

Sexual Orientation and Gender Identity in Hong Kong: A Case for the Strategic Use of Human Rights Treaties and the International Reporting Process

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INTRODUCTION

Although many jurisdictions have enacted domestic laws that prohibit discrimination on the ground of sexual orientation and gender identity, there is still no binding international treaty that expressly requires states to prohibit discrimination on these grounds. To some extent the

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nonbinding Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (“Yogyakarta Principles”) help to fill this gap by providing guidance on how existing human rights treaties should be interpreted in relation to sexuality and gender identity.¹ However, the Yogyakarta Principles—and international human rights law generally—only have impact if applied domestically. To what extent are governments, judges, legislatures, and activists using international human rights to address the persistent discrimination experienced by the lesbian, gay, bisexual, transgender, and intersex (“LGBTI”) community? This article explores that question in the context of Hong Kong, a territory that has undergone significant legal reform in the past two decades and has regularly looked to international human rights treaties for guidance.

The population of Hong Kong is predominantly Chinese² and the territory is currently a Special Administrative Region (“SAR”) of the People’s Republic of China. However, it is governed under the “one country, two systems” model, with a separate legal system and a “high degree of autonomy” from Beijing.³ A British colony from 1842–1997, Hong Kong inherited the English common law legal system, an independent judiciary, and the core principals of rule of law. Yet, as will be demonstrated in Part I of this article, Hong Kong was far from democratic in the colonial period and it lagged behind the United Kingdom in law reform to promote human rights. As recently as 1990 virtually any male-to-male sexual conduct was a criminal offense, punishable by a maximum term of life imprisonment. Not surprisingly, gay men maintained a low profile during this period and there were no gay pride marches.⁴

In 1985, the Sino-British Joint Declaration⁵ was ratified and Hong Kong entered a twelve-year transition period in preparation to reunite with

¹ For additional information on the Yogyakarta Principles, see <http://www.yogyakartaprinciples.org> (last visited Oct. 15, 2012).

² According to the 2011 census, ninety-three percent of Hong Kong’s population is ethnically Chinese. See Gov’t of H.K. SAR, *Interactive Visualisations*, 2011 POPULATION CENSUS, <http://www.census2011.gov.hk/en/interactive-visualisations.html> (last modified Sept. 25, 2012).

³ For an introduction to the “one-country, two systems” model that governs Hong Kong’s relationship with mainland China, see generally YASH GHAI, *HONG KONG’S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW* (2d ed. 1999) (especially ch 2).

⁴ For an early discussion of the legal framework during the pure colonial period and the ways in which gay men maintained a low profile, see generally H.J. Lethbridge, *The Quare Fellow: Homosexuality and the Law in Hong Kong*, 6 H.K.L.J. 292 (1976).

⁵ Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China (“PRC”) on the Question of Hong Kong, Dec. 19, 1984, U.K.-P.R.C., 23 I.L.M. 1371-87 [hereinafter

China in 1997. This was a remarkable time for law reform, much of it aimed at reassuring the public that civil liberties would be protected after reunification. Part II of this article analyzes the impact of the colonial government's decision to enact a domestic Bill of Rights Ordinance⁶ in order to incorporate the International Covenant on Civil and Political Rights ("ICCPR")⁷ into the domestic legal system. While this decision was intended to assure the public that the status quo would be maintained after 1997, the Bill of Rights Ordinance brought about many changes that were not anticipated by conservative forces. In particular, the law created an enforceable right to privacy and a public sector right to equality. This compelled the local legislature partly to decriminalize male-to-male sexual conduct, but it enacted new criminal provisions that regulated gay sexual relations more strictly than heterosexual or lesbian expressions of sexual intimacy. Part III analyzes two challenges to these laws, as well as a challenge to a decision by the Broadcasting Authority that discriminated on the basis of sexual orientation. The resulting jurisprudence demonstrates that Hong Kong lawyers and judges are adept at applying international norms when assessing the constitutionality of Hong Kong statutes and government actions that discriminate on the ground of sexual orientation.

Part IV of this article then considers the ongoing campaign to establish a broader right to equality and respect for diversity, particularly in private sector employment, housing, and the provision of goods and services. The first anti-discrimination bill introduced into the legislature, the Hong Kong Equal Opportunities Bill of 1994, sought to prohibit discrimination on a wide range of grounds, including sexual orientation. The colonial government defeated that bill, claiming that it preferred to address discrimination more gradually, with a separate piece of legislation for each ground of discrimination. Sadly, this approach has divided the equality movement and created gross inequality within the legal framework: while Hong Kong now has comprehensive laws prohibiting discrimination on the grounds of sex and disability, it has much weaker protection against racial discrimination and little explicit protection for the LGBTI community. Yet the very process of debating these bills in the Legislative Council has created a new awareness of diversity, which is gradually filtering into related areas of law and policy.

Joint Declaration].

⁶ Hong Kong Bill of Rights Ordinance, (1991) Cap. 383 (H.K.), *available at* [http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/AE5E078A7CF8E845482575EE007916D8/\\$FILE/CAP_383_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/AE5E078A7CF8E845482575EE007916D8/$FILE/CAP_383_e_b5.pdf). (last visited Nov. 25, 2012).

⁷ International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

Although most of the litigation discussed in this article concerns discrimination on the ground of sexuality, the pending case of *W v. Registrar of Marriages*⁸ has brought more attention to the rights of the transgender community. Analyzed in Part V of this article, the case also illustrates the importance of using every available legal tool in human rights advocacy. A transgender woman who underwent gender reassignment surgery (and is now described as “female” on her Hong Kong identity card) was prevented from marrying the man she loves because Hong Kong law only permits marriage between a “man” and a “woman” and the Registrar of Marriages looks to the couple’s birth certificates (rather than their identity cards) when determining whether they satisfy this requirement. W’s action for judicial review, which relied primarily upon the right to marry under the ICCPR, was unsuccessful in the Court of First Instance and the Court of Appeal. She has recently been granted leave to appeal to the Court of Final Appeal, which may adopt a more robust interpretation of the right to marry. However, this article argues that the plaintiff’s case was also framed too narrowly and that her lawyers could have made better use of Hong Kong’s anti-discrimination laws and treaty obligations.

Part VI of this article develops this point by arguing that the LGBTI community should actively participate in the reporting processes for all human rights treaties. At least partly in response to recommendations made by treaty-monitoring bodies, Hong Kong’s Domestic Violence Ordinance was recently amended to apply to same-sex relationships. The U.N. Committee on the Rights of Persons with Disabilities, which will review Hong Kong for the first time in 2012, could also become an ally, particularly for transgender individuals who seek gender reassignment services in Hong Kong’s public healthcare system. However, recent events indicate that the LGBTI community in Hong Kong may be reluctant to engage with the Convention on the Rights of Persons with Disabilities (“CRPD”),⁹ fearing that it will lead to further stigma.¹⁰ This is unfortunate because the CRPD does not define disability in medical terms. Rather it embraces the social model and a rights-based approach to disability, emphasizing respect for diversity, inclusion, reasonable accommodations, and substantive equality.

⁸ See *W. v. Registrar of Marriages*, [2010] H.K.E.C. 1518 (C.F.I.) (*appeal dismissed* [2011] H.K.E.C. 1546 (C.A.)). Leave to appeal to the Court of Final Appeal was granted on Mar. 1, 2012. The applicant’s appeal to the Court of Final Appeal was still pending as of Oct. 10, 2012.

⁹ Convention on the Rights of Persons with Disabilities, *opened for signature* Mar. 30, 2007, 2515 U.N.T.S. 3 (entered into force May 3, 2008) [hereinafter CRPD].

¹⁰ As discussed in greater detail in *infra* Part VI, the rights of transgender individuals were not raised in any of the alternative reports submitted by non-governmental organizations to the U.N. Committee on the Rights of Persons with Disabilities, which reviewed China (including Hong Kong) in 2012.

I. HONG KONG IN THE PURE COLONIAL PERIOD: CRIMINALIZATION OF
GAY SEXUAL RELATIONS AND NO ENFORCEABLE RIGHT TO PRIVACY
OR EQUALITY

Prior to the signing of the Joint Declaration there was no democracy and no formal legal protection of human rights in Hong Kong. The purpose of the colonial constitution was not to protect rights, but rather to give the British colonial government the “maximum degree of freedom to rule.”¹¹ The Governor was always a white British citizen, appointed by London. The colonial legislature consisted of the Governor who acted on the advice of the appointed Legislative Council. Although the British government had applied the ICCPR to Hong Kong when it ratified the treaty in 1976, it had not enacted legislation to incorporate the ICCPR into domestic law, which is necessary because Hong Kong is a dualist legal system (similar to the British system) and treaties are not automatically incorporated.¹² The local colonial government prided itself on adhering to the basic principles of rule of law, including respect for the decisions of the independent judiciary. However, in the absence of any constitutional protection for human rights, the judiciary did not have the authority to invalidate a local law on the ground that it violated a person’s civil liberties.¹³

Although most Hong Kong criminal law was derived from English law, the lack of democracy meant that the territory often lagged behind England with respect to law reform promoting human rights. The long delay in decriminalizing male-to-male sexual conduct is but one example of the tendency to delay progressive law reform in Hong Kong.¹⁴ Until 1990, Hong Kong’s Offences Against the Persons Ordinance contained a chapter entitled the “Abominable Offenses” which was directly aimed at gay men.¹⁵ Section 51 provided:

¹¹ Benny Tai Yiu-ting, *The Development of Constitutionalism in Hong Kong*, in THE NEW LEGAL ORDER IN HONG KONG 39, 41 (Raymond Wacks, ed. 1999).

¹² RODA MUSHKAT, ONE COUNTRY, TWO INTERNATIONAL LEGAL PERSONALITIES: THE CASE OF HONG KONG 171 (1997).

¹³ Albert H.Y. Chen, *Constitutional Adjudication in Post-1997 Hong Kong*, 15 PAC. RIM L. & POL’Y J. 627, 653 (2006).

¹⁴ This section provides a brief summary of the events that finally led to decriminalization; for a more detailed discussion, see Carole J. Petersen, *Values in Transition: The Development of the Gay and Lesbian Rights Movement in Hong Kong*, 19 LOY. L.A. INT’L & COMP. L. J. 337, 337-62 (1997), available at <http://digitalcommons.lmu.edu/ilr/vol19/iss2/5> [hereinafter Petersen, *Values in Transition*].

¹⁵ Offences Against the Person Ordinance, (1981) Cap. 212, 1, §§ 49-53 (H.K.), available at [http://www.legislation.gov.hk/blis_pdf.nsf/CurAllEngDoc/43CA4DC0171D9224482575EE004D5CE1/\\$FILE/CAP_212_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/CurAllEngDoc/43CA4DC0171D9224482575EE004D5CE1/$FILE/CAP_212_e_b5.pdf) (last visited Nov. 25, 2012). These offences became part of Hong Kong law in 1865 (when Hong Kong adopted the English Offences Act of 1861 as local law). As discussed *infra* pp. 43-45, these offenses were repealed in

Any male person who, in public or private, commits or is a party to the commission of, or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person shall be guilty of a misdemeanor triable summarily, and shall be liable to imprisonment for two years.¹⁶

The statute further provided that “any person who is convicted of the abominable crime of buggery” could be punished by life imprisonment.¹⁷ Although the term “buggery” included all anal intercourse in English and Hong Kong law,¹⁸ an openly gay couple was obviously more vulnerable to prosecution than a heterosexual couple. Even though prosecutions were rare,¹⁹ gay men had no choice but to remain closeted and had to be careful not to attract attention.²⁰

These criminal provisions were originally derived from English criminal law,²¹ but the British Parliament had decriminalized private homosexual acts between consenting adults in 1967.²² Because the amending act applied only to England and Wales, and not to the United Kingdom’s dependent territories,²³ it was left to Hong Kong’s colonial legislature to decide whether to enact similar reforms. At that time, the Hong Kong Legislative Council consisted entirely of government officials and other appointed members from the community, who were known as the “unofficial members” because they did not hold offices within the

July 1991, but certain new offenses that continued to discriminate against gay men were also introduced at that time.

¹⁶ *Id.* § 51.

¹⁷ *Id.* § 49.

¹⁸ MICHAEL JACKSON, CRIMINAL LAW IN HONG KONG 615 (2003); *see also* THE LAW REFORM COMMISSION OF HONG KONG, REPORT ON LAWS GOVERNING HOMOSEXUAL CONDUCT 53 (1983) [hereinafter LAW REFORM COMMISSION REPORT].

¹⁹ *See* LAW REFORM COMMISSION REPORT, *supra* note 18, at 23-24

²⁰ *See generally*, Lethbridge, *supra* note 4.

²¹ Sexual Offences Act, 1956, 4 & 5 Eliz. 2, ch 69, §§ 12(1), 13 (Eng.), *available at* <http://www.legislation.gov.uk/ukpga/Eliz2/4-5/69> (last visited Dec. 2, 2012).

²² Sexual Offences Act, 1967, ch 60, § 1 (Eng.), *available at* <http://www.legislation.gov.uk/ukpga/1967/60> (last visited Dec. 2, 2012). The Act applied only to England and Wales and did not extend to other British territories, such as Hong Kong. *Id.* § 11(5). The Act implemented a recommendation that had been made a decade earlier by the Departmental Committee on Homosexual Offences and Prostitution, commonly known as the Wolfenden Committee. *See* HOME OFFICE, SCOTTISH HOME DEP’T, REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION 115 (1957).

²³ Sexual Offences Act, 1967, ch 60, § 11(5).

government.²⁴ The unofficial members were essentially part-time legislators with other positions in the private sector who never drafted new legislation.²⁵ Thus, it fell to the executive branch to determine whether it should follow England's example and propose a bill to decriminalize male-to-male sexual conduct.

The Hong Kong government initially showed no interest in decriminalization and there was little public demand for law reform. Hong Kong was a conservative society in the colonial period and sexuality was not generally discussed in public forums.²⁶ Moreover, the laws were rarely enforced so there was little opportunity to criticize their application. This began to change in the 1970s when a Special Investigation Unit ("SIU") was established in the Royal Hong Kong Police Force for the express purpose of investigating homosexual activities.²⁷ According to internal guidelines, the SIU was supposed to focus primarily on male prostitution and men who had sex with minors. Yet there was no policy requiring it to refrain from investigating consenting adults who engaged in non-procured gay sex. The SIU was particularly threatening for gay men who worked in the legal system or in law enforcement. With respect to these individuals, Hong Kong's Attorney General instructed the Commissioner of Police as follows:

An exception to the . . . [normal] guidance in relation to consenting adults should be made in the case of credible "leads" against either members of the Judiciary or of the Attorney General's Chambers or of other lawyers in active practice in the Courts or of the Police. Assuming such leads to be credible, then these should be followed up, because it is unacceptable to have those charged with the enforcement of the law themselves to be deliberately breaking it.²⁸

²⁴ Under the Letters Patent, Hong Kong's colonial Constitution, the legislature consisted of the "Governor, by and with the advice and consent of the Legislative Council." HONG KONG LETTERS PATENT [CONSTITUTION] (1917-1993), art. VII(1).

²⁵ See NORMAN MINERS, *THE GOVERNMENT AND POLITICS OF HONG KONG* 120-121 (5th ed. 1991); KATHLEEN CHEEK-MILBY, *A LEGISLATURE COMES OF AGE: HONG KONG'S SEARCH FOR INFLUENCE AND IDENTITY* 161 (1995) (noting that it was not until 1985, during the transition leading to reunification with China, that the Legislative Council became active in the creation of new legislation).

²⁶ See Lethbridge, *supra* note 4 (describing how gay men were required to live in a semi-secret society in colonial Hong Kong); LAW REFORM COMMISSION REPORT, *supra* note 18, at 2 (noting that public discussion of homosexuality was "virtually non-existent" until the 1970s).

²⁷ For a summary of the events that led to the creation of the SIU and its activities, see LAW REFORM COMMISSION REPORT, *supra* note 18, at 2, 25.

²⁸ *Id.* annexure 28 at A199.

The activities of the SIU increased public awareness and generated new criticism of the laws, including a petition for decriminalization that was circulated in 1979.²⁹ The issue received additional publicity in 1980 when John MacLennan, an inspector with the Royal Hong Kong Police, died under mysterious circumstances.³⁰ An official inquiry concluded that MacLennan had committed suicide (by shooting himself multiple times in the chest) because he knew that he was about to be arrested by the SIU for “acts of gross indecency” with male prostitutes.³¹ However, some people believed that the inspector was murdered because he had assembled a list of government officials and other prominent members of the community who were gay.³² The incident was still being debated in the press when the government established the Hong Kong Law Reform Commission.³³ As a result, it selected the laws against homosexual acts as one of its early topics for consideration.³⁴

The Law Reform Commission created an eight-member subcommittee, headed by Sir Ti Liang Yang (a Justice of the Court of Appeal who had also conducted the inquiry into MacLennan’s death). The subcommittee conducted substantive comparative legal research and suggested means of consulting the public, including gay men who were naturally reluctant to use their names when giving evidence of the impact of the laws on their lives.³⁵ It also solicited comments from the District Boards, which had little policy-making power, but were arguably the most representative institution in Hong Kong at the time. Unfortunately, the District Boards strongly opposed decriminalization, arguing that it would offend the moral values of the Chinese population and create the impression that the government approved of gay sex.³⁶ Public opinion polls indicated that these views reflected the majority of Hong Kong’s Chinese population in the early 1980s. In one survey, seventy percent of

²⁹ See *id.* at 2; see also *Anti-Homosexuality Laws Blasted as “Wicked,”* S. CHINA MORNING POST (Hong Kong), July 14, 1979; *Is This the Witch-hunt of the Century?,* S. CHINA MORNING POST (Hong Kong), Mar. 20, 1980.

³⁰ See LAW REFORM COMMISSION REPORT, *supra* note 18, at 2-3.

³¹ See T.L. YANG, A SUMMARY OF THE REPORT OF THE COMMISSION OF INQUIRY INTO INSPECTOR MACLENNAN’S CASE 5 (1981).

³² See Mariana Wan, *Shots That Changed the Law*, S. CHINA MORNING POST (Hong Kong), Jan. 20, 1991, Spectrum, at 5; Shane Green, *MacLennan: Doubt Still Casts a Shadow*, S. CHINA MORNING POST (Hong Kong), Jan. 13, 1990, Review, at 1.

³³ See LAW REFORM COMMISSION REPORT, *supra* note 18, at 2-3.

³⁴ *Id.* at 3.

³⁵ *Id.* annexure 1(II) at A3.

