

INTERNATIONAL LAW AND THE RIGHTS OF GAY MEN IN FORMER BRITISH COLONIES: COMPARING HONG KONG AND SINGAPORE



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As former British colonies with predominantly Chinese populations, developed economies, and sophisticated legal systems, Singapore and Hong Kong have much in common. Both jurisdictions inherited prohibitions on non-procreative sexual conduct during the colonial period and maintained them long after England liberalised its own laws. Opponents of lesbian, gay, bisexual and transgender (LGBT) rights in both cities frequently claim that homosexuality is alien to Chinese culture, although it was the prohibitions on same-sex relationships that were inherited from England. Yet, despite these similarities, gay men enjoy far more legal space in Hong Kong than in Singapore. Ironically, this difference can be partly explained by the delay in developing democracy in Hong Kong, which has increased the role of international human rights law. Section 1 of the article introduces relevant international norms and the comparative case study. Section 2 analyses the process of decriminalisation in Hong Kong, which began during the colonial period but was completed after 1997, through successful applications for judicial review. Section 3 then analyses the failure to decriminalise in Singapore and the recent judgment by Singapore's Court of Appeal upholding the criminal prohibition of male-to-male sexual relations. Section 4 analyses prospects for legislation prohibiting discrimination in the private sector, a milestone that has yet to be achieved in either jurisdiction. While enacting domestic legislation is an inherently local process, international human rights monitoring bodies can assist the LGBT movement by critiquing domestic laws and policies.

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1. Introduction

Although no binding treaty expressly requires states to prohibit discrimination on the grounds of sexuality or gender identity,¹ our understanding of how general constitutional and human rights norms should be applied in this context has progressed in recent decades.² This is partly because of the jurisprudence of international treaty-monitoring bodies, particularly the United Nations (UN) Human Rights Committee, which monitors the International Covenant on Civil and Political Rights (ICCPR).³ The UN Human Rights Council also recently expressed grave concern regarding acts of violence and discrimination against lesbian, gay, bisexual and transgender (LGBT) individuals and requested the UN High Commissioner for Human Rights to report on best practices.⁴ A core recommendation is that states should decriminalise same-sex relations by consenting adults.⁵

Nonetheless, there is significant variation in legislative and judicial approaches at the domestic level, even in jurisdictions that share similar legal and cultural traditions.⁶ This article explores that variation by comparing the rights of gay men in Singapore and Hong Kong.⁷ Like

¹ See Kerstin Braun, “Do Ask, Do Tell: Where Is the Protection against Sexual Orientation Discrimination in International Human Rights Law?” (2014) 29 *American University International Law Review* 871.

² See Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles), available at <http://www.yogyakartaprinciples.org/> (visited 1 December 2015).

³ For example, see Braun (n 1 above), pp 880–883.

⁴ UN Human Rights Council, “Human Rights, Sexual Orientation and Gender Identity”, UN Doc A/HRC/27/L.27/Rev.1 (24 September 2014), available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/27/L.27/Rev.1 (visited 1 December 2015).

⁵ UN High Commissioner for Human Rights, “Discrimination and Violence against Individuals Based on Their Sexual Orientation and Gender Identity”, UN Doc A/HRC/29/23 (4 May 2015) p 6, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/29/23&referer=/english/&Lang=E.

⁶ James Wilets, “From Divergence to Convergence? A Comparative and International Law Analysis of LGBTI Rights in the Context of Race and Post-Colonialism” (2011) 21 *Duke Journal of Comparative & International Law* 631.

⁷ Due to space constraints, this article does not analyse the rights of transgender individuals. However, it should be noted that both Singapore and Hong Kong permit gender reassignment and allow individuals to marry in their reassigned gender. This was accomplished legislatively in Singapore (see Women’s Charter, Cap 353, s 12) and in Hong Kong through judicial review (see *W v Registrar of Marriages* (2013) 16 HKCFAR 112 (CFA)). For a critique of the current legal framework in Hong Kong, which still requires a transgender individual to undergo gender reassignment surgery to obtain a new identity card, see Kai Yeung Wong, “Taking Transgender Rights Seriously: A Rights-Based Model of Gender Recognition in Hong Kong” (2015) 45 *HKLJ* 109. For analysis of the extent to which transgender individuals may be able to rely upon Hong Kong’s existing Disability Discrimination Ordinance, see Carole J Petersen, “Gender Diversity and Human Rights Treaty Bodies: Is there a Role for the Committee on the Rights of Persons with Disabilities?” in Alexander Schuster (ed), *Equality and Justice: Sexual Orientation and Gender Identity in the XXI Century* (Italy: Forum Societa Editrice Universitaria Udinese, 2011).

