Mauritius), first introduced his answer by stating that “*Mauritius has always adhered to the principle of universality of human rights, as enshrined in the Universal Declaration of Human Rights, Article 1 of which proclaims that “All human beings are born free and equal in dignity and rights”*”. He underlined that since December 2008, a specific domestic law had been adopted: the Equal Opportunities Act, which already expressly prohibits discrimination on various grounds, including sexual orientation. He recalled that “*in December 2008, Mauritius had co-sponsored along with 66 other countries a Statement delivered in the United Nations General Assembly on human rights, sexual orientation and gender identity. This statement expressed deep concern about violations of human rights and fundamental freedoms based on sexual orientation or gender identity*”. He stressed that “*at the Universal Periodic Review of Mauritius held in February 2009, the United Kingdom had called upon Mauritius to take further measures to prevent discrimination based on sexual orientation, and to make provision in our Equal Opportunities Act for the legal acknowledgement of homosexual couples and their human rights. It is noteworthy that the reaction of Mauritius to the UK proposal was that Mauritius would give further consideration to the proposal*” and that against this background, “*Mauritius supported the Resolution on “Human rights, sexual orientation and gender identity” which was adopted on 17 June [2011] by the 17th Session of the Human Rights Council.*”

On whether Mauritius should have refrained from supporting the said resolution like Zambia and Burkina Faso, the Prime Minister rightly answered negatively as follows:

“I tend not to agree, Mr Speaker, Sir, because, as I said, we have always adopted the position which prohibits discrimination on various grounds and I think abstaining would give the wrong impression that we are as if going back on what our positions have been in the past. We had, as I said, cosponsored in December 2008 along with the 66 other countries, a statement in the United Nations General Assembly on Human Rights, Sexual Orientation and Gender Identity and we have also, as I said, at different times, supported the different resolutions on human rights. So, I think that would be in line with what position we have taken.”

He further explained that there have always been a lot of sensitivities in Mauritius about the subject and that debates about it are never ending but that he thinks that:

“we need to take the bull by the horns and decide once and for all what kind of society we want to live in.”⁶²

The applicable legal framework in Mauritius is indeed materially distinct from those in force in Zambia or Burkina Faso, both of which have enacted explicit statutory provisions discriminating on the basis of sexual orientation. In order to comprehend why the aforementioned countries abstained from supporting the said resolution, and why Mauritius, by contrast, did not abstain but rather extended its full support, an analysis of the respective domestic laws of Zambia and Burkina Faso pertaining to marriage and homosexuality is required.

In Zambia for instance, the Legislature has, unlike the Mauritian legislator, expressly prohibited same-sex marriage through the enactment of the Matrimonial Causes Act 2007. Its section 27 provides that a marriage is not valid if the parties to the marriage are of the same sex:

« 27. Grounds for decree to nullity of marriage

(1) A marriage celebrated after the commencement of this Act shall be void on the following grounds:

(a) that the marriage is not a valid marriage under the provisions of the Marriage Act due to the fact that –

⁶² Parliamentary Debates (Hansard) – First session, 28.06.2011 (debate n° 14 of 2011)

- (i) the parties are within the prohibited degrees of consanguinity or affinity;*
- (ii) either party to the marriage was a child at the time the marriage was*
:[subparagraph (ii) substituted by section 3 of Act 6 of 2024]
- (iii) the parties have not complied with the requirements of the Act with respect to the solemnisation of the marriage as specified in subsection (2) of section thirty-two of that Act;*
- (b) that either party to the marriage was lawfully married to some other person at the time of the marriage; or*
- (c) the parties to the marriage are of the same sex.”⁶³*

Pursuant to Section 23(4)(c) of the Constitution of Zambia, discrimination on the basis of sex is permitted under specific and limited circumstances, namely in matters relating to adoption, marriage, or the devolution of property. It is notable, however, that such exceptions are not provided for under the laws of Mauritius.

In Burkina Faso, the legislator has also always restricted marriage to the “*man with the woman*” by defining it as the union between a man and a woman. Article 220-1 of the current version of the “*Code des personnes et de la famille*” enacted in 2025⁶⁴ provides as follows :

“Le mariage est la célébration d'une union entre un homme et une femme, régie par les dispositions du présent code.

Il ne peut être dissout que par la mort de l'un des époux ou par le divorce légalement prononcé.”

This can be translated as follows:

“Marriage is the solemnisation of a union between a man and a woman, governed by the provisions of this Code.

It may be dissolved only by the death of one of the spouses or by a divorce legally pronounced.”

This new article 220-1 merely replicates the content of the former article 237 without any substantive amendment⁶⁵.

⁶³ The Matrimonial Causes Act (Act 20 of 2007) - <https://zambialii.org/akn/zm/act/2007/20/eng@2024-08-16>

⁶⁴ Décret n° 2025-1232/PF promulguant la loi n° 012-2025/ALT du 01.09.2025

⁶⁵ Zatu an VII 13 du 16 novembre 1989 portant institution et application d'un code des personnes et de la famille au Burkina Faso.

Furthermore, article 210-3 of Burkina Faso's *Code des personnes et de la famille* strictly prohibits same-sex marriage in a general term which criminalises all types of homosexual activities:

“L’homosexualité et les pratiques assimilées sont interdites.

Est punie d’une peine d’emprisonnement de deux à cinq ans et d’une amende de deux millions (2 000 000) à dix millions (1 000 000) de francs, toute personne qui se rend coupable d’actes d’homosexualité ou de pratiques assimilées ou de tout comportement de nature à promouvoir les pratiques homosexuelles et assimilées.

En cas de récidive, les peines sont portées au double.

Lorsque le mis en cause est de nationalité étrangère, il peut en outre être prononcé contre lui l’expulsion du territoire national. ”

This article can be translated as follows:

“Homosexuality and related practices are prohibited.

Any person who commits acts of homosexuality or related practices, or any behavior likely to promote homosexual or related practices, shall be punished by imprisonment of two to five years and a fine of two million (2,000,000) to ten million (10,000,000) francs.

In the event of a repeat offense, the penalties shall be doubled.

If the accused is of foreign nationality, expulsion from the national territory may also be ordered against them.”

Under Burkina Faso's law, marriage is legally restricted to opposite-sex parties and is expressly proscribed for same-sex couples. It is interesting to highlight that, pursuant to Article 221-21 of the *Code des personnes et de la famille*, polygamy is still permitted in Burkina Faso. Nevertheless, such permission operates unilaterally in favour of the husband, who may contract marriage with multiple wives. By contrast, polyandry - i.e. the union of one woman with more than one husband - is strictly prohibited. The aforementioned provision therefore gives rise to a *de jure* discrimination based on sex, insofar as it grants to husbands a right that is entirely withheld from wives. The UN Human Rights Committee has since long, considered that *“equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to*

*exist*⁶⁶. Consequently, it is rather striking that the position of Burkina Faso - whose domestic legislation upholds discrimination on the basis of sex - has been proposed as a model to be followed by Mauritius.

The legal framework in Mauritius stands in stark contrast to those of Zambia and Burkina Faso. As will be demonstrated in depth, Mauritius neither confines the legal definition of marriage to a union between “*a man and a woman*”, nor imposes any prohibition on marriage between same-sex parties. Furthermore, unlike Zambia and Burkina Faso, Mauritius has enacted domestic legislation that explicitly outlaws discrimination on the ground of sex and sexual orientation. Such protection against discrimination based on sex and sexual orientation has further attained constitutional rank within the Mauritian legal order. Consequently, it is both pertinent and necessary to examine the position adopted by the State of Mauritius at the international level in relation to the said subject matter.

b. The position of the State of Mauritius with respect to discrimination based on sexual orientation

Many statutes provide for protection against discrimination based on sex, gender and sexual orientation. The two terms ‘sex’ and ‘gender’ are not always both present in the statute but in the absence of explicit definition in the “interpretation section” of a statute, the term ‘sex’ or ‘gender’ should rationally be considered as encompassing transgenders. Below are some domestic instruments which provide for such protection:

i. The Constitution of the Republic of Mauritius

The Constitution of Mauritius is the supreme law of the land in Mauritius. Chapter 2 of the Constitution provides for the protection of the fundamental rights and freedoms of the individual and sets out a list of constitutionally protected rights, namely:

- a. Protection of right to life (section 4) and to personal liberty (section 5)
- b. Protection from inhuman treatment (section 7)

⁶⁶ Human Rights Committee, 68th session, General Comment n° 28

- c. Protection for privacy of home and other property (section 9)
- d. Protection of freedom of conscience (section 11) and expression (section 12)
- e. Protection of freedom of movement (section 15)
- f. Protection from discrimination on the basis of race, caste, place of origin, political opinions, colour, creed or sex (section 16).

In 2023, the Supreme Court of Mauritius delivered, on the same day, its two first explicit judgments on LGBTI issues⁶⁷ and outlined that *“The word ‘sex’ is not defined in the Constitution. Generally, so far, the word ‘sex’ in the Constitution, in keeping with its primary dictionary meaning, has been accepted as referring to ‘gender’.”*

After referring to a series of foreign landmark cases, the Supreme Court held that *“The Constitution is a living document and must be given a generous and purposive interpretation. [...]*

since Mauritius has acceded to the ICCPR, it has accepted to adhere to international norms and standards regarding the fundamental rights and freedoms the ICCPR provides for and that interpreting “sex” as including ‘sexual orientation’ in section 16 of our Constitution would be in conformity with the standard canon of constitutional interpretation which requires, where possible, that our constitutional provisions be interpreted in line with our international obligations. This would also be in line with the fact that, in interpreting the Constitution, reference may be made to international instruments and international jurisprudence. We also endorse the remaining cogent and persuasive submissions of learned Counsel for the plaintiff, as set out above, in favour of interpreting ‘sex’ in section 16 of the Constitution as including ‘sexual orientation’.

ii. The Workers Rights Act 2019 (which repealed and replaced the Employment Rights Act 2008)

The Employment Rights Act 2008 (ERA 2008) was the first domestic legislation in Mauritius to explicitly prohibit discrimination in employment on the grounds of sex and sexual orientation. In 2019, the ERA 2008 was repealed and replaced by the Workers’ Rights Act 2019

⁶⁷ Ah-Seek v. State of Mauritius-2023 SCJ 399, Fokeerbux & Ors v. State of Mauritius-2023 SCJ 400

(WRA 2019) and the protection from discrimination based on sexual orientation in employment was preserved. In 2020, the term ‘gender’ was explicitly added⁶⁸ as one of the grounds on which discrimination was forbidden, in addition to the existing words ‘sex’ and ‘sexual orientation’, as follows:

“ ‘discrimination’ includes affording different treatment to –

(a) different workers attributable, wholly or mainly, to their respective description by age, race, colour, caste, creed, sex, sexual orientation, gender, HIV status, [...], which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation”.⁶⁹

iii. The Mauritius Family Planning and Welfare Association Act 2018

Section 7 provides that the Association shall, in the discharge of its functions and exercise of its powers, not discriminate on various grounds, namely, gender and sexual orientation.

iv. The Equal Opportunities Act 2008

The Equal Opportunities Act which forbids discrimination on the ground of “status” defines “status” as including “sex or sexual orientation”.

v. Relevant international instruments

Mauritius has adhered to a series of international instruments in the field of human rights. In many foreign jurisdictions, the application of some of these international instruments has unlocked trans rights and, more generally, LGBTI rights. As pointed out by the highest jurisdictions of Mauritius on several occasions, international instruments to which Mauritius is a party certainly do not have direct effect and are not directly applicable in Mauritius, unless these instruments are domesticated by an act of parliament. However, Mauritian Justices have steadily reiterated that “*it is a well-recognised canon of construction that domestic legislation,*

⁶⁸ Act 7 of 2020

⁶⁹ Section 5 of the Workers’ Rights Act 2019

including the Constitution, should if possible be construed so as to conform to such international instruments [to which Mauritius has been a signatory]”⁷⁰.

In its 11th Periodic Report on the Implementation of the African Charter on Human and Peoples’ Rights, the Republic of Mauritius proudly stresses that:

“55. Mauritius has acceded to almost all the Core Conventions on Human Rights at international level, as follows:

Table 1 – United Nations Treaties/ Conventions

<i>Treaty/Convention</i>	<i>Date of accession (a) /ratification(r) /</i>
<i>International Covenant on Civil and Political Rights (CCPR)</i>	<i>12 December 1973 (a)</i>
<i>International Covenant on Economic, Social and Cultural Rights (CESCR)</i>	<i>12 December 1973 (a)</i>
<i>International Convention on the Elimination of all Forms of Racial Discrimination (CERD)</i>	<i>30 May 1972 (a)</i>
<i>International Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)</i>	<i>09 July 1984 (a)</i>
<i>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)</i>	<i>09 December 1992 (a)</i>
<i>Convention on the Rights of the Child (CRC)</i>	<i>26 July 1990 (a)</i>
<i>Convention on the Rights of Persons with Disabilities (CRPD)</i>	<i>08 January 2010 (r)</i>

Source: Ministry of Foreign Affairs, Regional Integration and International Trade

56. Along with the above-mentioned Conventions/Treaties, Mauritius has ratified three and acceded to two Optional Protocols.

Table 2: Optional Protocol

<i>Optional Protocol</i>	<i>Date of accession (a) /ratification (r)</i>
<i>Optional Protocol to the International Covenant on Civil and Political Rights (CCPR-OP1)</i>	<i>12 December 1973 (a)</i>
<i>Optional Protocol to the Convention against Degrading Treatment or Punishment (CAT- OP)</i>	<i>21 June 2005 (a)</i>
<i>Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW-OP)</i>	<i>31 October 2008 (r)</i>

⁷⁰ See *Matadeen v. Pointu*, 1997 PRV 14

<i>Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (CRC-OP-AC)</i>	<i>12 February 2009 (r)</i>
<i>Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (CRC-OP-SC)</i>	<i>14 June 2011(r)</i>

Source: Ministry of Foreign Affairs, Regional Integration and International Trade

57. Mauritius became a Member State of the African Union in August 1968. As a State Party, it signed the African Charter on Human and Peoples' Rights on 27th February 1992 and ratified same on 19th June 1992. It has acceded to and ratified Regional and Multilateral Treaties/Conventions as follows: -

Table 3 – Regional Treaties/Conventions

<i>Treaty/Convention</i>	<i>Date of Ratification (r)</i>
<i>African Charter on the Rights and Welfare of the Child</i>	<i>14 February 1992 (r)</i>
<i>African Charter on Human and Peoples' Rights</i>	<i>19 June 1992 (r)</i>
<i>Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights</i>	<i>03 March 2003 (r)</i>
<i>Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)</i>	<i>16 June 2017 (r)</i>

Source: Ministry of Foreign Affairs, Regional Integration and International Trade

Table 4: Multilateral Treaties

<i>Multilateral Treaties</i>	<i>Date of Accession (a) /Ratification (r)</i>
<i>The Hague Convention on the Civil Aspects of International Child Abduction</i>	<i>23 March 1993 (a)</i>
<i>Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational</i>	<i>24 September 2003 (a)</i>
<i>United Nations Convention against Transnational Organised Crime</i>	<i>21 April 2003 (r)</i>
<i>Convention for the protection of individuals with regards to automatic processing of personal data (European Treaty 108)</i>	<i>17 June 2016 (r)</i>

Source: Ministry of Foreign Affairs, Regional Integration and International Trade”

More specifically, when it comes to sexual orientation, it is to be pointed out that the State of Mauritius has recognised on international fora that protection from discrimination on the ground of sexual orientation and gender identity is a necessity. Indeed, it had sponsored the *UN Declaration on Sexual Orientation and Gender Identity*⁷¹ presented to the UN General Assembly dated 18 December 2008, which was the First ever statement on sexual orientation and gender identity at the UN General Assembly. Mauritius stated that it was “*deeply concerned by violations of human rights on fundamental freedoms based on sexual orientation and gender identity*” and even firmly condemned such prevailing discriminations. Some of the principles enumerated in the declaration deserve an explicit reproduction:

“Principle 3 - We reaffirm the principle of non-discrimination, which requires that human rights apply equally to every human being regardless of sexual orientation or gender identity.

Principle 4 - We are deeply concerned by violations of human rights on fundamental freedoms based on sexual orientation or gender identity.

Principle 5 - We are also disturbed that violence, harassment, discrimination, exclusion, stigmatization and prejudice are directed against persons in all countries in the world because of sexual orientation or gender identity, and that these practices undermine the integrity and dignity of those subjected to these abuses.

Principle 6 - We condemn the human rights violations based on sexual orientation or gender identity wherever they occur, in particular the use of the death penalty on this ground, extrajudicial, summary or arbitrary executions, the practice of torture and other cruel, inhuman and degrading treatment or punishment, arbitrary arrest or detention and deprivation of economic, social and cultural rights, including the right to health.

Principle 10 - We call upon all states and relevant international human rights mechanisms to commit to promote and protect the human rights of all persons, regardless of sexual orientation or gender identity.

⁷¹ Joint statement on sexual orientation and gender identity 18 December 2008 UN General Assembly. Delivered by Argentina (Ambassador Jorge Arguello) – total of 66 co-sponsors

Principle 11 - We urge states to take all the necessary measures, in particular legislative or administrative, to ensure that sexual orientation or gender identity may under no circumstances be the basis for criminal penalties, in particular executions, arrests or detention.

Principle 12 - We urge States to ensure that human rights violations based on sexual orientation or gender identity are investigated and perpetrators held accountable and brought to justice.

Principle 13 - We urge States to ensure adequate protection of human rights defenders, and remove obstacles which prevent them from carrying out their work on issues of human rights and sexual orientation and gender identity.

* * *

A comparative analysis of analogous legal frameworks governing the issue of same-sex marriage in other jurisdictions is therefore essential, as Mauritius is not the first State to confront this issue. Such analysis is rendered particularly significant in light of the established fact, as extensively detailed, that Mauritian statutory law does not define marriage restrictively as the union between “*a man and a woman*”, nor does it explicitly prohibit same-sex unions. On the contrary, Mauritian law expressly prohibits discrimination on the grounds of sexual orientation.

CHAPTER 2: THE UNITED KINGDOM

An analysis of the legal evolution concerning same-sex unions in the UK is quite pertinent, given that Mauritius was a British colony from 1810 to 1968, following its capture from French administration. The nation achieved independence from the United Kingdom in March 1968. The Mauritian legal and governmental system is predicated on the British Westminster model, and retains a series of statutory provisions that have remained in force since the period of British sovereignty. Nevertheless, it is imperative to note that in the Republic of Mauritius, the legal institution of marriage does not derive from the English Common Law tradition. Rather, it is governed by a distinct civil law framework, codified principally within the *Code Civil Mauricien* (CCM) which is mostly inspired from French law, albeit some indigenous local provisions which differ substantively from both French and British law. Mauritian Courts have mostly followed the French principles of civil law with regards to marriage in Mauritius⁷². Consequently, the classic British Common Law definition of marriage is of limited legal assistance in Mauritius. However, the evolution of the law in UK is interesting to analyse in order to understand the legislature's intents.

It is notable that, until the mid-eighteenth century, marriages in the UK were not formally recognised by law. They could be solemnised in any location, provided the ceremony was conducted before an ordained clergyman of the Church of England. This procedural latitude facilitated the practice of clandestine marriages, which were frequently entered into without parental consent and often constituted bigamy⁷³.

I. The Marriage Act 1753

In 1753, the State took control of the institution of marriage by enacting the Marriage Act 1753, which came into force in March 1754. In essence, marriage was exclusively provided for Anglicans since the said legislation declared that for a marriage to be legally binding, the ceremony had to be conducted by a Minister of the Church of England. Any marriages in any place other than in a church or in a public chapel, and without banns of licence, were to be “null

⁷² Aubeelock v. Aubeelock - 1999 SCJ 382, Murugan v. Murugan - 2003 SCJ 169

⁷³ <https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/relationships/overview/lawofmarriage/>

and void to all Intents and Purposes whatsoever". Some exceptions were provided only to members of the Royal Family and to the marriages of Quakers or Jews⁷⁴. Marriage at that time could not be intended to be accessible to same-sex couples since homosexuality could be punishable by death⁷⁵. For instance, on 27 November 1835, James Pratt and John Smith, two adult males were hanged outside Newgate Prison in London for sexual intercourse⁷⁶. The Criminal Law Amendment Act 1885 made gross indecency a crime and was used to prosecute homosexuals where sodomy could not be proven⁷⁷.

II. The Marriage Act 1836 and the Marriage Act 1949

The Marriage Act 1753 was ultimately superseded by the Marriage Act 1836 and subsequently the Marriage Act 1949. While Parliament removed the religious restriction, thereby permitting non-conformists and Catholics to be married in their own places of worship, the substantive law governing marriage in the United Kingdom continued to recognise marriage as a religious sacrament, thereby reinforcing its inherently "different-sex" prerequisite. Moreover, given that homosexuality constituted a criminal offence under United Kingdom law, a same-sex marriage was, *de facto*, been unlawful.

However, In September 1954, the Departmental Committee on Homosexual Offences and Prostitution led by Sir John Wolfenden (the "Wolfenden Committee") was commissioned to report about homosexuality and to make recommendations to the Government for legislative changes. The report, known as the Wolfenden Report was published in 1957⁷⁸. The Wolfenden Committee concluded that homosexual behaviour between consenting adults in private was part of the "*realm of private morality and immorality which is, in brief and crude terms, not the law's business*" and should no longer be criminal. The Sexual Offences Act 1967 thereafter decriminalised same-sex sexual activities. Homosexuality being no more an offence, the issue of same-sex marriage started to emerge.

⁷⁴ S. Parker, *Informal Marriage, Cohabitation and the Law 1750–1989* – Ch. 3 "Lord Hardwicke Act 1753"

⁷⁵ The Buggery Act 1533, the Offences Against the Person Act 1828

⁷⁶ Case n°. 1934 – John Smith and James Pratt, "Proceedings of the Central Criminal Court", 21 September 1835, Eleventh Session, pp. 728–9.

⁷⁷ Section 11 of the Criminal Law Amendment Act 1885 (the Labouchere Amendment)

⁷⁸ 'Report of the Departmental Committee on Homosexual Offences and Prostitution' – Sir J. Wolfenden, 04.09.1957

The Marriage Act 1949 did not expressly contain provisions restricting marriage to a union between a man and a woman. It neither prohibited marriage between same-sex couples and its section with regard to void marriages did not provide for same-sex marriages to be void⁷⁹.

III. The Marriage Act 1971 and the Matrimonial Causes Act 1973

Following the decriminalisation of homosexuality, same-sex couples commenced advocacy for legal recognition of their unions and to access marriage. This claim was expressly rejected by the State through the enactment of the Nullity of Marriage Act 1971. Section 1(a)(c) of the said Act provided that a marriage shall be void if the parties are not respectively male and female, thereby strengthening the Common law conception of marriage as the union between a man and a woman solely. This statutory prohibition eliminated any legal possibility for the solemnisation or recognition of marriage between persons of the same sex. Given that marriage constituted the sole mechanism for the legal recognition of a conjugal relationship, same-sex couples were consequently deprived of any such recognition by virtue of the express provisions of the Nullity of Marriage Act 1971.

The Matrimonial Causes Act 1973 retained the same terms and provided *inter alia* for a marriage to be void if “*the parties are not respectively male and female*”⁸⁰ thereby expressly precluding the formation of a valid marriage between persons of the same sex.

Furthermore, the Government nevertheless still considered homosexuality as being against public order and in 1988, Section 28 of the Local Government Act was enacted and stated that a local authority “*shall not intentionally promote homosexuality or publish material with the intention of promoting homosexuality*” and shall not promote the teachings aiming at the acceptability of homosexuality as a pretended family relationship.

Section 28 of the Local Government Act 1988 stated that a local authority “*shall not intentionally promote homosexuality or publish material with the intention of promoting homosexuality*” or promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship. Fifteen years later, the UK government

⁷⁹ Section 25 of the Marriage Act 1949

⁸⁰ Section 11(c) of the Matrimonial Causes Act 1973

realised that this law section was unjustly discriminatory and offensive to LGBTI people and repealed this law provision in the Local Government Act 2003⁸¹. It is reported that in July 2009, David Cameron, in his capacity of leader of the Conservative Party, apologised for the existence of that clause between 1988 and 2003⁸².

The Mauritian legislature has never promulgated provisions within domestic law that stigmatise individuals on the basis of homosexual orientation. Consequently, it cannot be judicially concluded that homosexuality or same-sex unions are contrary to public order in Mauritius.

This stands in contrast to the legislative history of the United Kingdom, where the sovereign Parliament historically enacted a series of statutes that instituted arbitrary discrimination against LGBT persons. This necessitated a subsequent, deliberate legislative intervention to rectify those historical injustices. This process required the explicit repeal of the offending statutes and the enactment of comprehensive new provisions designed to bring the legal framework into conformity with fundamental rights and freedoms.

IV. The Civil Partnership Act 2004

Legislation concerning sexual orientation continued to evolve, with discrimination on this basis being progressively eliminated from various statutory provisions. A significant milestone was the introduction of the Employment Equality (Sexual Orientation) Regulations 2003, which expressly prohibited such discrimination in the workplace.

In response to societal evolution and advocacy by the LGBTQI community for the protection of their fundamental rights and freedoms - including, *inter alia*, the rights to dignity, private life, and family life under international human rights norms - the Government initiated a formal consultation aimed at providing a legal recognition to same-sex couples. This process commenced with the publication of the consultation paper “Civil Partnership: A framework for the legal recognition of same-sex couples”, which outlined the proposed legal structure for a

⁸¹ <https://commonslibrary.parliament.uk/research-briefings/cdp-2023-0213/>

⁸² “David Cameron apologises to gay people for section 28” – Nicholas Watt, The Guardian, 02 July 2009

civil partnership scheme. A report summarising the consultation's outcomes was published in November 2003.

More than 80% of the respondents from different sectors, including the private sector, the public sector and civil-society organisations supported the idea of providing legal recognition to same-sex unions. The main concerns against the recognition of same-sex unions emerged from some religious groups who *“felt that any legal recognition of same-sex couples was contrary to the teachings of the Bible and other religious texts”*⁸³. However, the report underlined that other religious groups *“made it clear that they felt civil partnerships were entirely compatible with their religious beliefs”* and that *“religious organisations should be free to choose whether their faith should allow or forbid same-sex registrations”* in their religious spheres but not in civil society. The report quoted from a priest of the Church of England who expressed a favourable opinion on the recognition of same-sex unions:

“As a Church of England priest, I warmly and wholeheartedly endorse the proposals for Civil Partnership registration for lesbian and gay couples. Justice for all is one of the central Christian teachings, and at the heart of the Bible. Lesbian and gay people who have made a commitment in a relationship deserve the same rights and benefits as heterosexual couples who marry.”

The Government's position was clear: *“It is not for the Government to interfere in matters that are clearly for religious groups to decide for themselves. These are decisions best left to individual faiths. The registration of a civil partnership would be a purely civil process and involves no religious element.”*⁸⁴

Thereafter, the United Kingdom established a statutory framework for the formal recognition of same-sex relationships through the enactment of the Civil Partnership Act 2004. This legislation conferred upon registered civil partners a comprehensive suite of legal rights, obligations, and entitlements that were substantially equivalent to those arising from marriage, thereby creating a parallel, institutionally distinct legal status. The main conditions and impediments for the registration of a civil partnership were as follows⁸⁵:

⁸³ Section 3.10 of the “Responses to civil partnership. A framework for the legal recognition of same-sex couples” – November 2003

⁸⁴ P. 19 of the report

⁸⁵ <https://www.legislation.gov.uk/ukpga/2004/33/notes>

- The parties are of the same sex;
- The parties are not already in a civil partnership or lawfully married;
- They are not within the prohibited degrees of relationship;
- They are both aged sixteen or over (and, if either of them is under 18 and the registration is to take place in England and Wales or Northern Ireland, the consent of the appropriate people or bodies has been obtained).

The Civil Partnership Act 2004 also set out the legal consequences of forming a civil partnership, including the rights and responsibilities of civil partners.

In 2004, same-sex marriage remained prohibited under the provisions of the Matrimonial Causes Act 1973.

V. The Marriage (Same Sex Couples) Act 2013

In 2013, the Marriage (Same Sex Couples) Act was enacted and as from 17 July 2013, same-sex marriage became legal in England and Wales. Between 2014 and 2020, same-sex marriage was extended to Scotland⁸⁶ and Northern Ireland⁸⁷, thereby making same-sex marriage legal in the whole of the UK.

VI. Regrets and apology in the UK for State discrimination and persecution

As previously demonstrated, the respective governments of the constituent jurisdictions of the United Kingdom commenced a policy reversal in the 1990s - less than two decades following the explicit statutory *de facto* nullity of same-sex marriages in the Nullity of Marriage Act 1971. From the inception of the 21st century, a clear legal recognition emerged that it is impermissible to exclude individuals from the legal recognition of their unions based on a form of discrimination predicated solely upon sexual orientation.

⁸⁶ Marriage and Civil Partnership (Scotland) Act 2014

⁸⁷ The Marriage (Same-sex Couples) and Civil Partnership (Opposite-sex Couples) (Northern Ireland) Regulations 2019

A principle was thus established: that the familial bonds arising from a same-sex relationship are entitled to equivalent legal recognition, without discriminatory distinction from those of heterosexual couples. This evolution was driven by, and is in compliance with, the fundamental right to equality and the prohibition of discrimination based on sexual orientation, as enshrined in both domestic human rights law and international conventions to which the United Kingdom is a party.

The Policing and Crime Act 2017 introduced a specific statutory provision, commonly known as the “Alan Turing law”. This legislation provided for the automatic posthumous pardon of deceased individuals who had been convicted of now-repealed historical offences related to consensual homosexual activity.

Pursuant to this provision, a posthumous pardon was extended to notable historical figures, including the Irish poet Oscar Wilde, and to more than 75,000 other men convicted under such historical statutes⁸⁸. Sam Gyimah, then Justice Minister, welcoming the Turing’s Law, stated: *“We can never undo the hurt caused, but we have apologized and taken action to right these wrongs. I am immensely proud that ‘Turing’s Law’ has become a reality under this government.”*⁸⁹

Human rights campaigner Peter Tatchell said: *“This pardon is an important, valuable advance that will remedy the grave injustices suffered by many of the estimated 50,000 to 100,000 men who were convicted under discriminatory anti-gay laws between 1885 and 2003 – the latter being the year when all homophobic sexual offences legislation was finally repealed in England and Wales.*

In 2018, British Prime Minister Theresa May publicly stated that she “*deeply regrets*” Britain’s historical legacy of anti-gay laws across the Commonwealth. She urged Commonwealth nations to overhaul “*outdated*” colonial-era legislation that threatens more than 100 million lesbian, gay, bisexual and trans people across the member countries as criminals:

⁸⁸ ‘Legendary Irishman Oscar Wilde among thousands of gay men pardoned by new Turing’s Law’ – A. Lonergan, The Irish Post, 01.02.2017

⁸⁹

*“There remains much to do. Nobody should face persecution or discrimination because of who they are or who they love. And the UK stands ready to support any Commonwealth member wanting to reform outdated legislation that makes such discrimination possible.”*⁹⁰

Scotland followed the trend. In June 2018, following the “Alan Turing Law” enacted in 2017 in England and Wales, the Scottish Parliament passed the Historical Sexual Offences (Pardons and Disregards) Act 2018 which issued a formal pardon to men, living and dead who had been convicted of having consensual sex with other men. Scottish First Minister Nicola Sturgeon stated that the men persecuted because of their sexual orientation deserved an “*unqualified apology*.” and stated as follows:

*“So today, categorically and wholeheartedly, as First Minister I apologise for those laws, and for the hurt and the harm that they caused, [...] “Nothing this parliament does can erase those injustices,” [...] “But I hope that this apology, alongside our new legislation, can provide some comfort to those who endured them. And I hope that it provides evidence of this parliament's determination, in so far as we can, to address the harm that has been done.”*⁹¹

⁹⁰ “Theresa May says she deeply regrets Britain’s legacy of anti-gay laws” – Pippa Crerar, The Guardian, 17.04.2018

⁹¹ “Decades after ‘Massive Injustice’ repealed, Scotland will offer pardons to gay men” – Colin Dwner, in NPR, 06.06.2018

CHAPTER 3: FRANCE

The French settlers were among the first colonisers who introduced a sustainable and codified legal system in Mauritius. Laws of French origin are still in force in Mauritius. France colonised Mauritius from 1715 to 1810. Some of the most famous examples of laws introduced by the French in Mauritius are the *Code Civil*, the *Code de Commerce*, the *Code Noir*, the *Code Pénal 1791*, and the *Code de Procédure Civile*. Articles of the Mauritian Civil Code are very often identical to those of the French Civil Code. When it comes to marriage, the relevant provisions in Mauritian law have been brought back in the CCM in 1981 and most of them have been borrowed from the French Civil Code. In France, same-sex marriage is possible since 19 May 2013. Before this date, the *Cour de cassation*, France's highest jurisdiction, had previously held that since the law on marriage in France was enacted in such a way that it was restricted to “*the man with the woman*”, it could not be extended to same-sex couples⁹². The court rightly refrained itself from undertaking a statutory interpretation or an analysis of the prohibited conditions for marriage, such as the circumstances of the parties did not fall within any of the grounds for prohibition expressly enumerated in the French Civil Code. The court's holding rested solely on a textual construction of the foundational provision, which explicitly restricted marriage to “*l'homme et la femme*” (“the man and the woman”).

I. From criminalisation to decriminalisation

The evolution of French law regarding the recognition of same-sex unions demonstrates substantial parallels with the United Kingdom's legal trajectory. Commencing with the Napoleonic Code of 1804, French civil law expressly limited marriage to a union “of a man and a woman”⁹³ - a substantive restriction mirrored in the original *Code Civil Mauricien* and subsequently, in Ordinance No. 26 of 1890. While the minimum age condition for marriage was modified in France in 1986, the core substantive provision, Article 144 of the French Civil Code which explicitly defined marriage as a union “between a man and a woman”, remained in force until subsequent legislative reform in 2013.

⁹² Cass. 1ère Ch. Civ. 13 Mar. 2007, n° 05-16.627

⁹³ Article 144 of the French Civil Code

Homosexuality was also explicitly considered as against public order in France through specific enactments. In August 1942 acts “*against nature*” involving minors were formally criminalised in the French Criminal Code⁹⁴. Thousands of homosexuals were arbitrarily arrested and deported to Germany and eventually to concentration camps in Auschwitz⁹⁵ under application of this law which remained after World War II. In 1960, homosexuality was officially declared as a « *fléau social* » (social scourge) in France by article 4 the « *loi du 30 juillet 1960* »⁹⁶ which authorised the government to take all measures to combat homosexuality. The Mauritian legislature found no basis to incorporate such discriminatory provisions into its domestic legal framework.

During the early 1980s, a political party contesting the French presidential election included in its platform a commitment to abrogate legislation criminalising homosexuality. Concurrently, this period witnessed the emergence of non-governmental organisations, such as AMG⁹⁷, dedicated to advocating for the rights of gay individuals and securing their access to essential healthcare services without fear of prosecution. In a significant parallel development of 1981, France formally removed homosexuality from its national classification of mental illnesses, a *depathologisation* that preceded a similar decision by the World Health Organization by nearly a decade.

The decisive legislative action occurred in 1982⁹⁸ when the French parliament repealed all criminal offenses predicated solely upon the homosexual nature of consensual conduct. This reform was directly precipitated by a landmark judgment⁹⁹ of the European Court of Human Rights in October 1981, which condemned the United Kingdom for a breach of Article 8 (the right to respect for private and family life) of the European Convention on Human Rights. The Court ruled that the criminalisation of consensual sexual acts between adults in private constituted a manifest interference with the fundamental right to private life.

⁹⁴ Article 334 of the 1942 French Criminal Code

⁹⁵ Sibalis (2002)

⁹⁶ Loi n° 60-773 du Journal Officiel de la République Française publié le 02 août 1960

⁹⁷ « Association des Médecins Gays » (or « Association of gay doctors »)

⁹⁸ <https://www.cairn.info/revue-deviance-et-societe-2019-3-page-421.htm#no88>

⁹⁹ Dudgeon v. The United Kingdom – ECtHR – 22.10.1981, n° 7525/76

II. Anti-discriminatory reforms and recognition of same-sex unions

The legislative reforms of 1982 and 1983, marked by the *Loi Quilliot*¹⁰⁰ - which prohibited the termination of a lease on grounds of a “homosexual lifestyle” and the *Loi Le Pors*¹⁰¹ which eliminated the “good morals” requirement that had previously barred homosexual individuals from civil service positions - further dismantled systemic discrimination based on sexual orientation. In 1999, the French Republic formally extended legal recognition to same-sex unions through the enactment of the *Pacte Civil de Solidarité* (PACS)¹⁰². This statutory civil partnership, accessible to both same-sex and opposite-sex couples, confers a substantive bundle of rights and obligations upon its registrants.

In 2013, the French legislature enacted a fundamental reform of the Civil Code’s foundational provisions governing marriage. This reform involved the abrogation of the restrictive clause in Article 144, which had defined marriage as a union “*between a man and a woman*” and the concurrent introduction of a new Article 143, which expressly provides that “*marriage is contracted by two persons of different sex or of the same sex*”.

Since Mauritian law does not contain a specific provision similar to article 143 of the French Civil Code providing for civil marriage between two persons of the same sex, the Mauritian Civil Status Office refuses to celebrate such unions. In November 2025, the Civil Status Office of Mauritius even issued an official document in which it states that “*le mariage n’est pas permis entre deux personnes de même sexe*”¹⁰³ (*civil marriage is prohibited between two persons of the same sex*).

This position is highly questionable since:

- The current provisions of the CCM, unlike the French Civil Code before 2013, do not restrict marriage to “the man with the woman”;
- The CCM does not prohibit same-sex marriage;

¹⁰⁰ Loi Quilliot Du 22 juin 1982

¹⁰¹ Loi Le Pors du 13 juillet 1983

¹⁰² Loi n° 99-944 du 15 novembre 1999

¹⁰³ “Certificat de coutume” – Civil Status Office, 25.11.2025

- Article 144 of the CCM is fundamentally different from the pre-2013 article 144 of the French Civil Code as it is written in a gender-neutral, stand-alone and non-discriminatory language.