³⁶ *Id.* annexure 11(II) at A109.

respondents opposed decriminalization and most cited “Chinese morals” or the corruption of youth as their reason.³⁷

Despite this opposition, the Law Reform Commission published a lengthy report recommending decriminalization of homosexual acts between consenting adults. It based its recommendations partly on the principle that the law should not unnecessarily interfere in private lives, but also noted that the laws were causing gay men substantial anxiety and could make them vulnerable to blackmail.³⁸ The Commission argued that public opposition to decriminalization reflected a lack of understanding of human sexuality and an incorrect view that homosexuality was a “Western” phenomenon and alien to Chinese societies.³⁹

Although the highest officials in the Hong Kong government probably agreed with the Law Reform Commission’s recommendations, they chose to ignore the report.⁴⁰ This was understandable given the colonial government’s lack of political legitimacy in the early 1980s. An unelected government and legislature (dominated by British expatriates) would be reluctant to force legislative reforms on the Chinese majority, especially reforms that would be perceived as undermining Chinese moral values.⁴¹ Given the nonexistence of the gay rights movement in Hong Kong at the time and the small number of people who were willing to publicly support the rights of gay men, the government had little to gain by pushing the issue.

However, within two years of the release of the Law Reform Commission’s report, the Joint Declaration was signed⁴² and Hong Kong entered a new era, an era with far greater legal protection for civil liberties. As demonstrated in Part II of the article, this is what finally led to decriminalization of male-to-male sexual relations.

³⁷ See COMMERCIAL RADIO OPINION SURVEY SERVICE, PUBLIC OPINION SURVEY (1980), reprinted in LAW REFORM COMMISSION REPORT, *supra* note 18, annexure 21 at A167-69.

³⁸ See LAW REFORM COMMISSION REPORT, *supra* note 18, at 120-22, 128-37.

³⁹ *Id.* at 130.

⁴⁰ Michael I. Jackson, *The Criminal Law*, in THE FUTURE OF THE LAW IN HONG KONG 1969-1989 206 (Raymond Wacks, ed. 1989) (noting that the Law Reform Commission’s recommendation to decriminalize was “put on ice” by the Hong Kong government because it was acutely conscious of local opposition to homosexuality).

⁴¹ *Id.* at 206-7 (criticizing the government for failing to take a courageous lead by decriminalizing homosexual acts between consenting adults).

⁴² IAN SCOTT, POLITICAL CHANGE AND THE CRISIS OF LEGITIMACY IN HONG KONG 189 (1989) (describing the signing of the Joint Declaration on Dec. 19, 1984).

II. THE IMPACT OF THE SINO-BRITISH JOINT DECLARATION: DOMESTIC INCORPORATION OF THE ICCPR AND PARTIAL DECRIMINALIZATION

One of the great ironies of history is that Hong Kong's human rights and equality movements benefited enormously from reunification with the People's Republic of China ("PRC"). The transition process began in the 1980s, when the British government first began to negotiate with the PRC concerning Hong Kong's future. Although Hong Kong Island and Kowloon Peninsula had purportedly been ceded to the British in perpetuity, the part of the colony known as the "New Territories" (which makes up the largest land area of Hong Kong) had only been leased to the British for 99 years and the lease was due to expire on July 1, 1997.⁴³ Margaret Thatcher's government initially proposed that China extend the lease so that the British could continue to administer Hong Kong.⁴⁴ Deng Xiaoping completely rejected that idea; indeed, he viewed the 1997 deadline not only as the time to regain the New Territories, but also as an opportunity to regain all of Hong Kong and remove the shame of colonialism.⁴⁵ This should not have been a surprise to the British as Beijing had long disputed the legality of the treaties by which the United Kingdom had acquired Hong Kong.⁴⁶ The treaties had essentially been forced upon China as a result of its defeats in the Opium Wars.⁴⁷ As early as the 1920s, the Chinese government had begun to dispute the legality of what it referred to as the "unequal treaties" and the Chinese Communist Party adopted a similar position after it came to power in 1949 and established the PRC.⁴⁸ When the PRC was admitted to the United Nations in 1971, taking the seat that had previously been held by Taiwan, Beijing made it clear that it did not consider Hong Kong to be a British colony.⁴⁹ Instead, the PRC considered Hong Kong to be Chinese territory that had been temporarily and unlawfully occupied by the British.⁵⁰

In theory, the British could have suggested that a plebiscite be held

⁴³ PETER WESLEY-SMITH, *UNEQUAL TREATY 1898-1997: CHINA, GREAT BRITAIN, AND HONG KONG'S NEW TERRITORIES* 1-2 (1998).

⁴⁴ Scott, *supra* note 42, at 171.

⁴⁵ *Id.* at 172.

⁴⁶ *Id.* at 18.

⁴⁷ GHAI, *supra* note 3, at 3-9.

⁴⁸ *Id.* at 9.

⁴⁹ *Id.* at 11 (describing the Chinese government's insistence that Hong Kong be removed from the list of colonies that the United Nations was still supervising in 1972).

⁵⁰ *Id.* at 9-12. Ghai observed that the Chinese position that the "unequal treaties" were invalid is not widely supported in traditional international law. *Id.* at 11; *see also* Wesley-Smith, *supra* note 43, at 298-301. However, the lease of the New Territories region of Hong Kong was, in any event, due to expire on July 1, 1997.

thereby allowing the people of Hong Kong to determine their own future. Opinion polls showed that most people would have voted to remain British.⁵¹ Although colonial rule was inherently undemocratic and often discriminatory, it was more popular than the prospect of reunification with the motherland. In the early 1980s the majority of Hong Kong residents were either refugees from China or descendents of refugees, people who had fled the PRC for the relative stability and freedom of a British colony.⁵² Beijing understood this, which is one reason that it would never have agreed to a plebiscite on Hong Kong's political future. London did not insist on one because it was not prepared to risk a confrontation with China over a small territory like Hong Kong.⁵³

Eventually the two sides agreed that the entire territory would become a Special Administrative Region of China on July 1, 1997, and that it would be governed under the "one country, two systems" model, with a high degree of autonomy from Beijing.⁵⁴ Although Beijing had been firm on the question of reunification, it was fairly flexible on the written terms. These terms were initially set forth in the Joint Declaration and then elaborated upon in the Basic Law of the Hong Kong SAR ("Basic Law"), the constitutional instrument for Hong Kong after reunification.⁵⁵ The two documents promised Hong Kong far more autonomy than any previous autonomous region had enjoyed in mainland

⁵¹ A 1982 survey reported that only four percent of respondents wanted to be returned to China, while seventy percent wanted to remain a British colony; an additional fifteen percent suggested that Hong Kong become a British trust territory. See JOSEPH Y.S. CHENG, *HONG KONG IN SEARCH OF A FUTURE* 85 (1984).

⁵² A huge wave of migration occurred during China's civil war and immediately after the Communist Party won control of the country in 1949. As result, the population of Hong Kong swelled from only 600,000, at the end of World War II, to 2,360,000 in 1951. MINERS, *supra* note 25, at 34. Another large wave of migration from China to Hong Kong occurred during the Cultural Revolution. *Id.* at 234-35.

⁵³ Scott, *supra* note 42, at 182 (describing the factors that persuaded the British to abandon its initial position in the negotiations with China and noting that "there was little advantage for Britain in worsening relations" with the PRC).

⁵⁴ For the historical background of the "one country, two systems" concept (which was originally designed by China to facilitate reunification with Taiwan), see Ming K. Chan, *The Politics of Hong Kong's Imperfect Transition: Dimensions of the China Factor*, in *THE CHALLENGE OF HONG KONG'S REINTEGRATION WITH CHINA* (Ming K. Chan, ed., 1997); GHAI, *supra* note 3, ch 2.

⁵⁵ See Basic Law of the Hong Kong Special Administrative Region of the PRC (promulgated by Nat'l People's Congress. Apr. 4, 1990, effective Jul. 1, 1997), available at <http://www.basiclaw.gov.hk/en/basiclawtext> (last visited Aug. 1, 2012) [hereinafter the Basic Law]. Although the Basic Law is a national law enacted by the National People's Congress ("NPC") of the PRC, it has the status of superior law in Hong Kong and is considered to be its constitutional instrument. See Albert H.Y. Chen, *The Interpretation of the Basic Law—Common Law and Mainland Chinese Perspectives*, 30 H. K. L. J. 380-81 (2000).

China.⁵⁶ For example, Beijing promised that Hong Kong could continue to issue its own travel documents, including a Hong Kong passport, and to apply its own immigration controls.⁵⁷ Hong Kong was also permitted to continue to issue its own currency and to maintain a separate taxation system,⁵⁸ so that local tax revenues would remain in the territory and not be given to the central government.⁵⁹ Hong Kong was also empowered to “conclude and implement agreements with foreign states and regions and relevant international organizations” in a variety of fields.⁶⁰ In addition to these specific powers, it was agreed that Hong Kong would be vested with general executive⁶¹ and legislative powers.⁶² The only significant limitations were in the areas of defense, those aspects of foreign affairs that were not delegated to the SAR government, and certain other areas where the Basic Law expressly allocated an executive or legislative power to the central government (such as the power to appoint the Chief

⁵⁶ For example, Tibet is referred to as an autonomous region, but enjoys virtually no autonomy in practice. See Michael C. Davis, *Establishing a Workable Autonomy in Tibet*, 30 *HUM. RTS. Q.* 227, 227-58 (2008).

⁵⁷ Basic Law, art. 154.

⁵⁸ *Id.* arts. 110-111. The Basic Law places certain restrictions on Hong Kong’s monetary policy. For example, the “issue of Hong Kong currency must be backed by a 100 percent reserve fund” and the local government shall “safeguard the free flow of capital within, into and out” of Hong Kong and shall not apply foreign exchange control policies. *Id.* arts. 111-12. These restrictions are not, however, generally viewed as examples of intervention by Beijing, but rather as reflecting the commitment, agreed in the Joint Declaration, to maintain Hong Kong’s free market and capitalist system. GHAI, *supra* note 3, at 230-44.

⁵⁹ *Id.* art. 106.

⁶⁰ See *id.* art. 13 (noting that the central government shall be responsible for foreign affairs but “authorizes the Hong Kong Special Administrative Region to conduct relevant external affairs on its own”); *id.* art. 151 (listing the fields in which Hong Kong may conclude agreements with foreign states and international organizations, including “economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields”). For further information on Hong Kong’s powers regarding external affairs, see *id.* arts. 150-57; GHAI, *supra* note 3, at 461-69.

⁶¹ Basic Law, art. 16 (stating that Hong Kong “shall be vested with executive power” and “shall, on its own, conduct the administrative affairs of the Region in accordance with the relevant provisions of this law.”). For more detailed provisions on the powers of the Chief Executive, see *id.* arts. 43, 48-53. For provisions relating to the powers of the Executive Council (the closest thing to a cabinet in Hong Kong) and the Hong Kong government generally, see *id.* arts. 54-65.

⁶² *Id.* art. 17 (stating that Hong Kong “shall be vested with legislative power”). For additional provisions relating to legislative powers and the legislative process, see *id.* arts. 8, 17-18, 66-79.

Executive and the power to amend the Basic Law).⁶³ Hong Kong's Legislative Council enacts laws in virtually every other field.⁶⁴

Article 8 provides that the sources of law in Hong Kong shall be the Basic Law, Hong Kong's pre-existing laws⁶⁵ (including ordinances, common law and the rules of equity), and new ordinances enacted by the local legislature. Chinese national laws other than the Basic Law are not, therefore, a source of law for Hong Kong. If the central government wishes to make a national law apply in Hong Kong, it must go through a special procedure set forth in Article 18 of the Basic Law, which involves seeking advice from the Committee for the Basic Law (a joint committee with members from both Hong Kong and mainland China) and then adding the national law to Annex III of the Basic Law.⁶⁶ Moreover, Annex III must be confined to laws relating to defense, foreign affairs, and other matters "outside the autonomy" of the Region.⁶⁷ Although that final phrase is vague and can be abused, in practice very few national laws have been added to Annex III.⁶⁸

The Joint Declaration and Basic Law also provide that Hong Kong will maintain its own common law legal system, rule of law, and

⁶³ *Id.* arts. 8, 17-18, 45, 159. *See also id.* art. 13 (quoted *supra* note 60).

⁶⁴ Local laws are reported to the Standing Committee of the NPC, which has the power to invalidate a law "if it is not in conformity with the provisions of [the Basic Law] regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region." *Id.* art. 17, para 3. This is unlikely to occur, but if it does then the Standing Committee may not amend the law, but rather must simply invalidate it. *Id.*

⁶⁵ Laws already in force in the British territory of Hong Kong on June 30, 1997, were adopted as part of the law of the Hong Kong Special Administrative Region ("SAR"), provided that they had not been determined by the Standing Committee of the NPC to be in conflict with the Basic Law. For a list of the ordinances and provisions of ordinances that were not adopted, *see Decision of the Standing Committee of the National People's Congress on the Treatment of the Laws Previously in Force in Hong Kong in Accordance with Art. 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (adopted Feb. 13, 1997), available at http://www.legislation.gov.hk/blis_ind.nsf/CURALLENGDOC/8AB4C17B24B1AA96482575EE000E8402?OpenDocument [hereinafter *Decision of the Standing Committee of the National People's Congress*].

⁶⁶ *See* Basic Law, art. 18 (stating that national laws "shall not be applied" in Hong Kong except for those contained in Annex III to the Basic Law and setting forth the procedure for adding a national law to Annex III.).

⁶⁷ *Id.*

⁶⁸ Annex III includes the Nationality Law of the PRC, the Declaration of the Government of the PRC on the Territorial Sea, the Regulations of the PRC Concerning Diplomatic Privileges and Immunities, plus three laws relating to the national calendar and the national flag, anthem and emblem. The application of the law on the national flag (which prohibits flag desecration) was challenged in Hong Kong, but upheld in the case of *Hong Kong SAR v. Ng Kung Siu*, [1999] 2 H.K.C.F.A.R. 442 (C.F.A.).

independent judiciary. These two documents included many detailed provisions on human rights and promised that Hong Kong would continue to be bound by human rights treaties that the British government had applied to the territory during the colonial period, including the ICCPR and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”). This was a significant concession because China itself was not a state party to either the ICCPR or the ICESCR at the time the Joint Declaration was negotiated (the PRC is still not a state party to the ICCPR).⁶⁹ A similar provision was placed in Article 38 of the draft of the Basic Law of the Hong Kong Special Administrative Region (published for public consultation in 1988), and in Article 39 of the final version of the Basic Law, which now serves as Hong Kong’s regional constitution.⁷⁰

When the Joint Declaration was negotiated in the early 1980s, the Chinese government was far less engaged in the U.N. human rights system than it is now. In the mid-1980s human rights were still a forbidden topic in the PRC⁷¹ and the Chinese government regularly condemned international attempts to monitor rights as improper intervention in domestic affairs.⁷² Thus, the officials who were negotiating on behalf of China almost certainly did not fully appreciate the potential impact of placing a reference to international human rights treaties in a document that would ultimately have constitutional significance for Hong Kong. The British negotiators also probably did not expect these references to promote significant change in the territory because there was no expectation at that time that the treaties would be incorporated into Hong

⁶⁹ China became a State Party to the ICESCR in 2001. It signed the ICCPR in 1998, but still has not ratified it. As a result, Hong Kong reports on its own to the Human Rights Committee, the treaty-monitoring body for the ICCPR, which is another example of the extent of Hong Kong’s autonomy. See United Nations Treaty Collection, *Status of Treaties: Chapter IV: Human Rights, International Covenant on Civil and Political Rights* UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Oct. 6, 2012) (recording China’s signature of the ICCPR in 1998 and also, in footnote 6, China’s notification to the Secretary-General that the ICCPR would continue to apply to Hong Kong after reunification despite the fact that China is still not a state party to the treaty).

⁷⁰ Basic Law, art. 39. This language also appeared in Article 38 of the Apr. 1988 draft and Article 39 of the Feb. 1989 draft. See *THE HONG KONG BASIC LAW: BLUEPRINT FOR “STABILITY AND PROSPERITY” UNDER CHINESE SOVEREIGNTY?* 73, 150, 176 (Ming K. Chan & David J. Clark, eds., 1991).

⁷¹ See Albert H. Y. Chen, *Conclusion: Comparative Reflections on Human Rights in Asia*, in *HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE AND THE USA* 487, 502 (Randal Peerenboom, Carole J. Petersen, and Albert H.Y. Chen, eds., 2006).

⁷² Randle Edwards, *Civil and Social Rights: Theory and Practice in Chinese Law Today*, in *HUMAN RIGHTS IN CONTEMPORARY CHINA* 41, 52-53 (Randle Edwards, Louis Henkin, and Andrew J. Nathan, eds. 1986).

Kong's domestic law.⁷³ Although some academics had suggested that Hong Kong should have a domestic human rights law, the government and influential business community were initially opposed.⁷⁴ The business community wanted basic civil liberties maintained and was happy to see detailed provisions in the Basic Law on property rights, access to information, and religious freedom. However, they had little desire to endow women, ethnic minorities, and other marginalized groups with new rights that might disturb Hong Kong's laissez-faire economic system.⁷⁵

This conservative approach to rights might have continued had it not been for the tragic events on June 4, 1989. The Communist Party sent tanks into Tiananmen Square, crushing student protests and forever changing the political atmosphere in Hong Kong. One million Hong Kong people, approximately twenty percent of the population at the time, took to the streets to protest against the Chinese government.⁷⁶ With only eight years remaining before reunification, the colonial government needed to rebuild public confidence quickly. In addition to a host of other measures, it proposed to draft a Hong Kong Bill of Rights, incorporating international standards into domestic law.⁷⁷ Although the government conducted consultation on the specific rights to be protected, in the end it largely copied from the ICCPR. This was considered the safest approach because the Chinese government had already agreed that the Basic Law would provide for the continued implementation of the ICCPR.⁷⁸ A

⁷³ THE HONG KONG BILL OF RIGHTS: A COMPARATIVE APPROACH 1 (Yash Ghai and Johannes Chan, eds., 1993).

⁷⁴ Nihal Jayawickrama, *The Bill of Rights*, in HUMAN RIGHTS IN HONG KONG 37, 63-64 (Raymond Wacks, ed. 1992) (describing his own proposals to the government as well as the British colonial government's decision to leave Hong Kong out of the general trend to introduce domestic human rights legislation in the Commonwealth, a view that changed only after the massacre in Tiananmen Square on June 4, 1989).

⁷⁵ See Carole J. Petersen, *Equality as a Human Right: the Development of Anti-Discrimination Law in Hong Kong*, 34 COLUM. J. TRANSNAT'L LAW 334, 355-61 (1996) [hereinafter Petersen, *Equality as a Human Right*] (describing how the business community successfully lobbied to make the Bill of Rights Ordinance inapplicable to discrimination in the private sector).

⁷⁶ MINERS, *supra* note 25, at 27.

⁷⁷ Jayawickrama, *supra* note 74, at 69-71.

