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# INCHING TOWARDS EQUALITY: LGBT RIGHTS AND THE LIMITATIONS OF LAW IN HONG KONG

JOY L. CHIA & AMY BARROW\*

## ABSTRACT

Since legislative reform decriminalizing sodomy in 1991, the Hong Kong government has taken a passive role in the legal protection of lesbian, gay, bisexual, and transgender (LGBT) individuals. Instead, LGBT rights advancements have occurred primarily through the work of the courts, resulting in piecemeal progress that has left unaddressed the daily discrimination experienced by LGBT people in Hong Kong. Despite increased pressure in recent years for anti-discrimination legislation, the Hong Kong government continues to assert that self-regulation and public education, rather than legislation, are more appropriate tools for addressing discrimination based on sexual orientation or gender identity. This Article argues that current LGBT rights debates are a useful site of inquiry for how different parties in Hong Kong understand and use “the idea of law” in the creation and articulation of their claims. Different stakeholders have all adopted and utilized different conceptualizations of the purpose and effects of LGBT-specific anti-discrimination legislation. These different conceptions of law also imply contested visions of Hong Kong’s identity, including how it should treat the marginalized and invisible minorities within society.

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INTRODUCTION

*Of the many and varied purposes for which law is made, none is more important than that of declaring, protecting and realising the full potential of human rights. And there is no better way to secure these rights than ensuring that they are enjoyed by everyone in equal measure.<sup>1</sup>*

Writing in his concurrence to the Hong Kong Court of Final Appeal’s decision in *Secretary for Justice v. Yau Yuk Lung Zigo*, Justice Kemal Bokhary presents a forceful view of the role of the law and courts in protecting individuals from discrimination and ensuring equal protection under the law.<sup>2</sup> Hong Kong courts have generally agreed with this perspective—at least with regards to government treatment of the lesbian, gay, bisexual, and transgender (LGBT) community<sup>3</sup>—and have been the primary driver of LGBT rights in Hong Kong in the last two decades.<sup>4</sup> Largely due to progressive constitutional jurisprudence, LGBT rights advancements in Hong Kong have been considerable—especially compared to other Asian countries—but efforts in support of the enactment of anti-discrimination legislation, which would protect individuals from discrimination on the basis of sexual orientation and gender identity (SOGI), have consistently fallen short.<sup>5</sup> This Article seeks to examine both the

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1. *Sec’y for Justice v. Yau Yuk Lung Zigo*, [2007] 10 H.K.C.F.A.R. 335, ¶ 33 (C.F.A.).

2. *Id.* ¶¶ 34–36.

3. *See, e.g.*, *Leung v. Sec’y for Justice*, [2006] 4 H.K.L.R.D. 211, ¶¶ 42, 49 (C.A.) (holding that the different ages of consent for anal and vaginal sex violated the right to equality contained in the Basic Law and the Bill of Rights Ordinance); *Yau Yuk Lung Zigo*, [2007] 10 H.K.C.F.A.R. 335 (finding the unequal punishment of same-sex and opposite-sex couples for public indecency to violate the constitutional right to equality).

4. *See infra* Part III for further discussion.

5. *See, e.g.*, Jennifer Ngo & Tony Cheung, *Lawmakers Reject Call for Public Debate on Gay-Bias Law*, S. CHINA MORNING POST (Nov. 8, 2012, 12:00 AM), <http://www.scmp.com/news/hong-kong/article/1077291/lawmakers-reject-call-public-debate-gay-bias-law> [<http://perma.cc/SE3U-ZQZN>]; *see also* Ada Lee & Stuart Lau, *Policy Address to Ignore*

successes and limitations of legal efforts and the law in the movement towards LGBT equality in Hong Kong and consider the factors that have contributed to the current social and legal landscape on LGBT issues.

This Article first examines the impact of international human rights treaties on legislative reform in Hong Kong in relation to SOGI by considering the impact of human rights on Hong Kong's constitutional framework, especially around the integration of the International Covenant on Civil and Political Rights (ICCPR) into Hong Kong's Basic Law and Bill of Rights Ordinance (BORO). It then explores the debates around decriminalization of sodomy between consenting male adults, which focused on the right to privacy as articulated in the ICCPR. The Article considers why privacy norms were privileged above equality norms in the Hong Kong context and argues that the incorporation of the ICCPR into Hong Kong's constitutional framework has helped construct a social landscape where there is extreme wariness about government intervention into private lives. Part II.C compares the impact of international human rights treaties on the development of anti-discrimination legislation in Hong Kong, noting that while there is a general consensus about the necessity of vertical protections that protect individuals from government regulation, there is great resistance from various stakeholders to legislation that provides horizontal protections, that is, those that protect individuals or private entities from other private actors. Although international human rights obligations and treaty body actions have played some role in the promulgation of anti-discrimination legislation on sex and race as protected classes, the Hong Kong government is extremely passive in the incorporation of evolving human rights standards into domestic law.

The Article then assesses the success of legal mobilization that has sought to incorporate international human rights standards on equality through domestic litigation around gender and sexuality in the face of political paralysis. The discussion examines the limitations of strategic litigation and the primary tool for legal mobilization—the application for judicial review. Although Hong Kong courts have been quite innovative and enterprising in their judgments, courts are by nature limited in their capacity to push for legal reform or the

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*Anti-Discrimination Debate*, S. CHINA MORNING POST (Jan. 9, 2013, 12:00 AM), <http://www.scmp.com/news/hong-kong/article/1123283/policy-address-ignore-anti-discrimination-debate> [<http://perma.cc/YSQ8-7ALK>] (reporting that the Chief Executive's upcoming policy address will not mention consultation about a law prohibiting discrimination against sexual minorities).

enactment of new legislation. With the most obviously discriminatory and coercive laws against homosexuals struck down, LGBT advocates are left with a landscape characterized by absence—the absence of regulation prohibiting discrimination against LGBT individuals, and, even more troublesome, the absence of sexual minorities in general from the legal and policy framework.

The Conclusion discusses possible reasons for such absence, looking at current debates about LGBT rights in Hong Kong through the different lenses of how various parties understand and use “the idea of law” in the creation and articulation of their claims. Proponents and opponents of LGBT rights, as well as government bodies, have all adopted and utilized different conceptualizations of the purpose and effects of anti-discrimination legislation. Parsing out the contradictions and confusion around LGBT issues in Hong Kong offers us an opportunity to examine a society with divergent views of international engagement and transnational linkages: a society that is being pushed and pulled in multiple directions by its aspirations towards internationalism and cosmopolitanism, the emergence of social conflict derived from social inequalities, and the inclinations of an inherently non-democratic system to cater to vested interests.

### I. LGBT RIGHTS IN THE HONG KONG CONTEXT

Hong Kong is a good case study for examining the role of law in protecting or undermining fundamental rights of sexual minorities because it presents a paradox. Hong Kong is arguably one of the leading jurisdictions in Asia with regards to LGBT rights. Sodomy is decriminalized, same-sex cohabitating couples are protected under anti-domestic violence legislation, and Hong Kong courts have established that the constitutional right to equality extends to protections from discrimination based on sexual orientation.<sup>6</sup> The LGBT community is free to organize, and non-governmental LGBT organizations are allowed to operate freely.<sup>7</sup> The law generally protects freedom of assembly and expression, as evidenced by a monthlong “Pink Season” of celebratory and educational LGBT-themed events culminating in Hong Kong’s Pride Parade.<sup>8</sup> However, despite some level of visibility,

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6. See *infra* Part III.A for further discussion.

7. See, e.g., Holning Lau et al., *Public Opinion in Hong Kong About Gays and Lesbians: The Impact of Interpersonal and Imagined Contact*, 26 INT’L J. PUB. OP. RES. 301 (2014) (noting that marches in celebration of the International Day Against Homophobia (IDAHO) have been organized since 2005, even though Hong Kong’s first “official” parade took place in 2008).

8. *Id.* For more information on Pink Season, see, e.g., *Pink Season 2015 is Here!*, PINK SEASON, <http://pinkseason.hk> [<http://perma.cc/CS7B-P9HV>].

there are still no laws that address the daily discrimination experienced by LGBT people in Hong Kong. Despite increased pressure in recent years for anti-discrimination legislation that would protect individuals from discrimination based on sexual orientation and gender identity,<sup>9</sup> the Hong Kong government continues to assert that self-regulation and public education, rather than legislation, are more appropriate tools for addressing such discrimination.<sup>10</sup> SOGI anti-discrimination legislation has been vehemently opposed by various elements of society, principally conservative Christian groups, and the government has resolutely refused to engage in public consultations on the necessity for such legislation in recent years.<sup>11</sup> This Article argues that the government's reluctance to engage with LGBT rights should not only be considered through the lens of its relationship with the LGBT community, but also within the context of its fraught relationship with concepts of equality, government responsibilities, and minority protections.