It is therefore important to analyse the main relevant provisions of the French Civil Code before 19 May 2013 and the current ones with the prevailing legal framework in the CCM:

French Civil Code before 19 May 2013	Mauritian Civil Code (CCM)
<i>144. L'homme et la femme ne peuvent contracter mariage avant dix-huit ans révolus.</i>	<i>144. Nul ne peut contracter mariage avant dix-huit ans révolus.</i>
<i>145. Néanmoins, il est loisible au procureur de la République du lieu de célébration du mariage d'accorder des dispenses d'âge pour des motifs graves.</i>	
<i>146. Il n'y a pas de mariage, lorsqu'il n'y a point de consentement.</i>	<i>149. Il n'y a pas de mariage lorsqu'il n'y a point de consentement.</i>
	<i>149A. Les dispositions des articles 144, 149, 150, 151 et 152 sont d'ordre public.</i>
<i>147. On ne peut contracter un second mariage avant la dissolution du premier.</i>	<i>150. On ne peut contracter un second mariage avant la dissolution du premier.</i>
<i>148. Les mineurs ne peuvent contracter mariage sans le consentement de leurs père et mère ; en cas de dissentiment entre le père et la mère, ce partage emporte consentement.</i>	
<i>161. En ligne directe, le mariage est prohibé entre tous les ascendants et descendants et les alliés dans la même ligne.</i>	<i>151. En ligne directe, le mariage est prohibé entre tous les ascendants et descendants légitimes ou naturels, et les alliés dans la même ligne.</i>

162. En ligne collatérale, le mariage est prohibé, entre le frère et la sœur. 163. Le mariage est encore prohibé entre l'oncle et la nièce, la tante et le neveu. Néanmoins, il est loisible au Président de la République de lever, pour des causes graves, les prohibitions portées : 1° Par l'article 161 aux mariages entre alliés en ligne directe lorsque la personne qui a créé l'alliance est décédée ; 2° (Abrogé) ; 3° Par l'article 163 aux mariages entre l'oncle et la nièce, la tante et le neveu. 184. Tout mariage contracté en contravention aux dispositions contenues aux articles 144, 146, 146-1, 147, 161, 162 et 163 peut être attaqué, dans un délai de trente ans à compter de sa célébration, soit par les époux eux-mêmes, soit par tous ceux qui y ont intérêt, soit par le ministère public.	152. En ligne collatérale, le mariage est prohibé entre le frère et la sœur légitimes ou naturels. 153. Le mariage est encore prohibé entre l'oncle et la nièce, la tante et le neveu, que la parenté soit légitime ou naturelle. 154. Néanmoins, il est loisible au Juge en Chambre à la requête de la personne intéressée de lever, pour des causes graves, les prohibitions portées par l'article 151 aux mariages entre alliés en ligne directe lorsque la personne qui a créé l'alliance est décédée et par l'article 153 aux mariages entre l'oncle et la nièce, la tante et le neveu.
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From the reading of these articles, it can easily be seen that Article 144 of the French Civil Code before 2013 formerly defined the parties to a marriage as “*l’homme et la femme ne peuvent contracter mariage avant dix-huit ans révolus*” (“**the man and the woman** cannot contract marriage before eighteen years old”) – thereby restricting marriage to the different-sex precondition. On the other hand, the Mauritian formulation in article 144 of the CCM since 1981 – “Nul ne peut contracter mariage avant dix-huit ans révolus” (“**No one** may contract

marriage before eighteen years of age”) - establishes a gender-neutral capacity to marry, by omitting any reference to the sex of the parties and does not provide for the restriction to different-sex couples present in both the French text prior to the 2013 reform and the Mauritian law prior to the 1981 reform. In addition, the substantive impediments enumerated in Mauritian law with respect to the legal capacity to marry do not contain any prohibition for the parties to marry if they are of the same sex.

In December 2025, the French National Assembly recognised the past wrongdoings of the State towards gay people and unanimously adopted a bill aimed at rehabilitating individuals convicted for homosexuality in France. The bill also seeks to symbolically redress decades of discriminatory policies¹⁰⁴.

¹⁰⁴ “Proposition de Loi n° 2351, 17^e législature

CHAPTER 4: CANADA

The comparative analysis of the evolution of Canadian law regarding same-sex unions holds significant merit for legal consideration within the Mauritian context since both jurisdictions possess the common heritage of successive colonisation by France and Great-Britain. The province of Quebec exemplifies a hybrid legal system, synthesising civil law principles of French origin with Common Law traditions of British origin within a bilingual framework - a structural parallel that offers a pertinent comparative model.

The Mauritian legislature has historically demonstrated considerable receptiveness to Canadian legal developments. For instance, it has incorporated principles and frameworks from the Canadian system into domestic law. This is exemplified by key reforms, most notably during the comprehensive revision of the Mauritian Civil Code in the 1980s. As underlined by the JCPC, the Mauritian legislature, in enacting Act No. 9 of 1983 which amended many articles of the CCM, adopted various provisions from the Québec Civil Code¹⁰⁵. The Supreme Court of Mauritius has also sought guidance from the case-laws and doctrine of Québec to interpret and apply domestic provisions which are similar to Canadian ones¹⁰⁶.

Prior to 1969, consensual same-sex sexual activity between adults constituted a criminal offence under Canadian law, punishable by imprisonment. In that year, the Parliament of Canada enacted omnibus legislation that decriminalised private sexual acts between two persons over the age of twenty-one. This legislative reform marked a pivotal breakthrough in establishing formal legal equality for gay men, lesbians, and bisexuals. Subsequently, in 1977, the Province of Quebec became the first jurisdiction in Canada to amend its provincial *Charter of Human Rights and Freedoms* to explicitly enumerate “sexual orientation” as a prohibited ground of discrimination. In 1996, this prohibition was extended to all the provinces of Canada through the Canadian Human Rights Act¹⁰⁷.

It is highly improbable that the Mauritian legislature was unaware of these developments in Canada towards the acceptance of same-sex couples.

¹⁰⁵ *Gujadhur & Ors v. Gujadhur & Anor* (Mauritius) [2007] UKPC 54 (26 July 2007)

¹⁰⁶ *South Seas Development Co. Ltd v. Government of Mauritius* 2006 SCJ 126

¹⁰⁷ <https://www.canada.ca/en/canadian-heritage/services/rights-lgbti-persons.html>

Same-sex couples in Canada began to claim the right to legal recognition of their unions. After the authorities refused to accept their applications for civil marriage, they seized the competent Court, arguing that their fundamental rights were being violated.

The Canadian Charter of Rights and Freedoms (the “*Charter*”) contains a set of provisions protecting a number of rights and freedoms, including freedom of expression and the right to equality. It forms part of the Constitution of Canada, the supreme law in all of Canada. All other laws must be consistent with the rules set out in it¹⁰⁸. Between 2002 and 2003, Canadian courts were confronted with the issue of the legal recognition of same-sex marriage in Canada mainly under the prism of Section 15 of the *Charter* which provides for anti-discriminatory treatment on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability as follows:

“15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

This provision is very similar to Section 16 of the Constitution of Mauritius which provides for anti-discriminatory provisions on similar grounds. Sections 16 (1) to 16 (3) of the Constitution of Mauritius read as follows:

“16. Protection from discrimination

(1) Subject to subsections (4), (5) and (7), no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to subsections (6), (7) and (8), no person shall be treated in a discriminatory manner by any person acting in the performance of any public function conferred by any law or otherwise in the performance of the functions of any public office or any public authority.

(3) In this section, 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, caste, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected

¹⁰⁸ <https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html>

to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages that are not accorded to persons of another such description.”

In 2023, the Supreme Court of Mauritius, upon a review of a series of seminal foreign judicial authorities, including notably the Canadian case of *Vriend v. Alberta*¹⁰⁹ held that “*the word ‘sex’ in section 16 of the Constitution should be interpreted as including ‘sexual orientation’*”¹¹⁰. In reaching this determination, the Court expressly invoked Section 15(1) of the Canadian Charter, citing its substantial jurisprudential and textual alignment with the relevant provisions of the Mauritian Constitution:

“Section 15, which is reproduced below, does not provide for prohibition against discrimination on the ground of sexual orientation [but] the Supreme Court of Canada held that sexual orientation is a personal characteristic which has been found to be analogous to the grounds enumerated in section 15 and went on to read into section 15 ‘sexual orientation’ as a ground on which discrimination was not permissible”

The question of according legal recognition to same-sex marriages has been adjudicated by Canadian courts, specifically in the context of determining whether legislative exclusions constituted discrimination based on sexual orientation, as was addressed in the landmark case of *Hedy Halpern v. Attorney General of Ontario*¹¹¹

I. Facts of the Halpern v. Attorney General of Ontario case

In 2000, a group of same-sex couples applied for the legal recognition of their unions. Some of them requested civil marriage licences but were denied of access to civil marriage. In the same time-frame, other couples already had a “*religious same-sex marriage*” celebrated by the Metropolitan Community Church of Toronto (“MCCT”), a Christian church allowing marriage for both heterosexual and homosexual couples. The MCCT registered the religious marriages in the Church Register and issued marriage certificates to the couples. In compliance with the laws of Ontario, the MCCT submitted the requisite documentation for the two marriages to the

¹⁰⁹ *Vriend v Alberta* [1998] 1 R.C.S. 493

¹¹⁰ *Ah-Seek v. State of Mauritius* 2023 SCJ 399

¹¹¹ *Halpern v. Canada (AG)* [2003] O.J. No. 2268, 10 June 2003

Office of the Registrar General and the Regulations under the Marriage Act for the religious marriage to have civil effects. The Registrar refused to accept the documents for registration, citing an alleged federal prohibition against same-sex marriages. The issue before the court of first instance and subsequently, on appeal before the Court of appeal of Ontario, was mainly whether the denial of same-sex couples to the right to civil marriage amounted to discrimination based on sexual orientation.

The appellate court observed that, under Canadian law, the legal conception of marriage had for a period exceeding 136 years derived from a religious origin, as established in the common law authority of *Hyde v. Hyde and Woodmansee*¹¹² and articulated by Lord Penzance, who stated: “*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.*”

II. The issues of the Halpern v. Attorney General of Ontario case

The Court of appeal underlined that the case was ultimately about “*the recognition and protection of human dignity and equality*” and that the central question was “*whether the exclusion of same-sex couples from this common law definition of marriage breaches ss. 2(a) or 15(1) of the Canadian Charter of Rights and Freedoms (“the Charter”) in a manner that is not justified in a free and democratic society*”.

The appellate court accorded substantial weight to established authorities emphasising the fundamental significance of human dignity:

“*Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.*”¹¹³ [...] “*It is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the*

¹¹² *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P.&D. 130 at 133

¹¹³ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at 530

community and able to contribute fully to the development and well-being of the community and the Province”¹¹⁴.

The Court of Appeal subsequently addressed the legal issue concerning the marital rights of same-sex couples. It commenced this analysis by first articulating the foundational importance of the institution of marriage to the fabric of society:

“[5] Through the institution of marriage, individuals can publicly express their love and commitment to each other. Through this institution, society publicly recognizes expressions of love and commitment between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society’s approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships. This can only enhance an individual’s sense of self-worth and dignity.

[6] The ability to marry, and to thereby participate in this fundamental societal institution, is something that most Canadians take for granted. Same-sex couples do not; they are denied access to this institution simply on the basis of their sexual orientation.”

Quoting from the landmark case of *Egan v. Canada*¹¹⁵, the Court of Appeal underlined that: *“Sexual orientation is “a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs” (para. 5). In addition, a majority of this Court explicitly recognized that gays, lesbians and bisexuals, “whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage”*

The Court of Appeal enumerated several significant inequalities and corresponding struggles for rights confronting same-sex couples before addressing the constitutional issue:

*“[8] Historically, same-sex equality litigation has focused on achieving equality in some of the most basic elements of civic life, such as bereavement leave, health care benefits, pensions benefits, spousal support, name changes and adoption. **The question at the heart of this appeal is whether excluding same-sex couples from another of the most basic elements of civic life - marriage - infringes human dignity and violates the Canadian Constitution.**” [emphasis added].*

¹¹⁴ Human Rights Code, R.S.O. 1990, c. H.19

¹¹⁵ *Egan v. Canada*, [1995] 2 S.C.R. 513

Chief Justice McMurtry and Justices MacPherson and Gillese composing the appellate Court framed the issues as follows:

- “(1) What is the common law definition of marriage? Does it prohibit same-sex marriages?*
- (2) Is a constitutional amendment required to change the common law definition of marriage, or can a reformulation be accomplished by Parliament or the courts?*
- (3) Does the common law definition of marriage infringe MCCT’s rights under ss. 2(a) and 15(1) of the Charter?*
- (4) Does the common law definition of marriage infringe the Couples’ equality rights under s. 15(1) of the Charter?*
- (5) If the answer to question 3 or 4 is ‘Yes’, is the infringement saved by s. 1 of the Charter?*
- (6) If the common law definition of marriage is unconstitutional, what is the appropriate remedy and should it be suspended for any period of time?”*

III. Findings of the Court of Appeal on each issue

1. The 1867 Common Law rule on marriage

The appeal judges here confirmed that the 1866 Common Law rule on marriage indeed restricted marriage to unmarried opposite sex couples. They also considered that the 1867 Common Law Rule, as explained in *Hyde v. Hyde and Woodmansee*¹¹⁶, excluded same-sex marriages.

2. The need for parliamentary intervention or not to change the Common Law rule on marriage

According to the Court of Appeal, the definition of the Common Law rule on marriage could not remain frozen to its 1867 meaning.

“Second, to freeze the definition of marriage to whatever meaning it had in 1867 is contrary to this country’s jurisprudence of progressive constitutional interpretation.

¹¹⁶ *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P.&D. 130 at 133

[...]

[46.] In our view, “marriage” does not have a constitutionally fixed meaning. Rather, [it] has the constitutional flexibility necessary to meet changing realities of Canadian society without the need for recourse to constitutional amendment procedures.

[...]

[49] The Nova Scotia Speaker case dealt with the decision of the legislature of Nova Scotia to prohibit the televising of its proceedings. The Supreme Court of Canada recognized that parliamentary privilege is necessary to ensure the orderly operation of the legislature, and that this privilege includes the power to exclude strangers from legislative chambers. A majority of the court held that parliamentary privilege is part of the constitution of Canada, and therefore not subject to Charter review. In our view, the exercise of a constitutionally recognized parliamentary privilege to exclude strangers from the legislature is not analogous to a law excluding persons from marriage.”

3. The issue of same-sex marriage as the right to religion and the right to be protected against religious discrimination

The religious body MCCT argued that the common law definition of marriage breached its freedom of religion under s. 2(a) of the *Charter* (which states *inter alia* that everyone has the fundamental freedom of conscience and religion) and its right to be free from religious discrimination under s. 15(1). MCCT further argued that the Common Law definition of marriage was rooted in Christian values, as propounded by the Anglican Church of England, which had never recognised same-sex marriages. MCCT contended that this definition, therefore, had the unconstitutional purpose of enforcing a particular religious view of marriage and excluding other religious views of marriage. MCCT also argued that the Common Law definition of marriage, which provided legal recognition and legitimacy to marriage ceremonies that accord with one religious view of marriage, had the effect of diminishing the status of other religious marriages.

The Court of Appeal rejected these arguments as follows:

“[53] In our view, this case does not engage religious rights and freedoms. Marriage is a legal institution, as well as a religious and a social institution. This case is solely about the legal institution of marriage. It is not about the religious validity or invalidity of various forms of

marriage. We do not view this case as, in any way, dealing or interfering with the religious institution of marriage.”

4. The issue of discrimination based on sexual orientation

The same-sex couples here submitted that the Common Law definition of marriage drew a formal distinction between opposite-sex couples and same-sex couples on the basis of their sexual orientation: Opposite-sex couples having the legal capacity to marry; same-sex couples not.

The Court of Appeal here underlined that the only issue to be decided at this stage of the analysis of s. 15(1) of the *Charter* was whether a distinction is made based on sexual orientation between same-sex couples and opposite-sex couples:

“Canadian governments chose to give legal recognition to marriage. Parliament and the provincial legislatures have built a myriad of rights and obligations around the institution of marriage. The provincial legislatures provide licensing and registration regimes so that the marriages of opposite-sex couples can be formally recognized by law. Same-sex couples are denied access to those licensing and registration regimes. That denial constitutes a formal distinction between opposite-sex and same-sex couples.

[...]

Similarly, if marriage were defined as “a union between two white persons”, there would be a distinction between white persons and all other racial groups.

[...]

[A]n argument that marriage is heterosexual because it “just is” amounts to circular reasoning. It sidesteps the entire s. 15(1) analysis. It is the opposite-sex component of marriage that is under scrutiny. The proper approach is to examine the impact of the opposite-sex requirement on same-sex couples to determine whether defining marriage as an opposite-sex institution is discriminatory: see Miron v. Trudel, [1995] 2 S.C.R. 418 at 488-93 per McLachlin J.

[72] Accordingly, in our view, there is no doubt that the common law definition of marriage creates a formal distinction between opposite-sex couples and same-sex couples on the basis of their sexual orientation.”

This being said, the Court of Appeal then laid emphasis on the importance of respecting human dignity and referred to the case of *Gosselin v. Quebec (Attorney General)*¹¹⁷:

“Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?”

In answering this question and recognising the discrimination faced by same-sex couple on the basis of their sexual orientation, the Court quoted from the landmark case of *Egan v. Canada*¹¹⁸ and also referred to *Vriend v. Alberta*¹¹⁹ and *Nova Scotia (Attorney General) v. Walsh*¹²⁰ as follows:

“[83] The disadvantages and vulnerability experienced by gay men, lesbians and same-sex couples were described by Cory J. in Egan at 600-602:

The historic disadvantage suffered by homosexual persons has been widely recognized and documented. Public harassment and verbal abuse of homosexual individuals is not uncommon. Homosexual women and men have been the victims of crimes of violence directed at them specifically because of their sexual orientation... They have been discriminated against in their employment and their access to services. They have been excluded from some aspects of public life solely because of their sexual orientation... The stigmatization of homosexual persons and the hatred which some members of the public have expressed towards them has forced many homosexuals to conceal their

¹¹⁷ *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84

¹¹⁸ *Egan v. Canada*, [1995] 2 S.C.R. 513

¹¹⁹ *Vriend v Alberta* [1998] 1 R.C.S. 493

¹²⁰ *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83

orientation. This imposes its own associated costs in the work place, the community and in private life.

...

Homosexual couples as well as homosexual individuals have suffered greatly as a result of discrimination. Sexual orientation is more than simply a “status” that an individual possesses. It is something that is demonstrated in an individual's conduct by the choice of a partner... [S]tudies serve to confirm overwhelmingly that homosexuals, whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage.

[...]

[H]istorical disadvantage is a strong indicator of discrimination: see Law at 534-35. Therefore, the historical disadvantage suffered by same-sex couples favours a finding of discrimination in this case.

[...]

Finally, it is important to note that the discriminatory aspect of the legislative distinction must be determined in light of Charter values. One of those essential values is liberty, basically defined as the absence of coercion and the ability to make fundamental choices with regard to one's life... Limitations imposed by this Court that serve to restrict this freedom of choice among persons in conjugal relationships would be contrary to our notions of liberty.

In this case, the common law requirement that persons who marry be of the opposite sex denies persons in same-sex relationships a fundamental choice – whether or not to marry their partner.”

In his submissions to refuse the recognition of same-sex marriage, the Attorney General of Canada (‘AGC’) argued that “marriage relates to the capacities, needs and circumstances of opposite-sex couples. The concept of marriage - across time, societies and legal cultures - is that of an institution to facilitate, shelter and nurture the unique union of a man and woman who, together, have the possibility to bear children from their relationship and shelter them within it.”

In response to this argument, the Court of Appeal highlighted that “*the government's burden is to justify a breach of human dignity, not to explain it or deny its existence*”. The Court went even further as follows:

“[A] law that prohibits same-sex couples from marrying does not accord with the needs, capacities and circumstances of same-sex couples. While it is true that, due to biological realities, only opposite-sex couples can “naturally” procreate, same-sex couples can choose to have children by other means, such as adoption, surrogacy and donor insemination. An increasing percentage of children are being conceived and raised by same-sex couples.

[94] Importantly, no one, including the AGC, is suggesting that procreation and childrearing are the only purposes of marriage, or the only reasons why couples choose to marry. Intimacy, companionship, societal recognition, economic benefits, the blending of two families, to name a few, are other reasons that couples choose to marry. As recognized in M. v. H. at 50, same-sex couples are capable of forming “long, lasting, loving and intimate relationships.” Denying same-sex couples the right to marry perpetuates the contrary view, namely, that same-sex couples are not capable of forming loving and lasting relationships, and thus same-sex relationships are not worthy of the same respect and recognition as opposite-sex relationships.

[95] Accordingly, in our view, the common law requirement that marriage be between persons of the opposite sex does not accord with the needs, capacities and circumstances of same-sex couples. This factor weighs in favour of a finding of discrimination.”

Before concluding, the Court of Appeal held as follows:

“[107] In this case, same-sex couples are excluded from a fundamental societal institution – marriage. The societal significance of marriage, and the corresponding benefits that are available only to married persons, cannot be overlooked. Indeed, all parties are in agreement that marriage is an important and fundamental institution in Canadian society. It is for that reason that the claimants wish to have access to the institution. Exclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships.”

5. The necessity of analysing Section 1 of the *Charter*

Section 1 of the *Charter* provides that The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In response to the Attorney General's arguments for "*reasonable limits*" to marriage, namely that "*uniting same-sex couples is of lesser importance than uniting opposite sex couples*" and that "*marriage as a procreation unit for heterosexual couples*", the Court of Appeal held that: "[118] We now turn to the more specific purposes of marriage advanced by the AGC: (i) uniting the opposite sexes; (ii) encouraging the birth and raising of children of the marriage; and (iii) companionship.

[119] The first purpose, which results in favouring one form of relationship over another, suggests that uniting two persons of the same sex is of lesser importance. [...] Accordingly, a purpose that demeans the dignity of same-sex couples is contrary to the values of a free and democratic society and cannot be considered to be pressing and substantial.

[120] The second purpose of marriage, as advanced by the AGC, is encouraging the birth and raising of children. Clearly, encouraging procreation and childrearing is a laudable goal that is properly regarded as pressing and substantial. However, the AGC must demonstrate that the objective of maintaining marriage as an exclusively heterosexual institution is pressing and substantial: see *Vriend* at 554-57.

[121] We fail to see how the encouragement of procreation and childrearing is a pressing and substantial objective of maintaining marriage as an exclusively heterosexual institution. Heterosexual married couples will not stop having or raising children because same-sex couples are permitted to marry.

Moreover, an increasing percentage of children are being born to and raised by same-sex couples.

[122] The AGC submits that the union of two persons of the opposite sex is the only union that can "naturally" procreate. In terms of that biological reality, same-sex couples are different

from opposite-sex couples. In our view, however, “natural” procreation is not a sufficiently pressing and substantial objective to justify infringing the equality rights of same-sex couples. As previously stated, same-sex couples can have children by other means, such as adoption, surrogacy and donor insemination. A law that aims to encourage only “natural” procreation ignores the fact that same-sex couples are capable of having children.

[123] Similarly, a law that restricts marriage to opposite-sex couples, on the basis that a fundamental purpose of marriage is the raising of children, suggests that same-sex couples are not equally capable of childrearing. The AGC has put forward no evidence to support such a proposition. Neither is the AGC advocating such a view; rather, it takes the position that social science research is not capable of establishing the proposition one way or another. In the absence of cogent evidence, it is our view that the objective is based on a stereotypical assumption that is not acceptable in a free and democratic society that prides itself on promoting equality and respect for all persons.

[124] The third purpose of marriage advanced by the AGC is companionship. We consider companionship to be a laudable goal of marriage. However, encouraging companionship cannot be considered a pressing and substantial objective of the omission of the impugned law. Encouraging companionship between only persons of the opposite sex perpetuates the view that persons in same-sex relationships are not equally capable of providing companionship and forming lasting and loving relationships.

[130] [T]he AGC has not shown that the opposite-sex requirement in marriage is rationally connected to the encouragement of procreation and childrearing. The law is both overinclusive and underinclusive. The ability to “naturally” procreate and the willingness to raise children are not prerequisites of marriage for opposite-sex couples. Indeed, many opposite-sex couples that marry are unable to have children or choose not to do so. Simultaneously, the law is underinclusive because it excludes same-sex couples that have and raise children.

[131] Second, the AGC has not demonstrated that companionship is rationally connected to the exclusion of same-sex couples. Gay men and lesbians are as capable of providing companionship to their same-sex partners as persons in opposite-sex relationships.

[132] Accordingly, if we were of the view that the objectives advanced by the AGC were pressing and substantial, we would conclude that the objectives are not rationally connected to the opposite-sex requirement in the common law definition of marriage.

[125] Accordingly, it is our view that the AGC has not demonstrated any pressing and substantial objective for excluding same-sex couples from the institution of marriage. For that reason, we conclude that the violation of the Couples' rights under s. 15(1) of the Charter cannot be saved under s. 1 of the Charter.

[134] [...] In our view, same-sex couples and their children should be able to benefit from the same stabilizing institution as their opposite-sex counterparts.

[136] [...] As explained in our s. 15(1) analysis, it is our view that same-sex couples have not achieved equal access to government benefits. There are significant waiting periods involved before cohabiting couples can access these benefits. Some benefits and obligations are available only to married couples. Importantly, the benefits of marriage cannot be viewed in purely economic terms. The societal significance surrounding the institution of marriage cannot be overemphasized: see *M. v. H.* at 57.

[137] Allowing same-sex couples to choose their partners and to celebrate their unions is not an adequate substitute for legal recognition. This is not a case of the government balancing the interests of competing groups. Allowing same-sex couples to marry does not result in a corresponding deprivation to opposite-sex couples.

[138] Nor is this a case of balancing the rights of same-sex couples against the rights of religious groups who oppose same-sex marriage. Freedom of religion under s. 2(a) of the Charter ensures that religious groups have the option of refusing to solemnize same-sex marriages. The equality guarantee, however, ensures that the beliefs and practices of various religious groups are not imposed on persons who do not share those views.

[139] In our view, the opposite-sex requirement in the definition of marriage does not minimally impair the rights of the claimants. Same-sex couples have been completely excluded from a fundamental societal institution. Complete exclusion cannot constitute minimal impairment.

[142] Accordingly, we conclude that the violation of the Couples' equality rights under s. 15(1) of the Charter is not justified under s. 1 of the Charter. The AGC has not demonstrated that the objectives of excluding same-sex couples from marriage are pressing and substantial. The AGC has also failed to show that the means chosen to achieve its objectives are reasonable and justified in a free and democratic society.

6. Remedy

The Court of Appeal held as follows:

“[155] [...]

(1) the existing common law definition of marriage is “the voluntary union for life of one man and one woman to the exclusion of all others”;

(2) the courts have jurisdiction to alter the common law definition of marriage; resort to constitutional amendment procedures is not required;

(3) the existing common law definition of marriage does not infringe MCCT's freedom of religion rights under s. 2(a) of the Charter or its equality rights on the basis of religion under s. 15(1) of the Charter;

(4) the existing common law definition of marriage violates the Couples' equality rights on the basis of sexual orientation under s. 15(1) of the Charter; and

(5) the violation of the Couples' equality rights under s. 15(1) of the Charter cannot be justified in a free and democratic society under s. 1 of the Charter.

[156] To remedy the infringement of these constitutional rights, we:

(1) declare the existing common law definition of marriage to be invalid to the extent that it refers to “one man and one woman”;

(2) reformulate the common law definition of marriage as “the voluntary union for life of two persons to the exclusion of all others”;

(3) order the declaration of invalidity in (1) and the reformulated definition in (2) to have immediate effect;

(4) order the Clerk of the City of Toronto to issue marriage licenses to the Couples; and

(5) order the Registrar General of the Province of Ontario to accept for registration the marriage certificates of Kevin Bourassa and Joe Varnell and of Elaine and Anne Vautour.”

IV. Legal reform following the *Halpern v. Attorney General of Ontario* case

Following the *Halpern* case, Norm Sterling, the Attorney General of Ontario, announced that the province will obey the law and register same-sex marriages¹²¹. Other Canadian Courts also held that the prohibition of same-sex marriage violated the Constitutional right to protection from discrimination based on sex which includes sexual orientation¹²².

In August 2003, the United Church of Canada overwhelmingly voted to endorse same-sex marriages. Most of the delegates at the church's general council meeting in Wolfville, N.S., voted to ask Ottawa to recognize same-sex marriage in the same way as heterosexual ones¹²³.

In 2005, the Parliament of Canada enacted the *Civil Marriage Act*. This legislation established a gender-neutral definition of marriage for civil purposes. It neither confined marriage to people of the opposite-sex, nor explicitly defined marriage as a union between two people of opposite sex or of same-sex. Its gender-neutral language therefore sufficed to allow the celebration of civil marriages of same-sex couples.

Concurrently, the Act expressly safeguards the freedom of conscience and religion by providing that no religious official is compelled to solemnise a marriage that is contrary to their religious beliefs:

¹²¹ <https://www.cbc.ca/news/canada/ontario-will-register-same-sex-marriages-attorney-general-1.395517>

¹²² *EGALE Canada v. Canada*, 2003 BCCA 251, see also *Ligue Catholique pour les droits de l'Homme v. Hendricks* 2003 CanLII 47729 (QC CA)

¹²³ <https://www.cbc.ca/news/canada/united-church-endorses-gay-marriage-1.357106>

*“2. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.
3. It is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs.”*

In 2011, Jamie Hubley, the son of Ottawa City Councillor Allan Hubley, died by suicide following prolonged and severe harassment by peers due to his openly gay identity.¹²⁴ This tragic incident served as a catalyst for legislative intervention, compelling the Legislative Assembly of Ontario to introduce and subsequently enact the *Accepting Schools Act 2012*¹²⁵, aimed at combating bullying at school on grounds such as sexual orientation or gender identity. This statute substantially strengthened legal frameworks to address bullying within educational institutions by imposing enhanced sanctions and mandating comprehensive preventative measures.

In 2017, Canada's Prime Minister Justin Trudeau apologised formally before the House of Commons for historical injustices against the LGBT community by Canada and proposed a bill in parliament that would allow the courts to expunge the records of people criminalised for their sexuality:

“It is with shame and sorrow and deep regret for the things we have done that I stand here today and say: We were wrong. We apologise. I am sorry. We are sorry,”. It is reported that his words *“were greeted by a warm round of applause from all parties”*¹²⁶.

¹²⁴ <https://ottawasun.com/2012/04/06/jamie-hubleys-dad-defends-anti-bullying-legislation>

¹²⁵ Accepting Schools Act, 2012, S.O. 2012, c. 5 - Bill 13

¹²⁶ “Trudeau apologises for Canada's discrimination against LGBT people” – BBC 28.11.2017 - <https://www.bbc.com/news/world-us-canada-42157806>

CHAPTER 5: SOUTH AFRICA

South Africa and Mauritius, both African States and are parties to several international human rights instruments of common application. In particular, both States have ratified the African Charter on Human and Peoples' Rights (the Banjul Charter) and the International Covenant on Civil and Political Rights (ICCPR). While neither treaty explicitly enumerates discrimination on the grounds of sexual orientation or gender identity, each contains provisions prohibiting discrimination on the basis of "sex" and "other status".

Since the abolition of apartheid - the institutionalised system of racial segregation that prevailed in South Africa from 1948 until the early 1990s - South Africa has demonstrated a marked evolution in its commitment to equality. It has since emerged as a progressive actor in the field of human rights, particularly in the protection of marginalised groups. The Constitution of South Africa prohibits discrimination on the basis of sexual orientation. It is here to be underlined that the Supreme Court of Mauritius has considered that the provisions of Section 16 of the Constitution of the Republic of Mauritius similarly protect every person from discrimination based on sexual orientation¹²⁷. Section 17 of the Constitution of the Republic of Mauritius provides for the original jurisdiction of the Supreme Court to "*make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of sections 3 to 16*" of the Constitution of Mauritius. Such a power of relief also exists in the Constitution of South Africa.

Between 2002 and 2005, South African jurisdictions were confronted with the question of same-sex marriage in the landmark case known as *Minister of Home Affairs v. Fourie*¹²⁸ (also known as the "*Fourie*" case). The issue was finally and authoritatively adjudicated by the Constitutional Court of South Africa in December 2005.

¹²⁷ Ah Seek v. State of Mauritius – 2023 SCJ 399

¹²⁸ Minister of Home Affairs and Another v Fourie and Another (CCT 60/04) [1 December 2005]

I. Facts of the case and decision of first instance

Ms Marié Adriaana Fourie and Ms Cecelia Johanna Bonthuys, of female gender, loved each other and had been living together since June 1994. They had deliberately expressed an exclusive commitment to each other for life and wanted to get married. Pursuant to their desire to marry and thereby acquire the status, benefits and responsibilities which traditionally flow from the legal recognition of marriage between heterosexual couples, the applicants went to the Pretoria High Court. They asked for an order declaring that the law recognises their right to marry, and a mandamus ordering the Minister of Home Affairs and the Director-General to register their marriage in terms of the Marriage Act. They did not mount a challenge either to the common law definition of marriage or to the constitutionality of section 30(1) of the then Marriage Act of South Africa which marriage officers interpreted as excluding marriage between two people of the same sex, since they had to put to each party the following question, with reference to “wife” and “husband” (emphasis added):

“Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful wife (or husband)?”, and thereupon the parties shall give each other the right hand and the marriage officer concerned shall declare the marriage solemnized in the following words: ‘I declare that A.B. and C.D. here present have been lawfully married.’”

In October 2002, the Pretoria High Court dismissed their application and held that South African law “contemplates a marriage between a male and a female and no other” and that the application was “*still born*”¹²⁹.

II. Decision of the Supreme Court of Appeal of South Africa

Ms Fourie and Ms Bonthuys appealed to the Supreme Court of Appeal of South Africa¹³⁰ and expressed their wish to be married, ‘*for the very reason that the bond between [them] is so genuine and serious*’, and because not being able to marry presented a host of practical and

¹²⁹ Fourie and Another v Minister of Home Affairs and Another (The Lesbian and Gay Equality Project intervening as amicus curiae), Case No 17280/02, handed down on 18 October 2002.

¹³⁰ Fourie and Another v Minister of Home Affairs and Another (The Lesbian and Gay Equality Project intervening as amicus curiae), Case No 232/2003 [30.11.2004]

legal impediments to their shared life. **They raised no statutory challenge.** Instead, they asked the Court of Appeal to grant them relief on constitutional grounds, namely on the right not to be discriminated against on the basis of their sexual orientation.

The SCA quashed the first instance judgment and upheld the appeal in part. All five judges held that the exclusion of same-sex couples from the common law definition of marriage constituted unfair discrimination against them. In delivering the appeal judgment, Cameron JA emphasised that the Constitution of South Africa entrenches the principle of equality, including explicitly on the ground of sexual orientation. He made a parallel between the subsisting discriminatory treatments inflicted on the basis of sexual orientation with the dark chapter of apartheid of the South African history and underlined that gays and lesbians are a permanent minority in society who have suffered patterns of disadvantage and are consequently exclusively reliant on the Bill of Rights for their protection. He held that permanent same-sex partners are entitled to found their relationships in a manner that accords with their sexual orientation and such relationships should not be subject to unfair discrimination; and same-sex life partners are “*as capable as heterosexual spouses of expressing and sharing love in its manifold form*”.

The majority judgment by Cameron JA held, however, that although the common law definition should be developed so as to embrace same-sex couples, the Marriage Act could not be read in such a way as to include them. In the result, the only way the parties could marry would be under the auspices of a religious body that recognised same-sex marriages, and whose marriage formula was approved by the Minister of Home Affairs. The right of same-sex couples to celebrate a secular marriage would have to await a challenge to the Marriage Act.

The State expressed its profound dissatisfaction with the judgment. The applicants were likewise not entirely satisfied and cross-appealed. The State *inter alia* considered that it was not appropriate for the judiciary to bring about what it regarded as a momentous change to the institution of marriage, something, it contended, that should be left to Parliament. The applicants for their part were unhappy because although the newly developed definition of the common law included them in its terms, they were still prevented from getting married by the phrasing of the marriage vows in the Marriage Act. The only possible route enabling them to marry under the Act was a tenuous one, namely, to find a sympathetic religious denomination with an inclusive marriage vow that was approved by the Minister of Home Affairs.

III. The decision of the Constitutional Court of South Africa

The State appealed against the judgment of the Supreme Court of Appeal and Ms Fourie (along with her partner Ms Bonthuys) cross-appealed¹³¹.

The Lesbian and Gay Equality Project (the Equality Project), as one of the *amicus curiae*, asked for a constitutional relief declaring that the common law definition of marriage and the prescribed marriage formula in section 30(1) of the Marriage Act 25 of 1961 ('the Marriage Act') are unconstitutional in that they violate the rights of lesbian and gay people to:

- i. equality in terms of section 9 of the Constitution of the Republic of South Africa, 1996;
- ii. dignity in terms of section 10 of the Constitution; and
- iii. privacy in terms of section 14 of the Constitution;

The issue was remitted to the Constitutional Court of South Africa¹³² and a single judgment was thereafter delivered on 01 December 2005.

The other *amici curiae* were:

- Doctors for Life International (First *amicus curiae*);
- John Jackson Smyth (Second *amicus curiae*);
- The Marriage Alliance of South Africa (Third *amicus curiae*)

The Constitutional Court of South Africa framed the issue as follows:

“At the hearing, two broad and interrelated questions were raised: The first was whether or not the failure by the common law and the Marriage Act to provide the means whereby same-sex couples can marry, constitutes unfair discrimination against them. If the answer was that it does, the second question arose, namely, what the appropriate remedy for the unconstitutionality should be. These are the central issues in this matter [...].”

¹³¹ Minister of Home Affairs v. Fourie – Constitutional Court of South Africa, CCT 60/04 [01.12.2005]

¹³² Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs and Others CCT 10/05 [01.12.2005].

In the judgment delivered by Sachs J. and concurred by Langa CJ, Moseneke DCJ, Mokgoro J, Ngcobo J, Skweyiya J, Van der Westhuizen J and Yacoob J, the Constitutional Court addressed the issues as follows:

A. Does the law deny equal protection to and discriminate unfairly against same-sex couples by not including them in the provisions of the Marriage Act?

The Constitutional Court of South Africa deliberated on the arguments raised by the parties, namely those of the State and the *amicus curiae*, who opposed the access of same-sex couples to the institution of marriage.

1. Arguments of the State

The main arguments of the State were mainly as follows:

- the Constitution of South Africa does not protect the right to marry;
- the Constitution of South Africa merely guarantees to same-sex couples the right to establish their own forms of family life without interference from the State. This is a negative liberty, not to be equated with a right to be assimilated into the institution of marriage, which in terms of its historic genesis and evolution, is heterosexual by nature.
- International law recognises and protects marriage as so understood;
- Same-sex couples accordingly have no constitutional right to enter into or manipulate that institution. If their form of family life suffers from particular disadvantages, then these should be dealt with by appropriate legal remedies in response to each of the identified problems, not by entry into the global set of rights and entitlements;

Findings of the Constitutional Court:

The Constitutional Court considered that the constitutional Bill of Rights “*does not expressly include a right to marry*” but that “*it does not follow, however, that the Constitution does nothing to protect that right, and with it, the concomitant right to be treated equally and with dignity in the exercise of that right.*” It recalled that it had already pointed out that “*families are constituted, function and are dissolved in such a variety of ways, and the possible outcomes of*

constitutionalizing family rights are so uncertain, that Constitution-makers appear frequently to prefer not to regard the right to marry or to pursue family life as a fundamental right that is appropriate for definition in constitutionalised terms.”

