

# TO BE OR NOT TO BE: RECOGNITION OF SAME-SEX PARTNERSHIPS IN HONG KONG



Bart Rwezaura\*

*The primary aim of this article is to provide a background study and analysis of same-sex partnerships in the hope that it may assist the debate and contribute to policymaking. This article begins by looking at the events that led to the 1991 decriminalisation of homosexual conduct between consenting adults in private. This is followed by a summary and analysis of the gay and lesbian rights movement as a global force. It is argued that the recent success of gay and lesbian groups, especially in the liberal West, is closely related to a larger movement for equality and non-discrimination. The author argues that the demands of same-sex couples in Hong Kong are also part of this wider movement for equality and non-discrimination and deserve to be debated and addressed without undue delay.*

## Introduction

The question whether Hong Kong law should recognize same-sex partnerships and if so, to what extent, can no longer be avoided or postponed indefinitely. During the last 10 years an increasing number of states have, with varying degrees of reluctance, yielded to the demands of gay and lesbian groups by granting them limited legal recognition and protection. Some state legislatures have acted out of political pressure while others have been compelled to act by superior court decisions following a successful constitutional challenge. Today, nine jurisdictions permit same-sex couples to contract a marriage and to have rights and responsibilities similar to those enjoyed by heterosexual married couples.<sup>1</sup> Many other jurisdictions have enacted legislation to recognise and regulate the rights and obligations of same-sex couples albeit stopping short of granting them the same rights and obligations available to heterosexual married couples.<sup>2</sup> Looking ahead into the future, and

\* Senior Lecturer, Faculty of Law, University of Hong Kong. The author wishes to acknowledge with thanks the helpful comments and suggestions made by the anonymous reviewer. My thanks also go to Rick Glofcheski for his encouragement during the writing of this article.

<sup>1</sup> The jurisdictions are: the Netherlands (Apr 2001); Belgium (Jan 2003); Ontario, Canada (Jun 2003); British Columbia, Canada (Jul 2003); Quebec, Canada (Mar 2004); Massachusetts, US (May 2004); Yukon Territory, Canada (Jul 2004); Manitoba, Canada (Sep 2004); and Nova Scotia (Sep 2004).

<sup>2</sup> According to Robert Wintemute, by Aug 2001 there were at least 38 jurisdictions which had enacted legislation to grant certain rights and protections to same-sex couples. See Robert Wintemute, "Conclusion" in Robert Wintemute and Mads Andenaes (eds), *Legal Recognition of Same-Sex Partnerships* (Oxford and Portland Oregon: Hart Publishing, 2001), pp 759–773.

basing on the events of the last decade, it is very likely that the number of jurisdictions granting recognition to same-sex partnerships, be it partial or full recognition, will steadily rise as we enter the second decade of this millennium.

The object of this article is to provide a background study and analysis of same-sex partnerships in the hope that the study may assist the debate and hopefully, contribute to policymaking. This paper begins by looking at the events in Hong Kong that led in 1991 to the decriminalisation of homosexual conduct between consenting adults in private. This is then followed by a summary and analysis of the gay and lesbian rights movement as a global force. It is argued that the recent success of the gay and lesbian groups, especially in the liberal West, is closely related to a wider movement for equality and non-discrimination. This article is concluded by noting that the demands of same-sex couples in Hong Kong are also part of this wider movement for equality and non-discrimination and deserve to be debated and addressed without undue delay.

### From Closet to Street: Decriminalisation of Homosexuality

According to the Law Reform Commission of Hong Kong (LRC), public discussion of homosexuality was virtually non-existent until the 1970s. There was virtually no local publication on the subject until Lethbridge's article appeared in the *Hong Kong Law Journal* in 1976.<sup>3</sup> The situation rapidly changed in 1978 when an English solicitor, who had practised law in Hong Kong for some years, was convicted on his own plea to charges of buggery and gross indecency with four 15-year-old Chinese boys. His appeal against a jail sentence was dismissed by the Court of Appeal.<sup>4</sup>

The trial and conviction of the English solicitor uncovered evidence that led to the establishment of a Special Investigation Unit of the Royal Hong Kong Police Force.<sup>5</sup> The unit was "charged with investigating homosexual prostitution and the procurement and exploitation of youths".<sup>6</sup> A number of male homosexual suspects were arrested and some were formally charged with

<sup>3</sup> See The Law Reform Commission of Hong Kong, *Report on Laws Governing Homosexual Conduct* (Topic 2) (hereinafter "HKLRC (No 2)") (Hong Kong: Government Printer, 1983), para 1.4, p 2 and H. J. Lethbridge, "The Quare Fellow: Homosexuality and the Law in Hong Kong" (1976) 6 *Hong Kong Law Journal* (hereinafter "HKLJ") 292.

<sup>4</sup> Until 1991 it was an offence, punishable with life imprisonment, for two consenting male adults to engage in homosexual conduct.

<sup>5</sup> See HKLRC (No 2) (n 3 above), para 1.6, p 2.

<sup>6</sup> *Ibid.*

the offence of buggery.<sup>7</sup> In response to the more active policing of homosexual conduct by the unit, “an informal gathering of individuals collected 424 signatures on a petition requesting that Hong Kong’s law be brought into line with that in England and Wales, and this was sent to the Government.”<sup>8</sup> In light of these events, on 14 June 1980 the LRC was asked to consider whether “the present laws governing homosexual conduct in Hong Kong be changed and, if so, in what way?”<sup>9</sup> In 1983, the LRC recommended the decriminalisation of homosexual conduct committed in private between two consenting adults. This recommendation was eventually enacted into law in July 1991.<sup>10</sup> Evidence before the LRC had revealed that there was a substantial number of Hong Kong residents who were gay. It was also noted that homosexual men and lesbians came from all walks of life and were not confined to a given race, religion, culture or profession.<sup>11</sup> It is estimated that in the general adult population in any country, the incidence of gay men and lesbians is between five per cent and seven per cent.<sup>12</sup>

In 1994, public debate on the rights of homosexuals started again after the introduction of the Equal Opportunity Bill, a Private Member’s Bill, by legislator Anna Wu. The Bill contained, among others, a clause seeking to prohibit discrimination based on sexual orientation. Although the Bill was not passed, it brought the issue of homosexuality back on the agenda leading to the commissioning by the Hong Kong Government in 1995 of an independent opinion survey on sexual orientation<sup>13</sup> and the publication, in the following year, of a consultation paper on discrimination based on sexual orientation.<sup>14</sup> According

<sup>7</sup> One of the suspects was police inspector John MacLennan who was due to be arrested and charged with acts of gross indecency with male prostitutes. However, the arrest was not effected because the suspect was found dead in his flat. See HKLRC (No 2) (n 3 above), para 1.8, p 3.

<sup>8</sup> See HKLRC (No 2) (n 3 above), para 1.7, p 2. Homosexual acts between two consenting adults in private ceased to be a criminal offence in England and Wales following the enactment of the Sexual Offences Act of 1967.

<sup>9</sup> See HKLRC (No 2) (n 3 above), p iii.

<sup>10</sup> *Ibid.*, para 11.50, p 133. See Ordinance No 90 of 1991, s 3 and Crimes Ordinance (Cap 200), s 118F. Carole Petersen has shown that the decriminalisation of homosexual conduct was greatly assisted by the government’s persistence as well as its strong argument that failure to change the law would have contravened the Bill of Rights Ordinance which was due to be enacted in 1991 by the Legislative Council. See Carole Petersen, “Values in Transition: The Development of Gay and Lesbian Rights Movement in Hong Kong” 19 (1997) *Loyola of Los Angeles International & Comparative Law Journal* 337, at pp 344–351.

<sup>11</sup> See HKLRC (No 2) (n 3 above), para 12.5, p 138.

<sup>12</sup> Simon Le Vay, “Sexual Orientation and Its Development” in Robert M. Baird and M. Katherine Baird (eds), *Homosexuality, Debating the Issues* (New York: Prometheus Books, 1995), p 62; HKLRC (No 2) (n 3 above), p 138; UK Department of Trade and Industry (UKDTI), *Civil Partnership: A Framework for Legal Recognition of Same-sex Couples* (London: Women & Equality Unit, Jun 2003), Annex A, para 4.1, p 68 and note 15 (<http://www.dti.gov.uk>) where, according to the report, “Stonewall estimates that lesbian, gay and bisexual people constitute 5 per cent to 7 per cent of the total adult population in England and Wales. *Equal Opportunities: A Study on Discrimination on the Ground of Sexual Orientation, A Consultation Paper* (Hong Kong: Government Printer, 1996), para 12, p 4, (hereinafter *Equal Opportunities*) places the percentage at 6 per cent to 10 per cent.

