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Beyond *Lex Specialis*: Rethinking Constitutional Conflicts in *Sham Tsz Kit v Secretary for Justice*

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Abstract

On September 5, 2023, Hong Kong's Court of Final Appeal ruled in *Sham Tsz Kit v Secretary for Justice* that the legislature must create an alternative legal framework within two years to allow same-sex couples to manage their civil affairs. However, the court declined to recognise same-sex marriage, unanimously holding that the gendered marriage provisions in the constitutional documents, as a *lex specialis*, override broader guarantees of privacy and equality. While *lex specialis* is traditionally used to resolve normative conflicts, its application in human rights contexts remains contested. This article argues that the court's reliance on *lex specialis* is theoretically flawed and inconsistent with international human rights jurisprudence. Instead, a proportionality test should be adopted to adjudicate conflicts between constitutional rights. Through a close reading of *Sham*, this article contributes to broader debates on constitutional interpretation and LGBTQ+ rights in Hong Kong.

Keywords

Lex Specialis – LGBTQ+ Rights – Proportionality Test – Constitutional Rights Conflict – Hong Kong Court of Final Appeal

1. Introduction

Over the past decade, several jurisdictions across the Asia-Pacific region have made significant strides toward marriage equality.¹ Hong Kong—notwithstanding increasing social acceptance of LGBTQ individuals and even marriage equality itself—has lagged behind.² Beyond commonly cited concerns grounded in social and cultural conservatism or appeals to ‘traditional values,’³ the difficulty in constitutionalising marriage equality is also embedded in textual constraints within Hong Kong's constitutional framework. In particular, article 19(2) of the Hong Kong Bill of Rights Ordinance (HKBOR) (Cap 383) frames the right to marry in

¹ In the past decade, four Asia-Pacific jurisdictions—Australia, Taiwan, Nepal, and Thailand—legalised same-sex marriage. See Pew Research Center, ‘Same-Sex Marriage Around the World’ (*Pew Research Center*, 2 June 2025), <<https://www.pewresearch.org/religion/fact-sheet/same-sex-marriage-around-the-world>> accessed 3 February 2026.

² Holning Lau, Kelley Loper and Yiu Ting Suen, ‘Support in Hong Kong for same-sex couples’ rights grew over ten years (2013–2023): 60 percent now support same-sex marriage’ (2023) University of Hong Kong Faculty of Law Research Paper 2023/43, UNC Legal Studies Research Paper 4452861, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4452861> accessed 3 February 2026.

³ Marco Wan, ‘The invention of tradition: Same-sex marriage and its discontents in Hong Kong’ (2020) 18 ICON 539.

explicitly gendered terms.⁴ When read alongside the otherwise gender-neutral formulation in article 37 of the Basic Law (BL),⁵ article 19(2) of the HKBOR introduces a structural impediment to claims for same-sex marriage.

Nevertheless, Hong Kong courts have in recent years extended some measures of protection to same-sex couples through a series of piecemeal judgements.⁶ Without altering the statutory or constitutional definition of marriage, the courts have relied on principles of equality and non-discrimination to invalidate policies which imposed disadvantages on same-sex couples in specific policy-related contexts, including immigration, local spousal benefits, and taxation.

It was not until *MK v Government of the HKSAR*⁷ that the constitutional exclusion of same-sex couples from marriage was directly tested. Unlike earlier cases, which targeted administrative policies or ancillary benefits, the plaintiff known as MK mounted a frontal challenge to the Marriage Ordinance (Cap 181). The Court of First Instance (CFI) rejected the claim, holding that article 37 of the BL and article 19 of the HKBOR together constitute a *lex specialis* regarding marriage rights, thereby displacing more general constitutional guarantees of equality and non-discrimination as a basis to infer marriage equality.

Then came *Sham Tsz Kit v Secretary for Justice*⁸, which proceeded all the way to the Court of Final Appeal (CFA). The CFA delivered a mixed judgement. While directing the legislature to establish an alternative legal framework for same-sex couples, the court unanimously rejected claims seeking either a constitutional right to same-sex marriage or the recognition of foreign same-sex marriages. In doing so, the CFA relied on the same *lex specialis* principle adopted in *MK*. Although more elaborately reasoned, the CFA's analysis did not materially depart from the foundational logic established in *MK*, treating the marriage provisions as dispositive and precluding further scrutiny under general equality or right to privacy clauses.

The reliance on *lex specialis* in *Sham* is noteworthy because the doctrine itself has been the subject of sustained controversy in international legal scholarship, particularly in the context of conflicts between International Humanitarian Law (IHL) and International Human Rights Law (IHRL).⁹ In that setting, legal scholars have long questioned whether *lex specialis* can legitimately operate as a conclusory device which allows one body of law to displace another without substantive justification. The doctrine's conceptual ambiguity, along with its potential to undermine the normative force of fundamental rights, has led to increasing scepticism toward its use as a primary interpretive tool.