many former British colonies, both jurisdictions inherited criminal prohibitions on same-sex relations⁸ and maintained them long after England liberalised its own laws. Singapore and Hong Kong have much in common: they are similarly-sized “city states” with predominantly Chinese populations, highly developed economies and sophisticated common law legal systems.⁹ Both governments like to present their cities as international and cosmopolitan, in order to attract foreign investment and talent. The Pink Dot movement (which started in Singapore and spread to Hong Kong, as well as to other cities) is just one example of increased acceptance of diversity.¹⁰ Yet social conservatives in Hong Kong and Singapore regularly characterise gay rights as a “foreign” concept that offends Chinese values, despite the documented history of same-sex relations in China.¹¹ This discourse has been particularly strong among certain Chinese Christian groups, who do not represent a majority of the population but continue to exercise significant influence in the post-colonial era.¹²

Yet, despite these similarities, gay men enjoy considerably more legal space in Hong Kong than in Singapore. To some extent, this can be attributed to the delay in developing democracy in Hong Kong. Unlike Singapore, Hong Kong did not become an independent nation after decolonisation. Instead, Hong Kong was returned to China in 1997, under the “one country, two systems” model. As a Special Administrative Region of China, Hong Kong is a “liberal autocracy” that languishes under an appointed government.¹³ While this situation violates the rights of all Hong Kong residents, the democracy gap has, paradoxically,

⁸ For the origins of Hong Kong’s laws, see Carole J Petersen, “Values in Transition: The Development of the Gay and Lesbian Rights Movement in Hong Kong” (1997) 19 *Loyola of Los Angeles International and Comparative Law Review* 337. For the origins of Singapore’s s 377A, see George Baylon Radics, “Decolonizing Singapore’s Sex Laws: Tracing Section 377A of Singapore’s Penal Code” (2013) 45 *Columbia Human Rights Law Review* 57.

⁹ Hong Kong is a Special Administrative Region of China but similar to a city state because it operates its own common law legal system and is separated from Mainland China by an immigration border.

¹⁰ Pink Dot is an annual public rally in support of the LGBT community, which began in Singapore in 2009. See Pink Dot SG, available at <http://pinkdot.sg/about-pink-dot/> (visited 10 December 2015). See also Lynette J Chua, *Mobilizing Gay Singapore: Rights and Resistance in an Authoritarian State* (Philadelphia: Temple University Press, 2014) pp 118–130.

¹¹ See Bret Hinsch, *Passions of the Cut Sleeve: The Male Homosexual Tradition in China* (Los Angeles: University of California Press, 1990); and see also sources cited in Wilets (n 6 above), p 636.

¹² Chua (n 10 above), pp 114–117; and Carole J Petersen and Kelley Loper, “Equal Opportunities Law Reform in Hong Kong: The Impact of International Norms and Civil Society Advocacy”, in Michael Tilbury, Simon NM Young and Ludwig Ng (eds), *Reforming Law Reform: Perspectives from Hong Kong and Beyond* (Hong Kong: Hong Kong University Press, 2014) pp 191–194.

¹³ Eliza Lee, “Social Mobilization, Blame Avoidance, and Welfare Restructuring in Hong Kong”, in Ming Sing (ed), *Politics and Government in Hong Kong: Crisis under Chinese Sovereignty* (New York: Routledge, 2009) p 165.

increased the influence of international human rights law. This is partly because the unelected government seeks approval from international human rights bodies as an alternative (albeit increasingly inadequate) source of legitimacy. The democracy gap also increases the role of Hong Kong's independent judiciary, which regularly looks to international and comparative jurisprudence for guidance and has struck down local legislation that violates the ICCPR.¹⁴

