RESPECTING PRIVACY AND AFFIRMING EQUALITY: THE DUAL SIGNIFICANCE OF *LEUNG V SECRETARY FOR JUSTICE* FOR HONG KONG'S GAY COMMUNITY

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On 24 August 2005, Justice Hartmann handed down a landmark judgment in Leung v Secretary for Justice, the first "gay rights" case to come before the Hong Kong courts. In a judicial review application, the High Court declared that four provisions in the Crimes Ordinance relating to sexual activities between men were unconstitutional and therefore invalid, on the basis that they arbitrarily interfered with the private lives of gay men, and discriminated against them on the ground of their sexual orientation. The Government has appealed the decision regarding section 118C (only), which prohibits "buggery" between men where one party is under the age of 21. This article calls for the Court of Appeal to uphold Justice Hartmann's ruling, arguing that it should comfortably withstand the Government's grounds of appeal, and highlighting further potential precedents and arguments in support. It also responds to an article in Volume 35, Part 3 of this journal, in which Robert Danay argued that the offence of buggery should have been analysed on privacy grounds alone, and that the use of the equality analysis had resulted in the judicial promotion of a negative, "hypersexualised homosexual stereotype". This article contends that upholding the dual aspects of the judgment is important for continuing Hong Kong's progressive jurisprudence in the fields of equality and human rights, and also has positive significance for Hong Kong's gay community, by both respecting the privacy and affirming the equality of gay men in Hong Kong society.

Introduction

On 24 August 2005, Justice Hartmann handed down a landmark judgment in *Leung v Secretary for Justice*,[1] the first "gay rights" case to come before the Hong Kong courts. In this judicial review application, the High Court declared that four provisions in the Crimes Ordinance[2] relating to sexual

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1 *Leung T. C. William Roy v Secretary for Justice*, HCAL 160/2004 (referred to below as "*Leung*").

2 Cap 200.

activities between men were unconstitutional and therefore invalid, on the basis that they arbitrarily interfered with the private lives of gay men, and discriminated against them on the ground of their sexual orientation.

Three of the impugned provisions apply only to sexual conduct between men, namely "gross indecency" with a man under the age of 21 (section 118H), and private group activities involving "buggery" and "gross indecency" between men of any age (sections 118F(2)(a) and 118J(2)(a)). The fourth provision, section 118C, prohibits "buggery", (as it is still archaically referred to in the Crimes Ordinance)[3] between men where one party is under the age of 21, under penalty of *life imprisonment*. Unlike the other three provisions, section 118C has a heterosexual counterpart, as section 118D separately prohibits "buggery" between men and women where the woman is under the age of 21, and subjects it to the same penalty. However, section 118C criminalises both parties to the sexual act, whilst section 118D criminalises only the older party. The Legislative Council introduced these provisions in 1991 as part of a legislative scheme to regulate sexual conduct between men. This scheme replaced previous legislation that had criminalized all forms of male homosexual conduct.[4]

Although Justice Hartmann's ruling was celebrated by the gay community and human rights advocates in Hong Kong and abroad, it unleashed a certain amount of criticism. This was directed primarily at the ruling on the offence of buggery, which had the effect of lowering the age of consent for anal intercourse between men to 16. Some also questioned the appropriateness of the court determining what many perceived as a sensitive issue, which was better left to the legislature.[5] Celebrations were silenced when the Government – seemingly in response to public concern – appealed the decision regarding section 118C (only) on 30 September 2005. The appeal is expected to be heard in the summer of 2006.

This article calls for the Court of Appeal to uphold Justice Hartmann's ruling. Whilst the judgment has been criticised by one author as "at times rather conclusory, and at other times somewhat imprecise",[6] its reasoning goes

[3] The author prefers the less derogatory term "anal intercourse", but uses the term "buggery" to be consistent with the Crimes Ordinance and other relevant law. The term "gay men" is also used in preference to "homosexuals".

[4] For a discussion of the legal and political developments that led to decriminalisation, *see* Carole Petersen, "Values in Transition: The Development of the Gay and Lesbian Rights Movement in Hong Kong", (1997) 19 *Loyola of Los Angeles International and Comparative Law Review* 337.

[5] For example, "Government should appeal against gay ruling" (editorial), *Ming Pao*, 26 Aug 2005; "Mr Justice Hartmann ignored the protection of adolescents", *Wen Wei Po*, 26 Aug 2005; "Hartmann doesn't know the difference between men and women", *Oriental Daily*, 27 Aug 2005; "Court should respect their judicial freedoms", *Ta Kung Pao*, 29 Aug 2005. *See*, however, eg, "The best gift Mr Justice Hartmann could give to gays", *Ming Pao*, 28 Aug 2005; "A blow struck for the rights of the individual" (editorial), *South China Morning Post*, 25 Aug 2005 and "Gay sex law a milestone for Hong Kong" (editorial), *South China Morning Post*, 29 Aug 2005.

[6] Robert Danay, "*Leung v Secretary for Justice*: Privacy, Equality and the Hypersexualised Homosexual Stereotype", (2005) 35 *HKLJ* 545, 547.

to the heart of the issues, and is based on strong legal precedent from international and comparative sources. This article argues that the judgment should comfortably withstand the Secretary for Justice's grounds of appeal, and highlights further potential precedents and arguments in support of the High Court's findings, including a recent authority from the High Court of Fiji. The article also responds to an article in Volume 35, Part 3 of this journal, in which Robert Danay argued that the offence of buggery should have been analysed on privacy grounds alone, and that the use of the equality analysis had resulted in the judicial promotion of a negative, "hypersexualised homosexual stereotype". This article contends that if the Court of Appeal determines the case on a privacy basis only – even if ultimately it affirms the unconstitutionality of section 118C – this move would constitute a step backwards for Hong Kong's otherwise progressive jurisprudence in the fields of equality and human rights.

Sexual Orientation as a Prohibited Ground of Discrimination

Undoubtedly, the most significant outcome of the case for Hong Kong's gay community is that the Government accepted "without demur"[7] that gay men constitute a class of persons for the purposes of the equality and non-discrimination guarantees in the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (the "Basic Law") and the Hong Kong Bill of Rights Ordinance (the "BORO").[8] Justice Hartmann adopted this view, drawing primarily on *Toonen v Australia*,[9] in which the United Nations Human Rights Committee held that the prohibition on discrimination on the ground of "sex" in Articles 2(1) and 26 of the International Covenant on Civil and Political Rights (the "ICCPR") (the equivalents of Articles 1(1) and 22 of the BORO) encompassed "sexual orientation".[10] *Leung* was the first time that the Hong Kong judiciary had

7 *Leung* (n 1 above), para 43.

8 Cap 383. Basic Law, Art 25 provides: "All Hong Kong residents shall be equal before the law"; BORO, Art 1(1) provides: "The rights recognized in this Bill of Rights shall be enjoyed without distinction of any kind, such as race, colour, sex, language, religion . . . birth or other status"; and BORO, Art 22 provides: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against any discrimination on any ground such as race, colour, sex, language, religion . . . birth or other status".

9 *Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).

10 *Ibid.*, para 8.7. This was later reaffirmed by the Human Rights Committee in *Young v Australia*, Communication No 941/2000, UN Doc CCPR/C/78/D/941/2000. Justice Hartmann also referred to a series of judgments of the European Commission and Court of Human Rights which came to a similar conclusion. These include *Sutherland v United Kingdom*, 25186/94, 24 EHRR CD 22, and *Salgueiro da Silva Mouta v Portugal*, 332901/96, [1999] ECHR 176, which held that sexual orientation discrimination is prohibited under Art 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention"), as discrimination on the grounds of "sex" or "other status". Domestic courts have reached the same conclusion in interpreting constitutional guarantees of equality, *see*, eg, the Canadian Supreme Court case of *Egan v Canada* [1995] 2 SCR 513.

recognised sexual orientation as a prohibited ground of discrimination under the Basic Law and the BORO.[11]

Since counsel for the Secretary for Justice agreed the point at the hearing, this finding has not been appealed. *Leung* therefore has the potential to play a pivotal role in the future development of gay rights jurisprudence in Hong Kong. Now any discrimination on the ground of sexual orientation by the Government or public authorities[12] in law, policy or practice is clearly open to judicial review. The Government is to be credited for upholding its international obligation to outlaw discrimination on the ground of sexual orientation in this regard, although it is yet to introduce legislation prohibiting such discrimination by both government *and* private actors.[13]

The Government's Concession

Having agreed that the Basic Law and the BORO prohibit discrimination on the ground of sexual orientation, the Secretary for Justice conceded that, if the applicant was found to have sufficient standing (which Justice Hartmann held to be the case),[14] three of the challenged provisions were indeed "unsus-

[11] In *Ng Ka Ling v Director of Immigration* [1999] 2 HKCFAR 4 (referred to below as "*Ng Ka Ling*"), the Court of Final Appeal held that the "other status" language in the equality and non-discrimination provisions in the Basic Law and the ICCPR protects children born out of wedlock, and that certain provisions in the Immigration Ordinance which discriminated against such children were therefore unconstitutional. Thus Hong Kong's highest court has also acknowledged that the Basic Law and the ICCPR (and therefore the BORO) protect classes of persons who suffer discrimination in society, even though they are not expressly mentioned in those provisions. Significantly, this part of the Court's decision still stands, notwithstanding the reinterpretation of the right of abode cases by the Standing Committee of the National People's Congress. Indeed, the Hong Kong Government did not argue that the Court of Final Appeal had erred on this particular point when it sought the reinterpretation

[12] BORO, Art 7, provides that the BORO binds the Government and public authorities.