These critiques are directly relevant to the CFA's reasoning in *Sham*. Drawing on the rich body of theoretical developments in international law, this article argues that the CFA's

⁴ Article 19(2) of the HKBOR reads, 'The right of men and women of marriageable age to marry and to found a family shall be recognized.'

⁵ Article 37 of the BL reads, 'The freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law.'

⁶ See *QT v Director of Immigration* [2018] HKCFA 28, which concerns the extension of dependent visas eligibility for same-sex partners; *Leung Chun Kwong v Secretary for the Civil Service* [2019] HKCFA 19, which concerns the extension of spousal employment benefits and joint tax assessment to same-sex couples married overseas.

⁷ [2019] HKCFI 2518.

⁸ [2023] HKCFA 28.

⁹ For a concise overview of the scholarly debates on the application of *lex specialis* in conflict between IHL and IHRL, see Cordula Droege, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 *Isr L Rev* 310; Marko Milanovic, 'Norm conflicts, international humanitarian law and human rights law' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (Oxford University Press 2011). A more detailed examination of the relevant scholarly debates will be undertaken in sections 2.3 and 2.4.

application of *lex specialis* to resolve normative conflicts within a domestic constitutional framework is doctrinally untenable. By treating marriage clauses as categorically immune from equality-based scrutiny, the CFA foreclosed meaningful constitutional engagement with discrimination claims and avoids addressing the underlying tension between competing rights. This article further contends that conflicts of this nature call for a substantive engagement with the normative conflicts in question rather than categorical displacement, and that the CFA's reliance on *lex specialis* represents a missed opportunity for more principled constitutional adjudication in Hong Kong.

2. *Sham Tsz Kit v Secretary for Justice and Lex Specialis*

2.1. *Sham overview*

The appellant Sham Tsz Kit, a Hong Kong permanent resident and a prominent pro-democracy and LGBTQ rights activist, entered into a same-sex marriage in New York in 2013. As his marriage was not legally recognised in Hong Kong, he sought a judicial review against the Hong Kong government, contending that the failure to acknowledge same-sex marriages infringes upon his constitutional rights. Following the dismissal of his initial appeal by the Court of Appeal (CA), Sham escalated the matter to the CFA, where he advanced three key propositions:

1. The equal protection provisions encapsulated in article 22 of the BL and article 22 of the HKBOR grant him a constitutional right to same-sex marriage;
2. Article 14 of the HKBOR (which protects the right to privacy), along with the above two clauses concerning the right to equality, requires, at the very least, some form of alternative legal framework other than same-sex marriage (such as civil partnerships, civil unions, and registered partnerships); and
3. The equal protection clauses necessitate a recognition of his foreign same-sex marriage.

Sham's legal arguments closely parallel those presented in *MK*, where the appellants employed a dual-tiered strategy, offering the court a choice between two alternatives: the recognition of same-sex marriages or the provision of civil partnerships. The only substantial difference between the two cases is that *Sham* relied on a much limited range of provisions from the BL and the HKBOR.

2.2 *The judgement*

On 5 September 2023, the CFA delivered a mixed judgement on *Sham*. The CFA, consisting of 5 judges, unanimously rejected the first and the third propositions which sought the constitutional right to same-sex marriage on the ground of equal protection provisions in the BL and the HKBOR, and *lex specialis* was invoked as the main basis of their judgement (to be expanded in the next section). However, the judges did not agree on the second claim concerning the right to privacy.

Given that this thesis does not concentrate on the right to privacy, I will provide a concise summary of this aspect of the judgement. The two main sources of contention regarding the second claim are: (1) whether an alternative legal framework—whether it is civil union or civil partnership—would constitute marriage ‘in all but name’;¹⁰ and (2) whether there is a positive obligation on the part of the government to protect citizens’ right to privacy against unlawful interferences.¹¹ Four of the five judges departed from the judgement of *MK*, on the basis that the the legislature’s inaction to set up any alternative legal framework by which same-sex couples can arrange their private life in Hong Kong constitutes a violation of same-

¹⁰ *Sham Tsz Kit* (n 8) [127], [148]–[151]

¹¹ *ibid* [136]–[146].

sex couples' right to privacy.¹² By a majority, the court thereby directed the Hong Kong Legislative Council to come up with an alternative legal framework within two years.¹³

2.3 *Lex specialis and its applications in human rights violations*

As written in the last section, the judges in both *MK* and *Sham* relied on the legal doctrine of *lex specialis*. This maxim derives from the Latin phrase '*lex specialis derogat legi generali*,' which refers to a legal principle of where there are two laws applicable to a particular issue, the law specially designed for that specific issue should prevail over more general laws.¹⁴ *Lex specialis*, frequently employed across various fields of law to resolve normative conflicts, has been the focus of increasing scholarly attention in recent decades, and much of this scholarship examines the (mis)application of this general principal in situations of armed conflict, where both IHL and IHRL could be applied. In this section, I will offer an overview of key legal debates surrounding this topic.