In contrast, Singapore is often described as an illiberal democracy. It has not ratified the ICCPR and the ruling party, the People's Action Party (PAP), does not apologise for controls on freedom of expression, association and assembly—taking the position that such measures are necessary to preserve social stability in a multi-ethnic society.¹⁵ Singapore's Constitution does include the rights to liberty and equal protection and the judiciary has the formal power to strike down legislation.¹⁶ However, Singaporean judges generally show great deference to Parliament and rarely disagree with the government's interpretation of a constitutional provision.¹⁷

As illustrated in the next two sections of this article, these factors help to explain why the rights of gay men are currently better protected in undemocratic Hong Kong than in the managed democracy of Singapore. Section 2 analyses the process of decriminalisation in Hong Kong, which began during the colonial period and was completed, after reunification with China, through actions for judicial review. Section 3 contrasts Hong Kong with the situation in Singapore, where the Court of Appeal recently upheld a statute that criminalises virtually all expressions of sexual intimacy between men.¹⁸ Section 4 concludes by analysing the prospects for legislation to prohibit discrimination, a milestone that has yet to be accomplished in either jurisdiction. While anti-discrimination legislation requires domestic political will, it also can be influenced by international human rights monitoring processes.

¹⁴ See Carole J Petersen, "Embracing Universal Standards? The Role of International Human Rights Treaties in Hong Kong's Constitutional Jurisprudence", in Fu Hualing, Lison Harris and Simon NM Young (eds), *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (New York: Palgrave Macmillan, 2007).

¹⁵ Human Rights Council, Working Group on Universal Periodic Review: National Report of Singapore, UN Doc A/HRC/WG.6/24/SGP/1 (28 October 2015), especially paras 5 and 114–120. Singapore's National Report was reviewed by the Working Group on Universal Periodic Review at its twenty-fourth session, 18–29 January 2016, available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/SGSession24.aspx>.

¹⁶ Jack Tsen-Ta Lee, "Foreign Precedents in Constitutional Adjudication by the Supreme Court of Singapore: 1963–2013" (2015) 24(2) *Washington International Law Journal* 253.

¹⁷ *Ibid.*, p 263.

¹⁸ *Lim Meng Suang v Attorney-General* [2014] SGCA 53.

2. Decriminalisation in Hong Kong

As a British colony, Hong Kong inherited prohibitions on male-to-male sexual conduct. The Offences against the Person Ordinance included a chapter entitled the “Abominable Offenses”, which prohibited non-procreative sexual relations.¹⁹ A person convicted of the “abominable crime of buggery” (whether heterosexual or homosexual) could be punished by life imprisonment.²⁰ However, s 51 specifically targeted gay men, providing that:

“Any male person who, in public or private, commits or is a party to the commission of, or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person shall be guilty of a misdemeanor triable summarily, and shall be liable to imprisonment for two years”.²¹

In the United Kingdom the process of decriminalisation began in the 1960s.²² Yet in the 1970s, the Royal Hong Kong Police Force still had a Special Investigation Unit (SIU) for the sole purpose of investigating “homosexual activities”.²³ Although the SIU focussed primarily on male prostitution and minors, it could also investigate consenting adults, particularly if they worked in law enforcement or the legal profession.²⁴

In one particularly notorious case, a police inspector who was about to be arrested by the SIU committed suicide.²⁵ The controversy inspired the Hong Kong Law Reform Commission (LRC) to launch a study of the laws governing homosexual conduct.²⁶ The District Boards (the only elected bodies in Hong Kong at the time) were consulted and opposed decriminalisation, claiming it would offend Chinese values.²⁷ Nonetheless, the LRC concluded that the laws violated privacy and served no purpose.²⁸ The LRC also noted that public support for

¹⁹ For details on the laws and decriminalisation process, see Petersen (n 8 above).

²⁰ Offences against the Person Ordinance (Cap 212) (1981), ss 49–53, especially s 49.

²¹ *Ibid.*, s 51.

²² Sexual Offences Act, 1967, Ch 60, s 1 (initially decriminalising only private sexual acts between two men who had attained the age of 21).

²³ Law Reform Commission of Hong Kong, “Report on Laws Governing Homosexual Conduct” (1983) pp 2 and 25, available at <http://www.hkreform.gov.hk/en/publications/chronological.htm#1982> (visited 1 October 2015).