<sup>13</sup> The survey was conducted by the *Survey Research Hong Kong Ltd* and its findings were published in *Equal Opportunities* (n 12 above), as Appendix III.

<sup>14</sup> See *Equal Opportunities* (n 12 above).

to the survey, public attitude towards homosexuality was at best ambivalent, with the level of tolerance being much lower among older respondents (45 to 64 years) than it was among the younger generation (15 to 24 years). The paper considered the problems encountered by homosexuals in Hong Kong, including self-rejection and self-stigmatisation, concealment of their sexual orientation, public misconceptions about homosexuality and discrimination in certain fields such as employment and service provision.<sup>15</sup> It identified a number of options for reform including the possibility of instituting non-legal measures to "enhance equal opportunities for persons of different sexual orientations."<sup>16</sup> The paper stressed the importance of public education on the issue of homosexuality noting that punishing acts of discrimination based on sexual orientation was unlikely to be effective.<sup>17</sup> Although the deadline for submitting comments on the paper expired over eight years ago (on 31 March 1996), there has been no further action by the Government.

More recently, the same question has come up again; but this time as an issue of recognition of same-sex partnerships. Same-sex couples are now demanding access to some of the social benefits that are currently available to heterosexual married couples, including public housing and tax benefits.<sup>18</sup> There is currently no legal protection for same-sex partners when their relationship ends. For example, courts cannot order financial provisions for the disadvantaged partner such as personal maintenance or division of their assets. Where one of the partners is not a Hong Kong resident, no provisions exist under the immigration law to allow the non-resident partner to enter Hong Kong as a family member or as a dependant. Also if one of the parties dies intestate or is killed through the negligent act of a third party, no legal provisions exist to protect or compensate the surviving partner.<sup>19</sup> Same-sex couples may need to access certain public services currently not available to them. These include assisted human reproduction technology and child adoption services which are only available to heterosexual married couples.<sup>20</sup>

<sup>15</sup> *Ibid.*, pp 4–8.

<sup>16</sup> *Ibid.*, pp 32–37.

<sup>17</sup> *Ibid.*, p 14.

<sup>18</sup> See Chow Chung-yan, "Gay and Lesbian Wed in Benefits Protest", *South China Morning Post* (hereinafter "SCMP"), 26 Mar 2002, p 7.

<sup>19</sup> Fatal Accidents Ordinance (Cap 22), s 3; Inheritance (Provision for Family and Dependents) Ordinance (Cap 481), s 3; Intestate Estates' Ordinance (Cap 73), ss 3 and 7; Surviving Spouses' and Children's Pensions Ordinance (Cap 79), ss 5 and 6; Widows and Orphans Ordinance (Cap 94), ss 22 and 24; Pension Benefits Ordinance (Cap 99), s 19; Pension Benefits (Judicial Officers) Ordinance (Cap 401), s 20. A same-sex partner could apply to the court for discretionary provision from the intestate estate of his or her partner under the Inheritance (Provision for Family and Dependents) Ordinance, Cap 481, s 3(1)(ix) but there are no decided cases on this as yet provision.

<sup>20</sup> However, recent studies have shown that the extension of assisted human reproduction facilities to gay couples requires careful consideration given the recent experience of certain jurisdictions such as Australia and the Netherlands. See Machteld Vonk, "One, Two or Three Parents? Lesbian Co-Mothers and a Known Donor with 'Family Life' under Dutch Law" 18 (2004) *International Journal of Law, Policy and the Family* (hereinafter "IJLPF") 103–117; and Deborah Dempsey, "Donor, Father or Parent? Conceiving Paternity in the Australian Family Court" (2004) 18 *IJLPF* 76–102.

There are also difficult legal issues raised by cases where a couple contracts a same-sex marriage outside Hong Kong and returns to the territory to seek legal recognition. Such cases may increase over time, but no legal provisions exist to deal with them.<sup>21</sup> Furthermore, same-sex couples registered in their own countries of origin and who are now resident in Hong Kong could also attempt to seek certain remedies in Hong Kong courts thus raising the question of legal recognition of their relationship. As noted above, certain jurisdictions including Canada, the United States (US) and some Western European states, have been amending their domestic legislation to address specific social welfare issues and other demands made by same-sex couples. Many of these jurisdictions now recognise registered partnerships or civil unions. At the time of writing, nine jurisdictions have passed legislation (or have been required by their superior courts) to permit same-sex couples to contract a marriage.<sup>22</sup>

At the local level there are also indications of a softening of attitudes in the community regarding the social status of gay and lesbian people. In March 2003, a survey was conducted by the Social Policies Research Institute of the Hong Kong Polytechnic University. Of the 1,604 respondents polled, "across a wide age range, 70 per cent agreed [that] homosexuals and heterosexuals should have equal rights in terms of building a family and 73 per cent in terms of enjoying the same social welfare benefits, while 72.6 per cent did not think giving homosexual equal rights would dilute social resources."<sup>23</sup>

Some community leaders have also openly expressed support for a public debate on the rights of gay and lesbian couples. This includes former legislator Cyd Ho Sau-lan, who has stated that the Government should do something "to prepare for the eventual recognition of the rights of the same-sex couples [because] it would require some substantial changes to public policy".<sup>24</sup> Both the Secretary for Justice and the Home Affairs Department are supportive of

<sup>21</sup> The Government's stand is that same-sex marriages contracted abroad are not recognised under local law. This is arguably an accurate statement of how principles of private international law might apply to a Hong Kong domiciled couple who contracts a same-sex marriage outside Hong Kong. See Robin A. Warren, "Comment: Gay Marriage – Analyzing Legal Strategies for Reform in Hong Kong and the United States" (2004) *Pacific Rim Law & Policy Journal* 711, at pp 801–802.

<sup>22</sup> See n 1 above.

<sup>23</sup> See "Legal Row Looms on Same-sex Wedlock" LCIFC Discussion Forum at <http://forum.lesliecheung.com>, SCMP visited 14 Jul 2003. See also Ravina Shamdasani, "Fight Over Sexual Discrimination", SCMP, 18 Aug 2003. When a popular Hong Kong singer and actor committed suicide in Mar 2003, there was an outpouring of grief, but also a flood of sympathy for his partner of 18 years. The family of the deceased partner was reported to have acknowledged the surviving partner by listing his name on the funeral notice in the place reserved for a surviving spouse. See Tim Cribb, "Gay Marriage in Asia", *Sydney Star Observer*, Issue No 693.

<sup>24</sup> *Ibid.*, the Deputy Home Affairs Secretary, Stephen Fisher, stated recently that a public survey will be conducted early in 2005 to determine the extent of public support for gay and lesbian rights. If the survey reveals significant public support, the government might initiate the process of consultation leading to legislation. See Tim Cribb, "Survey to test water for gay law", SCMP, 27 Jul 2004.

such a debate.<sup>25</sup> Moreover, the recent decision of the Secretary for Home Affairs to attend the annual *Tongzhi* Community Media Awards as a guest of honour, indicates at least a degree of official approval. It was the first time a government minister had attended an event held by any gay rights group. Similar invitations had previously been routinely turned down.<sup>26</sup> It now remains to consider some of the issues that might be open for debate. But first, a brief analysis of the global context of the debate is given below.

### Gay and Lesbian Rights as a Global Movement

It is not necessary for purposes of this article to give a detailed analysis of the history of gay and lesbian rights movement. It suffices to note three salient features of this movement that seem to stand out. The first is that the recent history of gay and lesbian rights movement is closely linked to the growth of the human rights movement in Western Europe and North America and, to a lesser extent, other parts of the world. The second feature is that gay and lesbian demands have been incremental and their success has been more of a process than a sudden event. And third, from a jurisprudential perspective, there is today a plurality of forms of same-sex partnerships and this has important implications for the way legal recognition and regulation of these unions will be structured. These three features are briefly examined below.

#### *Gay and Lesbian Rights as Human Rights*

The demand for equal treatment and non-discrimination by the gay community constitutes part of the wider movement for individual liberty in liberal democratic political systems. In the US, for example, campaigners against sexual orientation discrimination see it as comparable to racial and gender discrimination. Both the United Nations (UN) and the European Union “support the ‘human right’ not to be discriminated against on the grounds of sexual orientation”.<sup>27</sup> Sexual orientation is also a prohibited ground of

<sup>25</sup> See Tim Cribb, “Same Sex: Different Rules”, SCMP, 27 Nov 2003.

<sup>26</sup> Ravina Shamdasani and Louisa Yan, “HK’s Gay Community Sends Delegation to Landmark UN Event”, SCMP, 15 Mar 2004.