As multiple scholars suggest, the increasing attention to *lex specialis* is a result of the increased fragmentation of international law.¹⁵ More 'specialised and multi-levelled' regimes and legal systems have emerged from the constant development of specialised institutional frameworks and forms of co-operation.¹⁶ Without a single normative hierarchy or a centralised legislative body, these systems, each operating in its own normative environment, often lead to different and sometimes contrasting solutions in individual situations.¹⁷ When addressing such normative conflicts, especially where no higher norm can be referred to, courts may resort to various legal principles of interpretation, including *lex specialis*.¹⁸

Lex specialis as a 'common sense' maxim is but one of the means to facilitate the interpretative process by 'direct[ing] the attention of decision-makers to a more appropriate regulation'¹⁹. While generally accepted, some of its applications are controversial, particularly in resolving normative conflicts between IHL and IHRL which, despite their "substantive parallelism", have historically failed to complement each other in buttressing human rights.²⁰

The most prominent example of such contention is which of the two legal regimes should apply when deciding whether the loss of life in armed conflicts constitutes an arbitrary deprivation of life prohibited by article 6 of the ICCPR.²¹ First in the *Nuclear Weapons* Advisory Opinion and later in *The Wall* Advisory Opinion, the International Court of Justice (ICJ) determined that in armed conflicts, operates as the *lex specialis* and, while not derogating

¹² *ibid* [136]–[146], [257]–[258].

¹³ *ibid* [260(b)].

¹⁴ Silvia Borelli, 'The (Mis)-Use of General Principles of Law: *Lex Specialis* and the Relationship Between International Human Rights Law and the Laws of Armed Conflict' in Laura Pineschi (ed), *General Principles of Law - The Role of the Judiciary* (Springer 2015), 266.

¹⁵ Anja Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*' (2005) 74 *Nord J Intl L* 27, 29-30; Martti Koskenniemi and UN International Law Commission, *Study on the "Function and scope of the lex specialis rule and the question of 'self-contained regimes'"*

(ILC(LVI)/SG/FIL/CRD.1, 2004), 9-10; Martti Koskenniemi and UN International Law Commission, *Fragmentation of international law: difficulties arising from the diversification and expansion of international law* (A/CN.4/L.682, 2006), 30-64; Alexander Orakhelashvili, 'The interaction between human rights and humanitarian law: fragmentation, conflict, parallelism, or convergence?' (2008) 19.1 *European Journal of International Law* 161, 162

¹⁶ Lindroos (n 15) 27-31. See also UN International Law Commission (n 15).

¹⁷ Lindroos (n 15) 28, 31.

¹⁸ *ibid* 39.

¹⁹ *ibid* 36.

²⁰ *ibid* 36. See also Conor McCarthy, 'Legal Conclusion or Interpretative Process? *Lex Specialis* and the Applicability of International Human Rights Standards' (2008) in Roberta Arnold and Noëlle Quéniévet (eds) *International Humanitarian Law and Human Rights Law* (Brill | Nijhoff 2008); Nancie Prud'homme, 'Lex Specialis: Oversimplifying A More Complex and Multifaceted Relationship?' (2007) 40 *Isr L Rev* 356.

²¹ Borelli (n 14) 272–277.

from the applicability of IHRL, governs the assessment of whether a deprivation of life constitutes an arbitrary killing under Article 6 of the ICCPR.²²

2.4 Controversies surrounding the (mis)applications of *lex specialis*

Since the publications of the two Advisory Opinions, the ICJ's recourse to *lex specialis* in resolving normative conflicts between IHL and IHRL has drawn much criticism. This section is by no means an attempt to construct an exhaustive taxonomy of various (mis)applications of *lex specialis* or advance certain interpretative approaches over others; instead, it simply provides a synthesis of critiques and suggestions offered by other legal scholars. In doing so, I seek to build up a conceptual framework through which different interpretive methods can be applied in examining the use of *lex specialis* in *Sham*.

Some major problems with the ICJ's application arose from the inconsistent and unclear role of *lex specialis* in its legal reasoning. As Borelli points out in her analysis, to properly apply *lex specialis derogat legi generali* would necessarily involve the derogation of the general rule.²³ In the *Nuclear Weapons* Advisory Opinion, however, the ICJ resisted the idea that IHRL is displaced by IHL in armed conflicts, and instead used *lex specialis* as a mere 'technical tool' in a limited sense to aid the evaluation of the specific issue of arbitrary deprivation of life.²⁴ In other words, the ICJ merely invoked the idea of *lex specialis* and failed to conduct a rigorous exercise to evaluate which body of law was specific; nor did it acknowledge any derogation as implied in *lex specialis*, even though the court paradoxically reached the conclusion that the IHL as a *lex specialis* should apply. The problematic nature of such conclusory and circular application of *lex specialis* is well articulated by McCarthy, who suggests that this maxim is self-referential, as it 'becomes both the legal justification and *de facto* consequence of the legal analysis.'²⁵

Perhaps having realised its own confusing application of *lex specialis*, the ICJ in later cases concerning human rights violations in armed conflicts avoided any reference to *lex specialis* altogether.²⁶ The ICJ's difficulty in applying *lex specialis* in a consistent manner highlights not only the complex relationship between two bodies of law, but also the dangerous implication that an entire body of law may be treated as *lex generali* and thereby displaced in certain circumstances.