²⁴ *Ibid.*, Annexure 28, pp A198–A200.

²⁵ TL Yang, *A Summary of the Report of the Commission of Inquiry into Inspector MacLennan’s Case* (Hong Kong: Government Printer, 1981) p 5. Some suspected that MacLennan was murdered because he maintained a list of gay men in important positions.

²⁶ Law Reform Commission Report (n 23 above).

²⁷ *Ibid.*, Annexure 21, pp A179–A185.

²⁸ *Ibid.*, pp A120–A122, A128–A137.

criminalisation reflected an incorrect view that homosexuality was a Western phenomenon and alien to Chinese culture.²⁹

Initially, no action was taken on the LRC's report. Meanwhile, the Sino-British Joint Declaration was ratified in 1985, putting Hong Kong on the path to reunification with China under the "one country, two systems" model.³⁰ Although hopelessly vague on democracy, the Joint Declaration provided that Hong Kong would enjoy a high degree of autonomy and maintain its common law legal system. It also provided that the ICCPR would continue to apply and be enforced through the laws of Hong Kong, a commitment repeated in the Basic Law, Hong Kong's constitution.³¹ This was a significant concession because China had not signed the ICCPR at that time (and still has not ratified the treaty).³²

These references took on new significance after the tragedy in Tiananmen Square on 4 June 1989. The British Government wanted to reassure the international community that it would not return Hong Kong to China without adequate protection for human rights.³³ The local government also needed to rebuild public confidence. It therefore proposed to enact a Bill of Rights ordinance, which incorporated most of the ICCPR into domestic law. As enacted in 1991, the Hong Kong Bill of Rights Ordinance (Cap 383) (BORO) repealed pre-existing legislation that could not be interpreted to comply with it.³⁴ The Letters Patent (the colonial constitution) was simultaneously amended to address subsequent legislation.³⁵ The goal was to provide a seamless transition to the post-1997 legal framework, when Art 39 of the Basic Law would take over.³⁶

Hong Kong's BORO was particularly important for gay men because the ICCPR contains an explicit right to privacy and the European Court of Human Rights determined, in the 1981 case of *Dudgeon v United Kingdom*, that Northern Ireland's laws prohibiting male-to-male

²⁹ *Ibid.*, pp A122–A123.

³⁰ Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (1984), available at <http://www.cmab.gov.hk/en/issues/joint3.htm> (visited 1 October 2015).

³¹ Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Art 39, available at <http://www.basiclaw.gov.hk/en/basiclawtext> (visited 1 October 2015).

³² The Hong Kong Government drafts its own periodic reports for the UN Human Rights Committee, available at <http://www.cmab.gov.hk/en/issues/human.htm> (visited 1 November 2015).

³³ Norman Miners, *The Government and Politics of Hong Kong* (Hong Kong: Oxford University Press, 5th ed., 1991) p 27.

³⁴ BORO, s 3.

³⁵ Hong Kong Letters Patent, Art VII(5).

³⁶ Although the Chinese Government threatened to invalidate the BORO (and could do so pursuant to Art 160 of the Basic Law), it invalidated only a few preliminary provisions, including s 3. For discussion of why this had no practical impact, see Peter Wesley-Smith, "Maintenance of the Bill of Rights" (1997) 27 HKLJ 15.

sexual relations violated the right to privacy.³⁷ Had Hong Kong's laws prohibiting gay sex been retained, the local courts would have considered *Dudgeon* as persuasive authority.³⁸ Anticipating this, in 1990, the colonial government asked the Legislative Council to debate a motion supporting decriminalisation. The Chief Secretary and Attorney General spoke strongly in favour of decriminalisation, citing the need to comply with the ICCPR. The government also threatened to enforce the laws more vigorously if the legislature refused to decriminalise.³⁹

The government's motion met with some fierce opposition. By 1990, limited democracy reforms had been introduced in preparation for the end of colonial rule: there were 12 indirectly elected seats in the legislature (from the District Boards, Urban Councils and Regional Councils), as well as 12 functional constituency seats (representing professional and corporate interests). Many local Chinese legislators opposed the motion and complained that government was pressuring them to decriminalise. They delivered speeches that were openly contemptuous of gay men, labelling them as deviant, immoral and offensive to Chinese values.