[13] This omission is despite numerous calls by the United Nations for the Hong Kong Government to introduce anti-discrimination on the ground of sexual orientation, *see* Human Rights Committee, UN Doc CCPR/C/79/Add 117 (Nov 1999), para 15; Committee on Economic, Social and Cultural Rights, UN Doc E/C 12/1/Add 58 (May 2001), para 15(c), and E/C 12/1/Add 107 (May 2005), paras 73 and 78(a); and Committee on the Rights of the Child, UN Doc CRC/C/15/Add 271 (Sept 2005), para 31. The issue is now under review by the Home Affairs Bureau's Sexual Minorities Forum. For discussion of a private member's bill which attempted to prohibit discrimination on the ground of sexual orientation, but was defeated in 1991, *see* Petersen (n 4 above). *See* also Phil C. W. Chan, "The lack of sexual orientation anti-discrimination legislation in Hong Kong: breach of international and domestic legal obligations", 9(1) *International Journal of Human Rights* 69.

[14] Justice Hartmann found that the applicant had sufficient standing, despite the absence of a public authority decision or act, such as a criminal charge or conviction, having affected him. Although a detailed discussion of this point is beyond the scope of this article, this finding (which has not been appealed) has great potential for future human rights litigation. In essence, Justice Hartmann held that the court's jurisdiction to grant declaratory relief in this case was derived from Art 35(1) of the Basic Law, which guarantees Hong Kong residents the right of access to the courts and to judicial remedies. This provision, he held, must include a direct remedy for those who argue that their fundamental rights have been undermined by primary legislation (*Leung*, para 56), and a litigant, such as the applicant, should not be required to break the law in order to secure the route to an effective remedy (*ibid.*, para 59).

tainable in law".[15] Justice Hartmann confirmed this position, holding that the provisions arbitrarily interfered with the applicant's right to privacy, and directly discriminated against the applicant on the ground of sexual orientation.[16]

The first of these three provisions is section 118H, which criminalises acts of "gross indecency" (defined by Justice Hartmann as "sexual intimacy that falls short of sexual intercourse, namely penetration"),[17] between men, where one is under the age of 21. By contrast, heterosexual and lesbian couples may lawfully consent to such acts once they both attain the age of 16.[18] Following *Leung*, the reference in section 118H to "under the age of 21" is now to be read as "under the age of 16", equalising the age of consent for gross indecency (or sexual intimacy) for people of all sexual orientations.[19]

The second and third of the impugned provisions are contained in sections 118F and 118J, which respectively prohibit men – *whatever their age* – from engaging in buggery and gross indecency, "otherwise than in private". The challenged sub-sections, 118F(2)(a) and 118(J)(2)(a), operate as "deeming provisions", providing that where more than two persons take part in the act, or are present during the act, the act will *not* be treated as done in private. Group sexual activities involving more than two men are therefore prohibited, even though they are carried out in private and consensually. By contrast, heterosexual and lesbian people may lawfully engage in private group sexual activities once they reach the age of 16.[20] These deeming provisions (although not sections 118F and 118J themselves, since they were not challenged by the applicant)[21] were struck down.[22]

In a separate case four months later, the Magistrates' Court held that section 118F in its entirety was also unconstitutional, following the reasoning in the *Leung* case. Criminal charges were therefore dismissed against two men who had allegedly engaged in anal intercourse in a car, their cases having been postponed pending the judgment in *Leung*.[23]

The significance of the Government's concessions in *Leung* should not be overlooked, since they have resulted in the dismantling of most of the 1991 legislative scheme regulating sexual conduct between men. But unfortunately, the Government was not prepared at the hearing, nor following the ruling, to abandon the last bastion of that legislative scheme, namely section 118C.

15 *Leung* (n 1 above), para 99.
16 *Ibid.*, para 99.
17 *Ibid.*, para 16.
18 Pursuant to the Crimes Ordinance, s 146.
19 *Leung* (n 1 above), para 99(i).
20 *Ibid.*
21 Some gay rights advocates, in personal conversations with the author, have expressed regret that these two provisions were not challenged, although initially they seemed to be included in the applicant's case.
22 *Leung* (n 1 above), para 99(ii) and (iii).
23 Decision (by Magistrate Glass), TWCC 3105/2004 (16 Dec 2005).

The Last Bastion: Section 118C

Unlike the other three challenged provisions in *Leung*, section 118C has a heterosexual counterpart, as section 118D also prohibits buggery between a man and a woman, where the woman is under the age of 21. Counsel for the Secretary for Justice argued at the hearing that section 118C was therefore not discriminatory. He pointed out that different ages had been set for many different activities, and argued that it "was not the function of the court to tidy up the statute book", but that of the legislature.[24] Further, if successful, the challenge to section 118C would result in the "idiosyncratic situation where it is a crime to commit buggery with a woman under 21, but not with a man under 21", in other words, a successful challenge would create a "yawning disparity" with 118D, and "the effect of the application would lead to the very kind of disparity that ironically the applicant is complaining about".[25]

Citing a wide range of international and comparative jurisprudence, Justice Hartmann rejected these arguments, declaring section 118C constitutionally invalid on the grounds of both privacy and equality. His judgment can be added to the growing number of cases in the 2000s in which the Hong Kong courts have shown great receptiveness to international and comparative jurisprudence in interpreting the human rights guarantees in the Basic Law and the BORO,[26] and keeps Hong Kong in line with progressive understandings of these two rights.

The Heart of the Government's Appeal

The heart of the Government's appeal is found in the second ground of the Notice of Appeal, and echoes the argument made by counsel for the Secretary for Justice at the High Court hearing. As this ground of appeal will be discussed in detail below, it is reproduced in full below:

[24] Notes taken by the author during the High Court hearing on 21 and 22 July 2005 ("Author's notes").

[25] *Ibid.*

[26] *See* for example, *Chow Shun Yung v Wei Pih Stella and Another* (2003) HKCFA 18; *Shum Kwok Sher v HKSAR* 2 [2002] HKLRD 793; *Keung Kwok Hung and Others v Hong Kong SAR* [2005] 3 HKLRD 212 and *Yeung May-wan and Others v Hong Kong SAR* [2005] 2 HKLRD 212. *See* further Carole Petersen, "Embracing 'Updated' Universal Standards? The Role of Human Rights Treaties and Interpretative Materials in Hong Kong's Constitutional Jurisprudence", paper presented at the *Interpretations and Beyond* conference held at the University of Hong Kong, 25 Nov 2005. This judicial climate can be contrasted with that of the late 1990s, when certain commentators found cause to remark that Hong Kong courts had a tendency to dismiss international and comparative case law as "unhelpful" and to look with "indifference and occasionally irritation" on attempts to invoke such jurisprudence before them: Andrew Byrnes, "And Some Have Bills of Rights Thrust Upon Them: The Experience of Hong Kong's Bill of Rights", in Philip Alston, *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (Oxford: Oxford University Press, 1997), p 352, and Johannes M. M. Chan, "Hong Kong's Bill of Rights: Its Reception and Contribution to International and Comparative Jurisprudence" (1998) 47 *ICLQ* 306, 314–315 and 355.