The ICJ's retreat from using *lex specialis* since the two above-mentioned Advisory Opinions is symptomatic of the increasing controversy over the divergent usages of *lex specialis* in legal discourse. Among them, Linderfalk notes three generally accepted meanings of *lex specialis*:

lex specialis is referred to (i) as a norm designed to resolve conflicts between entire categories of norms; (ii) as a norm designed to resolve conflicts on a case-by-case basis; and (iii) as a rule of interpretation designed to avoid the occurrence of normative conflicts, rather than to resolve them.²⁷

After drawing on other scholars' concern over the conceptual and functional difficulties of *lex specialis*, Linderfalk subsequently concludes that:

²² *ibid* 272-277.

²³ *ibid* 275.

²⁴ *ibid* 275; Lindroos (n 15) 43-44.

²⁵ McCarthy (n 20) 109.

²⁶ Borelli (n 14) 276.

²⁷ Ulf Linderfalk, 'Neither Fish, Nor Fowl: A New Way to a Fuller Understanding of the *lex specialis* Principle' (2023) 25 ICLR 426, 429.

Not only are international lawyers unsure of the legal status of the principle in each of its three renditions. They are equally unsure of whether, as a matter of international law, the three renditions can possibly co-exist, or whether some or all are mutually exclusive.²⁸

However, the theoretical conundrum posed by *lex specialis* has not prevented it from being a helpful tool in making legal arguments in courtrooms. For instance, in both *Hassan v United Kingdom*²⁹ and *Serdar Mohammed v Ministry of Defence*³⁰, the UK government in defending the conducts of UK troops advanced the argument that the IHL as a *lex specialis* should prevail in armed conflicts.³¹ After all, *lex specialis*, as a mere legal device, does hold its appeal to intentional lawyers who, driven by pragmatic considerations, seem to be comfortable with keeping apart ‘theory’ from ‘practice.’³² Nevertheless, as Borelli observes, courts have generally refrained from supporting such pragmatic application of *lex specialis* in the context of human rights violations during armed conflicts.³³ In *Hassan*, the European Court of Human Rights (ECtHR) did not make any direct references to the observations on *lex specialis* made by the ICJ in *Nuclear Weapon* and *The Wall*.³⁴ Similarly, in *Serdar Mohammed*, the High Court of UK only applied *lex specialis* in the most modest manner, rejecting any possibility that IHL can completely displace or partially derogate IHRL in armed conflicts.³⁵ Borelli’s observation is confirmed by other scholars³⁶ who similarly note the general trend in international law jurisprudence of rejecting the direct application of *lex specialis* as a conclusory device.

The ongoing debates surrounding the maxim’s application will guide the analysis of *Sham*, as there exists a remarkable parallel between the application of *lex specialis* in both *Sham*, a domestic legal context, and the international legal arena.

3. Lex Specialis and its (mis)Application in *Sham*

As Martti Koskeniemi observes in another report for ILC’s *Fragmentation of International Law* Study Group, the absence of a general hierarchy among international norms renders analogies drawn from the hierarchical structure of domestic legal systems “not generally appropriate”.³⁷ Admittedly, issues naturally arise whenever legal norms or doctrines cross the border from one legal regime to another, especially in the realm of constitutional interpretation.³⁸

²⁸ *ibid* 430.

²⁹ [2014] 9 WLUK 388.

³⁰ [2015] EWCA Civ 843.

³¹ Borelli (n 14) 282–288.

³² Jörg Kammerhofer, ‘Unearthing Structural Uncertainty Through Neo-Kelsenian Consistency: Conflicts of Norms in International Law’ (2005) *European Society of International Law* <<https://ssrn.com/abstract=1535942>> accessed 3 February 2026, 4.

³³ Borelli (n 14) 278–281.

³⁴ *ibid* 282–286.

³⁵ *ibid* 286–288.

³⁶ For relevant discussions, see also Jens David Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (Cambridge University Press 2016); Marko Milanovic, ‘The Lost Origins of *Lex Specialis*: Rethinking the Relationship between Human Rights and International Humanitarian Law’ in Jens David Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (Cambridge University Press 2016); Bill Bowring, ‘The Death of *Lex Specialis*? Regional Human Rights Mechanisms and the Protection of Civilians in Armed Conflict’ in Mark Lattimer and Philippe Sands (eds), *The Grey Zone: Civilian Protection Between Human Rights and the Laws of War* (Bloomsbury 2018).

