



HONG KONG LAW JOURNAL  
香港法律學刊

VOLUME 35 ■ PART 3 ■ 2005

LEUNG V SECRETARY FOR JUSTICE: PRIVACY,  
EQUALITY AND THE HYPERSEXUALISED  
HOMOSEXUAL STEREOTYPE



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## ARTICLES

### LEUNG V SECRETARY FOR JUSTICE: PRIVACY, EQUALITY AND THE HYPERSEXUALISED HOMOSEXUAL STEREOTYPE

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*In this paper the author critiques the recent decision of the Hong Kong Court of First Instance in *Leung v Secretary for Justice* (2005), in which four provisions regulating particular forms of sexual conduct (including, most famously, the act of “buggery”) were struck down as being in violation of the applicant’s constitutional equality and privacy rights as a homosexual man. In the author’s view, it is unfortunate that the Court opted to employ an equality analysis in declaring one of the four provisions (section 118C of the Crimes Ordinance) to be unconstitutional when the constitutional right to privacy alone would have sufficed. This is so as the nature of the equality analysis that was used in regard to this section (which prohibited buggery for both same-sex and heterosexual couples) served to implicitly endorse the view that homosexual individuals (men in particular) are abnormally preoccupied with sexual relations such that legislative restrictions on buggery represented an intolerable and unconstitutional attack on their identity as gay men. The judicial promotion of such a “hypersexualised” stereotype serves to impede rather than enhance the full and equal participation of homosexual persons in society. Though some might object to the application of privacy rights in such contexts, these objections ought to be discounted on the basis that they tend to be based on an outmoded conception of the right to privacy. It is hoped that these considerations will be taken into account by the Court of Appeal in its forthcoming review of the *Leung* decision.*

#### Part I – Introduction

In the recent decision of *Leung v Secretary for Justice* (2005),<sup>1</sup> Hartmann J of the Hong Kong Special Administrative Region Court of First Instance made

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<sup>1</sup> [2005] HKCFI 368 (Court of First Instance) (hereinafter *Leung*).

a widely publicised<sup>2</sup> declaration to the effect that four sections of the Hong Kong Crimes Ordinance<sup>3</sup> regulating sexual conduct, most notably the act of “buggery” (a term synonymous with “intercourse *per anum*” or “sodomy”<sup>4</sup>), were inconsistent with both the Hong Kong Basic Law<sup>5</sup> and the Bill of Rights<sup>6</sup> and were thus of no force and effect.<sup>7</sup> The Applicant, a 20-year-old homosexual man, challenged the provisions as being discriminatory on the basis that, *inter alia*, they “permitted heterosexual and lesbian couples to give physical expression to their shared sexual orientation”<sup>8</sup> while criminalising various acts of sexual intimacy when engaged in by gay men. For example, pursuant to the Ordinance, once heterosexual and lesbian couples reached 16 years of age they were generally free to engage in “sexual intimacy”<sup>9</sup> (which did not include the act of buggery) whereas homosexual male couples were prohibited from similar expression until each of them reached 21 years of age.<sup>10</sup> Another pair of impugned provisions prohibited individuals (on penalty of up to life imprisonment) from engaging, before reaching 21 years of age, in the act of buggery.<sup>11</sup> These provisions applied both to cases where buggery was committed between a man and a woman as well where committed between two men. Ultimately, Hartmann J declared all of the four provisions at issue to be unconstitutional on the basis that they violated both the Applicant’s equality rights as a homosexual person and his privacy rights. Both of these rights were enshrined in the Basic Law, the Bill of Rights as well as the International Covenant on Civil and Political Rights.<sup>12</sup>

<sup>2</sup> See, for example, A. Wong, “Sodomy is no longer criminal, court rules”, *The Standard* (25 Aug 2005), online: <http://www.thestandard.com.hk/stdn/std/Metro/GH25Ak01.html> (accessed 24 Nov 2005); “Gay Hong Kong Man Wins Legal Fight” CBS News (25 Aug 2005), online: <http://www.cbsnews.com/stories/2005/08/24/world/main793638.shtml> (accessed 24 Nov 2005).

<sup>3</sup> Crimes Ordinance, Part XII, Cap 200 (hereinafter “the Ordinance”).

<sup>4</sup> See s 118C of the Ordinance.

<sup>5</sup> Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (hereinafter “the Basic Law”).

<sup>6</sup> Hong Kong Bill of Rights Ordinance 1991 Cap 383 (hereinafter “the Bill of Rights”).

<sup>7</sup> *Leung*, n 1 above at paras 47, 152.

<sup>8</sup> *Leung*, n 1 above at para 3.

<sup>9</sup> Hartmann J defined (at para 16) “sexual intimacy” as “any act of such intimacy with or towards another person that falls short of sexual intercourse; namely, penetration.” This term was defined for the purposes of determining what sorts of conduct might constitute “gross indecency” (a term that is not defined) under the terms of the Ordinance. Pursuant to s 146 of the Ordinance, a person, male or female, who commits an act of “gross indecency” with a boy or a girl under the age of 16, is guilty of an offence. Thus, subject to the operation of the impugned buggery provisions, the Ordinance sets out a general “threshold age,” for engaging in sexual intimacy of 16.

<sup>10</sup> Section 118H of the Ordinance states: “A man who – commits an act of gross indecency with a man under the age of 21; or being under the age of 21 commits an act of gross indecency with another man, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 2 years.”

<sup>11</sup> See s 118C of the Ordinance.

<sup>12</sup> *Leung*, n 1 above at para 47.

This historic decision, which follows a recent trend both in Commonwealth countries<sup>13</sup> and other jurisdictions,<sup>14</sup> was the first in Hong Kong to recognise rights under the Basic Law and Bill of Rights for individuals to be free from discrimination on the basis of sexual orientation. However, Hartmann J's decision, which is at times rather conclusory and at other times somewhat imprecise, raises a number of broad questions regarding the nature of constitutional litigation in Hong Kong. I will seek to address but one of these here.<sup>15</sup> In particular, I wish to explore whether it is appropriate, from a constitutional rights perspective, for a court to apply an equality, as opposed to a privacy rights analysis in considering impugned criminal provisions that regulate sexual conduct.

I assert in Part III of the paper that an important distinction needs to be made when determining the appropriateness of constitutional equality (versus privacy) rights in cases impugning provisions regulating sexual conduct. In particular, the constitutional treatment accorded to provisions that regulate sexual conduct in a manner that is facially directed at particular groups must be distinguished from those that regulate forms of conduct that can be performed regardless of the participants' sexuality. In the case of provisions that (at least on their face) apply neutrally to both heterosexuals and homosexuals alike, I would argue that a privacy analysis is the preferable constitutional tool with which to assess such provisions. This is so as the use of an equality analysis (when deployed on behalf of homosexual persons) in such contexts tends to promote and reinforce a "hypersexualised" stereotype of homosexual individuals (gay men, in particular). The judicial promotion of such a stereotype has the unfortunate and rather ironic consequence of impeding, rather than enhancing, the full and equal participation of homosexual individuals in society. By contrast, where provisions are crafted in such a way that they are directed (in either purpose or effect) at particular minorities based on their shared sexual orientation, both equality and privacy analyses are appropriate and indeed necessary to capture the full scope of the violation at issue.