"The judge was in error in finding in [147] and [151] that section 118C of the Crimes Ordinance (Cap 200) was discriminatory on the basis of sexual orientation and unconstitutional. The judge should have found that section 118C was not in and of itself discriminatory, whether directly or indirectly. The judge should have found that section 118C together [with] section 118D of the same Ordinance, which prohibited buggery on a woman who is under the age of 21, ensured the legislative intention of protection of adolescents, both male and female from engaging in the conduct of buggery: penetration *per anum* and resulted in no inequality before the law. The Judge's finding and declaration of unconstitutionality of section 118C had exposed section 118D to a different form of challenge by girls under the age of 21, namely on the ground of discrimination on the basis of sex. The Judge was in error in [123] in declining to defer to the scheme enacted by the Legislative Council dealing with a matter of specific concern."[27]

The Privacy Analysis: Interference with Privacy

The Notice of Appeal does not explicitly challenge Justice Hartmann's finding that section 118C arbitrarily interferes with the private lives of gay men, and is therefore unconstitutional under Article 14 of the BORO. Rather, the only explicit challenge is to his finding that section 118C is discriminatory, and therefore unconstitutional under Article 25 of Basic Law and Articles 1(1) and 22 of the BORO. On the other hand, the Notice of Appeal[28] states broadly "that the judge was in error for declaring section 118C to be unconstitutional" and that "the judgment should be set aside", which suggests that the Secretary for Justice contends that the finding of unconstitutionality is incorrect, on whatever ground.

This point will need to be clarified. In any event, as a practical matter, counsel for the appellant might be advised to advance a strong, stand-alone privacy argument, separately from the equality argument, should the Court of Appeal be minded to accept privacy as the sole ground for declaring section 118C unconstitutional. However, this paper does not seek to make a case on privacy grounds alone, but rather to support Justice Hartmann's legally sound and enlightened decision that section 118C breaches *both* privacy and equality rights.

In order to establish a violation of the right to privacy under Article 14 of the BORO,[29] the applicant must show that section 118C constituted an

[27] Notice of Appeal, 30 Sept 2005 (copy on file with the author).
[28] *Ibid.*, para 3.
[29] BORO, Art 14, states "No one shall be subjected to arbitrary or unlawful interference with his privacy"

interference with his private life. The burden then lies on the Government to prove that the interference was not arbitrary, and therefore that it was constitutionally valid.

As stated by Justice Hartmann,[30] it is well established under European Convention jurisprudence that "private life" includes sexual life and sexual orientation, thus section 118C clearly interferes with the applicant's private life. The cardinal issue therefore becomes whether section 118C constitutes a justified interference in the private life of the applicant (and gay men as a class), in other words, whether it is constitutionally valid.

The Equality Analysis: Unequal Treatment

Similarly, there are two stages in respect of the right to equality. First, the applicant must show that there was unequal treatment. Second, the Government must prove that the unequal treatment was not discriminatory, in order to uphold its constitutional validity.

The Notice of Appeal maintains that Justice Hartmann erred in finding that section 118C was discriminatory, *whether directly or indirectly*, on the basis that, together with section 118D, section 118C "ensured the legislative intention of protection of adolescents, both male and female, from engaging in the conduct of buggery, penetration *per anum*" and therefore "resulted in no inequality before the law". It seems therefore that the Secretary for Justice does not contest Justice Hartmann's finding that unequal treatment of gay men arises under these provisions, but rather challenges Justice Hartmann's finding that the justification for such differential treatment is constitutionally invalid. For completeness (and in the event that this interpretation of the grounds for appeal is not correct), the first stage, as well as the second stage of the equality analysis is considered below.

Direct Differential Treatment

Although section 118C has a heterosexual counterpart in section 118D, Justice Hartmann rejected counsel for the Secretary for Justice's argument in the hearing that there was "perfect symmetry" between the two provisions.[31] Under section 118C, *both* the older and the younger man are criminally liable, whereas, under section 118D, only the older man is criminally liable, and not the younger woman.[32] This obviously constitutes differential treatment.

[30] *Leung* (n 1 above), para 120 (citing *Dudgeon v United Kingdom*, 7525/76 [1981] ECHR 5, para 5.2).
[31] Author's notes (n 24 above).
[32] Note that it is not an offence for man aged between 16 and 21 to engage in anal intercourse with a woman over 21.

Indirect Differential Treatment or "Adverse Impact"

As recognised by Justice Hartmann, the indirect discrimination resulting from section 118C constitutes the more "general and profound" violation in this case, rather than the direct discrimination.[33]

The European Commission and European Court of Human Rights have developed strong jurisprudence stating that laws which set a *different* age of consent for anal intercourse or other sexual activity between men, compared to the age of consent for the same activity between men and women, violate both the right to privacy and, in conjunction with that right,[34] the right to equality.[35] Hong Kong's criminal law, however, sets the *same* age of consent for anal intercourse, whether between men, or between men and women. On its face, it is therefore a neutral law, applying identically to all people, regardless of their sexual orientation.

Identical treatment does not always constitute equal treatment, however. The Human Rights Committee, in its General Comment 18 on Non-Discrimination, recognises that "the enjoyment of rights and freedoms on an identical footing does not mean identical treatment in every instance",[36] and states expressly that the concept of indirect discrimination is encompassed within the equality and non-discrimination clauses of the ICCPR.[37] Similarly, in Hong Kong, Justice Bokhary stated in *R v Man Wai Keung (No 2)* (as cited by Justice Hartmann) that "clearly there is no requirement of literal equality in the sense of unrelenting identical treatment always. For such rigidity would subvert rather than promote true even-handedness".[38]

For a finding of indirect discrimination, it must first be established that section 118C has an adverse impact on gay men, or in other words, that it is unequal in its application, if not on its face.

There is little international jurisprudence on apparently neutral buggery (or other sexual offences) laws. In *Toonen v Australia*, one of the provisions challenged was neutral, prohibiting "unnatural sexual intercourse" between any persons. Having already determined that the provision violated the

[33] *Leung* (n 1 above), para 127.

[34] The right to equality under Art 14 of the European Convention is not an independent right, but can only be raised in conjunction with another right under the European Convention.

[35] *See*, eg, *Sutherland* (n 10 above); *L and V v Austria*, 39392/98; 39829/98 (2003) ECHR 20; *S L v Austria*, 45330/99 [2003] ECHR 22; and *B B v United Kingdom* 53760/00 [2004] ECHR 65.

[36] United Nations Human Rights Committee, General Comment 18, *Non-Discrimination* (1989), para 8.

[37] *Ibid.*, the Human Rights Committee (at para 7) draws on the definitions of discrimination contained in the Convention on the Elimination of all Forms of Discrimination against Women and the Convention on the Elimination of all Forms of Racial Discrimination, to interpret the term "discrimination" in the ICCPR to encompass distinctions which have "the purpose *or effect* of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms" (emphasis added).

[38] (1992) 2 HKPLR 164, 179 (as cited in *Leung* (n 1 above), para 117). *See* also the seminal Supreme Court of Canada case on concepts of equality, *Andrews v the Law Society of British Columbia* [1989] 1 SCR 143.

ICCPR's privacy guarantee, however, the Human Rights Committee found it unnecessary to consider whether there had also been a violation of the right to equality.[39] Although this minimalist approach is regrettably still common in international jurisprudence, two Canadian cases and a recent Fijian case provide direct authority on point. As these cases were decided in the context of constitutionally entrenched bills of rights, they should be of particular assistance to the Hong Kong courts.[40] Justice Hartmann drew on one of these cases, *R v M(C)* (indexed also as *R v CM*, as cited in his judgment) as most relevant to the case in hand.[41]

In *R v M(C)*, the Ontario High Court held that section 159 of the Canadian Criminal Code, which neutrally prohibited anal intercourse with any person under the age of 18 years, not only breached the right to privacy, but also indirectly discriminated against gay men on the ground of their sexual orientation, since the age of consent for vaginal intercourse was 14 years. As cited by Justice Hartmann,[42] Justice Abella stated that section 159:

> "arbitrarily disadvantages gay men by denying them until 18 a choice available at the age of 14 to those who are not gay, namely, their choice of sexual expression with a consenting partner . . . Anal intercourse is a basic form of sexual expression for gay men. The prohibition of this form of sexual conduct found in section 159 accordingly has an adverse impact on them. Heterosexual adolescents 14 or over can participate in consensual intercourse without criminal penalty; gay adolescents cannot."[43]

In coming to his finding of adverse impact, Justice Hartmann felt it important to recognise, as advocated by the applicant, that buggery is a form of sexual intercourse, and that it is the *only* form of sexual intercourse available to gay men. Section 118C, he held, therefore prohibited them from engaging "in the only form of sexual intercourse available to them", whilst heterosexual couples were free to engage in sexual intercourse *per vagina* from the age of 16,[44] which showed that the legislative restrictions were not neutral.[45]

39 *Toonen v Australia* (n 9 above), paras 7.6 and 11.

