

Sexual Minorities Forum

**Presentation by the Hong Kong Human Rights Monitor:
Sexual Orientation and Human Rights in Hong Kong**

At the last meeting, the Hong Kong Human Rights Monitor had suggested that they would like to present to Members a paper on "Sexual Orientation and Human Rights in Hong Kong".

2. Attached please find a copy of the paper for Members' reference. A representative from the Hong Kong Human Rights Monitor will present this paper at the meeting.

**Home Affairs Bureau
May 2005**

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SEXUAL ORIENTATION AND HUMAN RIGHTS IN HONG KONG

A REPORT ISSUED BY THE HONG KONG HUMAN RIGHTS MONITOR, DECEMBER 2004

INTRODUCTION

A decade ago, in 1994, the United Nations Human Rights Committee declared that discrimination on the basis of sexual orientation is a violation of the fundamental human rights enshrined in the International Covenant on Civil and Political Rights ("ICCPR").¹ In the ten years since, sexual orientation rights² have developed such that Hong Kong, as a member of the international human rights regime, can no longer ignore the human rights norms and obligations associated with sexual orientation.

In 2001, the Legislative Council's Panel on Home Affairs formed a subcommittee to study discrimination on the ground of sexual orientation. Although the subcommittee's efforts have been commendable, its studies have largely failed to frame sexual orientation as a question of human rights. Notably, the subcommittee has failed to prompt the government of Hong Kong to adopt necessary legislation to protect the human rights of sexual minorities.³

This Paper argues that, in light of human rights developments, it is imperative that Hong Kong reform its sexual orientation laws. Hong Kong should adopt a sexual orientation anti-discrimination ordinance to supplement its existing civil rights legislation. Hong Kong should also adopt legislation to provide same-sex couples with legal recognition. Finally, Hong Kong should eradicate the disparity between the ages of consent for same-sex and heterosexual sexual relations.

Such legislative reform is necessary on two fronts. First, on the international front, legislation is necessary to fulfill Hong Kong's obligations under international human rights treaties. Hong Kong needs legal reform to maintain its reputation as a law-abiding, world-class city. Governments around the world—ranging from Ecuador⁴ to Taiwan⁵—are taking steps to protect the rights of sexual minorities. Hong Kong must not lag behind. Second, on the domestic front, sexual orientation legislation is necessary to ensure that all Hong Kong people, regardless of their sexual orientation, are treated with human dignity.

This report was researched and drafted for the Hong Kong Human Rights Monitor by Holning Lau, the 2004-2005 Stonewall Scholar at the University of Chicago Law School. The Hong Kong Human Rights Monitor maintained final editorial review.

¹ See *Toonen v. Australia*, UN Human Rights Committee, U.N. Doc. A/49/40 (1994).

² This Paper uses the phrase "sexual orientation rights" to bring under one umbrella the numerous rights associated with sexual orientation: equality rights, privacy rights, freedom of expression, freedom of association, etc. Specific substantive rights will be treated in greater detail in Parts II and III, *infra*.

³ For the purpose of this Paper, "sexual minorities" shall refer to all peoples who do not identify with being heterosexual or, in colloquial terms, "straight."

⁴ In 1998, the government of Ecuador added language to its constitution to protect sexual minorities against discrimination. Constitución Política de Ecuador, art. 23(3) (1998) ("Todas las personas serán consideradas iguales y gozarán de los mismos derechos, libertades y oportunidades, sin discriminación en razón de . . . orientación sexual"); see also Douglas Sanders, *Human Rights and Sexual Orientation in International Law*, at 35-6, online at Amnesty International, http://www.ai-lgbt.org/resources_other.htm (noting Ecuador's constitutional reform).

⁵ The Taiwanese government is now considering legislation that would legalize same-sex marriage. For more information on Taiwan's progress, see *infra* Section I.B.

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This Paper is organized in four parts. Section I provides background on the development of sexual orientation rights as human rights. Section II discusses international jurisprudence on the criminalization of sexual relations and shows that Hong Kong's laws are inconsistent with international law. It concludes that Hong Kong must reform so that its regulation of same-sex sexual conduct is no different than its regulation of heterosexual sexual conduct. Section III reviews international and comparative jurisprudence on equality protections for sexual minorities. It concludes that Hong Kong needs to codify the protection of sexual minorities' equality rights, both as individuals and as same-sex couples. Even if Hong Kong does not recognize same-sex marriage, Hong Kong should extend equality rights to same-sex couples. Section IV summarizes this Paper's legislative recommendations.

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I. SEXUAL ORIENTATION RIGHTS AS HUMAN RIGHTS

Over the past decade, sexual orientation rights have established a firm footing in the international human rights regime. This Section begins by providing a brief summary on the status of sexual orientation rights as human rights. It then highlights evidence that sexual orientation rights are indeed *universal*, as opposed to regional and culturally relative norms. The developments described in this Section cast a bright light on Hong Kong's neglect of international developments. While this Section illustrates overriding legal trends, Sections II and III will address specific rights in greater detail.

A. International Developments

Legal recognition of human rights often develops over time. Recognition of women's rights is an example.⁶ Similarly, sexual orientation rights did not develop overnight. Rather, they developed gradually—though rapidly—over the past decade. These developments can be observed in the United Nations (“UN”) system, as well as in regional and national practices. These developments have created a body of international law that Hong Kong cannot ignore.

i. The United Nations system

Developments in the United Nations are indicative of the status of sexual orientation rights. Five of the six United Nations treaty bodies have declared that their respective treaties encompass sexual orientation rights. The Human Rights Committee has stated that the ICCPR protects sexual minorities;⁷ the Committee on Economic, Social, and Cultural Rights has stated that the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”) protects sexual minorities;⁸ the Committee on the Rights of the Child has stated that the Convention on the Rights of the Child (“CRC”) protects sexual minorities;⁹ the Committee on the Elimination of Discrimination Against Women has stated that the Convention on Elimination of All Forms of Discrimination Against Women (“CEDAW”) protects lesbians;¹⁰ and the Committee on Torture has stated that the Convention on Torture protects sexual minorities.¹¹ The only treaty body that has not addressed sexual orientation is the Committee on the Elimination of Racial Discrimination because it only addresses the issue of race.

⁶ See generally Arvonne S. Fraser, *Becoming Human: The Origins and Development of Women's Human Rights*, 21 HUM. RTS. Q. 853 (1999).

⁷ The UN Committee on Human Rights has held that the ICCPR protects against discrimination on the basis of sexual orientation and that the ICCPR protects the privacy rights of sexual minorities. See *Toonen v. Australia*, *Toonen v. Australia*, UN Human Rights Committee, U.N. Doc. A/49/40.

⁸ In a statement of interpretation regarding health care, the UN Committee on Economic, Social and Cultural Rights declared that Article 2(2) of the ICESCR proscribes discrimination on the basis of sexual orientation. *CESCR General Comment No. 14*, U.N. Doc. E/C.12/2000/4 at para. 18 (2000).

⁹ The UN Committee on the Rights of the Child has interpreted Article 2 of the Convention on the Rights of Children as barring disparity between heterosexual and homosexual couples' age of consent. See, e.g., *Concluding Observations of the Committee on the Rights of the Child: (Isle of Man) United Kingdom of Great Britain and Northern Ireland*, U.N. Doc. CRC/C/15/Add.134 at para. 22 (2000).

¹⁰ Pursuant to CEDAW, The UN Committee on the Elimination of Discrimination Against Women has called for the decriminalization of lesbianism. See, e.g., *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Kyrgyzstan*, U.N. Doc. CEDAW/A/54/38 at paras. 127-28 (1999).

¹¹ Pursuant to the Convention Against Torture, The UN Committee on Torture has issued declarations criticizing states for prison conditions that discriminate based on sexual orientation. See, e.g., *Concluding Observations of the Committee against Torture: Egypt*, U.N. Doc. CAT/s/XXIX/Misc.4 at para. 5(e) (2002).

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This development in UN treaty bodies helps to dispel scepticism regarding sexual orientation rights. Opponents to sexual orientation rights sometimes note that the words “sexual orientation” do not appear in the title or express provisions of any major human rights treaties. They then conclude that, due to this omission, sexual minorities are not protected by international law. The development in UN treaty bodies, however, rejects such faulty logic.

Essentially, the UN treaty bodies have declared that sexual orientation rights are subsumed by existing provisions in their respective treaties. For example, the UN Human Rights Committee has announced that “sexual orientation” is subsumed by the ICCPR’s protection against discrimination on the basis of “sex.”¹² Meanwhile, the UN Committee on Social, Economic, and Cultural Rights has suggested that “sexual orientation” is a ground for protection that is subsumed by the ICESCR’s “other status” grounds.¹³

The treaty bodies are not the only organs that now regard sexual orientation rights as human rights. Five UN Special Rapporteurs now include sexual orientation issues in their agendas.¹⁴ Ad hoc working groups established by the UN Human Rights Commission address sexual orientation rights.¹⁵ The UN High Commissioner on Refugees has also declared that sexual minorities are protected by the Convention on Refugees.¹⁶

In sum, according to the UN system, sexual minorities are protected by existing human rights treaties. Moreover, the UN system has remarked upon Hong Kong’s failure to provide adequate protection for sexual minorities. As recently as 2001, the UN Committee on Economic, Social, and Cultural Rights criticized Hong Kong for such inadequacies.¹⁷ It stated that “the failure of the HKSAR to prohibit discrimination on the basis of sexual orientation” is a “principal subject of concern.”¹⁸ Three years prior, in 1999, the UN Human Rights Committee similarly criticized Hong Kong: “The Committee remains concerned that no legislative remedies are available to individuals in respect of discrimination on the grounds of race or sexual orientation.”¹⁹ As a city that strives to comply with standards set forth by the UN, Hong Kong should not treat these developments lightly.

ii. *Evolving regional and national practices*

Scholars often use the evolution of regional and national practices to assess the development of human rights norms. Accordingly, it is worth noting that regional and national practices reflect the fact that sexual orientation rights are protected as human rights.