In Part IV of the paper I consider two possible counter-arguments to the assertion that privacy, and not equality rights ought to be used in order to strike down facially-neutral provisions regulating sexual conduct. In particular, I seek to rebut the notion that the use of privacy rights in such cases represents a rather insulting and begrudging tolerance of (implicitly) disapproved of conduct, so long as it is conducted in private. I also attempt to rebut the argument that the judicial promotion of the hypersexualised homosexual

<sup>13</sup> See, for example, *Halpern v Canada (Attorney General)*, (2003) 65 OR (3d) 161 (CA); *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1998) 6 BHRC 127 (Con Ct SA); though cf *Banana v State*, (2000) 8 BHRC 345 (SC Zimbabwe).

<sup>14</sup> See, for example, *Lawrence v Texas* 539 US 558 (2003); *Dudgeon v United Kingdom* [1981] ECHR 5 (hereinafter *Dudgeon*), *Norris v Ireland* [1988] ECHR 22 (hereinafter *Norris*).

stereotype is of trivial import, existing as it does on the plane of the purely “symbolic.”

Before proceeding to explore the above implications of the *Leung* decision on privacy and equality rights adjudication, the basic facts and holdings of the case must be briefly summarised. I undertake this endeavour in Part II of the paper.

## Part II – The Facts and Holdings in *Leung*

The Applicant in *Leung* had not actually been charged with any offence under the Ordinance, and thus made a free-standing application for a declaration of unconstitutionality. As a result, the Secretary for Justice argued that the Court did not have the jurisdiction to entertain the application. This argument was based on the fact that, as a matter of common law, the Court’s powers of judicial review have historically been contingent on the presence of an underlying exercise of public authority in order to give the Court jurisdiction to entertain a challenge.<sup>16</sup> As no such act (such as a prosecution) had occurred in the instant case, it was argued that the Court did not have jurisdiction.<sup>17</sup>

Hartmann J did not accept the Secretary for Justice’s jurisdictional argument. The Court held that in light of the “inherent structure and purpose” of the Basic Law, the Applicant’s claim could be heard, despite the absence of any underlying exercise of public authority. In this regard Hartmann J cited Article 35(1) of the Basic Law, which states that “Hong Kong residents shall have the right to ... access to the courts ... for timely protection of their lawful rights and interests ... and to judicial remedies.”<sup>18</sup> The Court properly noted that for the Applicant to bring about a valid exercise of public authority in this case, he would have had to break the law in question and thereby risk (up to life) imprisonment. Following the reasoning of the European Court of Justice on this point,<sup>19</sup> Hartmann J held that:

<sup>15</sup> One issue that I will not delve into in any detail is the Court’s extensive reliance in *Leung* on international and foreign comparative jurisprudence. For more on this issue, see A. Byrnes, “Jumpstarting the Hong Kong Bill of Rights in its Second Decade? The Relevance of International and Comparative Jurisprudence” (Symposium: A Decade of the Bill of Rights and the ICCPR in Hong Kong; Hong Kong: Centre for Comparative and Public Law, Hong Kong University (2002)); and C. McCrudden, “Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights” 20(4) *Oxford Journal of Legal Studies* (2000) 499.

<sup>16</sup> British case law, such as *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 at 408E was cited by Hartman J in this regard (at para 49).

<sup>17</sup> *Leung*, n 1 above at paras 51–52.

<sup>18</sup> *Ibid.*, at para 56.

<sup>19</sup> On this point Hartmann J cited (at para 58) *Union de Reguenos Agricultures v Council of the European Union* [2003] QB 893 at 906.

“... a litigant, such as the applicant in this case, is not required to break the law in order to secure the route to an effective remedy. If, however, the Basic Law guarantees a remedy – without imposing any obligation to break the law in order to challenge it – where is that remedy to be found? Without the need to cast the net further out into jurisprudential waters, it is to be found in the procedure adopted by the applicant in this case; that is, by way of seeking declaratory adjudication.”<sup>20</sup>

The Court also addressed the concern that by permitting litigants such as the Applicant, who have not been directly affected by the exercise of public authority, to challenge the constitutionality of legislation, the proverbial “flood-gates” would be opened, thereby inundating the courts with similar claims. In this regard, after canvassing Scottish,<sup>21</sup> British<sup>22</sup> and Canadian<sup>23</sup> authorities on point, Hartmann J held that courts can easily avoid such concerns by applying an appropriate test for the granting of discretionary standing.<sup>24</sup> Specifically, where litigants such as the Applicant seek declaratory relief without being able to demonstrate that they are directly affected by an underlying exercise of public authority, Hartmann J held that courts should determine whether (a) there is a more appropriate procedure open to the applicant; (b) the issue is “real” and not hypothetical or academic; and (c) the applicant has a sufficient interest in the matter or in raising the issue.<sup>25</sup> On all of these points, Hartmann J held that the Applicant’s circumstances were such that the discretion to hear his challenge ought to be exercised by the Court.<sup>26</sup> In this way the Applicant was able to invoke the supervisory jurisdiction of the Court and engage its responsibility for ensuring that all Hong Kong legislation properly conforms to the strictures of the Constitution.<sup>27</sup>

<sup>20</sup> *Ibid.*, at para 59.

<sup>21</sup> At para 72 of *Leung*, Hartmann J cited *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438 at 448.

<sup>22</sup> At para 73 of *Leung*, Hartmann J cited *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 (HL) at 82.

<sup>23</sup> *Canadian Council of Churches v Canada* [1992] 1 SCR 236 at 253.

<sup>24</sup> *Leung*, n 1 above at paras 70–81.

<sup>25</sup> *Ibid.*, at paras 72–81.

<sup>26</sup> *Ibid.*

<sup>27</sup> Hartmann J cited (at para 54) *Ng Ka Ling v Director of Immigration* [1999] 1 HKC 291 at 322 on this point. The Court also cited (at para 62) the House of Lords decision of *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] AC 1 (HL) for the proposition that “the jurisdiction to grant declaratory relief is not founded solely upon a decision of a public authority and may, in appropriate cases, be employed for the purpose of obtaining an adjudication on the validity of legislation, in so far as that legislation affects an applicant.”

Having overcome this initial jurisdictional hurdle (as well as an argument based on unreasonable delay),<sup>28</sup> the Court moved on to analyse the merits of the Applicant's challenge. In this regard it is significant that the Secretary for Justice conceded that three out of the four impugned provisions were constitutionally unsustainable.<sup>29</sup> Without in-depth analysis Hartmann J accepted that each of these three provisions discriminated against the Applicant as a homosexual man and, in addition, arbitrarily interfered with his right to self-autonomy in private.<sup>30</sup> These violations were rooted in Articles 25 (equality before the law) and 39 (inclusion of the International Covenant on Civil and Political Rights into Hong Kong law) of the Basic Law as well as Articles 1 (rights to be enjoyed without distinction of any kind), 14 (protection against arbitrary or unlawful interference with privacy) and 22 (equality before and equal protection of the law) of the Bill of Rights.<sup>31</sup> In laying the foundation for these conclusions, the Court held, citing jurisprudence of the United Nations Human Rights Committee<sup>32</sup> and the European Court of Human Rights,<sup>33</sup> that sexual orientation is capable of defining a class of persons.<sup>34</sup> Pointing to the treatment of homosexuals in Nazi Europe, Hartmann J came to this conclusion on the basis that gay men have been historically disadvantaged by being "perceived to belong to a group marked by stereotyped capacities."<sup>35</sup>

The first section conceded by the Secretary for Justice as being unconstitutional, section 188H of the Ordinance, permitted homosexual male couples to engage in what the Court termed "acts of sexual intimacy" only after both parties reached the age of 21. The Court defined such acts as follows: "any act of ... intimacy with or towards another person that falls short of sexual intercourse; namely, penetration."<sup>36</sup> As noted above, heterosexual and

<sup>28</sup> The Court (at paras 82–89) canvassed the argument, raised by the Secretary for Justice, that the Applicant had unreasonably delayed bringing forth his challenge, and ought to thus be precluded from presently doing so. This was so, it was argued, because the Applicant, now 20 years old, became subject to differential treatment at the age of 16 – when heterosexual and lesbian couples would be free to engage in intimate sexual activity and he would be precluded from doing so with other men. The Court acknowledged that delay was a valid argument, but held that where (a) the violation of a class of persons' fundamental rights is alleged to be ongoing; (b) rights of others have not been substantially prejudiced by the delay; and (c) the delay has not been detrimental to good administration, the delay ought to be condoned by a court. Hartmann J found that all of these conditions were satisfied in the instant case.