40 *See R v Sin Yau-ming* [1991] 1 HKPLR 88, *per* Silke VP, 105–107.

41 *R v M(C)*, 23 OR (3d) 629 (also indexed as *R v MC*, as cited in *Leung*) (cited by Justice Hartmann in *Leung* (n 1 above), para 133). Justice Hartmann also referred (at para 140) to *obiter* in Justice O'Connor's concurring opinion in *Lawrence v Texas* (2003) 15 BHRC 111, p 126 – in which the United States Supreme Court had before it a law applicable to anal intercourse between men only, unlike the neutral law it had previously adjudicated in *Bowers v Hardwick* 478 US 186 – that "a sodomy law which applied equally to the private consensual conduct of homosexuals and heterosexuals . . . would not long stand" under the US due process clause.

42 *Leung* (n 1 above), para 139.

43 *R v M(C)* (n 41 above), p 636.

44 *Leung* (n 1 above), paras 134 and 135.

45 *Ibid.*, para 135.

This reasoning unfortunately paved the way for a challenge to his whole indirect discrimination analysis. Thus the Notice of Appeal states that "the Judge erred in finding in [20] that buggery was recognised to be a form of sexual intercourse both in common law and under the Crimes Ordinance", and "this erroneous finding had implications for his consideration of the issue of indirect discrimination".[46] Although this promises some rather interesting arguments on appeal, perhaps reference to "penetration" rather than "sexual intercourse", or reference to the fact that the law clearly limits gay men's "choice of sexual expression", as stated in *R v M(C)* above, would satisfy the point, without undermining the clearly rational basis for Justice Hartmann's finding of adverse impact.

Only two days after the judgment was handed down in the *Leung* case, the High Court of Fiji delivered its judgment in *Nadan and McCoskar v State*,[47] which also involved a facially-neutral law. In this case, the two male appellants had been sentenced to two years' imprisonment for having or permitting "carnal knowledge of any person against the order of nature", contrary to section 175 of the Fijian Penal Code (as well as for committing acts of gross indecency between males, which constituted direct unequal treatment under the law). The Court, taking note of Fiji's ratification of the ICCPR, held that the appellants were entitled to expect an interpretation of the rights to privacy and equality in accordance with the ICCPR,[48] and drew on various international and comparative authorities in their analysis. On the adverse impact point, the Court held that "whilst technically the provisions of section 175 are not anti-homosexual, nonetheless they proscribe criminal conduct essential to the sexual expression of the homosexual relationship and are perceived as such".[49] This judgment therefore provides further persuasive authority for upholding the ruling in *Leung*.

The Constitutional Validity of the Government's Justifications for Section 118C under the Privacy and the Equality Analyses

Assuming section 118C is found (i) to constitute direct differential treatment and (ii) have an adverse impact on gay men,[50] the Secretary for Justice nevertheless argues on appeal that section 118C, taken together with section 118D, does not result in any inequality before the law, "since both provisions

[46] Notice of Appeal (n 27 above), Ground 1.
[47] *Nadan and McCoskar v State*, Criminal Appeal Cases Nos: HHA 85 & 86 of 2005 (referred to below as "*Nadan*").
[48] *Ibid.*, p 13.
[49] *Ibid.*, p 21.
[50] This assumption is criticised by Danay, however, *see* p 166 below.

ensure the legislative intention to protect adolescents, both male and female, from engaging in the conduct of anal intercourse" and further, that the judge was in error in declining to defer to the legislative scheme on this matter. The Secretary for Justice will presumably raise the same justification regarding the interference with privacy, although the point is not addressed in the Notice of Appeal.

Before assessing the Secretary for Justice's particular justifications for the constitutional validity of section 118C, a broader issue was raised on appeal, which must be examined. This issue regarded the extent to which the court should have given "weight" or "deference" to the views of the legislature in the assessing the constitutional validity of section 118C.

The Need to Give Deference to the Legislature

Counsel for the Secretary for Justice argued in the High Court that, in determining the age of consent for homosexual and heterosexual buggery, it was for the legislature, and not the judiciary to set the mark,[51] and, "if it wished, to reflect the conservative attitude of the Hong Kong community in matters of sexual mores".[52] The Notice of Appeal states that "the Judge was in error [in 123] in declining to defer to the scheme enacted by the Legislative Council" on this matter.[53]

Justice Hartmann accepted as a general principle that it was legitimate for the legislature to legislate to protect those who, by reason of their youth, are seen to be vulnerable, citing *Modinos v Cyprus* in which the European Commission of Human Rights held:[54]

> "Some degree of regulation of male homosexual conduct, as indeed of other forms of sexual conduct, by means of the criminal law can be justified as 'necessary in a democratic society' . . . Furthermore, this necessity of some degree of control may even extend to consensual acts committed in private, notably where it is necessary to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young . . ."

In *R v M(C)*, Justice Abella similarly accepted that "line-drawing exercises" are one of the proper functions of the government. She continued, however, to state that "the lines must be reasonable and demonstrably justified when Charter rights are involved".[55] This approach is echoed in *Lau Cheong and*

51 *Leung* (n 1 above), para 104.
52 *Ibid.*, para 105.
53 Notice of Appeal (n 27 above), Ground 3.
54 16 EHRR 485, 491 (following *Dudgeon* (n 30 above), para 49) (as cited in *Leung* (n 1 above), para 103).
55 *R v M(C)* (n 41 above), p 638.

Another v HKSAR,[56] which Justice Hartmann referred to in some detail in his judgment.[57] In this case (which concerned the compatibility of the mandatory life sentence for murder with the right to liberty and security of the person), the Court of Final Appeal affirmed the constitutional entitlement of the legislature to prescribe by legislation what conduct should constitute criminal offences, and what punishment should ensue, and then continued:

> "But in the exercise of their independent judicial power, the courts have the duty to decide whether legislation enacted is consistent with the Basic Law and the Bill of Rights. If found to be inconsistent, the duty of the courts is to hold that legislation invalid."[58]

As explained by Justice Hartmann,[59] the Court of Final Appeal recognised in *Lau Cheong* that, in discharging this constitutional obligation, "the context in which such issues arise may make it appropriate for the courts to give particular weight to the views and policies adopted by the legislature".[60] The Court then cited a passage from Lord Hope in *R v DPP, ex parte Kebilene*,[61] that "in some circumstances" it would be appropriate for the courts to recognise that it should "defer, on democratic grounds, to the considered opinion of the elected body . . . whose act or decision is said to be incompatible with the [European] Convention."[62]

In order to determine which contexts or circumstances would require the courts to give "particular weight" or "deference" to the views of the legislature, Justice Hartmann relied on a subsequent passage from Lord Hope, which was not cited by the Court of Final Appeal in *Lau Cheong*.[63] In that passage, Lord Hope stated that this was a "discretionary area of judgment", which was "much easier to be recognised where the issues involve questions of social and economic policy, *much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection*".[64] Justice Hartmann held, correctly in the author's view, that it was "manifest" that the rights to privacy and equality were "fundamental human rights",[65] and therefore matters of "high constitutional

56 [2002] 2 HKLRD 612 (referred to below as "*Lau Cheong*").
57 *Leung* (n 1 above), para 109 ff.
58 *Lau Cheong* (n 56 above), p 641. *See* also *Ng Ka Ling* (n 11 above), p 25G–I.
59 *Leung* (n 1 above), para 110.
60 *Lau Cheong* (n 56 above), para 102.
61 [2000] 2 AC 326 (referred to below as "*Ex parte Kebilene*").
62 *Ibid.*, p 381.
63 *Leung* (n 1 above), para 110.
64 *Ex parte Kebilene*, n 61 above, p 381.
65 *Leung* (n 1 above), para 114.

importance", requiring the court's special protection from majority rule. Thus, whilst he agreed that "deference must be given to the legislature", where fundamental human rights were at issue, such deference should be "limited", and "cogent and persuasive reasons" would be required to justify any inconsistency with such rights.[66]

The Notice of Appeal states that Justice Hartmann was in error "in holding in [123] that the Court's deference to the intention of the Legislature would be limited when fundamental human rights are in issue".[67] It further states that this finding was contrary to the binding judgments in *Lau Cheong* and *HKSAR v Ng Kung Siu and Another*,[68] which both "endorsed the approach of giving due weight to the judgment of the [legislature in the case of fundamental][69] human rights".[70]

In the author's view, there may need to be clarification of what is meant by giving "due weight" and "deferring" to the views of the legislature. Neither term can mean complete subjugation to the legislature in the area of fundamental human rights, since this would subvert the separation of powers envisaged by the Basic Law, and would deny the courts' constitutional duty to review the validity of legislation passed by the legislature *vis-à-vis* the Basic Law and the BORO.