⁷⁸ Although Article 39 of the Basic Law also refers to the ICESCR, the government has never introduced legislation that expressly incorporates the ICESCR into domestic law and these rights have always been considered less "justiciable" in Hong Kong than civil liberties. For discussion of this issue and the judiciary's treatment of the ICESCR in litigation, see Carole J. Petersen, *Embracing Universal Standards? The Role of International Human Rights Treaties in Hong Kong's Constitutional Jurisprudence*, in INTERPRETING HONG KONG'S BASIC LAW: THE STRUGGLE FOR COHERENCE 33 (Fu Hualing, Lison Harris, and Simon N. M. Young, eds., 2007) [hereinafter Petersen, *Embracing Universal Standards?*].

preliminary draft of the Bill of Rights was published in March 1990 for consultation and the Bill of Rights Bill was formally introduced into the legislature in July 1990.⁷⁹

A major issue during the consultation on the draft Bill of Rights was the extent to which it should preempt existing law. The final version of the Bill of Rights Ordinance provides, at Section 3, that “(1) All preexisting legislation that admits of a construction consistent with this Ordinance shall be given such a construction. (2) All preexisting legislation that does not admit of a construction consistent with this Ordinance is, to the extent of the inconsistency, repealed.”⁸⁰ Thus, the local courts became obligated to interpret preexisting statutes (including the criminal laws that prohibited gay sexual relations) in a manner consistent with the Bill of Rights Ordinance, and if this proved impossible, to declare the offending provision invalid.⁸¹ The treatment of legislation enacted *after* the enactment of the Bill of Rights Ordinance was more difficult because the Hong Kong legislature was not elected and did not have the authority to restrict its own powers.⁸² Ultimately, it was agreed that the British government would amend the Letters Patent (which served as Hong Kong’s colonial constitution until July 1, 1997) to provide that “No law of Hong Kong shall be made . . . that restricts the rights and freedoms enjoyed in Hong Kong in a manner that is inconsistent with [the ICCPR].”⁸³ Thus, for the first time in their history, the people in Hong

⁷⁹ Hong Kong Bill of Rights Bill (1990), H.K. GOV’T GAZETTE, Jul. 20, 1990 vol. CXXXII, no. 29, Legal Supp. no. 3, C776-C811, at C784.

⁸⁰ Hong Kong Bill of Rights Ordinance, (1991) Cap. 383, 1-2, § 3 (H.K.), *available at* [http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/AE5E078A7CF8E845482575EE007916D8/\\$FILE/CAP_383_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/AE5E078A7CF8E845482575EE007916D8/$FILE/CAP_383_e_b5.pdf) (last visited Nov. 25, 2012). Although the Chinese government threatened to repeal the Bill of Rights Ordinance in 1997 (and the NPC Standing Committee had the power to do so pursuant to Article 160 of the Basic Law), it ultimately invalidated only a few preliminary provisions, including § 3. *See Decision of the Standing Committee of the National People’s Congress, supra* note 65. However, the removal of these provisions in 1997 had no effect on decriminalization in 1990-91. Moreover, the Basic Law continues to require, in Article 38, that all domestic legislation in Hong Kong must comply with the ICCPR as it has been applied to Hong Kong. For a discussion of the limited impact of the NPC Standing Committee’s decision, *see* Peter Wesley-Smith, *Maintenance of the Bill of Rights*, 27 H. K. L. J. 15 (1997).

⁸¹ As a result of the Court of Appeal’s decision in *Tam Hing-ye v. Wu Tai-wai*, [1992] 1 H.K.L.R. 185 (C.A.), the Bill of Rights Ordinance did not have the effect of repealing legislation when it was relied upon in disputes between private parties. This judgment did not, however, reduce the impact of the Bill of Rights Ordinance on criminal statutes. *See* Peter Wesley-Smith, *supra* note 80.

⁸² Colonial Laws Validity Act, 1865, 28 & 29 Vict., ch 63, § 5 (Eng.) (providing that only a representative colonial legislature has the power to enact a law that affects its own constitution).

Kong enjoyed the right to challenge laws that violated their basic human rights. It is highly unlikely that the British colonial government would have adopted such a law had it not been for the need to reassure Hong Kong people that their rights would be protected after reunification.

For gay men, the Bill of Rights Ordinance was particularly important, partly because it provides for equality before the law,⁸⁴ but also because it contains an explicit right to privacy. Article 14 states: “(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks.”⁸⁵ The right to privacy was especially significant at that time because the European Court of Human Rights had already determined, in the now famous case of *Dudgeon v. United Kingdom*,⁸⁶ that Northern Ireland’s criminal laws prohibiting male-to-male sexual relations breached Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is similar to Article 14 of the Hong Kong Bill of Rights Ordinance.⁸⁷ Had a gay man been prosecuted in Hong Kong after the Bill of Rights Ordinance was enacted he would have certainly challenged the criminal statute and the Hong Kong court would have considered the European Court of Human Rights’ decision to be highly persuasive.⁸⁸ This is partly because Northern Ireland’s laws prohibiting gay sex were also derived from old English law and thus were almost identical to Hong Kong’s laws. Moreover, Northern Ireland’s laws had stayed on the books for reasons

⁸³ HONG KONG LETTERS PATENT [CONSTITUTION] (1917-1993), art. VII(5). This amendment entered into force on June 8, 1991, the same day that the Bill of Rights Ordinance itself entered into force. ANDREW BYRNES & JOHANNES CHAN, PUBLIC LAW AND HUMAN RIGHTS: A HONG KONG SOURCEBOOK 18, 215 (1993).

⁸⁴ Hong Kong Bill of Rights Ordinance, (1991) Cap. 383, § 8, arts. 1, 22 (H.K.), available at [http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/AE5E078A7CF8E845482575EE007916D8/\\$FILE/CAP_383_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/AE5E078A7CF8E845482575EE007916D8/$FILE/CAP_383_e_b5.pdf) (last visited Nov. 25, 2012) (based upon ICCPR arts. 2, 3, 26).

⁸⁵ *Id.* art. 14.

⁸⁶ *Dudgeon v. United Kingdom*, 40 Eur. Ct. H.R. (ser. B) (1982).

⁸⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

⁸⁸ The Hong Kong courts regularly look to the European Court of Human Rights for guidance and this practice received approval at the appellate level soon after the Bill of Rights Ordinance came into force. *See R. v. Sin Yau Ming*, [1992] 1 H.K.P.L.R. 88, 107-08 (C.A.) (noting that it is proper for courts interpreting the Bill of Rights to derive guidance from decisions in common law jurisdictions with a constitutionally entrenched bill of rights and also from the European Court of Human Rights, the European Human Rights Commission, and the U.N. Human Rights Committee, which is the treaty-monitoring body for the ICCPR).

that were quite similar to Hong Kong: London had imposed a very unpopular “home rule” on Northern Ireland and thus felt a special need to be sensitive to the local community’s opinions on law reform relating to moral issues.⁸⁹ In *Dudgeon v. United Kingdom*, the European Court of Human Rights acknowledged that the British government’s failure to reform the laws reflected the Northern Irish community’s opposition to decriminalization. Nonetheless, the European Court decided that the United Kingdom had unjustifiably interfered with Dudgeon’s private life by prohibiting male-to-male sexual relations by consenting adults.⁹⁰

While *Dudgeon v. United Kingdom* would have provided a useful precedent in Hong Kong, it would have been difficult to find a gay man in 1991 who was willing to risk prosecution (not to mention discrimination and social ostracism) in order to challenge the laws in court. Fortunately, the Hong Kong government used the draft Bill of Rights as a reason to persuade the legislature to decriminalize. In the summer of 1990, while the Bill of Rights Bill was still pending in the Legislative Council, the Hong Kong government proposed a legislative debate on decriminalization.⁹¹ The Chief Secretary (the second highest government official in Hong Kong) and the Attorney General both spoke strongly in favor of decriminalization, arguing that the existing laws conflicted with the ICCPR and the forthcoming Bill of Rights. Although a significant number of legislators expressed their disapproval of homosexuality and others would have preferred to leave the issue for the courts to resolve, the motion passed by a comfortable margin.⁹² The government then drafted the Crimes (Amendment) Bill, which decriminalized male homosexual conduct in private between two consenting adults, defined as persons twenty-one years of age or older; it was enacted in July 1991, shortly after the Bill of Rights Ordinance came into force.⁹³ Sections 49 through 53 of the Offences Against the Person Ordinance were thus repealed and references to the “abominable offenses” finally disappeared from Hong Kong’s criminal statute book.⁹⁴

However, this does not mean, that the law was completely equalized for gay men. Perhaps out of a desire to cater to conservatives in the legislature, the Hong Kong government simultaneously proposed to add several new offenses to the Crimes Ordinance, including: a

⁸⁹ See *Dudgeon*, 40 Eur. Ct. H.R. (ser. B), at 28.

⁹⁰ See *id.* at 40-41.

⁹¹ See OFFICIAL REPORT OF PROCEEDINGS, HONG KONG LEGISLATIVE COUNCIL 1949 (July 11, 1990).

⁹² The vote was thirty-one to thirteen with six abstentions. *Id.*

⁹³ Crimes (Amendment) Bill (1991), H.K. GOV’T GAZETTE, Mar. 22, 1991, Legal Supp. No. 3, at C215.

⁹⁴ *Id.* § 26, at C228.

prohibition on anal intercourse between men where one party is under the age of twenty-one (although the legal age of consent for vaginal intercourse was and remains sixteen),⁹⁵ a prohibition on “gross indecency” with a man under the age of twenty-one,⁹⁶ and a prohibition on any sexual activities among men of any age if more than two persons are present (although there was no comparable provision for heterosexual relations).⁹⁷ These provisions were clearly intended to regulate male-to-male sexual relations more strictly than heterosexual relations.⁹⁸ As discussed in the next section, these infringements of gay men’s rights to privacy and equality would eventually be litigated, creating important precedents in Hong Kong and persuasive authority for other jurisdictions.

III. STRATEGIC LITIGATION: USING INTERNATIONAL NORMS TO CHALLENGE DISCRIMINATORY CRIMINAL STATUTES AND RESTRICTIONS ON EXPRESSION

The case of *Leung T.C. William Roy v. Secretary for Justice* was the first successful gay rights case to be litigated in Hong Kong.⁹⁹ The case was not filed until 2004, more than a decade after the new offenses relating to male-to-male sexual relations were added to the Crimes Ordinance. This was partly because the police were not generally enforcing the discriminatory laws unless the two parties were apprehended in a public place or there was some evidence of nonconsensual sexual relations or abuse of a minor.¹⁰⁰ Without prosecutions, there was little opportunity for men involved in consensual relationships to challenge the constitutionality of the discriminatory laws.

⁹⁵ Crimes Ordinance, (1991) Cap. 200, 35, § 118C (H.K.), available at [http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/46A02C9D714527F1482575EE004C2BC1/\\$FILE/CAP_200_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/46A02C9D714527F1482575EE004C2BC1/$FILE/CAP_200_e_b5.pdf). It should be noted that section 118D separately prohibited anal intercourse between a man and a woman where the woman was under the age of twenty-one. However, section 118D criminalized only the older party whereas section 118C criminalized both the older man and the younger man. *Id.* §§118C-118D.

⁹⁶ *Id.* § 118H.

⁹⁷ *Id.* §§ 118F(2)(a), 118J(2)(a).

⁹⁸ *Id.* §§ 118A-118N.

⁹⁹ *Leung T. C. William Roy v. Sec’y for Justice*, [2005] 3 H.K.L.R.D 657 (C.F.I.). The unsuccessful appeal by the Secretary for Justice is discussed *infra* pp. 51-53 and notes 131-44.

¹⁰⁰ The Law Reform Commission’s extensive study of the pre-1991 offenses concluded that consenting adults who violate the laws prohibiting homosexual conduct “are unlikely in present circumstances to be detected and prosecuted.” See LAW REFORM COMMISSION REPORT, *supra* note 18, at 24. There is no evidence to suggest that the rate of prosecution increased after partial decriminalization in 1991. Indeed, in *Sec’y for Justice v. Yau Yuk Lung* (discussed *infra* pp. 53-55), the Court of Final Appeal noted that “[t]his case is the first prosecution under s. 118F(1) since its enactment in 1991.” *Sec’y for Justice v. Yau Yuk Lung*, [2007] 3 H.K.L.R.D. 903, ¶ 4 (C.F.A.).

Mr. Leung, a gay man who was under the age of twenty-one when his case was first heard, had not been prosecuted for his sexual orientation.¹⁰¹ Rather, he sought to challenge the laws through an application for judicial review, asking for a declaration that the laws were unconstitutional for violating his rights to privacy and equality.¹⁰² In order to demonstrate that he had standing to sue, Leung attested that he had formed relationships with other gay men since attaining the age of sixteen, but that his desire to share sexual intimacy was frustrated by the discriminatory provisions in the Crimes Ordinance.¹⁰³ While heterosexual and lesbian couples could lawfully enjoy sexual intimacy once they reached the age of sixteen, male gay couples were prohibited from doing so until each man attained the age of twenty-one.¹⁰⁴ The law also prohibited certain sexual acts between gay men at any age.¹⁰⁵

Mr. Leung alleged that these criminal provisions were placing considerable stress on his relationships with other gay men, clouding them with apprehension, and making it impossible to develop long-lasting relationships.¹⁰⁶ The knowledge that his sexual orientation was perceived by the law to be a form of deviance also caused feelings of low self-esteem and an ongoing denial of his identity. The judge summarized the applicant's feelings as "a sense of marginalisation and . . . a profound uncertainty as to his own moral worth as a member of the Hong Kong community."¹⁰⁷

The government argued that Mr. Leung lacked standing for judicial review and offered a host of additional arguments in an effort to persuade the judge not to reach the merits of the case, including that Mr. Leung had lost his right to challenge the laws because he did not file his application for judicial review as soon as he turned sixteen and first felt affected by the criminal laws.¹⁰⁸ However, the judge rejected all of the procedural

¹⁰¹ *Leung*, 3 H.K.L.R.D 657, ¶ 1.

¹⁰² *Id.* ¶¶ 7-9.

¹⁰³ *Id.* ¶¶ 2, 5.

¹⁰⁴ *Id.* ¶¶ 3-4.

¹⁰⁵ For example, §118J(2) of the Crimes Ordinance prohibited even adult males from engaging in acts of sexual intimacy if more than two people were present by deeming it to be "nonprivate" even if it occurred behind closed doors; in contrast, as the court explained, lesbian and heterosexual group sexual intimacy was not prohibited. *See Id.* ¶¶ 26-27.

¹⁰⁶ *Id.* ¶ 5.

¹⁰⁷ *Id.* ¶ 6.

¹⁰⁸ *Id.* ¶¶ 82-89. The judge rejected this argument, partly because the applicant was still being affected, on a daily basis, *Id.* ¶85, by the allegedly unconstitutional criminal restraints and also because neither party was prejudiced by the delay in applying for judicial review. *Id.* ¶ 89.

arguments, holding that the applicant had sufficient standing and that the court had jurisdiction to grant him declaratory relief under Article 35(1) of the Basic Law, which guarantees Hong Kong residents a right of access to the courts and to judicial remedies.¹⁰⁹ The court determined that this provision included a remedy for those who allege that their fundamental rights are being undermined by primary legislation and that an applicant should not be required to break the law in order to secure an effective remedy.¹¹⁰ This was an important holding, not only for gay men, but for others who might wish to challenge unconstitutional legislation without risking a criminal prosecution.

In response to the argument that the case could “open the floodgates” to litigants who lacked traditional forms of standing, the judge reminded the government that declaratory relief is discretionary and that a Hong Kong court can always refuse relief to those who have no real interest.¹¹¹ In this case, however, the applicant had not raised an academic question, but rather a matter of genuine concern because he was continuously and adversely affected by the criminal laws he sought to challenge.¹¹²

Interestingly, once the court held that the applicant had standing, the government’s lawyer rather quickly conceded that three of the challenged provisions in the Crimes Ordinance were unsustainable because they violated gay men’s right to privacy and unlawfully discriminated against them.¹¹³ The government also conceded that gay men constituted a protected class under the equality provisions of the Hong Kong Basic Law,¹¹⁴ the Bill of Rights Ordinance, and the ICCPR. This was an extremely important concession by the government because none of these instruments expressly mentions sexual orientation. The court agreed with the government, and cited the United Nations Human Rights Committee’s decision in *Toonen v. Australia*,¹¹⁵ as well as other jurisprudence recognizing that sexual orientation is a protected class for the purposes of the right to equal protection of the law. The fact that the government did not even dispute this point reveals the extent to which

¹⁰⁹ *Id.* ¶¶ 54-56.

¹¹⁰ *Id.* ¶¶ 57-60.

¹¹¹ *Id.* ¶ 69.

¹¹² *Id.* ¶¶ 77-80.

¹¹³ The government conceded that sections 118F(2)(a), 118H, and 118J(2)(a) were unconstitutional because these sections only applied to sexual relations between men and had no “heterosexual” equivalent. *Id.* ¶ 99.

¹¹⁴ The Basic Law states that “All Hong Kong residents shall be equal before the law.” Basic Law, art. 25.

¹¹⁵ *Toonen v. Australia*, Comm. No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (U.N. H. R. Comm. 1994) (especially ¶ 87).

international human rights law had permeated Hong Kong legal culture by 2005.¹¹⁶

Yet the government was not prepared to concede that section 118C of the Crimes Ordinance was unconstitutional, although it set a significantly higher age of consent for anal intercourse (twenty-one) than for vaginal intercourse (sixteen). In defending this provision, the government maintained that the legislature could lawfully determine that persons between the ages of sixteen and twenty-one needed to be prohibited from participating in anal intercourse, but not from vaginal intercourse.¹¹⁷ The government also argued that section 118C did not discriminate on the ground of sexuality because there was a “heterosexual equivalent” in the Crimes Ordinance (section 118D also made it an offense for a man to have anal intercourse with a woman who was under the age of twenty-one). In fact, as the Court noted, the two provisions were not identical because section 118D criminalized only the man in a case of anal intercourse with a woman under the age of twenty-one; in contrast, if two men participated in anal intercourse, section 118C criminalized *both* men unless they had each attained the age of twenty-one. On its face, this was a case of direct discrimination on the grounds of both sex and sexual orientation. As the court noted, it also reflected a stereotyped view of a woman’s role during intercourse, as always being the “submissive” partner.¹¹⁸

Had the court stopped there, the government might have simply offered to amend the statute so as to treat all acts of anal intercourse equivalently where one of the participants was under the age of twenty-one. However, the court went much further and addressed the complex question of indirect discrimination, which occurs when a statute is neutral on its face, but disproportionately burdens one group in a way that cannot be justified by a non-discriminatory legislative purpose.¹¹⁹ Justice Hartman held that a higher age of consent for anal intercourse would cause indirect discrimination even if it were applied equally to heterosexual and gay couples (and to male and female participants) because this is the only form of intercourse available to gay men.¹²⁰ In rejecting the government’s

¹¹⁶ Similarly, in 2003 the government offered to add a clause to a controversial national security bill stating that it should be interpreted by judges to comply with the ICCPR. Nonetheless, the bill had to be withdrawn after massive public protests. See Carole J. Petersen, *Hong Kong’s Spring of Discontent: the Rise and Fall of the National Security Bill in 2003*, in NATIONAL SECURITY AND FUNDAMENTAL FREEDOMS: HONG KONG’S ARTICLE 23 UNDER SCRUTINY 13 (Fu Hualing, Carole J. Petersen, and Simon Young, eds., 2005).