<sup>29</sup> *Leung*, n 1 above at para 99.

<sup>30</sup> *Ibid.*

<sup>31</sup> For an explanation of the complex interaction of these three interrelated constitutional documents, see S. Young, "Restricting Basic Law Rights in Hong Kong" (2004) 34 *HKLJ* 109–132.

<sup>32</sup> *Toonen v Australia*, Vol 112 International Law Reports, 328; Communication No 488 (1992) (hereinafter *Toonen*).

<sup>33</sup> *Salgueiro da Silva Mouta v Portugal* No 33290196.

<sup>34</sup> *Leung*, n 1 above at paras 43–36.

<sup>35</sup> *Ibid.*, at para 44.

<sup>36</sup> *Ibid.*, at para 16.



lesbian couples were permitted to engage in such conduct provided they had reached the age of 16. Hartmann J accepted the Secretary for Justice's concession and held that section 118H must be "read down" so that references to "under the age of 21" are read as references to "under the age of 16" with respect to homosexual male couples. The second concession (also accepted by the Court) related to the fact that the Ordinance permitted heterosexual and lesbian couples who are 16 or older to engage in acts of sexual intimacy with each other where one or more other persons take part or are present. Homosexual male couples, however, whatever their age, were prohibited from having sexual relations in the presence of others. This was so as section 118J(2)(a) deemed such conduct, where gay couples were involved (and wherever actually carried out), to be in public and thus subject to criminal sanction. The Court agreed that this deeming provision was constitutionally unsustainable. The Secretary for Justice's final concession stemmed from the fact that, while a heterosexual or lesbian couple (over the age of 21) was permitted to engage in buggery even though one or more other persons take part or are present, homosexual male couples, whatever their age, were prohibited from such conduct. This was so as section 118F(2)(a), like section 118J(2)(a), deemed such conduct to be in public (wherever it actually takes place) and therefore subject to criminal sanction. This subsection was similarly declared by Hartmann J to be unconstitutional.

The one section that the Secretary for Justice did not concede as being unconstitutional was section 118C of the Ordinance, which made it unlawful (with a maximum penalty of *life imprisonment*) for a gay couple to commit buggery with each other if either of them was under the age of 21. The Secretary of Justice defended the constitutionality of this section on the basis of two contentions. First, that it is for the legislature to determine how best to protect young persons (physically, psychologically, economically and, in this case, especially *morally*). As a result, it was argued, the courts should defer to the legislature's sovereignty in this regard. Second, it was argued that when read in conjunction with section 118D (which makes it an offence for a man to commit buggery with a woman who is under the age of 21), section 118C was neither discriminatory nor did it constitute an arbitrary interference in the private life of gay men.<sup>37</sup>

Hartmann J disagreed with both of the Secretary for Justice's defences of section 118C of the Ordinance. With regard to deference to the legislature on questions involving the moral protection of young persons, the Court accepted the general proposition that the legislature is in a better position than the courts to judge prevailing "social norms and values." As such, the

<sup>37</sup> *Ibid.*, at para 101.



legislature must be able to give expression to those norms and values by holding that homosexual activity involving adolescents of a certain age should be prohibited. However, Hartmann J held in rejecting the application of this argument to the instant case:

“... no evidence was put before me to demonstrate what today – if it can be ascertained – is the prevailing view of the Hong Kong community towards matters of homosexual activity carried out consensually and in private. In a cosmopolitan society like Hong Kong ‘social norms and values’ change, often rapidly.”<sup>38</sup>

Ultimately, the Court held, based in part on a reading of the text of the Basic Law,<sup>39</sup> that when matters of “high constitutional importance” such as equality or privacy (as opposed to, say, questions involving the allocation of

<sup>38</sup> *Ibid.*, at para 106. Though beyond the scope of this paper, it must be noted that the Court’s analysis in this regard is fertile ground for an exploration of the appropriate role and sources of public opinion in Hong Kong constitutional interpretation. In this regard it should be noted that the extent to which courts take note of public opinion in interpreting constitutional texts is often tied to the judicial view of its own role as an independent source of protection for minority rights in a democratic state. See, for example *State v Makwanyane & Anor* [1995] ICHRL 34, in which Chaskalson P, writing for the Constitutional Court of South Africa, held (at para 88) with regard to the relevance of public opinion in determining whether capital punishment was “cruel, inhuman or degrading treatment or punishment” under the Transitional Constitution:

“Public opinion may have some relevance to this inquiry, but in itself, it is no substitute for the duty vested in the courts to interpret the constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication ... The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process.”

See also, in the American context, the comments of Jackson J in *West Virginia State Board of Education v Barnette* 319 US 624 (1943) at 638.

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

<sup>39</sup> *Ibid.*, at paras 107–108, wherein Hartmann J held that “[t]he Hong Kong courts today have a constitutional obligation to consider whether legislation accords with the Basic Law and in that regard I consider it legitimate to look to the nature and purpose of the Basic Law itself rather than make a hazardous attempt to identify shifting social values. As to the Basic Law, in its protection of a wide range of rights, I see it as contemplating an open and essentially democratic society, one based on equality of all persons before the law and on the dignity of the individual, by which I mean all persons – in their sameness and difference – being worthy of respect.”

resources)<sup>40</sup> are under consideration, the courts are obliged to give “considerably less” deference to the legislature than would otherwise be the case.<sup>41</sup> Hartmann J further held that with respect to constitutional privacy and equality rights (which were each defined quite expansively), if any provision is demonstrated to be inconsistent with such rights, “cogent and persuasive reasons” must then be provided in order to justify such inconsistency.<sup>42</sup> Thus, the Secretary for Justice’s first argument in favour of the constitutionality of section 118C, based on judicial deference, was rejected by the Court in *Leung*.

The second argument set forth by the Secretary for Justice in defence of section 118C, that the section was not actually discriminatory or a violation of privacy, was also rejected by the Court in *Leung*. The Secretary for Justice asserted that, as sections 118C and 118D prohibit both buggery involving both heterosexual and homosexual couples under the age of 21, the sections were directed at the (putatively harmful) act of buggery itself, and were thus untainted by discrimination on the basis of sexual orientation.<sup>43</sup> This argument was rejected by Hartmann J on the basis that the impugned sections were both directly and indirectly discriminatory. With regard to direct discrimination, the Court noted that in terms of section 118C, when homosexual buggery takes place, both men are made criminally liable, whereas pursuant to section 118D, only the man is made criminally liable, not the woman. In the Court’s view, this constituted “a direct inequality of treatment.”<sup>44</sup> Hartmann J did not elaborate on this rather conclusory holding by specifying the grounds upon which this direct inequality of treatment was based (though presumably he was referring to either discrimination on the basis of sexual orientation and/or sex). However, with regard to the indirectly discriminatory effect of section 118C (which was held in any event to be the more “general and profound”<sup>45</sup> violation), the Court found, following a

<sup>40</sup> In making this distinction, Hartmann J relied upon the dictum of Lord Hoffmann in *R (Alconbury Ltd) v Environment Secretary* [2001] 2 WLR 1389 (HL) at 1411. It should be noted that the distinction between rights of “high constitutional importance” and those involving the allocation of resources is one that is open to challenge. This distinction may be specious as many fundamental rights have serious resource allocation consequences (eg the right to a trial within a reasonable time); whereas many classic socio-economic rights (such as the right to housing or medical care) have consequences on fundamental civil-political interests such as the right to life or security of the person. As an example, the right to social security, enshrined in 27(1)(c) of the South African Bill of Rights was commented upon as follows by the Constitutional Court in *Khosa v Minister of Social Development* 2004 (6) BCLR 569 (SACC) per Mokgoro J: “The socio-economic rights in our Constitution are closely related to the founding values of human dignity, equality and freedom. Yacoob J observed in *Grootboom* that the proposition that rights are interrelated and are all equally important, has immense human and practical significance in a society founded on these values.”