Thus, in *Ng Kung Siu* (commonly known as the flag desecration case), to which the Notice of Appeal refers, the Court of Final Appeal did indeed note that "due weight" had to be given to the views of the legislature. Justice Bokhary emphasised, however, that this did not amount to "deference", in the sense of negating the court's duty to review whether the flag laws constituted a valid restriction on the fundamental human right of freedom of expression:

> "When a matter of the present kind comes before the courts, the question is not which approach the judges personally prefer. It is whether the approach chosen by the legislature is one permitted by the constitution. *This does not involve deference to the legislature*. It is simply a matter of maintaining the separation of powers . . . The legislature having chosen the approach which protects the national and regional flags and emblems from desecration – having so chosen by enacting laws which provide such protection – the question in the present case is whether those laws are constitutional. And the answer, as I see it, depends on whether such laws are reconcilable with the freedom of expression guaranteed by the constitution. The test is one of reconcilability." (Emphasis added)

66 *Ibid.*, para 123.
67 Notice of Appeal (n 27 above), Ground 2.
68 (1999) 2 HKCFAR 442.
69 This (presumed) part of the sentence is missing on the author's copy of the Notice of Appeal.
70 Notice of Appeal (n 27 above), Ground 3.

Further, the circumstances in *Leung* can clearly be distinguished from *Lau Cheong* and *Ng Kung Siu*. In *Lau Cheong*, the Court of Appeal stated that "the context and circumstances of the present case . . . justify the courts giving proper weight to the decision of the legislature".[71] It attached particular significance to the fact that the provision in question had been passed "after extensive debate" in 1993,[72] that the legislature "arrived at that decision when the Bill of Rights had been part of our law for nearly two years",[73] and that the relevant part of the provision had been impliedly confirmed again when the provision was amended in 1997.[74] In *Ng Kung Siu*, the legislation in question had been enacted in 1997, subsequent to both the BORO and the Basic Law, and indeed, only two years before the Court of Final Appeal considered its constitutional validity in 1999.

By contrast, as Justice Hartmann emphasises in *Leung*,[75] section 118C of the Crimes Ordinance was put in place in 1991, several years before the Basic Law came into force. Petersen points out that, at the time these provisions were implemented, the Government was making an explicit attempt to comply with the ICCPR,[76] so this point is perhaps not so significant. Of more import, however, is that the challenge to section 118C's constitutionality in *Leung* came some 14 years after its enactment. During that time, the law has not been subject to any further review by the legislature, except by a small subcommittee.[77] Meanwhile, however, medical opinion in the field has changed dramatically, as described in *Leung*.[78] It is now widely recognised that sexual orientation is usually fixed, in both boys and girls, before the age of puberty.[79] As Justice Hartmann notes, this undermines the assumptions on which the 1991 amendments were made, namely that homosexuality was "a lifestyle choice, a chosen deviance, which could be avoided if the necessary legal deterrents were in place".[80] International and comparative jurisprudence in this field has also developed significantly in this time, partly in response to the change in medical opinion, as discussed below. Finally, as Justice Hartmann recognises, Hong Kong's social values may also have shifted.[81] The significant medical, legal and potentially also social developments since section 118C

71 *Lau Cheong* (n 56 above), para 105.
72 *Ibid.*, para 107.
73 *Ibid.*, para 106.
74 *Ibid.*
75 *Leung* (n 1 above), para 107.
76 Petersen (n 26 above), p 7.
77 For a description of the work of the Legislative Council Panel on Home Affairs, Subcommittee to Study Discrimination on the Ground of Sexual Orientation, *see* Chan (n 13 above).
78 *Leung* (n 1 above), paras 97 and 98.
79 *See*, eg, *Sutherland* (n 10 above), para 24, referring to a 1994 report of the British Medical Association to this effect.
80 *Leung* (n 1 above), para 96.
81 *Ibid.*, para 107.

was passed by the legislature in 1991 suggest that Justice Hartmann was correct in giving less weight in *Leung* to the legislature's views *in the particular circumstances of this case*, than the courts did in *Lau Cheong* and *Ng Kung Siu*. Moreover, the Court of Appeal's finding as regards Justice Hartmann's statement of principle that the courts should give only limited deference to the views of the legislature when fundamental human rights are in issue, should not affect the Court from coming to the same conclusion as the author regarding the level of "deference" required of the court *in the particular circumstances* of the *Leung* case.

Finally, although the judgment in *Leung* now renders section 118D vulnerable to constitutional challenge, this possibility clearly cannot require the court to derogate from its duty to consider the constitutional validity of the particular provision before them, namely section 118C, as suggested by the Notice of Appeal.[82]

The Relevant Tests for Constitutional Validity

The next question is whether the Government's grounds for limiting the right to privacy and the right to equality through section 118C are constitutionally valid. First, a description of the relevant tests is apposite.

Right to equality

As mentioned above, equality does not always require identical treatment, although identical treatment is the starting point. A difference in treatment can be justified, and therefore found to be non-discriminatory, if certain conditions are met. These conditions are not set out in the equality provisions contained in the Basic Law or the BORO, but have been developed in international and comparative jurisprudence. In the Hong Kong context, Justice Hartmann, citing *R v Man Wai Keung (No 2)*, states that the courts require demonstration of a "genuine need for some difference of treatment", and evidence that the response is "rational" and "proportionate" to the need.[83] This, he notes, is comparable to the test developed by the European Commission and Court of Human Rights in respect of the European Convention's equality guarantee.[84] A similar formulation is also adopted by the Human Rights Committee in General Comment 18 on Non-Discrimination.[85]

[82] *See* Notice of Appeal (n 27 above), Ground 2.

[83] *R v Man Wai Keung* (n 38 above), p 179, *per* Bokhary J (as cited in *Leung* (n 1 above), para 117).

[84] *Leung* (n 1 above), citing (at para 120) *Schmidt v Germany* [1994] ECHR 13580/99, para 24, that the difference in treatment must have an "objective and reasonable justification", namely that it must pursue a "legitimate aim", and that there must be a "reasonable relationship of proportionality between the means employed and the aim sought to be realized"

[85] *See* United Nations Human Rights Committee, General Comment 18: *Non-Discrimination* (1989) (n 36 above), which states (at para 13) "that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant"

Danay notes that Justice Hartmann did not explain how the three-part test in *R v Man Wai Keung (No 2)*, "which clearly relates to violations of equality rights" also "worked to somehow justify violations of privacy rights".[86] It is true that Justice Hartmann merges the analysis on constitutional validity without proper explanation of the connection between the equality and privacy-based tests, but his combined analysis can be explained by reference to the General Comments and jurisprudence of the Human Rights Committee.

The right to privacy

The privacy provision in Article 17 of the ICCPR, repeated *verbatim* in Article 14 of the BORO, states that no one shall be subject to "arbitrary or unlawful interferences with their privacy". It does not have a limitation clause, as does the comparable right (Article 8) in the European Convention. In its General Comment 16 on Article 17, however, the Human Rights Committee has stated that "the introduction of the concept of arbitrariness is intended to guarantee that even interferences provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, *reasonable* in the particular circumstances" (emphasis added).[87] Referring to this General Comment, the Human Rights Committee in *Toonen v Australia* stated that it "interprets the requirement of reasonableness to imply that any interference with privacy must be *proportional* to the end sought and be *necessary* in the circumstances of any given case" (emphasis added).[88]

The above explanation completes the missing link in Justice Hartmann's reasoning, namely that the concepts of necessity, reasonableness and proportionality are equally applicable to the constitutional validity of a law interfering with private life, as to the constitutional validity of a law resulting, directly or indirectly, in unequal treatment.

The Government's Justification

As mentioned above, the Notice of Appeal states that any limitation of the equality right (and presumably any interference with private life) which arises through section 118C is justified as being designed to protect adolescents from engaging in the conduct of buggery.