<sup>27</sup> Donald J. West and Richard Green, “Conclusion” in Donald J. West and Richard Green (eds), *Sociological Control of Homosexuality: A Multi-Nation Comparison* (New York: Penum Press, 1997), p 333. On 16 Mar 2000, the European Union adopted a non-binding resolution urging member states to grant same-sex couples the same rights granted to opposite-sex couples. More recently; on 3 Mar 2004, the European Parliament widened the definition of “family” to include same-sex couples. This measure will enable same-sex couples to move freely and live within the European Union. See *Legal Marriage Report by Demian*, Mar 2004 (Demian Report 2004) at <http://www.buddybuddy.com/mar-repo.html>.

discrimination under the Human Rights Act 1993 in New Zealand. The New Zealand legislation has established a complaints procedure under its Human Rights Commission.<sup>28</sup> As for Australia, although it does not have a federal statute prohibiting sexual orientation discrimination, some states such as New South Wales, the Australian Capital Territory and the Northern Territory have such laws.<sup>29</sup> In 2000, the Australian state of Victoria enacted a law to prohibit discrimination based on gender identity or sexual orientation.<sup>30</sup> The United Kingdom has the Employment Equality (Sexual Orientation) Regulations 2003, specifically designed to protect gay men and lesbians from discrimination on the ground of sexual orientation. A recent amendment to the Housing Bill and the Civil Partnership Bill will make it clear that the surviving partner of a cohabiting homosexual couple will become a statutory tenant in the same way as a surviving spouse of a married couple.<sup>31</sup>

The European Court of Human Rights has held on a number of occasions that the provisions of Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms – which requires states to ensure that the rights contained in the said convention “shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status” – also prohibits discrimination based on the ground of sexual orientation.<sup>32</sup> Thus the increasing recognition of minority rights and the enactment of non-discrimination laws in liberal political systems have created ideal conditions for the growth and visibility of the gay and lesbian rights movement.<sup>33</sup> As West and Green have aptly commented, there are “all the signs of a seemingly unstoppable progression of liberal law and philosophy regarding homosexuality in nearly all Western industrial nations”.<sup>34</sup>

<sup>28</sup> The New Zealand Human Rights Act of 1993 replaces the Human Rights Commission 1977 and the Race Relations Act 1971. See *Equal Opportunities* (n 12 above), para 66, p 18.

<sup>29</sup> See New South Wales Anti-Discrimination Act 1977, the Australian Capital Territory Discrimination Act 1991 and the Northern Territory Anti-Discrimination Act 1991. Cited in *Equal Opportunities* (n 12 above), para 70, p 10. For a comprehensive coverage of the Australian situation, see Hon Justice Michael Kirby, “Same-Sex Relationships: An Australian Perspective on a Global Issue” in Wintemute and Andenaes (eds) (n 2 above), pp 7–21.

<sup>30</sup> See Equal Opportunity (Gender Identity and Sexual Orientation) Act 2000, s 4 which defines “sexual orientation” as “homosexuality (including lesbianism), bisexuality or heterosexuality”.

<sup>31</sup> See Para 2 of schedule 1 to the Rent Act 1977. The amendment of the two Bills is intended to reflect the decision of the European Court of Human Rights in *Karner v Austria* (2003) 2 FLR 623.

<sup>32</sup> *Salgueiro do Silver Mouta v Portugal* [2001] 1 FCR 653, ECHR; *Karner v Austria* (2003) 2 FLR 623.

<sup>33</sup> See Bruce Bawer, “Notes on Stonewall” in Robert M. Baird and M. Katherine Baird (eds) (n 12 above), p 23.

<sup>34</sup> See West and Green (n 27 above), pp 333–334. Baroness Hale of Richmond stressed that a guarantee of equal treatment is also essential to democracy because democracy “is founded on the principle that each individual has equal value.” See *Ghaidan v Mendoza* (FC) [2004] UKHL 30, para 132.

In contrast, in certain regions such as Asia, Africa, parts of Eastern Europe and Latin America, and despite the increasing visibility of some gay and lesbian groups in those regions, there are cultures and religious systems which remain essentially hostile to homosexuality.<sup>35</sup> In these regions, homosexuality is still viewed as antithetical to fundamental moral standards and/or contrary to basic principles of family organisation and male succession.<sup>36</sup> The underlying logic for social control of homosexuality in these regions includes a duty to reproduce, compliance with “pronouncements of religious doctrine, and moral beliefs in one ‘natural’ form of sexual expression”.<sup>37</sup> Consequently, in political and social systems with weak or non-existent liberal traditions or where there is heavy reliance on traditional culture or radical religious belief, an organised gay and lesbian rights movement is either suppressed, stigmatised or is simply absent.<sup>38</sup>

<sup>35</sup> On 13 Apr 2004, the Zanzibar House of Representatives overwhelmingly passed a bill imposing a harsher punishment against those found guilty of homosexual conduct. Although under the 1934 Zanzibar Penal Code “sodomy and unnatural acts” are already criminal offences, the government wanted to update the law in order to specifically deal with what is viewed as an increase in homosexual behaviour in the Isle. According to the Minister for Constitutional Affairs, Adam Mwakanjiki, Zanzibar was “a predominantly Muslim country and in Islam homosexuality is strictly prohibited.” *Sapa-AP* at <http://www.gmx.co.za/look04/04/15-zanzibar.html> (visited on 1 Sep 2004). Although rarely enforced (unless such acts involved minors), the Penal Codes of mainland Tanzania, Kenya and Uganda prescribe stiff punishments for sodomy and unnatural offences. Also in Apr 2004 the Singapore government refused to register a gay group known as “People Like Us”. The reason, according to the Minister of State for National Development, Vivian Balakrishnan, is that “[t]he vast majority of Singaporeans are not ready and do not accept the formation of groups who may, amongst other things, be seen to promote gay or alternative lifestyles which the majority of Singaporeans are not comfortable with.” See <http://www.gmx.co.za/look04/04/16-singapore.html> (visited on 1 Sep 2004). For an insightful illustration of the thinking of certain African leaders towards homosexuality, see Elsa Steyn, “From Closet to Constitution: The South African Gay Family Rights Odyssey” in J. Eekelaar and T. Nhlapo (eds), *The Changing Family: Family Forms and Family Law* (Oxford: Hart Publishing, 1998), pp 405–431, at 414–417.

<sup>36</sup> Pinkerton and Abramson state that “[h]omosexual behaviours are neither forbidden nor heavily stigmatised in modern Japan, provided they respect the prevailing framework of social and familial responsibilities. According to Confucian principles, one’s primary responsibility is to one’s family, including both future and past generations. The socially inescapable duty of every Japanese person is to marry and reproduce, in order to perpetuate the family lineage, and in so doing, to respectfully pay homage to past generations.” See Steven D. Pinkerton and Paul R. Abramson, “Japan” in Donald J. West and Richard Green (eds) (n 27 above), p 70.

<sup>37</sup> See West and Green (n 27 above), p 331. In a survey of problems encountered by Hong Kong homosexuals, family pressure was identified as one of the problems. It is reported, for example, that a male homosexual who had to marry due to parental pressure continued to seek male companions while remaining married to his wife with whom he had two children. See *Equal Opportunities* (n 12 above), Appendix II. See also Chiu Man-Chung (Andy Chiu), “Contextualizing the Same-sex Erotic Relationship: Post-Colonial *Tongzhi* and Political Discourse in Hong Kong and Mainland China” in Wintemute and Andenaes (eds) (n 2 above), p 357, at 367.

<sup>38</sup> See West and Green (n 27 above), p 331. In India, gay groups are emerging but Hindu culture remains hostile, and the law on “unnatural offences” dating back to the British colonial era, prescribes long-term imprisonment for “whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal.” The Internet magazine *rediff.com* reported in Jun 2004 that between 1995 and 2001, at least 21 lesbian women committed suicide in the southern Indian state of Kerala because they were hounded by society. And according to Rafiqueel Hague Dowjah, a gay activist in Calcutta, many gay men and lesbians are afraid to come out of the closet because “we are living in a society where homosexuality is covered up, ignored or treated as a disease.” See <http://www.gmx.co.za/look04/04/28-india.html> (visited on 1 Sep 2004).