The government ultimately persuaded only 11 of the elected legislators to support decriminalisation. However, with 20 votes from government officials and appointed legislators, the motion passed by a comfortable margin. The government then drafted the Crimes (Amendment) Bill, which decriminalised gay sex in private between two consenting adults, defined as 21 or older.⁴⁰ Although even this partial decriminalisation upset many people, the government cared more about its international reputation than public opinion. Moreover, the government knew that the idea of incorporating the ICCPR into Hong Kong's domestic law was very popular, not only with the legislators but also with the public at large. Thus, the government's decision to link decriminalisation to the broader social goal of enforcing the ICCPR was a wise strategy.

The colonial government did, however, make some concessions to the elected legislators and simultaneously added new offences to the Crimes Ordinance, including: a prohibition on anal intercourse between men where one party is under 21 (although the legal age of consent for vaginal

³⁷ *Dudgeon v United Kingdom* (1982) 4 EHRR 149.

³⁸ Hong Kong courts regularly look to the European Court of Human Rights for guidance. See *R v Sin Yau Ming* (1991) 1 HKPLR 88, 107–108 (CA) (noting that courts can derive guidance from the European Court of Human Rights, the UN Human Rights Committee, and courts in common law jurisdictions with a constitutionally entrenched Bill of Rights).

³⁹ See Official Report of Proceedings, Hong Kong Legislative Council (11 July 1990), beginning at page 1949. The author also attended the legislative debate.

⁴⁰ Crimes (Amendment) Bill (90 of 1991), Hong Kong Government Gazette, 22 March 1991, Legal Supp No 3, p C215.

intercourse was only 16);⁴¹ a prohibition on “gross indecency” with a man under 21;⁴² and a prohibition on any sexual activities among men if more than two persons were present.⁴³ These restrictions would eventually lead to judicial review.

The first important case was *Leung TC William Roy v Secretary for Justice*,⁴⁴ filed by a gay man who was under 21 at the time. Although never prosecuted, Leung demonstrated standing by attesting that the higher age of consent frustrated his desire to develop intimate relationships. Interestingly, once the court determined that Leung had standing, the Hong Kong Government conceded that three of the challenged statutory provisions were unconstitutional, either because they violated the right to privacy or unlawfully discriminated against gay men (as there was no “heterosexual equivalent” offence). The Government also conceded that gay men constitute a protected class under the equality provisions of the Basic Law, the BORO and the ICCPR, although none of these instruments expressly mention sexuality as a prohibited ground of discrimination. The Court agreed, citing *Toonen v Australia*⁴⁵ and other international and foreign case law.⁴⁶

The Hong Kong Government did, however, attempt to defend the higher age of consent by arguing that: (1) the legislature could lawfully determine that persons between 16 and 21 require special protection; and (2) there was an equivalent heterosexual offence (prohibiting a man from having anal intercourse with a woman under 21). In fact, these offences were not strictly equivalent because the “heterosexual equivalent” criminalised only one of the participants (the man). More importantly, for future cases, the Court found that the statute constituted *indirect* discrimination because a higher age of consent for anal intercourse unduly burdens gay men and the purported justification (protection of youth) was unconvincing. The Court cited international and comparative jurisprudence, as well as research demonstrating that criminalising sexual intimacy harms, rather than protects, gay teenagers. Hong Kong’s Court of Appeal upheld the judgment, agreeing that courts

⁴¹ Crimes Ordinance (Cap 200) s 118C. Although s 118D prohibited anal intercourse between a man and a woman where the woman was under the age of 21, it criminalised only the older party; in contrast, s 118C criminalised both the older man and the younger man.

⁴² *Ibid.*, s 118H.

⁴³ *Ibid.*, ss 118F(2)(a) and 118J(2)(a).

⁴⁴ [2005] 3 HKLRD 657 (CFI). The Government’s unsuccessful appeal is discussed below.

⁴⁵ Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (UN Human Rights Committee 1994), especially para 8.7.