¹¹⁷ *Leung*, 3 H.K.L.R.D 657, ¶¶ 102-05.

¹¹⁸ *Id.* ¶¶ 128-30.

¹¹⁹ *Id.* ¶¶ 133-36.

¹²⁰ *Id.* ¶¶ 134-35.

attempt to defend the higher age of consent, Justice Hartman relied heavily upon international and comparative jurisprudence that had found no objective and reasonable justification for legislation that set a higher age of consent or that otherwise targeted gay sexual relations in the criminal law. For example, he cited decisions by the Ontario Court of Appeal,¹²¹ the United States Supreme Court,¹²² and the European Commission of Human Rights.¹²³ This practice is common for Hong Kong judges, who regularly look to jurisprudence from outside of Hong Kong for guidance on how to interpret and apply the ICCPR to local legislation.¹²⁴

The court also relied upon research demonstrating that sexual orientation is established before the age of puberty, undermining the government's argument that gay men between sixteen and twenty-one require special legislative protection from intercourse.¹²⁵ Indeed, the research indicated that a statute that criminalizes expressions of sexual intimacy is more likely to harm rather than benefit gay teenagers.¹²⁶ The court thus concluded that there was no objective and reasonable justification for section 118C and that it constituted unlawful discrimination on the ground of sexual orientation.¹²⁷ This was highly significant, not only for gay men, but also for others who may seek to rely upon the concept of indirect discrimination when challenging statutes and government policies that apply to all, but have a disproportionate and adverse affect on one group.¹²⁸

¹²¹ *Id.* ¶¶ 137-39 (citing *R. v. C.M.* 98CCC (3d) 481 (Ontario Court of Appeal 1995)) (holding that a law setting the age of consent for anal intercourse at eighteen violated the right to equal protection in the Canadian Charter of Rights and Freedoms because the age of consent for most forms of sexual conduct was fourteen).

¹²² *Id.* ¶ 140 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003) (O'Connor, J., concurring)).

¹²³ *Id.* ¶ 142 (citing the decision of the European Commission of Human Rights in *Sutherland v. UK*, APP. No. 25186/94 Eur. Comm'n H.R. 117 (1997) that there was no objective and reasonable justification for maintaining a higher age of consent in British criminal law for male-to-male sexual intimacy or sexual intercourse).

¹²⁴ For additional examples of this practice by Hong Kong judges, *see generally* Petersen, *Embracing Universal Standards?*, *supra* note 78.

¹²⁵ *Leung*, 3 H.K.L.R.D 657, ¶ 97.

¹²⁶ *Id.* ¶¶ 97, 145.

¹²⁷ *Id.* ¶ 146.

¹²⁸ The judge's interpretation of the concept of indirect discrimination in the Hong Kong Bill of Rights Ordinance and the ICCPR (which bind only the government and public authorities) is particularly interesting in that it appears to be more robust than the statutory definition of indirect discrimination in the anti-discrimination ordinances that apply to both the public and the private sectors. The definition of indirect discrimination that applies to Hong Kong's private sector was originally borrowed from British legislation in 1995, when Hong Kong enacted the Sex Discrimination Ordinance, and it is arguably too narrow. *See* Carole J. Petersen, *Equal Opportunities: A New Field of*

The judgment also used comparative jurisprudence to interpret the right to privacy, contained in both the ICCPR and the Hong Kong Bill of Rights Ordinance. Endorsing the view of Justice Sachs, of the Constitutional Court of South Africa, Justice Hartman defined the right to privacy in broad and purposive language as including the freedom to make fundamental decisions about intimate relationships without penalization, and held that the government had a positive obligation to “promote conditions in which personal self-realization can take place.”¹²⁹ He concluded that the statutory regime enacted in 1991 constituted a “grave and arbitrary interference” with the right of gay men to self-autonomy in the most intimate aspects of their private lives.¹³⁰

The government appealed the judgment of the Court of First Instance, partly to pursue its argument that Mr. Leung lacked standing, but also to defend the constitutionality of section 118C.¹³¹ The government particularly objected to Justice Hartman’s assumption that “buggery” (the term for anal intercourse that is still used in Hong Kong’s Crimes Ordinance) should be compared to vaginal intercourse when analyzing indirect discrimination and argued that the legislature had the right to set an older age of consent for anal intercourse.¹³²

While the case worked its way to the Court of Appeal, an interesting legal debate ensued regarding the reasoning applied by Justice Hartman. In an article published in the *Hong Kong Law Journal*, Robert Danay, a Canadian lawyer, argued that the Court should have assessed section 118C entirely as an invasion of the right to privacy. Danay maintained that the analysis of indirect discrimination had implicitly promoted a “hypersexualised homosexual stereotype” by conveying the view that a legislative restriction on anal intercourse would unduly burden gay men and that this would tend to increase discrimination against them.¹³³ Robyn Emerton, an academic at the University of Hong Kong at

Law for Hong Kong, in *THE NEW LEGAL ORDER IN HONG KONG* 595-625 (Raymond Wacks, ed. 1999) (especially p. 601). When the government drafted the legislation to prohibit racial discrimination, it did its utmost to further narrow the definition of indirect discrimination and was strongly criticized for this. See Carole J. Petersen, *International Norms and Domestic Law Reform: The Difficult Birth of Hong Kong’s Racial Discrimination Law*, 6(2) *DIRECTIONS* 13-21 (2011); see also Kelley Loper, *One Step Forward, Two Steps Back: The Dilemma of Hong Kong’s Racial Discrimination Legislation*, 38 *H.K. L. J.* 15 (2008) [hereinafter Loper, *One Step Forward, Two Steps Back*].

¹²⁹ Leung, 3 *H.K.L.R.D.* 657, ¶ 116.

¹³⁰ *Id.* ¶ 147.

¹³¹ Leung T. C. *William Roy v. Sec’y for Justice*, [2006] 4 *H.K.L.R.D.* 211, ¶¶ 15-16 (C.A.) [hereinafter Leung II].

¹³² *Id.* ¶¶ 46-51.

¹³³ Robert Danay, *Leung v. Secretary for Justice: Privacy, Equality and the Hypersexualised Homosexual Stereotype*, 35 *H.K. L. J.* 545, 555-61 (2005).

the time, responded with a lengthy article supporting Justice Hartman's approach to the concept of indirect discrimination.¹³⁴ Emerton also cited additional examples of international and comparative jurisprudence that had condemned similar laws as a violation of both the right to equality and the right to privacy.

The Court of Appeal apparently agreed with Emerton, as it approached section 118C of the Crimes Ordinance primarily from the perspective of the right to equality.¹³⁵ In rejecting the government's appeal, the Court of Appeal endorsed Justice Hartman's approach and made similar use of comparative materials, noting that courts outside Hong Kong had consistently analyzed anal intercourse as a form of sexual intimacy comparable to vaginal intercourse.¹³⁶ The judgment also makes it clear that the ICCPR prohibits discrimination on the ground of sexual orientation¹³⁷ and was critical of the government's submission that the court should defer to the legislature:

There are, however, limits to the margin of appreciation that can be accorded to the legislature. Where there is an apparent breach of rights based on race, sex or sexual orientation, the court will scrutinize with intensity the reasons said to constitute justification . . . Where the court does not see any justification for the alleged infringement of fundamental rights, it would be its duty to strike down unconstitutional laws, for while there must be deference to the legislature as it represents the views of the majority in a society, the court must also be acutely aware of its role which is to protect minorities from the excesses of the majority. In short, the court's duty is to apply the law; in constitutional matters, it must apply the letter and spirit of the Basic Law and the Bill of Rights.¹³⁸

The Court of Appeal also upheld the lower court's finding that Mr. Leung had standing to challenge the laws, noting that he had been

¹³⁴ Robyn Emerton, *Respecting Privacy and Affirming Equality: The Dual Significance of Leung v. Secretary for Justice*, 36 H.K. L. J. 143, 143-70 (2006).

¹³⁵ *Leung II*, 4 H.K.L.R.D. 211, ¶ 41.

¹³⁶ *Id.* ¶ 47.

¹³⁷ *Id.* ¶ 46. The Court of Appeal observed that the government accepted that sexual orientation fell within "other status" in Articles 2 and 26 of the ICCPR. *Id.* In contrast to Justice Hartman's opinion in the High Court, the Court of Appeal's judgment focused on the words "other status" in Articles 2 and 26 of the ICCPR and did not cite *Toonen v. Australia*, *supra* note 115, which held that the reference to "sex" in these articles encompassed sexual orientation. *Id.* (noting that "the Respondent accepted that homosexuality was a status for the purpose of Articles 1 and 22 of the Bill of Rights").

¹³⁸ *Id.* ¶ 53 (internal citations and quotation marks omitted).

“seriously affected” by the legislation and was living “under a considerable cloud” due to the threat of prosecution.¹³⁹ The case is frequently cited as a leading example of a developing body of jurisprudence in Asia that is putting sexuality discrimination on an equal footing with other prohibited grounds of discrimination.¹⁴⁰ Unfortunately, the Legislative Council has not yet amended or repealed the sections that were challenged by Leung, and the original statutory language still appears in the Crimes Ordinance.¹⁴¹ However, the government is well aware that it cannot enforce criminal statutes that target gay men and that it can only enforce section 118C when one of the participants is under the age of sixteen.¹⁴²

In 2007, Hong Kong’s Court of Final Appeal endorsed the approach taken by the lower courts in *Leung v. Secretary for Justice*, in a case involving an actual prosecution under the discriminatory criminal statutes. In *Secretary for Justice v. Yau Yuk Lung*,¹⁴³ two men were charged with committing the offense of “buggery with another man, otherwise than in private,” contrary to section 118F(1) of the Crimes Ordinance. The Magistrate held that section 118F(1) was unconstitutional and dismissed the charges.¹⁴⁴ The government appealed the decision all of the way to the Court of Final Appeal,¹⁴⁵ where it attempted to portray

¹³⁹ *Id.* ¶ 29(2).

¹⁴⁰ See, e.g., Holning Lau, *Sexual Orientation and Gender Identity: American Law in Light of East Asian Developments*, 31 HARV. J. L. & GENDER 67, 67-68 (2008).

¹⁴¹ As of October 6, 2012, the provisions that were successfully challenged in *Leung T. C. William Roy v. Sec’y for Justice* and in *Sec’y for Justice v. Yau Yuk Lung and Another* (discussed *infra* pp. 53-54) had not been repealed. See Crimes Ordinance, (1991) Cap. 200, §§ 118C, 188F, 118H, 118J(2)(a) (H.K.), available at [http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/46A02C9D714527F1482575EE004C2BC1/\\$FILE/CAP_200_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/46A02C9D714527F1482575EE004C2BC1/$FILE/CAP_200_e_b5.pdf) (last visited Nov. 25, 2012). However, the Law Reform Commission is conducting a review of sexual offenses which will hopefully lead to reforms of the Crimes Ordinance, both to repeal unconstitutional offenses and also to enact a gender neutral definition of rape. See LAW REFORM COMMISSION OF HONG KONG, CURRENT PROJECTS: SEXUAL OFFENSES, available at: http://www.hkreform.gov.hk/en/projects/sex_off.htm (last visited Oct. 9, 2012). See also *Rights Groups Welcome Overdue Proposals on Rape Laws*, S. CHINA MORNING POST (H.K.), Sept. 18, 2012, available at <http://www.scmp.com/news/hong-kong/article/1039298/rights-groups-welcome-overdue-proposals-rape-laws>.

¹⁴² Presumably, the government also would never prosecute the younger party in such a case because that person would be below the age of consent.

¹⁴³ *Sec’y for Justice v. Yau Yuk Lung* [2007] 3 H.K.L.R.D. 903 (C.F.A.).

¹⁴⁴ *Id.* ¶ 5.

¹⁴⁵ The government appealed by way of case stated to challenge the magistrate’s conclusion of law. The Court of First Instance ordered that the appeal be heard by the Court of Appeal, which upheld the magistrate’s conclusion that the prosecution was unconstitutional. *Sec’y for Justice v. Yau Yuk Lung and Another*, [2006] 4 H.K.L.R.D. 196 (C.A.). The government then appealed to the Court of Final Appeal. See *Sec’y for*

section 118F(1) as a specific form of the common law offense of outraging public decency (an offense that applies to all persons, irrespective of sexual orientation).¹⁴⁶ However, the Court of Final Appeal rejected this argument because the common law offense can only be prosecuted where there was a real possibility that members of the general public might witness the defendants' actions.¹⁴⁷ In contrast, these two defendants had been arrested for activities in a private car that was parked by the side of the road late at night. Thus, they were in a place where they were unlikely to have been seen by any member of the general public and could not be prosecuted for the common law offense. That is precisely why the government chose to prosecute them under section 118F(1), an offense that is much easier to prove and only applied to "buggery" between men. The Court of Final Appeal confirmed that section 118F(1) discriminated on the ground of sexual orientation and was unconstitutional under Article 25 of the Basic Law and Article 22 of the Hong Kong Bill of Rights Ordinance. The Court of Final Appeal quoted from the same standard that had been applied by the Court of Appeal in *Leung v. Secretary of Justice*, noting that gay men constitute a minority and that any differential treatment based on sexual orientation requires a court to "scrutinize with intensity whether the difference in treatment is justified."¹⁴⁸ The fact that the legislature had apparently considered this offense to be a necessary part of the 1991 legislative package to decriminalize gay sexual conduct in private was not a sufficient justification.¹⁴⁹ Far from establishing a legitimate aim or purpose for section 118F(1), the legislative history confirmed that the law was enacted in order to treat gay men less favorably than heterosexual couples.

The next important case in the public sector was decided in 2008, when the Court of First Instance held that the Broadcasting Authority, a public body, had unlawfully reached a determination that Radio Television Hong Kong ("RTHK")¹⁵⁰ had breached its code of practice by broadcasting a television documentary about same-sex couples during family viewing hours.¹⁵¹ The applicant for judicial review, Cho Man Kit, is a gay man who appeared in the television documentary (entitled "Gay Lovers") focusing on the day-to-day lives of two gay couples. During the

Justice v. Yau Yuk Lung and Another, [2007] 10 H.K.C.F.A.R. 335 (C.F.A.).

¹⁴⁶ *Id.* ¶ 5.

¹⁴⁷ *Id.* ¶ 18.

¹⁴⁸ *Id.* ¶¶ 21, 29.

¹⁴⁹ *Sec'y for Justice v. Yau Yuk Lung*, [2007] 3 H.K.L.R.D. 903. ¶¶ 26-28. (C.F.A.).

¹⁵⁰ Radio Television Hong Kong ("RTHK") is a public broadcaster and a government department, but it enjoys substantial editorial independence. *Id.* ¶¶ 2, 42.

¹⁵¹ *Cho Man Kit v. Broadcasting Auth.*, [2008] H.K.E.C. 783, ¶¶ 1-3 (C.F.I.).

program, Mr. Cho and two women in a same-sex relationship spoke of their aspirations, including their hope that same-sex marriage would eventually be permitted in Hong Kong. After the program was televised twice during prime time slots, the Broadcasting Authority published a ruling stating that the content of the program and the time of the broadcast violated its code of practice. The ruling (which was apparently issued in response to complaints from members of the public) was partly based on the Authority's finding that the program had promoted same-sex marriage without including opposing views and had therefore failed to meet the "impartiality" requirement.¹⁵²

Mr. Cho applied for judicial review and sought an order of certiorari to quash the determination of the Broadcasting Authority. He argued that the Broadcasting Authority had placed an impermissible restraint on the freedom of expression of RTHK and of the participants in the program, and that the restraint was discriminatory because it was based solely on the sexual orientation of the participants. Justice Hartman first reviewed freedom of expression, which is protected in Hong Kong under both the Basic Law and the Bill of Rights Ordinance. Pursuant to Article 16 of the Bill of Rights Ordinance (based upon Article 19 of the ICCPR), the government can only lawfully restrict freedom of expression if the restriction is provided by law and necessary for respect of the rights or reputations of others; the protection of national security; public order (*ordre public*); or public health or morals. Any such restriction should also be narrowly interpreted, whether by a court or by a regulatory body like the Broadcasting Authority.¹⁵³

Justice Hartman viewed the program and concluded that it was not intended to advocate for same-sex marriage and that there were no scenes of nudity or undue intimacy. The documentary was simply a study of gay people involved in stable, long-term relationships and recorded matters that they considered important, such as the hope that one day their unions may receive some form of legal recognition. RTHK had done no more than "faithfully record the fears, hopes, travails and aspirations of persons who happened to be gay."¹⁵⁴ The judge concluded that the only reason that the Broadcasting Authority could have determined that the program was not impartial arose from the subject matter of the program: people in same-sex relationships. He asked, "Would a similar decision have been reached as to impartiality if the programme had focused on hunter-gatherers or a daughter caring for her invalid mother at home and had spoken of the aspiration of those people? The answer is plain enough."¹⁵⁵

¹⁵² *Id.* ¶ 32(i).

¹⁵³ *Id.* ¶ 8 (citing *HKSAR v. Ng Kung Siu*, [1999] 2 H.K.C.F.A.R. 442 (C.F.A.))

¹⁵⁴ *Id.* ¶ 86.

¹⁵⁵ *Id.* ¶ 87.

The judge had to be careful in articulating this conclusion because in an action for judicial review a court is not entitled to set aside a lawful decision of the Broadcasting Authority, even if the court would have reached a different decision on the merits. But in this case the judge was convinced that the Broadcasting Authority's ruling had arisen from "a misunderstanding of its own code of practice" and that this misunderstanding had led directly to an impermissible restriction on freedom of speech, one that was "founded materially on a discriminatory factor; namely, that homosexuality, as a form of sexual orientation, may be offensive to certain viewers."¹⁵⁶

The court was also asked to review the Broadcasting Authority's decision that the television program was not suitable for broadcasting during the period from 4:00 p.m. to 8:30 p.m.¹⁵⁷ Here the court concluded that the Broadcasting Authority could *lawfully* decide that the program should not be aired at a time when young children, who might lack the maturity to understand the issues, would likely be watching television without their parents.¹⁵⁸ (After 8:30 p.m. the code of practice assumes that parents will be home and share responsibility for what their children are permitted to watch.) Contrary to what some commentators have suggested,¹⁵⁹ the judge gave no indication as to whether he agreed with the Broadcasting Authority that it would be best for young children to have parental guidance when watching the program. Rather, the judge simply acknowledged that this was a conclusion that a reasonable decision maker might reach. Because the judge concluded that the Broadcasting Authority's decision on this issue "whatever its merits was a lawful finding," he had no authority to set it aside.¹⁶⁰

Of course, the Legislative Council and other bodies with policy-making responsibilities in this field can debate the merits of the Broadcasting Authority's decision and the debates held thus far have generated substantial public input.¹⁶¹ The Hong Kong Equal Opportunities

¹⁵⁶ *Id.* ¶ 91.