¹² See *Toonen v. Australia*, UN Human Rights Committee, U.N. Doc. A/49/40, at para. 8.7 (“in [the Committee’s view] the reference to ‘sex’ . . . is to be taken as including sexual orientation”).

¹³ *CESR General Comment No. 14*, U.N. Doc. E/C.12/2000/4 at para. 18 (“the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status”).

¹⁴ See Sanders, *Human Rights and Sexual Orientation in International Law*, at 25 (cited in note 4).

¹⁵ *Id.*

¹⁶ United Nations High Commissioner on Refugees, *Who is a Refugee?*, <http://www.unhcr.ch>.

¹⁷ See *Concluding observations of the Committee on Economic, Social and Cultural Rights (Hong Kong): China*, U.N. Doc. E/C.12/1/Add.58, at para. 15(c) (2001).

¹⁸ *Id.*

¹⁹ *Concluding Observations of the Human Rights Committee (Hong Kong): China*, U.N. Doc. CCPR/C/79/Add.117, at para. 15 (1999).

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The development of sexual orientation rights is most rapid in—though certainly not unique to—Europe. The European Court of Human Rights (“ECHR”) has issued numerous opinions that safeguard sexual orientation rights. The ECHR’s case law is quite expansive, ranging from case law that protects the rights of sexual minorities to serve in the armed forces,²⁰ to case law that bars unequal ages of consent between gay and straight couples,²¹ to case law that bars discrimination against gay couples with regards to tenancy survivorships.²²

The European Union has also taken many steps to protect the human rights of sexual minorities. For example, in 1994, the European Parliament called upon the Commission of the European Community to recommend that member states terminate “the barring of lesbians and homosexual couples from marriage or from an equivalent legal framework . . . and any restriction on the right of lesbians and homosexuals to be parents or to adopt or foster children.”²³ The European Union has also declared that respect for sexual orientation rights is a prerequisite for states that join the European Union through its enlargement process.²⁴

Advancement of sexual orientation rights is not confined to Europe. Examples of advancement span across the globe. Non-European states have increasingly found sexual minorities to be protected either by existing non-discrimination laws or they have enacted new laws to expressly prohibit sexual orientation discrimination. South Africa, Ecuador, and Fiji epitomize this trend; all three of these non-European states have modified their national constitutions to expressly proscribe sexual orientation discrimination.²⁵ In another example, Canadian provinces have been legalizing same-sex marriages one after the other, since the summer of 2003.²⁶ Other jurisdictions, such as Brazil and Buenos Aires, Argentina have granted marriage-like partnership rights to same-sex couples.²⁷ There is also pending legislation to legalize same-sex marriage in non-Western parts of the world such as Taiwan.²⁸

In assessing practice, opponents may point out that a good number of states still do not protect sexual minorities. In fact, many states still tolerate or even sanction violence against sexual minorities. Those states, however, have been severely criticized by the UN and international NGOs such as Amnesty International and Human Rights Watch.²⁹ Thus, while it is true that regional and national practices are divergent, Hong Kong must ask itself

²⁰ See *Lustig-Prean v. United Kingdom*, 29 E.H.R.R. 548 (1999).

²¹ See *L. & V. v. Austria*, unpublished opinion available at http://www.hrw.org/lgbt/pdf/l_and_v_v_austria.pdf (2003).

²² See *Karner v. Austria*, unpublished opinion available at <http://www.hrw.org/lgbt/pdf/karner.pdf> (2003). But see *Fretté v. France*, 2 F.L.R. 9 (ECHR 2002) (plurality opinion) (holding that denying gays and lesbians the right to adoption did not violate the European Convention on Human Rights).

²³ 1994 E.U.O.J. (C 61) 40 (Official Journal of the European Communities).

²⁴ See generally Travis J. Langenkamp, *Finding Fundamental Fairness: Protecting the Rights of Homosexuals under European Union Accession Law*, 4 SAN DIEGO INT’L L. J. 437 (2003).

²⁵ Sanders, *Human Rights and Sexual Orientation in International Law*, at 35-36 (cited in note 4).

²⁶ See Doug Struck, *Canada Court Clears Way for Gay Marriage Law*, Dec. 10, 2004, at 4 (noting that “[c]ourts in 6 of 10 Canadian provinces have upheld same-sex unions.”).

²⁷ Paul Wiseman, *Same-sex Marriage Spurs Few Political Ripples in Taiwan*, SEATTLE TIMES, Feb. 27, 2004, at A10 (noting that Brazil and the city of Buenos Aires have extended some marriage rights to same-sex couples and similar legislation is being considered in Chile).

²⁸ Debbie Wu, *Human-Rights Law Promises Change, Liberal Agenda: The Draft That Is to Be Presented to the Cabinet Will Abolish the Death Penalty and Give Legal Protection to the Rights of Gay Couples*, TAIPEI TIMES, July 26, 2003.

²⁹ For an example of Amnesty International’s criticisms, see *Human Rights and Sexual Orientation and Gender Identity*, available at <http://web.amnesty.org/library/index/engACT790012004?Open&of=eng-200>. For an example of Human Rights Watch’s criticisms, see <http://hrw.org/doc/?t=lgbt>. For examples of the UN’s criticisms, see *supra* notes 7-11.

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whether it wishes to associate with governments that are well-regarded by the international human rights community or governments that receive condemnation. As a truly cosmopolitan city, it is in Hong Kong's best interest to be at the forefront of human rights developments; accordingly, reform of sexual orientation laws is due.

iii. *The weight of law*

The developments described above are not merely anecdotal; they illustrate that Hong Kong has obligations under international law to protect sexual minorities. It is true that there is no specific treaty on sexual orientation. It is also true that regional and state practices are inconsistent and, thus, like women's rights,³⁰ sexual orientation rights cannot yet be deemed customary international law. Those facts, however, are inconclusive. Other sources of law indicate that sexual orientation rights are protected by international law.

According to mainstream international law, when treaty and customary law are unclear, international court decisions and the writing of international jurists serve as a subsidiary source of law.³¹ Thus, statements from the UN system and opinions from regional human rights tribunals serve as a subsidiary source of law. Traditionally, international lawyers give great deference to UN treaty bodies³² and the European Court of Human Rights³³—both of which have declared that states have legal obligations with regards to sexual orientation. Thus, arguments that Hong Kong has no legal obligations with regards to sexual orientation are questionable at best.

On top of the weight of international law, there are simpler policy concerns. Hong Kong has an international reputation to maintain. As one Canadian editorialist noted: "Nothing marks . . . change more than the changing status of homosexuals. . . . just about every modern society tolerates, then accepts them."³⁴ Hong Kong must reform its sexual

³⁰ Practices associated with women's rights are too inconsistent for women's human rights to be deemed customary international law. See Jo Lynn Southard, *Protecting Women's Human Rights under the Convention on the Elimination of all Forms of Discrimination Against Women*, 8 PACE INT'L L. REV. 1 (1996) (noting that, although the *opinio juris* component of international law may be fulfilled, practice is too inconsistent to render women's rights to be part of customary international law.).

³¹ See Statute of the International Court of Justice, Art 38(1)(d), 59 Stat 1055, 1060, Treaty Serial No. 933 (1945) (listing subsidiary sources of law); Diane Wood, *Diffusion and Focus in International Law Scholarship*, 1 CHICAGO J. INT'L L. 141, 143 (2000) ("Public international lawyers point to Article 38 of the Statute of the International Court of Justice ("ICJ") for a definitive list of . . . source[s] of international law").

³² See Laurence Helfer and Alice M. Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, 9 HARVARD HUM. RTS. J. 61, 77 n. 77 (1996) (noting that "the [UN Human Rights] Committee's 'views' are not legally binding but rather a *strongly persuasive interpretation of the ICCPR*, which is binding on State Parties") (emphasis altered); Deana Pollard, *Banning Child Corporal Punishment*, 77 TULANE L. REV. 575, 592 (2003) (noting that the UN Committee on the Rights of the Child "issues authoritative interpretations" of the Convention on the Rights of the Child); Onuma Yasuaki, *Is the International Court of Justice an Emperor Without Clothes?*, 8 INT'L LEGAL THEORY 1, 26 (2002) (arguing that "customary law . . . is far inferior to that of the general international law-creating process based on multilateral treaties of a universal nature or UN declarations").

³³ Although the ECHR is a regional court, many states outside of Europe cite the ECHR for its interpretation of international human rights norms. See Marie-Anne Slaughter, *Judicial Globalization*, 40 VIRGINIA J. INT'L L. 1103, 1109 (2000) ("Beyond Europe, the ECHR has become a source of authoritative pronouncements on human rights law for national courts that are not directly subject to its authority."); John Attanasio, *Rapporteur's Overview and Conclusions: Of Sovereignty, Globalization, and Courts*, 28 N.Y.U. J. INT'L L. & POLITICS 1, 16 (1995-1996) (discussing the widespread deference to the ECHR and concluding that "the ECHR may be becoming a sort of world court of human rights").

³⁴ Marcus Gee, *Taiwan Has Good Reason to be Proud*, GLOBE & MAIL, Nov. 07, 2003, at A25.

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orientation laws to maintain its reputation as a world-class city that embraces modern notions of justice.

B. Sexual Orientation Rights Are Universal Rights

Some groups in Hong Kong have asserted that there should be a ceiling placed on local sexual orientation rights because sexual orientation is a sensitive cultural issue that should be molded to fit the local culture of Hong Kong. This logic is faulty. Four reasons stand to challenge that logic. This Subsection addresses, in turn, these four challenges: (1) The UN Human Rights Committee has explicitly denounced culture as a defence to violations of sexual orientation rights; (2) the human rights regime's purpose is to protect minorities, especially when they are marginalized by local majoritarian cultures; (3) other Asian jurisdictions with similar cultural mores have begun to accommodate sexual orientation rights; and (4) studies show that Hong Kong is culturally receptive to the protection of sexual minorities.