Three points, however, need to be stressed at this juncture. The first is that homosexuality as a global social phenomenon has a much longer history. It seems as if almost in every society there has been a time when both public opinion and official attitude towards homosexuality were either tolerant or at least indifferent while at other times such opinion swung the opposite direction.<sup>39</sup> Therefore, what is seen today as a movement towards greater tolerance to homosexuality is such a phase, albeit a more recent one, in the long history of homosexuality. The second point is that even in those regions which lack a history of liberal democratic traditions, there is growing visibility of gay groups and a persistent campaign for recognition. Reference has been made of the activities of gay and lesbian groups in Hong Kong.<sup>40</sup> A similar movement is reported in India and Taiwan.<sup>41</sup> Former King Sihanouk of Cambodia has also expressed sympathy to the gay and lesbian rights movements.<sup>42</sup> Post-apartheid South Africa is widely noted for its liberal policy towards same-sex relationships.<sup>43</sup> This is primarily because its 1996 constitution prohibits discrimination – based on sexual orientation.<sup>44</sup> This constitutional provision has been relied upon in a number of successful court challenges by gay and lesbian applicants against various forms of discrimination based on sexual orientation.<sup>45</sup> In neighbouring Namibia, the High Court

<sup>39</sup> See Fang-Fu Ruan, "Male Homosexuality [in China]" in West and Green (n 27 above), p 57.

<sup>40</sup> Some of these include: Civil Rights for Sexual Diversity; Hong Kong Ten Percent Club; Hong Kong University Gay and Lesbian Society; Horizons; Hong Kong Joint College Queer Union; Lavender Phoenix; Queer Sisters; and Rainbow Action. See [http://sqzm14.ust.hk/hkgay/Gay\\_and\\_Lesbian\\_Organizations/](http://sqzm14.ust.hk/hkgay/Gay_and_Lesbian_Organizations/) (visited on 11 Jun 2004). The first gay parade was held in Central, Hong Kong, on 15 Oct 2004. The SCMP hailed the parade as a small but significant step "towards living up to the government's claim that Hong Kong is Asia's World City." See SCMP, 16 Oct 2004, p 12 and Ravina Shamdasani, "Gays Come Out to Parade Their Pride in a Pink-carpet First for Hong Kong", SCMP, 16 Oct 2004, p 1.

<sup>41</sup> On 27 Oct 2003, it was announced that the government of Taiwan would draft legislation to legalise same-sex marriages. If enacted, it would make Taiwan the first jurisdiction in Asia to permit same-sex marriages. A cabinet official stated that the proposal, jointly drafted by the presidential office and the cabinet, is designed to protect basic human rights. See <http://www.buddybuddy.com> (visited on 2 Nov 2004).

<sup>42</sup> Two Cambodian women were informally married on 12 Mar 1995, according to the Cambodian Daily newspaper. See <http://www.buddybuddy.com> (visited on 11 Jun 2004).

<sup>43</sup> See Craig Lind, "Politics, Partnership Rights and the Constitution in South Africa ... (and the Problem of Sexual Identity)" in Wintemute and Andenaes (eds) (n 2 above), pp 278–293.

<sup>44</sup> South African Constitution, s 9(1) states that "Everyone is equal before the law and has the right to equal protection and benefit of the law ..." And s 9(3) states that "[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, *sexual orientation*, age, disability, religion, conscience, belief, culture, language and birth (emphasis by author). And s 9(10) states that "[e]veryone has inherent dignity and the right to have their dignity respected and protected." For a background discussion of how protection on the ground of "sexual orientation" was included in the Constitution, see Lind (n 43 above), pp 280–284.

<sup>45</sup> In *Satchwell v President of the Republic of South Africa & Another* 2002 (6) SA 1 CC, the South African Constitutional Court ruled that a female partner of a High Court judge (Ms Kathy Satchwell), should receive the same financial benefits granted to spouses of judges who are parties to heterosexual marriages. A lower court had ruled that the couple should qualify for state benefits, but the decision had been appealed by the government. See also Chuma Himonga, "Transforming the Family Law Landscape: The Role of the Courts" in A. Bainham (ed), *The International Survey of Family Law 2004* (The Hague: Kluwer Law International, 2004), pp 421–437, at 428.

also ruled on 25 June 1999 that it was improper for the Ministry of Home Affairs to deny a residence permit to a German national because she was a lesbian living with a Namibia national.<sup>46</sup> Nonetheless, in much of sub-Saharan Africa, gay men and lesbians remain somewhat invisible and with minimal, if any political voice.<sup>47</sup>

The third and final point is that even in the West where gay and lesbian groups have succeeded in pushing for changes, they still face very stiff opposition from certain groups such as the Roman Catholic Church and conservative elements in society who believe that the gay movement poses a threat to traditional marriage, conventional morality, and family organisation.<sup>48</sup> A good example is the strong opposition to same-sex marriage in the US which culminated in the enactment of the Defense of the Marriage Act (DOMA) in 1995.<sup>49</sup> In February 2004, President George W. Bush announced that “he would support efforts to pass a constitutional amendment in America banning gay marriage”.<sup>50</sup> Even where a state court has ruled in favour of legal marriage for same-sex couples, as in Hawaii and Alaska, there has been such strong opposition within the state that it has led to a constitutional amendment to overturn the relevant court’s decision.<sup>51</sup> As Warren has noted, it was in response to the Hawaii decision that the US Congress enacted DOMA.<sup>52</sup> Such opposition, as will be noted below, explains why the success of the gay and lesbian rights movements in the West has been incremental and piecemeal.

<sup>46</sup> See <http://www.buddybuddy.com/mar-repo.html>. Judge Harold Levy also ruled that the Ministry of Home Affairs must supply reasons for refusing an application for permanent residence. The couple had been living together for several years and were raising a son together.

<sup>47</sup> For an insight on opinions about homosexuality held by certain leaders in sub-Saharan Africa, see Steyn (n 35 above), pp 414–417.

<sup>48</sup> For example, Robert Piggot, a BBC correspondent, reported on 28 Sep 2004, that “the Roman Catholic Church has attacked the Spanish government’s plans to introduce gay marriage, comparing them to releasing a virus into society.”

<sup>49</sup> The Defense of Marriage Act (DOMA) provides that no state shall be required to give effect to a law of any other state which allows same-sex “marriage”. DOMA also defines the words “marriage” (for purposes of Federal Law) to mean the legal union of a man and a woman and a “spouse” is also defined as a husband or wife of the opposite sex.

<sup>50</sup> See “The Case for Gay Marriage”, *The Economist*, 28 Feb 2004, p 9. But the proposed amendment failed to meet the minimum requirement of a two-thirds majority during a vote taken in the House of Representatives on 29 Sep 2004. In Jul 2004 a similar amendment was defeated in the US Senate. See David Espo, “House Defeats Gay Marriage Amendment”, *Associated Press*, 30 Sep 2004.

<sup>51</sup> Following the Hawaii Supreme Court decision in *Baehr v Lewin*, 852 P.2d 44 (Haw 1993) the State legislature amended the Constitution in 1998 to provide that “the legislature shall have the power to reserve marriage to opposite-sex couples.” See Hawaii Constitution Art 1, 23, cited in Warren (n 21 above), p 784. Previously, the Hawaii Supreme Court had held in *Baehr* that the State law which restricted marriage to opposite-sex couples was discriminatory in that it denied same-sex couples equal protection of the laws guaranteed by the Hawaii Constitution. See also Sanford N. Katz, “The United States: Domestic Partnerships Law” in A. Bainham (ed) *The International Survey of Family Law* 1997 (The Hague: Kluwer Law International, 1999), pp 485–505, at 489.

<sup>52</sup> See Warren (n 21 above), p 784.

*Incremental Movement Towards Gay and Lesbian Rights*

In many jurisdictions the gay rights movement has evolved from a movement seeking the removal of criminal sanctions against homosexual conduct to the more recent demands for legal recognition and protection of homosexuals as a minority group.<sup>53</sup> These demands include calls upon governments to prohibit discrimination on ground of sexual orientation in areas such as employment and housing, and demands to punish homophobic crimes. Many of these demands have taken the form of court challenges. There are numerous such court challenges in many jurisdictions on both sides of the Atlantic. For example, the English House of Lords held in 1999 that a same-sex cohabitant qualified as member of the original tenant's family with a right to inherit a protected tenancy previously held by the deceased male partner.<sup>54</sup> This phase has also seen the emergence of informal systems of registration of same-sex unions by non-state organs such as a local government or city authorities. For example, in the US, a number of cities still offer registration facilities to same-sex couples even though such registrations have no legal force.<sup>55</sup> Perhaps the most daring attempt, if also short-lived, was the decision of the Mayor of San Francisco, Gavin Newsom – he took the unprecedented step of authorizing, on 12 February 2004, the celebration of marriage between gay and lesbian couples.<sup>56</sup> In the United Kingdom, where new legislation to provide for the registration of civil partnerships has just been enacted, the Greater London Authority has been providing informal registration facilities to same-sex couples (and opposite-sex couples in *de facto* unions) since September 2001.<sup>57</sup> Other English cities and counties providing similar services include Bath, Birmingham, Brighton, Darlington, Devon, Dorset, Leeds, Liverpool, Manchester and Swansea.<sup>58</sup> Certain religious groups such as the Metropolitan Community Church (MCC) of Toronto also conduct extralegal marriages between same-sex couples.<sup>59</sup>

From the stage of informal registration, the gay and lesbian rights movement has made its way up to the next level of registered partnerships and

<sup>53</sup> *Ibid.*, at 788–791 and 803–805.