¹⁵⁷ *Id.* ¶¶ 94-95.

¹⁵⁸ *Id.* ¶ 99.

¹⁵⁹ See, e.g., Lauren E. Sancken, *Hong Kong's Discriminatory Air Time: Family Viewing Hours and the Case of Cho Man Kit v. Broadcasting Authority*, 19 PAC. RIM L. & POL'Y J. 357, 376-82, which the author believes reflects misunderstanding of the judgment on this issue.

¹⁶⁰ *Cho Man Kit v. Broadcasting Auth.*, [2008] H.K.E.C. 783, ¶ 108 (C.F.I.).

¹⁶¹ For a summary of submissions that were made to the Panel on Information Technology and Broadcasting on the issue, see LEGISLATIVE COUNCIL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA, PANEL ON INFORMATION TECHNOLOGY AND BROADCASTING: MINUTES OF MEETING HELD ON MONDAY, 12 MARCH 2007, available at <http://www.legco.gov.hk/yr06-07/english/panels/itb/minutes/itb070312.pdf> (last visited Oct. 14, 2012).

Commission has taken the position that television shows like “Gay Lovers” are entirely consistent with the government’s stated policy of using education to reduce discrimination on the grounds of sexual orientation and gender identity in the community.¹⁶² However, these are very different forums than an action for judicial review, and it is not surprising that the Broadcasting Authority’s decision on the appropriate broadcasting time survived judicial review. In many ways, this aspect of the judgment demonstrates the limitations of strategic litigation and particularly of applications for judicial review. Although it is a valuable tool for invalidating unconstitutional statutes and government actions, it is completely inadequate for redressing broader issues of discrimination in society.

The next section of this article analyzes the ongoing campaign for comprehensive legislation that would expressly prohibit discrimination on the grounds of sexual orientation and gender identity. It also analyses the extent to which the government is adhering to its own guidelines to reduce discrimination and promote diversity.

IV. EFFORTS TO ESTABLISH A RIGHT TO EQUALITY AND RESPECT FOR DIVERSITY IN PRIVATE SECTOR EMPLOYMENT AND OTHER REGULATED FIELDS

Hong Kong has always lagged far behind the United Kingdom in the field of anti-discrimination law. For example, Hong Kong’s first law to prohibit gender discrimination in the private sector was not enacted until 1995, almost thirty years after the British Sex Discrimination Act.¹⁶³ Hong Kong’s first law prohibiting racial discrimination in the private sector was not enacted until 2009,¹⁶⁴ more than fifty years after the United Kingdom

¹⁶²See SUBMISSION OF THE HONG KONG EQUAL OPPORTUNITIES COMMISSION ON ISSUES RELATING TO THE EDITORIAL INDEPENDENCE OF RTHK AND THE YARDSTICKS OF THE BA IN IMPOSING SANCTIONS, SUBMITTED TO THE PANEL ON INFORMATION TECHNOLOGY AND BROADCASTING, MEETING OF MARCH 12, 2007, *available at* <http://www.legco.gov.hk/yr06-07/english/panels/itb/papers/itb0312cb1-1045-1-e.pdf> (last visited Oct. 14, 2012).

¹⁶³ Sex Discrimination Ordinance, (1995) Cap. 480 (H.K.), *available at* [http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/A15C32BE97DAFAA6482575EF000D6CA2/\\$FILE/CAP_480_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/A15C32BE97DAFAA6482575EF000D6CA2/$FILE/CAP_480_e_b5.pdf) (last visited Nov. 25, 2012). For a comparison of the legal frameworks for gender equality in the two jurisdictions, see Carole J. Petersen & Harriet Samuels, *The International Convention on the Elimination of All Forms of Discrimination Against Women: A Comparison of Its Implementation and the Role of Non-Governmental Organizations in the United Kingdom and Hong Kong*, 26 HASTINGS INT’L & COMP. L. REV. 1, 1-50 (2002).

¹⁶⁴ Race Discrimination Ordinance, (2009) Cap. 602 (H.K.), *available at* [http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/7B5C41B095863F7C482575EF0020F30A/\\$FILE/CAP_602_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/7B5C41B095863F7C482575EF0020F30A/$FILE/CAP_602_e_b5.pdf) (last visited Nov. 25, 2012).

first prohibited race discrimination in the private sector.¹⁶⁵ Therefore, it is not surprising that the government and conservative forces have been resistant to proposed legislation prohibiting discrimination on the grounds of sexual orientation and gender identity in the private sector. However, it is interesting that in the mid-1990s Hong Kong came close to enacting a law that would have at least prohibited discrimination on the ground of sexual orientation. The history of that bill demonstrates how important it is for the different branches of Hong Kong's equality and human rights movements to work together.

The campaign for an enforceable right to equality started with the Hong Kong women's movement. Although much of Hong Kong law is based on British law, the Hong Kong legal system lagged well behind the UK in the field of gender equality. In the 1970s, the British Parliament legislated against gender discrimination in a broad range of fields, including employment and education, and established an Equal Opportunities Commission to assist with enforcement.¹⁶⁶ The British government was also actively involved in the drafting of the U.N. Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"),¹⁶⁷ which it signed in 1981 and ratified in 1985.¹⁶⁸ The normal practice of the British government was to apply a human rights treaty to its dependent territories upon ratification—indeed, this is how the ICCPR and the ICESCR came to apply to the colony of Hong Kong.¹⁶⁹ However, when it came to CEDAW, the British left Hong Kong out of the ratification because the local government claimed that it needed more time to consider the ramifications of the treaty for Hong Kong.¹⁷⁰

¹⁶⁵ The Race Relations Act 1965 prohibited racial discrimination in public places and the Race Relations Act 1968 applied this prohibition to employment, housing, and public services. The legislation was updated and improved in the Race Relations Act 1967 and Race Relations Amendment Act 2000. For analysis of this legislation, *see generally*, IYIOLA SOLANKE, MAKING ANTI-RACIAL DISCRIMINATION LAW: A COMPARATIVE HISTORY OF SOCIAL ACTION AND ANTI-RACIAL DISCRIMINATION LAW (2009).

¹⁶⁶ Sex Discrimination Act 1975, §§ 6 (employment), 22 (education) and 53-61 (powers of the Equal Opportunities Commission). The Sex Discrimination Act has been amended since 1975; however, the original version can be viewed on the UNITED KINGDOM'S NATIONAL ARCHIVES LEGISLATIVE DATABASE, <http://www.legislation.gov.uk/ukpga/1975/65/enacted> (last visited Oct. 10, 2012).

¹⁶⁷ U.N. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (1979) (entered into force Sept. 3 1981) [hereinafter CEDAW].

¹⁶⁸ For the history of the CEDAW treaty in the United Kingdom and the women's movement's involvement in the reporting process, *see* Petersen & Samuels, *supra* note 163, at 9-21.

¹⁶⁹ *See* BYRNES & CHAN, *supra* note 83, at 298.

¹⁷⁰ The author frequently heard government officials take this position in

The reluctance of the colonial government to be bound by CEDAW was not surprising, as Hong Kong had many laws and government policies at the time that violated CEDAW, including a ban on female inheritance of much of the land in the New Territories region of Hong Kong, village election procedures that discriminated against women, and employment regulations that purported to protect women but restricted them from full labor participation.¹⁷¹ As time passed, it became clear that the colonial government had no intention of initiating reforms to bring the colony into compliance with CEDAW. This was partly because some discriminatory laws and policies had their origins in Chinese customary law, making reforms culturally sensitive.¹⁷² However, the colonial government was also heavily influenced by the business community, which did not want legislation prohibiting gender discrimination in the employment market.¹⁷³

When a Bill of Rights was first proposed in 1989, women's organizations actively participated in the consultation process, hoping to use the new law as a weapon against discrimination.¹⁷⁴ It was widely accepted that the draft Bill of Rights would be based on the ICCPR, which prohibits discrimination on the ground of sex.¹⁷⁵ However, there were substantial debates in the Bills Committee on who should be bound by the Bill of Rights. While the legislature rejected a proposal for a broad exemption for all "traditional rights" of males in the New Territories, it agreed to the business community's proposal to amend the draft Bill of Rights so as to bind only the government and public authorities.¹⁷⁶ This

meetings with women's organizations between 1989 and 1994. For examples of the British and Hong Kong governments taking this position in written documents, *see, e.g.*, THIRD PERIODIC REPORT OF THE UNITED KINGDOM IN RESPECT OF ITS DEPENDENT TERRITORIES UNDER ARTICLE 40 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: HONG KONG, ¶ 26 (Oct. 1989), *reprinted in* Byrnes & Chan, *supra* note 83, at 421-36 [hereinafter THIRD PERIODIC REPORT: HONG KONG]; THIRD PERIODIC REPORT ON HONG KONG UNDER ARTICLE 40 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: AN UPDATE, ¶ 89 (Mar. 1991), *reprinted in* BYRNES & CHAN, *supra* note 83, at 437-52 [hereinafter THIRD PERIODIC REPORT: AN UPDATE]. At the time, the British government officially reported to the Human Rights Committee on Hong Kong's behalf; however, the text of the reports indicate that the information concerning CEDAW was provided by the Hong Kong colonial government. THIRD PERIODIC REPORT: HONG KONG, *supra*, at 425; THIRD PERIODIC REPORT: AN UPDATE, *supra*, at 442.

¹⁷¹ For detailed discussion of these discriminatory laws and policies, *see* Petersen, *Equality as a Human Right*, *supra* note 75, at 339-48.

¹⁷² *Id.* at 339-45.

¹⁷³ For citations to studies of employment discrimination in Hong Kong during this time period, *see id.* at 346-48.

¹⁷⁴ *Id.* at 353-54.

¹⁷⁵ ICCPR, arts. 2, 26.

¹⁷⁶ The business community persuaded the legislature that private-sector

amendment, adopted shortly before enactment, was a major disappointment to women and it severely limited the impact of the Bill of Rights on gender discrimination. However, women gained many allies in the Legislative Council during the lobbying process and this laid the groundwork for future legislation on gender equality.

This was an ideal time to lobby legislators because the composition and role of the Legislative Council were changing in preparation for the end of colonial rule.¹⁷⁷ In September 1991, just a few months after the Bill of Rights Ordinance was enacted, Hong Kong held its first direct elections for eighteen Legislative Council seats¹⁷⁸ and women's organizations began asking legislators and candidates to declare their positions on gender equality. For example, Emily Lau, who was among the first group of directly elected legislators, promised women's organizations that she would support extending the CEDAW treaty to Hong Kong.¹⁷⁹ True to her word, she introduced a motion for debate in the legislature, calling upon the colonial government to formally request the British government to apply CEDAW to Hong Kong. Although government officials spoke against the motion, it passed easily.¹⁸⁰ This compelled the government to initiate the first public consultation on CEDAW and discrimination against women.¹⁸¹ The results were overwhelmingly in favor of accepting CEDAW and enacting a law prohibiting sex discrimination.¹⁸²

The equality movement also found allies among the remaining appointed members of the Legislative Council. For example, Christine Loh became famous for leading the legislative effort to repeal the ban on female inheritance of land, which had its origins in Chinese customary law, but was being enforced and perpetuated through colonial

discrimination should be addressed, if at all, through specific legislation rather than through a general Bill of Rights. *See* HONG KONG LEGISLATIVE COUNCIL OFFICIAL REPORT OF PROCEEDINGS, 2307-39 (June 5, 1991).

¹⁷⁷ *See* CHEEK-MILBY, *supra* note 25, at 161-64.

¹⁷⁸ MINERS, *supra* note 25, at 116.

¹⁷⁹ The Public Affairs Committee of the Business and Professional Women's Association of Hong Kong has published a summary of its lobbying efforts, including the request to Emily Lau. *Legislation*, BUSINESS AND PROFESSIONAL WOMEN'S ASSOCIATION OF HONG KONG (Jan. 16, 2011 5:15AM), <http://www.bpwhk.org/--public-affairs/legilation> (last visited Oct. 9, 2012).

¹⁸⁰ HONG KONG LEGISLATIVE COUNCIL OFFICIAL RECORD OF PROCEEDINGS, 1451-89 (Dec. 16, 1992). The legislative debate is also summarized in Petersen. *Equality as a Human Right*, *supra* note 75, at 363-66.

¹⁸¹ For a copy of the consultative document, *see* HONG KONG GOVERNMENT, GREEN PAPER ON EQUAL OPPORTUNITIES FOR WOMEN AND MEN (1993) (on file with the author).

¹⁸² HONG KONG GOVERNMENT, GREEN PAPER ON EQUAL OPPORTUNITIES FOR WOMEN AND MEN: COMPENDIUM OF SUBMISSIONS (1994) (on file with the author).

ordinances.¹⁸³ Although her proposal was controversial and generated threats of violence from males in the New Territories, it was easily enacted,¹⁸⁴ and helped to launch Loh's political career.¹⁸⁵

Another appointed legislator, Anna Wu, drafted and introduced the first piece of anti-discrimination legislation in Hong Kong, the Equal Opportunities Bill of 1994 ("EOB").¹⁸⁶ Wu modeled her EOB on a comprehensive anti-discrimination statute from Western Australia, with modifications to suit the circumstances of Hong Kong.¹⁸⁷ The EOB went well beyond gender discrimination, seeking to prohibit discrimination on the grounds of sex, marital status, pregnancy, family responsibility, disability, sexuality, race, age, political and religious conviction, and "spent conviction." In addition to laws and government programs, the EOB applied to many important areas in the private sector, including employment, education, housing, and the provision of goods and services.

Wu's EOB made history because the government had traditionally proposed and drafted all substantive legislation in colonial Hong Kong.¹⁸⁸ Although the Legislative Council's Standing Orders permitted the introduction of non-government bills, which were known as "private members' bills," such bills were rare until the 1990s and tended to be very limited in scope. Wu was the first non-governmental member of the Legislative Council to introduce a bill that sought to create an entirely new area of law for Hong Kong.¹⁸⁹ Wu also drafted a bill to establish a Human Rights and Equal Opportunities Commission ("the Commission Bill") that would serve as an enforcement body for the EOB and also investigate other complaints alleging violations of human rights.¹⁹⁰ It was a

¹⁸³ The legislative effort to repeal the ban on female inheritance, which was highly controversial and generated some threats to Loh's safety, is documented in Petersen, *Equality as a Human Right*, *supra* note 75, at 368-72.

¹⁸⁴ *Id.* at 370-72.

¹⁸⁵ See *Loh's Popularity Soars Over Stance on Inheritance Laws*, S. CHINA MORNING POST (H.K.), Apr. 2, 1994, available at <http://www.scmp.com/article/69247/lohs-popularity-soars-over-stance-inheritance-laws>. Loh went on to become a directly elected member of the Legislative Council. She left the legislature in 2000 to establish a think-tank, Civic Exchange, and recently accepted a high-level post in the government. See *Hong Kong Names Environmental Undersecretary*, WALL ST. J., Sept. 11, 2012, <http://online.wsj.com/article/SB10000872396390443884104577646463499051048.html>.

¹⁸⁶ Equal Opportunities Bill (1994), H.K. GOV'T GAZETTE, July 1, 1994, Legal Supp. No. 3, at C1026-C1218.

¹⁸⁷ For a more detailed discussion of these events, see Petersen, *Equality as a Human Right*, *supra* note 75, at 335-88.

¹⁸⁸ MINERS, *supra* note 25, at 76.

¹⁸⁹ CHEEK-MILBY, *supra* note 25, at 243.

¹⁹⁰ See Draft Human Rights and Equal Opportunities Commission Bill (1994),

challenging process because all legislation had to be introduced in both Chinese and English,¹⁹¹ and Wu did not have access to the government's legal draftspersons.¹⁹²

In addition to the logistical challenges, Wu faced an important constitutional constraint. Under the colonial constitution a member of the Legislative Council had to obtain the governor's permission before introducing a bill that would require public revenue.¹⁹³ Wu's Commission Bill required public funding because it sought to establish a new public body, and the governor did exercise his constitutional power to block it.¹⁹⁴ However, the governor could not block the EOB because it had no revenue implications. Wu drafted the EOB so as to be enforceable through the existing court system in the event that no Equal Opportunities Commission was created.

Wu realized that the government would likely oppose the EOB. But she hoped that this opposition would soften if all groups with an interest in anti-discrimination legislation joined together and supported it. During the drafting process, Wu and her colleagues met with numerous organizations including women's organizations, gay rights groups, and disability rights groups.¹⁹⁵ They found that some women's organizations were reluctant to support the sections in the EOB that sought to prohibit discrimination on the ground of sexuality.¹⁹⁶ Nonetheless, Wu kept the full bill intact and formally introduced it in the Legislative Council in July

reprinted in HONG KONG BILL OF RIGHTS: 1991-1994 AND BEYOND 123-34 (George Edwards & Andrew Byrnes, eds., 1995).

¹⁹¹ In the true colonial period, legislation was only drafted in English, which meant that the vast majority of Hong Kong residents could not read the statute book. But, after the Joint Declaration was ratified, Hong Kong began to develop a bilingual legal system with legislation available in both languages. GHAI, *supra* note 3, at 346-49.

¹⁹² Wu prepared the bill with assistance from two legislative aides and two members of the faculty at the University of Hong Kong, one of whom is the author of this article.

¹⁹³ HONG KONG ROYAL INSTRUCTIONS [CONSTITUTION] (1917-1933), cl. XXIV, P2(c).

¹⁹⁴ See *Exco Rejects Wu's Rights Commission*, E. EXPRESS (H.K.), June 22, 1994, at 1.

¹⁹⁵ This paragraph is based upon the author's observations while assisting Wu in the drafting of her bills and the public consultation process.

¹⁹⁶ The author met with numerous women's organizations in late 1994 and early 1995 and observed that several groups had conservative views on issues of sexuality and would only support legislation to prohibit discrimination on the grounds of sex, marital status, pregnancy, and age. For additional analysis of different organizations in the Hong Kong women's movement in the 1990s, see Lisa Fischler, *Women's Activism During Hong Kong's Political Transition*, in GENDER AND CHANGE IN HONG KONG: GLOBALIZATION, POSTCOLONIALISM, AND CHINESE PATRIARCHY 49 (Eliza W.Y. Lee, ed., 2003).