First, however, it is noted that, at least regarding the direct differential treatment arising between 118C and 118D, the justification cited in the Notice of Appeal is somewhat different from the justification given by the legislature when it passed the law in 1991. As Justice Hartmann explained,

[86] Danay (n 6 above), p 554.
[87] United Nations Human Rights Committee, General Comment 16 (1988): *The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art 17)*, para 4.
[88] *Ibid.*, para 8.3.

the legislature's most substantive reason at the time was that there was potential for blackmail by the younger man in the case of buggery between men unless both parties were made criminally liable.[89] That is, the legislature was seeking to protect the *older party* from blackmail. Justice Hartmann rejected the constitutional validity of this justification, relying on an Equal Opportunities Commission ("EOC") report on the point.[90] The EOC stated that there was no empirical data to support the premise that men under 21 who commit buggery were more likely to blackmail their partners than women under 21 who commit buggery, and if the legislative objective was to protect the older male partner, the response was neither rational nor proportionate, as his interests were already safeguarded by criminal provisions dealing with blackmail.

The second reason originally given by the legislature for the differential treatment was that section 118D was "consistent with the existing provisions designed to protect women and girls, where the female party to the sexual act is not made criminally liable".[91] As Justice Hartmann states, this approach, at least in the context of section 118D, was based on a stereotype that the woman is the submissive partner, and the man the sexually active partner, "the proposer, the one upon whom responsibility lies for any perceived deviance".[92] This reason is also somewhat different than the Secretary for Justice's argument in the Notice of Appeal that the law was designed to protect adolescents, including *male adolescents*, from engaging in the conduct of buggery.

In any event, in respect of both the interference with privacy, and the direct and indirect inequality of treatment, the Government will need to prove on appeal that criminalizing young men – with *life imprisonment* no less – for anal intercourse is a necessary, rational and proportionate response to the need to protect them from the risks of such intercourse (assuming the alleged risks can be demonstrated). The constitutional validity of this justification is considered below, in the context of the need to protect the health of young people, and the need to protect the morals of young people.

89 *Leung* (n 1 above), para 131. *See* further Hong Kong Security Bureau, *Written Response to the Legislative Council Panel on Home Affairs, Subcommittee to Study Discrimination on the Ground of Sexual Orientation*, LC Paper No CB(2)2000/00-01(01) (2001), para 5: "the rationale of making a man under 21 who commits consensual buggery with another man criminally liable was to guard against the possibility of blackmail against the other partner."

90 *Leung* (n 1 above), para 132. *See* Hong Kong Equal Opportunities Commission, *Comments by the Equal Opportunities Commission to the Response of the Administration to the Legislative Council Panel on Home Affairs, Subcommittee to Study Discrimination on the Ground of Sexual Orientation*, LC Paper No CB(2)2185/00-01 (2001).

91 *Leung* (n 1 above), para 129. *See* also, Principal Assistant Secretary for Security, *Briefing to the Legislative Council Panel on Home Affairs, Subcommittee to Study Discrimination on the Ground of Sexual Orientation*, LC Paper No CB(2)2188/00-01 (2001), para 6.

92 *Leung* (n 1 above), paras 129 and 130.

Protection of Health of Young People

The protection of health argument holds little credence in international or comparative jurisprudence as a valid basis for interference in the private lives of young gay men, or as a basis for differential treatment towards them. Indeed, the Hong Kong Government would be hard pressed to find evidence to support this argument, where so many governments have failed before it. The Secretary for Justice implicitly recognises this difficulty, in stating that "if necessary" the legislature should be able to introduce such legislation on "moral grounds alone".[93]

In *Sutherland v United Kingdom*, as referenced in *Leung*,[94] the European Commission held that the UK's different age of consent for anal intercourse between men (21 years) and men and women (16 years), constituted a discriminatory interference in the private lives of gay men. Citing the Medical Association's view that the recommended age of consent for homosexual and heterosexual sexual activity (in this case, anal intercourse) should be 16 years, and that the current law might inhibit efforts to improve the sexual health of young gay men, the European Commission found that the UK Government had produced no convincing reason against reducing the age of consent for male homosexuals to 16 years, and moreover, stated that "to do so may yield some positive health benefits".[95]

Many young people in Hong Kong are sexually active. The British Medical Association found in 1994 that the average age of first homosexual encounter was 15.7 years, and said that it was "vital that these young homosexual men receive effective health education and health care".[96] Whilst the author is not aware of any similar statistics in respect of the average age of commencement of sexual activity amongst Hong Kong's young population, a supportive and enabling environment is clearly crucial for young men to be open about their sexuality, and to access sexual health services, including testing, counselling and treatment.[97] In particular, if young people feel comfortable about seeking advice about anal intercourse, they are likely to be advised of the importance of using a condom to prevent transmission of AIDS and other sexually transmitted diseases. It is possible that they might otherwise incorrectly assume that they do not need to use a condom for anal intercourse, since it does not carry the risk of pregnancy. It is also important that health agencies, counsellors, teachers, support groups and the like do not feel inhibited in giving sexual health advice to young people because of the law.

93 *Ibid.*, para 102.
94 *Ibid.*, para 97 (citing *Sutherland* (n 10 above), para 24).
95 *Ibid.*
96 Cited in *Sutherland* (n 10 above), para 24.
97 See, eg, Stonewall, *Sexual Offences (Amendment) Bill: Parliamentary Briefing*, p 15.

In *R v M(C)*, Justice Abella said, in a nutshell, that "health risks ought to be dealt with by the health care system".[98] She attached particular significance to the fact that section 159 of the Canadian Criminal Code (like section 118C of the Hong Kong Crimes Ordinance) made the younger party as well as the older party criminally liable for engaging in anal intercourse. As discussed above, young people might therefore be inhibited from seeking advice and health care regarding anal intercourse, and counsellors might be concerned about potentially aiding and abetting a criminal offence. Thus, she stated, a "provision ostensibly crafted to prevent adolescents from harm, may itself, by inhibiting education about health risks associated with the behaviour, contribute to the harm it seeks to reduce".[99] The same argument – highlighted by Justice Hartmann's above reference to *Sutherland*, but not developed in his analysis – could be argued equally well by the respondent in *Leung* on appeal.

In so far as the risk of AIDS or similar diseases might rationally require some different response between anal intercourse and vaginal intercourse, Justice Hartmann relied on the following passage of Justice Abella, to conclude that the provision was neither rational nor proportionate:[100]

> "The health risks from unprotected anal intercourse are real and ought to be aggressively addressed. But in my view, the measures chosen in section 159 to protect young people from risk are arbitrary and unfair, compared to the measures used to protect against the health risks for individuals who prefer other forms of sexual conduct. There is no evidence that threatening to send an adolescent to jail will protect him (or her) from the risks of anal intercourse. I can see no rational connection between protecting someone from the potential harm of exercising sexual preferences and imprisoning that individual for exercising them. There is no proportionality between the articulated health objective and the Draconian criminal means chosen to achieve them."

Further support for this position is found in *R v Roy*,[101] in which the Quebec Court of Appeal, following *R v M(C)*, declared that section 159 of the Canadian Criminal Code was unconstitutional both on privacy and equality grounds. In that case, the Court was not convinced in the first place that anal intercourse, as compared with other (oral and vaginal) forms of sexual relations engaged in by young people, presented a particular health risk necessitating special treatment under the criminal law. As regards the spread

98 *R v M(C)* (n 41 above), p 638.
99 *Ibid.*, p 638.
100 *Leung* (n 1 above), para 150 (citing *R v M(C)* (n 41 above), p 638).
101 125 CCC (3d) 442.

of sexually transmitted diseases and AIDS, "the risk [was] not with the type of sexual relation but rather with the degree of protection taken".[102] Thus, it held, the Government's response to the risk was neither rational nor proportionate, and was therefore constitutionally invalid.

On the basis of these authorities, the Hong Kong Government will surely struggle to prove that threatening young people who engage in anal intercourse with the criminal sanction of life imprisonment is necessary, rational and proportionate to protect them from the alleged health risks associated with anal intercourse.

Protection of Morals of Young People

The next question is whether section 118C is necessary to protect the morals of young people.