<sup>54</sup> *Fitzpatrick v Sterling Housing Association Ltd* [1999] 3 WLR 1113.

<sup>55</sup> See Katz (n 51 above), pp 490–505.

<sup>56</sup> See Agence France-Presse, "Defiant San Francisco Marries Gays", SCMP, 14 Feb 2004. However, following a court challenge of the Mayor's decision, the California Supreme Court ordered the celebration and licensing of same-sex marriage to be stopped immediately until the courts had ruled on the legality of the decision. California state law, like several other states in the US does not permit same-sex marriages. The California Supreme Court has now held that the Mayor Gavin Newsom "did not have the legal authority to issue marriage licences to 4,000 gay and lesbian couples" and further held that these marriages were null and void. See Knight Ridder, "Honeymoon is Over After Court Rules Same-sex Unions Illegal", SCMP, 14 Aug 2004.

<sup>57</sup> See UKDTI, *Civil Partnership* (n 12 above), p 14.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Attorney General for Ontario v M and H* [1999] 171 DLR (4th) 577.

civil unions. This stage represents a significant advance constituting state recognition of same-sex unions. As will be noted below, there is a range of differing models or forms of civil unions in these jurisdictions. Moreover, the rights and obligations conferred by these unions also tend to differ with each jurisdiction. However, despite their differences, these civil unions, registered partnerships and solidarity pacts, have two things in common. First, their existence constitutes clear evidence of state recognition, and second, they do not confer the same rights and obligations as those enjoyed by heterosexual married couples. In this regard, it might be said that these civil unions stand at the intersection between non-recognition and full equality of same-sex unions with heterosexual marriage. The final stage of equalisation of rights and duties between heterosexual married couples and same-sex couples has so far only been reached in nine jurisdictions.<sup>60</sup> But as Wintemute has noted, the aforementioned jurisdictions probably represent a metaphoric crack in the wall that currently separates same-sex partners from married couples of the opposite sex. In time, this “crack will gradually be widened, and ultimately the wall will be demolished”.<sup>61</sup>

#### *The Varying Models of Gay and Lesbian Unions*

A common feature of same-sex unions is that they take many forms, each being slightly different from the other and having varying legal consequences for the couple. According to Taylor's<sup>62</sup> classification and analysis, relying in part on Bailey-Harris and others,<sup>63</sup> there are at least six models of same-sex unions. Only five are considered in this article.

The first is the “gay-marriage model” (Model 1), whereby the law will declare that a marriage is a voluntary union between two persons rather than between a man and a woman. This has the effect of abolishing the restriction of marriage to male and females by extending, without discrimination, all rights and obligations arising from marriage to same-sex couples.<sup>64</sup>

The second form is the “general registered partnership model” (Model 2), whereby the law would permit all partners of the same-sex and those of the

<sup>60</sup> See n 1 above. See also “US State Stirs Up Furore With Gay Wedding Licences”, SCMP, 18 May 2004. This followed the decision of the Massachusetts Supreme Court in *Goodridge v Department of Public Health* 440 Mass. 309, 798 N.E. 2d 941.

<sup>61</sup> Robert Wintemute, “Conclusion” in Wintemute and Andenaes (eds) (n 2 above), p 773. Warren also argues in support of Yuval Merin's view that the success of the gay and lesbian movement may have to go through “the necessary process” whereby “each step in the expansion of rights gained not only paves the way for the next, but is also required.” See n 51 above, p 803.

<sup>62</sup> Greg Taylor, “Same-Sex Unions and the Law: The New Gay and Lesbian Partnerships Law in Germany” (2003) 41 *Alberta L Rev* 573, 577–578 and Rebecca Bailey-Harris “Same-Sex Partnerships in English Family Law” in R. Wintemute and Andenaes (eds) (n 2 above), p 605, 618.

<sup>63</sup> See Taylor (n 62 above), pp 577–578.

<sup>64</sup> As noted above there are now nine jurisdictions that have adopted the gay-marriage model. But the gay-marriage model has been expressly rejected by the United Kingdom. See UKDTI, *Civil Partnership* (n 12 above), p 13 and ss 1 and 3 of the Civil Partnership Act 2004.

opposite-sex to register their partnership without undergoing a ceremony of marriage. There are fewer rights and obligations under Model 2 than those enjoyed by parties married under Model 1.<sup>65</sup> Within Model 2, the law could restrict the partnership to persons who are not closely related by blood or affinity and this could be classified as Model 2A. Alternatively, Model 2 may also be opened up to adult persons who live together and care for each other without having any sexual intimacy, and the latter may be classified as Model 2B. For example, Alberta in Canada has enacted provisions under section 3(1) of the Adult Interdependent Relationship Act which “permits partners to enter into an agreement to create an adult interdependent relationship”. The Alberta legislation also imposes Model 2B on individuals who meet the statutory criteria regardless of their wishes.<sup>66</sup>

The third form is the “same-sex registered partnership model” (Model 3), which is substantially similar to Model 2 above, but for the fact that it is exclusively open to same-sex partners. This model is found in the Scandinavian countries and Germany, subject to certain qualifications.<sup>67</sup> The new United Kingdom Civil Partnership Act (which received Royal Assent on 18 November 2004), also makes provisions for Model 3. The inclusion of Model 2B into the Civil Partnership Bill was rejected by both Houses on various grounds including the fact that family members were already to some extent provided for under other legislation. It was also believed that the inclusion of Model 2B would make the legislation too complex and unworkable.

The fourth is the “full *de facto* model” (Model 4), whereby the law does not require same-sex and opposite-sex parties to register as such but treats them as married by extending to them all the rights and obligations available to married couples on proof of a *de facto* partnership.

The fifth form is the “partial *de facto* model” (Model 5), which is similar to Model 4 but for the fact that it does not confer all the rights and responsibilities available to persons who are parties to a full *de facto* model or heterosexual marriage. The partial *de facto* model could be seen as a halfway house to the full *de facto* model in the same way as the same-sex registered partnership (Model 3) found in Belgium and Holland have evolved into the gay-marriage model (Model 1).

It must be noted that in jurisdictions where the legal status of same-sex unions has evolved from one model to another, there is clearly a plural system

<sup>65</sup> See the jurisdictions cited above. Model 2B was rejected by England and Wales on the ground that opposite-sex couples already have a choice to marry if they so wish. See UKDTI, *Civil Partnership* (n 12 above), p 13. For a critique of the decision to exclude heterosexual *de facto* unions, see Jane Craig, “The Civil Partnership Bill: Cohabitation Law Reform or Missed Opportunity?” [2004] *Family Law* 148.

<sup>66</sup> See Taylor (n 62 above), p 578. Model 2B is imposed by the Alberta law when parties have lived together for three years.

<sup>67</sup> See Taylor (n 62 above), p 578.

of family law. In such circumstances, the law will have to make provisions to regulate the rights and obligations of the following couples:

- (i) same-sex couples who registered under the old law (Models 2 and 3);
- (ii) same-sex couples who marry under the new law (Model 1);
- (iii) same-sex couples who converted from Models 2 or 3 to Model 1; and
- (iv) foreign same-sex couples whose unions belong to any of the above models.

It now remains to consider what might be Hong Kong's future choices and policy options.

### Policy Choices and Options for Hong Kong

From the foregoing overview it will have become clear that the issue of same-sex unions has been on the agenda in many jurisdictions for several years now. It should not come as a surprise, therefore, that the same issues have now emerged in Hong Kong and are begging to be addressed. If Hong Kong wishes to move beyond the 1991 era when homosexual conduct between consenting adults in private ceased to be a criminal offence, it will need to consider at least two primary questions. First, it will have to decide the question: "what should be Hong Kong's policy towards same-sex relationships?" If the answer to the first question is that protection should be granted to them, then, the second question will be: "how far should such protection go?" In other words, whether discrimination on grounds of sexual orientation should be specifically prohibited by law and further, what model or models of same-sex partnership should Hong Kong adopt?