According to the Constitutional Court, the principal values entrenched in the Bill of Rights are those of “*human dignity, equality and freedom*”. Referring to the landmark case of *National Coalition for Gay and Lesbian Equality and Others v. Minister of Justice and Others*¹³³ which decriminalised the act of consensual sodomy between adult males in South Africa on constitutional grounds, the Constitutional Court pointed out that “*it did not deal with access to marriage as such*” but that “*it highlighted the seriously negative impact that societal discrimination on the ground of sexual orientation has had, and continues to have, on gays and same-sex partnerships. It concluded that gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage.*”

Adopting the reasoning of the appeal judgment delivered by Cameron J, the Constitutional Court of South Africa considered that:

“The sting of past and continuing discrimination against both gays and lesbians was the clear message that it conveyed, namely, that they, whether viewed as individuals or in their same-sex relationships, did not have the inherent dignity and were not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. This discrimination occurred at a deeply intimate level of human existence and relationality. It denied to gays and lesbians that which was foundational to our Constitution and the concepts of equality and dignity, which at that point were closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be. The denial of equal dignity and worth all too quickly and insidiously degenerated into a denial of humanity and led to inhuman treatment by the rest of society in many other ways. This was deeply demeaning and frequently had the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays.”

By further referring to past landmark South African authorities with regard to laws which restricted some rights to opposite-sex couples and denied the same rights to same sex couples, the Constitutional Court underlined that:

¹³³ ¹³³ *National Coalition for Gay and Lesbian Equality and Others v. Minister of Justice and Others.*, CCT 11/98 – 09.10.1998.,

“The impact of the exclusion of lesbians and gays by the provision in question was to reinforce harmful and hurtful stereotypes. Underlying these stereotypes, the Court continued, lay misconceptions derived from the fact that the sexual orientation of lesbians and gays was such that they had an erotic and emotional affinity for persons of the same sex. This resulted in classifying lesbians and gays as exclusively sexual beings, reduced to one-dimensional creatures “defined by their sex and sexuality.”

It stressed the fact that past cases had already, *inter alia*, judged that:

- Gays and lesbians have a constitutionally entrenched right to dignity and equality;
- Sexual orientation is a ground protected from discrimination under s 9(3) of the Constitution and under S. 9(5) discrimination on it is unfair unless the contrary is established;
- Prior criminal proscription of private and consensual sexual expression between gays, arising from their sexual orientation and which had been directed at gay men, had been struck down as unconstitutional;
- Gays and lesbians in same-sex life partnerships are as capable as heterosexual spouses of expressing and sharing love in its manifold forms, including affection, friendship, eros and charity;
- They are likewise as capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support and assistance in running the common household;
- They are individually able to adopt children and in the case of lesbians to bear them.

According to Sachs J, who delivered the judgment:

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

exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society. The issue goes well beyond assumptions of heterosexual exclusivity, a source of contention in the present case. The acknowledgement and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation. Accordingly, what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.

The Constitutional Court of South Africa enumerated several legal impediments faced by same-sex couples as a consequence of the discriminatory prohibition on marriage, which effectively relegated them to a normative vacuum: “[T]he impact of the legal void in which same-sex couples are compelled to live is real, intense and extensive. To appreciate this, it is necessary to look precisely at what it is that the law offers to heterosexual couples, and, conversely, at what it denies to same-sex couples. Such scrutiny establishes that the consequences of the total exclusion of same-sex couples from the solemnities and consequences of marriage are far from academic [...]

[...]

Marriage stabilises relationships by protecting the vulnerable partner and introducing equity and security into the relationship.

[...]

Marriage law thus goes well beyond its earlier purpose in the common law of legitimising sexual relations and securing succession of legitimate heirs to family property. [...]

[It is] source of socio-economic benefits such as the right to inheritance, medical insurance coverage, adoption, access to wrongful death claims, spousal benefits, bereavement leave, tax advantages and post-divorce rights.

[...]

The exclusion of same-sex couples from the benefits and responsibilities of marriage, accordingly, is not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew. It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.

[...]

It should be noted that the intangible damage to same-sex couples is as severe as the material deprivation. To begin with, they are not entitled to celebrate their commitment to each other in a joyous public event recognised by the law. They are obliged to live in a state of legal blankness in which their unions remain unmarked by the showering of presents and the commemoration of anniversaries so celebrated in our culture. It may be that, as the literature suggests, many same-sex couples would abjure mimicking or subordinating themselves to heterosexual norms. Others might wish to avoid what they consider the routinisation and commercialisation of their most intimate and personal relationships, and accordingly not seek marriage or its equivalence. Yet what is in issue is not the decision to be taken, but the choice that is available. If heterosexual couples have the option of deciding whether to marry or not, so should same-sex couples have the choice as whether to seek to achieve a status and a set of entitlements and responsibilities on a par with those enjoyed by heterosexual couples. It follows that, given the centrality attributed to marriage and its consequences in our culture, to deny same-sex couples a choice in this respect is to negate their right to self-definition in a most profound way.

[...]

In its 111-page judgment, the Constitutional Court then emphasised on the importance of equality for every citizen in society, and made a parallel between the discrimination faced on sexual orientation and discriminations which previously existed on the basis of race and skin colour and which were sanctioned by both law and religions:

“There is nothing to suggest that same-sex couples are any less affected than are heterosexual ones by the emotional and material consequences of a rupture of their union. The need for comprehensive judicial regulation of their separation or divorce, or of devolution of property,

or rights to maintenance or continuation of tenancy after death, is no different. Again, what requires legal attention concerns both status and practical regulation.

[...]

*The law should not turn its back on any persons requiring legal support in times of family breakdown. It should certainly not do so on a discriminatory basis; the antiquity of a prejudice is no reason for its survival. **Slavery lasted for a century and a half in this country, colonialism for twice as long, the prohibition of interracial marriages for even longer, and overt male domination for millennia. All were based on apparently self-evident biological and social facts; all were once sanctioned by religion and imposed by law; the first two are today regarded with total disdain, and the third with varying degrees of denial, shame or embarrassment. Similarly, the fact that the law today embodies conventional majoritarian views in no way mitigates its discriminatory impact. It is precisely those groups that cannot count on popular support and strong representation in the legislature that have a claim to vindicate their fundamental rights through application of the Bill of Rights.***

[...]

It is clear that the exclusion of same-sex couples from the status, entitlements and responsibilities accorded to heterosexual couples through marriage, constitutes a denial to them of their right to equal protection and benefit of the law.

[...]

*It is equally evident that same-sex couples are not afforded equal protection not because of oversight, but because of the legacy of severe historic prejudice against them. Their omission from the benefits of marriage law is a direct consequence of prolonged discrimination based on the fact that their sexual orientation is different from the norm. **This result is in direct conflict with section 9(3) of the Constitution, which states:***

“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

[...]

In the present matter, the unfair discrimination against same-sex couples does not flow from any express exclusion in the Marriage Act. The problem is that the Marriage Act simply makes no provision for them to have their unions recognised and protected in the same way as it does for those of heterosexual couples. It is as if they did not exist as far as the law is concerned. They are implicitly defined out of contemplation as subjects of the law.

[...]

Sections 9(1) and 9(3) [...] also go beyond simply preserving a private space in which gay and lesbian couples may live together without interference from the State. Indeed, what the applicants in this matter seek is not the right to be left alone, but the right to be acknowledged as equals and to be embraced with dignity by the law.

[...]

Accordingly, taking account of the decisions of this Court, and bearing in mind the symbolic and practical impact that exclusion from marriage has on same-sex couples, there can only be one answer to the question as to whether or not such couples are denied equal protection and subjected to unfair discrimination. Clearly, they are, and in no small degree. The effect has been wounding and the scars are evident in our society to this day. By both drawing on and reinforcing discriminatory social practices, the law in the past failed to secure for same-sex couples the dignity, status, benefits and responsibilities that it accords to heterosexual couples. Although considerable progress has been made in specific cases through constitutional interpretation, and, as will be seen, by means of legislative intervention, the default position of gays and lesbians is still one of exclusion and marginalisation. The common law and section 30(1) of the Marriage Act continue to deny to same-sex couples equal protection and benefit of the law, in conflict with section 9(1) of the Constitution, and taken together result in same-sex couples being subjected to unfair discrimination by the State in conflict with section 9(3) of the Constitution.

[...]

At the very least, then, the applicants in both matters are entitled to a declaration to the effect that same-sex couples are denied equal protection of the law under section 9(1), and subjected to unfair discrimination under section 9(3) of the Constitution, to the extent that the law makes no provision for them to achieve the dignity, status, benefits and responsibilities available to heterosexual couples through marriage. The question that then has been posed is whether the traditional law of marriage is itself constitutionally defective, or whether the solution must necessarily be found outside of it.

The Constitutional Court recapitulated its findings as follows:

“A law that creates institutions which enable heterosexual couples to declare their public commitment to each other and achieve the status, entitlements and responsibilities that flow from marriage, but does not provide any mechanism for same-sex couples to achieve the same, discriminates unfairly against same-sex couples. It gives to the one and not to the other.

[...]

The conclusion is that when evaluated in the context of the legal regime as a whole, the common law definition and section 30(1) are under-inclusive and unconstitutional to the extent that they make no appropriate provision for gay and lesbian people to celebrate their unions in the same way that they enable heterosexual couples to do.

2. The “procreative” argument by The Marriage Alliance, *amicus curiae*

The Marriage Alliance, with the support of Cardinal Napier, contended that an essential, constitutive and definitional characteristic of marriage is its procreative potential. It argued that marriage institutionalises and symbolises, the “*inherently procreative relationship between a man and a woman, and it should be protected as such. Lacking such procreative potential same-sex unions could never be regarded as marriages, whatever other form of legal recognition could be given to them.*”

Findings of the Constitutional Court

Sachs J had no difficulty in dismissing such an argument. Referring to an authoritative judgment delivered by the Constitutional Court of South Africa, he held as follows:

“The Court held in that matter that however persuasive procreative potential might be in the context of a particular religious world-view, from a legal and constitutional point of view, it is not a defining characteristic of conjugal relationships. To hold otherwise would be deeply demeaning to couples (whether married or not) who, for whatever reason, are incapable of procreating when they commence such relationship or become so at any time thereafter. It is likewise demeaning to couples who commence such a relationship at an age when they no longer have the desire for sexual relations or the capacity to conceive. It is demeaning to adoptive parents to suggest that their family is any less a family and any less entitled to respect and concern than a family with procreated children. It is even demeaning of a couple who voluntarily decide not to have children or sexual relations with one another; this being a decision entirely within their protected sphere of freedom and privacy. It is clear, then, that the procreation argument cannot defeat the claim of same-sex couples to be accorded the same degree of dignity, concern and respect that is shown to heterosexual couples.”

3. The “religious” argument put forward by the amici curiae

It was submitted by the amici curiae that same-sex unions can never be regarded as marriages, or even marriage-like or equivalent to marriages. Otherwise, they argued, such a recognition would: “*disrupt and radically alter an institution of centuries-old significance to many religions*”, which “*would accordingly infringe the Constitution by violating religious freedom in a most substantial way*”.

Findings of the Constitutional Court

The Constitutional Court recognised that their argument raised important issues concerning the relationship foreshadowed by the Constitution between the sacred and the secular. In replying to this argument, the Court pointed out that there existed in South Africa 2 types of marriage:

- Marriage celebrated by a religious officer which then was entitled to the same effects as the civil marriage; and
- Civil marriage before a magistrate or a State-officer.

The Constitutional Court held as follows:

“It is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others. Between and within religions there are vastly different and at times highly disputed views on how to respond to the fact that members of their congregations and clergy are themselves homosexual. Judges would be placed in an intolerable situation if they were called upon to construe religious texts and take sides on issues which have caused deep schisms within religious bodies.

[...]

In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other.

[...]

[A]cknowledgement by the State of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as marriage law accords to heterosexual couples is in no way inconsistent with the rights of religious organisations to continue to refuse to celebrate same-

sex marriages. The constitutional claims of same-sex couples can accordingly not be negated by invoking the rights of believers to have their religious freedom respected. The two sets of interests involved do not collide, they co-exist in a constitutional realm based on accommodation of diversity.

4. The “international law” argument

It was also argued before the Constitutional Court that international human rights instruments to which South Africa had adhered did not expressly provide for the right to same-sex marriage. Reference was here made to the ICCPR and the *Joslin v New Zealand*¹³⁴ decision of the United Nations Human Rights Committee to the effect that a New Zealand law denying marriage to same-sex couples does not violate the ICCPR.

Findings of the Constitutional Court

In rejecting this argument, Justice Sachs of the Constitutional Court held as follows:

“The Committee held that there was no provision in the ICCPR which forbade discrimination on sexual orientation. This is a far cry from declaring that the ICCPR forbids the recognition of same-sex marriages and seals off same-sex couples from participating in marriage or establishing families.

[...]

I conclude that while it is true that international law expressly protects heterosexual marriage it is not true that it does so in a way that necessarily excludes equal recognition being given now or in the future to the right of same-sex couples to enjoy the status, entitlements, and responsibilities accorded by marriage to heterosexual couples.”

5. Conclusion of the Constitutional Court with regard to the first question

The Constitutional Court concluded that *“the failure of the common law and the Marriage Act to provide the means whereby same-sex couples can enjoy the same status, entitlements and*

¹³⁴ *Joslin v New Zealand* (Communication No 902/1999) (17 July 2002)

responsibilities accorded to heterosexual couples through marriage, constitutes an unjustifiable violation of their right to equal protection of the law under section 9(1), and not to be discriminated against unfairly in terms of section 9(3) of the Constitution”. Such failure, according to the Constitutional Court “represents an unjustifiable violation of their right to dignity in terms of section 10 of the Constitution.”

B. Remedy

Having concluded that the common law definition of marriage and section 30(1) of the Marriage Act were inconsistent with sections 9(1) and 9(3) and 10 of the Constitution to the extent that they make no provision for same-sex couples to enjoy the status, entitlements and responsibilities they accord to heterosexual couples, the Constitutional Court took into consideration the principle of separation of powers and stated that Parliament should be given the opportunity in the first place to decide how best the equality rights at issue could be achieved, through a legislative remedy which *“must be as generous and accepting towards same-sex couples as it is to heterosexual couples, both in terms of the intangibles as well as the tangibles involved, and that is truly and manifestly respectful of the dignity of same-sex couples.”*

This order was, however, subject to a temporal condition that would take effect in the event of parliamentary inaction or failure to discharge its constitutional obligations in this regard. The Court also prepared for a solution *“should Parliament fail to cure the defect”*. It held that *“what justice and equity would require, then, is both that the law of marriage be kept alive and that same-sex couples be enabled to enjoy the status and benefits coupled with responsibilities that it gives to heterosexual couples. These requirements are not irreconcilable. They could be met by reading into section 30(1) of the Marriage Act the words “or spouse” after the words “or husband”, as the Equality Project proposes.”*

The Constitutional Court of South Africa replaced the orders of the Supreme Court of Appeal and made *inter alia*, the following orders:

- The Common law definition of marriage is declared to be inconsistent with the Constitution and invalid to the extent that it does not permit same-sex couples to enjoy

the status and the benefits coupled with responsibilities it accords to heterosexual couples;

- The declaration of invalidity is suspended for twelve months from the date of this judgment to allow Parliament to correct the defect.
- Should Parliament not correct the defects within this period, Section 30(1) of the Marriage Act 25 of 1961 will forthwith be read as including the words “or spouse” after the words “or husband” as they appear in the marriage formula.

IV. Analysis and outcome of the *Fourie* Constitutional Court judgment

In November 2006, the Government of South Africa promulgated the Civil Union Act 2006¹³⁵ which defined “civil union” as the voluntary union of two persons who are both 18 years of age or older, solemnised and registered by way of either marriage or a civil partnership. Same-sex partners could thereafter get their unions recognised in South Africa.

The *Fourie* judgment offers significant guidance and has been frequently referenced by other foreign jurisdictions in dealing with the constitutional question of same-sex marriage. The core constitutional lesson imparted by the South African Constitutional Court is that limiting “marriage” to a union between a man and a woman may not, in itself, violate the Constitution, so long as the State provides an alternative framework for same-sex couples that guarantees benefits equivalent to those of marriage. Significantly, throughout the judicial proceedings, the South African State failed to undertake any commitment to legally recognise same-sex unions. Instead, its defence was expressly premised on resisting the extension of marriage to same-sex couples. According to the Constitutional Court, it is not the appellation of “marriage” that is constitutionally objectionable, but rather the existence of a legal institution exclusively reserved for opposite-sex couples and the absence of an alternative institution affordable to same-sex couples providing for equivalent legal recognition and effects, resulting in unfair discrimination based solely on sexual orientation.

¹³⁵ No. 17 of 2006: Civil Union Act, 2006

This is the reason why the institution of marriage in South Africa was declared to be partially unconstitutional, only to the extent “*that it does not permit same-sex couples to enjoy the status and the benefits coupled with responsibilities it accords to heterosexual couples*”. As clearly explained by the Constitutional Court, since the law on marriage created an institution which enabled heterosexual couples to declare their public commitment to each other and achieve the status, entitlements and responsibilities that flow from marriage, **but did not provide any mechanism for same-sex couples to achieve the same**, the said law discriminated unfairly against same-sex couples on the basis of sexual orientation, which is a prohibited ground of discrimination under the Constitution of South Africa.

Strictly adhering to the limitations inherent to the doctrine of the separation of powers, the Constitutional Court restrained itself from creating a new legal institution for the recognition of same-sex unions. However, in exercising its role of guardian of the Constitution and the Constitution’s fundamental rights for all persons, including sexual minorities, the Court could not support the perpetuation of discrimination against same-sex couples on the basis of their sexual orientation. Faced with this tension, and in the event that Parliament failed or unduly delayed in discharging its obligation to provide for corrective measures, the Court imposed a reasonable but mandatory deadline of twelve months. The Constitutional Court underlined that it would be unacceptable that “*the applicants end up with a declaration that makes it clear that they are being denied their constitutional rights, but with no legal means of giving meaningful effect to the declaration*”. Consequently, the Constitutional Court issued a remedial order stipulating that, in the event of parliamentary inaction within the mandatory prescribed period, the existing marriage provisions would be read so as to extend access to marriage to same-sex unions.

CHAPTER 6: INDIA

India and Mauritius were both under British sovereignty prior to their respective independence, and both States inherited from the British Crown certain legislative provisions that are discriminatory on the basis of sexual orientation. During the period of British colonial administration, a substantial number of Indians migrated to Mauritius. Consequently, individuals of Indian descent constitute a significant proportion of the contemporary Mauritian population.

The Constitution of India bears several similarities with that of Mauritius, namely concerning the fundamental rights and freedoms of the individual. In 2018¹³⁶ and 2023¹³⁷ respectively the highest jurisdictions of both States have held that the protection from discrimination based on “sex” enshrined in their respective constitutions encompasses the term “sexual orientation”.

In 2023, the Supreme Court of India had to deal with the question of same-sex marriage in the *Supriyo v. Union of India*¹³⁸ (also known as the “*Supriyo*”) case since the law in India expressly restricted marriage to the man with the woman in the Special Marriage Act (“SMA”). Indian law does not expressly provide for the recognition of same sex unions and the requirement in the SMA for marriage is that a couple should consist of a man and a woman.

In contrast to the Mauritian legislative framework, more specifically the Equal Opportunities Act, which explicitly prohibits discrimination on grounds of sexual orientation, India lacks a corresponding specific anti-discrimination legislation encapsulating sexual orientation. This gap in the legal framework was expressly deplored by the Supreme Court of India in the *Supriyo* decision whereby Justice Sanjay Kishan Kaul observed that India requires comprehensive anti-discrimination legislation, “*which inter alia prohibits discrimination on the basis of sexual orientation*”.

In this case, the Supreme Court of India examined the rights of same-sex couples through the prism of the constitutional guarantees of freedom of association (section 19 of the Constitution of India) and the right to life and personal liberty (section 21). Notably, the Constitution of

¹³⁶ ¹³⁶ Navtej Singh Johar & Ors v. Union of India Ministry of Law., Writ Petition (CRL.) No. 76 of 2016

¹³⁷ Ah-Seek v. State of Mauritius – 2023 SCJ 399

¹³⁸ Supriyo & Anr v. Union of India – 17.12.2023 - WP (Civil) no. 1011 of 2022.

Mauritius provides for an almost identical formulation of these fundamental rights (section 13 for the right to freedom of association and sections 3 and 5 for the right to life and personal liberty). Freedom of conscience, which is a fundamental right under both the Constitution of India (section 25) and the Constitution of Mauritius (section 11) was also scrutinised since the opponents to the recognition of same-sex unions heavily relied on their freedom of religion. The right to privacy was also questioned. It is worth noting that Article 22 of the Code Civil Mauricien provides for the right to privacy. Mauritius has also adhered to international instruments which provide for the right to privacy (e.g. Article 17 of the ICCPR).

A legal analysis of the 2023 *Supriyo* case is therefore relevant.

I. Facts and main issues of the *Supriyo* case

In this case, the petitioners contended that the State of India, through the operation of the prevailing legal regime, discriminates against the queer community by impliedly excluding the queer community from a civic institution: marriage. The petitioners invoked the equality code of the Constitution to seek legal recognition of their relationship with their partner in the form of marriage. They declared that LGBTQIA+ persons are entitled to dignity, equality, and privacy, which encompasses the fundamental right of LGBTQIA+ persons to marry a person of their choice.

They contested the constitutionality of the Special marriage Act (SMA), the primary legislation in India with regard to marriage, and submitted, *inter alia*, that:

- i. The SMA is unconstitutional because it discriminates on the grounds of sexual orientation by preventing same-sex couples from solemnising their marriages. Article 15(1) of the Constitution prohibits discrimination on the grounds of sex, which subsumes sexual orientation. The requirement in the SMA that a couple should consist of a man and a woman is one which is based on ascriptive characteristics (attributes that are pre-determined or designated by society or other external norms) and is an exclusion based on a marker of identity;
- ii. It denies LGBTQIA+ persons equal protection of the laws since non-recognition of same-sex and gender-non conforming marriage causes prejudice to LGBTQIA+ persons and denies them rights under social welfare and beneficial legislations;

- iii. It is manifestly arbitrary to exclude LGBTQIA+ persons from the SMA and there is no fair or reasonable justification to exclude LGBTQIA+ couples from the institution of marriage;
- iv. The failure of the SMA to recognise same-sex marriages violates Articles 14 and 15 of the Constitution because it fails the reasonable classification test, is manifestly arbitrary, and discriminates based on gender identity and sexual orientation;
- v. The failure of the SMA to recognise same-sex marriages violates Article 19(1)(a) of the Constitution because sexuality, gender expression, and marriage are forms of expression;
- vi. The SMA discriminates on the basis of sex, gender identity, and sexual orientation, thereby violating Article 15 of the Constitution;
- vii. The denial of the right to marry to persons based on their gender identity is a denial of the right to dignity, personal autonomy, and liberty under Article 21 of the Constitution.

During the hearing, the Solicitor General of India made a statement that a committee chaired by the Cabinet Secretary would be constituted to set out the rights which will be available to queer couples in unions. The said committee would be setting out the scope of the benefits which accrue to such couples.

When delivering the judgment and before going into the legal intricacies the Supreme Court of India deplored that *“despite the decriminalization of queer relationships and the broad sweep of the decision in [Navtej judgment], members of the queer community still face violence and oppression, contempt, and ridicule in various forms, subtle and not so subtle, every single day [and that the] State (which has the responsibility to identify and end the various forms of discrimination faced by the queer community) has done little to emancipate the community from the shackles of oppression.”*. It was also highlighted that *“the stigma against the members of the LGBTQIA+ community did not end with a stroke of the pen when this Court decriminalized consensual homosexual sexual activity”* and that *“Despite this Court recognizing that sexual orientation is a core and innate trait of an individual, the members of the queer community continue to face economic, social and political oppression in both visible and invisible ways.”*

The Supreme Court also reaffirmed that the question of whether homosexuality or queerness is unnatural was no longer *res integra*, since it has previously held that it is *“innate and natural”*

and that “*gender queerness, transgenderism, homosexuality, and queer sexual orientations are natural, age-old phenomena which have historically been present in India*” and not “*imported from the west*”.

The Supreme Court underlined that it had been reported¹³⁹ that religious same sex marriages had been solemnised in India since decades, though not recognised by the State and the following examples were given:

- In 1993, two women in Faridabad married each other in a Banke Bihari temple, with a priest officiating;
- Two men, one Indian and the other American, married according to Hindu rites in a ceremony in New Delhi in 1993;
- In 2004, a twenty-four-year-old Dalit woman and a twenty-two-year-old Jat woman travelled to Delhi and performed the rites of marriage in a temple;
- Two young Muslim men (one aged twenty-two and the other aged twenty-eight) married in Ghaziabad, Uttar Pradesh. Their friends and family physically assaulted them for marrying but it was reported that they continued to intend to live together;
- Two women who happened to be Adivasi married according to the customs of their tribe, in a small village in Koraput district, Orissa;

Drawing upon historical evidence, the Supreme Court of India pointed out that in pre-colonial times, the Indian subcontinent was home to a diverse population with its own, unique understanding of sexuality, companionship, morality and love, including “*queerness*”. The Court also observed that society did not view the queer identity as something that required prior acceptance “*because it formed a part of ordinary, day-to-day life, similar to the heterosexual or cisgender identities.*” This prevailing social order was disrupted by British colonisation, which introduced a foreign moral code and corresponding legislation that criminalised queerness - specifically, homosexuality and transgender identity. Consequently, “*criminalization of the LGBTQ community and their resultant prosecution and conviction under these laws coupled with the violence enabled by these laws drove large sections of the community underground and into the proverbial closet. Society stigmatized any sexual orientation which was not heterosexual and any gender identity which was not cisgender. Persons with an atypical gender identity and / or sexual orientation were therefore compelled*

¹³⁹ Ruth Vanita, *Love’s Rite: Same-Sex Marriage in India and the West* (Palgrave Macmillan, 2005)

to conceal their true selves from the world. Their presence in the public sphere gradually shrunk even as homophobia and transphobia flourished”.

The Supreme Court refused to give a static definition of marriage but accepted to list some of its features:

“There is no universal definition of marriage. Marriage is understood differently in law, in religion, and in culture.

[...]

Marriage is a voluntary union – of the mind, the body, and the soul.

[...]

Both the parties to the marriage provide emotional, financial, and spiritual support to the other. Each is an intellectual partner of the other, as also a friend. Love, respect and companionship are said to be the hallmarks of a successful marriage.

[...]

The sole purpose of marriage is not to facilitate sexual relations or procreation, although that may be one of the main motivations for entering into a marriage.”

The Supreme Court emphasised that *“different religions may have different understandings of marriage”*. The Court further adduced historical evidence demonstrating that the conception of marriage is not static and that some anciently accepted practices in India are now universally abhorred. Some of the examples listed by the Supreme Court of India are:

- ‘Sati’ ritual which was once permitted and practiced in India whereby the widow was either tied to the funeral pyre of her deceased husband or pressed to jump into it;
- Prohibition of widow remarriage. Additionally, in many communities, the heads of widows were shaved and they were prohibited from wearing jewellery or colourful clothes;
- Child marriage which was widespread in most religions and communities. The age of consent for girls was fixed at ten years in 1860 (in 1890, a thirty-five-year-old man caused the death of his ten-year-old wife through violent sexual intercourse with her);
- The giving and taking of dowry as a precondition to marriage, now prohibited in India;
- Indissolubility of civil marriage.

According to the Supreme Court of India:

“The only facet of marriage which is constant across religion, community, caste, and region is that the couple is in a legally binding relationship – one which recognizes an emotional bond of togetherness, loyalty and commitment - that is recognised by the law”.

II. The claim for legal recognition of same-sex union

The petitioners argued that through marriage, the State confers legal recognition to a relationship between two heterosexual persons. Consequently, the State confers innumerable benefits, both tangible and intangible, to a family unit constituted by marriage. The petitioners requested the State to grant legal recognition to the relationship between non-heterosexual persons in the form of marriage because they are otherwise excluded from the express and implied benefits of marriage. They claimed that non-heterosexual unions have not been able to attain social sanctity because their relationship is invisible in the eyes of the law.

It was admitted that marriage provides a set of benefits such as:

- property benefits would include securing a share in case of intestate succession;
- payment of gratuity, to receive funeral expenditure for the deceased spouse,
- payment of medical benefits to the spouse of the insured person;
- tax benefits;
- recognition of a spouse as a ‘near relative’ for the purpose of organ transplant.

The Supreme Court of India recognised that the non-recognition of non-heterosexual marriages denies the petitioners the social and material benefits which flow from marriage which captures the true essence of marriage. It also considered that *“the argument that the State has an interest in regulating heterosexual marriages only to sustain society through procreation is fallacious because the State does not impose a compelled choice of procreation on married heterosexual couples. Moreover, heterosexual couples need not be married to procreate nor is marriage a criteria for procreation.”*

The Supreme Court then addressed the different issues out of which the most important ones will be hereunder reproduced:

A. Challenge of the Special Marriage Act (SMA)

The issue here can be resumed as follows:

Does the SMA, in confining marriage to opposite-sex couples, discriminate against same-sex couples on the basis of sexual orientation?

The petitioners argued that Section 4 of the SMA was unconstitutional not because it expressly excluded or barred the marriage between two persons of the same-sex but because it excluded the solemnisation of marriage between non- heterosexual persons by implication since it only governed a heterosexual union. They relied heavily on the *Fourie* case delivered by the Constitutional Court of South Africa¹⁴⁰.

The Supreme Court of India outlined that the SMA was enacted to provide a special form of marriage for couples belonging to different religions and castes. Section 4 of the SMA prescribes conditions relating to the solemnisation of special marriages. The relevant portion of the provision is extracted below:

“4. Conditions relating to solemnization of special law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of the marriage the

(a) neither party has a spouse living;

(b) neither party:

(i) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(ii) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children;

or

(iii) has been subject to recurrent attacks of insanity;

(c) the male has completed the age of twenty-one years and the female the age of eighteen years;

(d) the parties are not within the degrees of prohibited relationship:

¹⁴⁰ Minister of Home Affairs v. Fourie – Constitutional Court of South Africa, CCT 60/04 [01.12.2005]

Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship;

[...]” (emphasis added).

To address the issue, the Supreme Court of India highlighted various sections of the SMA which, unlike the South African legislation prevailing during the *Fourie* case, confined the application of the SMA to heterosexual couples only:

*“Section 27 deals with divorce. Section 27(1A) **grants the wife additional grounds of divorce.** Section 31 stipulates the Court to which a petition for divorce must be made. Sub-Section (2) of the Section is a **special provision available to the wife** for the presentation of a divorce petition. Section 36 stipulates that **the husband may be directed to pay expenses of the proceedings** and such sum based on the income of the husband when the wife has no independent income, sufficient to support herself and necessary for divorce proceedings. Section 37 stipulates that **the court may order the husband to pay the wife permanent alimony and maintenance**”.* [emphasis added]

The Supreme Court of India refused to follow the reasoning behind the South African *Fourie* case principally because, *“unlike the SMA, there was only one provision in the South African Marriage Act (that is, Section 30(1)) which made a reference to heterosexual relationships. However, as indicated above, various provisions of the SMA (Sections 4, 27(1A), 31, 36, and 37) confine marriage to a union between heterosexual persons.”*

In its reasoning, the Supreme Court of India conducted a proportionality assessment of the implications inherent in a declaration of constitutional invalidity of the SMA. The Court determined that such a ruling would precipitate inequality and exacerbate the very forms of discriminatory treatment that the SMA was enacted to eradicate:

“The SMA was enacted to enable persons of different religions and castes to marry. If the SMA is held void for excluding same-sex couples, it would take India back to the pre-independence era where two persons of different religions and caste were unable to celebrate love in the form of marriage.

Such a judicial verdict, according to the Supreme Court of India, would not only have the effect of taking the nation back to the era when it was clothed in social inequality and religious intolerance but it would also push the courts to choose between eradicating one form of discrimination and prejudice at the cost of permitting another.

However, the Supreme Court clarified that ‘*marriage*’ *per se* does not constitute a constitutional right in India. It emphasised that the legislature was vested with the authority to regulate domestic relationships through various means and to designate them by specific nomenclature. The Court underscored marriage and adoption as illustrative examples in this regard. ‘Marriage’ was therefore only the nomenclature of the legally recognised union of a man with a woman fulfilling the conditions of the SMA. The central issue was not whether marriage, as an institution, was a fundamental right to each and every citizen, but rather whether the State had discriminated against same-sex couples on the basis of sexual orientation by establishing a legal framework with associated benefits for opposite-sex unions - namely, marriage - while failing to provide any corresponding legal framework for same-sex unions. Before addressing this issue, the Supreme Court clarified the question of the validity of same-sex marriages celebrated outside India and involving Indian citizens.

B. The validity of foreign same-sex marriages involving at least an Indian citizen

The Foreign Marriage Act providing for the recognition of foreign marriages was also challenged. The FMA sets out the conditions for solemnising foreign marriages as follows:

“4. Conditions relating to solemnization of foreign marriages.

A marriage between parties one of whom at least is a citizen of India may be solemnized under this Act by or before a Marriage Officer in a foreign country, if, at the time of the marriage, the following conditions are fulfilled, namely: -

- (a) neither party has a spouse living,*
- (b) neither party is an idiot or a lunatic,*
- (c) the bridegroom has completed the age of twenty-one years and the bride the age of eighteen years at the time of the marriage, and*
- (d) the parties are not within the degrees of prohibited relationship:*

Provided that where the personal law or a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship.”

The Supreme Court of India did not hesitate to hold that a same-sex marriage involving an Indian citizen and celebrated outside India is valid:

*“The FMA recognizes the right of an Indian citizen to marry outside India or to marry a person from a foreign country. In essence, it recognizes the right of a citizen of India to choose a life partner who is not a citizen of India. It follows that citizens of India may enter into an abiding union with a person of their choice, including a person of the same sex as them, even if that person is not a citizen of India. **It is accordingly clarified that the right of a citizen of India to enter into an abiding union with a foreign citizen of the same sex is preserved**”.*

C. The right for same-sex couples to enter a union recognised by law

The Supreme Court was tasked with adjudicating whether members of same-sex couples possess a constitutional entitlement to, at a minimum, the legal recognition of their unions. Consequently, the Supreme Court had to determine **whether the State's failure to provide for such recognition constitutes unlawful discrimination on the basis of sexual orientation, given that opposite-sex couples already possess the means to have their unions legally recognised and regulated through the institution of marriage.**

According to the Supreme Court, it is in the nature of human beings to seek companionship and value abiding relationships with other human beings in different forms and capacities. The Supreme Court went further and underlined the necessity for relationships such as the choice of a partner, to benefit from a legal regulation:

“It is insufficient if persons have the ability and freedom to form relationships unregulated by the State. For the full enjoyment of the such relationships, it is necessary that the State accord recognition to such relationships. Thus, the right to enter into a union includes the right to associate with a partner of one’s choice, according recognition to the association, and ensuring that there is no denial of access to basic goods and services is crucial to achieve the goal of self-development”.

The Supreme Court of India then addressed the right for such a legal recognition of same-sex unions under constitutional lenses:

1. The right to freedom of speech and expression and to form intimate associations

The Supreme Court had to determine whether the exclusion of same-sex couples from any legal recognition, while opposite-sex couples could benefit from such a recognition, constituted a discrimination based on sexual orientation to the fundamental right to form associations.

The Supreme Court here referred to the case of *Roberts v. United States Jaycees*¹⁴¹ where the US Supreme Court generously interpreted ‘freedom of association’ to include the freedom to form intimate associations. The Supreme Court of India considered that:

*“The State by not endorsing a form of relationship encourages certain preferences over others. In a previous segment of this judgment, we have discussed the tangible and intangible benefits of recognizing relationships in the form of marriage. While the tangible benefits of marriage are traceable to the content of law, the intangible benefits are secured merely because State recognises the relationship through the instrument of law. Intangible benefits in the form of expressive advantages exist irrespective of the content of the law. Even if the law does not grant any special material benefits to a relationship, the relationship would still be considered to be legitimate in the eyes of the society. **The freedom to choose a partner and the freedom to enjoy their society which are essential components of the right to enter into a union (and the freedom of intimate association) would be rendered otiose if the relationship were to be discriminated against. For the right to have real meaning, the State must recognise a bouquet of entitlements which flow from an abiding relationship of this kind. A failure to recognise such entitlements would result in systemic discrimination against queer couples. Unlike heterosexual couples who may choose to marry, queer couples are not conferred with the right to marry by statute.**”* [emphasis added].

Having considered that same-sex couples were discriminated against on the basis of sexual orientation in exercising their right to freedom of association, the Supreme Court noted that

¹⁴¹ *Roberts v. United States Jaycees* - 468 U.S 609 (1984)

during the hearing, the State of India, through its Solicitor General, had engaged itself to remedy this discrimination through an official statement in court that *“a Committee chaired by the Cabinet Secretary will be constituted to set out the rights which will be available to queer couples in unions. The Committee shall set out the scope of the benefits which accrue to such couples.”*

2. The right to dignity, autonomy and privacy

The Supreme Court of India here readily concluded that same-sex couples were being denied these rights on the basis of their sexual orientation when denied of the benefits accessible to opposite sex couples only, namely the access to a legally recognised union:

“When citizens are prevented from exercising their rights, the courts of the country create the conditions for their exercise by giving effect to the laws enacted by the legislative wing or the schemes formulated by the executive wing. In the process, courts interpret the Constitution and the rights and freedoms it recognizes. This exercise lies at the core of Article 21 of the Constitution, which guarantees the right to life and personal liberty.

[...]

Article 21 is available to all persons including queer persons. Article 21 encompasses the rights to dignity, autonomy, and privacy. Each of these facets animates the others. It is not possible to speak of the right to enter into a union without also speaking of the right to intimacy, which emanates from these rights. These rights demand that each individual be free to determine the course of their life, as long as their actions are not barred by law. Choosing a life partner is an integral part of determining the course of one’s life. Most people consider this decision to be one of the most important decisions of their lives – one which defines their very identity. Life partners live together, spend a significant amount of time with one other, merge their respective families, create a family of their own, care for each other in times of sickness, support one another and much more. Hence, the ability to choose one’s partner and to build a life together goes to the root of the right to life and liberty under Article 21. Undoubtedly, many persons choose not to have a life partner – but this is by choice and not by a deprivation of their agency. The law constrains the right to choose a partner in certain situations such as when they are within prohibited degrees of relationships or are in a consanguineous relationship.

Principle 24 of the Yogyakarta Principles (on the application of international human rights law in relation to sexual orientation and gender identity) states that all people have the right to found a family:

“Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members.”