In the hearing, counsel for the Secretary for Justice (in light of the applicant's reliance on many European Court and Commission precedents) cautioned the Court against taking European cultures and values and "plugging" them into Hong Kong. Justice Hartmann replied that he was mindful of this, as well as of placing his own personal values on Hong Kong's multicultural society.[103] Further, in his judgment, he noted that he had not been given any evidence of the prevailing attitude of the Hong Kong community towards the matter.[104] He stated, however, that it was of greater significance to recognise that the law being challenged was passed in 1991, and the "Hong Kong courts today have a constitutional obligation to consider whether legislation accords with the Basic Law".[105] In carrying out that constitutional duty, he considered it "legitimate to look to the nature and purpose of the Basic Law itself, rather than make a hazardous attempt to identify shifting social values".[106] The Basic Law, he found, contemplated:

> "an open and essentially democratic society, one based on the equality of all persons before the law and on the dignity of the individual, by which I mean all persons – in their sameness and difference – being worthy of respect."[107]

This citation indicates the central underpinnings of Justice Hartmann's judgment, which are particularly relevant to the symbolic value of the ruling, as discussed below.[108]

[102] *Ibid.*, p 469.
[103] Author's notes (n 24 above).
[104] *Leung* (n 1 above), para 106.
[105] *Ibid.*, para 107.
[106] *Ibid.*
[107] *Ibid.*, para 108.
[108] *See* p 169 below.

Justice Hartmann's finding is consistent with the European Court's statement in *Dudgeon v United Kingdom*, that "the Court itself did not need to make any value judgment as to morality" but had only to look "at whether reasons to justify the interference were relevant and sufficient".[109] Thus, although Justice Hartmann accepted in principle that the legislature was entitled to give expression to society's norms and values by prohibiting homosexual activity involving adolescents,[110] he emphasised that the Government still has to prove that the law is constitutionally valid, or in other words, that the law passes through the Basic Law and BORO "hoops".

In this context, as noted by Justice Hartmann,[111] the European Commission rejected in *Sutherland* the UK Government's argument that society was entitled to indicate its disapproval of homosexual conduct and its preference for a heterosexual lifestyle through the criminal law. Prevailing social values, it found, were *not* sufficient justification for interference with the right to respect for private life, nor did they constitute an objective or reasonable justification for maintaining the differential age of consent for homosexual and heterosexual acts. The UK law resulted in discriminatory treatment in the exercise of the right to respect for private life under the European Convention.[112] In *Dudgeon*, the question which the European Commission asked was whether the change to the law – in that case, the general decriminalisation of anal intercourse amongst men – would have a damaging effect on moral attitudes. Only if this question could be answered in the affirmative, was the Government entitled to maintain the legislation.[113]

Beyond the rich European Convention jurisprudence on the point, the Human Rights Committee accepted in *Toonen v Australia* that, under the ICCPR, morals could constitute a legitimate ground for interfering with a person's privacy in the sexual sphere, but emphasised that moral issues were not exclusively a matter of domestic concern, and were subject to the Committee's supervision.[114] Of potential relevance to the *Leung* case, is that the Human Rights Committee noted that the provisions in Tasmania were at the time not being enforced, which, it concluded, implied that they were not deemed essential to the protection of morals in Tasmania. The Committee therefore held that the provisions did not meet the reasonableness test, and arbitrarily interfered with the applicant's private life under the ICCPR.[115]

[109] *Dudgeon* (n 30 above), para 54.
[110] *Leung* (n 1 above), para 103.
[111] *Ibid.*, para 145, citing *Sutherland* (n 10 above), para 65.
[112] As mentioned above, the European Convention, unlike the ICCPR, does not contain an independent equality provision, rather its equality guarantee in Art 14 can only be raised in conjunction with another right under the European Convention, hence the Commission's finding of a violation of privacy *in conjunction with* the right to equality.
[113] *Dudgeon* (n 30 above), para 80.
[114] *Toonen v Australia* (n 9 above), para 8.6.
[115] *Ibid.*

Potentially, one could query the necessity of Hong Kong's laws for the protection of the morals of young people in Hong Kong on the same basis. The Subcommittee to Study Discrimination on the Ground of Sexual Orientation was provided with statistics in November 2001, which showed that there had been no convicted case in Hong Kong of homosexual buggery involving a man between the ages of 16 and 21.[116] The author has requested updated statistics from the Police Force, but had not received these at the date of publication of this paper.

Comparative case law also makes it clear that society's values or morals *in and of themselves* are not sufficient justification for legislative interference with the rights to privacy and equality in the realm of sexual relations. In *Lawrence v Texas*,[117] the United States Supreme Court held that, under the US constitution, laws could not be justified merely on the basis of morality without the demonstration of actual harm, embracing Justice Steven's declaration in his *Bowers v Hardwick* dissent, that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice".[118] In *Nadan and McCoskar*, the Fiji High Court also gave particular attention to this point, recognising that there was a strong body of conviction in the Fijian community "that any change in the law to decriminalise homosexual conduct would seriously damage the moral fabric of society", and that this was "certainly relevant for the purposes of interpretation of the constitution".[119] The Court continued, however, that "while members of the public who regard homosexuality as amoral may be shocked, offended or disturbed by private homosexual acts, *this cannot on its own validate unconstitutional laws*" (emphasis added).[120] It concluded in that case that "the right to privacy [is] so important in an open and democratic society that the morals argument cannot be allowed to trump the constitutional validity", and that the criminalisation of private consensual adult sexual acts "against the course of nature" was not a proportionate or necessary limitation on the right to privacy,[121] and also constituted indirect discrimination on the grounds of gender and sexual orientation.[122]

Clearly then, Hong Kong's "prevailing social norms and values"[123] are not enough in themselves to justify section 118C, and, as in the case of protecting health, the Government will surely find it difficult to prove that the threat of criminal liability, in the form of life imprisonment, over the young people

[116] LC Paper No CB(2)2723/01-02 (2002), para 27.
[117] 539 US 558 (2003).
[118] *Ibid.*, p 17 (citing *Bowers v Hardwick* 478 US, p 216).
[119] *Nadan* (n 47 above), p 13.
[120] *Ibid.*, p 15.
[121] *Ibid.*, p 20.
[122] *Ibid.*, p 22.
[123] *Leung* (n 1 above), para 102.

themselves is a necessary, rational and proportionate response to the objective of protecting those young people against the moral degradation that is perceived to ensue from anal intercourse.

Dual Significance of the High Court Finding for Hong Kong's Gay Community

Danay expresses strong criticism of Justice Hartmann's conclusion that the right to equality, as well as the right to privacy, is breached by section 118C, asserting that the application of the equality rights analysis in this context was "ill-advised",[124] and ought to be reconsidered by the Court of Appeal. This author does not agree.

Danay's argument is that in respect of provisions which apply neutrally to people of all sexual orientations, such as section 118C, the privacy analysis is "the preferable constitutional tool".[125] The use of an indirect equality analysis in these circumstances, he asserts, promotes and reinforces a "hypersexualised stereotype" of gay people, which is damaging to them and impedes their equal participation in society.[126] He argues that because the indirect equality analysis relies on the court finding, or assuming, as did Justice Hartmann, that such a law has a disproportionate effect on homosexual men,[127] the courts are forced to assert, or to imply, that the conduct at issue – here anal sexual intercourse – is "somehow fundamental to the status of being a homosexual",[128] "inherent to the identity of homosexual males in a manner that is not so for heterosexuals and others",[129] and further, that "homosexuals are abnormally pre-occupied with sex".[130]

Danay only supports the equality argument being invoked in addition to the privacy argument where *direct* discrimination against homosexual people is evident, as in the case of the other three provisions declared unconstitutional in the *Leung* case. He states that:

> "All three of these provisions are demonstrably directed . . . at homosexual men in particular. Since the difference in treatment is apparent from the very nature of the prohibitions themselves, these three provisions can be effectively impugned through the use of equality rights, without having to

[124] Danay (n 6 above), p 567.
[125] *Ibid.*, p 547.
[126] *Ibid.*
[127] *Ibid.*, p 556.
[128] *Ibid.*
[129] *Ibid.*, p 561.
[130] *Ibid.*, p 558.

resort to assumptions that promote a damaging hypersexualised homosexual stereotype".[131]

In this author's view, however, Justice Hartmann correctly considered all four impugned provisions together, as "a legislative scheme", rather than in isolation.[132] He found the provisions, as a whole, to be "demeaning of gay men", stereotyping them as "deviant", and aimed at discouraging young men, through threat of severe sentences of imprisonment, "from what is perceived to be a chosen lifestyle of which the majority of the community disapprove".[133] As Justice Hartmann notes, when the provisions were enacted, "buggery, even homosexual buggery, was seen as a morally reprehensible deviance springing from homosexuality".[134] This author agrees with Justice Hartmann's view that the provisions as a whole discriminate against gay men, whether directly (as in the cases of sections 118H, 118F(2)(a) and 118J(2)(a)) or indirectly (as in the case of section 118C). To now separate out the analysis of section 118C, and to examine it only in privacy terms might offer a convenient compromise position if the Secretary for Justice does not in fact dispute the privacy analysis (as discussed above),[135] but it would devalue the internationally recognised concept of indirect discrimination[136] under Hong Kong's otherwise progressive equality jurisprudence.[137] It is well established that the concept of indirect discrimination (as well as the concept of direct discrimination) is fundamental to the protection of minorities from majority rule.