1994.¹⁹⁷ A Bills Committee was formed in August 1994 to study the EOB and met regularly for most of the 1994-1995 legislative session.¹⁹⁸ In October 1994, while the Bills Committee was studying the EOB, the government suddenly introduced its own Sex Discrimination Bill¹⁹⁹ (based on the UK's Sex Discrimination Act), and announced that it was preparing a bill to prohibit disability discrimination, which was introduced in June 1995.²⁰⁰ This was a significant shift in the government's position, which had previously been to oppose all anti-discrimination legislation for the private sector.²⁰¹ The government almost certainly changed its position because it was concerned that Wu's EOB might otherwise be enacted.²⁰² The government offered the two narrower compromise bills, because it knew that the women's movement and the disability rights movement enjoyed broad public support. The government then argued that Wu's comprehensive EOB constituted too radical a shift in policy and that a slow, "step-by-step" approach to anti-discrimination legislation was more appropriate.²⁰³ In contrast, Wu argued that the principle of equality created

¹⁹⁷ Equal Opportunities Bill (1994), H.K. GOV'T GAZETTE, July 1, 1994, Legal Supp. No. 3, at C1026-C1218.

¹⁹⁸ See PROCEEDINGS, HONG KONG LEGISLATIVE COUNCIL, 4766-7 (June 28, 1995) [hereinafter Leong Address] (address by Dr. Leong Che-hung, Chairman of the Bills Committee to Study the Equal Opportunities Bill).

¹⁹⁹ See Sex Discrimination Bill (1994), H.K. GOV'T GAZETTE, Oct. 14, 1994, Legal Supp. No. 3, at C1382.

²⁰⁰ Leong Address, *supra* note 198, at 4767.

²⁰¹ During the Legislative Council's motion debate on the CEDAW

treaty, the Secretary for Constitutional Affairs stated:

Members will be aware that it has always been the Government's policy to exercise minimum intervention in the labour market and that this has worked well for Hong Kong as a whole. The Government would hesitate, without more consultation, to depart from the non-interventionist policy and take the major step of introducing anti-discrimination or equal pay legislation affecting the private sector.

Hong Kong Legislative Council Official Record of Proceedings, 1487 (Dec. 16, 1992).

²⁰² See Address by Anna Wu, HONG KONG LEGISLATIVE COUNCIL OFFICIAL RECORD OF PROCEEDINGS, 6688 (July 28, 1995) (recalling that "individual officials told me a number of times that if there had been no EOB, the Administration would not have enacted the Sex and Disability Discrimination Ordinances"); see also Address by Emily Lau, HONG KONG LEGISLATIVE COUNCIL OFFICIAL RECORD OF PROCEEDINGS, 4785 (June 28, 1995) (observing that "the Government is forced by Ms. Anna Wu's private member's bill" to introduce the Sex Discrimination Bill).

²⁰³ See Address by the Attorney General to the Legislative Council, HONG KONG LEGISLATIVE COUNCIL OFFICIAL RECORD OF PROCEEDINGS, 6645 (July 28, 1995) (stating that the government sees "no pressing need for comprehensive legislation against discrimination"); see also, Leong Address, *supra* note 198, at 4767 (contrasting the comprehensive legislation offered by Anna Wu's EOB with the government's more

a duty to legislate against all grounds of discrimination, regardless of whether the cause was politically popular.²⁰⁴

The government's Sex Discrimination Bill was weaker than the corresponding provisions of Wu's EOB, because it contained several exemptions.²⁰⁵ Nevertheless, the Sex Discrimination Bill had one significant advantage in that the government had the constitutional power to include an Equal Opportunities Commission ("EOC") in the legislation. While the government's proposed commission had narrower enforcement powers than proposed in Wu's Commission Bill (and thus would not address general human rights concerns), it could assist in investigating and conciliating complaints of sex discrimination,²⁰⁶ which was important to women's organizations given the lack of affordable legal services in Hong Kong.²⁰⁷ Recognizing the need for an enforcement body, Wu allowed the Legislative Council to vote on the government's Sex Discrimination Bill and Disability Discrimination Bill first, and concentrated on amending these bills to improve them.²⁰⁸

Wu then agreed to reintroduce the remaining provisions from her EOB in three separate pieces of legislation. The first of these three bills covered discrimination on the grounds of age, family status, and

conservative step-by-step approach and noting that many legislators had urged the government to set out a concrete timetable for legislation on other grounds of discrimination, but that the government was unwilling to do so).

²⁰⁴ In her final speech in the Legislative Council in support of comprehensive legislation, Anna Wu strongly criticized the government for lack of interest in studying or preventing discrimination against minority groups and argued that "[a] responsible government should protect the community's victims." Address by Anna Wu, HONG KONG LEGISLATIVE COUNCIL OFFICIAL RECORD OF PROCEEDINGS, 6722 (July 28, 1995).

²⁰⁵ For a summary of the exemptions proposed by the government, see Petersen, *Equality as a Human Right*, *supra* note 75, at 378-80.

²⁰⁶ Sex Discrimination Bill, H.K. GOV'T GAZETTE, Oct. 14, 1994, Legal Supp. No. 3, at C1382., cls. 56, 62-65, 76 (describing the powers of the Equal Opportunities Commission "EOC"). The jurisdiction of the EOC has since expanded to include disability, family status, and racial discrimination. For a summary of its powers and functions, see *EOC Corporate Statement*, EQUAL OPPORTUNITIES COMMISSION, <http://www.eoc.org.hk/eoc/graphicsfolder/showcontent.aspx?content=vision%20and%20mission> (last visited Oct. 11, 2012).

²⁰⁷ Hong Kong lawyers are not permitted to represent clients on a contingency basis in Hong Kong, and only a small number of firms offer pro-bono services; thus, the vast majority of complainants rely heavily upon the EOC for assistance. See CAROLE J. PETERSEN, JANICE FONG & GABRIELLE RUSH, ENFORCING EQUAL OPPORTUNITIES: INVESTIGATION AND CONCILIATION OF DISCRIMINATION COMPLAINTS IN HONG KONG 13, 77-83 (2003).

²⁰⁸ Some of the amendments proposed by Wu and the Bills Committee were eventually accepted by the government after negotiations; a few of the remaining contentious amendments were made by the Legislative Council over the government's objection. See Petersen, *Equality as a Human Right*, *supra* note 75, at 380-83.

sexuality.²⁰⁹ Wu believed that this bill had the best chance of passing because there had been many public complaints of discrimination in these areas during the Bills Committee meetings.²¹⁰ The women's movement and certain legislators were particularly interested in age and family status discrimination (and some legislators suggested that Wu drop the sexuality provisions to help this bill pass, which she declined to do). The government argued strongly against this bill, particularly those provisions that sought to prohibit sexuality discrimination, implying that the community was not ready for such a law. For example, the Secretary for Home Affairs referred to sexuality as a "very controversial and highly sensitive" topic in Hong Kong and claimed "legislation that fails to reflect social values would be hard or even impossible to enforce."²¹¹ In order to persuade legislators not to enact Wu's bill, the government also offered to conduct a formal public consultation on age, family responsibility, and sexuality discrimination early in the next legislative term.²¹² This promise gave legislators who were on the fence an excuse not to vote for the legislation.

Although the Democratic Party and the majority of the Bills Committee members supported Wu's EOB, the Legislative Council ultimately defeated all three of her restructured bills. In the debate, many legislators embraced the government's step-by-step approach to discrimination, stating that they could not vote for a comprehensive bill until Hong Kong had more experience with the Sex Discrimination Ordinance and Disability Discrimination Ordinance. The problem with this approach is that it left minority groups out in the cold.

Wu returned to her law firm in 1995, and was subsequently appointed as Chairperson of the Equal Opportunities Commission (from 1999 to 2004). Other legislators tried to reintroduce portions of her EOB, including legislation addressing sexuality discrimination.²¹³ However, these efforts were not successful, and the government's consultation exercise was entirely unhelpful. Indeed, some of the questions asked

²⁰⁹ Equal Opportunities (Family Responsibility, Sexuality and Age) Bill, H.K. GOV'T GAZETTE, June 30, 1995, Legal Supp. No. 3, at C1660.

²¹⁰ The other re-introduced bills covered race discrimination and discrimination based on religious and political conviction, trade union membership, and spent conviction. *See* Equal Opportunities (Race) Bill, H.K. GOV'T GAZETTE, June 30, 1995, Legal Supp. No. 3, at C1770; Equal Opportunities (Religious or Political Conviction, Trade Union Activities and Spent Conviction) Bill, H.K. GOV'T GAZETTE, June 30, 1995, Legal Supp. No. 3, at C1834.

²¹¹ Address by Michael Suen, Secretary for Home Affairs, HONG KONG LEGISLATIVE COUNCIL OFFICIAL RECORD OF PROCEEDINGS, 6630 (July 28, 1995).

²¹² *Id.* at 6631.

²¹³ Equal Opportunities (Family Responsibility, Sexuality and Age) Bill, H.K. GOV'T GAZETTE, June 28, 1996, Legal Supp. No. 3, at C1792.

during the consultation seemed calculated to create prejudice and thus to solicit a negative public response to the concept of legislation to prohibit sexuality discrimination.²¹⁴

In the end, the results of the consultation were somewhat inconclusive, with eighty-one written submissions indicating support for legislation prohibiting sexuality discrimination, and eighty-four indicating opposition.²¹⁵ However, the government also received 9,850 pre-printed opinion forms and reported to the legislature that eighty-five percent of these forms opposed legislation prohibiting discrimination on the ground of sexual orientation.²¹⁶ Nonetheless, the process did arguably help to publicize the issue of gay rights and it seemed to persuade the Hong Kong government that it needed to become more supportive of the movement, if only superficially. In September 1996, the government issued a short brochure condemning sexuality discrimination and challenging what it deemed to be negative “myths” about homosexuality.²¹⁷

Unfortunately, sixteen years later, there is still no legislation prohibiting discrimination on the ground of either sexuality or gender identity. This is not to suggest that no remedies are available under the existing legislation. For example, the Sex Discrimination Ordinance prohibits sexual harassment in language that can be applied to harassment on the ground of a person’s sexual orientation or gender identity.²¹⁸ The Disability Discrimination Ordinance (“DDO”) has also been interpreted to prohibit discrimination on the basis of gender dysphoria²¹⁹ and at least some transgender individuals have filed complaints under the DDO and

²¹⁴ For example, the government conducted a telephone survey that asked respondents whether they would be willing to go swimming with homosexuals or to patronize a hotel that admitted them; to the uninformed respondent these questions could easily suggest that gay men posed some danger to the general population. *See* HONG KONG GOV’T, EQUAL OPPORTUNITIES: A STUDY ON DISCRIMINATION ON THE GROUND OF SEXUAL ORIENTATION—A CONSULTATION PAPER, app. III (1996). For a more detailed critique of the questions that were asked and the consultation process, *see* Petersen, *Values in Transition*, *supra* note 14, at 358-61.

²¹⁵ *See* HOME AFFAIRS BRANCH, HONG KONG GOV’T, LEGISLATIVE COUNCIL BRIEF—EQUAL OPPORTUNITIES: FAMILY STATUS AND SEXUAL ORIENTATION ¶ 8 (1996).

²¹⁶ *Id.* ¶ 4; *see also* HONG KONG GOV’T, CONSULTATIVE DOCUMENTS ON EQUAL OPPORTUNITIES: DISCRIMINATION ON THE GROUND OF FAMILY STATUS AND SEXUAL ORIENTATION—COMPENDIUM OF SUBMISSIONS (June 1996).

²¹⁷ *See New Leaflet Deals with Myths About Sexuality*, MORNING POST (H.K.), Oct. 17, 1996, available at <http://www.scmp.com/article/178330/new-leaflet-deals-myths-about-sexuality>.

²¹⁸ For an explanation of why the definition of sexual harassment can be used in these cases, *see* Carole J. Petersen, *Negotiating Respect: Sexual Harassment and the Law in Hong Kong*, 7 INT’L J. DISCRIM. & L. 127, 133-34 (2005).

²¹⁹ *See* The Church of Jesus Christ of Latter-Day Saints Hong Kong Ltd v. Stewart J.C. Park AKA Jessica Park, [2001] HKEC 1456 (C.F.I.).

obtained significant financial compensation for employment discrimination through the conciliation process at the Hong Kong Equal Opportunities Commission.²²⁰ However, these two ordinances do nothing to address discrimination on the ground of sexual orientation, which remains entirely legal in the private sector employment market.²²¹

Treaty-monitoring bodies in the U.N. human rights system have frequently criticized the Hong Kong government for failure to support legislation protecting sexual minorities. As early as 1999, the U.N. Human Rights Committee (which monitors Hong Kong's compliance with the ICCPR) stated that it "remains concerned that no legislative remedies are available to individuals in respect of discrimination on the grounds of race or sexual orientation."²²² In 2001, the Committee on Economic, Social, and Cultural Rights commented that "the failure of the [Hong Kong SAR] to prohibit discrimination on the basis of sexual orientation" is a "principal subject of concern."²²³ In May of 2005, the same committee stated that it "wishes to reiterate in particular its concern [that] . . . present anti-discrimination legislation [in Hong Kong] does not cover discrimination on the basis of . . . sexual orientation."²²⁴

²²⁰ This has been reported during interviews conducted at the Hong Kong EOC. See *Response by Mr. Lam Woon-kwong, Chairperson of the EOC to Dr. Sam Winter's presentation on "Gender and Culture: Identity and Expression—Transgender People in Gendered Cultures,"* EQUAL OPPORTUNITIES COMMISSION, <http://www.eoc.org.hk/EOC/GraphicsFolder/ShowContent.aspx?ItemID=9350> (last visited Oct. 10, 2012) (confirming that the "EOC has handled a number of cases in this field" under the Sex Discrimination Ordinance and the Disability Discrimination Ordinance).

²²¹ For an updated analysis of the extent of the problem, see Holning Lau & Rebecca L. Stotzer, *Employment Discrimination Based on Sexual Orientation: A Hong Kong Study*, 23 EMP. RESP. & RTS. J. 17-35 (2011); Community Business, *Hong Kong LGBT Climate Study 2011-2012*, available at: <http://www.communitybusiness.org/LGBT/climatestudy.html> (last visited Oct. 14, 2012).

²²² See U.N. Human Rights Comm., Concluding Observations: H.K. Special Admin. Region, Nov. 15, 1999, CCPR/C/79/Add.117, ¶ 15, available at <http://www.unhcr.org/refworld/docid/3ae6b03c10.html> (last visited Aug. 1, 2012). As noted earlier, race discrimination legislation was finally enacted in 2009. Race Discrimination Ordinance, (2009) Cap. 602 (H.K.), available at [http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/7B5C41B095863F7C482575EF0020F30A/\\$FILE/CAP_602_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/7B5C41B095863F7C482575EF0020F30A/$FILE/CAP_602_e_b5.pdf) (last visited Nov. 25, 2012).

²²³ U.N. COMM. ON ECON., SOC. & CULTURAL RIGHTS, CONCLUDING OBSERVATIONS, CHINA: H.K. SPECIAL ADMIN. REGION, May 21, 2001, E/C.12/1/Add.58, ¶ 15(c), available at <http://www.unhcr.org/refworld/docid/3cc7fa6b4.html> (last visited Aug. 4, 2012).

²²⁴ U.N. COMM. ON ECON., SOC. & CULTURAL RIGHTS, CONCLUDING OBSERVATIONS: PEOPLE'S REPUBLIC OF CHINA (INCLUDING HONG KONG & MACAO), May 13, 2005, E/C.12/1/Add.107, ¶ 78(a), available at <http://www.unhcr.org/refworld/docid/43f306770.html> (last visited Aug. 1, 2012).

The U.N. Committee on the Elimination of All Forms of Discrimination Against Women, the treaty-monitoring body for CEDAW, has been particularly concerned about the inadequacies of Hong Kong's legislation on domestic violence and has stressed the need to include all family relationships. In 2009, the Hong Kong government introduced legislation to expand the scope of the Domestic Violence Ordinance to include same-sex relationships.²²⁵ This bill has now been enacted and is a promising development because it recognizes the diversity of family relationships in Hong Kong (despite the fact that same-sex marriage is still not permitted).²²⁶ Interestingly, the government was willing to push through this bill, despite strong opposition from certain conservative forces in society.²²⁷

However, in the employment field the government has only been willing to produce a Code of Practice Against Discrimination on the Ground of Sexual Orientation ("Code of Practice").²²⁸ The Code of Practice is non-binding and thus has no real enforcement mechanisms. However, the government has established a hotline for complaints of discrimination on the grounds of both sexual orientation and gender identity, which includes (but is not confined to) the employment sector.²²⁹

The government's most recent position on enforceable legislation can be found in its Third Periodic Report to the Human Rights Committee, which was completed in 2011 but will not be reviewed until 2013:

Our considered view is the same as that in the previous report, i.e. at this stage, self-regulation and education, rather than legislation, are the most appropriate means of addressing discrimination in this area. We will continue to address discriminatory attitudes and promote equal

²²⁵ The legislation and relevant papers are available from the Legislative Council's Bills Committee to Study Domestic Violence (Amendment) Bill 2009, available at <http://www.legco.gov.hk/yr09-10/english/ord/ord018-09-e.pdf> (last visited Oct. 14, 2012).

²²⁶ Domestic Violence (Amendment) Ordinance 2009, Ord. No. 18 of 2000. H.K. GOV'T GAZETTE, A381-97 (Dec. 29, 2009).

²²⁷ See, e.g., Thaddeus Baklinski, *Hong Kong Legal Amendment May Lead to Change in Meaning of Family*, CATHOLIC EXCHANGE (Jan. 20, 2009), <http://catholicexchange.com/hong-kong-legal-amendment-may-lead-to-change-in-traditional-meaning-of-family/>.

²²⁸ See CONSTITUTIONAL AND MAINLAND AFFAIRS BUREAU, GOV'T OF THE H.K. SPECIAL ADMIN. REGION, CODE OF PRACTICE AGAINST DISCRIMINATION ON THE GROUND OF SEXUAL ORIENTATION, available at <http://www.cmab.gov.hk/en/issues/sexual.htm> (last visited Aug. 1, 2012).

²²⁹ For the government's summary of the services provided by the Gender Identity and Sexual Minorities Unit, including a hotline for complaints, see *The Rights of the Individual*, CONSTITUTIONAL & MAINLAND AFFAIRS BUREAU, GOV'T OF THE H.K. SPECIAL ADMIN. REGION (Oct. 12, 2012), <http://www.cmab.gov.hk/en/issues/equal.htm>.

opportunities on ground of sexual orientation through public education and administrative means, with a view to fostering in the community a culture of mutual understanding, tolerance and mutual respect.²³⁰

When pressed for reasons why it does not yet support legislation, the government normally points to the divided public opinion on the topic. The government continues to conduct public opinion surveys, and the reports of these surveys tend to break down the data in increasingly sophisticated ways, in an apparent effort to highlight the differing opinions on the subject rather than to find consensus. According to the results of a survey released by the government in March 2006, 34.5 percent of respondents opposed legislation to prohibit discrimination on the ground of sexual orientation, 28.7 percent supported it, and 33.7 percent were neutral.²³¹ Although the government has interpreted this as a reason not to legislate, the survey arguably demonstrates a significant increase in support (and certainly a decrease in opposition to legislation) since the 1996 survey.²³²

In any event, reliance upon public opinion surveys is a poor excuse for not legislating in this field and fails to acknowledge one of the main goals of anti-discrimination law—to protect minorities from prejudices, even if these prejudices sometimes constitute the majority's view. Another problem with this slow and painstaking approach is that when it does eventually lead to legislation for sexual minorities, the bill will almost certainly be weaker than the 1995 legislation adopted for women and persons with disabilities. This is precisely what happened with the legislation to prohibit racial discrimination: a law was finally enacted in 2009 after considerable pressure from the U.N. human rights treaty bodies, but it is much weaker than the anti-discrimination ordinances enacted in 1995.²³³ To some extent, the weaker legislation reflects the fact that ethnic

²³⁰ See Gov't of the H.K. Special Admin. Region, *Third Periodic Report Under the ICCPR*, UNITED NATIONS HUMAN RIGHTS COMMITTEE, ¶ 363, http://www2.ohchr.org/english/bodies/hrc/docs/AdvanceVersions/CCPR_C_CHN-HKG_3_en.pdf. The report is expected to be reviewed by the Human Rights Committee in July 2013.