Even as there has been increased visibility around LGBT issues, it is important to note that the most prominent advocacy issues in current LGBT debates revolve around sexual orientation. Transgender individuals in Hong Kong remain extremely invisible within the local LGBT community itself and in Hong Kong society at large.<sup>12</sup> Furthermore, until the 2012 *W* case,<sup>13</sup> gender identity issues were rarely discussed in the media or dealt with through the courts.<sup>14</sup> While a full discussion of the complex legal issues faced by transgender individuals in Hong Kong is beyond the scope of this Article,<sup>15</sup> it is

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9. See Jennifer Cheng, *Hong Kong's LGBT Community Seeks Ban on Discrimination*, S. CHINA MORNING POST (Nov. 15, 2012, 12:00 AM), <http://www.scmp.com/news/hong-kong/article/1082499/lgbts-look-for-ban-discriminating-against-them> [<http://perma.cc/2MKX-K23X>]; Jennifer Ngo, *Gays and Mainlanders in Spotlight as Hong Kong Launches Discrimination Law Review*, S. CHINA MORNING POST (July 8, 2014, 7:33 PM), <http://www.scmp.com/news/hong-kong/article/1549710/eoc-launches-review-anti-discrimination-laws> [<http://perma.cc/Z3CQ-F7D6>]; Timmy Sung, *Activists Call for Anti-Discrimination Law After Video Shows Women Abusing Gay Hong Kong Lawmaker Raymond Chan*, S. CHINA MORNING POST (June 6, 2015, 4:13 PM), <http://www.scmp.com/news/article/1817515/activists-call-anti-discrimination-law-after-video-shows-women-abusing-gay-hong> [<http://perma.cc/2HU5-XHQY>].

10. Cheng, *supra* note 9.

11. See *infra* Part II.B for further discussion.

12. LYNDA JOHNSTON & ROBYN LONGHURST, *SPACE, PLACE, AND SEX: GEOGRAPHIES OF SEXUALITIES* 120 (2010).

13. *W v. Registrar of Marriages*, [2010] 6 H.K.C. 359.

14. See *infra* Part III.B for further discussion.

15. See Sam Winter, *Identity Recognition Without the Knife: Towards a Gender Recognition Ordinance for Hong Kong's Transsexual People*, 44 H.K. L.J. 115, 118 (2014) (providing the most recent comprehensive discussion of the experiences of transsexual and transgender individuals in Hong Kong).

important to consider why gender identity has been less prominent in legislative and litigation contexts. A threshold issue is that there is a tendency on the part of many stakeholders to conflate gender identity and sexual orientation.<sup>16</sup> Community organizing among transgender individuals is far less developed, though there are now a number of trans-led organizations in Hong Kong.<sup>17</sup> These organizations are very under-resourced and generally lack the institutional capacity to undertake legal mobilization.<sup>18</sup>

Another possible contributing factor to underutilization of the courts is that transgender individuals, unlike those who face discrimination because of their sexual orientation, have an existing channel to address discrimination and seek redress through the Equal Opportunities Commission (EOC), which considers cases from transgender individuals to fall within its mandate under the Disability Discrimination Ordinance (DDO).<sup>19</sup> Although one can appreciate the pragmatism of the EOC in extending its jurisdiction to those individuals that do need redress and legal protection, this configuration is highly problematic, as it forces individuals to frame their gender identity as an illness and disorder to gain access to much needed services. Moreover, the EOC's main model relies heavily on conciliation rather than litigation, which "ha[s] the effect of limiting court-based enforcement."<sup>20</sup>

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16. For a comprehensive discussion of the experiences of transsexual and transgender individuals in Hong Kong, see Centre for Medical Ethics and Law, *Submission to the Legislative Council and the Security Bureau of the Hong Kong SAR on the Legal Status of Transsexual and Transgender Persons in Hong Kong*, UNIV. OF HONG KONG, Occasional Paper No. 1 (Mar. 2014), <http://www.legco.gov.hk/yr13-14/chinese/hc/papers/hccb2-1052-1-ec.pdf> [<http://perma.cc/ZSR8-3SLA>].

17. Transgender Resource Center and Rainbow of Hong Kong are among the few organizations led by transgender and transsexual individuals. See, e.g., Annemarie Evans, *Joanne Leung Raises Transgender Awareness*, S. CHINA MORNING POST (Oct. 13, 2013, 6:17 PM), <http://www.scmp.com/news/hong-kong/article/1330941/joanne-leung-raises-transgender-awareness> [<http://perma.cc/HC63-9D7M>].

18. But see Julie Chu, *Transgender Woman Takes Hong Kong Police, Prison Officers to Court Over All-Men Detention Ordeal*, S. CHINA MORNING POST (June 14, 2015, 12:56 AM), <http://www.scmp.com/news/hong-kong/law-crime/article/1821259/transgender-woman-takes-hong-kong-police-prison-officers> [<http://perma.cc/DPR5-WS67>] (reporting that an application for judicial review of a case involving a transgender woman was filed in 2015, thus indicating that the current situation of these organizations may be changing).

19. See Carole J. Petersen, *Sexual Orientation and Gender Identity in Hong Kong: A Case for the Strategic Use of Human Rights Treaties and the International Reporting Process*, 14 ASIAN-PAC. L. & POL'Y J. 28, 66–67 (2013) (indicating that gender dysphoria is treated as a mental disorder, and therefore qualifies as a disability under the Disability Discrimination Ordinance); see also Holning Lau & Rebecca L. Stotzer, *Employment Discrimination Based on Sexual Orientation: A Hong Kong Study*, 23 EMP. RESP. RTS. J. 17, 18 (2011).

20. Carole J. Petersen, *The Right to Equality in the Public Sector: An Assessment of Post-Colonial Hong Kong*, 32 H.K. L.J. 103, 109 (2002).

## II. LEGISLATIVE REFORM AND INTERNATIONAL LAW

A. *Human Rights and Decriminalization of Homosexuality*

Although the United Kingdom had ratified most of the core international human rights treaties, it was not until the return of Hong Kong to the People's Republic of China (PRC) was imminent that the colonial government took significant steps towards domesticating international human rights law into Hong Kong's legal framework.<sup>21</sup> The 1984 Sino-British Joint Declaration provides that "[t]he provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force."<sup>22</sup> This meant that existing reservations to the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR)—including those reserving the right not to provide for an elected executive or legislature—could continue to apply.<sup>23</sup>

It is likely that the Sino-British Joint Declaration would have been the extent of any efforts to incorporate international human rights obligations into Hong Kong law, had it not been for the PRC government's decision to send tanks into Tiananmen Square to crush the student movement on June 4, 1989.<sup>24</sup> The international condemnation of the PRC's crackdown was swift—international sanctions from multilateral bodies and individual states against the PRC were initiated and the PRC faced censure in international human rights fora.<sup>25</sup> In Hong Kong, close to one million people took to the streets to protest against the PRC government, and public confidence in the future of Hong Kong and its government was very low.<sup>26</sup> Seeking to

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21. See Petersen, *supra* note 19, at 42.

22. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, U.K.-P.R.C., art. I, ¶ 13, Dec. 19, 1984, 23 I.L.M. 1371, [http://www.legislation.gov.hk/blis\\_pdf.nsf/6799165D2FEE3FA94825755E0033E532/84A057ECA380F51D482575EF00291C2F/\\$FILE/CAP\\_2301\\_e\\_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/84A057ECA380F51D482575EF00291C2F/$FILE/CAP_2301_e_b5.pdf) [hereinafter Sino-British Joint Declaration].

23. See Peter K. Yu, *Succession by Estoppel: Hong Kong's Succession to the ICCPR*, 27 PEPP. L. REV. 53, 62–63 (1999) (discussing the continued nature of the reservations and possible impact) (citing ICCPR, *infra* note 32, and ICESCR, *infra* note 53).

24. Petersen, *supra* note 19, at 41–42 (“[T]here was no expectation [on the part of the British negotiators] at that time that the treaties would be incorporated into Hong Kong's domestic law.”).

25. ANN KENT, CHINA, THE UNITED NATIONS, AND HUMAN RIGHTS: THE LIMITS OF COMPLIANCE 49 (1999).

26. Petersen, *supra* note 19, at 42.

mitigate the fallout from possible instability, the colonial government took action to rebuild both the public's and investors' confidence in the future of Hong Kong,<sup>27</sup> and quickly announced the introduction of domestic human rights legislation in the form of a Bill of Rights.<sup>28</sup> Although the government opened the draft of the Bill of Rights for public consultation, the final product largely relies on the rights enumerated in the ICCPR.<sup>29</sup> Commentators have argued that "[t]his was considered the safest approach" because the Sino-British Declaration and the Basic Law already established that the ICCPR would continue to be applied in Hong Kong.<sup>30</sup> The Bill of Rights Ordinance (BORO) came into force in 1991, thereby granting Hong Kong citizens the right to challenge laws that violated their basic human rights.<sup>31</sup>

The direct modeling of the BORO on the ICCPR created an explicit right to privacy<sup>32</sup> and also provided for equality before the law.<sup>33</sup> The discourse around the right to privacy was particularly important for the regulation of sexuality in Hong Kong because existing human rights case law had determined that the criminalization of homosexual acts between consenting adults was a violation of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which protects the right to respect for "private and family life, . . . home and . . . correspondence."<sup>34</sup> This strong European jurisprudence preference against government

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27. Yu, *supra* note 23, at 64 (noting that the Bill of Rights Ordinance was enacted "to reassure the people of Hong Kong as they contemplated the transfer of sovereignty to China in 1997[] and to restore investment confidence in the territory" after the June 1989 Tiananmen Square massacre) (brackets in original) (internal quotation marks and citation omitted).