*While India is not a signatory to the Yogyakarta Principles, this Court has recognized their relevance to the adjudication of cases concerning sexual minorities. Depriving someone of the freedom to choose their life partner robs them of their autonomy, which in turn is an affront to their dignity. **Preventing members of the LGBTQ community from entering into a union also has the result of denying (in effect) the validity of their sexuality because their sexuality is the reason for such denial. This, too, would violate the right to autonomy which extends to choosing a gender identity and sexual orientation.** The act of entering into an intimate relationship and the choices made in such relationships are also protected by the right to privacy.”*

The right to life and mental health was also explained by the Supreme Court which considered that the mental health of members of the LGBTQ community may suffer “*not only because of the discrimination they may face at the hands of their families or society in general but also because they are prevented from choosing their life partner and entering into a meaningful, long-lasting relationship with them*”. The Supreme Court underlined that the effect of the right to life under Article 21 is that queer people “*have the right to complete mental health, without being discriminated against because of their sex, gender, or sexual orientation. A natural consequence of this is that they have the right to enter into a lasting relationship with their partner. They also have a right not to be subjected to inhumane and cruel practices or procedures.*”

3. Freedom of conscience

It was argued by some of the respondents that a declaration recognising non-heterosexual couples would conflict with the tenets of religion where marriage is considered a heterosexual union, and therefore, violate their right to freedom of conscience enshrined in section 25 of the

Constitution of India. In this regard, the Supreme Court found it necessary to provide guidance on the constitutional guarantee of freedom of conscience. It finally considered that the queer persons have the constitutional right to enter into a union since they were also entitled to freedom of conscience:

“The right under Article 25 is also available to members of the LGBTQ community since it is available to all persons.

[...]

All persons, including members of the queer community, have the right to judge the moral quality of the actions in their own lives, and having judged their moral quality, have the right to act on their judgment in a manner they see fit. This attribute is of course not absolute and is capable of being regulated by law. In the segment of this judgment on the right to life and liberty, this Court noticed that the meaning of liberty is - at its core - the ability to do what one wishes to do and be who one wishes to be, in accordance with law. All persons may arrive at a decision regarding what they want to do and who they want to be by exercising their freedom of conscience. They may apply their sense of right and wrong to their lives and live as they desire, in accordance with law. Some of the decisions the moral quality of which they will judge include the decision on who their life partner will be and the manner in which they will build their life together. Each individual is entitled to decide this for themselves, in accordance with their conscience.

[...]

The right under Article 25 is subject to four exceptions - public order, morality, health, and the other provisions of Part III. The respondents have not demonstrated that public order will be in peril or that the health of the public at large or of individuals will be adversely impacted, if queer persons enter into a union with their partners. As for morality, it is settled law that Article 25 speaks of constitutional morality and not societal morality.

[...]

Hence, the content of morality must be determined on the basis of the preambular precepts of justice, liberty, equality, and fraternity. None of these principles are an impediment to queer persons entering into a union. To the contrary, they bolster the proposition that queer persons have the right to enter into such a relationship.

Finally, the other provisions in Part III (which may also restrict the exercise of the right under Article 25) do not act as a bar to the exercise of the right in the present case. Similar to the preambular values, they give rise to the right to enter into a union.” [Emphasis added].

III. Decision and orders of the Supreme Court of India

A. Summary of the main findings of the Supreme Court of India

Having considered that same-sex couples are entitled to protection under the Constitution of India and that the right to protection from discrimination based on sexual orientation demands that their union be legally recognised, regardless of sexual orientation and gender, the Supreme Court of India resumed its findings as follows before making its orders:

“This Court recognized that equality demands that queer persons are not discriminated against. An abiding cohabitational relationship which includes within its fold a union of two individuals cannot be discriminated against on the basis of sexual orientation. Material and expressive entitlements which flow from a union must be available to couples in queer unions. Any form of discrimination has a disparate impact on queer couples who unlike heterosexual couples cannot marry under the current legal regime.

[...]

As a consequence of the rights codified in Part III of the Constitution, this Court holds that all persons have a right to enter into an abiding union with their life partner.

[...]

However, when two persons enter into a union with a person whom they consider to be their life partner, certain legal consequences will follow. For instance, if one of them happens to die, their partner will have the right to access the body of the deceased.

[...]

The word ‘sex’ cannot be read independent of the social and historical context. Thus, ‘sex’ in Article 15 includes within its fold other markers of identity which are related to sex and gender such as sexual orientation. Thus, a restriction on the right to enter into a union based on sexual orientation would violate Article 15 of the Constitution.”

Justice Sanjay Kishan Kaul, who concurred with the judgment delivered by the Chief Justice of the Supreme Court of India, opined personally as follows:

“I have had the benefit of the exhaustive and erudite judgment of the Hon’ble Chief Justice D.Y. Chandrachud; which enumerates the prevalence of these relationships in history, the

Constitutional recognition of the right to form unions (in other words ‘civil unions’), and the necessity of laying down guidelines to protect non-heterosexual unions. In a way, this is a step forward from the decriminalisation of private consensual sexual activities by the LGBTQ+ community in Navtej Singh Johar & Ors. vs. Union of India.

[...]

This Court has always been guided by constitutional morality and not by social morality.

[...]

Non-heterosexual unions are well-known to ancient Indian civilisation as attested by various texts, practices, and depictions of art.

[...]

Marriage as an institution developed historically and served various social functions. It was only later in its long history that it came to be legally recognized and codified. However, these laws regulated only one type of socio-historical union, i.e., the heterosexual union.

[...]

It would thus be misconceived to claim that non-heterosexual unions are only a facet of the modern social milieu. The objective of penning down this section is to provide perspective on the existence of non-heterosexual unions, despite continued efforts towards their erasure by the heteronormative majority.

[...]

Non-heterosexual unions are entitled to protection under our Constitutional schema.

[...]

The judgment of the Hon’ble Chief Justice notes that the right to form unions is a feature of Articles 19 and 21 of the Constitution. Therefore, the principle of equality enumerated under Articles 14 and 15 demands that this right be available to all, regardless of sexual orientation and gender. Having recognized this right, this Court has taken on board the statement of the Learned Solicitor General to constitute a Committee to set out the scope of benefits available to such unions. I agree with the Hon’ble Chief Justice.

[...]

*Section 4 of the SMA is clear in so far as it contemplates a marriage between a **male** who has completed the age of twenty-one years **and** a **female** at the age of eighteen years.*

[...]

Non-heterosexual unions and heterosexual unions/marriages ought to be considered as two sides of the same coin, both in terms of recognition and consequential benefits. The only deficiency at present is the absence of a suitable regulatory framework for such unions.

[...]

This technique of reading in Constitutional values should be used harmoniously with other canons of statutory interpretation. In this context, legislations that confer benefits on the basis of marriage should be construed to include civil unions as well, where applicable.

[...]

I am wholeheartedly in agreement with the opinion of the Hon'ble Chief Justice that there is a need for a separate anti-discrimination law which inter alia prohibits discrimination on the basis of sexual orientation."

B. Conclusion and orders of enforcement

The Supreme Court made no fewer than 20 conclusive points and directives. It took cognisance of the State's commitment to undertake appropriate remedial measures aimed at eliminating the discrimination faced by same-sex couples on the basis of sexual orientation with respect to the recognition of their unions. Among the directives meriting specific quotation are the following:

"[...]

b. Queerness is a natural phenomenon known to India since ancient times.

It is not urban or elite;

c. There is no universal conception of the institution of marriage, nor is it static. Under Articles 245 and 246 of the Constitution read with Entry 5 of List III to the Seventh Schedule, it lies within the domain of Parliament and the state legislatures to enact laws recognizing and regulating queer marriage;

d. Marriage has attained significance as a legal institution largely because of regulation by the state. By recognizing a relationship in the form of marriage, the state grants material benefits exclusive to marriage;

[...]

*g. The Constitution does not expressly recognize a fundamental right to marry. An institution cannot be elevated to the realm of a fundamental right based on the content accorded to it by law. **However, several facets of the marital relationship are reflections of constitutional values including the right to human dignity and the right to life and personal liberty;***

[...]

i. The freedom of all persons including queer couples to enter into a union is protected by Part III of the Constitution. The failure of the State to recognise the bouquet of entitlements which flow from a union would result in a disparate impact on queer couples who cannot marry under the current legal regime. The State has an obligation to recognize such unions and grant them benefit under law;

j. In Article 15(1), the word 'sex' must be read to include 'sexual orientation' not only because of the causal relationship between homophobia and sexism but also because the word 'sex' is used as a marker of identity which cannot be read independent of the social and historical context;

k. The right to enter into a union cannot be restricted based on sexual orientation. Such a restriction will be violative of Article 15. Thus, this freedom is available to all persons regardless of gender identity or sexual orientation;

[...]

s. We record the assurance of the Solicitor General that the Union Government will constitute a Committee chaired by the Cabinet Secretary for the purpose of defining and elucidating the scope of the entitlements of queer couples who are in unions. The Committee shall include experts with domain knowledge and experience in dealing with the social, psychological, and emotional needs of persons belonging to the queer community as well as members of the queer community. The Committee shall before finalizing its decisions, conduct wide stakeholder consultation amongst persons belonging to the queer community, including persons belonging to marginalized groups and with the governments of the States and Union Territories.

The Committee shall in terms of the exposition in this judgment consider the following:

i. Enabling partners in a queer relationship (i) to be treated as a part of the same family for the purposes of a ration card; and (ii) to have the facility of a joint bank account with the option to name the partner as a nominee, in case of death;

ii. In terms of the decision in Common Cause v. Union of India, as modified by Common Cause v. Union of India, medical practitioners have a duty to consult family or next of kin or next friend, in the event patients who are terminally ill have not executed an Advance Directive.

Parties in a union may be considered 'family' for this purpose;

iii. Jail visitation rights and the right to access the body of the deceased partner and arrange the last rites; and

iv. Legal consequences such as succession rights, maintenance, financial benefits such as under the Income Tax Act 1961, rights flowing from employment such as gratuity and family pension and insurance

IV. Consequences of the Supriyo judgment

Following the Supreme court of India's judgment in the *Supriyo* case, the Government of India, through a gazette notification dated 16 April 2024, constituted a Committee¹⁴² with Cabinet Secretary as the Chairperson and Secretaries of Ministry of Home Affairs, Ministry of Women and Child Development, Ministry of Health and Family Welfare, Legislative Department as Members and Secretary, Department of Social Justice and Empowerment as Member Convenor to examine and submit recommendations on the measures to be taken by Central and State Governments to safeguard the interest of the queer community.

By September 2024, the following interim actions had already been taken¹⁴³:

- i. Department of Food and Public Distribution (D/oF&PD) issued an advisory to all the States and Union Territories (UTs), that as per existing provisions, enabling partners in a queer relationship are to be treated as a part of the same household for the purposes of ration card. Further, States/UTs were asked to take necessary measures to ensure that partners in queer relationship do not face any discrimination in the issuance of ration cards.
- ii. Department of Financial Services (DFS) had issued an advisory that there are no restrictions for persons of the queer community to open a joint bank account and also to nominate a person in queer relationship as a nominee to receive the balance in the account, in the event of death of the account holder.

¹⁴² "Indian government creates committee to study rights for same-sex couples" – Ankush Kumar, Washington Blade, 28.05.2024 - <https://www.washingtonblade.com/2024/05/28/indian-government-creates-committee-to-study-rights-for-same-sex-couples/>

¹⁴³ "Host of measures taken by Government of India for the LGBTQI+ community" – 01.09.2024 - <https://www.pib.gov.in/PressReleasePage.aspx?PRID=2050655®=3&lang=2>

- iii. Ministry of Health and Family Welfare issued letters to all stakeholders including all States/UTs to take measures to ensure the rights of LGBTQI+ community with relation to healthcare, planning awareness activities, prohibition of conversion therapy, availability of sex reassignment surgery, changes in curricula, provision of Tele consultation, sensitisation and training various levels of staff and making of provision to claim the body when near relative/next of kin/family is not available.
- iv. The Directorate General of Health Services, Ministry of Health and Family Welfare also issued letter to the State Health Departments and other stakeholders on the subject of ensuring the health care access and reducing discrimination towards LGBTQI+ community.
- v. Ministry of Health and Family Welfare framed guidelines in respect of medical intervention required in infants/ children with disorders of sexual differentiation (intersex) to have medically normal life without complications.

* * *

CHAPTER 7: THE CAYMAN ISLANDS

The Cayman Islands are a self-governing British Overseas Territory with a constitution deeply inspired from the European Convention on Human Rights. Part I of the Constitution of the Cayman Islands, titled “*Bill of Rights, Freedoms and Responsibilities*” enshrines a number of fundamental rights and freedoms of the individual, namely freedom of conscience, freedom of expression, protection from discrimination on various grounds, etc. The United Kingdom is committed to ensuring that any local law in the Cayman Islands is compatible with the international obligations of the United Kingdom.

The *Marriage (Amendment) Law 2008* was passed in 2008 in the Cayman Islands. The introduction to that law stated that it was promulgated “*to expressly provide that a marriage is a union between a man and a woman*”. It amended the *Marriage Law (2007 Revision)* by inserting into the definition section, section 2, the statement that “*‘marriage’ means the union between a man and a woman as husband and wife*”. Seeking to preclude the possibility of the marriage law being declared unconstitutional on the ground of discrimination based on sex or sexual orientation (discrimination based on sex is prohibited in the BoR), the Cayman Islands Government constitutionally circumscribed marriage to opposite-sex couples within the Bill of Rights itself, which has been part of the Cayman Islands’ Constitution since its commencement in 2012. Section 14(1) of the Bill of Rights was drafted to meet this concern and it reads as follows:

“Government shall respect the right of every unmarried man and woman of marriageable age (as determined by law) freely to marry a person of the opposite sex and found a family.”

Marriage in the Cayman Islands therefore became a constitutional right but restricted to the “*unmarried man to the unmarried woman*”.

The apex court of the Cayman Islands is the Judicial Committee of the Privy Council (JCPC). The years 2021 to 2022 saw the JCPC tasked with rendering a determination on the issue of same-sex marriage in the Cayman Islands in the appeal of *Chantelle Day & Another v. Governor of the Cayman Islands and another*¹⁴⁴ (also known as the “*Chantelle Day*” case). The decisions of the Court of Appeal and the JCPC in *Chantelle Day* warrant careful examination,

¹⁴⁴ *Chantelle Day & Another v. Governor of the Cayman Islands and another* – [2022 UKPC] 6

given that the JCPC upheld the proposition that restricting marriage to opposite-sex couples is constitutionally permissible, so long as such restriction does not give rise to discrimination on the basis of sexual orientation. These judgments were instrumental in prompting the enactment of the Cayman Islands' Civil Partnership Act 2020, legislation which now provides for the legal recognition of same-sex unions.

I. Facts of the Chantelle Day case and first instance judgment

Ms Chantelle Day and Ms Vickie Bodden Bush, being in a committed relationship, wished to enter into a same-sex marriage recognised in law in the Cayman Islands. When they applied for the appropriate licence at the Cayman Islands General Registry in April 2018 the Deputy Registrar refused to grant a licence on the grounds that section 2 of the Marriage Law (“the Marriage Law”) defines marriage as “*the union between a man and a woman as husband and wife*”. Ms Day and Ms Bush claimed that the Bill of Rights, Freedoms and Responsibilities (“the Bill of Rights” or “BoR”), which forms Part 1 of the Cayman Islands’ Constitution (“the Constitution”) set out in the Cayman Islands Constitution Order 2009 (“the 2009 Order”), confers on them a constitutional right to legal recognition of such a marriage and that the Marriage Law should be read in such a way as to reflect that right. Their claim was successful at first instance. The Government of the Cayman Islands appealed against the decision before the Court of Appeal of the Cayman Islands. The decision of the Court of Appeal is interesting to analyse for two main reasons:

- it was upheld by the JCPC;
- between the Court of Appeal judgment and the JCPC decision, the government of the Cayman Islands had implemented an order of the Court of Appeal with regard to the recognition of same-sex unions.

II. Approach of the Court of Appeal of the Cayman Islands

The issues before the Court of Appeal of the Cayman Islands included, inter alia, whether Ms. Day and her partner had suffered a violation of their constitutional rights and whether they had the right to claim for the legal recognition of their union. More specifically, Ms Chantelle Day and Ms Vickie Bodden claimed that the Marriage Law infringed their rights to private and

family life under section 9(1), their freedom of conscience under section 10(1), their right to marry and found a family under section 14(1) and their right to non-discrimination under section 16(1). They sought a declaration that the Marriage Law should be “*read and construed with such modifications, adaptations, qualifications...as may be necessary to bring [it]...into conformity with the Constitution.*” While they claimed they were entitled to marry, they sought as a minimum, a declaration that provision should be made for them to enter into a civil partnership since not the slightest legal framework in the Cayman Islands existed for the recognition of same-sex unions.

In delivering its judgment, the Court of Appeal undertook a detailed construction of the terms of the Constitution. That judgment was later upheld in its entirety by the appeal Board of the JCPC comprising Lord Reed, Lord Hodge, Lady Arden, Lord Sales, and Dame Victoria Sharp. The Court of Appeal first explained how the constitutional BoR ought to be interpreted. It referred to numerous authorities, namely the landmark Mauritian judgment of *Matadeen v. Pointu*¹⁴⁵ delivered by the JCPC and pointed out that “*the court must approach constitutional provisions, such as those in the BoR, in a broad and purposive manner, not narrowly and technically [...] [and] when doing so, to have regard, among other things, to societal changes. However, in doing so, it is not open to the court simply to ignore or put on one side what the provisions clearly say*”. The Court of appeal here held that “*when construing a provision, in a constitution, that provision must not only be considered individually, but in the context of the Constitution as a whole*”.

The different issues were then addressed in the 37-page judgment of the Court of Appeal:

1. The right to private and family life

Section 9 of the BoR found in part I of Constitution of the Cayman Islands enshrines the right to private and family life. The relevant parts are as follows:

“(1) Government shall respect every person’s private and family life, his or her home and his or her correspondence.

...

¹⁴⁵ *Matadeen v Pointu* [1998] UKPC 9

(3) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society [for various defined purposes].”

This section, being substantially identical to the right to private and family life found at article 8 of the ECHR, the Court of Appeal of the Cayman Islands relied on the authorities of the Strasbourg European Court of Human Rights (the “Strasbourg Court”) to address the issue, namely the case of *Oliari and others v Italy*¹⁴⁶ where the applicants were men in stable, same-sex relationships but Italian law neither permitted them to marry nor did it provide for any alternative legal status to same-sex unions. The Strasbourg Court had considered that the right to private and family life did not confer the right to marriage to same-sex unions but that it nevertheless conferred the right for the legal recognition of same-sex couples. The Strasbourg Court therefore concluded that Italy was in breach of article 8 of the ECHR by reason of its failure to provide any form of legal recognition for same-sex couples, such as by way of a civil partnership regime.

The Court of Appeal of the Cayman Islands adopted this approach and held that the right to private and family life did not confer the obligation to the government to provide for a right of marriage to sex couples but that they were nevertheless entitled to the legal recognition of their union. The Court of Appeal underlined that the failure of the Cayman Islands either to permit marriage or provide for a functionally equivalent status to Ms Day and her partner, had affected their lives in the Cayman Islands in many deleterious ways and, more specifically, it has affected the legal status of their child. The government of the Cayman Islands, during the appeal, recognised that it had to provide for a mechanism for the legal recognition of same-sex couples. The Court of appeal therefore held that:

*“Appellants have finally accepted that section 9(1) of the BoR requires the Legislative Assembly to provide the Respondents with **legal status functionally equivalent to marriage**. Its failure to comply with its obligations under the law in that regard is woeful. That it had such an obligation has been apparent for several years. As the Chief Justice set out in detail, the Respondents, in broad terms, offered to compromise the present litigation on appropriate undertakings from the Appellants to establish an institution of civil partnership. Even now, when during the course of argument, the court sought information as to what the Appellants*

¹⁴⁶ *Oliari v Italy* (2017) 65 EHRR 26

intended to do, we were merely told they were awaiting the outcome of the litigation. It is difficult to avoid the conclusion that the Legislative Assembly has been doing all it can to avoid facing up to its legal obligations. In the meantime, Ms Day and Ms Bush (and their child) suffer in the many ways the Chief Justice set out.” (Emphasis added).

2. Freedom of conscience

Section 10 of the constitutional BoR of the Cayman Islands enshrines the right to freedom of conscience. The relevant parts are as follows:

“1) No person shall be hindered by government in the enjoyment of his or her freedom of conscience.

(2) Freedom of conscience includes freedom of thought and of religion or religious denomination; freedom to change his or her religion, religious denomination or belief; and freedom, either alone or in community with others, both in public and in private, to manifest and propagate his or her religion or belief in worship, teaching, practice, observance and day of worship ...

(6) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is.”

The Court of Appeal considered that the “*freedom of conscience*” argument regarding same-sex marriage could not be viewed in isolation, but rather required harmonious construction with the remainder of the Constitution. The Court specifically invoked Section 14, which operates as a *lex specialis* by confining the definition of marriage to a man and a woman:

“As we have said, section 14 is the lex specialis as far as marriage is concerned. There cannot be derived from a general provision such as section 10, a right to marriage for the reasons we have set out. The Respondents’ case fails on that ground alone. It is unnecessary for us to go further than that in the circumstances”.

3. The right to marry and form a family under section 14 of the Constitution

Section 14 of the Constitution of the Cayman Islands specifically provide for the right to marriage and its conditions as follows:

*“(1) Government shall respect the right of every unmarried man and woman of marriageable age (as determined by law) freely to marry a person of the opposite sex and found a family.
 (2) No person shall be compelled to marry without his or her free and full consent.
 (3) Nothing in any law or done under its authority shall be held to contravene subsection (1) to the extent that the law makes provision that is reasonably justifiable in a democratic society -
 (a) in the interests of public order, public morality or public health; (b) for regulating, in the public interest, the procedures and modalities of marriage; or (c) for protecting the rights and freedoms of others.”*

Section 14 of the Constitution of the Cayman Islands, as pointed out by the Court of Appeal, is quite similar to Article 12 of the ECHR but is yet much more specific. Article 12 of the ECHR provides as follows:

“Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

In holding that Section 14 of the Constitution of the Cayman Islands confined the right to marry to opposite sex couples only and not to same-sex couples, the Court of Appeal relied on landmark authorities delivered by the Strasbourg Court where it was held as follows:

*“Article 12 of the Convention is a *lex specialis* for the right to marry. It secures the fundamental right of a man and woman to marry and to found a family. Article 12 expressly provides for regulation of marriage by national law. It enshrines the traditional concept of marriage as being between a man and a woman. [...] Article 12 cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples.”¹⁴⁷*

For completeness the Court of Appeal also referred to *Juliet Joslin et al v New Zealand*¹⁴⁸, a decision of the United Nations Human Rights Committee, sitting in its judicial capacity under the First Optional Protocol of the ICCPR where it was held similarly.

The Court of Appeal nevertheless undertook a comprehensive examination, observing that while the right to “marriage” provided by Article 12 of the ECHR was restricted to a man and a woman, the Strasbourg Court had held that a State “*could not reasonably disregard the*

¹⁴⁷ *Hämäläinen v Finland* (2014) 37 BHRC 55, see also *Schalk and Kopf v Austria* (2011) 53 EHRR 20

¹⁴⁸ *Juliet Joslin et al v New Zealand*, Communication No. 902/1999

situation of the applicants which corresponded to a family life...without offering the applicants a means to safeguard their [same-sex] relationship.”¹⁴⁹ The Court of Appeal further explained that “the position under the BoR (as under the ECHR and the ICCPR), while restricting the right to marry and found a family to opposite-sex couples, does not deprive them of the right to respect for private and family life (under section 9 of the BoR, Article 8 of the ECHR and Article 17(1) of the ICCPR). **That right applies equally to same-sex and opposite-sex couples. As to the suggestion that a restrictive reading of section 14(1) could result in the proscribing of same-sex (or unmarried) couples having a family, that would, as it seems to us, infringe their right to a private and family life”.**

4. The right to protection from discrimination based on sex

Section 16(1) and 16 (2) of the Constitution of the Cayman Islands read as follows:

“16. (1) Subject to subsections (3), (4), (5) and (6), government shall not treat any person in a discriminatory manner in respect of the rights under this Part of the Constitution.

(2) In this section, “discriminatory” means affording different and unjustifiable treatment to different persons on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, age, mental or physical disability, property, birth or other status.”

Ms Day and her partner argued that the prohibition of same-sex couples to marry violated their right to non-discrimination on the basis of sex as enshrined in section 16 (1) of the Constitution of the Cayman Islands. They relied on several foreign landmark authorities, namely the South African *Fourie*¹⁵⁰ judgment, the Canadian *Halpern*¹⁵¹ judgment and the United States *Obergefell*¹⁵² judgment.

The Court of Appeal of the Cayman Islands addressed this issue in two limbs. Firstly, it explained thoroughly the constitutional right to marriage in the Cayman Islands, as a *lex*

¹⁴⁹ *Orlandi and Others v Italy* (Application Nos. 26431/12, 26742/12) – 14.12.2017

¹⁵⁰ *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [1 December 2005]

¹⁵¹ *Halpern v. Canada (AG)* [2003] O.J. No. 2268, 10 June 2003

¹⁵² *Obergefell v Hodges (United States)*, 576 US (2015),

specialis, expressly restricted to opposite-sex couples (a). Secondly, it distinguished the law of the Cayman Islands with regard to the laws of those other States which did neither provide for a constitutional provision for marriage nor did they define marriage in their respective constitutions.

a. Marriage as a *lex specialis* in the Constitution of the Cayman Islands and cannot be unconstitutional

In addressing the issue of whether the law in the Cayman Islands violated section 16 of the Constitution inasmuch it discriminated on the ground of sexual orientation, the Court of Appeal reasoned, in essence, that a provision of the Constitution cannot itself be deemed unconstitutional. The Court of Appeal explained that Section 14 of the Constitution of the Cayman Islands is a special law which constitutionally restricts marriage to opposite sex couples:

“The wording of section 14(1), on its face, defines marriage in terms of marriage between a man and a woman. The wording, in our judgment, precludes same-sex marriage.

[...]

the words, “the right of every unmarried man and woman of marriageable age...freely to marry a person of the opposite sex” make up a single, composite expression. Meaning and effect have to be given to the words “a person of the opposite sex.” If [...] the framers of the Constitution had intended that same-sex couples should enjoy a constitutional right to marry, the words “of the opposite sex” would have been otiose and misleading.”

The Court of Appeal had, in the same judgment held that the Constitution must be read as a whole and the court cannot simply ignore or put aside what the provisions of the Constitution clearly say:

“In other words, it is not for the courts effectively to legislate in respect of a constitutional provision, the meaning and effect of which is clear, and reflects the drafter’s intentions, because it disagrees.”

The right to non-discrimination enshrined in Section 16, according to the Court of Appeal, is only provided in respect of a violation of a right under the BoR and it is not “a free-standing right against discrimination, such as may be provided in other parts of the world.”

The Court of Appeal then considered that “*the specific, defined and restricted right to marry under section 14 cannot be extended by a reference to other general rights in other provisions. Consequently, section 16 cannot be brought into play.*”

It then elucidated the reasons why foreign authorities were not persuasive in the Cayman Islands.

b. The distinction with other jurisdictions

The Court of Appeal of the Cayman Islands underlined why it could not follow the judgements delivered in other countries which had considered that the prohibition of same-sex couples to marry amounted to discrimination based on sexual orientation. It highlighted that in none of the jurisdictions to which the cases relate was its relevant court “*construing a constitutional right expressly conferred subject to an opposite-sex limitation*”. The definition conditions and more generally, the construction of marriage in those jurisdictions were not constitutional, unlike in the Cayman Islands. Referring namely to the South African *Fourie*¹⁵³ judgment and the Canadian Halpern¹⁵⁴ judgment, it underlined that the applicants in *Fourie*, relying on a substantive, freestanding, equality clause under the Constitution, could successfully argue that the common law definition in terms of marriage being the union of one man with one woman, was unconstitutional since the Constitution of South-Africa did not restrict marriage to opposite-sex parties.

5. Declaration of the Court of Appeal

The Court of Appeal then declared that the same-sex union of Ms Chantelle Day and Ms Vickie Bush is nevertheless entitled to legal protection in the Cayman Islands, which is functionally equivalent to marriage:

“In recognition of the longstanding and continuing failure of the Legislative Assembly of the Cayman Islands to comply with its legal obligations under section 9 of the Bill of Rights,

¹⁵³ Minister of Home Affairs and Another v Fourie and Another (CCT 60/04) [1 December 2005]

¹⁵⁴ Halpern v. Canada (AG) [2003] O.J. No. 2268, 10 June 2003

And in recognition of the Legislative Assembly's longstanding and continuing violation of Article 8 of the European Convention on Human Rights,

IT IS DECLARED THAT:

Chantelle Day and Vickie Bodden Bush are entitled, expeditiously, to legal protection in the Cayman Islands, which is functionally equivalent to marriage."

III. Appeal to the JCPC and judgment of the JCPC

Ms Day and Ms Bush appealed before the JCPC against the judgment of the Court of Appeal of the Cayman Islands, claiming that the Bill of Rights, Freedoms and Responsibilities (the "Bill of Rights" or "BoR"), which forms Part 1 of the Cayman Islands' Constitution ("the Constitution") set out in the Cayman Islands Constitution Order 2009 ("the 2009 Order"), confers on them a constitutional right to legal recognition of such a marriage and that the Marriage Law should be read in such a way as to reflect that right.

By the time the JCPC heard the matter, the government of the Cayman Islands had passed the Civil Partnership Law 2020, providing for the legal recognition of same-sex unions and conferring them a legal status functionally equivalent to marriage. The Board of the JCPC delivered its judgment in 2022 and dismissed the appeal. Globally, the JCPC upheld the approach of the Court of Appeal of the Cayman Islands and made some useful supplementary observations with regard to the constitutional rights in question and their alleged violations. A central legal issue adjudicated by the JCPC was the apparent conflict between section 14 of the Cayman Islands' constitutional Bill of Rights, which explicitly defines marriage as the union of a man with a woman, and the other provisions of the said Bill of Rights, which were susceptible to a broad interpretation that would extend the right to marry to same-sex couples, as previously decided in foreign landmark authorities. These foreign authorities were "*of limited assistance*" to the Board as they were from countries which did not confine marriage to the man and the woman in their respective constitutions.

The JCPC first upheld the approach of the Court of Appeal which had considered that same-sex couples have the right to the legal recognition of their union, not compulsorily in the form of "*marriage*", but in a form providing for with a legal status functionally equivalent to

marriage. However, since the Cayman Islands had, shortly before the hearing, passed the Civil Partnership Law 2020, the JCPC did not deem it necessary to go deeper into the issue:

“the Court of Appeal also held that, as was conceded by the Government, the failure of the Government and Legislative Assembly to provide for a regime of civil partnerships for same-sex partners, with functional equivalence to marriage, was in breach of the rights of the appellants under section 9 of the Bill of Rights (family and private life) and made a declaration accordingly. The Board notes that this matches the position under article 8 of the ECHR, as determined by the ECtHR in Oliari v Italy (2017) 65 EHRR 26. In view of the declaration made by the Court of Appeal, the Civil Partnership Law 2020 was passed. This law allows both opposite-sex and same-sex couples to enter into a civil partnership, and amends existing laws (other than the Marriage Law) so that civil partnership has equivalent effect to marriage. It is not necessary to say anything further about this.”

With regard to the constitutional prohibition based on sex and the constitutional confinement of marriage to opposite-sex couples, the JCPC resumed its answer as follows:

“The Board’s view is that the Court of Appeal was correct in its approach to the interpretation of the Bill of Rights and in the construction which it gave it. In the context of the Bill of Rights, section 14(1) is a lex specialis dealing with the right to marry. That right is confined to opposite-sex couples. Sections 9, 10 and 16 have to be interpreted in the light of that lex specialis, so none of them can be construed as including a right for a same-sex couple to marry.”

Referring to the landmark Mauritian authority of *Matadeen v. Pointu*¹⁵⁵ where it had previously been held that “domestic legislation, including the Constitution, should if possible be construed so as to conform to such international instruments”, the JCPC considered that “the Constitution should be read as a coherent whole” and that “the approach to interpretation of an instrument which includes a provision which constitutes a lex specialis in relation to a particular subject matter is not a technical rule of treaty interpretation”. Consequently, “the approach to interpretation of an instrument which includes a provision which constitutes a lex specialis in relation to a particular subject matter is not a technical rule of treaty interpretation[...]. Rather, like the maxim *generalia specialibus non derogant*, it is a consequence of the principle that an instrument should be interpreted as a coherent whole and “represents simple common sense and ordinary usage.” Thus, whilst a generous and purposive interpretation of fundamental

¹⁵⁵ *Matadeen v Pointu* [1998] UKPC 9

rights provisions in conformity with international treaty obligations, is a well-established tenet of constitutional adjudication, it cannot be deployed in a manner that effectively negates or displaces the plain meaning and operative effect of another **explicit** provision within the same constitutional instrument. In other words, while a broad or purposive interpretation of the constitutional right to be free from discrimination on the grounds of sex (which includes sexual orientation) might have extended recognition to the right of same-sex couples to marry, such an interpretative approach was precluded by the express constitutional provision that limits the definition of marriage to a union between a man and a woman (this comparison is interesting in the Mauritian context since Mauritian law does not contain any *lex specialis* or **explicit** provision in its Constitution or elsewhere which either confines marriage to opposite-sex couples or which prohibits same-sex marriage).

The JCPC drew a distinction between the Bill of Rights of the Constitution of the Cayman Islands and the anti-discrimination provisions contained in the constitutions of other jurisdictions, such as South Africa and Canada. In those countries, the constitutional anti-discrimination provisions pertaining to sex or sexual orientation had been correctly accorded a generous interpretation so as to encompass same-sex marriage, given that the institution of marriage was not constitutionally confined to a union between a man and a woman.

This is significantly different in the Cayman Islands, as highlighted by the JCPC:

“The right to marry in section 14(1) of the Bill of Rights has been drafted in highly specific terms to make it clear that it is a right “freely to marry a person of the opposite sex ...”. Comparing section 14(1) with article 12 of the ECHR, which was the model for it, it is obvious that this language has been used to emphasise the limited ambit of the right and to ensure that it could not be read as capable of covering same-sex marriage.

[...]

*In the Board’s judgment, it is clear that within the scheme of the Bill of Rights section 14(1) constitutes a *lex specialis* in relation to the right to marry. Therefore, the interpretation of the other general provisions in sections 9, 10 and 16, which do not stipulate for a right to marry, must take account of this and cannot be developed to circumvent the express limits on the right to marry in section 14(1). They cannot establish indirectly by implication a right to marry which is not directly set out in the relevant express provision in the Bill of Rights. Interpreting them in that way [...] would have the effect of making the right in section 14(1) redundant, which would clearly be contrary to the intention of the drafters of the Bill of Rights.*

[...]

*For the reasons given above, sections 9, 10 and 16 cannot be given a different and more extensive interpretation pursuant to the “living tree” principle to include a right to same-sex marriage, since that would circumvent the intended effect of section 14(1) and thereby undermine the coherence of the Bill of Rights. [T]he highly specific terms in which section 14(1) is drafted reinforce the inference that it was intended to operate as a *lex specialis* which should not be by-passed by unduly generous interpretation of other, general provisions in the Bill of Rights.*

[...]

Section 14(1) creates a right to marry for opposite-sex couples and, consequent on the exercise of that right, a right to found a family within marriage as so defined.

[...]

*The language of section 14(1) constitutes the definition of the right it establishes and cannot be regarded as a “restriction” on that right for the purposes of section 16(7)(b). Section 16(7)(b) does not have the effect that the limits on the right in section 14(1) are made subject to a justification test. That would undermine the *lex specialis* status of section 14(1) which the drafters of the Bill of Rights obviously intended it should have.”*

IV. Observations and outcome

Hadn’t the Constitution of the Cayman Islands provided for marriage as a constitutional *lex specialis*, expressly restricting it to opposite-sex couples, the constitutional prohibition against discrimination on grounds including, inter alia, sex (and consequently sexual orientation) would in all likelihood have been sufficient to render the statutory Marriage Law unconstitutional. Such an outcome would have mirrored the reasoning adopted in the South African *Fourie* decision and the Canadian *Halpern* judgment.

In the *Fourie* case, the South African Constitutional Court was interpreting a Bill of Rights that guaranteed the right to marry in general terms, without defining it, and whereby the right to marriage was not a constitutional one. The court had to determine whether excluding same-sex couples from this undefined right constituted discrimination on the ground of sexual orientation which is a prohibited ground of discrimination under the Constitution of South Africa. In contrast, for the Cayman Islands, the JCPC’s judgment highlighted that this was not a matter of

applying general values, but of interpreting the specific *lex specialis* provisions of marriage under the Constitution itself. The JCPC applied the *lex specialis* principle, meaning that the specific rule (the detailed section on marriage) overrides the general ones (like the right to non-discrimination). The specific terms of section 14 of the Constitution of the Cayman Islands, restricting marriage to opposite-sex couples, constituted an obstacle to the progressive development and expansive interpretation of section 16 (prohibiting discrimination on the basis of sex and, by extension, sexual orientation) towards the recognition of same-sex marriage via the “*non-discrimination*” mechanism.

In any event, in the *Chantelle Day* case before the Judicial Committee of the Privy Council, it was unanimously affirmed - consistent with the prior holding of the Court of Appeal of the Cayman Islands - that **same-sex couples are entitled to a legal status functionally equivalent to marriage**, such as civil partnership. The deprivation of such a right constitutes a serious violation of their fundamental human rights and freedoms, and the failure of the Government to fulfil its obligations in this regard was characterised as “*woeful*”.

Following the highly instructive judgment of the JCPC, the Attorney General of the Cayman Islands made a statement stated as follows:

“I am also mindful of the observations of all three courts, that is, the Grand Court, the Court of Appeal and the Privy Council, about the obligation of the State to ensure the existence of some form of legal framework to give legal protection to same-sex relationships. This lacuna has now been addressed by the Civil Partnership Act 2020.

[...]

Chantelle Day and Vicki Bodden-Bush are to be commended for their determination to litigate the issues in their case. In addition to the significance of the clarity around the scope of section 14 of the Constitution, there is also the observation made by the Privy Council and Court of Appeal as well as the Grand Court the general thrust of which is that the Constitution is not static, but instead is a “living tree” capable of growth and expansion but within its limits.

[...]