²³¹ Some respondents did not express any opinion on the matter, which is why the percentages do not add up to 100 percent. See, e.g., MVA HONG KONG, HOME AFFAIRS BUREAU, GOV'T OF THE H.K. SPECIAL ADMIN. REGION, SURVEY ON PUBLIC ATTITUDES TOWARD HOMOSEXUALS 21-22 (2006), available at <http://www.legco.gov.hk/yr05-06/english/panels/ha/papers/ha0310cb2-public-homosexuals-e.pdf> (last visited Aug. 1, 2012).

²³² For comparison, see *supra* notes 214-16 and accompanying text.

²³³ Race Discrimination Ordinance, (2009) Cap. 602 (H.K.), available at [http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/7B5C41B095863F7C482575EF0020F30A/\\$FILE/CAP_602_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/7B5C41B095863F7C482575EF0020F30A/$FILE/CAP_602_e_b5.pdf) (last visited Feb. 25, 2012). For a critique of the law, see Carole J. Petersen, *International Norms and*

minorities simply do not enjoy the same level of public support that women and persons with disabilities enjoyed in 1995. However, an equally important factor is that several government departments have now been successfully sued for sex and disability discrimination. Therefore, when the government drafted the Race Discrimination Bill, it had an incentive to narrow the definition of discrimination and insert exemptions for government policies.²³⁴ The history also confirms the wisdom of Wu's original strategy. Had Hong Kong enacted her EOB, it would now have one comprehensive body of anti-discrimination legislation that treated the groups covered in the bill equally. This is not to say that the EOB would not have needed updating after it was drafted in 1994, particularly as there was little public discussion at that time concerning the transgender community and the discrimination that it faces.²³⁵ However, the comprehensive EOB that Wu introduced in 1994 would have avoided the confusing mix of standards that Hong Kong now has, as well as the gaping holes in the legislative framework.

V. THE RIGHTS OF THE TRANSGENDER COMMUNITY AND THE CASE OF *W. V. REGISTRAR OF MARRIAGES*: MORE THAN JUST A RIGHT TO MARRY?

While a good deal of research has now been published concerning the legal status of transgender persons in Hong Kong and the difficulties they face, there was little litigation on the topic until the past two years. The Hong Kong government provides gender reassignment services (as part of its public healthcare system) and there are legal mechanisms whereby a person who has undergone gender reassignment can obtain a Hong Kong Identity Card (which is the primary form of identity used in Hong Kong on a daily basis) in his or her chosen gender.²³⁶ However, the

Domestic Law Reform: The Difficult Birth of Hong Kong's Racial Discrimination Law, 6(2) DIRECTIONS 13-21 (2011); see also Kelley Loper, *One Step Forward, Two Steps Back*, *supra* note 128.

²³⁴ For analysis of lawsuits against the government under the sex and disability discrimination legislation and a call for the government to give the Equal Opportunities Commission the power to enforce the race discrimination provisions of the Hong Kong Bill of Rights Ordinance while the community awaited specific race discrimination legislation, see Carole J. Petersen, *The Right to Equality in the Public Sector: An Assessment of Post-Colonial Hong Kong*, 32 H.K. L. J. 103, 103-34 (2002).

²³⁵ See *infra* Part V.

²³⁶ For a comprehensive analysis of issues faced by transgendered persons in Hong Kong, see Robyn Emerton, *Neither Here Nor There: The Current Status of Transsexual and Other Transgender Persons Under Hong Kong Law*, 34 H.K. L. J. 245 (2004); Robyn Emerton, *Time for Change: A Call for the Legal Recognition of Transsexual and Other Transgender Persons in Hong Kong*, 34 H.K. L. J. 515 (2004). An update on her research has been published on the website of the Transgender ASIA Research Center: see ROBYN EMERTON, COUNTRY REPORT: HONG KONG, LEGAL ISSUES (2007), available at http://www.transgenderasia.org/country_report_hk_legal.htm (last visited Oct. 13, 2012).

Hong Kong Marriage Ordinance does not permit same-sex marriage²³⁷ and the government currently interprets this ordinance as prohibiting a transgender woman from marrying her male partner. This is because the Hong Kong government still relies upon the gender recorded at birth when determining whether to issue a marriage license, even if the applicant has undergone gender reassignment and obtained new identity documents recording the acquired gender.

W (who requested the court not disclose her full name) is a transgender woman who sought judicial review of the government's interpretation of the Marriage Ordinance, arguing that it violated her right to privacy and her right to marry.²³⁸ Her primary argument was that the Registrar of Marriages should have considered her to be a woman for the purposes of the Marriage Ordinance, and thus permitted her to marry a man. Alternatively, she argued that if the Marriage Ordinance could not be so interpreted, then it was unconstitutional because it violated her rights under the Hong Kong Basic Law, the Bill of Rights Ordinance, and the ICCPR.

W was unsuccessful in the Court of First Instance and numerous academic commentators published articles disagreeing with the judge's approach to the case. The court's interpretation of the Marriage Ordinance relied heavily on the traditional view that procreation is a central purpose of the institution of marriage.²³⁹ The court also applied the judgment of the English High Court in *Corbett v. Corbett*,²⁴⁰ which is no longer the law in England.²⁴¹ While it is arguable the Hong Kong legislature endorsed the

²³⁷ Section 40 of the Marriage Ordinance states: "(1) Every marriage under this Ordinance shall be a Christian marriage or the civil equivalent of a Christian marriage. (2) The expression 'Christian marriage or the civil equivalent of a Christian marriage' implies a formal ceremony recognized by the law as involving the voluntary union for life of one man and one woman to the exclusion of all others." Marriage Ordinance, (1997) Cap. 181, § 40 (H.K.), available at http://www.legislation.gov.hk/blis_ind.nsf/WebView?OpenAgent&vwpg=CURALLENGDOC*181*100*181.1 (last visited Nov. 25, 2012).

²³⁸ *W. v. Registrar of Marriages*, [2010] 5 H.K.C. 359 (C.F.I.), *aff'd* [2011] H.K.E.C. 1546 (C.A.).

²³⁹ See, e.g., Christopher Hutton, *Objectification and Transgender Jurisprudence: The Dictionary as Quasi-Statute*, 41 H.K. L. J. 27 (2011); Marco Wan, *Doing Things with the Past: A Critique of the Use of History by Hong Kong's Court of First Instance in W. v. Registrar of Marriages*, 41 H.K. L. J. 125 (2011); Sam Winter, *Transgender Science: How Might it Shape the Way We Think about Transgender Rights?*, 41 H.K. L. J. 139 (2011).

²⁴⁰ *Corbett v. Corbett* [1970] 2 AER 33 (U.K.) (holding the marriage void on the ground that Mrs. Corbett was born male).

²⁴¹ Parliament enacted legislation permitting changes to one's birth certificate, thus enabling an individual to marry in his or her acquired gender. See Gender Recognition Act 2004, available at <http://www.legislation.gov.uk/ukpga/2004/7/contents> (last visited 9 Oct. 2012). The new legislation was introduced largely to comply with

approach of *Corbett v. Corbett* when it enacted §20(1)(d) of the Matrimonial Causes Ordinance,²⁴² the Hong Kong court went well beyond what was stated in *Corbett v. Corbett* regarding the role of procreation in marriage.²⁴³ Commentators also disagreed with the extent to which the court deferred to the executive and legislative branches, noting that the judiciary has a special role to play in Hong Kong in protecting the rights of minorities.²⁴⁴ Additionally, commentators were dismayed that this decision would put Hong Kong behind Europe and many Asian countries with respect to recognizing the right of a person to live in one's chosen gender.²⁴⁵

Despite this onslaught of criticism, W's appeal to the Hong Kong Court of Appeal was denied in a unanimous opinion.²⁴⁶ Interestingly, both courts called for legislative reform of the Marriage Ordinance and condemned discrimination against transgender persons. At the end of the day, however, neither court found a way to interpret the existing Marriage Ordinance differently than the Registrar of Marriages. Nor did they find a breach of the ICCPR, which was perhaps not that surprising because Article 23 refers to the right of "men" and "women" to marry and many jurists have interpreted that to mean that a State Party to the ICCPR can determine whether it wishes to legalize same-sex marriage. Ironically, the court's decision would also mean that a transgender woman *can* marry

rulings by the European Court of Human Rights. *See, e.g.,* Christine Goodwin v. The United Kingdom, Case No 28957/1995 (finding that the UK had violated Articles 8 and 12 of the European Convention on Human Rights), *available at:* <http://www.unhcr.org/refworld/topic,4565c2252f,48917bbf2,4dad9f762,0,ECHR,,.html>.

²⁴² Matrimonial Causes Ordinance (1997) Cap. 179, §20(1)(d) (H.K.), *available at* [http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/EF17B3FD55EACC5D482575EE004A3491/\\$FILE/CAP_179_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/EF17B3FD55EACC5D482575EE004A3491/$FILE/CAP_179_e_b5.pdf) (last visited Nov. 25, 2012). (providing that a marriage that took place in Hong Kong after June 30, 1972 shall be declared void if "the parties are not respectively male and female.").

²⁴³ *See* Athena Liu, *Exacerbating Corbett: W. v. Registrar of Marriages*, 41 H.K. L. J. 759 (2011).

²⁴⁴ *See, e.g.,* Cora Chan, *Deference and the Separation of Powers: An Assessment of the Court's Constitutional and Institutional Competences*, 41 H.K. L. J. 7 (2011) (arguing that courts should not be overly deferential to the government's position when adjudicating constitutional challenges); Puja Kapai, *A Principled Approach Towards Judicial Review: Lessons from W. v. Registrar of Marriages*, 41 H.K. L. J. 49 (2011) (arguing against the court's search for a public consensus on the right of a transgender woman to marry on the ground that the court has a responsibility to serve as a conduit for minority representation in contentious cases).

²⁴⁵ Jens M. Scherpe, *Changing One's Legal Gender in Europe—The 'W' Case in Comparative Perspective*, 41 H.K. L. J. 109 (2011) (demonstrating that the Court's judgment, if not successfully appealed, will render Hong Kong less progressive than Europe and many countries in Asia).

²⁴⁶ *W. v. Registrar of Marriages*, [2011] H.K.E.C. 1546 (C.A.).

another woman if she wishes to do so—which would appear to the public as though same-sex marriage has been approved. One would think that the rational step (even if Hong Kong is not ready for same-sex marriage) would be to permit a person who is now designated “female” on her Hong Kong Identity Card to marry a man.

W has recently been granted leave to appeal to the Hong Kong Court of Final Appeal, which may find a way to hold that she is a woman for the purposes of the Marriage Ordinance, or adopt a more robust view of the right to marriage.²⁴⁷ It should be noted, however, that the two questions that have been certified for appeal are fairly narrow:

1. Whether on a true and proper construction of the Marriage Ordinance, Cap.181 the words ‘woman’ and ‘female’ in sections 21 and 40 of the [Marriage Ordinance] include a post-operative male-to-female transsexual?
2. If the answer to Question 1 is ‘No’, whether sections 21 and 40 of the Marriage Ordinance are unconstitutional having regard to the Applicant’s right to marry under Article 37 of the Basic Law and/or Article 19(2) of the Hong Kong Bill of Rights and/or her right to privacy under Article 14 of the Hong Kong Bill of Rights?²⁴⁸

The questions on appeal are narrow in part because that is the way that W argued her case. Interestingly, she did not argue that Hong Kong should recognize same-sex marriage, and apparently also did not argue that the government’s interpretation of the Marriage Ordinance constituted unlawful discrimination against her. In my view, she certainly could have argued that it constitutes discrimination on the ground of “sex” or “other status” (which is prohibited by the Basic Law, the ICCPR, and the Hong Kong Bill of Rights Ordinance). At least one other commentator has made a similar argument.²⁴⁹

W might also have alleged discrimination on the ground of disability under the Hong Kong DDO. The DDO has been interpreted to prohibit discrimination on the ground of gender dysphoria and W may well have been diagnosed at some point in time in order to qualify for gender reassignment services. Although the DDO does not have the status of superior law, it does apply to the administration of laws and government programs and thus should arguably influence the way that

²⁴⁷ Leave to appeal to the Court of Final Appeal was granted on March 1, 2012. See *W. v. Registrar of Marriages*, [2012] H.K.E.C. 308 (C.A.).

²⁴⁸ *W. v. Registrar of Marriages*, Certification of Appeal (CACV266/2010, March 1, 2012).

²⁴⁹ See Kelley Loper, *W. v. Registrar of Marriages and the Right to Equality in Hong Kong Law*, 41 H.K. L. J. 89 (2011).

government officials interpret and apply other statutes. It should be noted that the DDO prohibits not only discrimination on the ground of an existing disability, but also on the ground of a past or “imputed” disability.²⁵⁰ Thus, a transgender woman who has achieved gender alignment, whether through social transition, hormonal treatments, and/or surgical treatment, would not need to allege that she currently has a disability in order to rely upon the DDO in court.

It is my understanding that W chose not to allege disability discrimination, because she believed that to do so would stigmatize transgender persons and undermine the goal of gaining full acceptance of gender diversity. This is, of course, a highly sensitive issue. In 1973 the American Psychiatric Association (“APA”) removed homosexuality from the Diagnostic and Statistical Manual of Mental Disorders (“DSM”). The DSM is widely used in North America and also influences the International Statistical Classification of Diseases and Related Health Problems published by the World Health Organization (“WHO”). Virtually all major professional mental health organizations have since affirmed that homosexuality is not a mental disorder.²⁵¹ In contrast, Gender Identity Disorder (“GID”) was added to the DSM in 1980. The diagnosis has been strongly criticized and there is a growing international campaign to persuade the APA and the WHO to remove or revise it. For example, the World Professional Association for Transgender Health (“WPATH”) maintains that gender variance is a common and culturally-diverse human phenomenon that should not be judged as inherently pathological, as this only makes transgender individuals “more vulnerable to social and legal marginalisation and exclusion.”²⁵² WPATH also criticized governments that make surgery or sterilization a condition of changing one’s gender identity in legal documents.²⁵³

GID Reform Advocates (a group of medical professionals, caregivers, researchers, and activists) has also argued that the DSM stigmatizes transgender persons as “mentally deficient” and thus urges the medical professions to affirm that “difference is not disease,

²⁵⁰ For analysis of this and other provisions, see Carole J. Petersen, *A Progressive Law with Weak Enforcement? An Empirical Study of Hong Kong’s Disability Law*, 25(4) DISABILITY STUDIES QUARTERLY (Fall 2005).

²⁵¹ For a summary of events leading to the amendment, see *Sexual Orientation*, AMERICAN PSYCHIATRIC ASSOCIATION, available at <http://www.healthyminds.org/More-Info-For/GayLesbianBisexuals.aspx> (last visited Mar. 18, 2012).

²⁵² Press Release, World Prof’l Ass’n for Transgender Health (WPATH), WPATH De-Psychopatholisation Statement (May 26, 2010), available at http://www.wpath.org/publications_public_policy.cfm (last visited Mar. 10, 2012).

²⁵³ Press Release, World Prof’l Ass’n for Transgender Health (WPATH), WPATH Identity Recognition Statement (June 16, 2010), available at http://www.wpath.org/publications_public_policy.cfm (last visited Mar. 10, 2012).

nonconformity is not pathology, and uniqueness is not illness.”²⁵⁴ However, this group has not suggested that the diagnosis be entirely eliminated. Rather, it argues for recognition of the legitimacy of cross-gender identity while distinguishing “gender dysphoria” as a treatable condition. The group has lobbied for diagnostic criteria that will “serve a clear therapeutic purpose, are appropriately inclusive, and define disorder on the basis of distress or impairment and not upon social nonconformity.”²⁵⁵ The APA is currently drafting the fifth edition of the DSM, to be completed in 2013. The draft revisions have been published for public comment and they include a proposal to replace the term “Gender Identity Disorder” with “Gender Dysphoria.”²⁵⁶ However, some activists fear that the revised diagnosis will only perpetuate discrimination and intolerance.²⁵⁷ Perhaps in an effort to reassure the community, the APA recently released two position statements: one strongly condemning discrimination against transgender and gender-variant persons, and the other supporting access to treatment for those who seek it.²⁵⁸

Why not abandon the diagnosis entirely? This would be the logical continuation of the movement towards greater freedom of expression of sexuality and gender.²⁵⁹ However, access to medical and surgical transition services might become more limited in some countries if the diagnosis were removed. This could be a concern in Hong Kong, where gender reassignment services are currently paid for through the Hong Kong public healthcare system. Hong Kong employers might also refuse to provide leave or other accommodations to transitioning employees if there was no medical diagnosis documenting the need for gender reassignment treatments. However, at present, a transitioning employee could certainly file a complaint with the Hong Kong Equal Opportunities Commission if he or she were treated less favorably on the basis of gender dysphoria because the DDO has been interpreted to cover gender dysphoria.

²⁵⁴ *The Vision of GID Reform*, GID REFORM ADVOCATES, available at <http://www.gidreform.org/> (last visited Oct. 14, 2012).

²⁵⁵ *Id.*

²⁵⁶ DSM-5 Development: Proposed Revisions/Gender Dysphoria, AM. PSYCHIATRIC ASS’N, available at <http://www.dsm5.org/ProposedRevision/Pages/GenderDysphoria.aspx> (last visited 28 March 2012).

²⁵⁷ For an example, see INTERNATIONAL NETWORK FOR TRANS’ DEPATHOLOGIZATION, <http://www.stp2012.info/old/en/manifesto> (last visited Aug. 20, 2012).

²⁵⁸ See APA Issues Official Positions Supporting Access to Care and the Rights of Transgender and Gender Variant Persons, PSYCHIATRIC NEWS ALERT, Aug. 16, 2012, available at <http://alert.psychiatricnews.org/2012/08/apa-issues-official-positions.html>.

²⁵⁹ See Spanish Network for Depathologization of Trans Identities, Best Practices Guide to Trans Health Care in the National Health System (2010), available at www.stp2012.info/guia/STP_guide_health.pdf (last visited Apr. 12, 2012).