The UN Human Rights committee has denounced the idea that culture trumps sexual orientation rights. *Toonen v. Australia*³⁵ was the seminal case in which the UN Human Rights Committee upheld the right to be protected against discrimination on the basis of sexual orientation. In the case, Nicholas Toonen, a gay rights activist, challenged Tasmania's prohibition on homosexual activity. The Committee held that the Tasmanian legislation violated human rights pursuant to the ICCPR. The Committee found that the law violated both Toonen's right to privacy as well as his right to non-discrimination. Tasmania argued against extending privacy rights to same-sex couples because of Tasmania's local moral culture.³⁶ The Committee responded: "[We] cannot accept that for the purposes of article 17 of the Covenant, moral issues are exclusively a matter of domestic concern."³⁷ Thus, in the seminal case of *Toonen v. Australia*, the Committee rejected the assertion that sexual orientation rights are relative to domestic cultural norms. Instead, sexual orientation rights are universal rights that transcend political and cultural borders. Thus, culture cannot exempt Hong Kong from its obligations under international law.

Not only is the use of culture to defend discrimination legally invalid, it is offensive to the human rights regime. The human rights regime was founded on the premise that those who are most marginalized by majoritarian culture must be protected against oppression by the majority.³⁸ Accordingly, if social norms in Hong Kong do not support sexual minorities, that fact would be the precise reason why the government must intervene to protect sexual minorities' rights. Hong Kong must not passively accept cultural norms as harmless; rather, Hong Kong must pass legislation to protect sexual minorities while also eradicating discriminatory norms through the expressive function of law.³⁹

³⁵ *Toonen v. Australia*, UN Human Rights Committee, U.N. Doc. A/49/40.

³⁶ Sanders, *Human Rights and Sexual Orientation*, at 20 (cited in note 4).

³⁷ *Toonen v. Australia*, UN Human Rights Committee, U.N. Doc. A/49/40, at para. 8.7.

³⁸ See Peter G. Danchin, *U.S. Unilateralism and the International Protection of Religious Freedom*, 41 COLUMBIA J. TRANSNAT'L L. 33, 71 (2002) (noting the "the intrinsically non-democratic and counter-majoritarian nature of the concept of human rights"); Sionaidh Douglas-Scott, *The Hatefulness of Protected Speech: A Comparison of the American and European Approaches*, 7 WILLIAM & MARY BILL RTS. J. 305, 341 (1999) ("The general theory of human rights, however, is premised on the necessity of placing restraints on the majority at times").

³⁹ The "expressive function of law" is the concept that laws affect social norms by steering people's behavior. For an overview of legal academia's law-and-norms literature, see Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICHIGAN L. REV. 338, 343-50 (1997). For an explanation of the

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Even if it were assumed for the sake of argument that culture should be taken into account, the notion that sexual orientation rights are incompatible with Hong Kong's culture is largely ungrounded. One can simply look to Taiwan to see that sexual orientation law reform is not at odds with the Chinese social fabric of Taiwan. Both the president of Taiwan, Chen Shui-bian, and the mayor of Taipei, Ma Ying-jeou have publicly voiced support for Taiwan's gay community.⁴⁰ For example, at the Taipei's 2003 Gay Pride Parade, Mayor Ma stated: "We must loudly tell each of you, gay friends, if you live in Taipei city, we will not commit any discrimination or harassment against you because of your sexual orientation."⁴¹ He also expressed support for same-sex marriage.⁴² The president's office has been equally vocal in its support. For example, the president's office told United Daily News that "[t]he human rights of homosexuals have been gradually recognized by countries around the world . . . to protect their rights, people [of the same sex] should have the right to wed and have a family based on their free will."⁴³

Developments in Taiwan are not confined to rhetoric; Taiwan has also undergone legal reform. For example, in June 2004, Taiwan passed its Gender Equality Education Law, which protects against discrimination in the public education system on the grounds of gender and sexual orientation.⁴⁴ In 2002, Taiwan lifted its ban on hiring gay military police.⁴⁵ Taiwan is now considering legislation that would legalize same-sex marriage and gay adoptions.⁴⁶ Notably, the proposed legislation has elicited only nominal opposition. One lone legislator spoke out against the bill, but he was quickly reprimanded by his political party, the Democratic People's Party ("DPP").⁴⁷ The DPP is not alone in supporting sexual orientation rights, Taiwan's other major parties share a common progressivism. Both the Kuomintang ("KMT") and the People First Party ("PFP") have issued white papers supporting the rights of sexual minorities.⁴⁸ Taiwan has been heralded as one of the most gay-friendly jurisdictions in Asia, and even the world.⁴⁹ It is worth noting that Taiwan is home to ethnic Chinese who are culturally similar to the average Hong Konger.

Again, assuming for the sake of argument that local culture may trump sexual orientation rights, culture should still not pose a bar to anti-discrimination legislation in Hong Kong. Indeed, there is compelling empirical evidence that sexual orientation rights are

expressive function of law and its relationship to the law and norms movement, see generally Cass R. Sunstein, *On the Expressive Function of Law*, 144 UNIV. PENNSYLVANIA L. REV. 2021 (1996).

⁴⁰ Andrew Huang, *Film: Homosexual, and Happy*, FAR EASTERN ECON. REVIEW, Apr. 22, 2004, at 54 ("President Chen Shui-bian and Taipei Mayor Ma Ying-jeou have publicly embraced gay-rights issues").

⁴¹ Associated Press, *Taiwan Holds Gay Rights Parade, Considered the First in the Chinese World*, CANADIAN PRESS, Nov. 1, 2003, available on Westlaw at 2003 WL 6638233.

⁴² *Id.*

⁴³ Agence France-Presse, *Taiwan Moves to Abolish Death Penalty, Legalise Gay Marriages*, Oct. 27, 2003, available at Human Rights Watch, <http://www.hrc.org/Template.cfm?Section=Home&CONTENTID=11510&TEMPLATE=/ContentManagement/ContentDisplay.cfm>.

⁴⁴ See Caroline Hong, *Gender Fairness Bill is Made Law*, TAIPEI TIMES, June 5, 2004, at 2.

⁴⁵ See Brian Hsu, *Military Police to Accept Gays*, TAIPEI TIMES, May 2, 2004, at 2.

⁴⁶ Martin Regg Cohn, *Taiwan Promises Gay Marriages*, TORONTO STAR, Feb. 8, 2004, at F3.

⁴⁷ *Id.* ("The only ripple of protest came late last year when Dr. Ho Shui-sheng, a lawmaker from the governing Democratic Progressive Party, claimed the legislation was 'pushing the nation to its doom' because gay couples cannot procreate. The DPP quickly forced Ho to publicly retract his remarks and it has been smooth sailing [for the gay rights movement] ever since.").

⁴⁸ Jason Blatt, *Taiwan Considers Law to Allow Asia's First Gay Marriages*, SOUTH CHINA MORNING POST, Oct. 28, 2003, at 7.

⁴⁹ Marcus Gee, *Taiwan Has Good Reason to be Proud*, GLOBE & MAIL, Nov. 07, 2003, at A25.

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suitable for Hong Kong. In 2002, Hong Kong Polytechnic University conducted a survey on Hong Kongers' attitudes towards sexual minorities. The study found that up to 80 percent of respondents supported extending equal rights to gays and lesbians.⁵⁰

⁵⁰ Tim Cribb, *Quest for Equality*, SOUTH CHINA MORNING POST, July 27, 2004, at 14.

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II. BASELESS CRIMINALIZATION

It is commendable that Hong Kong legalized gay sex in 1991.⁵¹ However, many of Hong Kong's criminal laws regulating sexual relations remain in violation of international law. The epitome of this lies in Sections 118 and 124 of the Crimes Ordinance, which stipulate different ages of consent for gay and heterosexual sexual relations, as well as different degrees of punishment for violating the respective consent laws.⁵² This Section of the Paper addresses these discrepancies, highlighting Hong Kong's violation of international obligations insofar as regulation of sexuality is concerned. To address this violation, Hong Kong should reform its laws to eradicate the divergent regulations of same-sex and heterosexual sexual relations.

A. Hong Kong's Buggery Laws

The Hong Kong government regulates both heterosexual and same-sex sexual relations. It has stipulated the age of consent for heterosexual (i.e., vaginal) intercourse at 16.⁵³ Men who engage in sex with women under the age of 16 are liable to imprisonment for up to five years.⁵⁴ There are numerous discrepancies between this stipulation and the regulation of same-sex relationships.

The first troubling discrepancy lies in the age of consent for gay intercourse. Presently, the age of consent for gay intercourse (i.e., buggery) is 21.⁵⁵ As will be discussed below, this discrepancy is a violation of international law on non-discrimination. The higher age of consent for gay couples also raises numerous public policy concerns. Because it is technically illegal for gays between the ages of 16 and 21 to have sex, it is arguably illegal to approach these young gay men to educate them on safer sex.⁵⁶ Furthermore, the higher age of consent suggests that young gay men are less capable of decision-making, ultimately stigmatizing gay young adults.

The second troubling discrepancy lies in the difference between the degrees of punishment for underage sexual relations. While men who engage in underage vaginal intercourse are liable to imprisonment for up to five years,⁵⁷ men who engage in underage buggery are liable to life imprisonment.⁵⁸ As will be discussed below, this excessive punishment is a violation of international law. From a public policy standpoint, excessive punishment stigmatizes gay men by unjustly suggesting that gay sex is an expression of love that is less legitimate than heterosexual sex is.⁵⁹

⁵¹ Hong Kong Crimes Ordinance ss. 118(M)-(N) (CAP 200).