It has been demonstrated in the instant case this approach is constrained by the highly specific terms in which Section 14 has been crafted, and hence the concept could not be resorted to in

order to trump the plain meaning of Section 14(1) of the Constitution which talks about to whom the right to marry is available [...]”.¹⁵⁶

¹⁵⁶ “Statement by the Attorney General Hon. Samuel Bulgin QC On the Privy Council Ruling in the Chantelle Day and Vicki Bodden-Bush Appeal” -17 March 2022

CHAPTER 8: BERMUDA

Bermuda, as a British Overseas Territory, shares a notably similar legislative heritage with Mauritius. This is particularly evident in their constitutional frameworks, both of which came into force in 1968. Furthermore, their respective 1968 constitutions contain provisions that are textually almost identical. However, a significant distinction arises between the two constitutions regarding the prohibited grounds for discrimination and the constitutional definition of “discriminatory”. The relevant subsections of the provisions prohibiting discrimination are reproduced below:

Bermuda Constitution Order 1968	The Constitution of the Republic of Mauritius
<i>12. Protection from discrimination on the grounds of race, etc.</i> <i>(1) Subject to the provisions of subsections (4), (5) and (8) of this section, no law shall make any provision which is discriminatory either of itself or in its effect.</i> <i>(2) Subject to the provisions of subsections (6), (8) and (9) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.</i> <i>(3) In this section, the expression “discriminatory” means affording different treatment to different</i>	<i>16. Protection from discrimination</i> <i>(1) Subject to subsections (4), (5) and (7), no law shall make any provision that is discriminatory either of itself or in its effect.</i> <i>(2) Subject to subsections (6), (7) and (8), no person shall be treated in a discriminatory manner by any person acting in the performance of any public function conferred by any law or otherwise in the performance of the functions of any public office or any public authority.</i> <i>(3) In this section, “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their</i>

<i>persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.</i>	<i>respective descriptions by race, caste, place of origin, political opinions, colour, creed or <u>sex</u> whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages that are not accorded to persons of another such description.</i>
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[Emphasis added]

It must be emphasised here that the Mauritian legislature expressly amended the Constitution of the Republic of Mauritius in 1995 to insert the term “sex” as a prohibited ground of discrimination in the Constitution. The Constitution of Mauritius (Amendment) Act 1995¹⁵⁷ provides as follows:

“3. Section 16 of the Constitution amended

Section 16 of the Constitution is amended in subsections (3) and (5) by deleting the words “colour or creed” wherever they appear and replacing them by the words “colour, creed or sex”.

The Supreme Court of Mauritius has afterwards held that the term “sex”, as a prohibited ground of discrimination under the Constitution of Mauritius encompasses “*sexual orientation*”¹⁵⁸. Consequently, and in contrast to the position in Bermuda, protection from discrimination on the basis of sexual orientation is a constitutional right in Mauritius since 1995.

Bermuda presents a distinct paradigm, having, in 2013, explicitly incorporated sexual orientation as an additional protected ground within its primary anti-discrimination instrument, the Human Rights Act 1981 (or “HRA”). This specific statute aims to protect the fundamental

¹⁵⁷ Act 23 of 1995

¹⁵⁸ Ah-Seek v. State of Mauritius – 2023 SCJ 399

rights and freedoms of every person, whether these rights are enshrined in the Constitution of Bermuda, or in the Human Rights Act 1981 or in any other legal instrument applicable in Bermuda. Since the Human Rights Act 1981 expressly referred to the Constitution of Bermuda, it had been held that it has a “*quasi-constitutional status*” to be given the widest interpretation possible to ensure the obtainment of human dignity¹⁵⁹.

This Bermudian statutory instrument promotes equal opportunity between persons, by prohibiting discrimination on the ground of status (including sexual orientation), namely in the supply of goods, facilities and services. It finds a parallel in the Mauritian legal system, where the Equal Opportunities Act 2008, provides for the prohibition of discrimination on the basis of status, which includes sexual orientation, in various sectors, namely in the provision of goods, services or facilities¹⁶⁰. The Equal Opportunities Act clearly defines “*services*” as including services relating to “*the activities of the State, a local authority or parastatal body*”.

Another specific legislation in Mauritius, the Protection of Human Rights Act 1998, provides for the setting up of a National Human Rights Commission (the ‘Commission’), for the better protection of human rights. The Commission is vested with the power to promote and protect human rights and also to ensure the harmonisation of national legislation and practices with the international human rights instruments to which Mauritius is a party, and their effective implementation. This statute expressly provides that ‘*human rights*’ means any right or freedom referred to in Chapter II of the Constitution.

In 1974, the Bermudian law (The Matrimonial Causes Act 1974) on marriage did not define “marriage” but stated that marriage was void if not between a male and the female. There was no law in Bermuda against discrimination on the ground of sexual orientation. Following the 2013 amendment in the Human Rights Act 1981, the apex jurisdictions of Bermuda have been confronted with the issue of same-sex marriage. Highly instructive judgments were given in two separate cases, namely the *Godwin & Deroche v. Registrar General and Attorney General of Bermuda*¹⁶¹ case in 2017 (I) and the *Attorney General v. Roderick Ferguson* case in 2022 (II), between which the Bermudian legislature had profoundly amended the law on marriage.

¹⁵⁹ *Bermuda Bred Company v Minister of Home Affairs and the Attorney General* [2005] Bda LR 106

¹⁶⁰ Section 18 of the Equal Opportunities Act 2008

¹⁶¹ *Godwin & Deroche v. Registrar General and Attorney General of Bermuda* - [2017] SC (Bda) 36 Civ (5 May 2017) / [2016 no. 259]

The aforementioned judicial decisions may be of considerable relevance in the Mauritian legal context

I. The case of Godwin v. Registrar General of Bermuda

A. Facts of the case

A male citizen of Bermuda and his male companion applied to the Registrar General (Registrar) to be married notwithstanding that they were both males. The Registrar refused to issue the licence on the sole basis that “*section 13 of the Marriage Act must be read in conjunction with the Matrimonial Causes Act 1974 section 15 (c) the latter of which provides that a marriage is void on the ground that the parties are not respectively male and female*”.

The Applicants argued that the refusal by the Registrar to process their application for a marriage licence amounts, *inter alia*, to discrimination on the basis of their sexual orientation, in breach of the Human Rights Act. They sought relief for:

- a) an order of mandamus compelling the Registrar to act in accordance with the requirements of the Marriage Act;
- b) a declaration that same-sex couples are entitled to be married under the Marriage Act.

B. Decision of the Supreme Court of Bermuda

The parties and the judges agreed that the application before the court was a matter of statutory interpretation of the following terms:

- Marriage: whether there is a common law definition and or a statutory provision on marriage that constitutes a bar to same-sex marriage;
- Discrimination: whether the Applicants have been discriminated against on the basis of sex and or their sexual orientation;
- “Service”: whether the Registrar performs a “service” as contemplated by section 5 of the Human Rights Act (or “HRA”) when it comes to the solemnisation of marriage.

1. “Marriage”: common law definition and eventual statutory ban

The Supreme Court addressed this question by first underlining that “*there is no statutory definition of marriage*” and that “*no decided case in Bermuda*” had defined marriage. As a result, Bermuda’s law on marriage being historically of British origin, the Supreme Court held that the common law definition of marriage is based on the classic formulation of Lord Penzance in *Hyde v Hyde and Woodmansee*¹⁶², as “*the voluntary union for life of one man and one woman, to the exclusion of all other.*” The Supreme Court highlighted that “*By that definition, since marriage is the voluntary union of one man and one woman, a same-sex marriage would be void*”.

However, the Supreme Court emphasised that, with the advent of the Human Rights Act and the prohibition of discrimination based on sexual orientation since 2013, it had to “*now scrutinise the common law definition of marriage and its applicability to the Marriage [...] through the prism of the HRA*”. The Supreme Court considered that: “*An appraisal of the rights and values in the HRA necessarily involves the court appreciating that this important legislation resulted from Parliament recognising the changing attitudes of societies internationally reflected in the leading international Human Rights instruments*” since the preamble to the Human Rights Act reveals that its purpose is to give domestic law effect to international human rights conventions and to promote and protect the fundamental rights and freedoms of every person, whether these fundamental rights and freedoms are found in the Constitution of Bermuda or in other legal instruments such as the HRA.

2. “Discrimination”: whether the Applicants have been discriminated against on the ground of sex or sexual orientation

Before turning to address the specific issue at hand, the Supreme Court of Bermuda identified the South African case of *Minister of Home Affairs and Another v Fourie and Another*¹⁶³, which it considered to be “*most relevant and instructive*”. It underscored the obvious similarity of the legal frameworks of South Africa and Bermuda namely regarding definition of the common law definition of “*marriage*”. It was further observed that under the Constitution of South

¹⁶² *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P.&D. 130 at 133

¹⁶³ *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [1 December 2005]

Africa, which *inter alia*, provides for protection from discrimination based on sexual orientation, the Court had power to declare unconstitutional such a legal definition on that particular basis. However, given that the Constitution of Bermuda did not prohibit discrimination on the ground of ‘sex’ (including sexual orientation), the adoption of the South African Court's reasoning - being predicated upon the express provisions of the South African Constitution - was of limited assistance from a strictly constitutional perspective.

The Supreme Court however considered that there exists a specific human rights legislation in Bermuda, the HRA, which since 2013 explicitly prohibits discrimination, *inter alia* on the ground of sexual orientation. Referring to a landmark Bermudian authority¹⁶⁴, it held that “*distinctive rules governing the interpretation of human rights provisions*” should lead to a “*broad interpretation*” of the HRA.

Puisne Judge Charles-Etta Simmons who delivered the judgment further held that no law or cited case in Bermuda expressly provides that “*the common law on marriage operates notwithstanding the HRA*” and that “*the common law definition of marriage has not been developed at all in Bermuda to meet the changing social landscape*”. She further referred to the persuasive character of the South African *Fourie* judgment:

“I find confirmation of my view on the common law provision on marriage and its related Marriage Act provisions in a decision of the Constitutional Court of South Africa. South Africa is a commonwealth jurisdiction. While the authority of a decision of the Constitutional Court of South Africa does not carry the persuasive authority of a House of Lords decision, and is not binding on Bermuda’s courts as a decision of the Privy Council would be, in the absence of such authority I find the case to be most relevant and instructive”.

She resolved the discrimination issue by holding as follows:

“The facts reveal that the Registrar General declined to process the Applicants’ Notice, giving as his reason that marriage is between a man and a woman. In so doing he discriminated against the Applicants on the basis of their sexual orientation. By virtue of section 2 (2) (a) of the HRA, that discrimination was unlawful assuming that the conduct of the Registrar fell within the perimeters of the prohibited grounds of discrimination. The substantive provision is the

¹⁶⁴ Bermuda Bred Company v Minister of Home Affairs and the Attorney General [2005] Bda LR 106

prohibition of discrimination in the provisions of services as provided in section 5(1) of the HRA.”

Having established the discrimination on the basis of sexual orientation, the third issue had to be addressed, namely if “*marriage*” can be considered as a “*service*” under the HRA.

3. “Service”: Whether the Registrar performs a “service” as contemplated by the HRA.

The Supreme Court here pointed out that the HRA provides that discrimination can occur where a person is denied the supply of any goods, facilities or services. It considered that:

“Most of the acts carried out by the Registrar concerning an application for a marriage certificate are strictly administrative functions and do not differ in quality from acts akin to those performed by licencing authorities.

[...]

In all the circumstances I hold that the administrative functions performed by the Registrar pursuant to sections 13 and 14 of the Marriage Act amount to “services” as provided by section 5 of the HRA. The broad sweep of the HRA and section 5 (2) is intended to provide the HRA with teeth. It is not intended to allow a government department to be selective about what it will be bound by. Or to hide behind a technical narrow approach to what a “service” is.”

4. Conclusion and orders of the Supreme Court

The Supreme Court concluded that the definition of the common law of marriage which was judge-made, could be developed to be in line with the provisions of the HRA and to efficiently prohibit discrimination on the ground of sexual orientation. It further granted the applicants the required relief to be able to register their marriage. The Supreme Court held as follows:

“Therefore, the refusal by the Registrar to process the Applicants’ Notice of Intended Marriage as required by sections 13 and 14 of the Marriage Act on the basis of their sexual orientation amounted to discrimination contrary to sections 2 (2) (ii) as read with section 5 of the HRA.

[...]

The common law definition of marriage, that marriage is the voluntary union for life of one man and one woman, and its reflection in the Marriage Act section 24 and the MCA section 15 (c) are inconsistent with the provisions of section 2 (2) (a) (ii) as read with section 5 of the HRA as they constitute deliberate different treatment on the basis of sexual orientation. In so doing the common law discriminates against same-sex couples by excluding them from marriage and more broadly speaking the institution of marriage.

[...]

The functions that the Registrar carries out under section 13 and 14 of the Marriage Act amount to “services” as provided by section 5 of the HRA.

[...]

On the facts of this case the Applicants were discriminated against on the basis of their sexual orientation contrary to section 2 (2) (a) (ii) as read with section 5 of the HRA when the Registrar refused to process their Notice of Intended Marriage as required by sections 13 and 14 of the Marriage Act.

Same-sex couples denied access to marriage laws and entry into the institution of marriage have been denied what the HRC termed a “basket of goods”, that is, rights of a spouse contained in numerous enactments of Parliament (if they are to have the right to marry they must of course also assume the various obligations that adhere thereto). Such denial has created a hardship for same-sex couples.

[...]

It is neither the intention nor the purpose of the court to introduce new legislation to give effect to the HRA. There is neither need nor ability in the court to do so.

[...]

Parliament has had ample opportunity to re-endorse the common law definition of marriage. It failed, declined or omitted to do so when it passed the Human Rights Act in 1981.

[...]

The common law is by definition judge made law. As such it is a creature of change.

[...]

On this basis, I think that it is apt that the Court should develop the common law by giving effect to the will of Parliament as expressed in the HRA and specifically reflected in sections 29 and 30(b), of the HRA. As the Marriage Act and the MCA are informed by the common law definition of marriage, I believe that as a matter of internal and external cohesion and legal certainty it would be appropriate for the Court to remedy those sections and grant appropriate

declaratory relief along the lines of those drafted below subject to hearing counsel on the precise terms of the final Order to be drawn up to give effect to the present Judgment and as to costs.

- i. The Applicants are entitled to an Order of Mandamus compelling the Registrar to act in accordance with the requirements of the Marriage Act; and*
- ii. A Declaration that same-sex couples are entitled to be married under the Marriage Act 1944. [...]"*

* * *

Following the *Godwin* case, same-sex marriage became legal in Bermuda. However, following a change in government in 2017, the new majority in the House of Assembly supported overturning the legalisation of same-sex marriage. The Bermudian legislature wanted to repeal the effect of the *Godwin* judgment and therefore enacted Domestic Partnership Act 2018 (or “DPA”) to provide for the legal recognition of same-sex relationships in the form of a “domestic partnership”. An important aspect of this legislation was that it provided that the Human Rights Act 1981 would not take precedence over the provisions of the DPA which facilitated recognition only for a marriage between a man and a woman. The new law also expressly referred to the *Godwin* judgment.

Section 53 of the DPA reads as follows:

“Notwithstanding anything in the Human Rights Act 1981, any other provision of law or the judgment of the Supreme Court in Godwin and DeRoche v The Registrar General and others delivered on 5 May 2017, a marriage is void unless the parties are respectively male and female.”

Following the enactment of the DPA, same-sex couples could no longer get married in Bermuda. However, in contrast to the legal framework that had subsisted prior to the judgment in *Godwin*, same-sex couples in Bermuda, although unable to contract marriage, were nevertheless entitled to legal recognition of their unions in the form of a “domestic partnership”¹⁶⁵, affording them benefits comparable to those incidental to marriage. Nevertheless, many same-sex couples wanted to get married and contested the constitutionality

¹⁶⁵ Section 3 of the DPA

of the DPA to the extent it restricted marriage to “*a male and a female*”. The matter went up to the Judicial Committee of the Privy Council, the highest jurisdiction of Bermuda, in the *Attorney General for Bermuda v. Roderick Ferguson and Others*¹⁶⁶ case (the “*Ferguson*” case).

II. The *Ferguson* case

A. Facts of the case

Roderick Ferguson a gay Bermudian national, claimed that in taking away the right to enter a same-sex marriage, the DPA had deprived him of the ability to form an association with another man under the Marriage Act 1944, most precisely, in the form of a same-sex marriage. Further, he argued that the DPA had prevented him from freely expressing his creed and identity. He alleged contraventions of various sections of the Constitution of Bermuda. Maryellen Jackson a lesbian Bermudian, claimed similarly and alleged that the DPA, in taking away the right to celebrate a same-sex marriage interfered with her freedom of conscience rights as a person who believes in the institution of marriage. The matter climbed up to the Judicial Committee of the Privy Council which resumed the issue as follows:

“This appeal is about whether the law of Bermuda recognises same-sex marriage.”

B. Decision of the Judicial Committee of the Privy Council

The case was heard by Lord Reed, Lord Hodge, Lady Arden, Lord Sales and Dame Victoria Sharp, who formed the same bench in the case of *Chantelle Day v. Governor of Cayman Islands*¹⁶⁷. The JCPC delivered its judgment on the 14 March 2022 but it was not a unanimous ruling, with Lord Sales expressing a dissenting opinion. The majority decision will here be analysed in terms of the constitutional rights enshrined in the Constitution of Bermuda.

¹⁶⁶ *Attorney General for Bermuda v. Roderick Ferguson and Others* – 14.03.2022 - [2022] UKPC 5

¹⁶⁷ *Chantelle Day & Another v. Governor of the Cayman Islands and another* – [2022 UKPC] 6

In delivering the judgment, the JCPC pointed out that the DPA “*principally provides for the legal recognition of relationships between two individuals. These are domestic partnerships and may be entered into by any two persons. The DPA regulates the conditions of eligibility, and formalities, for domestic partnerships, and their termination. The preamble to the Act describes its purpose as follows and makes no reference to any religious purpose*”. However, it also stressed that “*Section 53 of the Domestic Partnership Act 2018 of Bermuda (“the DPA”) confines marriage to a union between a man and a woman*”.

The constitutional aspects addressed were most notably the following:

1. Should the Constitution of Bermuda be given a generous interpretation?

The JCPC explained that the Constitution of Bermuda, just like the constitutions of many other common law States, was inspired from the European Convention on Human Rights 1950 (the “Convention”) but that “*the Convention does not, however, form part of the domestic law of Bermuda and so the courts cannot give effect to Convention rights*”. However, quoting from a Mauritian precedent – the landmark case of *Matadeen v. Pointu*¹⁶⁸ – the JCPC held that “*in accordance with an established canon of construction (Matadeen v Pointu [1999] 1 AC 98), the courts of Bermuda will interpret any ambiguous enactment in a manner which is consistent with the international obligations of the United Kingdom in relation to Bermuda if that is one of the meanings open to them*” (emphasis added). Referring to another landmark authority¹⁶⁹, the JCPC underlined that “*the rights conferred by the Constitution which merely echo Convention rights should be read and applied in accordance with the jurisprudence relating to the Convention*”.

In reaching this conclusion, the JCPC outlined that “*the intention of the Constitution was that the way in which Convention rights were understood under the case law of the Strasbourg Court should be a particularly relevant consideration in the interpretation of those of the rights conferred by the Constitution that could be traced back to the Convention*”.

¹⁶⁸ *Matadeen v Pointu* [1998] UKPC 9

¹⁶⁹ *Rodriguez v Minister of Housing of the Government of Gibraltar, The Housing Allocation Committee* [2009] UKPC 52

2. Does Bermuda provide for a constitutional right to marry?

The JCPC here held that neither the Constitution of Bermuda nor the Convention confer any right to same-sex marriage. However, according to the JCPC, there is an obligation for the State to provide for the legal recognition of same-sex unions:

*“under the Convention as interpreted by the Strasbourg Court, **there is a right to a legally recognised union which is not marriage, and the Legislature has passed the DPA which gives same-sex couples in Bermuda the right to enter a domestic partnership, and this gives them all the rights that married couples have**. However, this institution is not called marriage. The respondents in this case attach considerable importance to that term and seek in these proceedings to have that name used also for the legally recognised unions which same-sex couples may enter”*. (emphasis added).

The JCPC also highlighted the importance of the HRA, which added “sex” and “sexual orientation” as prohibited grounds of discrimination but which are not constitutional protections: *“The HRA is not part of the Bermudian Constitution but it is clearly an important document so far as fundamental rights are concerned. The HRA enlarges the right to freedom from discrimination conferred by section 12 of the Constitution by adding, among others, sex as a protected characteristic [...]*.

In 2013, the Legislature added sexual orientation to the prohibited grounds of discrimination in section 2(2)(a)(ii) of the HRA. That extension, however, is not relevant on this appeal because the Legislature, in exercise of its constitutional law-making powers, provided in section 53 of the DPA that the HRA be disapplied in its entirety to that provision. The sole question in these appeals therefore is whether section 53 of the DPA is in conformity with the Constitution.”

3. Had the freedom of conscience of the same-sex couples been violated?

The Law Lords framed the question as follows:

“Whether the state has interfered with the respondents’ enjoyment of freedom of conscience by legislating to exclude the recognition in civil law of same-sex marriage and whether there falls to be implied into section 8(1) a positive duty to give such recognition in order to protect their enjoyment of freedom of conscience.”

They then observed that the government of Bermuda **had neither prohibited the celebration of religious same-sex unions nor interfered against the manifestation of such beliefs**. The JCPC held that, with respect to the freedom of conscience of individuals, the government was under no obligation to recognise religious same-sex marriages under civil law:

“First, neither the government nor the Legislature has interfered in any way with the conscientiously held internal belief of any of the respondents that the law of Bermuda should give recognition to same-sex marriage. They remain free to hold such beliefs.

Secondly, neither the government nor the Legislature has interfered in any way with the respondents’ ability to manifest and propagate such a belief. The respondents are free to argue forcefully in favour of such recognition, marshalling, among others, the arguments contained in their affidavits or affirmations and those advanced by Lord Sales in his dissenting opinion.

*Thirdly, the DPA does not prevent a church or other religious body from carrying out a marriage ceremony for a same-sex couple and giving recognition to such a marriage as a matter of religious practice within their faith community. Similarly, the legislation does not prevent people from celebrating a same-sex union in a secular ceremony of a similar nature. No restriction is placed on the worship, teaching, practice and observance of the respondents which manifests their belief in the validity of same-sex marriage. **The protection of a “practice” does not extend to a requirement that the state give legal recognition to a marriage celebrated in accordance with that practice.** This view is consistent with the judgment of the Court of Appeal for Ontario in *Halpern v Attorney General of Canada and others* (above), paras 52–57, and with the judgment of the Strasbourg Court in *Pretty v United Kingdom*.” (emphasis added).*

The JCPC emphasised that the constitutional safeguard for freedom of conscience could not serve to remedy the lack of explicit constitutional protection from discrimination on the grounds of sexual orientation:

“On this approach the legal recognition of same sex marriage is not simply an expression of thought, conscience or religion and section 8 cannot be interpreted as requiring the State to give such legal recognition because it is inconsistent with the absence of any protection in the Constitution against discrimination on the ground of sexual orientation and the ability of the legislature expressly to disapply the operation of the HRA. Such an interpretation would distort

the balance of the Constitution by restricting the powers which it has conferred on the legislature

[...]

Section 8 provides protection against interference to persons who wish to take part in religious or non-religious ceremonies of same-sex marriage and those who officiate at such ceremonies as a manifestation of a belief but does not impose any obligation on the state to give legal recognition to such marriages.”

4. Should the Constitution of Bermuda be generously interpreted to declare that the prohibition of same-sex marriage is unconstitutional on the basis of sexual orientation?

With regard to this specific question, the respondents relied heavily on foreign judgments, namely the *Fourie*¹⁷⁰ decision delivered by the Constitutional Court of South Africa, which had held that the prohibition of same-sex marriage amounts to discrimination on the basis of sexual orientation. In addressing this question, the JCPC first recognised “*the historical background of the stigmatisation, denigration and victimisation of gay people which has motivated a drive to right a wrong through the recognition by society of a relationship of love and commitment between gay people [and that] the provision of domestic partnerships for same-sex couples and the restriction of marriage to couples of different sexes may create among gay people and those who support their aspirations a sense of exclusion and stigma.*”

However, according to the Law Lords who again referred to the Mauritian landmark authority of *Matadeen v. Pointu*¹⁷¹, a generous and purposive interpretation should apply only to the enumerated constitutional grounds and the Constitution cannot be construed as creating rights which it does not contain. **Since the constitutional safeguard against discrimination in Bermuda was restricted to a closed list of grounds, which did not include “sex” or “sexual orientation”, the Bermudian Constitution could not be construed as providing for such protection, unlike the position under foreign constitutional instruments:**

“The Board fully accepts the need to interpret in a generous way the rights contained in the Constitution.

¹⁷⁰ Minister of Home Affairs and Another v Fourie and Another (CCT 60/04) [1 December 2005]

¹⁷¹ Matadeen v Pointu [1998] UKPC 9

[...]

But the Bermudian Constitution has no provision for the protection of private and family life, or for the protection of marriage, or which prohibits the discriminatory application of rights on the ground of a person's sexual orientation, such as are found in the Convention in articles 8, 12 and 14 and in some other national constitutions.

[...]

In the present case, the absence of a sufficient connection between the relevant terms of the Bermudian Constitution and the terms of the international instruments and foreign constitutions undermines any reliance on those instruments and constitutions as a basis for reading into section 8 of the Constitution a protection which it does not provide [...].

[...]

While it is legitimate to have regard as a matter of comparative law to the judgments of constitutional courts and international tribunals on questions of fundamental rights in order to assist the interpretation of analogous provisions concerning fundamental rights in another constitution, the provisions considered in those cases are not analogous”.

5. Is Bermuda in conformity with its international obligations in prohibiting same-sex marriage?

The JCPC again referred to the landmark authority of *Matadeen v. Pointu* and considered that Bermuda, as a self-governing British Overseas Territory with the United Kingdom retaining responsibility for its international relations, is required to conform to the international obligations of the United Kingdom, namely with the international instruments providing for protection from discrimination on the basis on sex (and sexual orientation). The JCPC held that despite the fact that the Constitution of Bermuda did not provide for such a protection and for the right to marry, **the international obligations were nevertheless fulfilled as the legal recognition of same-sex unions is provided in the DPA:**

“[...] the Strasbourg Court has recognised the obligation on a contracting state to provide a specific legal framework for the recognition and protection of same-sex unions by reference to the article 8 obligation to ensure respect for private and family life but has consistently held that the Convention does not oblige a contracting state to grant same-sex couples access to marriage [...] The DPA is therefore consistent with the United Kingdom's international obligations under the Convention.”

6. Can the constitutional protection from discrimination based on “*creed*” be interpreted to include “*sexual orientation*”

It was alleged by the respondents that the prohibition of same-sex marriage amounted to discrimination on the ground of “*creed*”, which is a prohibited ground of discrimination under section 12 of the Constitution of Bermuda. The JCPC rejected this argument and explained that the prohibition was on “*sex*” and not on the basis of “*creed*”. The Law Lords also defined the term “*creed*” as follows:

“There are two reasons why the respondents cannot bring themselves within the protection of section 12. [...]

Discrimination attributable to a person’s description by creed is a reference to discrimination based on a person’s system of beliefs, by which he or she is described, such adherence to a religion such as Christianity or Islam, or a secular belief system such as communism. Secondly, the exclusion of same-sex couples from the institution of marriage is attributable not to their or their supporters’ description by creed but because they are of the same sex.”

III. Relevance of the *Godwin* and *Ferguson* cases in the Mauritian context

The *Godwin* and *Ferguson* cases can be of significant relevance in the Mauritian context where the prevailing legal framework bears considerable similarities to the one which prevailed in Bermuda before the advent of the Domestic Partnership Act in Bermuda. In Mauritius the Equal Opportunities Act protects from discrimination on the basis of sexual orientation in the provision of a “*service*”. Furthermore, even if the Equal Opportunities Act allows some exceptional discriminations for “*acts of religious purpose*”. Civil marriage is not a ‘*religious*’ act. The *Godwin* judgment seems to have provided an answer to the Mauritian context on whether same-sex marriage should be recognised in Mauritius. The Supreme Court of Bermuda relied on a statute, namely the HRA which protects from discrimination based on sexual orientation, to hold that same-sex couples were denied to the right to marriage on the ground of sexual orientation. In Mauritius, protection from discrimination on the ground of sexual orientation enjoys much stronger protection than in Bermuda since such a protection is found not only in the Equal Opportunities Act 2008 (almost equivalent to the HRA in Bermuda) but

it is also enshrined in the Constitution of the Republic of Mauritius, encompassed in the term “sex”, which is not the case in Bermuda.

Pursuant to the Bermudian authority of *Godwin*, civil marriage, being a “service” provided by the State, cannot be confined to opposite-sex couples and prohibited for same-sex couples where the following conditions subsist:

- There is in force specific legislation prohibiting discrimination based on sexual orientation;
- No legal framework exists that affords same-sex couples with benefits equivalent to marriage.

The JCPC judgment in *Ferguson* affirms that Parliament has the legislative authority to limit marriage to opposite-sex couples where the Constitution lacks express protection against discrimination based on sexual orientation and subject to the concomitant requirement that Parliament provides legal recognition for same-sex unions. The JCPC also distinguished the *Ferguson* case from the *Chantelle Day*¹⁷² case in the Cayman Islands where the constitutional right to marriage confined to heterosexual couples was upheld there (since the Constitution of Cayman Islands expressly provided for this restriction and in parallel, the government of the Cayman Islands had passed the Civil Partnership Law in 2020 allowing both opposite-sex and same-sex couples to enter into a civil partnership, and had amended its existing laws - other than the Marriage Law - giving to civil partnership the equivalent effect of marriage).

In his dissenting judgment in *Ferguson*, Lord Sales nevertheless aligned himself with the majority's legal reasoning. He underlined that the constitution of Bermuda does not expressly confer a right to marriage but, in the event a constitution prohibits discrimination on the basis of sexual orientation, the absence of recognition of same-sex marriage at common law or under statute would be unconstitutional. Reference was here made to the South African *Fourie*¹⁷³ judgment.

¹⁷² *Chantelle Day & Another v. Governor of the Cayman Islands and another* – [2022 UKPC] 6

¹⁷³ *Minister of Home Affairs v. Fourie* – Constitutional Court of South Africa, CCT 60/04 [01.12.2005]

CHAPTER 9: TAIWAN

Taiwan is a jurisdiction with a legal system presenting a unique and compelling case study. The cornerstone of human rights protection in Taiwan is its Constitution, which contains a dedicated chapter for human rights. The Constitution of Taiwan guarantees a range of fundamental freedoms and rights. A central provision is Article 7, which serves as the general equality clause, providing that all citizens shall be equal before the law irrespective of sex, religion, race, class, or political affiliation. While this article provides the core basis for equal protection claims, other constitutional provisions also address equality, such as Article 5, which guarantees equality among racial groups. The text of the Constitution lists specific protected categories. Taiwan's Constitutional Court (officially the Constitutional Court of the Judicial Yuan) has generously interpreted the Constitution as a living instrument, extending protection to unlisted grounds such as disability or veteran status. Taiwan has also ratified core United Nations human rights covenants such as the ICCPR and the ICESCR to align its human rights standards with international norms. The Constitutional Court has further reinforced these international treaties into its constitutional interpretations, using them as a guide to shape domestic human rights jurisprudence so as to conform to such international instruments.

The Constitutional Court of Taiwan was called upon to adjudicate the question of same-sex marriage and rendered a landmark ruling in May 2017¹⁷⁴, also known as the *748 Interpretation*. This decision is particularly instructive to examine, notably within the Mauritian context as the Civil Code of Taiwan, which sets out the conditions for marriage, does not prohibit same-sex marriage.

I. Facts of the *748 Interpretation* case

Two petitioners applied before the Constitutional Court of Taiwan on the constitutionality of marriage. One of the petitioners was the Taipei City Government, responsible for the processing of marriage registrations applied for by two persons of the same sex in its jurisdiction and applied to the Constitutional Court following a letter emanating from the Ministry of Interior ("MOI Letter") prohibiting the registration of same-sex marriage.

¹⁷⁴ J.Y. Interpretation No. 748 (May 24, 2017)

The other petitioner was Chia-Wei CHI (or “CHI”). In 2013, CHI applied for a same-sex marriage registration at the Household Registration Office at Wan-Hua District of Taipei City and failed. He then filed an administrative appeal and a lawsuit. In September 2014, the Supreme Administrative Court ruled against him, ending his quest for ordinary judicial remedies. In August 2015, CHI petitioned the Constitutional Court for constitutional interpretation.

Both petitioners argued that the prohibition of same-sex marriage violated the Constitution of Taiwan, namely Articles 7, 22 and 23 which read as follows:

“Article 7

All citizens of the Republic of China, irrespective of sex, religion, ethnic origin, class, or party affiliation, shall be equal before the law.

Article 22

All other freedoms and rights of the people that are not detrimental to social order or public welfare shall be guaranteed under the Constitution.

Article 23

All the freedoms and rights enumerated in the preceding articles shall not be abridged by law except such as may be necessary to prevent infringement upon the freedoms of others, to avert an imminent danger, to maintain social order, or to promote public welfare.”

The Constitutional Court of Taiwan decided to consolidate these two petitions before hearing the oral arguments on March 24, 2017. It framed the issue as follows:

“Do the provisions of Chapter II on Marriage of Part IV on Family of the Civil Code, which do not allow two persons of the same sex to create a permanent union of intimate and exclusive nature for the purpose of living a common life, violate the Constitution’s guarantees of freedom of marriage under Article 22 and right to equality under Article 7?”

II. Arguments of the parties

A. Arguments of the Taipei City Government, petitioner

The Taipei City Government claimed that the Marriage Chapter is in violation of Articles 7, 22, and 23 of the Constitution. Its arguments were summarised as follows:

1. Prohibiting two persons of the same sex from entering into a marriage restricts their freedom to choose whom to marry.
2. Neither the importance of its ends nor the relationship between the means and the ends justifies such prohibition.
3. The prohibition fails the review under the proportionality principle as required by Article 23 of the Constitution.
4. Furthermore, different treatment based on sexual orientation should be subject to heightened scrutiny. Excluding same-sex couples from marriage is not substantially related to the furthering of important public interests. As a result, the Marriage Chapter infringes upon both the people's freedom of marriage under Article 22 and the right to equality under Article 7 of the Constitution.

B. Arguments of Chia-Wei CHI, petitioner

Chia-Wei CHI also argued that the prohibition of same-sex marriage violated the Constitution as follows:

1. The freedom of marriage guaranteed by Article 22 of the Constitution is an inherent right in personality development and human dignity, the essence of which is the freedom to choose one's own spouse. Restrictions on such freedom can only be allowed to the extent they are compatible with the requirements of Article 23 of the Constitution. Prohibiting a person from marrying another person of the same sex, however, does not

serve any important public interest. Nor are such prohibitive means substantially related to the ends, if at all. The prohibition, consequently, contravenes Articles 22 and 23 of the Constitution.

2. The term “sex” as referred to in Article 7 of the Constitution and Article 10, Paragraph 6 of the Additional Articles of the Constitution shall include sex, gender identity, and sexual orientation. Classifications based on sexual orientation, accordingly, shall be reviewed with heightened scrutiny. The means that prohibits same-sex couples from entering marriages is ostensibly not related to the alleged end of encouraging procreation and hence in violation of equal protection.
3. Article 10, Paragraph 6 of the Additional Articles of the Constitution imposes on the State the obligation to eliminate sex discrimination and actively promote substantive gender equality. The legislature is obliged to enact laws to protect same-sex couples’ right to marriage. The legislature’s longtime failure to pass such laws thus amounts to legislative inaction violative of its constitutional obligation.

C. Arguments of the Ministry of Justice (MOJ), respondent

The arguments of the authority concerned, the Ministry of Justice, are summarised as follows:

1. The precedents have long held “*marriage*” as a union between husband and wife, a man and a woman. Therefore, it is rather difficult to argue that the freedom of marriage under Article 22 of the Constitution necessarily guarantees “*the freedom to marry a person of the same sex.*” Proper protection of the rights and benefits of same-sex couples is a task better left to legislation.
2. The Civil Code, which regulates people’s interactions in the private sphere, is an “*enacted statute based on social autonomy.*” Statutory legislation on family should defer to the fact that the institution of family has existed since long before the enactment of the Civil Code. It follows that the legislature has ample discretion in shaping “*private autonomy in marriage.*” Having considered “*the social order rooted in the marriage institution of husband and wife,*” the legislature enacted the Marriage Chapter to protect

the marriage institution. The marriage institution provided for in the Marriage Chapter is meant to serve social functions such as maintenance of human ethical orders and sex equality, as well as child raising; it is also a building block of family and society. All of the above are certainly legitimate ends. Restricting marriage to opposite-sex couples only, as a means, is not arbitrary, but rationally related to the ends of the marriage institution. The provisions of the Marriage Chapter, therefore, are not violative of the Constitution.

D. Arguments of the Ministry of Interior (MOI), respondent

The MOI arguments were mostly that “*marriage as referred to in the Marriage Chapter shall be limited to the union between a man and a woman*”. As to the constitutionality of the Marriage Chapter, it considered that “*it is within the competence of the Constitutional Court to have the final word*”.

III. Decision of the Constitutional Court of Taiwan

A. Separation of powers between the legislature and the judiciary

The Constitutional Court of Taiwan introduced its ruling by stating that the case “*concerns the very controversial social and political issues of whether homosexuals shall have the autonomy to choose whom to marry and of whether they shall enjoy the equal protection of the same freedom of marriage as heterosexuals.*” It highlighted that legislative solution would have been appreciated on the issue but that the timetable for such legislative solution is hardly predictable now and yet these petitions concern the protection of people’s fundamental rights. It then held that it “*is the constitutional duty of this Court to render a binding judicial decision, in time, on issues concerning the safeguarding of constitutional basic values such as the protection of people’s constitutional rights and the free democratic constitutional order.*”

B. Definition of marriage

The Constitutional Court underlined that marriage was understood to be the union between a man and a woman *“though Section 2 on Marriage does not stipulate again that a marriage ought to be concluded between parties of one male and one female out of their own wills, the same construction of one-male-and-one-female marriage can be inferred from Article 972, which mandates a betrothal agreement to marry in the future be concluded only between a man and a woman. If we further refer to the naming of “husband and wife” as the appellations for both parties of marriage as well as their respective rights and obligations in those corresponding provisions of the Marriage Chapter, it is obvious that marriage shall mean a union between a man and a woman, i.e., two persons of the opposite sex.”*

C. Alleged violations of constitutional rights

The Constitutional Court observed that indeed, the local authorities in charge of household administration had been denying all applications for marriage registration filed by two persons of the same sex. As a result, two persons of the same sex have been unable to conclude a legally-recognised marriage so far.

The Constitutional Court concluded that such a discriminatory treatment based on sex/sexual orientation amounted to *“a gross legislative flaw”* and violated the Constitution of Taiwan. It then addressed several issues as follows:

1. Giving marriage equality to same-sex couples will not affect opposite-sex couples

According to the Constitutional Court, the right to marry shall be equal to everyone and same-sex marriage will not alter the social order established upon the existing opposite-sex marriage. Both unions need to be protected under Article 22 of the Constitution:

“Unspoused persons eligible to marry shall have their freedom of marriage, which includes the freedom to decide “whether to marry” and “whom to marry” (see J.Y. Interpretation No. 362). Such decisional autonomy is vital to the sound development of personality and safeguarding of human dignity and therefore is a fundamental right to be protected by Article 22 of the

Constitution. Creation of a permanent union of intimate and exclusive nature for the purpose of living a common life by two persons of the same sex will not affect the application of those provisions on betrothal, conclusion of marriage, general effects of marriage, matrimonial property regimes, and divorce as provided for in Sections 1 through 5 of the Marriage Chapter, to the union of two persons of the opposite sex. Nor will it alter the social order established upon the existing opposite-sex marriage.