Regardless of the final outcome in W's case, it illustrates the choice that the transgender community may face in future litigation. As discussed in the next section, this issue may also affect the strategies of Hong Kong's human rights organizations regarding the reporting processes for international human rights treaties.

VI. THE IMPORTANCE OF PARTICIPATING IN THE REPORTING PROCESSES
FOR ALL HUMAN RIGHTS TREATIES THAT APPLY TO HONG KONG,
INCLUDING THE CONVENTION ON THE RIGHTS OF PERSONS WITH
DISABILITIES

Given the evidence of discrimination against persons who are sex- and gender-diverse, there is a clear need for an international treaty that expressly addresses their rights and a monitoring committee with expertise in the field. Unfortunately, the broad consensus that would be required to adopt such a treaty does not yet exist within the United Nations. In 2006, fifty-five member states joined a statement calling for dialogue on sexual orientation and gender identity within the United Nations Human Rights Council ("HRC"). In 2008, sixty-eight nations endorsed a statement affirming that human rights treaties apply to all persons, regardless of sexual orientation or gender identity.²⁶⁰ In 2011, in what has been described as a "ground breaking achievement," the HRC adopted a resolution requesting the High Commissioner for Human Rights to prepare a study on violence and discrimination on the basis of sexual orientation and gender identity.²⁶¹ However, the vote on the resolution was close and the Arab League has been particularly adamant in its opposition to the concept of recognizing gay rights in international law.²⁶² Thus, in the near future, it is unlikely that the United Nations will adopt a treaty that expressly prohibits discrimination against persons who are sex- and gender-diverse.

The lack of a specialist treaty makes it all the more important that existing international and regional human rights instruments are fully applied. This process has been greatly facilitated by the 2007 adoption of

²⁶⁰ Letter from the Permanent Representatives of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway to the President of the General Assembly (Dec. 18, 2008), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/667/99/PDF/N0866799.pdf?OpenElement>. For a summary of this and other initiatives related to sexual orientation and gender identity, see FRENCH PERMANENT MISSION TO THE UNITED NATIONS, <http://www.franceonu.org/spip.php?article4092> (last visited Aug. 20, 2012).

²⁶¹ For commentary, see Human Rights Watch, *Historic Decision at the United Nations: Human Rights Council Passes First Ever Resolution on Sexual Orientation and Gender Identity* (June 17, 2011), <http://www.hrw.org/news/2011/06/17/historic-decision-united-nations>.

²⁶² *Id.* (noting that the vote on the HRC resolution was twenty-three in favor, nineteen opposed, and four abstentions).

the Yogyakarta Principles, which affirmed that persons who are sex- and gender-diverse are entitled to the full range of human rights.²⁶³ Although not legally binding, the Yogyakarta Principles provide guidance on how international human rights treaties should be interpreted in relation to sex- and gender-diversity. As a result, the U.N. committees that monitor compliance with human rights treaties can use the principles when reviewing Hong Kong's periodic reports and when drafting concluding observations.

The International Commission of Jurists ("ICJ") publishes a regularly updated collection of relevant court decisions, general comments, and concluding observations by treaty bodies that are relevant to sex- and gender-diversity.²⁶⁴ The ICJ also produces a practitioners' guide to assist lawyers representing clients who are sex- and gender-diverse.²⁶⁵ These collections indicate that the Human Rights Committee has had the most influence among treaty bodies, partly because the ICCPR protects the right to privacy, but also because it prohibits discrimination on such a broad range of grounds, including "other status." Additionally, it has been argued that human rights advocates could make greater use of Article 19 of the ICCPR (freedom of expression) to advance the rights of persons who are sex- and gender-diverse. Freedom of expression can shift the focus away "from fitting people into binary categories of sex and gender" and towards greater respect for choice.²⁶⁶

The Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") also provides an interesting example of how a treaty body can apply existing law to issues of sex- and gender-diversity. The CEDAW Committee has recently paid increased attention to the situations of lesbian and transgender women. In 2010, it issued General Recommendation 28 on Article 2 of CEDAW to clarify the scope of states' obligations to eliminate discrimination.²⁶⁷ The Committee stressed that

²⁶³ Yogyakarta Principles, *supra* note 1.

²⁶⁴ INT'L COMM'N OF JURISTS, SEXUAL ORIENTATION AND GENDER IDENTITY IN HUMAN RIGHTS LAW: REFERENCES TO JURISPRUDENCE AND DOCTRINE OF THE UNITED NATIONS HUMAN RIGHTS SYSTEM (4th ed. 2010), *available at* <http://www.icj.org/themes/sexual-orientation-and-gender-identity/#!/lightbox/0/> (last visited Apr. 10, 2012).

²⁶⁵ INT'L COMM'N OF JURISTS, SEXUAL ORIENTATION, GENDER IDENTITY, AND INTERNATIONAL HUMAN RIGHTS LAW: PRACTITIONERS GUIDE (4th ed. 2009), *available at* <http://icj-usa.org/publications/> (last visited Apr. 10, 2012).

²⁶⁶ Sarah Winter, *Are Human Rights Capable of Liberation? The Case of Sex and Gender Diversity* 15(1) AUSTR. J. OF HUM. RTS. 151, 167 (2009).

²⁶⁷ U.N. Committee on the Elimination of Discrimination Against Women, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, Office for the High Commissioner for Human Rights (Oct. 19, 2010), CEDAW/C/2010/47/GC.2, *available at*

discrimination against women is “inextricably linked with other factors that affect women, such as . . . sexual orientation and gender identity”²⁶⁸ and reminded states parties that they “must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them.” This recommendation provides an open invitation to non-governmental organizations (“NGOs”) to submit alternative reports that inform the CEDAW Committee of violations of the rights of lesbians and transgender women. For example, in 2010 the Committee received a report describing incidents of torture and extortion by the Ugandan police.²⁶⁹ It responded by urging the government of Uganda to “decriminalize homosexual behavior and to provide effective protection from violence and discrimination against women based on their sexual orientation and gender identity, in particular through the enactment of comprehensive antidiscrimination” laws.²⁷⁰

The ability of any treaty-monitoring body to promote rights depends in part upon whether relevant issues are raised in the reporting process. Activists from Hong Kong are fortunate in that the treaty bodies review the territory separately from the rest of China. While the Hong Kong report is generally officially submitted as part of China’s report, it is drafted by the local government after consultation with the local community.²⁷¹ The government of Hong Kong also sends its own delegation to answer questions at each periodic review. Local NGOs regularly prepare shadow reports and typically send their own representatives to Geneva when Hong Kong is being reviewed. The treaty bodies then issue separate comments on Hong Kong, despite the fact that it is only a tiny part of China and has far fewer human rights controversies. The concluding comments are read carefully by local legislators and NGOs, which use them to lobby for reforms.

<http://www2.ohchr.org/english/bodies/cedaw/comments.htm>.

²⁶⁸ *Id.* ¶ 18.

²⁶⁹ See FREEDOM AND ROAM UGANDA & INT’L GAY AND LESBIAN HUMAN RIGHTS COMM’N, SHADOW REPORT TO THE CEDAW COMMITTEE: VIOLATION OF THE RIGHTS OF LESBIAN, BISEXUAL, AND TRANSGENDER (LBT) AND KUCHU PEOPLE IN UGANDA (2010), available at <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/1241.html> (last visited Mar. 5, 2012).

²⁷⁰ U.N. COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, CONCLUDING OBSERVATIONS: UGANDA, ¶ 44, U.N. Doc. CEDAW/C/UGA/CO/7 (Nov. 5, 2010).

²⁷¹ For copies of the initial reports from the Hong Kong government to the U.N. human rights treaty-monitoring bodies, see HONG KONG SPECIAL ADMIN. REGION, HUMAN RIGHTS REPORTING, available at <http://www.cmab.gov.hk/en/issues/human.htm> (last visited Aug. 10, 2011).

Previous sections of this article noted some of the concluding comments from treaty bodies that have called upon the Hong Kong government to introduce legislation prohibiting discrimination on the grounds of sexual orientation and gender identity. The most recent treaty to be applied to Hong Kong is the Convention on the Rights of Persons with Disabilities (“CRPD”) and its initial report was reviewed by the Committee in September 2012.²⁷² However, NGOs apparently chose not to raise issues affecting sex and gender minorities.²⁷³ My understanding is that the case of *W. v. Registrar of Marriages* was not discussed during the review because there was a concern that doing so would undermine the movement to depathologize transgender identities.

I believe that this was a strategic error and that discrimination against transgender individuals (including the government’s current interpretation of the Marriage Ordinance) should be brought to the attention of the Committee on the Rights of Persons with Disabilities, as well as to the other human rights treaty-monitoring bodies. It is important to recognize that the CRPD has rejected the medical model of disability, which focuses on the “affliction” and the need for treatment. Instead, the treaty embraces the social and human rights models of disability. The social model is a generic term for a theory of disability that emerged in the 1960s; it locates the experience of disability in the social environment and thus views disability as a form of social oppression.²⁷⁴ The human rights model is similar to the social model in that it views people who live with impairments as rights holders and recognizes that they are often more disabled by physical and attitudinal barriers than by any particular condition.²⁷⁵ The impact of these two models can be clearly seen in the

²⁷² See U.N. COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, CONCLUDING OBSERVATIONS: CHINA (INCLUDING HONG KONG AND MACAU) Sept. 27, 2012 (advanced unedited version).

²⁷³ For copies of the alternative reports that were submitted regarding China and Hong Kong (which are categorized under the heading “Information from Other Sources”), see *Committee on the Rights of Persons With Disabilities for the Seventh Session*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session7.aspx> (last visited Nov. 25, 2012); Office of the High Commissioner for Human Rights, *Committee on the Rights of Persons with Disabilities for the Eighth Session*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session8.aspx> (last visited Nov. 25, 2012).

²⁷⁴ See, e.g., Rosemary Kayess & Phillip French, *Out of Darkness Into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUM. RTS. L. REV. 1, 5-8 (2008); Arlene S. Kanter, *The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities* 34 SYRACUSE J. INT’L L. & COMM. 287, 291-92 (2007).

²⁷⁵ The terms “social model” and “human rights model” are often used interchangeably, at least in discussions of the CRPD. See, e.g., Kanter, *supra* note 274, at 291-92.

general principles of the CRPD, which are capability, equality, inclusion, full and effective participation in society, and the removal of physical and attitudinal barriers.²⁷⁶

Because of their commitment to the social and human rights models, the drafters of the CRPD struggled with the question of whether and how to define disability in the treaty. Some delegates and NGO representatives wanted a detailed definition because they feared that governments would otherwise try to exclude people with certain types of impairments from the protection of national laws. Others argued that any medical definition would undermine the treaty's commitment to the social model of disability. Eventually the drafters agreed on a compromise, but one that is largely committed to the social model: there is no definition of "disability" in the definitions section of the treaty, but Article 1 states that the purpose of the convention is to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities. . . ."²⁷⁷ and that "[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."²⁷⁸ Thus, the CRPD does not try to define the full scope of the term "persons with disabilities," but it does make clear that certain groups must be protected by any domestic legislation implementing the treaty. The CRPD thus recognizes that impairments are an inherent part of the human condition. But it is not simply our impairments that hinder full participation; rather it is the manner in which socially constructed barriers tend to interact with our individual conditions that creates disability. In short, the CRPD seeks to depathologize disability in much the same way that the transgender community seeks to depathologize gender variance.

The CRPD does define the *discrimination* that it seeks to redress, stating that "discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.²⁷⁹ This is comparable to the definitions of discrimination in the International Covenant on the Elimination of All Forms of Racial Discrimination ("ICERD") and CEDAW treaties, except that the CRPD goes on to state that discrimination includes "denial of reasonable accommodation," which it defines as "necessary and appropriate

²⁷⁶ CRPD, art. 3.

²⁷⁷ *Id.* art. 1.

²⁷⁸ *Id.*

²⁷⁹ *Id.* art. 2.

modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”²⁸⁰ A community’s understanding of what is necessary and appropriate will evolve as the social model of disability exerts more influence. Thus wheelchair ramps and accessible bathrooms were once considered major “accommodations,” but are now standard in many countries, enabling more people to attend school, work, and participate in public life. Similarly, a transgender person who elects to pursue medical or surgical transition services might benefit from modifications to the standard “male” and “female” bathroom facilities. The provision of such facilities could easily fall within the definition of a “reasonable accommodation,” the denial of which could constitute discrimination. Under the CRPD, the disability created by that denial of accommodation would not be the condition of the transgender person’s body but rather the interaction of the social environment with that individual. When the CRPD is seen in this light, there is far less reason to fear that the campaign to depathologize transgender would be undermined by participation in the CRPD reporting process.

People who are unfamiliar with the CRPD sometimes expect it to promote only economic and social rights, such as increased access to healthcare, education, and employment. In fact, the CRPD embraces the full range of rights, including many important civil liberties.²⁸¹ The treaty has also discarded the artificial distinction between negative and positive rights, which has tended to dominate international discourse since the adoption of the ICCPR and the ICESCR (the treaties that translated the Universal Declaration of Human Rights into enforceable obligations).²⁸² Instead, the CRPD embraces a more holistic view of what human rights mean for persons with disabilities,²⁸³ which typically involves a combination of rights that were previously set forth in separate treaties.

The CRPD is also very firm on personal autonomy and the right to family life. State parties have an obligation, pursuant to Article 23 of the CRPD, to “eliminate discrimination against persons with disabilities in all

²⁸⁰ *Id.*

²⁸¹ See, e.g., *id.* art. 14 (liberty and security of person); *id.* art. 15 (freedom from torture and cruel, inhuman, or degrading treatment); *id.* art. 18 (liberty of movement and nationality); *id.* art. 21 (freedom of expression); *id.* art. 22 (privacy).

²⁸² For example, in the CRPD, freedom of expression and access to information are not simply “negative rights” because the state has an affirmative duty to promote sign language and accessible technologies. CRPD, art. 21.

²⁸³ See Frédéric Mégret, *The Disabilities Convention: Towards a Holistic Concept of Rights* 12(2) INT’L J. HUM. RTS. 261 (2008); see also Frédéric Mégret, *The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?* 30 HUM. RTS. Q. 494 (2008).

matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that . . . [t]he right of all persons with disabilities who are of marriageable age to marry and to found a family” is recognized.²⁸⁴ Given that Hong Kong is bound by the CRPD, it is certainly arguable that this provision should be taken into account when interpreting and applying the Marriage Ordinance. Article 23 should also be considered in the event that Hong Kong conducts a legislative review of the right of transgender persons to marry, which is what the Court of First Instance and the Court of Appeal suggested in the case of *W. v. Registrar of Marriages*. The CRPD also states that all persons with disabilities shall “retain their fertility on an equal basis with others.”²⁸⁵ This would seem to preclude any law or policy that *requires* transgender persons to undergo sterilization before being legally recognized in the gender of their choice or before being allowed to marry in their chosen gender.

This summary has highlighted only a few of the many provisions in the CRPD that may prove useful. An additional reason for engaging with the CRPD reporting process is that a certain number of persons in Hong Kong’s LGBTI community will likely experience disability discrimination, particularly as they age and are compelled to interact more frequently with healthcare systems. This discrimination would probably be considered intersectional in that LGBTI individuals are more likely to experience discrimination in hospitals, retirement homes, and other healthcare institutions than those persons with disabilities who conform more easily to the traditional categories of male and female.

By participating in the CRPD reporting process, NGOs can help to ensure that the LGBTI community is not ignored when the Committee on the Rights of Persons with Disabilities reviews Hong Kong’s laws and policies. NGOs can also help to ensure that the Hong Kong government takes sex- and gender-diversity into account when drafting future reports to all human rights treaty-monitoring bodies. In short, Hong Kong’s LGBTI, disability rights, and general human rights movements should work together and simultaneously embrace the social and human rights models of disability and the diversity of sexual orientation and gender identity.

CONCLUSION

In September 2012, Raymond Chan Chi-chuen was elected to the Hong Kong Legislative Council. Soon after the election, he disclosed his

²⁸⁴ CRPD, art. 23.

²⁸⁵ *Id.* The author has previously analyzed the right to retain fertility in the context of mainland China. See Carole J. Petersen, *Population Policy and Eugenic Theory: Implications of China’s Ratification of the United Nations Convention on the Rights of Persons with Disabilities*, 8 CHINA: AN INTERNAT’L J. 85 (2010).

sexual orientation to the public and thus became the first openly gay legislator in the territory.²⁸⁶ Chan has vowed to work for equal opportunities, including legislation permitting same-sex marriage. On one hand, it is telling and somewhat sad that Chan did not feel he could disclose his sexual orientation until after the election. On the other hand, the territory has made enormous progress in the past three decades. In the mid-1980s Hong Kong had not incorporated any international human rights treaties into its domestic law and the government felt that it could simply shelve the Law Reform Commission's proposal to decriminalize same-sex relations. A few years later the Attorney General stood up and persuaded legislators to vote for decriminalization, sternly warning them that Hong Kong's criminal laws would otherwise be struck down once the Bill of Rights was enacted and the ICCPR was incorporated. And when the Legislative Council attempted to only partly decriminalize, that is exactly what the courts did: strike down unconstitutional criminal laws on the ground that they violated gay men's rights to privacy and equality.

Outside of the criminal law framework the progress has been slower but still meaningful. By the mid-1990s the Hong Kong Legislative Council was at least studying Wu's EOB and considering the possibility of prohibiting discrimination on the ground of sexuality in the private sector. Although the bill did not pass, we can expect the treaty-monitoring bodies to continue to nag the government on a regular basis until it agrees to support similar legislation. Meanwhile, small reforms (such as the expansion of the Domestic Violence Ordinance to cover same-sex couples) are gradually being adopted. At each stage the international reporting process for human rights treaties has provided that extra motivation when legislative inertia might otherwise have set in.

Moreover, the value of the international human rights system goes well beyond the legal and policy reforms that it helps to promote. For human rights activists, participation in the reporting process helps us to move beyond our "group"—be it based on gender, sexuality, disability, or nationality—and to think in terms of global citizenship. For a small territory like Hong Kong, which had no say in its political future when the colonial period came to an end, the human rights treaty system has become vital in maintaining the freedom and vibrancy of a remarkable city.²⁸⁷

²⁸⁶ See *First Openly Gay Legislator Raymond Chan Helps Pluralistic Society*, S. CHINA MORNING POST (H.K.), Sept. 13, 2012, available at <http://www.scmp.com/comment/insight-opinion/article/1035236/first-openly-gay-legislator-raymond-chan-helps-pluralistic>.

²⁸⁷ See generally, Carole J. Petersen, *From British Colony to Special Administrative Region of China: Embracing Human Rights in Hong Kong*, in *HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE, AND THE UNITED STATES* 224 (Randall Peerenboom, Carole J. Petersen, & Albert Chen, eds., 2006).