⁵² Compare Hong Kong Crimes Ordinance s. 118(C) (CAP 200) (stipulating age of consent for gay sex) with s. 254 (CAP 200) (stipulating age of consent for heterosexual sex).

⁵³ Hong Kong Crimes Ordinance s. 254 (CAP 200).

⁵⁴ *Id.*

⁵⁵ Hong Kong Crimes Ordinance s. 118(C) (CAP 200).

⁵⁶ See Shamdasani, *Activist to Challenge Legal Age for Gay Sex*, SOUTH CHINA MORNING POST, June 24, 2004, at 3.

⁵⁷ Hong Kong Crimes Ordinance s. 254 (CAP 200).

⁵⁸ Hong Kong Crimes Ordinance s. 118(C) (CAP 200).

⁵⁹ There is a plethora of legal literature categorizing sexual conduct as a form of expression. For an example of a pioneering article on this concept, see David Cole and William S. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES L. REV. 319, 325 (1994) ("[S]ex is intrinsically communicative and may express a wide range of emotions—love, desire, power, dependency, even rage or hatred. Indeed, the communicative power of sex is often unmatched by other forms of communication").

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A third troubling discrepancy lies in the fact that Hong Kong's age of consent laws entirely ignore the existence of lesbians. There are currently no Hong Kong laws dictating an age of consent for lesbians. The law does not address lesbianism in any express provisions. This denial of existence unduly jeopardizes young lesbians by failing to offer them the protection that other youth receive from age of consent laws.

The Hong Kong government justifies its heightened age of consent for buggery with an illogical stretch of reasoning; it argues that Hong Kong law also criminalizes heterosexual buggery that involves a female below the age of 21 and thus gays suffer no discrimination.⁶⁰ In other words, according to the Administration, even though there is a discrepancy between the age of consent for vaginal sex and buggery, there is no difference between the age of consent for gay and heterosexual buggery. This point, however, is immaterial. By setting a higher age of consent for buggery in general, the government is still discriminating against gays because gays suffer from a disparate impact. That is to say, despite the superficial neutrality of buggery laws, gays suffer indirect discrimination because they are disproportionately impacted upon by the heightened age of consent. As discussed below, this indirect discrimination is a violation of international law.⁶¹

Furthermore, even though the age of consent to buggery is 21 for both gay and heterosexual couples, the laws are discriminatory because in gay cases both parties are liable, but that is not so in heterosexual cases. In underage gay buggery cases, both partners are always liable to conviction and imprisonment—even the partner under 21.⁶² Contrarily, in buggery cases involving a female under 21, the female is never liable.⁶³ Also, when a male who is under 21 commits buggery with a female over the age of 21, neither partner is liable for any crime.⁶⁴

The Hong Kong government has attempted to legitimize this type of discrimination with a seriously flawed public policy rationale: According to the Administration, by imposing liability on gay men under 21 who commit consensual buggery, those gay men will be deterred from blackmailing their older partners by disclosing their relationship.⁶⁵ The Hong Kong Equal Opportunities Commission ("EOC") has criticized this defective logic. In a submission to the Legislative Council ("LegCo") Subcommittee on Discrimination on the

⁶⁰ Home Affairs Bureau, *Submission to the LegCo Panel on Home Affairs Subcommittee to Study Discrimination on the Ground of Sexual Orientation*, Paper No. CB(2)981-00-01(01), at para. 9 (2001) ("A group believes it is unfair to homosexuals as Section 118C of the Crimes Ordinance (CO) stipulates that it is unlawful for a man to commit buggery with another man under the age of 21. In fact, section 118D of the CO also prohibits a man from committing buggery with a girl under the age of 21. Indeed, the offence of buggery applies to both heterosexual and homosexual activities The legislative provisions are not discriminatory against homosexuals.").

⁶¹ See *infra* Section II.B. For background on indirect discrimination, see Rosemary C. Hunter and Elaine W. Shoben, *Disparate Impact Discrimination: American Oddity or Internationally Accepted Concept?*, 19 BERKELEY J. EMPLOYMENT & LABOR L. 108, 123 (1998) ("Thus in international law . . . discrimination may be found in the disparate impact of policies or practices on a protected group. State parties to international conventions against discrimination therefore undertake to ensure the absence of disparate impact discrimination against their citizens.").

⁶² Hong Kong Crimes Ordinance s. 118(C) (CAP 200).

⁶³ Hong Kong Crimes Ordinance s. 118(D) (CAP 200).

⁶⁴ See *id.* (failing to address situations involving an underaged male and an of-age female).

⁶⁵ See Hong Kong Security Bureau, *Written Response to the LegCo Panel on Home Affairs Subcommittee*, LC Paper No. CB(2)2000/00-01(01), at para. 5 (2001) ("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.").

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Grounds of Sexual Orientation, the EOC offered a list of reasons why such logic is flawed, including the simple fact that there is no evidence to support the notion that gay men under 21 are likely to blackmail their partners.⁶⁶ If the policy goal is to protect older men from blackmail, blackmail laws should be made more stringent; the solution does not rest in the discriminatory regulation of same-sex relations.⁶⁷

B. International and Comparative Law

On two levels, international law affects the legality of Hong Kong's criminalization of sexual relations. First, international law proscribes generally any discrimination on the basis of sexual orientation, with regards to criminalization of sexual relations. Second, international law extends that principle of non-discrimination to minors, insofar as ages of consent to sexual relations are concerned.

Discriminatory criminalization of sexual relations is a violation of international human rights. As noted above, the UN Human Rights Committee stated in *Toonen v. Australia*, in 1994, that discrimination on the basis of sexual orientation is proscribed by the ICCPR. Although the ICCPR's anti-discrimination provision, Article 26, does not expressly enumerate "sexual orientation" as a ground for protection, the Human Rights Committee held that sexual orientation is subsumed by the proscription of discrimination based on sex. Accordingly, the Human Rights Committee determined that Tasmania's criminalization of buggery violated the ICCPR because it discriminated against gay men.

International law is not limited to the question of buggery in and of itself. International law also addresses criminalization insofar as age of consent is concerned. Disparity in ages of consent between same-sex and heterosexual relations is a violation of human rights law. Such a disparity is not only a violation of the ICCPR under the logic of *Toonen*; Article 2 of the Convention on the Rights of the Child ("CRC") reiterates that logic by extending non-discrimination law to children.

The Committee on the Rights of the Child is the UN's treaty body that interprets the CRC. The Committee has stated that sexual orientation is a ground for protection under the CRC's Article 2. Specifically, disparity in the legal ages of consent based on sexual orientation is a violation of Article 2. The Committee first announced its position on age of consent in a 2000 report on the United Kingdom. In that report, the Committee condemned a disparity in ages of consent in the United Kingdom's Isle of Man, calling it inconsistent with Article 2. It stated: "[C]oncern is expressed at the insufficient efforts made to provide against discrimination based on sexual orientation. . . . [I]t remains concerned about the disparity that continues to exist between the ages for consent to heterosexual (16 years) and homosexual relations."

Hong Kong is bound by the CRC. In interpreting the CRC, international jurists give authoritative weight to statements issued by the Committee on the Rights of the Child. Under the Committee's interpretation of the CRC, Hong Kong's consent laws are presently inconsistent with international human rights norms. Accordingly, legal reform is due.

⁶⁶ See Hong Kong Equal Opportunities Commission, *Comments by EOC to the Response of the Administration to LegCo Panel on Home Affairs Subcommittee*, Paper No. CB(2)2185/00-01(01), at para. 4 (2001).

⁶⁷ *Id.* at para. 6.

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The CRC is not the only international institution to declare that disparity in age of consent laws is a violation of international norms. The Council of Europe has made the same determination. In *Sutherland v. United Kingdom*,⁶⁸ the European Commission on Human Rights⁶⁹ first stated that disparity in ages of consent infringes human rights—both the individual's right to privacy and the individual's right to non-discrimination. These principles have been echoed in subsequent determinations at the European Court of Human Rights ("ECHR"). Just this past year, in 2003, the European Court of Human Rights held that a disparity in ages of consent in Austria infringed upon human rights.⁷⁰ Although the ECHR is a regional tribunal, its case law is nonetheless indicative of international trends. States across the world often look to the ECHR as providing guidance for international standards.⁷¹

Finally, from a comparative standpoint, Hong Kong is out-of-line with its Asian peers. Taiwan, South Korea, Thailand, Vietnam, Cambodia, and the Philippines all have equal ages of consent between homosexual and heterosexual couples.⁷² In Japan, the age of consent (thirteen) is equal under national law, but some individual prefectures have specific laws prohibiting sexual relations when only one partner is under the age of 17.⁷³ On Mainland China, there are no national laws specifically addressing the age of consent for homosexual sexual relations.⁷⁴

C. Hong Kong Must Reform

In the light of human rights considerations, Hong Kong must reform its criminal law to eradicate all disparities between the regulation of sexual relations between homosexual and heterosexual couples. Hong Kong's criminal regulations of sexuality are inconsistent with human rights norms.

In addition to complying with the law for law's sake, Hong Kong should consider the normative underpinnings of the law. Human rights are fundamental protections of human dignity. Although decriminalizing buggery was a step towards respecting the human dignity of gays in Hong Kong, the disparity in criminalization laws still represses the local gay community. For example, the disparity in ages of consent falsely signals to the public that it is acceptable to discriminate against gays. As a result, gays suffer from a stigmatization that compromises their self-worth.

⁶⁸ App. No. 25186/94 (European Commission on Human Rights 1997).

⁶⁹ The European Commission on Human Rights existed until 1999, after which it was abolished so that all of the Council of Europe's cases proceed straight to the European Court of Human Rights.

⁷⁰ See *L. & V. v. Austria*, unpublished opinion available at http://www.hrw.org/lgbt/pdf/l_and_v_v_austria.pdf (2003).

⁷¹ See *supra* note 33.