#### *Same-Sex Partnerships in Hong Kong: What Future Direction?*

The question as to what policy Hong Kong should adopt towards same-sex relationships remains largely open. As noted above, even the Government is uncertain at this moment as to what measures should be taken to address the demands of gay and lesbian groups.<sup>68</sup> In addition, the results of the 1996

<sup>68</sup> It should not be assumed, however, that the Hong Kong government has historically been neutral on gay and lesbian rights issue. On the contrary, the government has at times actively opposed any attempt to prohibit discrimination based on sexual orientation. See Petersen (n 10 above), at 351. Also according to Rose Wu, Hong Kong government officials as well as the business and religious groups lobbied the Legislative Council in 1995 "to defeat additional legislative proposals that would have prohibited discrimination on other grounds – sexual orientation, age and race." See Rose Wu, "Homosexuals Deserve Same Equal Rights as Heterosexuals", *Hong Kong Christian Institute*, Sep 2002, p 1, at <http://hkci.org.hk/168b.htm>.

consultation exercise were inconclusive at best and, perhaps predictably, no action has been taken since. In any case, eight years ago is already a long time considering that public opinion has not remained static.<sup>69</sup> This article will now consider briefly the more common arguments that have been raised in Hong Kong and elsewhere on either side of the debate and their potential relevance to Hong Kong's future policymaking.

#### Those opposed to legal protection

It has been argued that the recognition of same-sex unions as marriage will result in undermining the special status of traditional marriage. Since marriage is the foundation of society, the weakening of marriage would have a negative consequence on the entire society.<sup>70</sup> Closely related to this is the widely-held view that marriage provides the ideal environment for human procreation, the rearing of children, and the transfer of essential skills and values from one generation to the next. Some opponents of same-sex marriages are fearful that children raised by same-sex couples may be predisposed to the same sexual orientation as their parents.<sup>71</sup> Others have pointed at certain demographic changes in society as evidence of the decline of the marriage institution. These changes include the rise of divorce, the increase in the number of children born out of wedlock and the increasing number of cohabitation by heterosexual unmarried couples. According to this argument, to recognise same-sex relationship as a marriage would push the traditional marriage to the brink by speeding up the process of its decline.<sup>72</sup> In these circumstances, it is argued that "the state has an interest in reinforcing the status of marriage and should do nothing to undermine its status".<sup>73</sup>

<sup>69</sup> Indeed, as noted above, the survey conducted by the Polytechnic University in Mar 2003 indicated a less hostile attitude towards same-sex relationships. The same can be said of certain government officials.

<sup>70</sup> See *Equal Opportunities* (n 12 above), pp 8–9.

<sup>71</sup> *Ibid.*, p 9. But recent studies now show that there is no difference in the gender development and sexual tendencies of children brought up by gay or lesbian families compared to those brought up in traditional families. See Clare Murray, "Same-Sex Families: Outcomes for Children and Parents" [2004] *Family Law* 136; Golombok, S., Tasker, F. and Murray, C., "Children Raised in Fatherless Families From Infancy: Family Relationships and the Socio-emotional Development of Children of Lesbian and Single Heterosexual Mothers" (1997) 38 *Journal of Child Psychology and Psychiatry*, 783–791.

<sup>72</sup> But as noted by *The Economist*, "Gays want to marry precisely because they see marriage as important; they want the symbolism that marriage brings, the extra sense of obligation and commitment as well as the social recognition. Allowing gays to marry would, if anything, add to social stability, for it would increase the number of couples that take on real, rather than simply passing, commitments." See "The Case for Gay Marriage", *The Economist*, 28 Feb 2004, p 9. Baroness Hale of Richmond also observed in her concurring speech in *Mendoza* (n 34 above), para 143 that "[T]he traditional family is not protected by granting it a benefit which is denied to people who cannot or will not become a traditional family. What is really meant by the 'protection' of the traditional family is the *encouragement* of people to form traditional families and the *discouragement* of people from forming others" (emphasis in original).

<sup>73</sup> See Craig (n 65 above), p 149, commenting on the reaction of some English MPs to the Civil Partnership Bill.

Yet others base their opposition to the legal protection of same-sex relationship on moral and religious grounds. They argue, for example, that traditional marriage is ordained by God since biblical times and that any form of sexual activity between two males or two females is against the law of nature and therefore the law of God. In the words of a US Senator:

“the definition of marriage is ... rooted in our history, in our laws and our deepest moral and religious conviction, and in our nature as human beings. It is a union of one man and one woman. This fact can be respected or it can be resented, but it cannot be altered.”<sup>74</sup>

The foregoing arguments obviously represent the mainstream or traditional understanding of family structure, gender roles and sexual orientation. They may come up in the Hong Kong debate. Indeed, such arguments have previously been voiced in Hong Kong as shown in the 1996 Consultation Paper.<sup>75</sup> But then, as noted above, the rise of the gay and lesbian movement constitutes a powerful global challenge to the mainstream thinking on these issues. It would be unrealistic therefore to expect consensus on such a highly contentious social issue. Nonetheless, the absence of social consensus is not the same thing as strong public opposition to recognition of same-sex relationships. In the author's view, a degree of societal acceptance of gay rights in any political system is essential if favourable legislation is to be passed. And in the absence of such legislation, social acceptance of or tolerance to gay rights can sustain court decisions that are supportive of such rights.

In any case, this article now moves on to consider some of the arguments put forward either in support of the equalisation of marital rights or narrowing the gap between the rights of same-sex couples and those of opposite-sex couples.

#### Those in support of legal protection

The recent case of *Halpern et al v Attorney General of Canada et al*<sup>76</sup> provides an ideal starting point given that most of the arguments raised above were also canvassed in the Divisional Court of Ontario. Only three of the issues raised in *Halpern* are relevant to this discussion. These are:

- (i) whether the common law definition of marriage prohibited same-sex marriages;

<sup>74</sup> See Ralph R. Smith and Russell R. Windes, *Progay/Antigay: The Rhetoric War Over Sexuality*, (Thousand Oaks: Sage Publications Inc., 2000), p 167.

<sup>75</sup> See *Equal Opportunities* (n 12 above), para 32-39, pp 8-9.

<sup>76</sup> See *Halpern et al v Attorney General of Canada et al* (10 Jun 2003) at <http://www.ncgle.org.za/archive/landmarks/halpernC39172.htm>.



- (ii) if so, whether the common law definition of marriage infringes the applicants' equality rights under the Canadian Charter of Rights and Freedom, s 15(1); and
- (iii) if the answer to the above issues is "Yes", whether the infringement is demonstrably justified in a free and democratic society.<sup>77</sup>

A panel of three judges of the Ontario Divisional Court held unanimously that the definition of marriage as the "voluntary union of one man and one woman to the exclusion of all others" prohibited same sex marriages. They also held that this common law definition did infringe the applicant's equality rights under s 15(1) of the Charter.<sup>78</sup> And in respect of the third issue, the court also held that the infringement was not demonstrably justified under s 1 of the Charter.<sup>79</sup> The Attorney General's appeal against the decision of the Divisional Court was unanimously dismissed by the Court of Appeal of Ontario.

At the centre of this legal challenge was the issue of discrimination of gay and lesbian people on the ground of sexual orientation. It was argued by the applicants that the common law definition of marriage drew a formal distinction between opposite-sex couples and same sex couples on the basis of their sexual orientation – that opposite-sex couples had a capacity to marry while same-sex couples did not.<sup>80</sup> Relying on *Egan*,<sup>81</sup> the court agreed that sexual orientation was analogous to the other prohibited grounds of discrimination stipulated under s 15(1); and further that there was differential treatment between heterosexual couples and same-sex couples on the basis of sexual orientation. The court also held that the differential treatment was not "demonstrably justified in a free and democratic society".

In coming to this conclusion the court stressed that the purpose of s 15(1) of the Charter was:

"to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration."<sup>82</sup>

<sup>77</sup> Canadian Charter of Rights and Freedom, s 1.

<sup>78</sup> *Ibid.*, s 15(1) provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

<sup>79</sup> *Ibid.*, s 1 states that the Charter "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

<sup>80</sup> See *Halpern* (n 76 above), para 64.

<sup>81</sup> [1993] 3 F.C. 401 and 103 D.L.R. (4th) 336 (CA).

<sup>82</sup> See *Halpern* (n 76 above), para 60.