<sup>41</sup> *Ibid.*, at para 112.

<sup>42</sup> *Ibid.*, at para 123.

<sup>43</sup> *Ibid.*, at paras 124–125.

<sup>44</sup> *Ibid.*, at para 128.

<sup>45</sup> *Ibid.*, at para 127.

decision of the Ontario Court of Appeal,<sup>46</sup> that “for gay couples the only form of sexual intercourse available to them is anal intercourse; that is, the act of buggery.”<sup>47</sup> Since buggery was the only form of sexual intercourse available to gay couples (a matter that is questioned and discussed further below), the Court reasoned, a prohibition against buggery operates as an unsustainable form of “disguised discrimination”<sup>48</sup> based on sexual orientation.

After having concluded that the four impugned sections represented *prima facie* violations of the Applicant’s equality and privacy rights, Hartmann J proceeded to determine whether the provisions were nevertheless constitutionally valid. In this regard, the Court cited the three-part test set out by Bokhary J (as he then was) in *R v Man Wai Keung (No 2)*<sup>49</sup> that must be met in order to justify a departure from identical treatment:

“... one, that sensible and fair-minded people would recognize a genuine need for some difference of treatment; two, that the difference embodied in the particular departure selected to meet that need is itself rational; and, three, that such departure is proportionate to such need.”<sup>50</sup>

Though Hartmann J did not explicitly apply each of the three prongs of the test (or, more importantly, explain how the test, which clearly relates to violations of equality rights, worked to somehow justify violations of privacy rights), he held that the four impugned violations were neither rationally connected to the stated goals of protecting young men from moral degradation and disease, nor did they represent constitutionally proportionate attempts to realise these goals.

With regard to the moral justification underlying the impugned provisions, the Court rhetorically asked: “if young men who are unsure of their sexuality are to be deterred in this way, why not young women too? Where is the justification for holding that ‘recruitment’ into homosexuality deserves imprisonment but ‘recruitment’ into lesbianism does not?”<sup>51</sup> Hartmann J rejected any putative public health justification for the differential treatment

<sup>46</sup> *Ibid.*, at para 139, following *R v CM*, (1995) 98 CCC (3d) 481 (Ont CA), in which Abella J held that an impugned section of the Canadian Criminal Code, which criminalised the act of sodomy when performed by *all* unmarried persons under the age of 18 “arbitrarily disadvantages gay men by denying to them until they are 18 a choice available at the age of 14 to those who are not gay, namely, their choice of sexual expression with a consenting partner to whom they are not married. Anal intercourse is a basic form of sexual expression for gay men. The prohibition of this form of sexual conduct found in s 159 accordingly has an adverse impact on them. Unmarried, heterosexual adolescents 14 or over can participate in consensual intercourse without criminal penalties; gay adolescents cannot.”

<sup>47</sup> *Ibid.*, at para 134.

<sup>48</sup> *Ibid.*, at para 141.

<sup>49</sup> (1992) 2 HKPLR 164.

<sup>50</sup> *Ibid.*, at 179.

<sup>51</sup> *Leung*, n 1 above at para 149.

by again citing the ruling of Abella J of the Ontario Court of Appeal, who held (in a similar case) that “I can see no rational connection between protecting someone from the potential harm of exercising sexual preferences and imprisoning that individual for exercising them. There is no proportionality between the articulated health objectives and the Draconian criminal means chosen to achieve them.”<sup>52</sup> Thus, the Court held that each of the challenged sections was inconsistent with the Basic Law and the Bill of Rights, and that declarations should be made to that effect.<sup>53</sup>

### Part III – Equality vs Privacy: Avoiding the Hypersexualised Homosexual Stereotype

Though Hartmann J concluded in *Leung* that both the Applicant’s privacy and equality rights were violated by the impugned sections of the Ordinance, the manner in which the Court defined the right to privacy seems to indicate that the ruling was one based primarily on the recognition of equality rights. With regard to defining privacy, Hartman J referred to a number of foreign authorities, including the Constitutional Court of South Africa and the European Court of Human Rights. In connection with the latter, Hartmann J noted that “it is well established in the case law of the European Court of Human Rights that *sexual orientation is included in that right*.” [emphasis added]<sup>54</sup> This comment reveals a lack of precision in distinguishing between sexual orientation as a *status* (ie “a personal characteristic that is immutable or changeable only at an unacceptable cost to personal identity”<sup>55</sup>) and sexual orientation as merely reflected in a choice to engage in particular sexual *activity* at any given point in time. Though the underlying status may inform a given choice to act, the two ought to be kept analytically distinct. In the context of constitutional privacy rights, an individual’s capacity to choose a particular sexual partner or practice is generally protected (at least on a *prima facie* basis),<sup>56</sup> but this choice does not (and indeed ought not to) require that the individual possess any underlying *status* in order to gain protection. Hartmann J does not seem to make this distinction clear in his ruling, and indeed he exacerbates this ambiguity by analysing the alleged privacy and

<sup>52</sup> *R v CM*, n 46 above at para 137.

<sup>53</sup> *Leung*, n 1 above at para 151.

<sup>54</sup> *Ibid.*, para 120.

<sup>55</sup> See, in the Canadian context, *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13. See also *Egan v Canada* [1995] 2 SCR 513 at para 5.

<sup>56</sup> In this regard, Hartmann J did indeed follow the dictum of Sachs J, of the Constitutional Court of South Africa, to the effect that privacy includes the “right to get on with your life, express your personality and make fundamental decisions about your intimate relationships without penalisation.” See *Leung*, n 1 above at para 116, citing *National Coalition*, n 13 above at 163.

equality violations in rather disorganised alternating paragraphs rather than in separate sections.<sup>57</sup> As I will attempt to show below, there are important reasons why, in the context of a constitutional challenge to criminal buggery provisions, a Court should treat privacy and equality provisions quite distinctly.

Perhaps the most notable feature of the *Leung* decision was the Court's novel recognition (as a matter of Hong Kong law) that sexual orientation amounted to a valid ground for the assertion of an equality rights claim. This is indeed an historic development, which in other jurisdictions has paved the way for a wide variety of successful challenges to legislation (and other government action) that was ruled to be discriminatory against lesbian, gay, bisexual and transsexual ("LGBT") individuals.<sup>58</sup> To the extent that such recognition might ultimately lead to better protection against discrimination, the decision can be viewed as salutary. However, a pressing question that should be answered is whether the striking down of a statute criminalising buggery is the appropriate case for establishing sexual orientation as a prohibited ground for discrimination. For the reasons that follow, I would argue that where a provision applies "neutrally" to conduct (such as buggery) that can be performed by both heterosexual and homosexual couples, a privacy analysis is indeed the more preferable approach. Indeed the one section of the Ordinance before the Court in *Leung* whose discriminatory character was not conceded by the Secretary for Justice represents just such a facially-neutral provision. As noted above, section 118C of the Ordinance, when read in conjunction with section 118D, essentially made it an offence for a man to commit buggery with a *person* who is under the age of 21. As such, it represented a facially-neutral scheme judged to be discriminatory by Hartmann J due to its *presumed* disproportionate effects on homosexual men.