³⁷ (A/CN.4/L.702, 2006), 20

³⁸ For discussions of the difficulties associated with the movement of legal norms and doctrines across legal regimes, see Margit Cohn, ‘Legal Transplants: A Theoretical Framework and a Case Study from Public Law’ in Mathias Siems and Po Jen Yap (eds), *The Cambridge handbook of comparative law* (Cambridge University Press 2024); Mark Tushnet, ‘Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law’ 1 (1998) *U. Pa. J. Const. L.*

Nevertheless, constitutional adjudication has long relied on cross-domain borrowing as a mode of reasoning, in which precedents, concepts, and argumentative frameworks are drawn from one doctrinal setting to illuminate another.³⁹ In this spirit, this section undertakes a structured examination of the CFA's reliance on *lex specialis* in *Sham Tsz Kit* through the lens of international law debates on the relationship between IHL and IHRL.

Section 3.1 first reconstructs the courts' reasoning in *MK* and *Sham*, focusing on how *lex specialis* was invoked to characterise the marriage provisions of the Basic Law and the Hong Kong Bill of Rights as dispositive in relation to more general equality guarantees. This analysis maps the justificatory moves through which the doctrine was treated as determinative. Section 3.2 then subjects those justificatory moves to closer scrutiny, assessing their coherence and sufficiency by reference to the concerns that have emerged in international law regarding the use of *lex specialis* as a conflict-resolving technique. Finally, Section 3.3 situates the CFA's approach within broader constitutional rights theory, arguing that the categorical resolution of conflicts between principles through *lex specialis* is conceptually misguided, and that a balancing-based framework offers a more defensible account of constitutional adjudication in this context.

3.1. Applications of *lex specialis* in *MK* and *Sham*

3.1.1. *MK*

In *MK*, the CFI briefly addressed the concept of *lex specialis* by asserting that article 37 of the BL read together with article 19(2) of the HKBOR constitutes a *lex specialis* governing the specific subject matter of marriage rights, thereby displacing any general provisions on equal protection or non-discrimination as embodied in article 25 of the BL and article 22 of the HKBOR.⁴⁰ The CFI justified this conclusory approach by referencing similar judgements in various jurisdictions including *Bellinger v Bellinger*⁴¹, *Schalk and Kopf v Austria*⁴², *Oliari v Italy*⁴³, and *Joslin v New Zealand*⁴⁴, which uniformly recognised the prevailing positions of specialised marriage statutes over general legal provisions in matters concerning marriage rights.⁴⁵ When confronted with a divergent judgement of *Day and Bush*, in which the Grand Court of the Cayman Islands relied on general provisions in the constitution to infer a right to marriage for same-sex couples⁴⁶, the CFI states:

It is of course not for this court to comment on how s.14 of the Cayman Bill of Rights ought to be interpreted. In so far as BL 37 and BOR 19 are concerned, I consider it to be clear that they protect only the right of opposite-sex couples to marry, and those articles constitute the relevant *lex specialis* precluding the right to marriage from being accorded to same-sex couples under other articles of the Basic Law and/or the Hong Kong Bill of Rights. I am not persuaded by the reasoning of the Grand Court of the Cayman Islands in *Day and Bush* that a different conclusion should be reached.⁴⁷

The court provided no further justification for dismissing the Grand Court's interpretation or for not considering broader provisions from the BL or the HKBOR related to equality, non-discrimination, or privacy.

³⁹ Nelson Tebbe and Robert L. Tsai, 'Constitutional borrowing' 108 (2009) *Mich. L. Rev.*, 459.

⁴⁰ *MK* (n 7) [32]–[44].

⁴¹ [2001] EWCA Civ 1140.

⁴² (2021) 53 EHRR 20.

⁴³ (2017) 65 EHRR 26.

⁴⁴ (2003) 10 IHRR 40.

⁴⁵ *MK* (n 7) [32]–[44].

⁴⁶ *ibid* [42].

⁴⁷ *ibid* [43].

It should be noted that after the *MK* judgement was delivered, the Cayman Islands government appealed to the Court of Appeal of the Cayman Islands, which subsequently overturned the Grand Court's decision in *Day and Bush*. Echoing similar judgements in other ECHR jurisdictions, the Court of Appeal insisted on relying only on relevant *lex specialis* to construe the right to marriage.⁴⁸

3.1.2. *Sham Tsz Kit*

The CFA's reasonings on *lex specialis* in *Sham*, albeit lengthier, did not provide any substantive insights beyond those already articulated in *MK*. All of the five judges agree that article 37 of the BL read together with article 19(2) of the HKBOR is the *lex specialis* in relation to the constitutional right to marry⁴⁹. In summary, they advanced three main justifications for applying the principle of *lex specialis* within the context of marriage rights interpretation. First, the CFA posits that *lex specialis* is part of a longstanding judicial tradition⁵⁰ aimed at interpreting legislative texts as a cohesive unit⁵¹, thereby preempting normative discrepancies. This approach ensures that specific legal norms take precedence in situations where there might be a general overlap, in order to maintain legislative harmony.