28. Carole J. Petersen, *Values in Transition: The Development of the Gay and Lesbian Rights Movement in Hong Kong*, 19 LOY. L.A. INT'L & COMP. L.J. 337, 345 (1997).

29. *Id.* at 345-46; *see also* Petersen, *supra* note 19, at 42.

30. Petersen, *supra* note 19, at 42.

31. Hong Kong Bill of Rights Ordinance, (1991) Cap. 383, 1, § 6(1).

32. *See* International Covenant on Civil and Political Rights art. 17, Dec. 19, 1966, 999 U.N.T.S. 171 ("1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.") [hereinafter ICCPR].

33. *See* ICCPR art. 26 ("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 discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

34. Petersen, *supra* note 28, at 348-49 (citing *Dudgeon v. United Kingdom*, 40 Eur. Ct. H.R. (ser. B) (1982), and arguing that the *Dudgeon* case would have been highly persuasive to a Hong Kong court because Northern Ireland's laws were almost identical to Hong Kong's sodomy laws, which also remained on the books due to the perceived need to reflect the local community's opposition to decriminalization).

interference with individuals' private lives appears to have influenced Hong Kong's executive arm, which sought to abolish the colonial-era sodomy laws introduced into Hong Kong and other British colonies in 1865<sup>35</sup> on the ground that criminalization of consensual sexual activity between adults would violate the right to privacy under the ICCPR.<sup>36</sup> It is particularly noteworthy that these legal reform efforts occurred even before the *Toonen v. Australia* case, in which the Human Rights Committee held that sodomy laws in Tasmania violated the right to privacy protected under the ICCPR.<sup>37</sup> Hong Kong's colonial government had therefore anticipated potential challenges to its criminal statute, the Crimes Ordinance, while being motivated to preempt those through legal reform.<sup>38</sup> Despite heated legislative debates and opposition to decriminalization by a significant number of legislators, the government's motion to amend the penal code passed,<sup>39</sup> and in July 1991, the Crimes (Amendment) Ordinance was enacted, repealing the century-old laws criminalizing consensual sexual activity between men.<sup>40</sup>

In arguing for decriminalization, the Attorney General pointed to Hong Kong's "international obligation to protect the individual from arbitrary and unlawful interference with his privacy" as expressed in the Universal Declaration of Human Rights (UDHR) and the ICCPR.<sup>41</sup> The government's leadership further relied on classical liberal principles that prioritized the privacy of individuals and sought to protect the personal choices of adults from government interference.<sup>42</sup> Sir David Robert Ford, the Chief Secretary at that time, linked the decriminalization debate to a broader conception of

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35. See Offences Against the Person Ordinance, (1981) Cap. 212, § 49 (H.K.) (criminalizing the "abominable" crime of buggery, with the potential penalty of life imprisonment); Cap. 212, § 51 (H.K.) (criminalizing "gross indecency" between men in public or private, with the potential penalty of two years in prison).

36. H.K. Legislative Council, OFFICIAL REPORT OF PROCEEDINGS 20, 28–29 (July 11, 1990) (explaining that the European Court of Human Rights interpreted the right of privacy to include "the right to freedom from interference in respect of consensual sexual behaviour between adults in private").

37. U.N. Human Rights Comm., *Toonen v. Australia*, Comm. No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994).

38. See, e.g., H.K. Legislative Council, *supra* note 36, at 28 ("While the [ICCPR] makes no specific reference to homosexuality our present law would, we believe, be open to challenge under the Bill of Rights endorsed by this Council in its debate two weeks ago.").

39. See Petersen, *supra* note 28, at 350.

40. *Id.* at 350–51.

41. H.K. Legislative Council, *supra* note 36, at 28.

42. *Id.* ("[T]he criminal law should not intervene in the private lives of citizens, or seek to enforce any particular pattern of behaviour, unless it is necessary to carry out the purposes just outlined.").

the relationship between individuals and governments, and the role of law, noting:

What is at issue is a matter of principle: the dividing line between the moral and the legal codes, where the individual's right to privacy begins and the Government's duty to interfere ends.

This is an important principle. Its implications extend beyond the immediate subject. And it is imperative that in addressing it we clear our minds of preconception, prejudice and emotion. If we do not, if we allow personal morality alone to dictate the scope of criminal law, then there is a real danger that the law will become an instrument for imposing moral values rather than preserving public order and protecting the citizen.<sup>43</sup>

These principles educate the contours of current-day debates around LGBT rights that are explored in the Conclusion.

#### *B. Privacy Versus Equality in Hong Kong's Constitutional Framework*

Hong Kong is highly unusual among the thirty-nine countries that inherited versions of British penal law<sup>44</sup> in that its colonial legislature decriminalized consensual sodomy in 1991 without any legal challenges to the court.<sup>45</sup> That international human rights standards played an important role in legislative reform cannot be understated; it is clear from the debates around decriminalization that privacy norms were extremely important in pushing forward decriminalization, and that the existence of clear jurisprudence from international courts was also persuasive to the colonial government.<sup>46</sup> However, such reliance on jurisprudence from the European Court of Human Rights also led to the privileging of privacy norms over equality arguments, in the context of government (non)regulation of sexuality.<sup>47</sup>

The saliency of privacy norms makes sense in the Hong Kong context. The colonial government had consistently prioritized its

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43. *Id.* at 21.

44. See HUMAN RIGHTS WATCH, THIS ALIEN LEGACY: THE ORIGINS OF "SODOMY" LAWS IN BRITISH COLONIALISM 6 (2008) (listing the colonies and countries that inherited versions of the Indian Penal Code in the Asian-Pacific and African regions).

45. *Id.* (noting that Hong Kong is only one of four jurisdictions that no longer has the colonial-era sodomy laws).

46. See Petersen, *supra* note 28, at 343–44; Yu, *supra* note 23, at 90.

47. See, e.g., Petersen, *supra* note 28, at 347–49 (explaining that the European Court of Human Rights in *Dudgeon* declined to rule on whether the sodomy law violated the right to equality, noting that it was not necessary to do so having found a violation under Article 8, the right to private life).

laissez-faire economy, and had adopted a hands-off approach to the governance of the Hong Kong Chinese population.<sup>48</sup> These priorities are reflected in the Sino-British Joint Declaration, which declared that Hong Kong's capitalist system and lifestyle would remain unchanged for fifty years after the 1997 handover, and that Hong Kong would retain the status of a free port and an international financial center with the free flow of capital.<sup>49</sup> The Declaration also guaranteed a long list of civil liberties and provided for the legal protections of "[p]rivate property, ownership of enterprises, [and] legitimate right of inheritance and foreign investment . . ."<sup>50</sup> Yet neither the Declaration nor its Annexes referred once to equality.

Although Hong Kong is party to most of the core international human rights legal instruments,<sup>51</sup> only the ICCPR is incorporated into its constitutional framework through the BORO.<sup>52</sup> Even though it was deemed politically expedient to use the ICCPR as the model for the BORO on the grounds that the PRC government had already agreed to it under the Sino-British Joint Declaration, the same document had also established that the ICESCR,<sup>53</sup> would likewise continue to be implemented in Hong Kong,<sup>54</sup> yet the Hong Kong government has never taken steps to expressly incorporate the ICESCR into domestic law.<sup>55</sup> Classical liberal principles about the relationship between government and individual are therefore embedded within Hong Kong's constitutional framework—creating a social landscape in which there is extreme wariness about government intervention

48. See, e.g., Sino-British Joint Declaration, *supra* note 22, ¶¶ 3(5)–(8).

49. *Id.* ¶¶ 3(5)–(8), (12).

50. *Id.* ¶ 3(5) ("Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be ensured by law in the Hong Kong Special Administrative Region.").

51. *But see* International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S. 3 [hereinafter Migrant Worker Convention] (showing that neither Hong Kong nor China is party to the Migrant Worker Convention).

52. See Hong Kong Bill of Rights Ordinance, (1991) Cap. 383, 1 ("An Ordinance to provide for the incorporation into the law of Hong Kong of provisions of the [ICCPR] as applied to Hong Kong; and for ancillary and connected matters.").

53. International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

54. The People's Republic of China signed the ICESCR in 1997 and ratified in 2001; in doing so China declared that the ICESCR will be implemented in Hong Kong via the Basic Law of Hong Kong. *Chapter IV: Human Rights, 3. International Covenant on Economic, Social, and Cultural Rights*, U.N. TREATY COLLECTION, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-3.en.pdf> (last visited Dec. 11, 2015) [hereinafter ICESCR Declarations and Reservations].

55. See Carole J. Petersen, *Stuck on Formalities? A Critique of Hong Kong's Legal Framework for Gender Equality*, in MAINSTREAMING GENDER IN HONG KONG SOCIETY 401, 432 (Fanny M. Cheung & Eleanor Holroyd eds., 2009).

into private lives and a political environment where civil liberties and privacy norms, rather than equality norms, have become the driving force for legal reform.