⁷² See generally Interpol, <http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/Default.asp> (providing summary of national laws regarding sexual offenses against Children); International Lesbian & Gay Association, *World Legal Survey*, online at http://www.ilga.info/Information/Legal_survey/Asia_Pacific/1world_legal_survey__asia_pacific.htm (same).

⁷³ *Id.*

⁷⁴ Interpol, <http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaChina.asp> (summarizing China's laws regarding sexual offenses against children).

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III. SEXUAL MINORITIES' RIGHT TO EQUALITY

Decriminalization is but the first level of justice for sexual minorities. Human rights norms have extended beyond decriminalization to protect other equal rights to sexual minorities. Equality protections for sexual minorities range from the right of individual gays and lesbians to equal employment opportunities to same-sex couples' equal right to have their partnerships recognized legally.

This Section explores, from the perspective of international and comparative law, the extent that equality protections should be extended to sexual minorities. Subsection A briefly describes the situation in Hong Kong. Subsection B.i addresses the rights of individual sexual minorities to equal opportunity. It will show that Hong Kong needs to enact an anti-discrimination ordinance to protect sexual minorities' equal rights. Subsection B.ii discusses specifically the right to equality between same-sex and heterosexual couples. It will show that Hong Kong needs to enact separate legislation to legally recognize same-sex couples.

The Hong Kong government has argued that many partnership rights cannot be extended to same-sex couples because Hong Kong's laws clearly define marriage as being between one man and one woman.⁷⁵ This logic is blatantly incorrect. It is possible for Hong Kong to maintain its definition of marriage, but amend its laws so that substantively equal rights are extended to long-term same-sex partners. Equal rights for same-sex partnerships are not synonymous with same-sex marriage rights. Essentially, it is inappropriate for Hong Kong to hide behind its marriage laws in order to deprive same-sex partners from fundamental human rights. This line of reasoning will be further discussed in Subsection B.ii.

A. Background: Discrimination in Hong Kong

At present, sexual minorities in Hong Kong have no legal redress against discrimination. The Administration has passed legislation to protect against discrimination on the grounds of gender, disabilities, and family status.⁷⁶ The Administration has also expressed a commitment to passing legislation to combat racial discrimination.⁷⁷ Despite all this progress, the Administration has failed to adequately address sexual orientation.⁷⁸

In theory, the Hong Kong Bill of Rights Ordinance ("BORO") protects sexual minorities in its broad language. Like Article 26 of the ICCPR, Article 22 of BORO protects against discrimination on the grounds of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."⁷⁹ However, while the

⁷⁵ See, e.g., Home Affairs Bureau, *Submission to the LegCo Panel on Home Affairs Subcommittee to Study Discrimination on the Ground of Sexual Orientation*, LC Paper No. CB(2)786/01-02(01) (2001), at para. 5 (arguing that same-sex partners of civil servants are not eligible for government medical benefits because the benefits system "will continue to be guided by the prevailing marriage system in Hong Kong"); *id.* at para. 3 (arguing that same-sex partners may not apply for public housing as a family unit because applicants "are required to produce relevant documentary proof such as a marriage certificate.").

⁷⁶ See Sex Discrimination Ordinance (CAP 480); Disability Discrimination Ordinance (CAP 487); Family Status Discrimination Ordinance (CAP 527).

⁷⁷ On September 16, 2004, the Hong Kong government released a consultation paper outlining the scope of its proposed ordinance proscribing racial discrimination. See Ravina Shamdasani, *Scope of Race Bias Law is Revealed*, SOUTH CHINA MORNING POST, Sept. 17, 2004, at 3.

⁷⁸ Instead of proposing anti-discrimination legislation to protect sexual minorities, the Hong Kong government announced in July 2004 that it would merely begin exploring sexual orientation rights by studying public opinion. See Tim Cribb, *Quest for Equality*, SOUTH CHINA MORNING POST, July 27, 2004, at 14.

⁷⁹ Bill of Rights Ordinance, art. 22 (CAP 383).

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UN Human Rights Committee has found the ground of “sex” to include “sexual orientation,” the Hong Kong government has not made that determination—neither through case law nor through other forms of declaration. Thus, it is questionable whether BORO protects sexual minorities. Even if it does, BORO only regulates the government and other public entities.⁸⁰ Therefore, it does not protect against discrimination in the private sector.

In theory, the Basic Law should also protect sexual minorities. Article 39 of the Basic Law states that the ICCPR “shall be implemented through the laws of the Hong Kong Special Administrative Region”⁸¹ and the ICCPR proscribes discrimination on the basis of sexual orientation.⁸² However, the Hong Kong judiciary has never invoked the Basic Law to protect sexual minorities. Also, LegCo has yet to enact any specific legislation to implement the ICCPR’s protection of sexual minorities.

The only government progress has been through non-enforceable policy declarations issued by the Home Affairs Bureau. In its statement, “Equal Opportunities: Sexual Orientation,” the Home Affairs Bureau announced that “[e]veryone shall have equal opportunities in every aspect of life, irrespective of race, colour, sex, religion, *sexual orientation*, or any other status. . . . [A]part from their sexual orientation, bisexuals, lesbians and gays are the same as any other members of the community.”⁸³ While the statement is commendable, its declarative principles are only aspirational in nature and not legally enforceable.

The Home Affairs Bureau also published a “Code of Practice Against Discrimination in Employment on the Ground of Sexual Orientation.”⁸⁴ Unfortunately, the code is again only a list of recommendations. The first paragraph of the code states that “[i]ts purpose is to facilitate *self-regulation* on the part of employers and employees in eliminating discriminatory practices in employment.”⁸⁵ Indeed, the Code only promotes “self-regulation” against discrimination on the basis of sexual orientation. The Code’s provisions are legally non-enforceable.

The Home Affairs Bureau has suggested that sexual minorities might be protected by the Employment Ordinance;⁸⁶ however, this assertion is questionable at best. The Employment Ordinance does not expressly address sexual orientation;⁸⁷ nor has the Administration offered evidence that individuals have successfully brought claims pursuant

⁸⁰ *Id.* at s. 7(1) (“This Ordinance binds only - (a) the Government and all public authorities; and (b) any person acting on behalf of the Government or a public authority.”).

⁸¹ See Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Apr. 4, 1990, art. 39.

⁸² See *supra* Section I.A.i.

⁸³ Hong Kong Home Affairs Bureau, *Equal Opportunities: Sexual Orientation*, online at http://www.hab.gov.hk/en/policy_responsibilities/the_rights_of_the_individuals/sexual1.htm.

⁸⁴ Hong Kong Home Affairs Bureau, *Code of Practice Against Discrimination in Employment on the Ground of Sexual Orientation*, online at http://www.hab.gov.hk/en/policy_responsibilities/the_rights_of_the_individuals/sexual.htm.

⁸⁵ *Id.* at s. 1.1 (emphasis added).

⁸⁶ Hong Kong Home Affairs Bureau, Submission to the LegCo Panel on Home Affairs Subcommittee to Study Discrimination on the Ground of *Sexual Orientation*, LC Paper No. CB(2)786/01-02(01), at para. 2 (2001) (“[E]mployees, regardless of their sexual orientation, may seek redress if they are deprived of their benefits and protection under the Employment Ordinance or the employment contract.”).

⁸⁷ See, e.g., Employment Ordinance s. 9 (CAP 57). Section 9 lists grounds on which employers may terminate their employees. It is unclear whether an employee’s sexual orientation may be deemed “misconduct” or “any other ground . . . at common law” for termination.

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to the Employment Ordinance with regards to discrimination on the ground of sexual orientation.

With regards to same-sex couples, Hong Kong fails to give legal recognition to same-sex couples. Not only does Hong Kong fail to offer *equal* rights to same-sex couples vis-à-vis heterosexual couples, Hong Kong fails to offer almost *any* recognition at all. The only exception lies in the extremely narrow case regarding organ transplants and same-sex couples who have acquired a marriage license abroad.

The Administration should be lauded for suggesting, in a June 2004 statement, that same-sex married couples from abroad can be recognized as legally married for the purposes of Hong Kong's Human Organ Transplant Ordinance.⁸⁸ However, this sole piece of recognition for same-sex couples does not suffice as partnership rights. In fact, one should be offended by the suggestion that same-sex couples' relationships should be recognized only when one partner becomes gravely ill and in need of an organ transplant.

Indeed, there is a glaring gap in Hong Kong's civil rights law. Hong Kong's laws do not regards sexual minorities as being equal to their heterosexual neighbors, co-workers, friends, or family members. This gap is inconsistent with international human rights norms.

B. Hong Kong through the Lens of International and Comparative Law

As already noted above, the UN human rights regime has stated that sexual minorities are protected by existing treaties. UN treaty bodies have invoked international law not only to protect sexual minorities from unjustified criminalization of homosexual conduct. Rather, international law has been invoked to protect additional equal rights for sexual minorities. This Subsection begins by discussing individual sexual minorities' right to equality. It then addresses the equal rights of same-sex couples.

i. Sexual minorities' right to equality: general background

The UN Human Rights Committee has stated that individuals should not be denied civil and political rights on the ground of sexual orientation.⁸⁹ Meanwhile, the UN Committee on Economic, Social, and Cultural rights has stated that individuals should not be denied their economic, social, and cultural rights based on the ground of sexual orientation.⁹⁰ These civil, political, economic, social, and cultural rights manifest in various forms such as sexual minorities' equal right to employment, access to public accommodation, succession, and many other rights.

The protection of sexual minorities' rights is not confined to statements made by UN treaty bodies. Jurisdictions across the globe have enacted constitutional provisions and statutory law to expressly protect the equal rights of sexual minorities. These provisions vary among jurisdictions across the world. This Subsection will begin by illustrating how

⁸⁸ See Hong Kong Health, Welfare, and Food Bureau, *Bill's Committee on Human Organ Transplant (Amendment) Bill 2001: Administration's Response*, LC Paper No. CB(2)2719/03-04(01) (2004).