In the court's view, the above purpose was infringed by the common law definition of marriage which violated the dignity of persons in same-sex relationships by excluding them from the institution of marriage. "Human dignity", according to the Ontario Court, "means that an individual or group feels self-respect and self-worth". And that human dignity "is harmed when individuals and groups are marginalised, ignored, or devalued, and is enhanced when laws recognise the full place of all individuals and groups within Canadian society".<sup>83</sup> In its final ruling, the Court of Appeal reformulated the definition of marriage in Ontario to be "the voluntary union for life of two persons to the exclusion of all others".<sup>84</sup>

*Halpern* is a landmark decision and may rightly be regarded as a major victory for the gay and lesbian rights movement in Canada. It must be stressed, however, that the Ontario decision did not come suddenly without prior warning. First, as noted in this article, various Canadian provinces since 1997 have granted limited recognition to same-sex couples.<sup>85</sup> Second, in response to the decision of the Supreme Court of Canada in *M and H*,<sup>86</sup> the Federal Parliament of Canada enacted in 2000 the Modernization of Benefits and Obligations Act, SC 200 c 12, to extend federal benefits and obligations attaching to opposite-sex married couples to all unmarried couples that have cohabited in conjugal relationships for a minimum of one year regardless of sexual orientation. Third, the Ontario court noted that two superior courts in Quebec (2002) and British Columbia (2003) had previously also declared invalid the common law definition of marriage.<sup>87</sup> This decision, therefore, was a result of a gradual process that unfolded over time but which, in other jurisdictions might be taken as unprecedented or even as revolutionary.<sup>88</sup>

The Canadian decisions cited above are of interest to Hong Kong for two main reasons. First, Article 84 of the Basic Law empowers Hong Kong courts, in the adjudication of cases, to refer "to precedents of other common law

<sup>83</sup> The Court further elaborated the concept of human dignity by noting that human dignity "is concerned with physical and psychological integrity and empowerment ... It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences." See *Egan* (n 81 above), p 2.

<sup>84</sup> It ordered the Clerk of the City of Toronto to issue marriage licenses to the same-sex applicants and further ordered the Registrar General of the Province of Ontario to accept registration of the marriage particulars of the same-sex couples previously married by the Metropolitan Community Church of Toronto, one of the parties to this suit. See *Halpern* (n 76 above), para 156.

<sup>85</sup> In 1997, British Columbia recognized same-sex couples as legal spouses for purposes of child adoption, child custody, maintenance and access; see *Demian Report 2004* (n 27 above).

<sup>86</sup> *Attorney General for Ontario v M and H* [1999] 171 DLR (4th) 577.

<sup>87</sup> *Hendricks v Quebec (Attorney General)* [2002] JQ No 3816 (SC); *EGALE Canada Inc v Canada (Attorney General)* [2003] BCJ No 994 (1 May 2003).

<sup>88</sup> It should not be imagined that *Halpern* and other similar court decisions will put to rest the anti-gay campaigns within the conservative sections of the Canadian society.

jurisdictions". Such precedents, while clearly not binding on Hong Kong courts, are certainly of persuasive authority. Second, these decisions interpret constitutional provisions which, although not identical, are nonetheless comparable to those applicable to Hong Kong. These include the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) which apply to Hong Kong by virtue of Article 39 of the Basic Law. Article 2(1) of the ICCPR provides for the equal enjoyment of all the rights set out in the ICCPR "without distinction of any kind". And Article 26 (ICCPR) further states that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law".<sup>89</sup> The latter article prohibits discrimination and guarantees to all persons "equal and effective protection against discrimination on any ground *such as*"<sup>90</sup> race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

Besides the Canadian jurisprudence, there are also decisions of UN bodies and the European Court of Human Rights which should be of interest to Hong Kong. For example, in 1994 the Human Rights Committee held in *Toonen v Australia*, that "the reference to 'sex' in articles 2, paragraph 1, and 26 [ICCPR] is to be taken as including sexual orientation"<sup>91</sup> and therefore, a prohibited ground of discrimination. In *Salgueiro da Silva Mouta v Portugal*,<sup>92</sup> the European Court of Human Rights also held that sexual orientation is "a concept which is undoubtedly covered by Article 14 of the Convention [because] the list set out in that provision is illustrative and not exhaustive, as shown by the words 'any ground such as' ". In *Siegmund Karner v Austria*<sup>93</sup> the European Court of Human Rights also held to the same effect that Article 14

<sup>89</sup> Article 25 of the Basic Law states that "[a]ll Hong Kong residents shall be equal before the law."

<sup>90</sup> Author's emphasis. The European Court of Human Rights held that the list of grounds set out in Art 14 of the Convention, (comparable to Art 26 ICCPR) is "illustrative and not exhaustive" and that this interpretation is drawn from the words "such as" which precede the list of grounds. See *Salgueiro da Silva Mouta v Portugal* [2001] 1 FCR 653 at para 28. The House of Lords also agrees that Art 14 "guarantees that the rights set out in the Convention shall be secured 'without discrimination' on any grounds such as those stated in the *non-exhaustive* list in that article." [author's emphasis] See Lord Nicholls of Birkenhead in *Ghaidan Mendoza (FC)* [2004] UKHL 30 at p 3, para 8.

<sup>91</sup> See *Toonen v Australia*, Communication No 488/1992, 31 Mar 1994, CCPR/C/50/D/488/1992, para 8.7.

<sup>92</sup> [2001] 1 FCR 653. In *Salgueiro*, the applicant, relying on Arts 8 and 14 of the European Convention, successfully challenged the decision of the Lisbon Court of Appeal on the ground that the court's decision violated his right to respect for his family life. The Court had based its decision to award parental responsibility to the mother rather than the applicant exclusively on the ground of the applicant's sexual orientation.

<sup>93</sup> *Karner v Austria* (2003) 2 FLR 623. In *Karner* the applicant successfully challenged the decision of the Supreme Court of Austria which had held that the statutory right of family members to succeed to a tenancy held by a deceased family member did not include homosexual partners living as "life-companions".

of the European Convention prohibits discrimination based on sexual orientation.<sup>94</sup>

The ICCPR is implemented in Hong Kong by the Hong Kong Bill of Rights Ordinance (Cap 383). The latter contains Articles 1 and 22 which are identical to Articles 2 and 26 of the ICCPR. The legal status of the ICCPR was enhanced after 30 June 1997 by the Basic Law which now provides under Article 39 that the ICCPR “shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region”. It is arguable that Hong Kong law already prohibits discrimination based on sexual orientation. Additional force to this argument can be drawn from the decisions of the Hong Kong Court of Final Appeal where it has been held that a constitutional document, such as the Basic Law and an international bill of rights such as ICCPR is a living instrument intended to meet changing needs and circumstances. In applying such an instrument, courts must give it a purposive and generous interpretation which seeks “to give effect to the principles and purposes declared in [it]”.<sup>95</sup> One cannot seriously argue that the “principles and purposes” of the ICCPR do not seek to eliminate discrimination based on sexual orientation as well as to protect human dignity without any discrimination. As Baroness Hale of Richmond has so aptly put it in *Mendoza*, it “would be a poor human rights instrument indeed if it obliged the state to respect the homes or private lives of one group of people but not the homes or private lives of another”.<sup>96</sup>

Therefore, it is open to the Hong Kong courts, following *Toonen*, to read the term “sex” into Articles 2 and 26 of the ICCPR<sup>97</sup> to include “sexual orientation”. Alternatively, Hong Kong courts may hold, following *Salgueiro* that since the list of grounds contained in Article 26 of the ICCPR is non-exhaustive, then “sexual orientation” is also an analogous prohibited ground of discrimination. Such a reading of the ICCPR by Hong Kong courts would prohibit discrimination on grounds of sexual orientation not only in relation to the specific circumstances complained of, but would also create an obligation to enact laws and set up procedures to guarantee to all persons equal and effective protection against discrimination on any of the enumerated as well as analogous grounds, including sexual orientation. It should be noted, however that a difference of treatment would amount to unfair discrimination “if it does not pursue a legitimate aim or if there is not a reasonable relationship

<sup>94</sup> Article 14 provides that “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

<sup>95</sup> See *Ng Ka Ling & Others v Director of Immigration* [1999] 1 HKLRD 315, 340.

<sup>96</sup> *Ghaidan v Mendoza* (FC) [2004] UKHL 30, at para 131.

<sup>97</sup> See the corresponding Arts 1 and 22 of the Hong Kong Bill of Rights.

of proportionality between the means employed and the aim sought to be realized".<sup>98</sup>

Also of importance to Hong Kong is the *English Civil Partnership Act* which will apply to the whole of the United Kingdom when it comes into force in 2005.<sup>99</sup> The Act provides for the registration of same-sex partners (to be known as "civil partners"). Civil partners will enjoy most of the rights and responsibilities currently available to married couples.<sup>100</sup> The new law will provide registration facilities to adult same-sex couples throughout the United Kingdom provided they are not parties to existing registered partnerships or valid marriage and are not within prohibited degrees of relationships or closely related.<sup>101</sup> Where both parties or one of them is below the age of 18 years, but is at least 16 years of age, the consent of the parent or other appropriate person is required for those who wish to register their partnership in England and Wales.