The CFA's second rationale is that their approach is consistent with the application of *lex specialis* in cases concerning the protection of marriage rights in other jurisdictions. The third justification addresses the appellant's argument by asserting that the autonomous, free-standing equality rights enshrined in article 25 of the BL and article 22 of the HKBOR are not immune to the application of *lex specialis* in matters of marriage right⁵². In essence, the CFA circles back to the principle's foundational premise: the specific provisions of marriage rights as *lex specialis*, negate the need for any further scrutiny under other legal provisions.

3.2 Critique of the CFA's applications of *lex specialis*

3.2.1 Theoretical parallel between international and domestic law

The CFA's application of *lex specialis* has a conclusory nature, which precludes any possibility of further legal reasoning under other general provisions. As noted at the end of section 2.4, *lex specialis* as a conclusory means for one body of law to displace another has fallen out of favour because of the dangerous implications it entails. Nonetheless, within the context of conflict adjudication among norms enshrined in a single legal framework, the preference for *lex specialis* as a legal conclusion persists, as evidenced by the CFA's invocation of various precedents.

Admittedly, international law and domestic law operate within distinct spheres with their own unique principles and enforcement mechanisms. However, two similarities between the two fields make the comparison possible. Firstly, article 37 of the BL, read together with article 19 of the HKBOR, regarding marriage right and article 25 of the BL, read together with article 22 of the HKBOR regarding equal protection, despite being housed within the same legal instruments, are standalone articles operating on the same level, much like how IHL and IHRL coexist without a clear hierarchy governing their interaction. Secondly, the standalone nature of the BL provisions implies that one article does not automatically qualify or displace another in certain situations, akin to the way IHRL does not become invalid in armed conflicts simply because there is another law which specifically governs wartime conducts.

This comparative analysis suggests that the principles guiding the resolution of conflicts between IHL and IHRL can be instructively applied to domestic constitutional

⁴⁸ *Day and Another v Governor of the Cayman Islands and Another* [2022] BHRC 598, [38]–[40].

⁴⁹ *Sham Tsz Kit* (n 8) [107].

⁵⁰ *ibid* [97]–[106].

⁵¹ *ibid* [98], citing *Kwok Cheuk Kin v Director of Lands* [2021] 24 HKCFAR 349, [44(2)].

⁵² *ibid* [111]–[112].

disputes. Just as IHRL does not become irrelevant during armed conflicts despite the presence of a more specialised legal regime (IHL), the application of *lex specialis* in resolving conflicts between different constitutional provisions should not be automatic; rather, there must be a compelling rationale for prioritizing one over the other. Hence, under this theoretical framework, the subsequent section examines the justifications provided by the court in *Sham* for applying *lex specialis* to resolve constitutional conflicts.

3.2.2 Validity of the CFA's justifications for *lex specialis*

Justification one

The CFA reasons that *lex specialis* serves as a well-established interpretive device to harmonise different articles that might otherwise come into conflict.⁵³ The court refers to *Kwok Cheuk Kin v Director of Lands (No 2)*, in which article 40 of the BL, a specific provision protecting the lawful traditional rights of indigenous inhabitants in the New Territories, was held by the CFA to qualify and limit other anti-discrimination provisions.⁵⁴

However, the CFA's reliance on *Kwok* is problematic on two levels. Firstly, the contexts in which articles 40 and 37 of the BL operate are significantly different. Article 40 of the BL concerns the rights of indigenous people, which involve historical considerations, cultural preservation, and reparative or affirmative actions. On the other hand, article 37 of the BL is related to marriage rights. The CFA's reliance on a precedent focused on indigenous rights to decide on the protection of marriage rights overlooks these critical contextual differences. Secondly, article 40 of the BL involves mostly collective and socio-economic rights tied to a specific community's historical practices, whereas article 37 of the BL involves a universal civil right related to marriage. The nature and scope of the rights protected under these provisions differ, making a direct application of the *Kwok* problematic. Given these differences, the mere fact that the CFA used it once in another contextually different case to address conflicting rights does not sufficiently justify the application of *lex specialis* in *Sham*.

Justification two

The CFA's second rationale hinges on the premise that since the ECtHR and the Human Rights Committee (HRC) have consistently applied *lex specialis* to give precedence to marriage laws over equality statutes, the application of *lex specialis* in *Sham* is thereby justified. However, this justification is contentious for two reasons.

Firstly, as Ramsden and Marsh⁵⁵ assert, a direct juxtaposition between article 37 of the BL and article 23 of ICCPR or article 12 of the ECHR is problematic, as the ICCPR and ECHR provisions on marriage right contain gender-specific language, whereas article 37 of the BL is gender-neutral. In fact, the CFA's heteronormative interpretation of article 37 of the BL emerged only after associating it with article 19(2) of the HKBOR, which is a derivative of article 23 of the ICCPR. Hence, the interpretive weight of these precedents is undermined by the CFA's decision to overlook the potential for a broader interpretation of article 37 of the BL, which is materially distinct from the constraints in article 23 of the ICCPR or article 12 of EHRC.