### *C. Human Rights Treaties and Anti-Discrimination Law*

Hong Kong had long been treated as a human rights exception by the British colonial government. International human rights treaty obligations of the United Kingdom were not always extended to Hong Kong. Commentators have argued that this reflected the extremely high priority that the colonial government placed on Hong Kong's free market and economic future<sup>56</sup> to the detriment of the individuals living within its jurisdiction. For example, the United Kingdom ratified the ICESCR and extended its application to Hong Kong in 1976, but with a fair number of reservations, including that "the provision of equal pay to men and women for equal work in the private sector" did not apply in Hong Kong.<sup>57</sup> The primacy of this free economic system meant that the government imposed little regulation in the labor field—a pattern that has continued to present day—with the hearty agreement of the local influential business community.<sup>58</sup> It is not surprising, then, that when the BORO was drafted and debated, the business community also pushed for the Ordinance to bind only public authorities and not private actors.<sup>59</sup>

Both the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>60</sup> and the Convention on the Elimination of Racial Discrimination (CERD)<sup>61</sup> have also positively impacted the promulgation of anti-discrimination legislation on the basis of sex and race, respectively, albeit in different ways and to different extents. Although the United Kingdom had been a State Party to the CEDAW since 1986,<sup>62</sup> the Convention was only extended

56. See Petersen, *supra* note 19, at 39 n.58.

57. See ICESCR Declarations and Ratifications, *supra* note 54, at 8 (The United Kingdom entered several reservations in 1976 upon its ratification of the ICESCR related to Hong Kong. The United Kingdom also reserved the right to restrict trade unions in Hong Kong, specifically noting the inapplicability of ICESCR art. 8, ¶ 1(b).).

58. Petersen, *supra* note 19, at 42 ("The business community wanted basic civil liberties maintained" but "had little desire to endow women, ethnic minorities, and other marginalized groups with new rights that might disturb Hong Kong's laissez-faire economic system.").

59. *Id.* at 42 n.75.

60. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

61. Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.

62. Chapter IV: Human Rights, 8. International Convention on the Elimination of All Forms of Discrimination Against Women, U.N. TREATY COLLECTION, <https://treaties>

to Hong Kong by the British colonial government a decade later following the Fourth World Conference on Women, which produced the Beijing Declaration and Platform for Action (BPFA) in 1995.<sup>63</sup> Thus, the BPFA together with CEDAW provided the positive impetus to adopt anti-discrimination legislation on the basis of sex. In 1994, Anna Wu, a legislator, tabled a private member's bill, the Equal Opportunities Bill (EOB), which pushed for the adoption of anti-discrimination legislation on the grounds of age, disability, family status, sex, race, sexual orientation, and religion at the Legislative Council.<sup>64</sup> The Bill was modeled on equal opportunities legislation in Western Australia, the anti-discrimination provisions of which apply in both public and private spheres.<sup>65</sup> However, there was significant opposition to the Bill, including by the British colonial government, which resulted in the introduction of two alternative bills to the Legislative Council: the Disability Discrimination Bill and the Sex Discrimination Bill, leading to the withdrawal of Anna Wu's EOB and effectively extinguishing the development of any broad bill on equality.<sup>66</sup> The Disability Discrimination Ordinance (DDO) and the Sex Discrimination Ordinance (SDO) were enacted in 1995 and fully entered into force in 1996.<sup>67</sup> Subsequent anti-discrimination legislation has developed incrementally.<sup>68</sup> The Family Status Discrimination Ordinance (FSDO) was enacted shortly after in 1997.<sup>69</sup>

Despite race being tabled as a characteristic to be protected at the Legislative Council in the Equal Opportunities Bill in 1993, it took more than a decade to adopt anti-discrimination legislation on the grounds of race.<sup>70</sup> In contrast to other anti-discrimination legislation, the Race Discrimination Ordinance (RDO) is a relatively young legal instrument, enacted in 2008.<sup>71</sup> Significantly, the CERD Committee had repeatedly urged the Hong Kong government to enact legislation to protect individuals who faced discrimination on the grounds of race.<sup>72</sup> Government resistance to the adoption of anti-discrimination

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.un.org/doc/Publication/MTDSDG/Volume%20I/Chapter%20IV/IV-8.en.pdf (last visited Dec. 11, 2015).

63. See Rep. of the Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, ¶¶ 1–2, U.N. Doc. A/CONF.177/20 (Sept. 15, 1995).

64. See Petersen, *supra* note 55, at 407.

65. *Id.*

66. *Id.* at 407–08.

67. See Disability Discrimination Ordinance, (1995) Cap. 487 (H.K.); Sex Discrimination Ordinance, (1995) Cap. 480 (H.K.).

68. See, e.g., Race Discrimination Ordinance, (2008) Cap. 602 (H.K.).

69. Family Status Discrimination Ordinance, (1997) Cap. 527 (H.K.).

70. See Race Discrimination Ordinance, (2008) Cap. 602 (H.K.).

71. *Id.*

72. See, e.g., Concluding Observations of the Comm. on the Elimination of Racial Discrimination, ¶ 17, U.N. Doc. CERD/C/59/Misc.16/Rev.3 (Aug. 9, 2001) (“With reference

legislation on the ground of race effectively stalled the development of the RDO for several years,<sup>73</sup> and, as ultimately enacted, the RDO's provisions are substantially narrower than the DDO, SDO, and FSDO.<sup>74</sup> Hong Kong's four anti-discrimination ordinances thus form the current legal landscape for the protected characteristics of disability, family status, race, and sex.

However, the pull factor of international human rights treaty mechanisms should not be overstated, and there are significant limitations to the reliance on human rights treaty bodies (and their jurisprudence) as a motivating factor for government action on legal reform. The Hong Kong government has taken the position that the SDO and RDO each fulfill substantive duties under international human rights obligations, even where there are glaring disparities between what is required by domestic law and what is required under international law.<sup>75</sup> Moreover, the government has generally failed to reform domestic laws even as international human rights standards have evolved over time. For example, the Hong Kong government has been slow to take up legal reform that would breathe life into the "due diligence standard" by which government actors are required to take action to constrain non-state actors.<sup>76</sup> Another example is the Hong Kong government's failure to overhaul the DDO even though many provisions of the law are diametrically opposed to the spirit

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to article 2, paragraph 1(d) of the Convention, the Committee takes note of on-going consultations, but reiterates its concern about the continuous absence in the Hong Kong Special Administrative Region of legal provisions protecting persons from racial discrimination to which they may be subjected by private persons, groups or organizations. The Committee does not accept the argument put forward for not initiating such legislation, i.e.[.] that such legislation would not be supported by the society as a whole. It is recommended to the Government of the State party and to the local authorities of Hong Kong Special Administrative Region that the existing unsatisfactory situation be thoroughly reviewed and that appropriate legislation be adopted to provide appropriate legal remedies and prohibit discrimination based on race, colour, descent or national or ethnic origin similarly to what has been done with regard to discrimination on the grounds of gender and disability.").

73. See Petersen, *supra* note 20, at 134.

74. See Carole J. Petersen, L.C. Paper No. CB(2)2232/06-07(01), *Hong Kong's Race Discrimination Bill: A Critique and Comparison with the Sex Discrimination and Disability Discrimination Ordinances*, 1, 1-3 (June 2007), <http://www.legco.gov.hk/yr06-07/english/bc/bc52/papers/bc52cb2-2232-1-e.pdf> (submitting analysis to the Hong Kong Legislative Council's Bills Committee regarding its proposed Race Discrimination Bill).

75. See, e.g., Concluding Observations of the Committee on Economic, Social, and Cultural Rights, U.N. Doc. E/C.12/1/Add.58, ¶¶ 15-16 (May 21, 2001).

76. See, e.g., Rep. of the Comm. on the Elimination of Discrimination Against Women, ¶ 9, U.N. Doc. A/47/38 (1992) (explaining that State Parties to CEDAW are required to take appropriate and effective measures to overcome violence against women, and that they "may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation").

and object of the Convention on the Rights of Persons with Disabilities (CRPD), which has applied to Hong Kong since 2008.<sup>77</sup>

The limitations of international law are even more pronounced in the context of LGBT rights. For over a decade, many international human rights treaty bodies have repeatedly raised concerns about the absence of legislation explicitly prohibiting discrimination on the basis of SOGI.<sup>78</sup> In 2013, the Human Rights Committee made a forceful recommendation that the Hong Kong government

consider enacting legislation that specifically prohibits discrimination on ground of sexual orientation and gender identity, take the necessary steps to put an end to prejudice and social stigmatization of homosexuality and send a clear message that it does not tolerate any form of harassment, discrimination or violence against persons based on their sexual orientation or gender identity.<sup>79</sup>

The Human Rights Committee is particularly important, as it is the treaty body that reviews State Parties' adherence to their obligations under the ICCPR.<sup>80</sup>

In the face of international criticism, the Hong Kong government has steadfastly held on to its position that self-regulation, awareness raising, and public education, rather than legislation, are more appropriate tools for addressing discrimination based on sexual orientation and gender identity.<sup>81</sup> It appears that the Hong Kong government believes that it does not have to legislate against discrimination based on sexual orientation and gender identity because it has no specific explicit treaty obligations to do so. Although the government has accepted that sexual orientation and gender identity are protected characteristics under the non-discrimination principle in human rights treaties,<sup>82</sup> it draws a distinction between vertical protections, in which the provisions of BORO directly regulate the treatment of

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77. See Petersen, *supra* note 19, at 31 n.9, 79.