Registered same-sex couples will enjoy the legal status of "registered civil partners" with certain rights and responsibilities comparable to those of a married couple. These rights include an obligation to provide reasonable maintenance to one another and the children of the family, the right to joint treatment for income-related state benefits, joint-state pension benefits, income tax benefits, recognition for immigration purposes, the right to gain parental responsibilities for each other's children, including exemption from testifying against one another in criminal prosecutions. Should the partnership breakdown, the parties will have the right to a judicial dissolution on the ground of irretrievable breakdown and division of family assets, provision for residence and contact with the minor children of the couple. There are also provisions for nullity decrees and decrees for judicial separation where appropriate. The Act also makes provisions in cases of death of one of the parties including the right to register the death of the deceased partner, the right to claim a survivor's pension benefits, inheritance, rights under intestacy provisions, succession to tenancy and the right to sue for compensation for fatal accidents.<sup>102</sup>

The enactment of the *Civil Partnerships Act 2004* by the United Kingdom is an equality measure intended to comply with the Human Rights Act of

<sup>98</sup> See *Salgueiro da Silva Mouta v Portugal* [2001] 1 FCR 653, 29. See also Lord Nicholls of Birkenhead in *Ghaidan v Mendoza (FC)* [2004] UKHL 30, para 18.

<sup>99</sup> See s 1(1) which provides that a civil partnership is formed when parties register (i) in England and Wales under Part 2, (ii) in Scotland under Part 3 and (iii) in Northern Ireland under part 4. There is also a provision for registration of civil partnerships outside the United Kingdom, for example, at British consulates overseas.

<sup>100</sup> See UKDTI, *Civil Partnership* (n 12 above), p 13 and the *Civil Partnership Act 2004*.

<sup>101</sup> See s 3 *Civil Partnership Act 2004*.

<sup>102</sup> See *Civil Partnership Bill: Explanatory Notes*, available at <http://www.publications.parliament.uk/pa/cm200304/cmbills/132/3n/04132x—htm>.

1998 by removing most of the existing differential treatment between same-sex couples and married couples in Britain. In the words of the Minister of State for Industry, Ms Jacqui Smith, it was no longer acceptable for the law to discriminate against same-sex couples who live in stable and committed relationships:

“living in exactly the same way as any other family. They are our families, our friends, our colleagues and our neighbours. Yet the law rarely recognises their relationship ... In so many areas, as far as the law is concerned, same-sex relationships simply do not exist.”<sup>103</sup>

By enacting the *Civil Partnerships Act 2004*<sup>104</sup> the United Kingdom has joined the expanding list of world jurisdictions which have extended recognition and legal protection to same-sex relationships.

Here again, it must be noted that although few would have imagined that the United Kingdom would soon join nine other members of the European Union in granting limited recognition to same-sex partnerships, (these include Belgium, Denmark, Sweden, Finland, France, Germany, the Netherlands, Spain and Portugal)<sup>105</sup> there were already some positive indications from the courts. As noted above, the main issue before the House of Lords in *Sterling* was “whether a same-sex partner is capable of being a member of the other partner’s family for the purposes of the Rent Act legislation”. Lord Nicholls of Birkenhead, with whom Lord Slynn and Lord Clyde concurred, held that he was “in no doubt that this question should be answered in the affirmative”.<sup>106</sup> According to Lord Nicholls, opposite-sex couples living together in a stable and permanent sexual relationship are capable of being members of a family for this purpose:

“Once this is accepted, there can be no rational or other basis on which the like conclusion can be withheld from a similarly stable and permanent sexual relationship between two men or between two women. Where a

<sup>103</sup> *Ibid*, “Foreword”, p 9.

<sup>104</sup> The civil partnership law was widely supported by the major political parties. It was previously reported, for example, that Conservative leader Michael Howard had indicated his Party’s support of the Bill. See *The Economist*, 28 Feb 2004. More significantly, both the Scottish Parliament and the Northern Ireland Office Ministers had all agreed to introduce comparable provisions into the Civil Partnership Bill which are now contained respectively in Part 3 and 4 of the Act. See “Background”; Para 6-8 of Civil Partnership Bill: Explanatory Notes.

<sup>105</sup> See Government News Network (GNN) “Landmark Civil Partnership Bill Receives Royal Assent,” Department of Trade and Industry (National), 19 Nov 2004, at <http://www.gnn.uk./Content/Detail.asp?> (visited on 1 Dec 2004).

<sup>106</sup> See *Sterling* (n 54 above), para 53.

relationship of this character exists, it cannot make sense to say that, although a heterosexual partnership can give rise to membership of a family for Rent Act purposes, a homosexual partnership cannot. Where sexual partners are involved, whether heterosexual or homosexual, there is scope for the intimate mutual love and affection and long-term commitment that typically characterise the relationship of husband and wife. This love and affection and commitment can exist in same-sex relationships as in heterosexual relationships.”<sup>107</sup>

The significance of *Sterling*, as noted by Gillian Douglas, is that the House of Lords was prepared to extend the meaning of “family” under the Rent Act to include same-sex couples thus providing a lead to other decision-makers “to see if the same flexibility can be applied elsewhere”.<sup>108</sup>

But *Sterling* has now been overtaken by the Human Rights Act 1998. In June 2004, the House of Lords upheld the decision of the Court of Appeal in *Mendoza*<sup>109</sup> holding that it was discriminatory to treat a survivor of a long-term committed same-sex relationship less favourably than the survivor of a long-term heterosexual relationship for purposes of the Rent Act 1977. Such treatment, according to the House of Lords, violated Articles 14 and 8 of the European Convention.<sup>110</sup> The significance of *Mendoza* is that a surviving same-sex partner in a committed long-term relationship is now entitled, for purposes of the Rent Act 1977, to succeed to a tenancy of his or her deceased partner as if she was his wife or her husband. But *Mendoza* also represents a more general, if also powerful, argument against discrimination based on sexual orientation and will certainly be relied upon in other areas where the law remains discriminatory.<sup>111</sup> Once again, the importance of *Mendoza* for Hong Kong cannot be over-emphasised.

In sum, all the above developments, especially those taking place in the older common law jurisdictions such as Australia, Britain, Canada, New Zealand and the US, including the European Court of Human Rights, will no doubt prove highly relevant if not persuasive to Hong Kong policymakers and anyone in the civil society who may wish to debate these issues.

<sup>107</sup> *Ibid.*

<sup>108</sup> Gillian Douglas, *An Introduction to Family Law* (Oxford: Oxford University Press, 2001), p 47.

<sup>109</sup> *Mendoza v Ghaidan* [2003] 1 FLR 468. For the House of Lord's decision in *Mendoza*, see n 34 above.

<sup>110</sup> In accordance with the Human Rights Act of 1998, s 3 (which came into force on 2 Oct 2000) English courts are required to read and give effect to local legislation “so far as it is possible to do so” in a way which is compliant with the European Convention on Human Rights.

<sup>111</sup> See Rebecca Bailey-Harris, “*Mendoza v Ghaidan* and the Rights of *de facto* Spouses” [2003] *Family Law* 575.

## Conclusion

In a recent article, Hong Kong family law was described as standing at the crossroads. According to the author, Hong Kong is “now ideally placed to bring about a state-of-the-art, multi-disciplinary family law system designed to take us confidently through the present century”.<sup>112</sup> But the author queried whether Hong Kong was “willing and able to rise to this challenge?”<sup>113</sup> Although the author’s main focus was on family mediation, her question is relevant to this article. As this article has shown above, the recognition and protection of the rights of same-sex couples is a neglected area of Hong Kong family law.<sup>114</sup> It is this author’s opinion that a family law system designed to take Hong Kong confidently through the present century should not be too rigid. It must be inclusive and non-discriminatory; it must be humane and sensitive to the emerging family forms. It must also be capable of adequately addressing the changing social values, needs and challenges of the twenty-first century and beyond. It may be too early at this juncture to predict whether Hong Kong will follow the English or the Canadian examples, or indeed, even strike out on its own path. What seems certain, however, is that Hong Kong cannot postpone indefinitely the question whether same-sex couples should be protected by law and if so, what level of protection should be accorded to them.

<sup>112</sup> Sharon D. Melloy, “Family Law Crossroads: Where to From Here? An Analysis of the Current Proposals for Change” (2003) 33 *HKLJ* 289.

<sup>113</sup> *Ibid.*

<sup>114</sup> Not only that, there is currently no law in Hong Kong protecting men and women who live together as husband and wife without being formally married. Nor has this article touched the rights of transsexual persons even though Queen Mary Hospital has conducted several successful gender reassignment surgery in recent years. See Robyn Emerton, “Neither Here nor There: The Current Status of Transsexual and Other Transgender Persons Under Hong Kong Law” (2004) 34 *HKLJ* 245. Interestingly, a transgender person in Sichuan Province, China, has made history by becoming the first male-to-female post-operative transsexual to be legally married at ceremony in Chongzhou attended by villagers and reporters “amid the clatter of drums and firecrackers”, see Chan Siu-sin, “Wedding belle”, *SCMP*, 3 May 2004.