Secondly, even if the gendered reading of article 37 of the BL is to be accepted, the CFA's justification by exclusive references to ECtHR cases is questionable. Lau and Dyer criticised this selective consideration by highlighting the lower court's striking omission of all relevant precedents from the Inter-American Court of Human Rights, which are more

⁵³ *Sham Tsz Kit* (n 8) [97]-[106].

⁵⁴ *Sham Tsz Kit* (n 8) [99], citing *Kwok Cheuk Kin* (n 48) [43]-[44].

⁵⁵ Michael Ramsden and Luke Marsh, 'Same-sex marriage in Hong Kong: the case for a constitutional right' (2015) 19 *IJHR* 90, 92.

‘germane’ to the HKBOR⁵⁶. Moreover, the CFA’s reliance on *Joslin* is controversial, as multiple scholars note that subsequent HRC decisions and observations have deviated from *Joslin*. This suggests that *Joslin*’s precedential value has declined.⁵⁷

Given these considerations, the CFA’s second line of reasoning for invoking *lex specialis* is untenable, given the inconsistent legal contexts between *Sham* and other cited cases and the questionable precedential authority of *Joslin*.

Justification three

The CFA’s third proposition that the standalone equal protection/non-discrimination clauses are not immune to the *lex specialis* marriage clauses is a tautology. As discussed in section 2.4, the circular reasoning uses *lex specialis* as both the ‘*de facto* consequence’⁵⁸ (same-sex marriage is not allowed) and the ‘legal justification’⁵⁹ (specific laws prevent it). This self-referential principle does not engage with the conflicts between the rights to equality and marriage. It is questionable because it does not add any new information or provide a distinct legal insight. It merely restates a basic principle of legal interpretation.

These lines of reasoning reflect the same conundrum which the ICJ faced in *Nuclear Weapons*. In its attempts to mitigate conflicts between IHRL and IHL, the ICJ had to strike a precarious balance between delivering definitive judgements and maintaining the universal validity and applicability of fundamental legal norms. Similarly, in the domestic context, the CFA also had to construct clear legal hierarchies while not undermining the integrity of broader legal principles.

Nevertheless, even though the deployment of *lex specialis* in both situations arguably enabled courts to sidestep deeper and more contentious debates regarding the overlap between complex legal frameworks, this strategic avoidance in effect perpetuates an unresolved ambiguity, which is left for future courts to grapple with.

3.3 Further discussion of the CFA’s approach

Robert Alexy’s seminal theory on constitutional rights is particularly helpful in completing this analysis of CFA’s problematic reliance on *lex specialis*. In *A Theory of Constitutional Rights*, Alexy clarifies the distinction between two categories of rights: rules and principles.⁶⁰ According to Alexy, rules function as definitive norms which necessitate strict adherence.⁶¹ They operate on a binary logic—either applicable in their entirety or not applicable at all, thereby yielding precise legal outcomes once invoked.⁶² Conversely, principles are more abstract and serve as optimisation requirements.⁶³ Instead of being applied in an all-or-nothing manner, they require something to be realised to the greatest extent possible, given the legal and factual possibilities.⁶⁴ Under Alexy’s theoretical framework, the rights to marriage and equality are principles.

Conflicts among principles are common, given that the realisation of these rights takes place within the complex realities of societal life. Often, it is impractical to fully realise one

⁵⁶ Holning Lau and Xavier Dyer, ‘Comparative Law and Freedom to Marry in Hong Kong’ (2023) 53 HKLJ 51, 53.

⁵⁷ *ibid* 62-63; Kristie A Bluett, ‘Marriage Equality Under the ICCPR: How the Human Rights Committee Got It Wrong and Why It’s Time to Get It Right’ (2019) 35 AUILR 605, 623-625.

⁵⁸ McCarthy (n 20) 109.

⁵⁹ *ibid*.

⁶⁰ Robert Alexy, *A theory of constitutional rights* (Julian Rivers (tr), 2nd edn, Oxford University Press 2010) 44–56.

⁶¹ *ibid* 48.

⁶² *ibid*.

⁶³ *ibid* 47–48.

⁶⁴ *ibid* 48.

right without impinging upon another. For instance, the right to freedom of expression may at times intersect and conflict with the right to privacy or national security imperatives. Nonetheless, both Alexy and Aharon Barak argue that interpretive tools such as *lex posterior* and *lex specialis*—while adept at resolving disputes between rules—are ill-suited for conflicts of principles⁶⁵. Instead, Barak advocates for a proportionality analysis, where the resolution hinges on balancing the realisation extents of the conflicting rights. This approach maintains that the adjudication of such conflicts only affects the realisation and should not compromise the validity of the constitutional rights⁶⁶. Employing this theory, the CFA’s application of *lex specialis* on principles is conceptually flawed.