78. See, e.g., Concluding Observations of the Human Rights Committee—Hong Kong Special Administrative Region, ¶ 15, U.N. Doc. CCPR/C/79/Add.117 (Nov. 15, 1999) (calling upon Hong Kong to introduce LGBT protections against discrimination); Concluding Observations of the Committee on Economic, Social and Cultural Rights, ¶ 15, U.N. Doc. E/C.12/1/Add.58 (May 21, 2001); Concluding Observations of the Committee on Economic, Social and Cultural Rights, ¶¶ 15, 78, U.N. Doc. E/C.12/1/Add.107 (May 13, 2005) (labeling the failure to prohibit discrimination on the basis of sexual orientation a “[p]rincipal subject of concern,” and reiterating this concern in its Concluding Observations).

79. U.N. Human Rights Comm., Concluding Observations on the Third Periodic Report of Hong Kong, China, Mar. 11–28, 2013, ¶ 23, U.N. Doc. CCPR/C/CHN-HKG/CO/3 107th Sess. (Apr. 29, 2013).

80. See Petersen, *supra* note 19, at 41 n.69.

81. *Id.* at 68–69.

82. See, e.g., *id.* at 52.

individuals and groups by government and public authorities, and horizontal protections, which apply between private individuals and bodies, implying that there are different criteria that have to be considered when legislation constrains private individuals.<sup>83</sup>

### III. LEGAL MOBILIZATION AND ITS LIMITATIONS

Given the reluctance of the Hong Kong government to incorporate positive equality protections and international human rights standards on equality through vigorous legislative reform, advocates have sought to do so through domestic litigation regarding gender and sexuality. The courts have proven to be a fertile area for such mobilization since 1997—in part due to the narrowing of political space for legislative reform and innovation following the handover to the PRC.<sup>84</sup> Tam argues that legal mobilization on a variety of social issues has increased since the handover for a number of reasons: (1) the establishment of a “[n]ew legal opportunity structure,” particularly the creation of a court of final adjudication allowing for Hong Kong lawyers to partake in local litigation, following the enactment of the BORO and the Basic Law (which provides a constitutional framework); (2) the reduction in political opportunity for pro-democratic legislators in government after the 1997 handover; and (3) the shifting of opportunity to the judicial branch.<sup>85</sup> In addition to these vital elements, legal mobilization on LGBT rights issues has also benefited from increased visibility of LGBT rights within the international community and the increased willingness of Hong Kong courts to consider human rights cases and international jurisprudence.<sup>86</sup>

#### *A. Legal Mobilization: Equality Secured?*

A series of seminal LGBT cases have strengthened the legal landscape for the protection of LGBT rights. In *Leung TC William Roy v. Secretary for Justice*, the Court of Appeal considered a challenge to provisions in Hong Kong’s criminal ordinance that set the age of consent for anal intercourse (between both same-sex and opposite-sex

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83. See, e.g., *id.* at 59–60.

84. WAIKEUNG TAM, LEGAL MOBILIZATION UNDER AUTHORITARIANISM: THE CASE OF POST-COLONIAL HONG KONG 18–20 (2013).

85. *Id.* at 12–18 (noting that before 1997 the highest court for constitutional issues arising in Hong Kong was the United Kingdom’s Privy Council, which led to constitutional issues being outsourced to United Kingdom lawyers. The establishment of the court of final adjudication therefore allowed Hong Kong lawyers to gain the necessary skills to litigate before a court of final adjudication.).

86. See *id.* at 62–63.

couples) at twenty-one, with punishment of life imprisonment for offenders.<sup>87</sup> In finding violations of privacy and equality provisions in the Basic Law and BORO, the court agreed with the lower court's judgment that "[d]enying persons of a minority class the right to sexual expression in the only way available to them, even if that way is denied to all, remains discriminatory when persons of a majority class are permitted the right to sexual expression in a way natural to them."<sup>88</sup> This judgment rejected arguments based on formal equality—that the status quo was equal because the legislation was gender-neutral and all were subject to the same restrictions—looking further to the effect of the law and giving more strength to substantive equality concepts.<sup>89</sup> In *Yau Yuk Lung Zigo*, the Court of Final Appeal explicitly adopted international standards of interpreting the term "other status" in the Basic Law.<sup>90</sup> Since the enactment of the Basic Law in 1991, international human rights treaty body jurisprudence had established that "other status" in various international conventions included sexual orientation (and to a less visible extent, gender identity).<sup>91</sup> This interpretation of "other status" was further incorporated by the court when it reiterated that the constitutional right to equality, as protected under Article 25 of the Basic Law and Article 22 of BORO, included sexual orientation as a protected characteristic.<sup>92</sup>

These were (and are) important successes for LGBT advocates in the courts, but the BORO and the Basic Law bind only the government and other public actors, and thus "limit[] [their] value to the protection of equality" between non-state actors and in society in general.<sup>93</sup> Moreover, the jurisprudence on equality before the law in Hong Kong has been interpreted to constrain the government largely in the area of criminal law, where it can use its coercive powers

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87. *Leung v. Sec'y for Justice*, [2006] 4 H.K.L.R.D. 211, ¶¶ 6, 45–46 (C.A.) (noting that the government had conceded that homosexuality "was a [protected] status for the purpose of Articles 1 and 22 of the Bill of Rights," and that the age of consent for vaginal intercourse is sixteen years); see Crimes Ordinance, (1978) Cap. 200, ¶ 124(1) (H.K.) (limiting punishment to five years in prison for vaginal intercourse prior to age sixteen).

88. *Leung*, [2006] 4 H.K.L.R.D. 211, ¶ 48 (C.A.) (quoting a portion of the lower court's decision).

89. *See id.* ¶ 47–54.

90. *Sec'y for Justice v. Yau Yuk Lung Zigo*, [2007] 10 H.K.C.F.A.R. 335, ¶¶ 10–11.

91. *See, e.g.*, Migrant Worker Convention, *supra* note 51.

92. *Yau Yuk Lung Zigo*, [2007] 10 H.K.C.F.A.R. 335, ¶¶ 10–11 ("Discrimination on the ground of sexual orientation would plainly be unconstitutional under both art. 25 of the Basic Law and art. 22 of BOR in which sexual orientation is within the phrase 'other status' [sic].").

93. Phil C.W. Chan, *Stonewalling Through Schizophrenia: An Anti-Gay Rights Culture in Hong Kong?*, 12 *SEXUALITY & CULTURE* 71, 74 (2008) (noting criticism of "a public/private dichotomy [which] allows government to clean its hands of any responsibility for the state of the 'private' world and depoliticises the disadvantages which inevitably spill over the alleged divide by affecting the position of the 'privately' disadvantaged in the 'public' world") (quotation marks in original).

against individuals. Conversely, challenges to actions by government bodies have had more qualified success, especially where cases are brought under judicial review to challenge policy decisions by administrative bodies.<sup>94</sup>

### *B. Limitations of Judicial Review: Two Case Studies*

The utility of applications for judicial review and other forms of strategic litigation as tools for legal and policy reform is inherently limited by the role and function of courts. “Judicial reform of the common law is always piecemeal and slow,” as it depends on lawyers finding the right plaintiff with the right set of facts to present to the court for decision and who is able to secure standing.<sup>95</sup> Judges also face other constraints in common law settings; they can only make decisions “within the constraints of the doctrine of precedent”<sup>96</sup> and are generally encouraged “to defer to the legislature in matters of policy.”<sup>97</sup> Moreover, courts can only make judgments based on the facts that are presented for their consideration. Unlike the legislature, law reform agencies, or the executive branch, courts cannot undertake the underlying and important work of investigation, consultation, and adjustment that legal reform necessarily requires, nor can courts ensure that laws and policies are adapted to the needs of the community.<sup>98</sup>

The case of *Cho Man Kit v. Hong Kong Broadcasting Authority* aptly demonstrates the limitations of the utility of judicial review challenges as an advocacy tool.<sup>99</sup> After its broadcast of a television show called “Gay Lovers” during primetime viewing hours, the Broadcast Authority censured Radio Television Hong Kong (RTHK, a government department) for violations of its code of practice on account of program material where interviewees expressed a desire to marry.<sup>100</sup> Cho Man Kit, one of the men interviewed, brought a judicial review challenging the Broadcasting Authority’s decision and

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94. See *infra* Part III.B for further discussion. See also Rules of the High Court, (2008) O. 53, r. 1A (H.K.) (Judicial review addresses the decision-making process, rather than the merits of the decision; it is the process by which Hong Kong’s Court of First Instance exercises its supervisory jurisdiction to review the exercise of power by public bodies or officers of statutory powers. Applicants may also challenge the act or decision of a public authority on the grounds that it is contrary to the Basic Law or BORO. Existing or newly enacted legislation may also be challenged in a similar manner.).

95. MICHAEL TILBURY, SIMON N M YOUNG & LUDWIG NG, REFORMING LAW REFORM: PERSPECTIVES FROM HONG KONG AND BEYOND 3 (Michael Tilbury et al. eds., Hong Kong Univ. Press 2014).