Furthermore, the freedom of marriage for two persons of the same sex, once legally recognized, will constitute the bedrock of a stable society, together with opposite-sex marriage. The need, capability, willingness, and longing, in both physical and psychological senses, for creating such permanent unions of intimate and exclusive nature are equally essential to homosexuals and heterosexuals, given the importance of the freedom of marriage to the sound development of personality and safeguarding of human dignity. Both types of union shall be protected by the freedom of marriage under Article 22 of the Constitution. The current provisions of the Marriage Chapter do not allow two persons of the same sex to create a permanent union of intimate and exclusive nature for the purpose of living a common life. This is obviously a gross legislative flaw. To such extent, the provisions of the Marriage Chapter are incompatible with the spirit and meaning of the freedom of marriage as protected by Article 22 of the Constitution.

2. With regard to the non-discrimination provisions of Article 7 of the Constitution

The Constitutional Court pointed out that Article 7 of the Constitution provides that “*All citizens of the Republic of China, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law.*”

According to the Constitutional Court, “*sexual orientation*” is included in this constitutional article: “*The five classifications of impermissible discrimination set forth in the said Article are only illustrative, rather than exhaustive. **Therefore, different treatment based on other classifications, such as disability or sexual orientation, shall also be governed by the right to equality under the said Article.***” [emphasis added]

It then went further and explained the existing discrimination towards same-sex couples on the constitutional prohibited ground of sexual orientation:

“The current Marriage Chapter only provides for the permanent union between a man and a woman, without providing that two persons of the same sex may also create an identical permanent union. This constitutes a classification on the basis of sexual orientation, which gives homosexuals relatively unfavorable treatment in their freedom of marriage. Given its close relation to the freedom of personality and human dignity, the freedom of marriage promised by Article 22 of the Constitution is a fundamental right. Moreover, sexual orientation is an immutable characteristic that is resistant to change. The contributing factors to sexual orientation may include physical and psychological causes, life experience, and the social environment. The World Health Organization, the Pan American Health Organization (the WHO Regional Office in the Americas), and other major medical organizations, both domestic and abroad, have stated that homosexuality is not a disease. In our country, homosexuals were once denied by social tradition and custom in the past. As a result, they have long been locked in the closet and suffered various forms of de facto or de jure exclusion or discrimination. Besides, homosexuals, because of the population structure, have been a discrete and insular minority in the society. Impacted by stereotypes, they have been among those lacking political power for a long time, unable to overturn their legally disadvantaged status through ordinary democratic processes.

Accordingly, to determine the constitutionality of different treatment based on sexual orientation, a heightened standard shall be applied. Such different treatment must be aimed at furthering an important public interest by means that are substantially related to that interest, in order for it to meet the requirements of the right to equality as protected by Article 7 of the Constitution.” [emphasis added]

The Constitutional Court also rejected one of the arguments of the respondents about marriage as the institution for procreation or about marriage as being ‘ethically an opposite-sex union’:

“The reasons that the State has made laws to govern the factual existence of opposite-sex marriage and to establish the institution of marriage are multifold.

[...] reproduction is obviously not an essential element to marriage. The fact that two persons of the same sex are incapable of natural procreation is the same as the result of two opposite-sex persons’ inability, in an objective sense, or unwillingness, in a subjective sense, to procreate. Disallowing the marriage of two persons of the same sex because of their inability to reproduce is a different treatment having no apparent rational basis. Assuming that marriage is expected to safeguard the basic ethical orders, such concerns as the minimum age of

marriage, monogamy, prohibition of marriage between close relatives, obligation of fidelity, and mutual obligation to maintain each other are fairly legitimate.

The Constitutional Court held that such a different treatment has no rational basis:

*Nevertheless, the basic ethical orders built upon the existing institution of opposite-sex marriage will remain unaffected, even if two persons of the same sex are allowed to enter into a legally-recognized marriage pursuant to the formal and substantive requirements of the Marriage Chapter, inasmuch as they are subject to the rights and obligations of both parties during the marriage and after the marriage ends. **Disallowing the marriage of two persons of the same sex for the sake of safeguarding basic ethical orders is a different treatment also having no apparent rational basis. Such different treatment is incompatible with the spirit and meaning of the right to equality as protected by Article 7 of the Constitution.***” [emphasis added].

3. Orders of the Constitutional Court

The Constitutional Court recognised that same-sex couples are a minority who are very often neglected by the Legislature and that it is very difficult for them to rely on a Legislature elected by the majority to provide for a remedy in a reasonable time which the Court deemed necessary to prescribe. The Constitutional Court held that it could grant a relief to the petitioners in the event the Legislature should not provide a remedy to the unconstitutional provisions prohibiting marriage between same-sex couples within 2 years. It held that if no action is taken by the Legislature within the prescribed period of 2 years, same-sex couples would be entitled to register for marriage:

*“Given the complexity and controversy surrounding this case, longer deliberation time for further legislation might be needed. **On the other hand, overdue legislation will indefinitely prolong the unconstitutionality of such underinclusiveness, which should be prevented. This Court thus orders that the authorities concerned shall amend or enact the laws as appropriate in accordance with the ruling of this Interpretation within two years after the date of announcement of this Interpretation.** It is within the discretion of the authorities concerned to determine the formality (for example, amendment of the Marriage Chapter, enactment of a special Chapter in Part IV on Family of the Civil Code, enactment of a special law, or other formality) for achieving the equal protection of the freedom of marriage for two persons of the*

same sex to create a permanent union of intimate and exclusive nature for the purpose of living a common life. If the amendment or enactment of relevant laws is not completed within the said two-year timeframe, two persons of the same sex who intend to create a permanent union of intimate and exclusive nature for the purpose of living a common life may, pursuant to the provisions of the Marriage Chapter, apply for marriage registration to the authorities in charge of household registration, by submitting a document signed by two or more witnesses. Any such two persons, once registered, shall be accorded the status of a legally-recognized couple and then enjoy the rights and bear the obligations arising on couples.

This Interpretation leaves unchanged the party status as well as the related rights and obligations for the institution of opposite-sex marriage under the current Marriage Chapter. This Interpretation only addresses the issues of whether the provisions of the Marriage Chapter, which do not allow two persons of the same sex to create a permanent union of intimate and exclusive nature for the purpose of living a common life together, violate the freedom of marriage protected by Article 22 and the right to equality guaranteed by Article 7 of the Constitution.” [emphasis added]

IV. Outcome of the 748 Interpretation case

In 2019, Taiwan passed “The Enforcement Act of the Judicial Yuan Interpretation No. 748” which took effect in May 2019. Under the new law, same-sex couples are now granted the same right to legally marry as opposite-sex couples, and many of the same rights and obligations applied to opposite-sex couples under the existing regulations in the Civil Code are now also applied to same-sex couples.

However, the law falls short of genuine and full marriage equality in some areas. For example, it does not provide equal adoption rights for same-sex couples. The law nevertheless allows spouses in same-sex marriages to adopt the biological children of their partners, but not joint adoption of non-biological children, as permitted for opposite-sex married couples.

CHAPTER 10: THE UNITED STATES OF AMERICA

In the USA, the Supreme Court had to adjudicate over the issue of same-sex marriage in the case of *Obergefell v. Hodges*¹⁷⁵ since several States restricted marriage to a man and a woman while others provided for same-sex marriage. Cases coming from Michigan, Kentucky, Ohio, and Tennessee - States that define marriage as a union between one man and one woman - were referred to the Supreme Court.

I. Facts and issue of the *Obergefell v. Hodges* case

The petitioners were 14 same-sex couples and two men whose respective same-sex partners were deceased. The respondents were state officials responsible for enforcing the laws in question. The petitioners claimed the respondents violated the Fourteenth Amendment by denying them the right to marry or by refusing to fully recognise their marriages, which were lawfully performed in another State. The Court of Appeals held that a State has no constitutional obligation to license same-sex marriages or to recognise same-sex marriages performed in another State.

The issue before the Supreme Court of the United States was principally whether the Fourteenth Amendment requires a State to recognise a same-sex marriage lawfully performed in another State where such marriage is legal. Relatedly, the issue was also whether the refusal to recognise same-sex marriage amounted to a violation of the Fourteenth Amendment, namely its first section which provides as follows:

*“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**”*
[emphasis added]

¹⁷⁵ *Obergefell v. Hodges*, Supreme Court of the United States, No. 14–556. Argued April 28, 2015 - Decided June 26, 2015

II. Decision of the Supreme Court of the United States

In delivering its opinion, the Supreme Court underlined that “*Courts must exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect.*”

[...]

Applying these tenets, the Court has long held the right to marry is protected by the Constitution. For example, Loving v. Virginia, [...], invalidated bans on interracial unions, and [...], held that prisoners could not be denied the right to marry.”

It observed the discrimination faced by same-sex couples:

“The marriage laws at issue are in essence unequal: Same-sex couples are denied benefits afforded opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial works a grave and continuing harm, serving to disrespect and subordinate gays and lesbians.”

The Supreme Court also explained why marriage is a fundamental right which must be accessible to same-sex couples:

“Four principles and traditions demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples. The first premise of this Court’s relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why Loving invalidated interracial marriage bans under the Due Process Clause. [...]. Decisions about marriage are among the most intimate that an individual can make. [...]. This is true for all persons, whatever their sexual orientation.

A second principle in this Court’s jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. The intimate association protected by this right was central to Griswold v. Connecticut, which held the Constitution protects the right of married couples to use contraception, [...], and was acknowledged in Turner [...]. Same-sex couples have the same right as opposite-sex couples to enjoy intimate association, a right extending beyond mere freedom from laws making same-sex intimacy a criminal offense. [...].

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See, e.g., Pierce v. Society of Sisters, 268 U. S. 510. Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life. The marriage laws at issue thus harm and humiliate the children of same-sex couples. [...] This does not mean that the right to marry is less meaningful for those who do not or cannot have children. Precedent protects the right of a married couple not to procreate, so the right to marry cannot be conditioned on the capacity or commitment to procreate.

Finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of the Nation's social order. [...]. States have contributed to the fundamental character of marriage by placing it at the center of many facets of the legal and social order. There is no difference between same- and opposite-sex couples with respect to this principle, yet same-sex couples are denied the constellation of benefits that the States have linked to marriage and are consigned to an instability many opposite-sex couples would find intolerable. It is demeaning to lock same-sex couples out of a central institution of the Nation's society, for they too may aspire to the transcendent purposes of marriage."

The Supreme Court also traced the historical evolution of the institution of marriage, emphasising that it has never been static. It also made a parallel with the historical unequal treatment of marriage towards interracial couples:

"The history of marriage is one of both continuity and change. Changes, such as the decline of arranged marriages and the abandonment of the law of coverture, have worked deep transformations in the structure of marriage, affecting aspects of marriage once viewed as essential.

[...]

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest.

[...]

The right of same-sex couples to marry is also derived from the Fourteenth Amendment's guarantee of equal protection. The Due Process Clause and the Equal Protection Clause are connected in a profound way. Rights implicit in liberty and rights secured by equal protection

may rest on different precepts and are not always coextensive, yet each may be instructive as to the meaning and reach of the other.

[...]

The reasons why marriage is a fundamental right became clearer and more compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions.”

The Supreme Court further stressed on the dignity in the bond of same-sex couples:

“The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation.

[...]

There is dignity in the bond between two men or two women who seek to marry and, in their autonomy, to make such profound choices.

[...]”

The Supreme Court also addressed the constitutional issue of “*liberty*” as enshrined in Section 1 of the Fourteenth Amendment, specifically considering its application to same-sex marriage and the scope of the expansive interpretation the Court could afford it:

“Under the Due Process Clause of the Fourteenth Amendment, no State shall “deprive any person of life, liberty, or property, without due process of law.” The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. [...]. In addition, these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.

[...]

The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed

[...]

The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment’s guarantee of the equal protection of the laws.

[...]

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them.

[...]

The Constitution says nothing about a right to same-sex marriage, but the Court holds that the term “liberty” in the Due Process Clause of the Fourteenth Amendment encompasses this right.”

The Supreme Court summarised its opinion, *inter alia*, as follows:

- The Fourteenth Amendment requires a State to license a marriage between two people of the same sex;
- The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex shall not be deprived of that right and that liberty;
- Same-sex couples may exercise the fundamental right to marry;
- The laws challenged by the petitioners in these cases are held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples;
- The Fourteenth Amendment requires States to recognise same-sex marriages validly performed out of State. Since same-sex couples may now exercise the fundamental right to marry in all States, there is no lawful basis for a State to refuse the recognition a lawful same-sex marriage performed in another State on the ground of its same-sex character.

CHAPTER 11: RELEVANT LATIN AMERICAN JURISDICTIONS - BRAZIL, COLOMBIA, MEXICO, COSTA RICA

In 2010 Argentina became the first Latin American nation to enact nationwide marriage equality legislation. This legal recognition of same-sex unions has expanded rapidly throughout the region. Since then, same-sex unions have been legally recognised in Latin American countries such as Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, Mexico, Uruguay and Bolivia. Consequently, the majority of the population in Latin America currently resides in jurisdictions where the right to marry is legally guaranteed without distinction based on sexual orientation. Some pertinent court decisions will hereunder be analysed.

I. Brazil

On 25 October 2011 Brazil's *Superior Tribunal de Justiça* (STJ) ruled in *Recurso Especial* No. 1.183.378/RS that, in the absence of an express prohibition (as opposed to authorisation) of same-sex marriage in Brazilian law, two women could convert their 'stable union' into a marriage under Article 1726 of the Civil Code ("*A stable union can be converted into a marriage at the request of the partners before a judge and following registration in the Civil Registry*"). On 14 May 2013, relying on the decisions of the STF and the STJ, the *Conselho Nacional de Justiça* (CNJ), which regulates the judiciary but is not itself a court (*Resolução* No. 175), ordered all public officials authorised to marry couples, or to convert 'stable unions' into marriages, to do so, for same-sex couples.

II. Colombia

On 26 July 2011 Colombia's Constitutional Court indicated in the Judgment C-577-11¹⁷⁶ that "*same-sex couples may go before a competent notary or judge to celebrate and formalize their contractual relationship.*" Subsequently, on 07 April 2016, the Constitutional Court recognised the marriage of same-sex couples. On that occasion, the Constitutional Court pointed out that there was no reason supported by the Constitution that justified refusing the surviving same-

¹⁷⁶ corteconstitucional.gov.co/relatoria/2011/C-577-11.htm. See also <https://www.washingtonblade.com/2016/04/07/colombia-high-court-rules-in-favor-of-same-sex-marriage/>

sex partner the right to receive the inheritance of the person with whom he or she had formed a family, especially if, based on the protective purpose underlying the special regulation of the family, that right had already been recognised to the surviving permanent companion in the case of a *de facto* union composed of a heterosexual couple, also recognised as a family and, thus, comparable to a *de facto* union between persons of the same sex. Lastly that Court emphasised that the family formed by a same-sex couple is, as other families, “*the basic institution and fundamental core of society*”, so that “*it merits the protection of society and the State.*”

As reported by the Inter-American Court of Human Rights¹⁷⁷, “*in a series of successive judgments of the Constitutional Court*”, Colombia extended the recognition of a number of rights derived from family ties to same-sex couples based on the recognition of the right to identity, human dignity and non-discrimination¹⁷⁸. Thus, in the area of health, it extended the family coverage of the Obligatory Health Plan to same-sex couples¹⁷⁹; it recognised the right to the survivor’s pension to same-sex couples¹⁸⁰, as well as the right to inheritance rights to persons living in *de facto* marital union¹⁸¹

III. Mexico

On 5 December 2012, the Supreme Court of Mexico held that same-sex couples in the State of Oaxaca had the right under the federal constitution to marry. On 19 December 2013 in *Griego v. Oliver*¹⁸², the New Mexico Supreme Court required equal access to marriage for same-sex couples as follows:

“We conclude that the purpose of New Mexico marriage laws is to bring stability and order to the legal relationship of committed couples by defining their rights and responsibilities as to one another, their children if they choose to raise children together, and their property. Prohibiting same-gender marriages is not substantially related to the governmental interests advanced... or to the purposes we have identified. Therefore, barring individuals from marrying

¹⁷⁷ Inter American Court of Human Rights, Advisory Opinion 24/17, 24.11.2017

¹⁷⁸ Constitutional Court, Judgment C-075 of 2007

¹⁷⁹ Constitutional Court, Judgment C-811 of 2007

¹⁸⁰ Constitutional Court, Judgment C-336 of 2008

¹⁸¹ Constitutional Court, Judgment C-283 of 2011

¹⁸² *Griego v. Oliver*, 316 P.3d 865 (2013)

and depriving them of the rights, protections, and responsibilities of civil marriage solely because of their sexual orientation violates the Equal Protection Clause... of the New Mexico Constitution... [T]he State of New Mexico is constitutionally required to allow same-gender couples to marry and must extend to them the rights, protections, and responsibilities that derive from civil marriage under New Mexico law.”

IV. The Republic of Costa Rica

The evolution in Costa Rica is worth an analysis because in 2016, the Republic of Costa Rica formally requested an advisory opinion to the Inter-American Court of Human Rights on, *inter alia*, whether the State should recognise all the patrimonial rights derived from a relationship between persons of the same sex. The Inter-American Convention on Human Rights contains non-discrimination provisions on the ground of sex, namely at Articles 1 (1) and 24 which respectively read as follows:

“Article 1 – Obligation to respect rights

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”

“Article 24 – Right to equal protection

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”

In introducing its opinion, the Court reaffirmed that sexual orientation was a protected ground from discrimination under the term ‘sex’ in the convention and that the said convention, as an international human rights treaty, is a living instrument which needs a generous interpretation which must evolve with time and with the evolution of society:

“the Court has determined that sexual orientation and gender identity are categories protected by the Convention. Consequently, the Convention prohibits any discriminatory law, act or

practice based on a person's sexual orientation or gender identity, as this would be contrary to the provisions of Article 1(1) of the American Convention.

Accordingly, as already mentioned, the Court recalls that human rights treaties are living instruments, the interpretation of which must evolve with time and with the conditions of contemporary life. This evolutive interpretation is consequent with the general rules of interpretation established in Article 29 of the American Convention, as well as by the Vienna Convention on the Law of Treaties."

In addressing the issue, the Inter-American Court of Human Rights noted that the forms of families had evolved with the development of society:

"the Court also notes that the existence of the family has accompanied the development of society. Its conceptualization has varied and evolved over time. For example, up until a few decades ago, it was still considered legitimate to distinguish between children born in and out of wedlock. Furthermore, contemporary societies have cast off stereotyped notions of the roles that the members of a family should assume, which were very present in societies of this region when the Convention was drawn up. At times, these notions have evolved long before the laws of a State have been adapted to them."

According to the court:

*"regarding Article 17(2) of the Convention, the Court considers that although it is true that, taken literally, it recognizes the "right of men and women of marriageable age to marry and to raise a family," **this wording does not propose a restrictive definition of how marriage should be understood or how a family should be based.** In the opinion of this Court, Article 17(2) is merely establishing, expressly, the treaty-based protection of a specific model of marriage. In the Court's opinion, this wording does not necessarily mean either that this is the only form of family protected by the American Convention."*

Considering that "human rights treaties are living instruments, the interpretation of which must evolve with the time and present-day conditions", the Court held that it "finds no reason to ignore the family relationships that same-sex couples who seek to undertake a life project together may establish by means of permanent emotional ties, typically characterized by cooperation and mutual support. In the Court's opinion, it is not its role to give preference to

or distinguish one type of family tie over another. However, the Court finds that, under the Convention, it is the obligation of States to recognize such family ties and protect them.”

With regard to the generous and expansive interpretation which must be given to human rights norms, the Court pointed out that *“those who drafted and adopted the American Convention did not presume to know the absolute scope of the fundamental rights and freedoms recognized therein. Accordingly, the Convention confers on the States and the Court the task of identifying and protecting the scope in accordance with the passage of time. Thus, the Court considers that it is not diverging from the initial intention of the States that signed the Convention; to the contrary, by recognizing this family relationship, the Court is adhering to the original intention.”*

The Court noted that people in same-sex unions deprived of any legal recognition were deprived of *“an increasing list of rights, benefits and responsibilities that same-sex couples could benefit from and enjoy. These aspects include, inter alia, taxes, inheritance and property rights, rules on intestate succession, spousal privilege as established by the law of evidence and procedural law, authority to take medical decisions, survivors’ rights and benefits, birth and death certificates, professional ethical standards, financial restrictions in electoral matters, workers’ compensation benefits, health insurance, and child custody. All of this, in the Court’s opinion, must be ensured without any discrimination to families composed of same-sex couples.”*

The Court held that *“all the patrimonial rights derived from a protected family relationship between a same-sex couple must be protected, with no discrimination as regards to heterosexual couples, pursuant to the right to equality and non-discrimination (Articles 1(1) and 24). Notwithstanding the foregoing, the international obligation of States goes beyond mere patrimonial rights and includes all the internationally recognized human rights, as well as the rights and obligations recognized under the domestic law of each State that arise from the family ties of heterosexual couples”*

Since the Republic of Costa Rica had also adhered to several international UN conventions, the Court underlined that *“the Human Rights Committee has considered that States “should ensure that [their] legislation is not discriminatory of non-traditional forms of partnership” and has indicated, for example, that a “difference in treatment in the granting of pension benefits to a partner of the same sex constitutes a violation of the prohibition of discrimination.” Also, both*

the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination against Women have called on States to facilitate the legal recognition of same-sex couples”

The Court held that:

“The establishment of a differentiated treatment between heterosexual couples and couples of the same sex regarding the way in which they can form a family – either by a de facto marital union or a civil marriage – does not pass the strict test of equality (supra para. 81) because, in the Court’s opinion, there is no purpose acceptable under the Convention for which this distinction could be considered necessary or proportionate.”

It noted that, in order to deny the right of access to the institution of marriage, it was typically asserted by the opponents of same-sex marriage that the purpose of marriage is procreation and that same-sex unions could not meet this purpose. The Court deemed such an assertion as absurd and considered that ***“procreation is not a characteristic that defines conjugal relationships, because affirming the contrary would be demeaning for couples – whether married or not – who, for whatever reason, are unable or unwilling to procreate.”***

The Court also observed that the opposition to the marriage of same-sex couples is based on philosophical or religious convictions. The Court considered that, in secular States, such convictions cannot condition what the Convention establishes in relation to discrimination based on sexual orientation and that ***“as such, in democratic societies there must exist a peaceful coexistence between the secular and the religious spheres, implying therefore that the role of the States and of this Court is to recognize the sphere inhabited by each of them, and never force one into the sphere of the other”***.

The Inter-American Court of Human Rights was also of the opinion that people engaged in same-sex unions should be given the possibility to marry and that it would still be discriminatory if they were prohibited from marrying but nevertheless given a legal recognition of their union with a different name:

“in the Court’s opinion, there would be no sense in creating an institution that produces the same effects and gives rise to the same rights as marriage, but that is not called marriage except to draw attention to same-sex couples by the use of a label that indicates a stigmatizing difference or that, at the very least, belittles them. On that basis, there would be marriage for

those who, according to the stereotype of heteronormativity, were considered ‘normal’ while another institution with identical effects but with another name would exist for those considered ‘abnormal’ according to this stereotype. Consequently, the Court deems inadmissible the existence of two types of formal unions to legally constitute the heterosexual and homosexual cohabiting community, because this would create a distinction based on an individual’s sexual orientation that would be discriminatory and, therefore, incompatible with the American Convention.

[...]

In addition, as already indicated, the Court understands that the principle of human dignity derives from the complete autonomy of the individual to choose with whom he or she wishes to enter into a permanent and marital relationship, whether it be a natural one (de facto union) or a formal one (marriage). This free and autonomous choice forms part of the dignity of each person and is intrinsic to the most intimate and relevant aspects of his or her identity and life project.”

The Court finally held as follows:

“States must ensure access to all the legal institutions that exist in their domestic laws to guarantee the protection of all the rights of families composed of same-sex couples, without discrimination in relation to families constituted by heterosexual couples. To this end, States may need to amend existing institutions by taking administrative, judicial or legislative measures in order to extend such mechanisms to same-sex couples. States that encounter institutional difficulties to adapt the existing provisions, on a transitional basis, and while promoting such reforms in good faith, still have the obligation to ensure to same-sex couples, equality and parity of rights with respect to heterosexual couples without any discrimination.”

The judges of the Inter American Court of Human Rights summarised their decision with regard to the recognition of same-sex couples by holding as follows:

“The State must recognize and ensure all the rights derived from a family relationship between same-sex couples [...]

States must ensure full access to all the mechanisms that exist in their domestic laws, including the right to marriage, to ensure the protection of the rights of families formed by same-sex couples, without discrimination in relation to those that are formed by heterosexual couples [...]”

CHAPTER 12: THE MAIN GAPS WITH RESPECT TO LEGAL PROTECTION - ONGOING SYSTEMIC DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION IN MAURITIUS

Same-sex couples face tremendous discrimination in Mauritius in different spheres when compared to *male-female* couples despite the landmark judgments delivered by the Supreme Court of Mauritius in 2023¹⁸³ which held that the right to protection from discrimination on the basis of sexual orientation is enshrined in the Constitution of Mauritius. For instance, the Civil Status Office of Mauritius refuses to give them access to civil marriage, which is the only union which benefits from a legal recognition under Mauritian law. As a result, despite the constitutional protection from discrimination based on sexual orientation recognised by the Supreme Court of Mauritius, domestic laws and international instruments ratified by Mauritius, discrimination based on sexual orientation still prevails in various spheres namely in relation with:

- **Income Tax:** Members of same-sex couples cannot file joint tax returns, often resulting in a higher combined tax burden since, for instance, the non-working partner cannot be considered as the “dependant” of the working partner;
- **Inheritance law** (same-sex partners do not have the slightest inheritance rights since they cannot get married);
- **Social Security/State Pensions;**
- **Insurance Benefits:** Employers often provide for insurance benefits for married family units. Same-sex couples are excluded since they cannot afford any legal recognition;
- **Medical decision-making:** No automatic right to make emergency medical decisions for an incapacitated partner. This right typically defaults to biological family, who may exclude the partner as compared to married spouses;
- **Protection from domestic violence** (the law on protection from domestic violence gives protection only to the spouse or unmarried partner of opposite sex)¹⁸⁴;
- **Immigration law:** Same-sex partners of foreign citizenship are excluded from the right to live as “dependant/spouse” in Mauritius as compared to opposite-sex partners and spouses.

¹⁸³ Ah-Seek v. State of Mauritius – 2023 SCJ 399

¹⁸⁴ Section 2 of the Protection from Domestic Violence Act 1997

Hereunder follows an analysis of selected salient legislative instruments and official administrative regulations or guidelines within the Mauritian legal framework that remain non-compliant with the Supreme Court's ruling in *Ah-Seek v. State of Mauritius*¹⁸⁵ and *Fokeerbux and Others v. State of Mauritius*¹⁸⁶ concerning discrimination on the grounds of sexual orientation.

I. At civil status level

The Code Civil Mauricien (CCM) constitutes the primary statutory foundation governing civil law in Mauritius, encompassing the core domains of legal personality and capacity, family law, property law, contract, and tort. Originally derived from French legal tradition, the CCM has undergone substantial revision on multiple occasions following the cessation of French colonial administration in 1810. Subsequent to the nation's independence in 1968, the Mauritian legislature has systematically excised a majority of the CCM's provisions which were predicated upon distinctions based on sex - vestiges originating from the era of the Code Napoleon's introduction. This legislative reform has been carried out through the adoption of more neutral statutory language, aligning the Code with contemporary principles of equality.

The CCM exclusively recognises marriage¹⁸⁷ as a legally valid union, which may be solemnised either as a civil marriage or a religious marriage duly registered with the Office of the Registrar General¹⁸⁸. The CCM comprehensively establishes the substantive conditions and formal restrictions governing the solemnisation of marriage. The pertinent provisions of the CCM neither confine marriage to parties of the opposite gender nor expressly prohibit its solemnisation between persons of the same gender.

Nevertheless, discrimination on the ground of sexual orientation still prevails in effect in various sectors. The Registrar of Civil Status Office, a statutory body created under the Civil Status Act 1981 and responsible for the registration of marriages in Mauritius (as well as the registration of marriages of Mauritian citizens celebrated abroad) for instance refuses the right

¹⁸⁵ *Ah-Seek v. State of Mauritius* (2023 SCJ 399)

¹⁸⁶ *Fokeerbux and Others v. state of Mauritius* (2023 SCJ 400)

¹⁸⁷ Articles 144 to 228-10 of the CCM

¹⁸⁸ Article 228-8 of the CCM

to marriage to same-sex couples. Consequently, same-sex partners cannot get access to the marital rights that the CCM provides for spouses or surviving spouse (ex. Right to act on behalf of the incapacitated partner in the absence of power of attorney¹⁸⁹, right to protection of the family accommodation¹⁹⁰, inheritance rights¹⁹¹, etc...)

In a note dated 25 November 2025, the Civil Status Services of Mauritius issued a certificate of custom in relation to marriage in Mauritius which states that “*le mariage n’est pas permis entre deux personnes du même sexe*” (*marriage is not allowed between two persons of the same sex*)¹⁹². This declaration is made without citation to or reliance upon any specific provision within the governing statutory framework that would substantiate or provide legal foundation for such a position. As such, in the absence of a clear statutory anchor, the statement may be construed as an administrative assertion lacking an explicit foundation law.

II. At immigration level

The Immigration Act 2022 sets out the main conditions for residence permits for non-citizens civilly married to a Mauritian citizen¹⁹³. The law itself is written in a neutral language without any restriction to “opposite-sex spouse” but in effect, a non-citizen married in a foreign State to a citizen of Mauritius of the same gender is discriminated and is refused the right to a residence permit in Mauritius.

The Immigration Act 2022 also provides for some definite procedures when it comes to some specific permits for investors, professionals and retired non-citizens. The applications in these cases shall be made through the Economic Development Board (hereafter “EDB”) which is a governmental institution set out in the *Economic Development Board Act 2017*. The main objects of the EDB are, *inter alia*, to:

- promote Mauritius as an attractive investment and business centre, a competitive export platform as well as an international financial centre;
- act as the main institution responsible for country branding for investment promotion;

¹⁸⁹ Article 220 of the CCM

¹⁹⁰ Article 216 of the CCM

¹⁹¹ Sections 768-770 of the CCM)

¹⁹² “Certificat de coutume” – Ms Y. Naïdoo, Civil Status Officer, 25 November 2025.

¹⁹³ Sections 7 and 9 of the Immigration Act 2022

- facilitate both inward and outward investment and ensure a conducive business environment.

The EDB is also responsible for the issuance of such guidelines as it may determine¹⁹⁴. The EDB Act specifically provides for a National Contact Point for Responsible Business Conduct for the purpose of the OECD (Organisation for Economic Co-operation and Development) Guidelines for Multinational Enterprises on Responsible Business Conduct.

A relevant consideration is that the cited OECD guidelines expressly prohibit discrimination on the basis of sexual orientation. Consequently, domestic measures or pronouncements that contravene this principle may be viewed as inconsistent with the normative framework articulated by the guidelines¹⁹⁵.

A Mauritian NGO reported that in 2022, a married foreign same-sex couple made an application to the EDB to acquire an immovable property under the legal regime of community of goods, under which they are married in their country of origin. The EDB rejected their application because it was a same-sex couple¹⁹⁶.

Another specific point of concern arises from the fact that the official guidelines of the Economic EDB continue to apply criteria that are discriminatory on grounds of sexual orientation, namely when it comes to processing applications for residence permit to partners or spouses of foreigners who work and live or invest in Mauritius. A clear illustration of this non-compliance is found in the EDB's guidelines, which categorically restrict eligibility for a "dependent residence permit" to the "spouse including Common-Law Partner of the opposite sex". This constitutes an administrative imposition of a condition wholly absent from the relevant legislative text. The said guidelines provide as follows:

"The Dependents of [Occupation Permit] holders and [Residence Permit] holders are eligible to apply for a residence permit."

¹⁹⁴ Section 5(2) (ca) of the EDB Act 2017

¹⁹⁵ "OECD (2023), OECD Guidelines for Multinational Enterprises on Responsible Business Conduct," - <https://doi.org/10.1787/81f92357-en>. See para 60 and 87

¹⁹⁶ "Joint submission NGO report: Young Queer 2 Alliance & ILGA World. 3 Submitted for the 45th 4 Session of the working group on the Universal Periodic Review (4 th 5 Cycle of the UPR of Mauritius)" - <https://youngqueeralliance.com/wp-content/uploads/2024/01/2023.07.17-NGO-Report-by-the-Young-Queer-Alliance-for-the-45th-Session-of-the-Universal-Periodic-Review-Mauritius-4th-Cycle.pdf>

*Dependents are defined as spouse (including Common Law Partner of the opposite sex), parents, and dependent children, including stepchildren or lawfully adopted children, who are unmarried and not engaged in any gainful activity.”*¹⁹⁷

This discriminatory treatment is highly questionable specially when the relevant statutory provisions, do not provide for such a discriminatory treatment and such a restriction of the dependant residence permit to the spouse or partner of the opposite sex. Indeed, the term “*Common law partner*”, for the purpose of the EDB Act, has been defined in the Economic Development Board (Property Development Scheme) Regulations 2015¹⁹⁸ which provide as follows:

“‘common law partner’ means a non-citizen who

(a) lives with a purchaser as spouse (en concubinage); and

(b) holds, at the time of application under regulation 12, a certificat de concubinage, or other document, attesting such relationship with the purchaser, duly certified by a law practitioner or civil status authority from the country of residence of the purchaser;”

Consequently, by unilaterally imposing the condition of being a spouse or partner of the “*opposite-sex*” to be eligible to a dependant residence permit, which is an obvious discrimination on the ground of sexual orientation not provided by law, the EDB, through its guidelines, is performing a legislative act which is supposed to be vested in Parliament only.

These practices pose serious questions regarding the effectiveness of the doctrine of separation of powers between the executive and the legislature. The administrative insertion of a requirement not found in the governing statute invites analysis as an overreach of regulatory authority, which may inadvertently conflict with the constitutional principle that primary law-making power is vested in Parliament and not in the Executive.

As a result, a same-sex common law partners cohabiting in a stable and committed relationship with the holder of an Occupation or Residence Permit delivered by the EDB is denied of the right to the “*Dependent*” residence permit by the Economic Development Board without any serious or legitimate aim, on the sole ground of his/her sexual orientation while an opposite-sex

¹⁹⁷ Section 7 of the “Guidelines for an Occupation Permit (Investor, Professional, & Self Employed) And a Residence Permit (Retired Non-Citizen)” – Economic Development Board Mauritius, July 2024

¹⁹⁸ Section 2 of the “Economic Development Board (Property Development Scheme) Regulations 2015”

partner in committed relationship with an Occupation/Residence Permit holder is eligible to such “*Dependent*” residence permit.

Similar practices, which once occurred in numerous other jurisdictions with legislation comparable to that of Mauritius, have been judged as being discriminatory on grounds of sexual orientation and have been judicially censored, namely by the Constitutional Court of South Africa (A), the House of Lords of the United Kingdom (B) and the European Court of Human Rights (C).

A. The Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality & Others v. Minister of Home Affairs*¹⁹⁹

The Constitution of South Africa, just like the Constitution of the Republic of Mauritius, enshrines the prohibition from discrimination on the basis of sexual orientation. In *National Coalition for Gay and Lesbian Equality & Others v. Minister of Home Affairs*, the Constitutional Court of South Africa had to determine whether it is unconstitutional for immigration law to facilitate the immigration into South Africa of the spouses of permanent South African residents but not to afford the same benefits to gays and lesbians in permanent same-sex life partnerships with permanent South African residents. Section 25(5) of the Aliens Control Act 96 of 1991 omitted to give non-citizens, who are partners in permanent same-sex life partnerships, the benefits it extends to “spouses” under this section while opposite-sex partners, being also non-citizens, could enjoy such a right and be eligible to a residence permit.

Section 25(5) was held to discriminate unfairly against gays and lesbians on the intersecting and overlapping grounds of sexual orientation and marital status and seriously limited their equality rights and their right to dignity. The judges considered that it did so in a way which was not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The Court accordingly held that the omission from section 25(5) of partners in permanent same-sex life partnerships was inconsistent with the Constitution which prohibited discrimination on the ground of sexual orientation:

¹⁹⁹ National Coalition for Gay and Lesbian Equality & Others v. Minister of Home Affairs [Case CCT 10/99] – 02.12.1999

*“Section 10 of the Constitution recognises and guarantees that everyone has inherent dignity and the right to have their dignity respected and protected. The message is that gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudices and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity. **The discrimination, based on sexual orientation, is severe because no concern, let alone anything approaching equal concern, is shown for the particular sexual orientation of gays and lesbians.***

[...]

there is no rational connection between the exclusion of same-sex life partners from the benefits under section 25(5) and the government interest sought to be achieved thereby, namely the protection of families and the family life of heterosexual spouses.”

B. The House of Lords in *Ghaidan v Godin-Mendoza*²⁰⁰

In England, the House of Lords also had to deal with a similar issue in *Ghaidan v Godin-Mendoza*²⁰¹. The question was about Schedule 1 of the Rent Act 1977 which provided that the spouse or the person living with the original tenant as his husband or wife in a dwelling-house before the death of the original tenant shall, after the death of the original tenant, be the statutory tenant if and so long as he or she occupies the dwelling-house as his or her residence. A surviving same-sex partner was denied of the right to tenancy as surviving spouse.

The House of Lords had to determine whether Schedule 1 should be interpreted so that a person cohabiting with the tenant in a committed same-sex relationship be entitled to the same tenancy rights as the “*surviving spouse*” after death of the tenant and whether restricting the confinement of the tenancy right to the opposite sex partner and to the exclusion of the same-sex partner would amount to discrimination on the ground of sexual orientation and sex (under Article 14 of the European Convention on Human Rights which prohibits discrimination on the basis of sex).

²⁰⁰ *Ghaidan v. Mendoza* – [2004] UKHL 30

²⁰¹ *Ghaidan v. Mendoza* – [2004] UKHL 30

The House of Lords held that Schedule 1 of the Rent Act 1977 indeed violated article 14 of the European Convention on Human Rights and that it discriminated on the ground of sexual orientation without any legitimate or reasonable aim:

*“Discrimination is an insidious practice. Discriminatory law undermines the rule of law because it is the antithesis of fairness. It brings the law into disrepute. It breeds resentment. It fosters an inequality of outlook which is demeaning alike to those unfairly benefited and those unfairly prejudiced. Of course all law, civil and criminal, has to draw distinctions. One type of conduct, or one factual situation, attracts one legal consequence, another type of conduct or situation attracts a different legal consequence. To be acceptable these distinctions should have a rational and fair basis. Like cases should be treated alike, unlike cases should not be treated alike. The circumstances which justify two cases being regarded as unlike, and therefore requiring or susceptible of different treatment, are infinite. In many circumstances opinions can differ on whether a suggested ground of distinction justifies a difference in legal treatment. But there are certain grounds of factual difference which by common accord are not acceptable, without more, as a basis for different legal treatment. Differences of race or sex or religion are obvious examples. Sexual orientation is another. This has been clearly recognised by the European Court of Human Rights: see, for instance, *Fretté v France* (2003) 2 FLR 9, 23, para 32. Unless some good reason can be shown, differences such as these do not justify differences in treatment. Unless good reason exists, differences in legal treatment based on grounds such as these are properly stigmatised as discriminatory.*

[...]