Further, notwithstanding that the privacy analysis could (and in this author's view, *should*) still result in the striking down of section 118C as constitutionally invalid, such a finding would deny the symbolic, dual significance for Hong Kong's gay community of the lower court's enlightened judgment, which both respects the privacy of gay men and affirms their equality in Hong Kong society.

[131] *Ibid.*, p 561.
[132] *Leung* (n 1 above), para 133.
[133] *Ibid.*, para 147.
[134] *Ibid.*, para 96.
[135] *See* Notice of Appeal (n 27 above), Ground 2.
[136] The concept of indirect discrimination has been expressly adopted in Hong Kong's anti-discrimination ordinances (SDO, s 5; DDO, s 6; Family Status Discrimination Ordinance (Cap 527), s 5) and, the Government promises, will be also included in the forthcoming racial discrimination bill, *see* Carole Petersen, "Racial Equality and the Law: Creating an Effective Statute and Enforcement Model for Hong Kong" (2004) 34 *HKLJ* 459, 469.
[137] *See* eg, *Ng Ka Ling*, n 11 above; *Secretary for Justice and Others v Chan Wah and Others* [2000] HKLRD 641 in which the Court of Final Appeal held the village electoral arrangements discriminated against men, contrary to the Sex Discrimination Ordinance ("SDO") (Cap 480); *Equal Opportunities Commission v Director of Education*, [2001] 2 HKLRD 690, in which the High Court (in a decision by Justice Hartmann) held the secondary schools allocation system discriminated against girls, contrary to the SDO; and *KYW v Secretary for Justice* DCEO3/1999, in which the District Court held that the policies of the Fire Services Department and Excise Department not to employ persons who had a parent who suffered from schizophrenia, were discriminatory under the Disability Discrimination Ordinance ("DDO") (Cap 487).

Whilst Danay implicitly recognises that neutral laws governing sexual activity can indirectly discriminate – referring, for example, to "provisions that (*at least on their face*) apply neutrally to heterosexuals and homosexuals alike"[138] (emphasis added) – he argues that the courts simply *assume* there is such an impact, and through that assumption promote a "hypersexualised homosexual stereotype". It seems rather far-fetched, however, to argue that the judgment in *Leung* (and *R v M(C)*, which Danay tars with the same brush)[139] does indeed perpetuate such a "hypersexualised homosexual stereotype", either in the sense that anal intercourse is fundamental to the identity of gay men, or that gay men are abnormally preoccupied with anal intercourse. It is clear from their judgments that Justice Hartmann and Justice Abella were concerned with ensuring that gay men have the same *choice* as heterosexual men and women to express themselves sexually through penetrative sex at the age of 16 (regardless of their physical make-up, or the particular orifice involved). It is this deprivation of *choice* that they held has an unequal, adverse impact on gay men. Their approach, this author would argue, positively promotes the perception of homosexual and heterosexual intercourse as equivalent and equal expressions of sexual intimacy, which must surely be an emancipatory, rather than a "pernicious" or "damaging" message, as Danay asserts; that is, a message of true equality, of respect across difference.

Finally, Danay is correct that, under progressive human rights jurisprudence, the right to privacy is cast as a positive right to autonomy and personal self-realisation, rather than a negative right to non-interference, as was traditionally the case. This affirmative interpretation of the right to privacy has been adopted in a number of cases considering privacy in the sexual sphere. Justice Sachs delivered a particularly eloquent analysis of the positive aspects of the right to privacy in the South African Supreme Court case of *National Coalition*, which is taken up by the Fiji High Court in *Nadan and McCoskar*,[140] and indeed by the Hong Kong High Court in *Leung*.[141] Thus, in an ideal world, gay rights advocates should no longer have to fear decisions based on privacy, as a "poor relation" of equality,[142] confining their protection to the private sphere of the bedroom, and merely tolerating their shameful existence behind closed doors (as opposed to positively accepting and valuing their differences, and embracing them as equals in the community, through

[138] Danay (n 6 above), p 547.
[139] *Ibid.*, p 557, n 59.
[140] *National Coalition for Gay and Lesbian Equality and the South African Human Rights Commission v Minister for Justice, Minister of Safety and Security and Attorney General of the Witwatersand* [1998] (12) PCLR 1517 (referred to below as "*National Coalition*"), para 112.
[141] *Leung* (n 1 above), para 116.
[142] *National Coalition* (n 140 above), para 115.

an equality-based decision).[143] This view is indeed based on a "rather impoverished and out-moded version of the right to privacy as it applies to sexual relations", as Danay states, echoing Justice Sachs in *National Coalition*.[144] This author fears, however, that a privacy analysis might nevertheless send out a message of begrudging tolerance in Hong Kong, which despite being a modern, developed, cosmopolitan community, unfortunately lags behind many other countries in its acceptance of sexual and gender diversity.[145]

In any event, a progressive interpretation of the right to privacy should not preclude consideration of the right to equality. Rather, both rights should be assessed. Justice Sachs wrote in the *National Coalition* case that "human rights are better approached and defended in an integrated rather than a disparate fashion".[146] If violations of both the right to privacy and the right to equality are demonstrated, then both of these violations should be declared by the courts. The Fiji High Court, expressly adopting the views of Justice Sachs in its review of a facially neutral law, stated that it "did not rank the rights of privacy and equality in any descending order of value" and said that the two rights could not be separated, because they were both violated simultaneously by the challenged law.[147]

Finally, Justice Sachs said that "the motif which links and unites equality and privacy . . . is dignity".[148] The Fiji High Court echoed this view when it held in *Nadan and McCoskar* that "what the constitution requires, is that the law acknowledges difference, affirms dignity and allows equal respect to every citizen as they are."[149] So too did Justice Hartmann, when he stated that the Basic Law, in its protection of a wide range of rights, contemplates "an open and essentially democratic society, one based on equality of all persons before

[143] Morgan and Walker argue this point particularly persuasively in their criticism of the Human Rights Committee's purely privacy-based decision in *Toonen v Australia* (as noted by Danay (n 6 above), p 562, n 77), *see* Wayne Morgan and Kristen Walker, "Tolerance and Homosex: A Policy of Control and Containment", 20 (1995–1996) *Melbourne University Law Review*, 202. They conclude (at 217) that "we want to be valued *for* who we are, not tolerated *despite* who we are", and call for a jurisprudence which is "genuinely inclusive of diversity".

[144] Danay (n 6 above), p 563 (echoing Sachs J in *National Coalition* (n 140 above), p 115).

[145] In March 2006, the Hong Kong Government delegation to the United Nations Human Rights Committee's hearing of Hong Kong's second periodic report under the ICCPR spoke of the Government's efforts to address discrimination in Hong Kong. Regarding discrimination on the ground of sexual orientation, the Permanent Secretary for Home Affairs spoke of the community's "deeply held traditional values and beliefs" and said that the Government's approach "had been one of seeking to balance a vision to take the lead ahead of popular consensus, and caution to build greater community understanding and support". Despite frequently mentioning the Government's fostering of "tolerance" in Hong Kong, she also stated more positively that the Government hoped to promote "cultural acceptance and mutual respect" in this area, *see Human Rights Committee takes up Report of Hong Kong Special Administrative Region of China: Delegation Outlines Steps Taken to Address Discrimination, Curb Domestic Violence, Foster Tolerance*, HR/CT/676 (20 Mar 2006).

[146] *National Coalition* (n 140 above), para 112.

[147] *Nadan* (n 47 above), p 22 (referring to *National Coalition*, *ibid.*, para 112).

[148] *National Coalition* (n 140 above), para 120.

[149] *Nadan* (n 47 above), p 25.

the law and on the dignity of the individual", by which he meant "all persons – in their sameness and difference – being worthy of respect."[150]

The Court of Appeal is presented with a valuable opportunity to promote the dignity of Hong Kong's gay community by upholding both aspects of Justice Hartmann's ruling, namely that section 118C breaches the rights of gay men to privacy *and* equality. The Court is urged to reject the Secretary for Justice's appeal.

[150] *Leung* (n 1 above), para 108.