96. *Id.*

97. *Leung v. Sec’y for Justice*, [2006] 4 H.K.L.R.D. 211, ¶ 52 (C.A.).

98. TILBURY, YOUNG & NG, *supra* note 95, at 10–11.

99. See *Cho Man Kit v. Broad. Auth.*, [2008] H.K.C.F.I. 383.

100. Petersen, *supra* note 19, at 54–55.

arguing that the Broadcasting Authority's determination placed an impermissible and discriminatory restraint on the freedom of expression of RTHK and the participating homosexual couples.<sup>101</sup> Although the court did find that the Broadcasting Authority's decision had justified its "restriction on freedom of speech on a supposed consensus among certain people" that homosexuality may be offensive to some viewers, and that such consensus was "based on 'prejudices, personal aversions and dubious rationalisations,'"<sup>102</sup> it still found such a restriction to be lawful (i.e., within the boundaries of the Broadcasting Authority's powers) because "the protection of the sensibilities of young viewers is a permissible restriction on freedom of speech and expression."<sup>103</sup> Although LGBT advocates had sought a judgment that invalidated the Broadcast Authority's finding, the tool of judicial review necessarily limits how far courts can step into the policy arena—in this case, the court could not address the merits of the Broadcasting Authority's decision by nature of the administrative review process.<sup>104</sup>

Nevertheless, confronted with governmental intransigence on many issues, Hong Kong courts have tried to motivate government action through judicial innovation. The Court of Final Appeal has invented "the power of courts to suspend temporarily a declaration of unconstitutionality to allow government time to enact corrective legislation," and some commentators have noted that this mechanism has been "highly effective in bringing about reform that is both timely and progressive."<sup>105</sup> This mechanism is best demonstrated through the Court of Final Appeal's decision in the *W v. Registrar of Marriages* case, where a post-operative transgender woman, W, challenged the constitutionality of the Marriage Ordinance and the Matrimonial Clauses Ordinance, which in effect impaired her right to marry under Article 37 of the Basic Law and Article 19(2) of BORO.<sup>106</sup> The Marriage Ordinance adopts the heteronormative definition of marriage provided in the English case of *Hyde v. Hyde*: "[m]arriage as understood in Christendon is the voluntary union for life of one man and

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101. *Id.* at 55.

102. *Cho Man Kit*, [2008] H.K.C.F.I. 383, ¶ 89.

103. *Id.* ¶ 100.

104. Petersen, *supra* note 19, at 56–57 (noting that "it is not surprising that the Broadcasting Authority's decision on the appropriate broadcasting time survived judicial review. In many ways, this aspect of the judgment demonstrates the limitations of strategic litigation and particularly of applications for judicial review. Although it is a valuable tool for invalidating unconstitutional statutes and government actions, it is completely inadequate for redressing broader issues of discrimination in society.").

105. TILBURY, YOUNG & NG, *supra* note 95, at 11.

106. *W v. Registrar of Marriages*, [2013] H.K.C.F.A. 39, ¶¶ 1–3.

one woman, to the exclusion of all others.”<sup>107</sup> The Court of Final Appeal ruled that the denial of W’s right to marry her partner was unconstitutional on the basis that she was effectively “den[ie]d . . . the right to marry at all.”<sup>108</sup> As a result of the judgment, the government was given one year to amend its laws in order to reflect the ruling.<sup>109</sup>

However, this innovation has its limits as the courts have no means of compelling government action. In the aftermath of the *W* case, the executive took very little action to address the complex issues concerning the legal status of transsexual and transgender persons. The government introduced the Marriage (Amendment) Bill during the last days of the 2014 Legislative Council session and completely missed the deadline for court-mandated law reform when the Bill was upheld by a raucous filibuster and could not be debated before the close of the session.<sup>110</sup> When it was again proposed in October 2014 (five months after the court’s deadline), the Bill was vetoed in the Legislative Council by both pan-democrat and pro-establishment lawmakers.<sup>111</sup> Pro-establishment lawmakers argued that it would be inappropriate to extend the parameters of marriage without any wider public consultation.<sup>112</sup> Pan-democrats objected to the inclusion of provisions requiring transgender individuals to go through full sex reassignment surgery before being recognized in their acquired gender.<sup>113</sup> One reason for such an objection could be that requiring such a surgery would effectively lead to the forced sterilization of transgender individuals, and could amount to cruel, inhuman, and degrading treatment.<sup>114</sup> At the time of writing, the Executive has yet to propose further amendments to the Marriage (Amendment) Bill.<sup>115</sup>

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107. *Hyde v. Hyde* [1866] 1 LRP & D 130 (Eng.); Marriage Ordinance, (1997) Cap. 181, § 40 (H.K.).

108. *W*, [2013] H.K.C.F.A. 39, ¶ 119.

109. Jennifer Ngo & Linda Yeung, *Conservative Christians and Gay-Rights Activists Unite to Condemn Transgender Marriage Bill*, S. CHINA MORNING POST (Apr. 24, 2014, 3:22 AM), <http://www.scmp.com/news/hong-kong/article/1494969/parents-and-teachers-vent-anger-proposed-easing-marriage-bill> [<http://perma.cc/6K68-TWZ3>]; see Marriage (Amendment) Bill, (2014) Cap. 133 (H.K.).

110. Tony Cheung & Phila Siu, *Transgender Marriage Law Vetoed by LegCo*, S. CHINA MORNING POST (Oct. 23, 2014, 9:25 AM), <http://www.scmp.com/news/hong-kong/article/1622339/legco-vetoes-transgender-marriage-law-minister-accused-not-lobbying> [<http://perma.cc/63TU-RPJG>].

111. *Id.*

112. *Id.*

113. *Id.*

114. See Juan E. Méndez, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶¶ 78, 88, U.N. Doc. A/HRC/22/53 (2013) (calling upon states “to outlaw forced or coerced sterilization in all circumstances and provide special protection to individuals belonging to marginalized groups”).

115. Legislative Council of the Hong Kong Special Administrative Region of the People’s Republic of China, *Bills*, LEGCO, <http://www.legco.gov.hk> (last visited Dec. 11, 2015).

There is no telling when further government action will take place. Legal provisions that regulate sexuality and gender have been allowed to stay on the books for many years after courts have found them unconstitutional. For example, nine years after the *Leung* and *Yau* cases were decided, neither the Executive branch nor the Legislative Council had proposed amendments to the offending criminal provisions.<sup>116</sup> Although no prosecutions had taken place under the unconstitutional provisions after the courts' rulings in 2006 and 2007, legislators noted in hearings that "many homosexual persons and even some frontline police officers have been under the misconception that it is unlawful for homosexual men aged 16 or above and under twenty-one years of age to [engage in] buggery."<sup>117</sup> These criminal provisions were finally repealed or amended in November 2014—almost a decade after the seminal judgments were issued.<sup>118</sup>

#### IV. THE "IDEA OF LAW" IN DEBATES ABOUT LGBT RIGHTS LEGISLATION

Since the 1997 handover, the sole example of legislative action (without the impetus provided by strategic litigation) is the inclusion of same-sex cohabitating couples within the protections of anti-domestic violence laws.<sup>119</sup> The government's original proposal in 2007 to reform anti-domestic violence laws had not included cohabitation between persons of the same sex in its coverage because of the government's policy position and Hong Kong law, which did not recognize same-sex marriage, civil partnership, or any same-sex relationship.<sup>120</sup> The government's position was that the recognition of same-sex relationships was "an issue concerning ethics and morality of the society," and that "[a]ny change to this policy stance would have substantial implications on society and should not be introduced unless consensus or a majority view is reached by society . . . ."<sup>121</sup> However, at the successful urging of Legislative Council members, the Administration later reexamined its proposal and agreed that domestic violence protections should be extended to victims of domestic violence

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116. See Report of the Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2014, ¶¶ 5–7, CB4/BC/3/13 (Nov. 14, 2014).

117. *Id.* ¶ 7.

118. See Crimes Ordinance, (2014) Cap. 200, ¶ 118C (H.K.).

119. See Domestic and Cohabitation Relationships Violence Ordinance, (2009) Cap. 189, § 2 (H.K.).

120. Labour & Welfare Bureau, L.C. Paper No. CB(2)341/08-09(03), *LegCo Panel on Welfare Services: Proposed Amendments to the Domestic Violence Ordinance (Cap. 189)*, 6 (Dec. 2008), <http://www.legco.gov.hk/yr08-09/english/panels/ws/papers/ws1208cb2-341-3-e.pdf> [hereinafter *LegCo Panel on Welfare Services*].

121. *Id.*

in same-sex cohabitation relationships.<sup>122</sup> The government's rationale for such expansion was based on the potential that domestic violence "incidents could quickly escalate into life-threatening situations or even fatality," and that government protections for LGBT individuals would only be "introduced in response to the distinct and unique context of domestic violence."<sup>123</sup>

In comparison, a 2013 motion in the Legislative Council urging the government to "expeditiously launch public consultation on enacting [anti-discrimination] legislation" protecting people of different sexual orientations was voted down after a highly contentious debate on the Legislative Council floor.<sup>124</sup> That such a modest motion—merely to *talk* to the public about legislation and solicit opinions, not to *enact* legislation—drew intense ire and confrontation, raises questions about how different stakeholders perceive the law, its purposes, and its effects.