In the present case paragraph 2 of Schedule 1 to the Rent Act 1977 draws a dividing line between married couples and cohabiting heterosexual couples on the one hand and other members of the original tenant's family on the other hand. What is the rationale for this distinction? The rationale seems to be that, for the purposes of security of tenure, the survivor of such couples should be regarded as having a special claim to be treated in much the same way as the original tenant. The two of them made their home together in the house in question, and their security of tenure in the house should not depend upon which of them dies first.

[...]

18. This being so, one looks in vain to find justification for the difference in treatment of homosexual and heterosexual couples. Such a difference in treatment can be justified only if it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Here, the difference in treatment falls at the first hurdle: the absence of a legitimate aim.”

C. The European Court of Human Rights

The European Court of Human Rights had likewise occasion to pronounce upon this issue in cases arising from Croatia and Italy:

1. Pajić v. Croatia²⁰²

Facts: In 2011, Ms. Danka Pajić, the applicant, lodged a request for a residence permit so she could live together with her Croatian partner in the city of Sisak. They were unmarried but were in a stable and committed relationship. At the time, domestic law in Croatia rendered her same-sex relationship invisible for the purposes of family reunification. On the other hand, the right to residence permit was open the unmarried partner of the opposite sex.

Issue: Whether such a treatment by the Croatian law amounted to discrimination on the basis of sex and sexual orientation with regard to the right to family life under article 14 read alongside with article 8 of the European Convention on Human Rights.

Decision: The Court agreed with Ms Pajić that there was indeed discrimination on the ground of sexual orientation since a partner in a same-sex relationship who applied for a residence permit for family reunification in order to pursue her intended family life in Croatia, was in a comparable situation to a partner in a different-sex unmarried relationship who did the same - except that Ms. Pajić was legally excluded from the possibility of applying for a permit. This exclusion introduced a difference in treatment into the law on the basis of sexual orientation:

“In any case, a partner in a same-sex relationship, as the applicant, who applied for a residence permit for family reunification so he or she could pursue the intended family life in Croatia is in a comparable situation to a partner in a different-sex extramarital relationship as regards the same intended manner of making his or her family life possible.

74. The Court notes, however, that the relevant provisions of the Aliens Act expressly reserved the possibility of applying for a residence permit for family reunification to different-sex couples, married or living in an extramarital relationship (see paragraphs 19 and 20 above).

²⁰² Pajic v. Croatia [68453/13] - 23.02.2016

Accordingly, by tacitly excluding same-sex couples from its scope, the Aliens Act in question introduced a difference in treatment based on the sexual orientation of the persons concerned [...]

although Article 8 does not include a right to settle in a particular country or a right to obtain a residence permit, the State must nevertheless exercise its immigration policies in a manner which is compatible with a foreign national's human rights, in particular the right to respect for his or her private or family life and the right not to be subject to discrimination.

[...]

The Court observes that the competent domestic authorities did not advance any such "justification", nor did the Government adduce any particularly convincing and weighty reasons to justify the difference in treatment between same-sex and different-sex couples in obtaining the family reunification.

[...]

Instead, the relevant provisions of the Aliens Act provided for a blanket exclusion of persons living in a same-sex relationship from the possibility of obtaining family reunification, which cannot be considered compatible with the standards under the Convention (compare Kozak, cited above, § 99). Indeed, as already noted above, a difference in treatment based solely or decisively on considerations regarding the applicant's sexual orientation would amount to a distinction which is not acceptable under the Convention."

2. Tadeucci and McCall v. Italy²⁰³

Facts: Taddeucci and McCall were respectively Italian and New Zealand nationals who lived in New Zealand as an unmarried same-sex couple until December 2003 when they moved to Italy, where McCall applied for a residence permit on family grounds. The Italian authorities dismissed his application in 2004, considering that only different-sex spouses could qualify for a residence permit for 'family members' under Italian laws.

Issue: Whether such a treatment by the Italian authorities amounted to discrimination on the basis of sex and sexual orientation with regard to the right to family life under article 14 read in conjunction with article 8 of the European Convention on Human Rights.

²⁰³ Tadeucci and McCall v. Italy [51362/09] – 30.06.2016

[Article 14 of the convention reads as follows: “*The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*”]

Decision: The European Court of Human Rights held that there had been discrimination on the ground of sexual orientation without any objective or reasonable justification, amounting to a prohibited ground of discrimination under Article 14 of the convention (emphasis added):

“the Court considers that, regarding the matter in question here - granting a residence permit for family reasons to a homosexual foreign partner - it cannot amount to a “particularly convincing and weighty” reason capable of justifying, in the circumstances of the present case, discrimination on grounds of sexual orientation.

[...]

The Court notes that the Government have not indicated any other legitimate aims capable of justifying the discrimination complained of by the applicants. Accordingly, it considers that, in the context of the proceedings that the applicants had brought with a view to obtaining a residence permit for family reasons, the fact that they were not treated differently from unmarried heterosexual couples, who alone had access to a form of regularisation of their partnership, had no objective and reasonable justification. In the Court’s view, the restrictive interpretation applied to the second applicant of the concept of “family member” did not duly take.

[...]

the Court considers that, at the material time, by deciding to treat homosexual couples - for the purposes of granting a residence permit for family reasons - in the same way as heterosexual couples who had not regularised their situation the State infringed the applicants’ right not to be discriminated against on grounds of sexual orientation in the enjoyment of their rights under Article 8 of the Convention.

III. At taxation level

The Income Tax Act of 1995 (hereinafter “the ITA”) constitutes the principal statutory framework governing taxation in Mauritius. This legislation affords specific fiscal advantages

to married couples, including provisions for tax reliefs, deductions, and interest reliefs pertaining to a spouse with negligible or no income, who is accordingly classified as a dependant for tax purposes²⁰⁴.

Illustratively, the ITA establishes mechanisms permitting employers to deduct contributions made to superannuation funds, encompassing pensions and retirement allowances, alongside medical expenses incurred for employees and their dependants²⁰⁵. Furthermore, Section 62 of the ITA expressly allows for tax deductions by companies for pension amounts disbursed to a former employee or their surviving spouse.

As same-sex couples are denied legal recognition in Mauritius, they are consequently excluded from claiming or benefiting from these tax reliefs and deductions, which are exclusively predicated upon the status of “spouse”. This exclusion results in a clear instance of discrimination based on sexual orientation within the tax system.

IV. At the level of protection from domestic abuse

The main legislation in Mauritius with regard to protection from domestic abuse is the Protection from Domestic Violence Act 1997 (hereafter “PDVA”) which provides for various judiciary mechanisms of protection against domestic abuse such as the Protection Order²⁰⁶ (which restrains the respondent spouse from engaging in any conduct which may constitute an act of domestic violence and ordering him to be of good behaviour towards the applicant), the Occupation Order²⁰⁷ (granting to the spouse victim of domestic abuse the exclusive right to live in the residence), the Tenancy Order²⁰⁸ (so that the tenancy of the residence be vested in the spouse victim of domestic abuse). Since 2016, the PDVA explicitly discriminates between whether the victim has been in a same-sex relationship or an opposite-sex relationship since the term “spouse” for the purpose of application of the PDVA now means a person who:

*“(a) is or has been civilly or religiously married to a person of the opposite sex;
(b) is living or has lived with a person of the opposite sex as husband and wife; or*

²⁰⁴ Sections 27 and 27A of the ITA 1995

²⁰⁵ Section 22 of the ITA 1995

²⁰⁶ Section 3 of the PDVA

²⁰⁷ Section 4 of the PDVA

²⁰⁸ Section 5 of the PDVA

*(c) whether living together or not with a person of the opposite sex, has a common child with that person;”*²⁰⁹

Such differential treatment is particularly questionable within the context of domestic abuse legislation. This is especially so given that the Constitution of the Republic of Mauritius, as the supreme law of the land, expressly prohibits discrimination on the ground of sexual orientation.

By way of comparative illustration, the United Kingdom's Domestic Abuse Act 2021 employs the objective, inclusive criterion of ‘*personally connected*’ individuals. This broader statutory definition, which is less discriminatory than Mauritian law, reflects more accurately contemporary societal realities, ensures that effective protection is anchored in the nature of the relationship rather than in prescribed personal characteristics such as sexual orientation. For the purpose of the Domestic Abuse Act 2021 in the United Kingdom, two people are considered as ‘*personally connected*’ to each other if any of the following applies—

“(a) *they are, or have been, married to each other;*

(b) they are, or have been, civil partners of each other;

(c) they have agreed to marry one another (whether or not the agreement has been terminated);

(d) they have entered into a civil partnership agreement (whether or not the agreement has been terminated);

(e) they are, or have been, in an intimate personal relationship with each other;

(f) they each have, or there has been a time when they each have had, a parental relationship in relation to the same child (see subsection (2));

(g) they are relatives.”

²⁰⁹ Section 2 PDVA, Section 3 of the “Protection from Domestic Violence (Amendment) Act 2016”

V. Some other discriminatory treatments identified

A. The National Pensions Act 1976

The National Pensions Act 1976 (hereafter “NPA”) is quite a unique statute in Mauritius bearing, on one hand, some heavy discrimination based on sex and on sexual orientation, while on the other hand, providing for recognition for polygamous marriages which are strictly forbidden under Mauritian law. Indeed, article 150 of the CCM provides that “*On ne peut contracter un second mariage avant la dissolution du premier*” (It is prohibited to contract a second marriage prior to the dissolution of the first) while article 149A of the CCM provides that section 150 of the CCM is of public order. Furthermore, section 257 of the Criminal Code Act 1838 provides that “*Any person who, being married, marries another person before the dissolution of the first marriage, shall be punished by penal servitude for a term not exceeding 20 years.*” In this section, marriage is defined as a civil marriage under section 24 of the Civil Status Act and a religious marriage having civil effect under sections 27 and 28 of the Civil Status Act.

The NPA provides for the recognition of specific pension rights to widows who had contracted a monogamous civil or religious marriage²¹⁰. The NPA further seems to recognise polygamous marriages as it provides for a right to a “*surviving spouse allowance in accordance with the Social Aid Act*” to the surviving spouses of a man who had contracted a religious marriage under Muslim rites with more than one female spouse:

“(a) where a male person who has contracted a religious marriage in accordance with Muslim rites, without being civilly married, to more than one female person dies after 31 August 2022; and

(b) the religious marriage is, on 22 September 2022, registered with the Muslim Family Council,

each of his surviving female spouse may be eligible to a surviving spouse allowance in accordance with the Social Aid Act.”²¹¹

²¹⁰ Section 4 of the NPA

²¹¹ Section 4A (2) of the NPA

Same-sex partners, being denied of any form of recognition by the State of Mauritius, are therefore prevented from claiming any of those benefits despite the fact that the laws of Mauritius do not prohibit the recognition of same-sex unions. Consequently, these individuals face discrimination based solely on their sexual orientation, a practice that contravenes constitutional guarantees of equality. This situation presents a notable legal incongruity when contrasted with the treatment of polygamous unions. Although such unions are expressly prohibited by law, they nonetheless receive a degree of recognition within the legal framework, thereby affording participants certain protections from which same-sex partners remain entirely excluded.

B. Other legal benefits for “spouses”

Statutory bodies in Mauritius provide for numerous benefits to married people. For instance, the Pay Research Bureau, which operates under the aegis of the Ministry of Public Services and Administrative Reforms, is responsible for the continual review of the pay and grading structures and conditions of service in the public sector (civil Service, parastatal and other statutory bodies, local authorities and Rodrigues Regional Assembly) and the private secondary schools. It namely formulates recommendations on public sector management reforms, salaries, allowances and other conditions of service²¹².

In its 2026 report²¹³, the document advances a series of recommendations aimed at extending benefit entitlements to spouses. Hereunder are some of these recommendations and observations:

- Expatriates who do not have a permanent residence permit in Mauritius to be provided economy class air passages from the country of permanent residence and back upon expiry of their contract for self, spouse and children²¹⁴;
- For officers entitled to “Passage Benefits”, the term “immediate members of the family” is deemed to mean the officers spouse, children, parents, brother, sister, father-in-law and mother-in-law²¹⁵;

²¹² <https://prb.govmu.org/prb/index.php/functions/>

²¹³ PRB Report 2026 – Volume 1

²¹⁴ Para 11.15

²¹⁵ Para 16.3.13

- Leave without pay may be granted to accompany spouse, proceeding on approved leave and employed in international and regional organisations of which Mauritius is a member²¹⁶;
- an officer should be granted up to a maximum of 10 days' leave to be offset, as per his option, against any of his paid leave entitlement to take care of his child/adopted child, spouse, parent or grandparent with healthcare related issues²¹⁷.
- With regard to the Civil Service Family Protection Scheme (CSFPS), the said scheme provides for a monthly payment pension payable to the dependants of a deceased contributor. Upon death of the contributor, the pension becomes payable to his/her spouse and/or children at a specified rate²¹⁸.
- Foreign Service Allowance (FSA) and 'Other Related Allowances' are paid to home-based staff serving in overseas missions to meet necessary expenses in the host location. Spouses are also entitled to these benefits. Some of them are:
 - Allowance as a form of assistance to cater for part of the living expenses of an officer's accompanying dependent(s), particularly as the spouse may encounter difficulties in finding a suitable job in the country of posting²¹⁹;
 - Refund of full medical expenses in case of hospitalisation for surgical intervention in respect of the officer, his/her spouse and dependent children aged up to 20 years²²⁰;
 - Spouse and dependants being entitled to a "Warm Clothing Allowance"²²¹.

For the avoidance of doubt, the PRB report clearly defines the interpretation of the term "dependant" as follows:

"Dependents of a married home-based staff comprise the officer's accompanying spouse and child/children up to the age of 20 years if they are in full-time education.

Dependents of a divorced home-based staff include the officer's child/children up to the age of 20 years if they are in full-time education and father OR mother.

²¹⁶ Para 16.4.108 (C)

²¹⁷ Para 16.4.139

²¹⁸ Para 16.15.3

²¹⁹ Para 16.19.25

²²⁰ Para 16.19.52

²²¹ Para 16.19.58

Dependents of an unmarried career diplomat are the officer's father OR mother OR brother OR sister.”²²²

The Code Civil Mauricien also confers numerous to spouses. For instance, the surviving spouse inherits in the same capacity of a child of the deceased and additionally holds a right of usufruct over the matrimonial home that belonged to the deceased²²³.

C. Denial of Home Loan Payment Scheme to same-sex partner

In February 2025, the Young Queer Alliance reported that “*the State of Mauritius introduced a Government assistance programme reimbursing eligible borrowers a 5% of the loan amount (up to a maximum of MUR 500,000) under the “Home Loan Payment Scheme”. The Scheme covered the purchase of a residential plot of land, a house or a flat, or the construction, extension or renovation of a home. No provision was included, in the eligibility criteria of the Scheme, explicitly or otherwise, that the said Scheme was restricted to heterosexual couples only, or that the Scheme would not equally apply to LGBTQ persons who wish to or are cohabitating or are same-sex couples. The matter was referred by the Young Queer Alliance to the Ministry of Finance and the Mauritius Revenue Authority in July 2023, deploring the discriminatory application of the Policy and to provide redress. As at date, no redress has been provided*”²²⁴.

* * *

The pervasive climate of insecurity, systemic discrimination, fear, and profound anguish experienced by members of the LGBT community within the Republic of Mauritius has constituted a significant causative factor in the compelled migration of numerous individuals from Mauritius, leading them to seek international protection and asylum in foreign jurisdictions. In recognition of these conditions and admitting an asylum claim by a Mauritian

²²² Para 16.19.88

²²³ Articles 767 to 770 of the CCM

²²⁴ Protection against violence and discrimination based on sexual orientation and gender identity in relation to forced displacement - Submission to the Independent Expert on sexual orientation and gender identity” – Young Queer Alliance, 14 February 2025

citizen belonging to the LGBT community, the judge of the First-tier Tribunal (Immigration and Asylum Chamber) of the United Kingdom held as follows:

“I am also of the view that there is no protection for generally for LGBT victims for hate crimes in Mauritius. I accept the evidence that 60% of LGBT Mauritians report experiencing verbal and physical abuse, violence and harassment within families in the workplace, the Mauritian law against hate crime does not include crime based on real or perceived sexual orientation, there are no laws in place dealing with the issue of homophobic hate crimes. [...]

*27. There is also further objective evidence that there is a rise in homophobia in Mauritius and that during a pride march in 2016 shots were fired by Islamists, police were present but no action was taken and as recent as 2018 a Pride march had to be cancelled due to the presence of 400 anti-gay demonstrators and death threats were made against the organisers. It is noted that no legal action was taken against the anti-LGBT activists. [...]*²²⁵.

In its 2020 report, the international non-governmental organisation *Avocats Sans Frontières France (ASF)* documented that members of the LGBTQIA+ community in Mauritius continue to face severe discrimination and persecution, thereby establishing a well-founded claim for the grant of international protection and asylum in foreign jurisdictions. ASF further reported a noticeable increase in the number of Mauritian nationals of the LGBTI community being recognised as refugees in various European States. This report was formally submitted to the competent asylum authorities within Europe. Corroborating this trend, official data from the French Office for the Protection of Refugees and Stateless Persons (OFPRA) indicates that the number of Mauritian nationals granted asylum in France increased by over 1 000 % between the years 2020 and 2023.²²⁶

It has been reported that in 2022, 202 refugees coming from Mauritius and 378 asylum seekers were registered in other countries. Their main countries of destination were the United Kingdom (32%), Australia (25%), France (11%), Ireland (9%), and Italy (5%)²²⁷.

²²⁵ Mr A. B v. Secretary of State for the Home Department – 03.12.2018

²²⁶ OFPRA – Rapports d’activité année par année - <https://www.ofpra.gouv.fr/publications/les-rapports-dactivite>

²²⁷ “Protection against violence and discrimination based on sexual orientation and gender identity in relation to forced displacement - Submission to the Independent Expert on sexual orientation and gender identity” – Young Queer Alliance, 14 February 2025 - <https://youngqueeralliance.com/wp-content/uploads/2025/02/2025.02.14-Protection-against-violence-and-discrimination-based-on-SOGIESC-in-relation-to-forced-displacement-FV.pdf>

CHAPTER 13: RECOMMENDATIONS

It has been demonstrated that, notwithstanding the existence of legislative provisions in Mauritius prohibiting discrimination on the grounds of sexual orientation, such discrimination continues to persist to a significant extent within the national territory. More concerning still is the fact that public bodies, including the Economic Development Board and the Civil Status Office, have issued regulatory measures of a discriminatory nature that appear to contravene Mauritian law, specifically the Constitution of the Republic of Mauritius, the Equal Opportunities Act 2008, as well as the international conventions to which Mauritius has adhered. It is all the more striking that such measures appear to stand in direct contradiction to judgments rendered by the Supreme Court of Mauritius which have considered that the constitutional protection from discrimination on the basis of ‘sex’ includes ‘sexual orientation’. A manifest inconsistency thus subsists between the aforementioned practices and the numerous recommendations issued to the State of Mauritius by domestic (I) and international (II) human rights institutions, aimed at fostering respect for the fundamental rights of persons in same-sex relationships.

I. Recommendations and observations made by local statutory bodies and other local platforms

A. Statutory bodies

1. Recommendations of the Law Reform Commission of Mauritius (LRC)

The LRC is a statutory body in Mauritius and its mission is to:

- keep under review in a systematic way the law of Mauritius;
- make recommendations for the reform and development of the law of Mauritius;
- advise the Attorney General on ways in which the law of Mauritius can be made as understandable and accessible as is practicable.

The LRC considers as part of its mandate to ensure that the laws of Mauritius are in conformity with the international rights treaty obligations of Mauritius, most specifically with international instruments ratified by Mauritius or to which Mauritius has acceded, such as the International Covenant on Civil and Political Rights.

In its “*Reform of Criminal Code*” Interim Report of May 2016²²⁸, the LRC proposed the amendment of section 87 of the Mauritian Criminal Code to establish as an offence “Discrimination” by a person holding public authority or discharging a public service mission, whilst acting in the exercise or in the course of the exercise of his function or mission, against a person by reason of his origin, sex, [...], sexual orientation or identity, [...], when it consists of refusing the benefit of a right conferred by law or of hindering the normal exercise of any given economic activity.

2. Recommendations of the National Human Rights Commission (NHRC)

The NHRC is a statutory body whose mandate includes, *inter alia*, the promotion of respect for human rights. Its annual report for the year 2018 placed considerable focus on the concerning prevailing situation in Mauritius with regard to the protection of the fundamental rights of lesbian, gay, bisexual, and transgender (LGBT) individuals. Furthermore, the NHRC undertook a significant analysis of the judgment delivered in 2018 by the Supreme Court of India, thereby underscoring the imperative need to effect structural and legislative reforms in Mauritius to ensure respect for the most fundamental human rights of LGBT individuals:

“The judgment of the Supreme Court made a deep philosophical, sociological, psychological and political evaluation of the LGBT issue and at the heart of it upheld the very essence of human rights, worth exploring.

In Mauritius, the society should have a frank conversation and stop being silent about this issue, as if it does not exist. The matter should be considered in light of basic human rights. Mauritius should engage in a study and research collecting data on the number of people in the LGBT community and the type of discrimination and violation of rights that they experience to really understand the problem.

²²⁸ “Reform of Criminal Code” Law Reform Commission Interim Report [May 2016] - <https://lrc.govmu.org/lrc/?p=2717>

*The way forward would be to have a dispassionate debate on the rights of LGBT persons in order to have a society free of discrimination and marginalisation.”*²²⁹

In its annual report for the year 2019, the NHRC underlined the growing acceptance of the LGBT Community as follows:

“LGBT *RIGHTS*

In an article entitled “Decolonizing Criminal Law” published in the Commonwealth Law Bulletin in 2018 (Volume 44 No. 4) Shaila Alan Asha from Bangladesh describes how colonialism also meant controlling the legal system in a colony and imposing standards of behavior “to reform the colonized and to protect the colonizers against moral lapses. Now former colonizers have come to accept and promote LGBT rights and attempt to persuade former colonies to depenalise ‘anti-sodomy laws’.

*The LGBT Community has come to be accepted in Mauritius [...].”*²³⁰

In its annual report for the year 2020 (published in May 2021), The NHRC made reference to significant religious and international positions and proceeded further in its advocacy for the respect of LGBT rights in Mauritius as follows:

“In most parts of the world there is now a social acceptance of LGBT. The Supreme Court of India delivered a groundbreaking decision in favour of LGBT persons. The European Union has declared Europe to be a LGBT Freedom Zone. The Pope has unofficially accepted that same sex couples should have certain rights like adopting a child. The Supreme Court of the United States has given a wider definition of sex in 2020.

The Supreme Court decision, Bostock vs. Clayton Country, Georgia, involved three separate cases in which employees alleged their employers discriminated against them because they were either gay or transgender. Ultimately this 57-page decision boiled down to the definition of the word “sex.” In a 6-3 decision, Justice Neil Gorsuch explained that even assuming “sex” refers only to “biological distinctions between male and female,” gay and transgender

²²⁹ Annual report of the NHRC for the year 2018:, <http://nhrc.govmu.org/English/Documents/Annual%20Report/website%20NHRC%20Annual%20Report%202018%20.pdf>

²³⁰ Annual report of the NHRC for the year 2019: <http://nhrc.govmu.org/English/Documents/Annual%20Report/NHRC%20ANNUAL%20REPORT%202019.pdf>

employees are protected from employment discrimination since “homosexuality and transgender status are inextricably bound up with sex.” Therefore “to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.”

In Mauritius, the Equal Opportunities Act makes it illegal to discriminate on the ground of status which includes sex or sexual orientation. Thus, this gives legal recognition to those who are LGBTQ. It is usual to refer to the LGBTQ community as being a separate group. But nowadays LGBTQ persons are being considered as ordinary members of society and lead a normal life whether in employment, in education, in cultural activities. There is some resistance in some quarters and the more tragic instances are where a family rejects one of its members (especially a young person) who may be LGBT.

The NHRC in its sensitization campaigns informs its audiences about the rights of LGBTQ people and about the need for inclusion. It held a workshop to sensitize senior police officers on the issue so that they could in turn create an awareness among their junior officers on how not to discriminate against LGBTQ people.

[...]

Some transgender persons are sex workers and as such have been targeted by the police. VISA G provides training to transgender to enable them to become small entrepreneurs. Transgender people may still be the subject of stigmatization.”²³¹

In its annual report for the year 2021 published in March 2022, the NHRC highlighted the importance of ensuring that LGBTI people enjoy their human rights fully without any discrimination:

“In Mauritius, it is fair to say that LGBTI people have been accepted to a large extent. The Equal Opportunities Act makes it unlawful to discriminate on the ground of status which includes sex or sexual orientation. This gives legal recognition to LGBTI people.

[...]

²³¹ Annual report of the NHRC for the year 2020 - <https://nhrc.govmu.org/Lists/AnnualReports/Attachments/10/annualreport2020.pdf>

*The NHRC, through all its sensitisation campaigns actively advocates for the rights of the LGBT people and highlights the importance of ensuring that they enjoy their human rights fully, without any discrimination or stigmatisation.”*²³²

The NHRC’s annual report for the year 2022, published in March 2023, indicated that it was “*carrying out its mandate for the promotion of human rights raises awareness about the situation and rights of LGBTI persons*” and that “*through all its sensitisation campaigns and in collaboration with NGOs, such as the Collectif Arc En Ciel and the Young Queer Alliance, [it] advocates for the rights of the LGBTI people and highlights the importance of ensuring that they enjoy their human rights fully, without any discrimination or stigmatisation. In May 2022, on the International day against homophobia, transphobia, and biphobia, the NHRC, on the invitation of the NGO, the Collectif-Arc-en-Ciel, delivered a presentation on the human rights of LGBTI people.*”²³³

In its annual report for the year 2023, published in March 2024, the NHRC stated that Mauritius has actively participated in this path to universality with amendments to the Civil Code to achieve gender equality, namely in banning sex discrimination in the Constitution, in combating gender-based violence, in recognising that there should be no discrimination against LGBTI persons, [etc]. It then referred to the judgements delivered by the Supreme Court in October 2023 to indicate that Mauritian laws give legal recognition to LGBTI people and that the latter should be respected and protected:

“In October 2023, the Supreme Court in Mauritius held that section 250(1) of the Criminal Code in so far as it criminalises sexual relations between consenting adults of the same sex, is unconstitutional and in breach of section 16 of the Constitution in so far as it prohibits consensual acts of sodomy between consenting male adults in private. Section 16 should accordingly be read so as to exclude such consensual acts from the ambit of section 250(1). This landmark decision unequivocally indicates that the rights of LGBTI persons should be respected and protected. Mr. Victor Madrigal-Borloz, Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity stated that “This ruling tells gay, lesbian and bisexual, trans and other gender-diverse people living in

²³² Annual report of the NHRC for the year 2021 - <https://nhrc.govmu.org/Lists/AnnualReports/Attachments/11/ANNUAL%20REPORT%202021%20PDF%20%282%29.pdf>

²³³ Annual report of the NHRC for the year 2022 - <https://nhrc.govmu.org/Lists/AnnualReports/Attachments/12/Annual%20Report%202022.pdf>

Mauritius that they are in a country in which their dignity is valued and protected under the rule of law.” He also added that “Criminalising homosexuality and other forms of sexual and gender diversity is at the origin of much violence, discrimination, and social exclusion. It also violates international human rights law.”

In Mauritius, the Equal Opportunities Act which prohibits discrimination on the ground of status including sex or sexual orientation, gives legal recognition to LGBTI people.

The NHRC, through all its sensitisation campaigns and in collaboration with NGOs, such as the Collectif Arc En Ciel and the Young Queer Alliance, advocates for the rights of the LGBTI people and highlights the importance of ensuring that they enjoy their human rights fully, without any discrimination or stigmatisation.”²³⁴

In its annual report for the year 2024, published in March 2025, the NHRC highlighted its participation in the landmark conference, “*Ten Years of Resolution 275 – Advancing LGBT+ Rights in Africa*”, held in Johannesburg, South Africa, which served as a platform for fostering dialogue and driving progress in the realisation of the human rights of LGBTQI+ individuals across the African continent. The annual report states that “*Mauritius was praised for its leadership in advancing LGBTQI+ rights. The country’s legal framework protecting LGBTQI+ individuals was acknowledged as a positive example for other African nations.*”.

The NHRC also underlines that its Human Rights Division (HRD) “was encouraged to continue fostering collaboration among civil society, government bodies, law enforcement, and health providers to ensure the protection and inclusion of LGBTQI+ persons” and that the “*HRD’s participation in this conference not only fostered a more comprehensive regional dialogue but also served as a powerful affirmation of Mauritius’ unwavering commitment to upholding the human rights of all individuals, including marginalised groups. The HRD remains steadfast in its dedication to supporting global endeavours aimed at promoting equality, eradicating discrimination, and ensuring the full spectrum of human rights protections for all individuals, irrespective of their sexual orientation or gender identity.*”²³⁵

²³⁴ Annual report of the NHRC for the year 2023 -

<https://nhrc.govmu.org/Documents/Annual%20Reports/Annual%20Report%202023.pdf>

²³⁵ Annual report of the NHRC for the year 2024 - <https://nhrc.govmu.org/nhrc/annual-reports/>

In March 2026, the NHRC published its annual report for the year 2025. For the first time, the report addressed the issue of same-sex unions under human-rights lenses and with regard to the laws of Mauritius. The report underlines that in 2025, the NHRC held *“a dedicated meeting with representatives of civil society organisations actively engaged in the advancement of the rights of LGBTQ+ persons, with a particular focus on equality, dignity and non-discrimination. The meeting brought together representatives of Young Queer Alliance and To Marry Global, with the latter represented by Mr Cameron Tolle and Mr Evan Wolfson, both internationally recognised advocates for marriage equality and broader LGBTQ+ rights. The purpose of the meeting was threefold: first, to exchange information on the current human rights situation affecting LGBTQ+ persons, particularly young people. Second, to assess the legal, social and institutional barriers that continue to undermine equality and full enjoyment of rights. Third, to explore avenues for cooperation between the Commission and civil society actors in strengthening human rights protection frameworks”*.

The report further stresses that *“Participants acknowledged that such institutions are uniquely positioned to bridge the gap between international human rights norms and domestic implementation. The Commission’s potential roles were identified as including monitoring and reporting on discrimination, advising public authorities on law and policy reform, supporting strategic litigation where appropriate, and facilitating dialogue between state institutions and civil society. Emphasis was placed on the importance of independence, credibility and accessibility of the Commission in building trust with marginalised communities”*.

It was noted that *“safeguarding LGBTQ+ persons from discrimination does not entail opposing or restricting religious beliefs or personal convictions, but rather ensuring that such beliefs are not transformed into laws, policies or practices that deny equal legal recognition. In this context, the request was framed specifically as one of access to civil marriage and legal protection, not as an infringement on religious doctrine. The Commission’s role in fostering nuanced, rights-based public discourse was highlighted as particularly important in maintaining this distinction”*²³⁶.

²³⁶ Annual report of the NHRC for the year 2025 - <https://nhrc.govmu.org/nhrc/annual-reports/>

B. Non-statutory local organisations and legal scholars

1. Recommendations made by local NGOs and platforms

The main NGOs in Mauritius whose principal missions are to address homophobia and transphobia are:

- The Collectif Arc-en-Ciel (CAEC) established since 2005
- The Young Queer Alliance (YQA) founded in 2014

Other local non-governmental organisations and platforms such as *Kolectif Drwa Imin* (KDI), *Gender Links Mauritius* (GL) and *OUT Moris* also make regular recommendations and joint submissions towards the respect of LGBTQIA+ rights in Mauritius.

a. Observations and recommendations of the YQA

A study carried out by the YQA in 2022 and titled “*The socio-economic condition of LGBTQ people in Mauritius, 2022*”²³⁷ shows that:

- a) the number of LGBTQ respondents reported living with their partner has increased from 5.6% in 2017 to 11.0% in 2022; and
- b) an overwhelmingly number of LGBTQ people regarded access to civil partnership/marriage equality as an increasing priority from 78.4% in 2017 to 90.4% in 2022.

In 2023, the YQA, alongside ILGA, submitted the following observations with regard to marriage equality for the consideration of the Human Rights Council’s 4th Cycle of the Universal Periodic Review for the Republic of Mauritius²³⁸ with regard to marriage equality in Mauritius:

²³⁷ <https://youngqueeralliance.com/wp-content/uploads/2022/06/2022.07.01-The-socio-economic-condition-of-LGBTQ-people-in-Mauritius.pdf>

²³⁸ Joint Submission NGO Report: Young Queer 1 Alliance & ILGA World. Submitted for the 45th Session of the working group on the Universal Periodic 4 Review (4th Cycle of the UPR of Mauritius), Geneva, Switzerland, July 2023

“Summary: The State party noted the only recommendation made during UPR Cycle 1 with regard to legally acknowledging homosexual couples and their human rights. [...].

Status of implementation: As at date, the State party has not implemented the recommendations in relation to marriage equality/civil partnership. Moreover, no legislative change is intended from the State party to give effect to these recommendations.

Existing challenges: Despite the provisions regarding the application of the Equal Opportunities Act and the absence of the definition of “spouse” in the Civil Status Act, the State party uses the definition of “spouse” as “...a person who has been civilly or religiously married to a person of the opposite sex” in the Protection from Domestic Violence (Amendment) Act. [...]

Areas of co-operation: Consultations for amendments to the Prevention of Domestic Violence Act are ongoing. Further advocacy to repeal the definition of “spouse” in the Act to align it with the Civil Status Act and expanding its scope to include LGBTQI people living in cohabitation or under the same roof would provide for legal protection against domestic violence faced by LGBTQI people.”

They recommended the following actions to be taken by Mauritius:

- i. To abide by provisions of the Equal Opportunities Act; and accordingly, amend the Protection from Domestic Violence (Amendment) Act in order to recognise marriage and/or civil partnership for same-sex couples in the definition of ‘spouse’;
- ii. To ascertain that Government policies and Schemes, which are funded by taxpayers’ money, including by LGBTQI persons, apply equally to individuals/couples irrespective of their Sexual Orientation, Gender Identity and Expression and Sex Characteristics;
- iii. To provide redress to the YQA and ensure its registration as well as other LGBTQI-led NGOs as Charitable Institutions at the level of the MRA;
- iv. To provide recognition of trans people by ensuring their registration under the Civil Status Act and providing for their protection against discrimination in the Employment Relations Act, the Equal Opportunities Act and the Workers’ Rights Act; and
- v. To implement policies and programs for the socio-economic inclusion of LGBTQI people in the Mauritian society including healthcare and access to various facilities and services, at workplace (in the public and private sectors), and by developing and

delivering continuous training programs for public officers at all levels but particularly medical personnel, the police and law enforcement officers

b. Observations and recommendations of the CAEC

In its NGO report submitted to the United Nations in 2018 for the 31st Session of the working group on the Universal Periodic Review (3rd Cycle of the UPR of Mauritius) ²³⁹, the CAEC made the following recommendations to the Government of Mauritius:

- i. With the assistance of UN agencies, to promote education and awareness by integrating the issue of sexual orientation and gender identity into the educational curriculum including through human rights education and/ or through specific courses focussing on sexual orientation and gender identity, at all stages;
- ii. In line with its commitment to the implementation of the 2030 Sustainable Agenda and the Sustainable Development Goals at its core, to ensure the implementation of SDGs, including
 - SDG 5 on achieving gender inequality and empowering all women and girls, and eliminating all forms of violence and discrimination against all women and girls, irrespective of their sexual orientation or gender identity;
 - SDG 10 on reducing inequality within countries, including through the empowerment and promotion of the inclusion of all, irrespective of sex, status etc, and ensuring equal opportunity for all by eliminating discriminatory laws, policies and practices;
 - SDG 16 on promoting peaceful and inclusive societies by inter alia ensuring equal access to justice for all and building accountable and inclusive institutions;
- iii. To ensure that all programs working on policing, the criminal justice system and/or civil society actively address LGBT hate crime;
- iv. To provide training on sensitivity and effective response to LGBT discrimination and hate crime for police, security services and the criminal justice system;

²³⁹ NGO Report: Individual Submission of Collectif Arc-En-Ciel, 29 March 2018

- v. To build the capacity of law enforcement officers to document instances of hate crime against LGBT people.
- vi. Law enforcement officials, and health and social care providers to be trained to recognise and uphold the human rights of LGBT and should be held accountable if they violate these rights.

c. Observations and recommendations made through joint submissions of NGOs to the United Nations for the Universal Periodic Review of Mauritius (4th cycle) of 2024

In the “*Summary of stakeholders’ submissions on Mauritius*” pursuant to the 4th cycle of the Universal Periodic Review of Mauritius in 2024, the Report of the Office of the United Nations High Commissioner for Human Rights²⁴⁰ highlights that local NGOs such as *Kolektif Drwa Imin (KDI)*, *Gender Links Mauritius*, *OUT** and *Young Queer Alliance* sometimes supported by international NGOs such as the *International Lesbian, Gay Bisexual, Trans and Intersex Association (ILGA World)* and the *International Service for Human Rights (ISHR)*, had made joint submissions for the protection of the rights of sexual minorities in Mauritius. In their submissions, they highlighted the severe human rights violation against LGBTQI persons in Mauritius. They indicated that the continued persecutions and attempts to human dignity and violations of individual rights and freedoms of LGBTQI persons in Mauritius highlighted the severe and serious non-compliance of the State to United Nations Conventions and human rights standards.

They also underlined the violation of the right to privacy, mainly due to the absence of a legal recognition of same-sex couples, the absence of effective protection against persecutions, and absence of sanctions against homophobic or transphobic discrimination and violence. They further reported that there was no specific legislation against homophobic and/or transphobic violence or hate speech in Mauritius. They recommended that all complaints regarding violence and hate speech against LGBT persons be systematically considered and investigated, and that those responsible be brought to justice.

²⁴⁰ United Nations Human Rights Council - Summary of stakeholders’ submissions on Mauritius, Report of the Office of the United Nations High Commissioner for Human Rights., 8 November 2023, A/HRC/WG.6/45/MUS/3

They also recommended to establish a shelter for gender, sex and sexually diverse persons who are victims of violence in their own family settings.

They indicated that a number of policy actions were being implemented to prevent LGBTQI people from being victims of stigmatisation, discrimination and violence. According to them however, in the absence of legal protection by Mauritius, these policy actions needed to be further expanded for a greater inclusion of LGBTQI people in the Mauritian society

They underlined that LGBTIQ defenders continued to fear reprisals for exercising their right to assemble as the government did not intervene and prosecute the religious groups who blocked the June 2018 gay pride parade.

They reported that, although the Protection from Domestic Violence Act provided protection for LGBTQI persons against another person living under the same roof, in practice, different family protection officers at the MOGEFW held different understanding and application of the law in relation to LGBTQI persons victims of domestic violence.