⁴⁶ For a more detailed analysis of the court’s use of international and comparative jurisprudence, see Carole J Petersen, “Sexual Orientation and Gender Identity in Hong Kong: A Case for the Strategic Use of Human Rights Treaties and the International Reporting Process” 14(2) *Asian-Pacific Law & Policy Journal* 28 (2013).

should not simply defer to the legislature when a criminal law appears to discriminate on the ground of sexuality. Rather, judges must intensely scrutinise the purported justification for unequal treatment and “protect minorities from the excesses of the majority”.⁴⁷

Hong Kong’s Court of Final Appeal took a similar approach in 2007 in *Secretary for Justice v Yau Yuk Lung*, in which two men were charged with “buggery with another man otherwise than in private”, an offence that specifically targeted same-sex relations.⁴⁸ The Court of Final Appeal agreed with the lower courts that the statute was unconstitutional under both Art 25 of the Basic Law and Art 22 of the Hong Kong Bill of Rights, although neither instrument expressly prohibits discrimination on the ground of sexuality. Noting that equality before the law is a fundamental right, the Court emphasised that the Government must justify differential legal treatment by showing that: the statute pursues a legitimate aim (and there is a genuine need for the differential treatment); there is a rational connection between the differential treatment and the legitimate aim; and the difference in treatment is no more than necessary to achieve the aim.⁴⁹ The Court of Appeal also endorsed the approach taken in *Leung*, noting that gay men constitute a minority and that courts should scrutinise “with intensity” whether a difference in legal treatment is justified.⁵⁰ The fact that the legislature had apparently considered the offence as a necessary part of the 1991 legislative package to partly decriminalise gay sexual conduct was not, by itself, a valid justification.⁵¹

It is important to note that when striking down these discriminatory statutes, the Hong Kong courts relied in part upon Art 25 of the Basic Law, which states simply that: “[a]ll Hong Kong residents shall be equal before the law”.⁵² As discussed in the next section, Singapore’s Constitution contains similar language but it has been interpreted and applied in a far more limited fashion.

⁴⁷ *Leung TC William Roy v Secretary for Justice* [2006] 4 HKLRD 211 (CA), [53].

⁴⁸ (2007) 10 HKCFAR 335 (CFA).

⁴⁹ *Ibid.*, [20]–[21].

⁵⁰ *Ibid.*, [1], [21] and [29].

⁵¹ *Ibid.*, [26]–[28]. The Government also argued, unsuccessfully, that the common law offence of offending public decency constituted an equivalent heterosexual offence. For discussion of this argument, see Petersen (n 46 above), p 27.

⁵² The statutes were eventually repealed, as a direct result of the judgments. See Hong Kong Legislative Council, Legal Service Division Report on Statute Law (Miscellaneous Provisions) Bill 2914, LC Paper No LS44/13-14 (citing the cases discussed above). For a critique of the Hong Kong Government’s reluctance to propose reforms beyond what is strictly required by court judgments, see Swati Jhaveri and Anne Scully-Hill, “Executive and Legislative Reactions to Judicial Declarations of Constitutional Invalidity in Hong Kong: Engagement, Acceptance or Avoidance?” (2015) 13 *International Journal of Constitutional Law* 507.

3. The Failure to Decriminalise in Singapore

Singapore's illiberal democracy requires LGBT activists to adopt different strategies for law reform than the strategies that have been employed in Hong Kong. The movement has learned to "deftly negotiate the interplay between legal restrictions and constraining political norms by means of 'pragmatic resistance'—a strategy that seeks to advance the movement while ensuring that it survives the scrutiny and potential retaliation of authoritarian rulers".⁵³ This incremental approach has generated practical results and LGBT activists are now openly organised as a movement—a significant achievement given the restrictions on freedom of expression, assembly and association in Singapore.⁵⁴

One of the defining moments in the movement was inspired by the Government's review of its criminal laws. In 2006, the Ministry of Home Affairs circulated draft revisions to the Penal Code, indicating its intention to repeal s 377 (the general ban on "carnal intercourse against the order of nature", which applied to both heterosexual and homosexual couples) while retaining s 377A (which is interpreted as prohibiting all acts of sexual intimacy between men).⁵⁵

The inequality of the Government's proposal inspired Singapore's LGBT movement to participate in the public consultation and to launch a "Repeal 377A campaign".⁵⁶ When the Government declined to amend its proposal, a Parliamentary Petition was submitted, supported by 2,341 signatures.⁵⁷ The Petition argued that the Amendment Bill would violate Art 12(1) of Singapore's Constitution (which provides that all citizens have the right to equal protection of the law) by legalising acts performed by a heterosexual couple, while criminalising the same acts when performed by a gay couple. However, a strong and emotional countermovement soon developed, including an online "Keep 377A" petition.⁵⁸

⁵³ Chua (n 10 above), p x.