Several key issues underlie current debates about LGBT rights in Hong Kong: (1) the boundaries between the public and private spheres, and when and how laws should pierce those boundaries; (2) the appropriate treatment of minority groups; and (3) how law should deal with competing fundamental rights.

#### A. *Private/Public Boundaries*

One of the key disagreements among various stakeholders is about the proper boundaries between the public and private spheres, and when and how laws should pierce these boundaries. The Hong Kong government appears to be willing to take action only where privacy concerns are at issue or where the stakes are high enough, but is extremely reluctant to take action on its positive equality duties. This is demonstrated by government willingness to take legislative action around decriminalization of sodomy among consenting male adults in private.<sup>125</sup> It also explains the Administration's eventual arguments that the high stakes involved—physical violence and even possible fatalities—warranted the amendment of domestic violence legislation to protect same-sex cohabitating couples.<sup>126</sup> It likewise

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122. *Id.* ¶¶ 7–8.

123. *Id.* ¶ 8.

124. LegCo Official Record of Proceedings, Equal Rights for People of Different Sexual Orientations, 1555–56 (Nov. 17, 2012) (statement of Ms. Cyd Ho).

125. See *supra* Part III.B for further discussion.

126. See *supra* Part IV for further discussion; LegCo Panel on Welfare Services, *supra* note 120, ¶ 6(a). But see Amy Barrow & Anne Scully-Hill, *Failing to Implement CEDAW in Hong Kong: Why Isn't Anyone Using the Domestic & Cohabitation Relationships Violence Ordinance?*, INT'L J. FAMILY L. & POL'Y (forthcoming April 2016 (Oxford University

explains the government's extreme reluctance to take action on anti-discrimination legislation because there is concern that it would require public actors to recognize same-sex relationships.<sup>127</sup>

Opponents to anti-discrimination legislation on the basis of sexual orientation and gender identity have raised concerns that any such legislation would improperly curtail fundamental rights, such as the freedom of religion, and freedoms of speech and expression, which are protected under Hong Kong's Basic Law.<sup>128</sup> Religious opposition and parent concern groups in Hong Kong have raised the specter of "reverse discrimination,"—the notion that the adoption of anti-discrimination legislation could indirectly or adversely affect the enjoyment of certain fundamental rights by groups within society, particularly freedom of religious belief. These groups oppose legislation because they believe that such a law would try to dictate morals or force people to change their moral opposition to homosexuality on account of religious beliefs.<sup>129</sup>

### *B. Majority v. Minority Rights*

Another issue where different stakeholders hold vastly different perceptions is what role laws should play in regulating the treatment of minority groups. Opponents to the proposed anti-discrimination legislation argue that the time is not ripe for LGBT-specific anti-discrimination legislation because LGBT issues are still controversial within Hong Kong society and there is no clear societal consensus on whether LGBT people should be protected under the law.<sup>130</sup> According to this perspective, the adoption of anti-discrimination legislation requires the whole of society to endorse certain perspectives, values, or behaviors; thus societal consensus must be reached before legislation can be enacted.<sup>131</sup> This perspective is clearly demonstrated by Frederick Fung, a Legislative Councilor, who argued in 2012 that, "[g]enerally speaking, we should enact legislation only after the agreement of the majority has been secured."<sup>132</sup>

In contrast, Hong Kong courts have generally adopted a different view about the role of law in protecting minorities, as well as the

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Press Journal)) (noting that there remain significant barriers to implementing the anti-domestic violence legislation. Despite being on the books, research shows that police, social workers, and other actors are relatively reticent when it comes to claims of violence from LGBT individuals.)

127. Barrow & Scully-Hill, *supra* note 126.

128. See XIANGGANG JIBEN FA art. 27, 32 (H.K.).

129. See, e.g., Tam, *infra* note 142.

130. Cheng, *supra* note 9.

131. *Id.*

132. LegCo Official Record of Proceedings, *supra* note 124, at 1559.

role of the courts in checking the power of the legislature and the executive, noting in *Leung* that, “while there must be deference to the legislature as it represents the views of the majority in a society, the court must also be acutely aware of its role which is to protect minorities from the excesses of the majority.”<sup>133</sup> Proponents of anti-discrimination legislation have also adopted the position that the principle of equality dictates that minority groups should be protected regardless of popular opinion.<sup>134</sup> Moreover, it is worth noting that in the Hong Kong context, one could argue that the legislature is not representative of the majority because of its electoral system, which does not give one person one vote, but rather has seats based on both geographic and functional constituencies.<sup>135</sup>

Similarly, in the case of *W v. Registrar of Marriages*, which focused on the right of W, a transgender woman, to marry her partner, the Court of First Instance relied on the European case of *Schalk and Kopf v. Austria* to reason that there was no emerging societal consensus on same-sex marriage.<sup>136</sup> However, the judgement also recognized that “fundamental rights are an exception to the democratic principle of majority rule.”<sup>137</sup> This would suggest that the Legislative Council has a duty to implement anti-discrimination legislation on the grounds of sexual orientation. Article 2(2) of the ICCPR clearly states that:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to

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133. *Leung v. Sec’y for Justice*, [2006] 4 H.K.L.R.D. 211, ¶ 53 (C.A.).

134. *See, e.g.*, Petersen, *supra* note 19, at 63–64 (stating that Anna Wu, the Legislative councilor who first proposed a comprehensive anti-discrimination legal framework including protections against discrimination based on sexual orientation, “argued that the principle of equality created a duty to legislate against all grounds of discrimination, regardless of whether the cause was politically popular.”).

135. *See* XIANGGANG JIBEN FA, *supra* note 128, at Instrument 8, Cap. IV; *see also* Amy Barrow, *Situating Social Problems in the Context of Law: Fostering Public Interest Lawyers in Hong Kong*, 22 INT’L J. CLINICAL LEGAL EDUC. 3, 275–311 (2015) (noting that whether the legislature is representative of the views of the majority of society in Hong Kong is open for debate. The Legislative Council is comprised of both geographical and functional constituencies that each form fifty percent of the Legislative Council (LegCo). LegCo members representing geographical constituents across five districts—Hong Kong Island, Kowloon West, Kowloon East, New Territories West, and New Territories East—are directly elected. However, functional constituencies are comprised of professional interest groups like the business and legal sectors, and only members of those functional constituencies vote in LegCo representatives. Inevitably, some interest groups within society are not effectively represented legally or politically.).

136. *W v. Registrar of Marriages*, [2010] 6 H.K.C. 359, ¶¶ 209–11 (C.F.I.).

137. *Id.* ¶ 217.

adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.<sup>138</sup>

Thus, given that non-discrimination provisions under the ICCPR have been interpreted to include sexual orientation within the definition of sex under the Covenant, and this has also been recognized in Hong Kong,<sup>139</sup> the Legislative Council is obliged to take measures to give effect to the right to non-discrimination on the basis of sexual orientation.<sup>140</sup> However, inaction on the part of the Legislative Council raises the question of who is a “deserving minority,” that is, which minority groups are deserving of legal protection and which minority groups are in effect a socially disadvantaged minority? While the Courts have played a pivotal role in advancing legal reasoning to support the legal status of social sexual minorities, thus inching towards equality and recognizing LGBT groups as “deserving,” inaction on the part of the Legislative Council conversely indicates the imbalanced weight given to majority protections at the cost of protections for sexual minority groups. Moreover, the pitting of majority against minority rights gives too much weight to societal anxieties—which in effect are driven by conservative opposition groups that do not necessarily represent the majority of the population—about the role of law and its implications for social change.

### *C. Law and Competing Fundamental Rights*

The Society for Truth and Light, longtime vocal opponents of legislation, have acknowledged that same-sex couples are deprived of rights that heterosexual married couples enjoy, but suggest that rather than introducing any law, government departments should simply change their policies.<sup>141</sup> Specifically, opponents argue that a SOGI-related anti-discrimination law would discriminate against those who “morally oppose” homosexuality and, accordingly, legal provisions prohibiting harassment and vilification would infringe upon their freedom of speech.<sup>142</sup> In the context of Hong Kong, the concept of “reverse” discrimination has been used by religious opposition and parental concern groups to lobby against the introduction of legal protections on the grounds of SOGI on the basis that freedom

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138. ICCPR, *supra* note 32, art. 2(2).