2. Recommendations made by legal scholars

In their 2017 paper²⁴¹, Ms D. S. Ramnauth and Dr R. Mahadew Senior Law Lecturer at the University of Mauritius made the following concluding observations and recommendations:

“Mauritius has an obligation to take appropriate measures to enforce its international human rights obligations. This is not only limited to legislative interventions. The Mauritian government must realise that legislative recognition has not necessarily translated into practical recognition. Consequently, there is the need for advocacy on attitudinal change for broader acceptance of LGBTI people in Mauritius.”

In 2022, Dr Ramtohul, Associate Professor and Mr Subbarayan, Legal Affairs Director at the University of Mauritius made the following observations and recommendations:

²⁴¹ Chapter 8 - A psycho-legal reflection on issues surrounding the LGBTI community in Mauritius – R. Mahadew and D. Ramnauth” in “Protecting the human rights of sexual minorities in contemporary Africa” – 2017 Ed., Sylvie Namwase & Adrian Jjuuko

- The State, the Council of Religions and NGOs should work together “*in view of bringing greater awareness on the plight of and destigmatising the LGBTQI community and protecting their human rights*”;
- “*The plight of the LGBTQI community needs to be de-stigmatised and given greater focus. At this level, there is a need for general education and awareness*”;

II. Recommendations and observations made by international institutions and foreign States in international fora

A. At the level of the United Nations

1. 2013: The Universal Periodic Review (2nd cycle for Mauritius)

The Working Group on the Universal Periodic Review, established following Human Rights Council resolution 5/1 of 18 June 2007, held its seventeenth session from 21 October to 01 November 2013. The review of Mauritius was held at the 6th meeting on 23 October 2013 and three recommendations were made to Mauritius concerning LGBTI rights, namely the repeal of the law sections criminalising same-sex conduct between consensual adults. The report of the Working Group was finalised in December 2013²⁴². Mauritius noted the recommendations and in March 2014, the Permanent Representative of Mauritius to the United Nations and other international organisations made a statement on the occasion of the adoption of the Universal Periodic Review at the 25th session of the Human Rights Council in which he declared:

*“Before we move into the substance of the issues that had been raised by several delegations in the meeting of the UPR Working Group of the Council in October 2013, let me reaffirm the unrelenting commitments of the Government of Mauritius to uphold the highest standards of human rights at a national level and to engage effectively in the universal promotion of human rights”*²⁴³.

²⁴² A/HRC/25/8 - Human Rights Council, Twenty-fifth session, Agenda item 6, Universal Periodic Review - Report of the Working Group on the Universal Periodic Review.,26.12.2013

²⁴³ https://www.upr-info.org/sites/default/files/document/mauritius/session_17_-_october_2013/mauritiusplenarystatement2014.pdf

It is here to be underlined that criminalisation of same-sex conduct between consensual adult males has been considered as unconstitutional by the Supreme Court of Mauritius in 2023²⁴⁴.

2. 2017: The Human Rights Committee

In December 2017, the Human Rights Committee expressed its concern about the discriminatory treatment faced by members of the LGBT community in Mauritius. The Committee regretted that the International Covenant on Civil and Political Rights had not yet been given full effect in the domestic legal order. It also deplored the limited number of cases in which the Covenant has been referred to by courts:

“5. The Committee is concerned that the Covenant has not yet been given full effect in the domestic legal order, and about the limited number of cases in which the Covenant has been referred to by courts (art. 2).

6. The State party should give full effect to the Covenant in its domestic legal order and should also raise awareness of the rights in the Covenant among judges, lawyers and prosecutors.

[...]

Discrimination against lesbian, gay, bisexual, and transgender persons

9. The Committee is concerned about reported cases of hate speech and violence, including death threats, brutality and humiliation, against lesbian, gay, bisexual and transgender persons. The Committee is also concerned that lesbian, gay, bisexual and transgender persons are not authorized to officially enter marriage or civil partnerships and are denied other rights relating to personal status. [...]

10. The State party should firmly prevent, and protect lesbian, gay, bisexual and transgender persons from, all forms of discrimination based on sexual orientation and gender identity and include this as grounds of discrimination in all relevant legislation, including in the Criminal Code. The State party should also take all the necessary measures to eradicate discrimination against lesbian, gay, bisexual and transgender persons with regard to

²⁴⁴ Ah-Seek v. State of Mauritius – 2023 SCJ 399

marriage or civil partnerships and repeal article 250 of the Criminal Code. Furthermore, the State party should ensure that all complaints of violence, including death threats and brutality, owing to discrimination against lesbian, gay, bisexual and transgender persons are registered by the police and investigated, and that those responsible are duly prosecuted and, if convicted, sanctioned with appropriate penalties. Moreover, the State party should train police officers, judges and prosecutors and conduct awareness-raising campaigns for the general public on the rights of lesbian, gay, bisexual and transgender persons.”²⁴⁵

3. 2018: The Committee on the Elimination of Discrimination Against Women

In 2018, the Committee on the Elimination of Discrimination Against Women made the following observations and recommendations:

“Lesbian, bisexual and transgender women, and intersex persons

33. The Committee notes with concern the intersecting forms of discrimination faced by lesbian, bisexual and transgender women and intersex persons, including the following:

- (a) The prevalence, in all areas covered by the Convention, of discriminatory practices that disadvantage lesbian, bisexual and transgender women and intersex persons, including social exclusion and acts of hate speech and abuse;*
- (b) The lack of policy measures pertaining to the rights of lesbian, bisexual and transgender women and intersex persons (CEDAW/C/MUS/8, para. 36);*
- (c) The underreporting of acts of violence and of physical, verbal and emotional abuse against lesbian, bisexual and transgender women and intersex persons.*

34. The Committee recommends that the State party:

- (a) Adopt the legislative and policy measures necessary to combat discrimination and violence against lesbian, bisexual and transgender women and intersex persons, including hate speech and physical, verbal, and emotional abuse;*
- (b) Promote the protection of the rights of lesbian, bisexual and transgender women and intersex persons, in all areas covered by the Convention, including in employment and health, and conduct awareness-raising activities to address their stigmatization in society;*

²⁴⁵ CCPR/C/MUS/CO/5 - Human Rights Committee, Concluding observations on the fifth periodic report of Mauritius., 11.12.2017

- (c) Ensure that law enforcement mechanisms efficiently protect the rights of lesbian, bisexual and transgender women and intersex persons;*
- (d) Provide access to shelter and assistance for lesbian, bisexual, and transgender women and intersex persons who are victims of violence;*
- (e) Provide training to medical personnel, the police, and law enforcement officials in this regard.”²⁴⁶*

4. 2018: The Universal Periodic Review (3rd cycle for Mauritius)

The Working Group on the Universal Periodic Review, established following Human Rights Council resolution 5/1, held its thirty-first session from 5 to 16 November 2018. The review of Mauritius was held at the 6th meeting, on 7 November 2018 and 24% of the recommendations made to Mauritius were on gender equality²⁴⁷. The State of Montenegro called on the Government of Mauritius to consolidate its legislation covering the rights of children and to ensure that lesbian, gay, bisexual, and transgender persons were protected from all forms of discrimination based on sexual orientation and gender identity. Belgium expressed its concern about violence and discrimination against women and a lack of respect for the rights of lesbian, gay, bisexual, transgender and intersex persons. Chile also stated that it was concerned about the stigmatization of the lesbian, gay, bisexual, transgender and intersex community in Mauritius.

The following recommendations in relation to gender identity were also made:

- Adopt comprehensive legislation to prevent and combat discrimination against all marginalized groups on any grounds, including gender and sexual orientation, which includes positive actions for their advancement (Honduras);
- Step up its efforts to combat all forms of discrimination, in particular against women and persons with disabilities, and discrimination based on sexual orientation and gender identity (Italy);

²⁴⁶ CEDAW/C/MUS/CO/8 – Committee on the Elimination of Discrimination Against Women, Concluding observations on the fifth periodic report of Mauritius., 14.11.2018

²⁴⁷ A/HRC/40/9 – General Assembly, Human rights Council, Concluding observations on the fifth periodic report of Mauritius., 27.12.2018

- Continue to combat discriminatory practices based on sex, and strengthen measures related to the protection of the family and the child (Algeria);
- Explicitly prohibit discrimination on the grounds of sexual orientation and gender identity and develop awareness campaigns and training programs to raise awareness about the rights of lesbian, gay, bisexual, and transgender persons (Uruguay);
- Take the necessary measures to establish in its national legislation a comprehensive legal framework for adequate and effective protection against discrimination based on sexual orientation (Argentina);
- Ensure better recognition of the rights of lesbian, gay, bisexual, transgender, and intersex persons and combat discrimination against them (France);
- Take measures to combat violence based on sexual orientation and gender identity, by guaranteeing freedom of speech and association for lesbian, gay, bisexual, transgender, and intersex persons (Brazil);
- Modify section 282 of the Criminal Code by inserting a direct indication that hate crimes motivated by sexual orientation or gender identity will be an aggravating circumstance and punishable by law (Chile);
- Implement policies and programs to protect lesbian, gay, bisexual, transgender and intersex persons from violence and intimidation, for instance by developing training programs for police officers, or by including attacks against such persons under section 282 of the Criminal Code Act of 1838 (Netherlands);
- Repeal the sections of its Criminal Code that criminalise same-sex relationships between consenting adults and strengthen efforts to address inequality and discrimination based on sexual orientation and gender identity (Australia);
- Repeal all laws that criminalise persons based on their sexual orientation and gender identity (Iceland);

5. 2019: The Committee on Economic, Social and Cultural Rights

In 2019, the Economic and Social Council of the United Nations (Committee on Economic, Social and Cultural Rights) expressed its concern regarding the absence of any legal recognition of same-sex couples in Mauritius and urged the State of Mauritius to provide for a legal framework recognising same-sex unions:

“Lesbian, gay, bisexual, transgender and intersex persons

17. The Committee is concerned [...] about the limited protection of lesbian, gay, bisexual, transgender and intersex persons provided in anti-discrimination provisions, since gender identity is not included as a prohibited ground. It is further concerned about the absence of any legal recognition of same-sex couples, which may restrict the protection of same-sex partners upon separation or following the illness or death of a partner (arts. 2 (2) and 10).

18. The Committee urges the State party to make the necessary legislative changes with a view to repealing section 250 of the Criminal Code, fully protecting lesbian, gay, bisexual, transgender, and intersex persons from discrimination based on sexual orientation and gender identity, and providing for legal recognition of same-sex unions or partnerships.”²⁴⁸

It is here to be noted that in 2024, in accordance with Articles 16 and 17 of the ICESCR, the Republic of Mauritius submitted its Sixth Periodic Report to inform the Committee on Economic, Social and Cultural Rights about the progress made in respect of implementation of the covenant following the concluding observations made in 2019. With regard to LGBTQIA+ issues, Mauritius underlined the only progress made as follows:

“Prohibition of discrimination on the ground of sexual orientation now has acquired constitutional protection following the judgement of the Supreme Court on October 4, 2023, declaring that section 250(1) of the Criminal Code is unconstitutional and in breach of section 16 of the Constitution in so far as it applies to consensual acts of sodomy between consenting males in private.”²⁴⁹

However, the report failed to specify that decriminalisation was not the result of a legislative act on the part of the State, but rather a judicial determination, and that no legal framework exists in Mauritius for the recognition of same-sex unions.

²⁴⁸ E/C.12/MUS/CO5 – Economic and Social Council, Committee on Economic, Social and Cultural Rights, Concluding observations on the fifth periodic report of Mauritius., 05.04.2019

²⁴⁹ Sixth periodic report submitted by Mauritius under articles 16 and 17 of the Covenant., Committee on Economic Social and Cultural Rights, 25 June 2024, E/C.12/MUS/6

6. 2023: Issues of concern addressed to Mauritius by the CEDAW Committee

In November 2023, the United Nations Committee on the Elimination of Discrimination against Women drew up a list of issues and questions for Mauritius concerning the human rights violations faced by ‘disadvantaged groups of women’ in Mauritius, which include lesbian, bisexual, transgender and intersex women, considered as in Mauritius:

“In view of the intersecting forms of discrimination faced by disadvantaged groups of women, please provide information on the situation of [...] lesbian, bisexual, transgender and intersex women; [...]. Please also indicate the measures taken to ensure that women belonging to disadvantaged groups have access to health-care services, social benefits, education and participation in political and public life. Please provide information on measures taken to adopt an adequate legal and policy framework to guarantee the security and protection of refugee and asylum-seeking women, and on measures taken to increase the access of refugee and asylum-seeking women and girls to basic services and ensure that they are not subjected to gender-based violence and sexual and labour exploitation [...].”²⁵⁰

7. 2023: Opinion of the UN Human rights Expert following the judgments of the Supreme Court of Mauritius

The 2023 judgments delivered by the Supreme Court of Mauritius which decriminalised same-sex activities between adult males²⁵¹ were highly appraised by the UN Human Rights Expert on protection against violence and discrimination based on sexual orientation and gender identity Victor Madrigal-Borloz. He stated being “*profoundly encouraged by the Supreme Court’s findings, which evoke the principle of equality and the imperative of respecting all the elements that create a person’s identity and their experience*”. He also underlined that the “*ruling tells gay, lesbian and bisexual, trans and other gender-diverse people living in Mauritius that they are in a country in which their dignity is valued and protected under the rule of law*” and that “*criminalising homosexuality and other forms of sexual and gender*

²⁵⁰ “List of issues and questions prior to the submission of the ninth periodic report of Mauritius” – Cedaw Committee, CEDAW/C/MUS/QPR/9 - <https://docs.un.org/en/CEDAW/C/MUS/QPR/9>

²⁵¹ Ah-Seek v. State of Mauritius [2023 SCJ 399] and Fokeerbux v. State of Mauritius [2023 SCJ 400]

diversity is at the origin of much violence, discrimination and social exclusion. It also violates international human rights law”²⁵².

8. 2024: The Universal Periodic Review (4th cycle for Mauritius)

The Working Group on the Universal Periodic Review for Mauritius, held its forty-fifth session from 22 January to 02 February 2024 and its report finalised in March 2024²⁵³. The review of Mauritius was held at the 5th meeting, on 24 January 2024. Prior to the review process, Mauritius submitted its Fourth Cycle Universal Periodic Review (UPR) National Report, setting forth the progress achieved with respect to the recommendations accepted by Mauritius following the third UPR cycle. The report contained no reference to the rights of LGBTQIA+ persons, thereby confirming the posture of the Republic of Mauritius of seeking to render sexual minorities invisible within its territory, as well as the absence of institutional will to bring an end to the discrimination to which they are subjected.

However, many States, such as France, Finland, Italy and the United States applauded the Supreme Court’s decision decriminalising same-sex conduct between consensual adults. They nevertheless expressed their concern regarding human rights violations faced by sexual minorities in Mauritius on the basis of their sexual orientation or gender identity. The Kingdom of the Netherlands for example, praised Mauritius for decriminalising same-sex relations and expressed its concern about the protection of human rights defenders and the guarantee of freedom of expression online and offline.

The following recommendations in relation to gender identity, and more generally, to LGBTQIA+ rights were also made:

- Advance in the protection of the rights of LGTBI people through public policies and awareness-raising programs for public employees (Spain);
- Ensure the full protection of LGBTQIA+ community against discrimination (Chile)

²⁵² “Supreme Court ruling tells LGBTQ people in Mauritius that their dignity is valued: UN expert” – 13.10.2023 - <https://www.ohchr.org/en/press-releases/2023/10/supreme-court-ruling-tells-lgbtq-people-mauritius-their-dignity-valued-un>

²⁵³ United Nations General Assembly, Human Rights Council, Report of the Working Group on the Universal Periodic Review, 26 March 2024 – A/HRC/56/8

- Adopt the legislative and policy measures necessary to combat discrimination and violence against persons of diverse sexual orientations, gender identity, gender expressions and sex characteristics (Iceland);
- Advance the adoption of the legislative and regulatory measures necessary to combat discrimination and violence against people based on their sexual orientation or gender identity (Uruguay);
- Investigate all complaints of violence and hate speech against persons of diverse sexual orientation, gender identity, gender expression and sex characteristics and bring perpetrators to account (Iceland);
- Continue efforts to protect the queer community by following the important steps made in October 2023 to combat discrimination against LGBTIQ+ persons (Austria);
- Revise the Equal Opportunities Act, with a view to ensuring the prohibition of all direct, indirect and intersectional forms of discrimination, on any ground, including gender identity, social origin or property (Romania).

The above recommendations were all noted by Mauritius but not implemented.

The advanced questions on gender issues addressed to Mauritius were as follows:

- How does the Government of Mauritius plan to put an end to discrimination and harassment based on sexual orientation and gender identity? (Belgium);
- What measures are Mauritius taking to implement the recommendations addressed to it by the Committee on the Elimination of Discrimination Against Women? (Canada);
- Has the State-under-review established a dedicated ‘national mechanism for implementation, reporting and follow-up’ (NMIRF) covering UPR recommendations, but also recommendations/observations generated by the UN human rights Treaty Bodies, the Special Procedures and relevant regional mechanisms, which, inter alia, clusters all the above, manages them in national databases, coordinates implementation actions across government, monitors progress and impact, and then streamline reporting procedures back to the UN? If so, could the State-under-review briefly share its experience on creating such mechanism, including challenges faced and lessons learnt, as well as any plans or needs to strengthen the NMIRF in the future? (Portugal);

- What concrete measures is the government of Mauritius taking to fight against the social stigma of rape and to ensure an effective implementation of the National Strategy and Action Plan on the Elimination of Gender-Based Violence? (Spain);
- Following the Supreme Court decision in October [2023], what further steps will Mauritius take to safeguard and promote the rights of the LGBT+ community and other marginalised groups in Mauritius? (The United Kingdom).

The report highlights that only answer given by Mauritius regarding the concerns on LGBTQIA+ issues which had been expressed since years at the level of the United Nations by different parties was that discrimination on the ground of sexual orientation became unconstitutional following the judgment of the Supreme Court, in which it had held that section 250 (1) of the Criminal Code was in breach of section 16 of the Constitution, insofar as it applied to consensual acts between consenting males in private, and interpreted the word “sex” in section 16 of the Constitution as also including “sexual orientation”.

9. 2025: Report of the UN Special Rapporteur on the right to privacy, Ana Brian Nougères

The Special Rapporteur on the right to privacy, Ana Brian Nougères, carried out a visit to Mauritius from 27 November to 4 December 2023. In her report²⁵⁴, she identified significant deficiencies in Mauritius with regard to the protection of the right to privacy as it pertains to LGBTI persons. She urged the Government *“to follow up on the landmark decision of the Mauritius Supreme Court of 4 October 2023, which ruled that it was unconstitutional to criminalize the private and intimate life of LGBTQI+ people **by advancing and adopting legislative and regulatory measures to fully protect their privacy rights and combat discrimination against people based on their sexual orientation or gender identity**”*²⁵⁵ and called *“to repeal all laws criminalizing or otherwise discriminating against individuals on the basis of their sexual orientation, gender identity or intersex status and to adopt laws prohibiting discrimination on those grounds”*²⁵⁶.

²⁵⁴ “Report of the Special Rapporteur on the right to privacy, Ana Brian Nougères” – Human Rights Council, 24 Feb.- 4 Apr. 2025 - <https://docs.un.org/en/A/HRC/58/58/Add.1>

²⁵⁵ P. 18, para 107

²⁵⁶ P. 19, para 120

B. Recommendations and observations made by international non-governmental organisations

1. The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA)

ILGA is an international organisation committed since 1978 to equal human rights for members of the LGBT community and their liberation from all forms of discrimination. In 2018, during the United Periodic Review of Mauritius, ILGA made the following observations towards the representatives of the Republic of Mauritius:

« 579. The International Lesbian and Gay Association noted that Mauritius received 14 recommendations, three advanced questions, and four remarks on sexual orientation and gender identity [...]. Despite the positive advancements, the Government noted all the recommendations related to these issues, including those on hate crimes and hate speech targeting LGBT people. A lack of legal protection towards hate crimes and hate speech violated LGBT people's rights, prevented law enforcement institutions to act towards homophobia and transphobia, and encouraged perpetrators of hate crimes to go unpunished. It emphasised that the religion and cultural sensitivities had been made into colourable devices to deny LGBT people of their human rights instead of evidenced-based, rational, human and inclusive decision and policymaking. It called upon Mauritius to effectively protect the rights of LGBT persons. »²⁵⁷

In March 2019, ILGA made a statement in which it expressed its concern about the dramatic situation prevailing in Mauritius and the unpunished acts of persecution against members of the LGBT community in Mauritius. ILGA further emphasised on the situation of Mauritians who are compelled to seek asylum abroad due to persecution faced in Mauritius based on sexual orientation to enjoy their fundamental human rights.

“Lack of legal protection for LGBT people towards hate crimes and hate speech violates the human rights of LGBT people; prevents law enforcement institutions to act towards homophobia and transphobia; and, encourages perpetrators of hate – including homophobic death threats – to go unpunished as in the case of the anti-LGBT protest of 2017 and 2018. As

²⁵⁷ A/HRC/40/2 - Report of the Human Rights Council on its fortieth session., Human Rights Council, 03.06.2019. - <https://www.ohchr.org/EN/HRBodies/UPR/Pages/MUIIndex.aspx>

recent as on the 3rd December 2018, the UK approved the asylum status of a Mauritian based on their sexual orientation due to life-threatening homophobia in Mauritius.

Religion and cultural sensitivities have been made into colourable devices to deny LGBT people of their human rights instead of evidenced-based, rational, human and inclusive decision and policy making. Moreover, State support to CSOs in addressing homophobia and providing support to LGBT people through the National Corporate Social Responsibility (NCSR) is not meaningful if symbolic.

The reply of Mauritius to UPR recommendations on LGBTI, sexual orientation and gender identity creates dire apprehension among the LGBT people of Mauritius. We call upon Mauritius to effectively protect the rights of LGBT persons and we stand ready to work with the Government.”²⁵⁸

2. The Human Dignity Trust (HDT)

The HDT is an international organisation working globally to support strategic litigation to challenge laws that persecute people based on their sexual orientation, namely laws that criminalise consensual same-sex conduct between adults. HDT expressed its concern on the various episodes of persecution and discrimination which took place in Mauritius against citizens of the LGBT community, and which were left unpunished²⁵⁹.

3. Avocats Sans Frontières France (‘ASF’ or ‘ASFF’)

ASF is an international organisation that consists mostly of practicing lawyers and other law professionals in various jurisdictions specialised in the defense of human rights throughout the world. In 2020, after a series of asylum status claimed and obtained by Mauritian citizens in European states based on sexual orientation and gender identity, the French branch of ASF came forward with a detailed legal analysis on the persecutions and degrading treatments faced

²⁵⁸ <https://youngqueeralliance.com/2019/03/15/40th-un-human-rights-council-session-statement-concerning-lgbt-rights-in-mauritius/>

²⁵⁹ <https://www.humandignitytrust.org/country-profile/mauritius/>

by members of the LGBT community in Mauritius, and more generally, on the violations of their fundamental human rights and freedoms in Mauritius. The report was authored by French and Mauritian barristers and prefaced by a former French Court of Appeal Judge.

The report emphasised on the alarming situation of members of the LGBT community in Mauritius who are increasingly and successfully being compelled to seek asylum abroad to flee the acts of torture, persecutions and degrading and humiliating treatments they face in Mauritius, highlighting the fact that the authors are mostly left unprosecuted and unpunished.²⁶⁰

The report also referred to the landmark judgment of **Rodriguez v. Minister of Housing (Gibraltar)**²⁶¹ delivered by the Judicial Committee of the Privy Council, where the Law Lords had acknowledged that the provisions of the Constitution of Gibraltar did not enjoy the clarity and simplicity of the equivalent provisions of the ECHR but that, however, since the United Kingdom had extended the protection of the ECHR to Gibraltar by declaration of 23 October 1953, it “*would be surprising if Gibraltarians were to enjoy a lesser level of protection for their fundamental human rights under their Constitution than they do under the ECHR*”. It shall here be noted that the protection of the ECHR was also extended to Mauritius by the same declaration of 23 October 1953.

The 2020 report called for the respect of the fundamental human rights of the LGBTI community in Mauritius and recommended the end of different forms of persecution, inhuman and degrading treatment against the LGBTI community in Mauritius. In 2022 and 2025, ASF carried out a country-visit in Mauritius²⁶² to analyse the situation after the 2020 report. The representatives of ASF met various stakeholders in Mauritius, namely State representatives such as the Attorney General, the Law Reform Commission, the Institute for Judicial and Legal Studies, the Director of Public Prosecutions, the National Human Rights Commission, the Ombudsperson for Children, representatives of the judiciary and of the legal profession, as well as various NGOs. In December 2024, through a press release, ASF regretted that no legislative advancement had occurred since 2022 regarding LGBTQ+ rights in Mauritius despite the 2023 judgment delivered by the Supreme Court of Mauritius:

²⁶⁰ <https://youngqueeralliance.com/wp-content/uploads/2020/12/2020.12.15-Demandeurs-dasile-LGBTI-de-Ille-Maurice.pdf>

²⁶¹ *Rodriguez v. Minister of Housing of the Government* – [2009] UKPC 52

²⁶² <https://lexpress.mu/s/article/408446/isabelle-schoenacker-rossi-surprise-que-mauriciens-demandent-droit-dasile-en-france>

“ASFF welcomes the exemplary rulings handed down by the Supreme Court of Mauritius in October 2023, which held that Section 250 of the Mauritius Penal Code was unconstitutional insofar as it punishes sexual practices between consenting adult males. The Supreme Court emphasised that Mauritius has ratified international conventions and that local laws must be interpreted as far as possible in line with these international conventions. It pointed out that Mauritius is a secular State and that this law did not reflect the will of the Mauritian legislature but was a vestige inherited from the British colonial period. Finally, the Supreme Court of Mauritius has affirmed that protection against discrimination based on sexual orientation also enjoys constitutional protection.

However, ASFF deplores the fact that no legislative progress has been made despite these rulings and despite the assurance given by the Attorney General in office in 2022. As a result, many LGBTQIA+ Mauritians, including many trans people, continue to face persecution in Mauritius and are forced to seek asylum abroad.”²⁶³

²⁶³ <https://www.avocatssansfrontieres-france.org/en/actualites/579/>

GENERAL CONCLUSION

The comparative analysis of the rights pertaining to same-sex unions in Mauritius and some relevant foreign jurisdictions reveals persistent legal challenges within Mauritius, where no legal framework whatsoever exists for the explicit recognition of same-sex couples or which expressly prohibits the recognition of same-sex unions. Jurisdictions which have attained legal recognition of same-sex unions have demonstrated that such an evolution not only affirms the dignity of same-sex couples but also constitutes the necessary culmination of protection against discrimination on the grounds of sexual orientation. Indeed, effective protection against discrimination based on sexual orientation cannot be achieved where members of a same-sex couple are precluded from obtaining legal recognition of their union, in contrast to their opposite-sex counterparts.

In Mauritius, where same-sex couples are currently being precluded from obtaining legal recognition of their union and the attendant benefits, the latter face profound vulnerabilities, including violence, marginalisation, and exclusion from essential services. These impediments not only infringe upon the fundamental human rights of same-sex couples but also perpetuate cycles of inequality, exclusion, and discrimination on the ground of sexual orientation.

The study underscores the critical role of domestic and international human rights norms, as well as advocacy, in advancing equitable legal standards for same-sex couples. Domestic legal instruments, including the Constitution of Mauritius and the *Code Civil Mauricien*, together with regional and international treaties ratified by Mauritius - such as the African Charter on Human and Peoples' Rights (ACHPR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) - provide valuable normative guidance. However, their effective implementation necessitates concerted efforts by the State, civil society, and international organisations to address the numerous barriers and obstacles confronting the recognition of same-sex unions in Mauritius.

One of the main obstacles in Mauritius remains violence and intolerance against the LGBTI persons in the name of religion. This is a common hurdle prevailing in many other countries as well, as outlined by Heiner Bielefeldt, Special Rapporteur on Freedom of Religion or Belief, in his 2014 report addressed to the Human Rights Council of the United Nations:

*“Furthermore, homophobic and transphobic violence against lesbian, gay, bisexual and transgender (LGBT) persons may also be perpetrated in the name of religion [...]. The Human Rights Committee has noted with concern hate speech and manifestations of intolerance and prejudice by religious leaders against individuals on the basis of their sexual orientation, in a broader context of acts of violence, including killings of LGBT persons. There have also been reports of direct violence exercised by religious authorities against LGBT persons [...].”*²⁶⁴

In 2017, the Special Rapporteur on Freedom of Religion and Belief explained that the right to freedom of religion does not give an individual the power to marginalise or carry out violent acts against other individuals:

*“It is also clear that the right to freedom of religion or belief does not give the individual - as a rights holder - the power to marginalize, suppress or carry out violent acts against other individuals. As stated in article 5 (1) of the Covenant, no State, group or person has the right “to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized” in the Covenant. This is especially applicable with regard to individuals in vulnerable situations, such as women and lesbian, gay, bisexual, transgender or intersex persons, under the guise of manifesting their religion or protecting the ‘moral high ground’.”*²⁶⁵

In 2018, the Special Rapporteur noted with concern *“the increasing trend by some States, groups and individuals, to invoke “religious liberty” concerns in order to justify differential treatment against particular individuals or groups, including women and members of the lesbian, gay, bisexual, transgender and intersex community. This trend is most often seen within the context of conscientious objection, including of government officials, regarding the provision of certain goods or services to members of the public”*. He further stressed that *“States must satisfy a range of obligations, including to adopt measures that guarantee structural equality and to fully realize freedom of religion or belief” and echoed the importance of “adopting a model for the relationship between State and religion that is in harmony with the concept of “respectful distancing” - i.e. political and legal, but not social, disentanglement from religion - which rests on a deep grounding of secularity based on human rights.”*

²⁶⁴ The Special Rapporteur’s report to the Human Rights Council in 2014 - <https://undocs.org/A/HRC/28/66>

²⁶⁵ The Special Rapporteur’s report to the General Assembly in 2017 - <https://undocs.org/A/72/365>

According to him, such a model ensures *“that the State does not resort to religious exclusivity or bias in culture, identity, schooling, or even symbolism for short-term ends and for vested interests but will continually strive to create spaces of inclusiveness for all as an active and ongoing endeavour”*²⁶⁶.

In his 2023 report²⁶⁷, the Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity explained that *“As an unfixed paradigm, religion does not have essential inbuilt positions, and it would make no sense to position it as inherently or predominantly pro- or anti-LGBT. And yet religion and the human rights of LGBT persons are often placed in antagonistic positions in social and political discourse, feeding the contention that there is an inherent conflict between [Freedom of religion and belief] and the human rights of LGBT individuals, a fabricated narrative that undermines the ideal of peaceful human coexistence.”*

He continued as follows:

“That all persons should live free from violence and discrimination based on their sexual orientation and/or gender identity is not an idea from a particular part of the world: it is an international standard. The State obligation to adopt measures to eradicate such violence and discrimination continues nevertheless to face opposition.”

Another major global obstacle identified by the Independent Expert in 2015, and probably, the most significant one in Mauritius, is lack of awareness and training on the issue of discrimination against sexual minorities. He recalled that United Nations mechanisms have *“called upon States to develop education campaigns and train public officials to combat stigma and discriminatory attitudes, to provide victims of discrimination with effective and appropriate remedies, and to ensure that perpetrators face administrative, civil or criminal responsibility, as appropriate.”*²⁶⁸

²⁶⁶ The Special Rapporteur’s report to the Human Rights Council in 2018 - <https://undocs.org/A/HRC/37/49>

²⁶⁷ Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity, 2023 report, A/HRC/53/27

²⁶⁸ Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity, 2015 report, A/HRC/29/23

As explained in this comparative analysis, a proper interpretation of the provisions of the *Code Civil Mauricien* and the Civil Status Act in line with a good knowledge of the rights embodied in the Constitution of Mauritius and the international instruments to which Mauritius has adhered shall result in the legal recognition of same-sex unions. Training must therefore be provided to law enforcement officials, as recommended to Mauritius by the different organs of the United Nations, so that the relevant laws are properly applied when it comes to the rights of people engaged in a stable and committed same-sex relationship. A constitutional human rights approach is urgently required.

The persuasive authorities delivered by foreign jurisdictions possessing legislative frameworks comparable, if not identical, to that of Mauritius demonstrate that precluding individuals in same-sex unions from obtaining legal recognition of their relationship and denying them access to benefits equivalent to those afforded by marriage amounts to discrimination on the ground of sexual orientation, which is prohibited by the Constitution of Mauritius and by the international human rights instruments to which Mauritius has acceded, including the ICCPR, the ICESCR and the ACHPR. The prevailing situation in Mauritius, which perpetuates stigma and discrimination against individuals whose same-sex unions remain unrecognised and therefore unprotected by law, further legitimises their emigration towards jurisdictions where such unions are recognised.

In the light of all the above, it seems urgent to address the issue of the legal recognition of same-sex unions in Mauritius, namely from a constitutional perspective. In its closing statement²⁶⁹ of the 2018 UPR session, the Government of Mauritius had affirmed before the United Nations, that its priorities would include the protection of the rights of the LBGT community. It is regrettable that the Mauritian Government has failed to honour its own commitments, particularly with respect to the legal recognition of same-sex unions. Instead, public bodies such as the Economic Development Board (EDB) and the Civil Status Office have instituted rules that operate in direct contravention of such commitments and further entrench discrimination on the grounds of sexual orientation. In order to fully achieve non-discrimination on the basis of sexual orientation, it is urgent for the Mauritian government to address the concerns raised by the by the different committees of the United Nations and implement their recommendations.

²⁶⁹<https://humanrights.govmu.org/Documents/Convention%20Corner/UPR/Statements/Closing%20Statement.pdf>

In 2017 for instance, the Human Rights Committee of the United Nations in 2017 stated as follows:

“The Committee is also concerned that lesbian, gay, bisexual and transgender persons are not authorized to officially enter marriage or civil partnerships and are denied other rights relating to personal status. [...]”

10. The State party should firmly prevent, and protect lesbian, gay, bisexual and transgender persons from, all forms of discrimination based on sexual orientation and gender identity and include this as grounds of discrimination in all relevant legislation, including in the Criminal Code. The State party should also take all the necessary measures to eradicate discrimination against lesbian, gay, bisexual and transgender persons with regard to marriage or civil partnerships [...]. Furthermore, the State party should ensure that all complaints of violence, including death threats and brutality, owing to discrimination against lesbian, gay, bisexual and transgender persons are registered by the police and investigated, and that those responsible are duly prosecuted and, if convicted, sanctioned with appropriate penalties. Moreover, the State party should train police officers, judges and prosecutors and conduct awareness-raising campaigns for the general public on the rights of lesbian, gay, bisexual and transgender persons”²⁷⁰.

In 2019, the Committee on Economic, Social and Cultural Rights urged the State of Mauritius to provide for a legal framework recognising same-sex unions:

“Lesbian, gay, bisexual, transgender and intersex persons

17. The Committee is concerned [...] about the limited protection of lesbian, gay, bisexual, transgender and intersex persons provided in anti-discrimination provisions, since gender identity is not included as a prohibited ground. It is further concerned about the absence of any legal recognition of same-sex couples, which may restrict the protection of same-sex partners upon separation or following the illness or death of a partner (arts. 2 (2) and 10).

18. The Committee urges the State party to make the necessary legislative changes with a view to repealing section 250 of the Criminal Code, fully protecting lesbian, gay, bisexual,

²⁷⁰ CCPR/C/MUS/CO/5 - Human Rights Committee, Concluding observations on the fifth periodic report of Mauritius., 11.12.2017

transgender, and intersex persons from discrimination based on sexual orientation and gender identity, and providing for legal recognition of same-sex unions or partnerships”²⁷¹.

* * *

The questions that this Study sought to address appear to find their resolution in the comparative legal analysis undertaken between Mauritian law and persuasive foreign authorities. The answers can be summarised as follows (the third question being in two limbs):

1. Is the legal definition of marriage in Mauritius explicitly restricted to a union between a man and a woman?

Answer: **No.**

Reason: The relevant law section is written in a gender-neutral, stand-alone and non-discriminatory language.

2. Does Mauritian law prohibit same-sex marriage?

Answer: **No.**

Reason: The statutory framework governing prohibited marriages is both express and exhaustive; the impediments to marriage set forth therein do not extend to marriages between persons of the same sex.

3. Can same-sex unions benefit from a legal recognition under the prevailing legal framework?

Answer: **Yes.**

Reason: Discrimination on the ground of sexual orientation is prohibited under the Constitution of Mauritius which is the Supreme law of the land. In the context of local civil marriage, its celebration is a service rendered by the State via the Civil Status Office under the Civil Status Act. The Equal Opportunities Act provides that discrimination on the basis of sexual orientation in the provision of a service is prohibited. Therefore, the Civil Status Office which enables heterosexual couples to declare their public commitment to each other and achieve the status, entitlements and responsibilities that flow from marriage, but prohibits same-sex couples to achieve the

²⁷¹ E/C.12/MUS/CO5 – Economic and Social Council, Committee on Economic, Social and Cultural Rights, Concluding observations on the fifth periodic report of Mauritius., 05.04.2019

same, discriminate unfairly against them on the basis of sexual orientation, which is a prohibited ground of discrimination under the Constitution of Mauritius and the Equal Opportunities Act, without any legitimate aim or serious reason, especially when Mauritian law does not provide for any other form of legally recognised union accessible to same-sex unions.

a. Can same-sex unions solemnised abroad benefit from a legal recognition in Mauritius?

Answer: **Yes**

Reason: When it comes to the recognition of a same-sex marriage solemnised abroad, there are no grounds to assume that the transcription of such a marriage poses a threat to the public order or the fundamental principles of the legal order of the Republic of Mauritius especially when discrimination on the ground of sexual orientation is prohibited by the Constitution of Mauritius and by international conventions ratified by the State of Mauritius. Furthermore, in foreign jurisdictions such as India²⁷² and Poland which do not yet provide for any form of legal recognition to same-sex unions, the courts have heavily underlined that same-sex marriage celebrated abroad are nevertheless valid and recognised. In Poland for instance, it is reported that the Court held as follows:

*“In the opinion of the Court, there are no grounds to assume that the transcription of a marriage certificate of persons of the same sex poses a threat to the fundamental principles of the legal order of the Republic of Poland”*²⁷³.

A parallel may be drawn in this respect with the issue of divorce by mutual consent performed before a notary, a procedure not provided for under Mauritian law. The Supreme Court of Mauritius has ruled that, where such a divorce is effected in a foreign State that permits this practice, it shall nonetheless be recognised in Mauritius, as it does not contravene public policy²⁷⁴.

²⁷² Supriyo & Anr v. Union of India – 17.12.2023 - WP (Civil) no. 1011 of 2022

²⁷³ “Poland to recognize same-sex marriages from EU states” - Farid Zuchrinata., <https://www.dw.com/en/poland-to-recognize-same-sex-marriages-from-eu-states/a-76456952#:~:text=Same%2Dsex%20marriages%20performed%20in%20other%20EU%20countries%20will%20now,married%20in%20Germany%20in%202018.>

²⁷⁴ Lacaze v. Lacaze- 2022 SCJ 52

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