The implications of the court’s erred approach are multifold. Firstly, by applying *lex specialis* to override or qualify the principles of equal protection and non-discrimination, the court not only compromises the integrity of equal protection, but also sets a concerning precedent where minority rights can be easily overridden by majority preferences through a dangerous legitimization of discrimination under the guise of legal specificity.

Secondly, constitutions as living documents are meant to be interpreted in a manner which reflects and adapts to evolving social norms and modern understandings. By rigidly applying *lex specialis* to deny same-sex marriage rights, the court missed the opportunity to facilitate the evolution of the constitutional framework in response to contemporary values and societal shifts. The court’s reluctance to engage with the BL’s transformative potential prevents the legal system from recognising and incorporating new understandings of equality, justice, and human rights, while risking a further decline of the BL’s relevance.

Thirdly, by deferring the matter to the legislature, the court’s conflict-avoidance approach can be seen as a further abdication of its judicial review power. This is particularly poignant in modern Hong Kong amidst China’s increasing influence over Hong Kong’s politics. The reluctance to adjudicate on such critical matters reflects a broader trend of judicial conservatism, possibly influenced by political pressure and the overarching priority to maintain stability and alignment with Beijing’s policies.⁶⁷ This trend is concerning for the future of judicial independence and the protection of constitutional rights in Hong Kong, as the court’s willingness to engage robustly with contentious issues is crucial for maintaining the already threatened integrity and independence of the judicial system.

4. Conclusion

While *lex specialis* is a widely accepted and applied maxim in legal reasoning, its conceptual standing can appear completely different across various judicial landscapes. In the international law arena, the inconsistent and questionable applications of *lex specialis* in reconciling norms of IHL and IHRL have raised more questions than it sought to answer. The resulting controversies have rendered this maxim less popular as an interpretive tool. On the other hand, in domestic legal contexts, especially in disputes involving constitutional rights such as the rights to equality and marriage, the doctrine’s application is equally variable. *Lex specialis* has been either applied in the fullest sense as a conclusory reasoning device—as in the ECHR cases mentioned above—or sidelined—as in recent HRC observations⁶⁸ and Inter-American Court

⁶⁵ Alexy (n 60) 49; Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Doron Kalir tr, Cambridge University Press 2012) 84.

⁶⁶ Barak (n 65) 88.

⁶⁷ Wanli Wang, ‘From liberal to conservative? The role of Hong Kong Court of final appeal in safeguarding fundamental rights under China’s One Country Two Systems policy’ (2023) 27 IJHR 1.

⁶⁸ For a review of HRC Observations on same-sex marriage since *Joslin et al. v. New Zealand*, see Kristie A. Bluett, ‘Marriage Equality under the ICCPR: How the Human Rights Committee Got It Wrong and Why It’s Time to Get It Right’ (2019) 35 *Am. U. Int’l L. Rev.*, 665-668. For relevant IACtHR rulings, see *Advisory Opinion OC-24/17, Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples*, Inter-

of Human Rights judgements. This variability of *lex specialis* is a double-edged sword: while it may streamline legal reasoning and provide decisive shortcuts in rulings, its inherent ambiguity and substantive emptiness can also be exploited to circumvent the genuine engagement with normative conflicts.

This examination of *lex specialis* across international and domestic constitutional legal frameworks therefore leads to this conclusion: where definitive hierarchy between norms is absent, this doctrine is ill-suited as a standalone tool for resolving norm conflicts in any legal framework. In intricate legal interplays, such as the one between IHL and IHRL, the invocation of *lex specialis* undermines the legal integrity of the more general body of law and generate issues surrounding the scope of and the applicability of the general law.

In the specific context of same-sex marriage, employing *lex specialis* as an interpretative device in constitutional law is particularly dangerous, as the direct application precludes any possibility for the judiciary to consider and evaluate whether restricting marriage to only opposite-sex couple clashes with the spirit of equality. This judicial deference to legislative decision-making represents a retreat the judiciary's core responsibility to proactively defend constitutionally guaranteed human rights.

As US Supreme Court Justice Kennedy wrote in the majority opinion in *Obergefell v Hodges*:

If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.⁶⁹

It is time for the CFA in Hong Kong to acknowledge that *lex specialis* is but a convenience excuse to conceal the essence of their judgement—using past restrictions of rights to justify the continuing restriction of these rights. After all, the judiciary is entrusted with a critical role in shaping the legal landscape, especially concerning the protection of human rights. It is imperative that the judiciary actively engages with these complex legal debates, to confront and deliberate on the nuanced challenges they present. Even in instances where a definitive resolution may not be immediately achievable, the judiciary's willingness to tackle these intricate issues is crucial, as it is through these difficult debates that the judiciary can uphold its duties as a protector of fundamental rights and a pivotal participant in the evolution of legal norms.

American Court of Human Rights (24 November 2017); *Duque v Colombia* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 310 (26 February 2016).

⁶⁹ *Obergefell v Hodges* 576 US 644 (2015), 18.