The primary reason for insisting on privacy, and not equality, as the appropriate right upon which to rely when impugning the constitutionality of facially-neutral statutes criminalising sexual conduct is the fact that equality arguments in this context tend to promote the pernicious view that homosexual persons are necessarily associated with and defined by sexual conduct in a manner that heterosexual persons are not. This is so as when courts use equality analyses to strike down facially-neutral provisions regulating sexual conduct, such courts are forced to assert (or implicitly suggest) that the conduct at issue is somehow fundamental to the status of being a homosexual person. Indeed the Court in *Leung* relied on the dictum of Abella J, (then) of the Ontario Court of Appeal to the effect that "[a]nal intercourse is a basic form of sexual expression for gay men. The prohibition of this form

<sup>57</sup> See, for example, *Leung*, n 1 above, at paras 115–121.

<sup>58</sup> See nn 12 and 13 above.



of sexual conduct...accordingly has an adverse impact on them.”<sup>59</sup> Such arguments ought to be avoided, in my view as they reinforce (with an influential judicial imprimatur) an existing *hypersexualised* stereotype of homosexual persons. This stereotype is indeed quite damaging and has been an historically significant hindrance to the full participation of LGBT persons in society.<sup>60</sup>

As a general matter, it is easy to see how the wearing of a permanent label advertising one’s presumed propensity to engage in (especially stigmatised) sexual conduct can make life particularly challenging in a whole host of public and private arenas.<sup>61</sup> Thus, ironically, through the associated promotion of this damaging stereotype, the use of an equality argument in striking down facially-neutral legislation regulating sexual conduct actually *impedes* the equal participation in society for LGBT persons. This criticism was described by Bruce MacDougall in the Canadian context as follows:

“While it is true today that men and women may be classified as “homosexual” for certain legal purposes, the prevalent attitude nevertheless remains that adult homosexuality is an aberration – *it entails a state of heightened sexualization*. Thus, homosexuality is directly equated with sexual acts in a way that heterosexuality is not. Judges have made this assumption even in cases where they have taken a “positive” approach to the actual resolution of a legal situation involving homosexuality. The judicial presumption that homosexuals are abnormally preoccupied with sex is reflected in numerous cases.” [emphasis added]<sup>62</sup>

<sup>59</sup> R v CM, n 46 above. It should be noted that Abella J came to the conclusion that anal sex was a basic form of sexual expression for gay men without citing any evidence on point, and thus her conclusion was made through taking of judicial notice. In my view, the taking of judicial notice on matters pertaining to the nature and prevalence of sexual practices in general is an exercise fraught with danger, often revealing more about the prejudices and misconceptions of the judge in question than about the actual character of sexual practices engaged in by the public at large. A particularly revealing example of this phenomenon can be found in the reasons of McNally J, writing for the majority of the Supreme Court of Zimbabwe in *Banana*, n 13 above. In that case, McNally J responded as follows to the argument that a provision prohibiting sodomy between two men, but not between a man and a woman discriminated on the basis of sex:

“I confess that I regard this argument as a kind of ‘chop-logic’, entirely lacking in common sense and real substance. Of course, it is technically correct. But realistically, and without going into sordid detail, how often does it happen that men penetrate women per anum? How often, if it does happen, is it the result of a drunken mistake? Or an excess of sexual experimentation in an otherwise acceptable relationship? And, most importantly, how can it be proved? I refrain from further analysis.” [emphasis added].

<sup>60</sup> See W. Allen, “Oversexed and Undermined: The Perception of Hypersexuality Among Gay Men” (Honours Thesis, College of William & Mary, 2004-05)

<sup>61</sup> See, for example, C.R. Peterson & D.A. Hedlund, “Heterosexism, Homosexual Health and the Church,” online: <http://perham.eot.com/~vati/peterson/doc2.html> (accessed 17 November 2005); B. Ryan, “A New Look at Homophobia and Heterosexism in Canada” (2003, Canadian AIDS Society Report), online: [http://www.cdn aids.ca/web/repguide.nsf/7df11ef9c5b7c745852568ff007d335e8/e597f908b523522c85256e91006f2fcf/\\$FILE/homophobia%20report\\_eng.pdf](http://www.cdn aids.ca/web/repguide.nsf/7df11ef9c5b7c745852568ff007d335e8/e597f908b523522c85256e91006f2fcf/$FILE/homophobia%20report_eng.pdf) (accessed 13 November 2005).

<sup>62</sup> B. MacDougall, “The Legally Queer Child” (2004) 49 *McGill LJ* 1057.

The judicial perpetuation of the stereotypical view that homosexual persons are abnormally preoccupied with sex is particularly damaging when one considers that those arguing against the recognition of LGBT rights often explicitly allege in support of their arguments, *inter alia*, that homosexual persons are generally: (a) more promiscuous than heterosexuals; (b) more likely than heterosexual persons to engage in “risky” sexual practices and thus more likely to contract sexually transmitted diseases; (c) less able than heterosexuals to form and maintain strictly monogamous relationships for extended periods of time; and, perhaps most damagingly, (d) more likely to sexually abuse children than heterosexuals.<sup>63</sup> It is thus particularly regrettable when benevolent judicial attempts at granting protective equality rights to LGBT persons actually add fuel to the fire of those arguing against the very recognition of those same rights.

The notion that a facially-neutral criminal restriction on buggery is necessarily tied to the status of homosexuality was properly criticized by Blackmun J of the Supreme Court of the United States in *Bowers v Hardwick* (1986).<sup>64</sup> In *Bowers*, the majority of the Court construed the issue of whether such a criminal prohibition (in this case passed in by the Georgia state legislature) was precluded by the Due Process Clause of the 14th Amendment as being synonymous with asking whether that clause protected a “fundamental right to engage in *homosexual sodomy*.” [emphasis added]<sup>65</sup> In his dissenting judgement, which was later followed by the majority of the court in *Lawrence v Texas* (2003),<sup>66</sup> Blackmun J held:

“... the Court’s almost *obsessive focus* on homosexual activity is particularly hard to justify in light of the broad language Georgia has used. Unlike the Court, the Georgia Legislature has not proceeded on *the assumption that homosexuals are so different from other citizens that their lives may be controlled in a way that would not be tolerated if it limited the choices of those other citizens*. Rather, Georgia has provided that “[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.” The sex or status of the persons who engage in the act is irrelevant as a matter of state law ... [The Applicant’s claim that the impugned section] involves an unconstitutional

<sup>63</sup> See, for example, J. Shea *et al*, “‘Gay Marriage’ and Homosexuality: Some Medical Comments,” online: [http://www.lifesite.net/features/marriage\\_defence/SSM\\_MD\\_evidence.pdf](http://www.lifesite.net/features/marriage_defence/SSM_MD_evidence.pdf) (accessed 13 November 2005); P. Pariseau, “The Homosexual Issues Involving Children in Canada” (2003)(Report to UN Committee on Rights of the Child), online: [http://www.crin.org/docs/resources/treaties/crc.34/Canada\\_RW\\_Update.pdf](http://www.crin.org/docs/resources/treaties/crc.34/Canada_RW_Update.pdf); J. Adolphe, “The Case Against Same-Sex Marriage in Canada: Law and Policy Considerations” (2004) 18 *BYU Journal of Public Law* 149.