⁸⁹ See *Young v Australia*, UN Human Rights Committee, U.N. Doc. CCPR/C/78/941/2000; *Toonen v. Australia*, *Toonen v. Australia*, UN Human Rights Committee, U.N. Doc. A/49/40.

⁹⁰ See *CESCR General Comment No. 14*, U.N. Doc. E/C.12/2000/4 at para. 18 (2000) (stating that Article 2(2) of the ICESCR proscribes discrimination on the basis of sexual orientation).

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widespread the protection of sexual minorities' equal rights has become. It will then look at New York—a world city like Hong Kong—as a specific case study.

1. *Reform around the world*

Jurisdictions around the world have taken initiatives to protect sexual minorities' right to equality. In Europe, for example, the Treaty establishing the European Community (the Treaty of Rome) includes "sexual orientation" as a ground for protection against discrimination.⁹¹ Subsequently, the European Council issued a directive in 2000 expressly prohibiting direct and indirect discrimination against sexual minorities with regards to employment.⁹²

Protection of sexual minorities is not confined to Europe. In Canada, sexual orientation is a ground for protection in the Canadian Human Rights Act as well as the human rights codes of individual Canadian territories.⁹³ In Central and South America, sexual orientation is a ground for protection in various local and national laws of Brazil, Costa Rica, and Ecuador.⁹⁴ In Africa, Namibia and South Africa both have laws expressly protecting sexual minorities.⁹⁵ In the Middle East, Israel's laws expressly protect sexual minorities.⁹⁶ New Zealand and Australia both have laws protecting the opportunity rights of sexual minorities.⁹⁷ In Asia, Hong Kong's neighbor, Taiwan, recently passed a law protecting

⁹¹ Treaty Establishing the European Community ("Treaty of Rome"), art. 13 (1957) (subsequently inserted as Article 6(a) in the Treaty on the European Union, and renumbered as Article 13 by the Treaty of Amsterdam).

⁹² European Council Directive 2000/78/EC, printed in the Official Journal of the European Union [2000], series L, issue 303, p. 16.

⁹³ See Canadian Human Rights Act, Revised Statutes of Canada, ch. H-6, ss. 2, 3(1) (1985, amended 1996). For provincial proscriptions of discrimination on the ground of sexual orientation, see Human Rights Code, Revised Statutes of British Columbia, ch. 210, ss. 7-11, 13-14 (1996); Human Rights Code, Revised Statutes of Manitoba, ch. H175, s. 9(2)(h) (1987); Human Rights Code, Revised Statutes of New Brunswick, ch. H-11, ss. 3-7 (1992); Human Rights Code, Revised Statutes of Newfoundland, ch. H-14, ss. 6-9, 12, 14 (1990, amended 1997); Human Rights Act, Revised Statutes of Nova Scotia, ch. 214, s. 5(1)(n) (1989, amended 1991); Human Rights Code, Revised Statutes of Ontario, ch. H.19, ss. 1-3, 5-6 (1990); Human Rights Act, Revised Statutes of Prince Edward Island, ch. H-12, s. 1(1)(d) (1988, amended 1998); Charte des Droits et Libertés de la Personne, Revised Statutes of Québec, ch. C-12, s. 10 (1977); Saskatchewan Human Rights Code, Statutes of Saskatchewan, ch. S-24.1, ss.9-19 (1979, amended 1993); Human Rights Act, Statutes of the Yukon Territory, ch. 3, ss. 6, 34 (1987).

⁹⁴ See, e.g. Lei no. 10.948 do São Paulo (2001) (proscribing discrimination "contra cidadão homosexual, bisexual ou transgênero"); Ley no. 7771 de Costa Rica, art. 48 (1998) (proscribing discrimination on the grounds of "opción política, religiosa o sexual"); Constitución Política de Ecuador, art. 23(3) (1998) ("Todas las personas serán consideradas iguales y gozarán de los mismos derechos, libertades y oportunidades, sin discriminación en razón de . . . orientación sexual").

⁹⁵ See Namibian Labour Act, s. 107(1) (1992) (including "sexual orientation" as a ground for protection); Constitution of the Republic of South Africa, s. 9(3) (1996) (same).

⁹⁶ See Israeli Equal Opportunities in Employment Act (1988, amended 1992) (including *neti'ya minit*, i.e., sexual orientation, as a grounds for protection).

⁹⁷ See New Zealand Human Rights Act, ss. 21(1)(m), 145 (including "sexual orientation" as a ground for protection) (1993); Australian Workplace Relations Act, s. 170CK (1996) ("sexual orientation"); Australian Capital Territory Discrimination Act, s. 7(1)(b) (1991) ("sexuality"); New South Wales Anti-Discrimination Act, Part 4C (1977, amended 1982) ("homosexuality"); Northern Territory Anti-Discrimination Act, s. 19(1)(c) (1992) ("sexuality"); Queensland Anti-Discrimination Act, s. 7(1)(1) (1991) ("lawful sexual activity"); South Australia Equal Opportunity Act, ss. 5(1), 29(3) (1984) ("sexuality"); Tasmania Anti-Discrimination Act, ss. 3, 16 (1998) ("sexual orientation"); Victoria Equal Opportunity Act, ss. 4, 6 (1995, amended 2000) ("sexual orientation"); Western Australia Acts Amendment Act ("Lesbian and Gay Law Reform Act") (2002) ("sexual orientation").

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sexual minorities' right to educational and recruitment opportunities.⁹⁸ Additionally, Taiwan's pending human rights law would further those rights.⁹⁹ In Korea, the National Human Rights Commission Act subjects discrimination on the ground of sexual orientation to the Commission's investigation.¹⁰⁰

As illustrated above, protections of equality for sexual minorities is widespread. Given this backdrop, one thing is strikingly clear: Compared to its peer jurisdictions that respect human rights, Hong Kong is the odd one out with no enforceable legislation expressly protecting sexual minorities. If Hong Kong is to maintain its reputation as a world city, it must stay abreast of legal reforms to ensure that Hong Kong remains hospitable to all its residents and international visitors, regardless of their sexual orientation.

2. Case study: New York City

Although many jurisdictions across the world protect sexual minorities' right to equality, the degree of protection varies among jurisdictions. As Hong Kong considers enacting anti-discrimination legislation to protect sexual minorities, it may be helpful to look more closely at another jurisdiction for insights. Because of Hong Kong's reputation as a world city, it is perhaps instructive to compare Hong Kong to another world city: New York.

In New York City, sexual minorities are protected against discrimination by both New York state law and New York municipal law. At the state level, New Yorkers are protected by New York State's "Sexual Orientation Non-Discrimination Act" ("SONDA").¹⁰¹ SONDA provides comprehensive protection by prohibiting discrimination on the basis of actual or perceived sexual orientation in employment, housing, public accommodations, education, credit, and the exercise of civil rights such as voting and the right to serve on juries.¹⁰² New Yorkers who believe that they have been discriminated against on the ground of sexual orientation may file a complaint with a government human rights agency within one year of the discriminatory act; the agency will then investigate and, if necessary, take legal action on behalf of the complainant.¹⁰³ Alternatively, individuals have up to three years from the date of the discriminatory act to file their own civil suit against the discriminator in state courts.¹⁰⁴ SONDA complainants with meritorious claims are eligible for monetary damages as well as injunctive relief.¹⁰⁵

In New York City, sexual minorities are not only protected by SONDA; they are protected by New York City's municipal human rights law. The New York City Human Rights Law ("NYCHRL") is similar to SONDA. NYCHRL protects sexual minorities from

⁹⁸ See Caroline Hong, *Gender Fairness Bill is Made Law*, TAIPEI TIMES, June 5, 2004, at 2 (discussing Taiwan's Gender Equality and Education Law, which proscribes discrimination on the grounds of gender and sexual orientation).

⁹⁹ See *supra* notes 46-49.

¹⁰⁰ Korean National Human Rights Commission Act, art. 30(2) (2001).

¹⁰¹ Office of the New York State Attorney General, *Sexual Orientation Non-Discrimination Act*, online at http://www.oag.state.ny.us/civilrights/sonda_brochure.html. SONDA was codified by inserting "sexual orientation" as a grounds for protection in various sections of the New York State Human Rights Law. See New York Executive Law, art. 15 (New York Human Rights Law), s. 290 et seq (2004).

¹⁰² Office of the New York State Attorney General, *Sexual Orientation Non-Discrimination Act* (cited in note 101).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

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discrimination with regards to housing, employment, and public accommodations.¹⁰⁶ However, under NYCHRL, complainants are eligible for punitive damages and attorney's fees that are not available under SONDA.¹⁰⁷

It is worth noting that, in New York State, "sexual orientation" is a ground for protection under the 2000 New York State Hate Crimes Act.¹⁰⁸ Thus, if perpetrators commit certain crimes against victims because of the victims' sexual orientation, those perpetrators may be punished more severely than if the victims were not part of a protected class.¹⁰⁹

The legal rights of sexual minorities in New York City stand in stark contrast to the legal status of sexual minorities in Hong Kong. In Hong Kong, no existing law expressly protects sexual minorities' equal rights. To begin protecting such rights, Hong Kong should enact an anti-discrimination ordinance addressing sexual orientation. The ordinance should mirror Hong Kong's existing anti-discrimination ordinances while incorporating protections that have proved to be useful in Hong Kong's peer jurisdictions.

ii. *Equal rights for same-sex couples*

A specific subset of sexual minorities' equal rights is their right to enter into same-sex partnerships. The LegCo Subcommittee to Study Discrimination on the Ground of Sexual Orientation attempted to address the right of same-sex couples, but the attempt largely failed. The Hong Kong government has conflated same-sex couples' rights with "marriage" rights and dismissed such rights altogether. This logic is flawed and inconsistent with developing international norms.