139. See Petersen, *supra* note 19, at 48.

140. See *id.* for further discussion.

141. Cheng, *supra* note 9.

142. Johnny Tam, *Christians in Prayer Rally to Fight Gay Law Proposal*, S. CHINA MORNING POST (Jan. 14, 2013, 12:00 AM), <http://www.scmp.com/news/hong-kong/article/1127407/christians-prayer-rally-fight-gay-law-proposal> [<http://perma.cc/2FB4-QNLU>].

of conscience and expression as well as religion and belief could be inhibited.<sup>143</sup>

The concept of reverse discrimination originally derives from the United States.<sup>144</sup> Claims of reverse discrimination are legitimate under Title VII of the Civil Rights Act of 1964, which was adopted with the principle aim of removing discriminatory practices which had helped to sustain the racial stratification of workplace environments thus disadvantaging minority groups.<sup>145</sup> However, the law also sought to strengthen equality of opportunities within the workplace in general and remove discriminatory bias towards any particular group.<sup>146</sup> The concept of reverse discrimination evolved as a means of challenging employers that were perceived to be discriminating against the majority.<sup>147</sup> In more recent years, the term reverse *religious* discrimination has been adopted as a tactic to remedy sexual orientation discrimination claims in the United States, providing “non-members of religious groups” with a cause of action for discrimination based on different beliefs, namely, that being gay is not wrong.<sup>148</sup> Specifically, homosexual individuals who also identify as members of a religious denomination have tried to rely upon reverse religious discrimination as a proxy for sexual orientation discrimination.<sup>149</sup>

It is not clear how and when the concept of reverse discrimination was adopted and applied to the Hong Kong context. In the United States, however, claims of reverse discrimination are limited to an employment context and are legitimate under Title VII of the Civil Rights Act of 1964 to challenge any perceived discrimination towards the majority in society.<sup>150</sup> A distinction should be drawn with how reverse discrimination is currently being framed in the Hong Kong context. Religious opposition groups are concerned that the adoption of any legislation on the grounds of SOGI would lead to a situation that would effectively curtail their fundamental rights and freedoms, and these groups have suggested that this would lead to reverse discrimination.<sup>151</sup> However, reverse discrimination is not open to use by minority groups, but rather applies to individuals within the majority who claim that they are being reverse discriminated against

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143. *Id.*

144. See Andrea J. Sinclair, Note, *Delimiting Title VII: Reverse Religious Discrimination and Proxy Claims in Employment Discrimination Litigation*, 67 VAND. L. REV. 239, 248 (2014).

145. *Id.* at 246–47.

146. *Id.* at 247.

147. *Id.* at 249.

148. *Id.* at 241 (internal quotation marks omitted).

149. *Id.* at 259–60.

150. Sinclair, *supra* note 144, at 248–49.

151. See Tam, *supra* note 142.

within an employment context, for example, by affirmative action policies that favor minority groups.<sup>152</sup> There are many different religious groups represented within Hong Kong, including Buddhism, Taoism, Confucianism, Christianity, Islam, Hinduism, Sikhism, and Judaism.<sup>153</sup> Out of Hong Kong's total population there are 379,000 Catholics and 480,000 Protestants, thus representing approximately five percent and seven percent respectively.<sup>154</sup> However, Buddhism, Taoism, and Confucianism are the dominant religions.<sup>155</sup>

It thus appears that in the Hong Kong context the concept of reverse discrimination seems to have been misinterpreted or at least not fully understood. Though there is some empirical research on the concept of reverse discrimination in relation to sex discrimination that has been conducted in the Hong Kong context,<sup>156</sup> there is limited explanation of what the term means. This may indirectly contribute to misunderstandings in wider society related to reverse-discrimination on the ground of sex.<sup>157</sup> To our knowledge reverse discrimination has not been formally recognized within any legislation or case law in Hong Kong. While freedom of religion and equality before the law are guaranteed by the Basic Law, which includes sexual orientation under "other status,"<sup>158</sup> neither religion, sexual orientation, nor gender identity are currently protected through horizontal protections.<sup>159</sup> As a result, it is difficult to determine whether the concept of reverse discrimination is applicable in practice, as these minority rights are not protected by any specific anti-discrimination legislation. Nevertheless, the manipulation of the concept of reverse discrimination by

152. Sinclair, *supra* note 144, at 249.

153. See, e.g., Hong Kong Special Admin. Region Gov't, *Hong Kong: The Facts: Factsheet on Religion and Custom* (Nov. 2014), <http://www.gov.hk/en/about/abouthk/factsheets/docs/religion.pdf> [<http://perma.cc/EXH6-LN4T>].

154. *Id.*

155. *Id.*

156. See, e.g., Catherine W. Ng, *Locations of Sex Discrimination and Reverse Discrimination: Hong Kong University Students' Experiences and Perceptions*, 20 EQUAL OPPORTUNITIES INT'L 1, 1 no. 3 (2001).

157. See, e.g., Radio Television Hong Kong, *The Pulse 13/11/2009: Men Are Not Strong as Steel: Men's Rights in Hong Kong?*, YOUTUBE (Nov. 13, 2009), <http://www.youtube.com/watch?v=wOzICEroe-U> [<http://perma.cc/AY4W-2PYY>] (noting that use of the term "reverse discrimination" has been adopted by some men's advocacy groups who suggest that they are now being discriminated against because of the advancement of women within society). But see GOV'T CENSUS & STATISTICS DEPT., *Hong Kong Statistics: Population Overview*, [http://www.censtatd.gov.hk/hkstat/sub/so20\\_t.jsp](http://www.censtatd.gov.hk/hkstat/sub/so20_t.jsp) [<http://perma.cc/69LH-VEKP>] (stating that population statistics for women stood at 3,913.3 million compared with 3,353.2 million men at the end of 2014; thus, reverse discrimination would be difficult to prove in Hong Kong, as women make up a majority of the population).

158. XIANGGANG JIBEN FA art. 25, 32 (H.K.) (protecting "freedom of conscience" and "freedom of religious belief" and stating that "[a]ll Hong Kong residents shall be equal before the law").

159. See *supra* Part II.C for further discussion.

opponents of SOGI anti-discrimination legislation is indicative of the perceived threat of any such law's impact on society.

CONCLUSION: CONFRONTING DISCRIMINATION IN THE  
ABSENCE OF THE LAW

Legal mobilization towards recognition of LGBT rights has largely been driven by strategic litigation through the courts, but this approach is not without its own limitations; in particular, the Hong Kong court's deference to the Legislative Council on any rulings that may have public policy implications. The Legislative Council's inaction in fulfilling its obligations under the ICCPR to enact legal protections to address the discrimination experienced by sexual minorities effectively creates a legal vacuum—that is, how can LGBT individuals confront discrimination in the absence of the law? An absence of anti-discrimination legislation on the grounds of sexual orientation means that LGBT individuals have no legal recourse against discrimination that occurs within education, employment, the provision of goods or services, or other domains. Arguably, the privileging of ICCPR provisions on privacy (Article 14) above equality before the law (Article 22) has inhibited how gender equality is conceptualized and understood within society, thus leading to negative repercussions for recognition of minority rights.

The current debates surrounding LGBT rights—namely, where the boundaries should be drawn between public and private spheres, how minority and majority rights should be balanced, and deciphering the role of law in adjudicating competing fundamental rights—point to the complexity of securing legal protections for minority groups in a society that lacks a clear understanding of equality and diversity.

Although the law has a role to play in educating the public about equality, it should not be seen as the panacea for discrimination. Despite the adoption of several anti-discrimination ordinances on disability, family status, sex, and race, there remain clear obstacles to the full realization of equality and fairness within Hong Kong society. Among these, the absence of critical legislation, including protections against pay discrimination, or even legal rhetoric around the right to receive equal pay for equal work, mean that anti-discrimination laws are not effectively reaching their expressed goals.<sup>160</sup> The lack of anti-discrimination on sexual orientation, as well as other characteristics like age, is symptomatic of a conservative and hostile environment for equality and diversity.

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160. See Petersen, *supra* note 19, at 63.

Although the adoption of anti-discrimination legislation may go some way to help secure the protection of LGBT individuals' rights, while also strengthening understandings of equality and fairness within society more broadly, the role of the law and its promise should not be overstated. On the one hand, the adoption of SOGI anti-discrimination legislation would allow for parity in the legal framework and give equal weight to the newly protected characteristic of sexual orientation together with disability, family status, race, and sex. On the other hand, legislation alone will not prevent discrimination—particularly given the current limitations of the existing anti-discrimination ordinances, which are underpinned by negative equality duties rather than positive equality duties.<sup>161</sup> Positive equality obligations or “duties” require public authorities to anticipate inequality in society and seek to prevent inequality before it occurs.<sup>162</sup> In contrast, negative equality protections operate retroactively to provide legal or other redress when discrimination has already occurred.<sup>163</sup>

Thus, while the role of law is important, stakeholders need to recognize both its promise as well as limitations in affecting social change. Governments and other public authorities have a variety of tools that they could potentially use to address discrimination against minority groups, including public awareness campaigns, government-issued guidelines or codes of practice, and anti-discrimination education programs in schools and through public bodies (e.g., in community centers, or through district councils). Private actors, such as companies or schools, may also adopt their own internal anti-discrimination policies. However, any toolkit should also propose enactment legislation and subsequent regulations that could be used to regulate the conduct of both private and public actors to prevent discrimination before it occurs and provide remedies to victims of discrimination.

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161. Puja Kapai, *The Hong Kong Equal Opportunities Commission: Calling for a New Avatar*, 39 H.K. L.J. 339, 349 (2009).

162. Eithne McLaughlin, *From Negative to Positive Equality Duties: The Development and Constitutionalisation of Equality Provisions in the UK*, 6 SOC. POL'Y & SOC'Y 111, 115 (2007).

163. *Id.* at 112.