⁵⁴ For example, Chua's study (n 10 above) describes how LGBT activists have coped with Singapore's tough restrictions on registration of societies, as well as restrictions on public rallies—always careful to comply with the law so as to be seen as acting consistently with Singapore's rule-oriented society.

⁵⁵ Section 377A provides: "Any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years."

⁵⁶ Chua (n 10 above), pp 109–110.

⁵⁷ Parliament of Singapore Official Reports—Parliamentary Debates (Hansard), Vol 83 (22 October 2007) (speech of Mr Siew Kum Hong, Nominated Member), available at <http://sprs.parl.gov.sg/search/report.jsp?currentPubID=00075231-ZZ> (visited 1 October 2015). The Petition submitted by Mr Siew Kum Hong is attached as an appendix to the Parliamentary Debate.

⁵⁸ Supporters of s 377A claimed to have obtained more than 15,000 signatures in the first four days.

During the parliamentary debate the Government defended its intention to retain s 377A almost entirely on the basis of popular opinion, noting that feedback was divided but that the majority supported criminalisation.⁵⁹ As a sort of compromise, the Government stated that it would not actively enforce s 377A against private acts by consenting adults; indeed, the Prime Minister insisted that he did not want talented gay men to emigrate to find “more congenial places” to live.⁶⁰ Yet the Government also seemed quite willing to use s 377A to inhibit gay men from advocating for full equality. The Prime Minister stressed that gay men “are free to live their lives ... [b]ut there are restraints and we do not approve of them actively promoting their lifestyles to others, or setting the tone for mainstream society”.⁶¹

A particularly low moment for the Repeal 377A movement was the openly hostile speech of Professor Li-Ann Thio, a Nominated Member of Parliament. Unlike the Government (which did not rule out the possibility of decriminalising in the future), Professor Thio argued that s 377A should be retained indefinitely. She used extremely derogatory terms to describe gay men and blamed them for a host of social ills. Professor Thio also characterised the Repeal 377A movement as a product of foreign influence and a threat to Singaporean values.⁶²

It might be tempting to conclude that Singapore retained s 377A simply because it is inherently more conservative than Hong Kong. Yet the views expressed by Professor Thio in the Singaporean Parliament were not dissimilar to views expressed by Hong Kong’s elected legislators, who also resisted decriminalisation in 1990. The key difference is that Hong Kong’s colonial government took the lead and lobbied for reform, despite public opposition. This does not necessarily imply that Hong Kong’s Government was a champion of LGBT rights. But as an unelected government, it did have a vested interest in being seen as complying with international norms. In contrast, Singapore’s PAP cares more about its local political base than its international reputation, and it is not willing to spend political capital to advance the rights of a minority.

In theory, Singapore’s judiciary, which does not have to seek re-election, is in a better position to protect minorities. However, Singapore

⁵⁹ *Ibid.* (speech by the Senior Minister of State for Home Affairs moving the second reading of the Penal Code (Amendment) Bill).

⁶⁰ Parliament of Singapore Official Reports—Parliamentary Debates (Hansard), Vol 83 (23 October 2007) (speech by Prime Minister Lee), available at <http://sprs.parl.gov.sg/search/report.jsp?currentPubID=00004748-WA> (visited 1 October 2015).

⁶¹ *Ibid.*

⁶² Singapore Parliamentary Debates (22 October 2007) (n 57 above) (speech by Professor Li-Ann Thio).

has not ratified the ICCPR and it has no explicit right to privacy in its Constitution. Although the Constitution provides for liberty and equal protection of the laws, Singaporean judges have tended to interpret these rights quite narrowly. Singapore's judiciary also shows great deference to Parliament and only rarely exercises its power to declare a law unconstitutional.⁶³ Given that background, gay men arguably had little to gain by challenging s 377A. Nonetheless, it was challenged and the resulting jurisprudence provides a sharp contrast to the judgments from Hong Kong.