<sup>64</sup> 478 US 186 (1986) (hereinafter *Bowers*).

<sup>65</sup> *Ibid.*, at 191.

<sup>66</sup> *Lawrence*, n 14 above.



intrusion into his privacy and his right of intimate association *does not depend in any way on his sexual orientation.*" [emphasis added]<sup>67</sup>

Thus, Blackmun J criticised the majority of the Court in *Bowers* and construed the issue as being whether there existed a constitutional right for (both homosexual and heterosexual) people "to decide for themselves whether to engage in particular forms of private, consensual sexual activity."<sup>68</sup> Like the majority of the Court in *Bowers*, the Court in *Leung* was forced to assert (or rather assume, in the absence of expert evidence on point) that the act of buggery is inherently fundamental to a homosexual male's personal identity in a manner that is not the case for others.

It should be reiterated at this point that, due to the implicit promotion of the pernicious hypersexualised homosexual stereotype, the use of privacy rather than equality rights ought to be preferred only in the context of constitutional challenges to *facially-neutral*<sup>69</sup> prohibitions on sexual conduct. By contrast, I would argue that where a given prohibition against sexual conduct discriminates against a particular group on its face, either in its purpose<sup>70</sup> or effects,<sup>71</sup> an equality analysis may indeed be appropriate. This is so as an

<sup>67</sup> *Bowers*, n 64 above at 199.

<sup>68</sup> *Ibid.*

<sup>69</sup> To clarify the meaning of "facially-neutral" in this context, a statute criminalising buggery between men (such as that in *Lawrence*, n 14 above) is demonstrably directed at sexual relations between men (and thus properly the subject of an equality analysis), whereas a statute (such as section 118D of the Ordinance in *Leung*) criminalising the act of buggery in general (which, unless expert is presented to the contrary) can be performed by both homosexual and heterosexual individuals. The latter can thus be characterised as being facially neutral.

<sup>70</sup> A provision will be facially discriminatory in its purpose where it can be shown that the legislature was motivated by an inequitable animus towards a particular group when it passed the scheme in question. As a general matter, it will be a rare case for a provision to be demonstrably motivated by a discriminatory purpose. Indeed the evidence before the Court in *Leung* was that the amendments to the Ordinance that gave rise to the current versions of the impugned sections were rooted in a legislative desire to decriminalise homosexual acts performed in private by consenting adult males provided both men were 21 years of age. Previously, all homosexual acts, whatever the age of the participants, were subject to criminal penalty. To the extent that homosexual men over the age of 16, but under the age of 21 were caught by the provisions of the Ordinance, the legislature was of the view that such individuals "required the protection of the law" for a number of reasons. Thus, though such purposes may have been misguided and produced legislation that violated constitutional privacy rights, it would be very difficult to establish that the provisions at issue in *Leung* were motivated by a discriminatory animus towards homosexual persons. In the absence of such a discriminatory animus Hartmann J was forced to presume that the impugned provisions had a disproportionately burdensome effect on the lives of homosexual persons (an analysis that is criticised above).

<sup>71</sup> Even in the absence of a discriminatory legislative animus, a prohibition on sexual conduct might obviously be directed at particular minorities by the very nature of the prohibition itself. For example, where the prohibited conduct is, by its very nature, engaged in only by individuals of a particular sexual orientation (eg the act of buggery between two men as in *Lawrence*, n 14 above or *National Coalition*, n 13 above), it is clear that the prohibition is, in effect, directed at those of that sexual orientation. Note that the judicial conclusion that a prohibition is directed in its effects at a particular group by the very nature of the prohibition itself does not require the assumption that such conduct is somehow fundamental to the identity of individuals in the targeted group. In this way the advantages of an equality analysis can be reaped without recourse to the judicial promotion of damaging stereotypes.

equality analysis in such cases has the advantage (when compared to the use of privacy rights) of more vividly capturing the manner in which such criminal prohibitions tend to exist as part of a broader web of laws and other norms that collectively serve to disadvantage and discriminate against LGBT individuals in society. This line of reasoning is apparent in the analysis of Sachs J, writing for the majority of the Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1998):

“The discriminatory prohibitions on sex between men reinforces already existing societal prejudices and severely increases the negative effects of such prejudices on their lives.

Even when these provisions are not enforced, they reduce gay men ... to what one author has referred to as ‘unapprehended felons’, thus entrenching stigma and encouraging discrimination in employment and insurance and in judicial decisions about custody and other matters bearing on orientation.”<sup>72</sup> [Footnotes omitted].

The European Court of Human Rights has correctly, in my view, recognised the often serious psychological harm for gays which results from such discriminatory provisions:

“[o]ne of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals leading, on occasions, to depression and the serious consequences which can follow ...

...

But such provisions also impinge peripherally in other harmful ways on gay men which go beyond the immediate impact on their dignity and self-esteem. Their consequences – ‘legitimate or encourage blackmail, police entrapment, violence (“queer-bashing”) and peripheral discrimination, such as refusal of facilities, accommodation and opportunities.”<sup>73</sup>

In other words, the use of an equality rights analysis, where laws are demonstrably directed at homosexual relations will tend to more accurately contextualise the “violence”<sup>74</sup> wrought by such regulation on LGBT individuals, without having to resort to the implicit reinforcement of a

<sup>72</sup> *National Coalition*, n 13 above.

<sup>73</sup> *Ibid.*, at paras 23–25.

<sup>74</sup> The use of the term “violence” to describe some of the broader effects wrought by the criminalisation of homosexual sexual relations was employed by Wayne Morgan in “Identifying Evil For What It Is: Tasmania, Sexual Perversity and the United Nations” (1994) 19 *Melbourne University Law Review* 740 at 751–756.

pernicious hypersexualised stereotype. The use of equality arguments in such cases would also have the advantage of laying the foundation for future challenges to discriminatory policies beyond the realm of private sexual conduct.

Applying the above analysis to the Court's ruling in *Leung*, I would argue that Hartmann J appropriately accepted the Secretary for Justice's concession that three of the four impugned sections of the Ordinance violated both the Applicant's privacy and equality rights. This is so as all three of these sections disadvantaged homosexual men through facially-apparent differences in treatment. Section 188H of the Ordinance set up a general age of consent for engaging in sexual intimacy other than buggery that was 21 years of age for homosexual couples, but 16 for heterosexual couples and lesbians. Section 118J(2)(a) of the Ordinance deemed sexual activity (other than buggery) performed by gay men in the presence of others to be in public (and thus prohibited) without providing for a similar prohibition in respect of other couples. Finally, section 118F(2)(a) deemed the act of buggery, only where engaged in between men, to be performed in public where other persons happen to be present. All three of these provisions are demonstrably directed, through their effects, at homosexual men in particular and thus properly subject to an equality challenge (in *addition* to a privacy challenge). It is important to note that since the difference in treatment is apparent from the very nature of the prohibitions themselves, these three provisions can be effectively impugned through the use of equality rights without having to resort to assumptions that promote a damaging hypersexualised homosexual stereotype. Conversely, by using an equality analysis to declare the facially-neutral section 118C of the Ordinance unconstitutional, Hartmann J did indeed resort to the assumption that the act of buggery is somehow inherent to the identity of homosexual males in a manner that is not so for heterosexuals and others.<sup>75</sup> To that extent, then, the decision in *Leung* (along with the Ontario Court of Appeal decision<sup>76</sup> upon which Hartmann J relied) ought to be criticised.