In one instance of such flawed logic, the Administration argued that same-sex partners cannot be deemed a family unit for purposes of public housing applications. The Administration justified this denial by asserting that same-sex couples lack "relevant documentary proof such as marriage certificate [sic] . . . to prove their family relationship."¹¹⁰ However, such justification lacks persuasiveness. If same-sex couples lack marriage documentation, the solution is not to deprive the couple of housing, but to grant the couple legal recognition via a domestic partnership scheme. Indeed, same-sex partnership rights and same-sex marriage rights are not synonymous. Even if the Hong Kong government chooses not to extend marriage rights to same-sex couples, it should extend fundamental partnership rights to same-sex couples. The government must not hide behind a cloak of rhetoric on marriage.

It is imperative that Hong Kong grant legal recognition to same-sex partners. In this Subsection, the Paper will outline four routes of reform that Hong Kong should consider: (1) establishing a preliminary non-rights conferring partnership registry, (2) establishing a rights

¹⁰⁶ New York City Commission on Human Rights, *Discrimination Is Illegal in New York City*, online at <http://www.nyc.gov/html/chr/>. The New York City Human Rights Law is codified in the New York City Administrative Code, tit. 8 (2004).

¹⁰⁷ Office of the New York State Attorney General, *Sexual Orientation Non-Discrimination Act* (cited in note 101) (comparing remedies under SONDA to remedies under municipal laws).

¹⁰⁸ *Id.* (describing the 2000 New York Hate Crimes Act). The 2000 New York Hate Crimes Act is codified in the New York Penal Code ss. 485.00-485.10 (2004).

¹⁰⁹ *Id.*

¹¹⁰ Home Affairs Bureau, *Submission to the LegCo Panel on Home Affairs Subcommittee to Study Discrimination on the Ground of Sexual Orientation*, LC Paper No. CB(2)786/01-02(01) (2001), at para. 3.

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conferring partnership registry, (3) legalizing same-sex marriage, and (4) recognizing same-sex couples for the purposes of immigration law.

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1. *Preliminary non-rights conferring partnership registries*

As a preliminary step, the Hong Kong government should create a same-sex domestic partnership registry. Domestic partnership registries are utilized by many jurisdictions, especially cities in the United States. In the United States, approximately 60 cities have same-sex partnership registries including all of the major cities such as New York, Los Angeles, San Francisco, Chicago, and Atlanta. Same-sex domestic partnership registries come in many forms. Same-sex domestic partnership registries come in many forms. The most basic registries do not confer rights, but are symbolic in function. While Hong Kong contemplates what rights to extend to same-sex partnerships, it should, at the very least, create such a basic domestic partnership registry as an initial step to government reform.

Even if a registry does not confer specific rights, it legally recognizes that two individuals of the same sex are in a committed relationship. This recognition serves two important goals. First, a registration serves as evidence of partnership, which private employers may choose to use for their employee benefits programs. Many international enterprises offer benefits to their employees' same-sex partners.¹¹¹ Thus, a registry in Hong Kong can facilitate the administration of such private employment benefits in Hong Kong.¹¹² Furthermore, by creating a registry, the government of Hong Kong legitimizes the notion of same-sex partnerships, thereby encouraging more private employers to recognize same-sex partnerships for their internal human resources purposes.

Second, the registry serves as a symbolic first step. Even if a registry does not confer specific rights that married couples enjoy, the registry would create symbolic rights. When the City of Chicago opened its non-rights conferring same-sex registry in 2003, Chicago's Clerk stated: "It is a symbol, but symbols are important . . . It says that same-sex couples have a right to a committed partnership . . . and the government recognizes that right."¹¹³ Indeed, the symbolic right to fall in love and enter into a committed relationship is an important one, albeit symbolic.

Although registration procedures vary among jurisdictions, registration usually requires the partners to complete an affidavit and/or provide evidence regarding the couple's background information such as their age, cohabitation, financial and emotional relationship, and unmarried status.¹¹⁴

2. *Rights-conferring partnership registries*

A registry without rights attached should, however, only serve as a first step. Arguably, such a registry does not satisfy human rights as they have been defined by institutions such as the UN Human Rights Committee and the ECHR. A more just registry

¹¹¹ As of October 2004, 225 out of the United States' Fortune 500 companies, many of which have Hong Kong branch offices, offer benefits to their employees' same-sex partners. Human Rights Campaign, online database at <http://www.hrc.org/worklife/dpbsearch> (last visited on Oct. 17, 2004).

¹¹² Private employers can administer benefits to their employees' domestic partners, even if Hong Kong does not establish a partnership registry. That is to say, employers can verify their employees' domestic partnership status by establishing their own mechanisms for verifying their employee's family status. However, creating a government registry facilitates the process by taking the onus off of the private employer. Creating a government registry also legitimizes same-sex relationships, reinforcing the human rights of same-sex couples.

¹¹³ Bonnie Miller Rubin, *Gays, Lesbians View Registry as Progress*, CHICAGO TRIBUNE, Oct. 1, 2003, at 1.

¹¹⁴ See, e.g., the City of Chicago's (Cook County's) domestic partnership registration procedures, online at http://www.cookctyclerk.com/sub/domestic_partnership_application.asp.

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would confer specific rights on same-sex couples—those that are enjoyed by committed heterosexual couples. Both the UN Human Rights Committee and the ECHR have recognized same-sex partnership rights.¹¹⁵

In 2002, the LegCo Subcommittee to Study Discrimination on the Ground of Sexual Orientation considered whether to extend certain rights to same-sex couples. These rights included the right to housing and health benefits. In both cases, the Committee summarily concluded that, because same-sex couples cannot enter marriage in Hong Kong, they cannot become eligible for rights as partners.¹¹⁶ This logic is flawed. The fact that Hong Kong's legal system rigidly defines couples' rights based on marriage alone is anachronistic. Indeed, this logic is the reason why Hong Kong must reform its laws so that rights are conferred upon same-sex partners, even if they are not married.

Again, New York City may serve as a model jurisdiction. Even though same-sex marriage is not recognized in New York, registered same-sex partners are conferred a variety of fundamental rights. In New York City, registered same-sex partners enjoy rights including, but not limited to, visiting rights in New York City hospitals, visiting rights in New York City correctional facilities, eligibility to qualify as a family member for the purpose of public housing, employment benefits for same-sex partners of government employees, and additional rights that may be created by statutes at any time.¹¹⁷

Furthermore, private businesses doing business with the City of New York are required to offer employment benefits to their employees' registered domestic partners.¹¹⁸ In other words, city contractors must offer employment benefits (health benefits, retirement benefits, travel benefits, rights to bereavement leaves, etc.) to domestic partners that are equal to those employment benefits that are offered to married spouses.¹¹⁹

Finally, registered same-sex partners in New York City are also conferred rights at the state level. The state of New York recognizes a variety of rights for same-sex partners including benefit rights for government employees, the right to include same-sex partners as family members for purposes of housing laws, and the right to second parent adoption by parents' same-sex partners.¹²⁰

¹¹⁵ See, e.g., *Young v Australia*, UN Human Rights Committee, UN Doc. CCPR/C/78/D/941/2000 (2000) (holding that a man was entitled to a government pension because of his status as the same-sex partner of an Australian veteran; noting that, pursuant to Article 26 of the ICCPR, Australia had no legitimate reason for denying government benefits, which were offered to heterosexual partners, from same-sex domestic partners.); *Joslin v. New Zealand*, UN Human Rights Committee, UN Communication 902/1999, Doc A/57/40 (2002) (Lallah and Scheinin concurring) (stating that, unless a state's laws allow for "recogni[tion of] same-sex partnership with consequences similar to or identical with those of marriage . . . [the] denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under article 26 [the ICCPR's anti-discrimination provision]"); *Karner v. Austria* (ECHR), unpublished opinion available at <http://www.hrw.org/lgbt/pdf/karner.pdf> (2003) (holding the withholding tenancy rights from same-sex partners violated the European Convention on Human Rights).

¹¹⁶ See *supra* note 75.

¹¹⁷ Office of the New York City Clerk, *Domestic Partnerships*, online at <http://nycmarriagebureau.com/about/domesticpartnership.html>.

¹¹⁸ New York City Local Law 2004/027 ("Equal Benefits Law"), codified in New York City Administrative Code, tit. 6 (2004). See also Pride Agenda, *Q&A on the City Council's Equal Benefits Bill*, online at <http://www.prideagenda.org/briefingpackets/ebb/faq.html>.

¹¹⁹ *Id.*

¹²⁰ Eric Wrubel, *Gay Divorcee: When Will New York Have Its First?*, N.Y. LAW JOURNAL, Oct. 30, 2003, at 4.

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In New York City, the importance of registering same-sex partners became especially pronounced in the wake of the September 11 terrorist attacks on the New York World Trade Center. Surviving partners of gay and lesbian victims needed to rely on domestic partnership status in order to seek victim support.¹²¹

Rights-conferring same-sex partnership registries are not limited to New York and American jurisdictions. Many countries have rights-conferring same-sex partnership schemes at either the national or local levels. These countries include Argentina, Australia, Belgium, Brazil, Canada, Croatia, Denmark, Finland, France, Germany, Hungary, Iceland, Israel, Italy, New Zealand, Norway, Portugal, Spain, and Sweden.¹²²

The rights conferred upon registered partners differ from jurisdiction to jurisdiction. For example, Sweden confers upon same-sex partners joint adoption rights;¹²³ however, Sweden's neighbor, Denmark, has not yet done so.¹²⁴ Despite this variance, one should note that several sources of human rights law have suggested that, in order to adequately protect the equality of same-sex couples, governments must confer upon same-sex partnerships the same degree of rights afforded to married heterosexual couples.