<sup>75</sup> For similar reasoning, see O'Connor J's concurring opinion in *Lawrence v Texas*, n 14 above ["While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual."]. Another case involving the assumed correlation between homosexuality and sexual practices *per se* is the ruling of the British Columbia Supreme Court in *Little Sisters Book and Art Emporium v Canada (Minister of Justice)* (1996), 131 DLR (4th), 18 BCLR (3d) 241 (Sup Ct); *aff'd* (1998), 160 DLR (4th) 385, 54 BCLR (3d) 306 (CA); *rev'd* [2000] 2 SCR 1120, 193 DLR (4th) 193, in which the Court considered the treatment by the Canada Customs and Revenue Agency of certain imported literature with homosexual content. Smith J held (at para 135) that "[s]ince homosexuals are defined by their homosexuality and their art and literature is permeated with representations of their sexual practices, it is inevitable that they will be disproportionately affected by a law proscribing the proliferation of obscene sexual representations."

<sup>76</sup> *R v CM*, n 46 above.



#### Part IV: Addressing Possible Objections

In spite of my endorsement of privacy, rather than equality rights as the appropriate vehicle for launching a challenge to facially-neutral criminal buggery provisions, an important concern with the use of privacy rights in this context must be addressed. In particular, for many advocates of LGBT rights, the recourse to privacy rights in challenging criminal buggery legislation has been viewed as a mere begrudging *tolerance* of the LGBT community, with the implicit message that its members may engage in whatever *immoral* acts they choose, so long as they do so away from the disapproving public eye.<sup>77</sup> So long as such a disapproving attitude is maintained, it is argued, the recognition of equality rights is impeded. This, in turn, might permit many discriminatory measures to persist without any constitutional limitation in place to protect LGBT individuals. Such an argument was indeed deployed by the Applicants in the Constitutional Court of South Africa case of *National Coalition*.<sup>78</sup> In that case Sachs J characterised this line of reasoning as follows:

“... [a] privacy analysis [it was argued] is inadequate because it suggests that homosexuality is shameful and therefore should only be protected if it is limited to the private bedroom; it tends to limit the promotion of gay rights to the decriminalisation of consensual adult sex, instead of contemplating a more comprehensive normative framework that addresses discrimination generally against gays; and it assumes a dual structure – public and private – that does not capture the complexity of lived life, in

<sup>77</sup> Wayne Morgan makes an argument that is somewhat similar to this in his criticism of the Opinion of the UN Human Rights Committee in *Toonen*, n 32 above. In *Toonen*, the majority of the Human Rights Committee decided the case (a challenge to criminal sodomy provisions in the Australian State of Tasmania) on the basis of privacy rights (under the *International Covenant for the Protection of Civil and Political Rights*) and thus did not see fit to deal with the equality aspect of the challenge (see *Toonen*, para 11). Morgan criticises this approach and argues that “[b]y naming sexuality an issue of *privacy*, the Committee’s decision reinforces the popular view that sexual difference is a matter not to be spoken of, something which is intimate and *no one else’s business*. Such a view disempowers gay men and lesbians: our sexuality has no public face.” [emphasis in original]. See Morgan, n 76 above at 754. I would disagree with Morgan’s view only to the extent that, in my view, by treating facially-neutral state restrictions on intimate sexual decisions affecting LGBT individuals in the same way that a court would (and indeed should) treat such a restriction on the sexual decisions of heterosexual persons, courts are actually sending the implicit message that homosexuality (and other minority sexual orientations) is a status that is *equal* to heterosexuality (in that LGBT persons are no more *defined by* their sexual practices than heterosexual persons). Also, as I argue below, the conception of privacy underlying Morgan’s view (ie as being the right to a protected realm in which dark and *unspeakable* acts are permitted to take place free of state regulation) is itself rather outmoded and need not be followed. Rather, in cases such as *National Coalition*, n 13 above and indeed in *Leung*, the right to privacy has more recently been seen as protecting the individual’s interest in self-determination and autonomy, a characterisation that is far removed from that envisaged by pundits such as Morgan.

<sup>78</sup> *National Coalition*, n 13 above.

which public and private lives determine each other, with the mobile lines between them being constantly amenable to repressive definition.”<sup>79</sup>

Such concerns are not fanciful, as can be evidenced by the reasons of the majority of the European Court of Human Rights in *Dudgeon v United Kingdom* (1981).<sup>80</sup> In that case, a majority the Court held that a statute criminalising homosexual sodomy violated Article 8 of the European Convention on Human Rights. Article 8 protects, *inter alia*, the right to respect for private and family life. The Court was careful in its reasons to note that such decriminalisation “does not imply approval”<sup>81</sup> of homosexuality. Given that approval or affirmation is an implicit *sine qua none* for the recognition of status necessary to support asserted equality rights,<sup>82</sup> the judicial posture adopted by the majority in *Dudgeon* would indeed appear to be rather inimical to the full recognition of equality rights for LGBT individuals. Thus, in order to argue, as I would, that privacy rights are the appropriate basis for a constitutional challenge to facially-neutral criminal sodomy laws, one must first allay such valid strategic and philosophical concerns.

In terms of assuaging the above concerns, I would argue that they posit a rather impoverished and outmoded vision of the right to privacy as it applies to sexual relations. As was held by Sachs J in *National Coalition*, the idea that privacy only protects otherwise reprehensible sexual conduct so long as it is performed away from the public eye is both far too narrow in some respects, and far too wide in others.<sup>83</sup> With respect to being too narrow:

“There is no good reason why the concept of privacy should ... be restricted simply to sealing off from state control what happens in the bedroom, with the doleful sub-text that you may behave as bizarrely or shamefully as you like, on the understanding that you do so in private. It has become a judicial cliché to say that privacy protects people, not places. Blackmun J in *Bowers, Attorney General of Georgia v Hardwick et al* made it clear that the much-quoted ‘right to be left alone’ should be seen not simply as a negative right to occupy a private space free from government intrusion, but as a right to get on with your life, express your personality and make fundamental decisions about your intimate relationships without penalisation.”<sup>84</sup>

<sup>79</sup> *Ibid.*, at para 110.

<sup>80</sup> *Dudgeon*, n 14 above.

<sup>81</sup> *Dudgeon*, n 14 above at para 61.

<sup>82</sup> See, for example, A.M. Jacobs, “The Rhetorical Construction of Rights: The Case of the Gay Rights Movement,” 1969–1991, 72 *Neb L Rev* 723, 724 (1993) [“[T]he task of gay rights proponents is to move the center of public discourse along a continuum from the rhetoric of disapprobation, to rhetoric of tolerance, and finally to affirmation.”]

<sup>83</sup> *National Coalition*, n 13 above at para 115.

<sup>84</sup> *Ibid.*, at para 16. See also *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC).

The conception of privacy articulated by Sachs J in *National Coalition* thus appears to be more purposively tied to the promotion of individual autonomy rather than the mere creation of an arbitrary physical sphere of activity into which the state cannot intrude.