Although the UN Human Rights Committee has yet to hear a case directly addressing the appropriate scope of partnership rights, two members of the Committee opined in dicta that, unless a state's laws allow for "recogni[tion of] same-sex partnership with consequences *similar to or identical with* those of marriage . . . [the] denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under article 26 [the ICCPR's anti-discrimination provision]".¹²⁵ Similarly, the European Parliament called upon the Commission of the European Community to recommend that member states terminate "the barring of lesbians and homosexual couples from marriage or from an *equivalent* legal framework . . . and any restriction on the right of lesbians and homosexuals to be parents or to adopt or foster children."¹²⁶

In establishing a domestic partnership registry, the Hong Kong government should work with local NGOs to decide on the scope of rights that Hong Kong will confer upon same-sex partnerships. Hong Kong must decide whether it will begin with a limited set of conferred rights, such as those provided in New York City, or establish a more comprehensive set of rights, which at least two members of the UN Human Rights Committee believe to be required by the ICCPR. Regardless of the scope that Hong Kong chooses, one thing is clear: The current state of things, in which same-sex couples in Hong Kong have virtually no recognized partnership rights, is unacceptably behind the standards set by Hong Kong's peer jurisdictions.

¹²¹ *Id.* (noting that the State of New York recognized same-sex partners for the purpose of September 11 damages); John O. Enright, Comment, *New York's Post-September 11, 2001 Recognition of Same-Sex Relationships: A Victory Suggestive of Future Change*, 72 FORDHAM L. REV. 2823 (2004);

¹²² International Gay & Lesbian Human Rights Commission, *Where You Can Marry: Global Summary of Registered Partnership, Domestic Partnership, and Marriage Laws* (2003), online at <http://www.iglhrc.org/site/iglhrc/content.php?type=1&id=91>.

¹²³ Agence France Press, *First Adoption by Swedish Gay Couples Recognised*, Oct. 10, 2003, available on Westlaw at 2003 WL 71505234.

¹²⁴ Hazeldean & Betz, *Years Behind: What the United States Must Learn about Immigration Law and Same-Sex Couples*, 30 HUMAN RIGHTS 17 (2003) (describing the Danish Registered Partnership Act).

¹²⁵ *Joslin v. New Zealand*, UN Human Rights Committee, UN Communication 902/1999, Doc A/57/40 (2002) (emphasis added).

¹²⁶ 1994 E.U.O.J. (C 61) 40 (Official Journal of the European Communities).

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3. Same-sex marriage

Whether there exists a human right to same-sex marriage is presently unclear. In *Joslin v. New Zealand*, the UN Human Rights Committee held that the ICCPR does not require states to legalize same-sex marriage.¹²⁷ Two members of the Human Rights Committee opined that, as long as states offer equal rights to same-sex partnerships, “marriage” could remain in name a heterosexual institution.¹²⁸ Despite the Committee’s holding, however, prominent human rights NGOs such as Human Rights Watch have concluded that same-sex couples have a human right to marry each other.¹²⁹

It is important to remember that human rights norms are not static; they emerge over time.¹³⁰ Although it is a relatively recent trend, states have begun to recognize the fundamental right of same-sex couples to marriage. Belgium, the Netherlands, the majority of Canadian provinces, parts of Brazil and the United States have legalized same-sex marriages.¹³¹ Spain¹³² and Taiwan¹³³ both have pending legislation to legalize same-sex marriage and both proposals have provoked little objection. Although South Africa has not yet legalized same-sex marriages, the South African Law Reform Commission concluded in 2003 that non-recognition of same-sex marriages violates the South African constitution.¹³⁴

Clearly, the large majority of the world’s jurisdictions have yet to legalize same-sex marriage. However, a growing number of states have come to recognize that same-sex couples have a fundamental right to marriage. The government of Hong Kong must ask itself whether it is only a follower, or whether it is at the forefront of emerging human rights norms. Legalizing same-sex marriage would solidify Hong Kong’s role as a progressive human rights leader.

4. Immigration and other cross-border concerns

Hong Kong is a world city that hosts a vibrant international community while serving as home to well-traveled Hong Kong natives. As a product of this status, Hong Kong must

¹²⁷ *Joslin v. New Zealand*, UN Human Rights Committee, UN Communication 902/1999, Doc A/57/40 (2002) at para. 8.3.

¹²⁸ See *id* (Lallah and Scheinin concurring) (stating that, unless a state’s laws allow for “recogni[tion of] same-sex partnership with consequences similar to or identical with those of marriage . . . [the] denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under article 26 [the ICCPR’s anti-discrimination provision]”).

¹²⁹ Human Rights Watch, *Non-Discrimination in Civil Marriage: Perspectives from International Human Rights Law and Practice*, online at <http://www.hrw.org/backgrounder/lgbt/civil-marriage.htm> (“The right to marry is a basic human right. Straightforward application of international protections against unequal treatment dictate that gay and lesbian couples, no less than heterosexual couples, should enjoy the right: there is no civil marriage “exception” to the reach of international anti-discrimination law.”).

¹³⁰ See *supra* Section I.A.ii.

¹³¹ See New Zealand Press Association, *Looking at the Legality of Same-Sex Unions Worldwide*, Oct. 6, 2004, available on Westlaw at 2004 WL 93694818 (noting that Belgium, the Netherlands, numerous Canadian provinces, Massachusetts in the United States, and Rio Grande do Sul in Brazil have all legalized same-sex marriage); Doug Struck, *Canada Court Clears Way for Gay Marriage Law*, Dec. 10, 2004, at 4 (noting that “[c]ourts in 6 of 10 Canadian provinces have upheld same-sex unions.”).

¹³² *Id* (“Gay marriage is expected to be legal in Spain by next year [2005] after the passing of a bill last week”).

¹³³ See notes 46-49 (discussing Taiwan’s same-sex marriage legislation).

¹³⁴ See Human Rights Watch, “Non-Discrimination in Civil Marriage: Perspectives from International Human Rights Law and Practice,” online at <http://www.hrw.org/backgrounder/lgbt/civil-marriage.htm> (reporting on the status of same-sex marriage in South Africa).

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contend with the question: How will Hong Kong deal with same-sex couples who attained legal recognition of their couple status from a foreign jurisdiction?

The first question is whether, under Hong Kong law, Hong Kong citizens should be allowed to sponsor same-sex partners for immigration. A study in 2003 found that sixteen nations have reformed their laws to ensure that gays and lesbians can sponsor their same-sex partners for immigration.¹³⁵ Immigration considerations are often independent of domestic marriage and partnership rights in other contexts. For example, Australia, Canada, Israel, New Zealand, and the United Kingdom allow gays and lesbians to sponsor their partners for immigration without granting those couples marriage or national partnership rights after immigration.¹³⁶

The second question is how Hong Kong should protect the rights of foreign same-sex couples who attain legal recognition of their relationship abroad. Even if Hong Kong does not grant same-sex marriage licenses, it should extend basic partnership rights to same-sex couples that attain marriage licenses abroad. This is the model in New York City. In 2002, the New York City Council voted to automatically confer partnership rights on same-sex married couples from other jurisdictions, without requiring those couples to formally register as a partnership in New York.¹³⁷ Similarly, states in the European Union that do not grant same-sex marriage licenses recognize same-sex married couples from other European Union member states.¹³⁸ These policies ensure that same-sex married couples from abroad aren't stripped of rights that they have become accustomed to, simply for coming to Hong Kong—be it for work or pleasure.

¹³⁵ Hazeldean & Betz, 30 HUMAN RIGHTS 17 (cited in note 124).

¹³⁶ *Id.*

¹³⁷ See New York City Administrative Code ss. 3-240(a) & 3-245 (conferring rights on legally recognized same-sex relationships from other jurisdictions); see also CNN, *NYC Recognizes Gay Partnerships*, Aug. 16, 2002, online at <http://archives.cnn.com/2002/US/08/16/nyc.gay.partners> (quoting Council Member Christine Quinn: "We voted to make it so that people who are registered domestic partners, members of civil unions or gay marriages from other jurisdictions, will now be recognized as registered New York City domestic partners").

¹³⁸ Hazeldean & Betz, 30 HUMAN RIGHTS 17 (cited in note 124).

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IV. CONCLUSION

Hong Kong is a cosmopolitan city with the reputation of being "Asia's world city." This reputation derives, at least in part, from Hong Kong's respect for the international human rights regime.¹³⁹ Thus, when considering the question of sexual orientation rights in Hong Kong, one should consider the issue's human rights implications.

Regrettably, Hong Kong presently does not have any legislation that expressly protects sexual minorities. In fact, Hong Kong has legislation, such as the Crimes Ordinance, that discriminates against sexual minorities. While other jurisdictions respected for their protection of international human rights have taken initiatives to protect sexual minorities, Hong Kong has lagged behind. Hong Kong's poor standing on the issue of sexual orientation necessitates legal reform.

As described by this Paper, necessary reforms can be placed into three categories: First, the Administration should eradicate any discrepancy between the criminalization of same-sex and heterosexual sexual relations. Second, the Administration should enact an anti-discrimination ordinance to protect the equal rights of sexual minorities. Third, the Administration should enact additional legislation to grant legal recognition to same-sex couples.

It is hoped that this Paper will promote dialogue on the issue of sexual orientation rights in Hong Kong. This Paper illustrates that legal reform in Hong Kong is long overdue, but it does not purport to provide detailed legislative proposals. It is clear that, as a question of human rights, Hong Kong's treatment of sexual orientation rights is unacceptable. The Administration should work with the local sexual minority community to formulate and implement legal reforms. In doing so, the Administration should be mindful that sexual orientation rights are a matter of human rights that affects Hong Kong's standing in the world community as well as the human dignity of the Hong Kong people.

¹³⁹ In a government report, the Hong Kong Special Administrative Region suggested that Hong Kong's respect for human rights contributes to its reputation as a world city. See Hong Kong Special Administrative Region, *Asia's World City*, online at <http://www.gov.hk/info/sar5/easia.htm> (noting that "[c]ommitment to maintaining the rule of law, freedom of expression and association, the free flow of information, openness and diversity" contributes to Hong Kong's reputation).