The Court in *National Coalition* also held that the vision of constitutional privacy expressed by those resisting the application of that right in striking down criminal sodomy provisions was also too broad:

“... there is no reason why the concept of privacy should be extended to give blanket libertarian permission for people to do anything they like provided that what they do is sexual and done in private ... There are very few democratic societies, if any, which do not penalise persons for engaging in inter-generational, intra-familial, and crossspecies sex, whether in public or in private. Similarly, in democratic societies sex involving violence, deception, voyeurism, intrusion or harassment is punishable (if not always punished), or else actionable, wherever it takes place (there is controversy about prostitution and sado-masochistic and dangerous fetishistic sex). The privacy interest is overcome because of the perceived harm.”<sup>85</sup>

Thus, the objection to the use of privacy rights as the means to striking down criminal buggery provisions, outlined above, is flawed to the extent that it relies on a rather outdated conception of privacy. Though such a conception of privacy (ie as permitting morally repugnant behaviour so long as conducted in private) may have been at play to some degree in past decisions such as *Dudgeon*, it is certainly not a necessary (or preferable) model to be followed. It is also of note in this regard that the Court in *Leung* specifically endorsed Sachs J’s more purposive, autonomy-based characterisation of the right to privacy.

Sceptics might also argue at this point that the harm stemming from the judicial promotion of a hypersexualised homosexual stereotype, existing as it does on the merely “symbolic” level, can be tolerated or even ignored. I would counter this view by arguing that, particularly in the area of constitutional human rights law, many of the most pitched legal battles are actually fought on the symbolic level over the “messages” that are implicitly sent by the law. Examples of this phenomenon are legion. As a rather immediate illustration, as noted above, the European Court of Human Rights in *Dudgeon* was particularly sensitive to the possibility of sending out an implicitly pro-homosexual message when it held that the decriminalisation of homosexual sodomy “does

<sup>85</sup> *Ibid.*, at para 118.

not imply approval”<sup>86</sup> of such conduct (or of homosexual persons generally). In the Canadian context, the fact that a law sends a particular undesirable message regarding the worth of a given group has become a significant indicium of unconstitutional discrimination in that jurisdiction. For example, in *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* (2004),<sup>87</sup> a defence to the Canadian Criminal Code assault provisions in cases of “reasonable physical correction of children by their parents” (ie “spanking”) was impugned before the Supreme Court of Canada on the basis that it “sends the message that a child’s physical security is less worthy of protection, even though it is seen as a fundamental right for all others.”<sup>88</sup> Similarly, in *Sauvé v Canada (Chief Electoral Officer)* (2002),<sup>89</sup> an election law denying penitentiary inmates the right to vote was struck down on the basis that it “sends the message that those who commit serious breaches are no longer valued as members of the community, but instead are temporary outcasts from our system of rights and democracy. More profoundly, it sends the unacceptable message that democratic values are less important than punitive measures ostensibly designed to promote order.”<sup>90</sup> Similar examples abound in many other jurisdictions as well.<sup>91</sup>

The fact that implicit messages sent by the courts (or, indeed the legislature) have been a significant locus of controversy ought not to be surprising given the “cultural” power of law to shape popular beliefs and activities. The general capacity of our legal system to shape everyday lives, essentially through the power of its own rhetorical discourse, has been persuasively articulated by feminists such as Carol Smart. In *Feminism and the Power of the Law* (1989),<sup>92</sup> Smart builds on the work of Michel Foucault in describing some of the ways in which the law, as a discourse that claims to “speak the truth,” exercises significant power in a society, such as our own, that values truth.<sup>93</sup> The primary mechanism of such power is the exclusion or marginalisation, by the

<sup>86</sup> *Ibid.*, at para 61.

<sup>87</sup> [2004] 1 SCR 76 (hereinafter *Canadian Foundation*).

<sup>88</sup> *Ibid.*, at para 224.

<sup>89</sup> [2002] 3 SCR 519 (hereinafter *Sauvé*).

<sup>90</sup> *Ibid.*, at para 40.

<sup>91</sup> As but one example, in the American context, the question of whether particular government action is forbidden by the First Amendment’s Establishment Clause has involved explicit discussions on the nature and effects on society of the “message” that is sent by impugned state activity. For example, in *Lynch v Donnelly* (1984), O’Connor J held that the “endorsement” of religion that is forbidden by the Establishment Clause is justified on the basis that such an endorsement would tend to send “a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” In the prior case of *Engel v Vitale* (1962), Black J provided deeper insight into the purpose underlying the Establishment Clause in holding: “[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.”

<sup>92</sup> C. Smart, *Feminism and the Power of Law* (London: Routledge, 1989).

<sup>93</sup> *Ibid.*, at 9–14.

law, of competing or contradictory versions of truth. For example, through legal methods of reasoning, proof and the rules of evidence, the law consistently excludes as inadmissible those versions and sources of truth that it deems unreliable or superfluous. Smart illustrates this aspect of the law in her characterisation of a solicitor's duties:

Primarily the job of the solicitor is to translate everyday affairs into legal issues. On hearing a client's story, the solicitor sifts it through a sieve of legal knowledge and formulations. Most of the story will be chaff as far as the lawyer is concerned, no matter how significant the rejected elements are to the client. Having extracted what law defines as relevant, it is translated into a foreign language of, for example, ouster injunctions, unfair dismissals, constructive trusts. The parts of the story that are cast aside are deemed immaterial to the case and the good solicitor is the one who can effect this translation as swiftly as possible. This is the routine daily practice of law in which alternative accounts of events are disqualified.<sup>94</sup>

Thus, through its influential claims to "speak the truth" and its related tendency to exclude alternative forms of knowledge, the law regularly shapes, and indeed defines, a whole panoply of popular conceptions of reality. This general "discursive" power of the law renders the judicial promotion of the hypersexualised homosexual stereotype (as exemplified by the Court's reasons in *Leung*) a matter of significant concern that ought not to be dismissed lightly.<sup>95</sup>

## Part V: Conclusion

The Court in *Leung* was faced with a series of unconstitutional provisions regulating sexual conduct, including the act of buggery. I have argued that insofar as the Court relied on equality arguments to declare the facially-neutral section 118C of the Ordinance unconstitutional, the Court's decision ought to be criticised. This is so as Hartmann J's reasoning in this regard implicitly drew the pernicious conclusion that buggery is something fundamental to the lives of homosexual men (in a way that is not the case for heterosexuals and others) such that equality rights are violated by its

<sup>94</sup> C. Smart, *Law, Crime and Sexuality: Essays in Feminism* (London: Sage, 1995) at 74.

<sup>95</sup> In a rather similar way, I have argued elsewhere, relying in part on the work of Carol Smart, that criminal child pornography prosecutions *themselves* can often be impugned for promoting the pernicious view that children can be properly viewed as sexual objects. See R. Danay, "The Danger of Fighting Monsters: Addressing the Hidden Harms of Child Pornography Law" 11(1) *Review of Constitutional Studies* 151 (2005) at 168–169.



circumscription. In my view, the proper course of action for Hartmann J in *Leung* would have been to accept that the three sections whose lack of constitutionality was conceded by the Secretary for Justice violated both the Applicant's privacy and equality rights on the one hand, and to declare that section 118C of the Ordinance was unconstitutional *only* on the basis of a violation of the Applicant's constitutional right to privacy. In this way, the Court would have been able to pave the way for future challenges to discriminatory provisions in areas other than the regulation of sexual conduct, without promoting the regrettable hypersexualised homosexual stereotype.

As the *Leung* decision has been recently appealed by the Secretary for Justice,<sup>96</sup> it would appear that the Court of Appeal will have an important opportunity to reconsider the substance of Hartmann J's analysis, including the lower Court's ill-advised application of equality, rather than privacy rights in striking down section 118C of the Ordinance.

<sup>96</sup> See "Hong Kong government appeals pro-gay ruling" *The Advocate*, online: [http://www.advocate.com/news\\_detail\\_ektid21258.asp](http://www.advocate.com/news_detail_ektid21258.asp) (accessed 24 November 2005).