The first challenge was brought by Tan Eng Hong, who was initially charged with violating s 377A by engaging in oral sex with another man in a toilet cubical. Tan's case did not initially attract backing from activists but a Singaporean lawyer filed a civil suit on his behalf, alleging violations of Arts 9 and 12 of Singapore's Constitution.⁶⁴ The Attorney-General argued that Tan lacked standing because he was not ultimately prosecuted under s 377A.⁶⁵ However, the Court of Appeal held that a gay man need not wait until prosecuted to challenge s 377A.⁶⁶ Interestingly, in this decision, the Court of Appeal cited the Hong Kong case of *Leung*, noting that: "We agree with the Judge in so far as a threat of future prosecution under an allegedly unconstitutional law, where the threat is real and credible and not merely fanciful, will suffice to show a violation of constitutional rights".⁶⁷

Soon after the Court of Appeal's judgment on standing, Lim Meng Suang and Kenneth Chee Mun-Leon filed a separate application seeking a declaration that s 377A is void due to its inconsistency with Art 12 of the Constitution (equal protection). These two plaintiffs were backed by activists, perhaps because they were considered to have a strong test case—two professional men in a long-term relationship, both of whom lived with their parents and were described as devoted sons.⁶⁸ However, the application of Lim and Chee was rejected on the merits by the High Court

⁶³ Lee (n 16 above), p 263 (noting that the judiciary rejected the Government's interpretation of a constitutional provision in only three cases in 50 years).

⁶⁴ Lynette J Chua, "How Relationships Matter in Law and Social Movements: Collective Litigation and Constitutional Challenges to Decriminalize Homosexuality in Singapore", paper presented at *The Life and Future of British Colonial Sexual Regulation in Asia*, Centre for Asian Legal Studies, National University of Singapore, 9 October 2015 (copy on file with the author).

⁶⁵ The trial court granted the motion to dismiss the constitutional challenge after the prosecution substituted a lesser charge under s 294(a) (committing an indecent act in a public place, to which Tan pleaded guilty). The High Court upheld the dismissal in *Tan Eng Hong v Attorney-General* [2011] 3 SLR 320 (HC).

⁶⁶ *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 (CA), [186].

⁶⁷ *Ibid.*, [112].

⁶⁸ Chua (n 64 above).

in April 2013.⁶⁹ Tan’s application was also rejected by the High Court, in October 2013.⁷⁰ The two appeals were then heard together in the Court of Appeal, which upheld s 377A.⁷¹

Both the High Court and the Court of Appeal applied Singapore’s “reasonable classification” test to determine the constitutionality of s 377A under Art 12(1). Under this approach, a “discriminatory law” is nonetheless constitutional if it is “based on a ‘reasonable’ or ‘permissible’ classification provided that: (i) the classification is founded on an intelligible differentia ...; and (ii) the differential has a rational relation to the object to be achieved” by the law.⁷² Although this is a low level of scrutiny, the reference to “reasonable or permissible” implies that there should be some assessment by the court of the underlying statutory purpose.

Indeed, the High Court judge did assess the statutory purpose, noting that: “If the legislation in question is truly discriminating arbitrarily and without a legitimate purpose, the court cannot stand by the sidelines and do nothing ... [t]he courts can, and will, critically examine and test such legislation where necessary and appropriate”.⁷³ Having embarked upon this enquiry, the judge then concluded that the purpose of s 377A was to signal “the public’s disapprobation of male homosexual conduct” and that this was legitimate in light of the long history of such laws and Singapore’s “specific traditions with regard to procreation and lineage” (which the judge suggested could explain why Parliament prohibited only male homosexual conduct).⁷⁴ While this justification is somewhat dubious, it is reassuring that the judge apparently did not think that the bare desire to express disapproval of a politically unpopular group justifies a discriminatory law.⁷⁵

Unfortunately, on appeal, even this mild level of scrutiny was deemed inappropriate. The Court of Appeal rejected the High Court’s assumption that a statute might be unconstitutional under Art 12(1) “even if it satisfies the reasonable classification test, provided that it can

⁶⁹ *Lim Meng Suang v Attorney-General* [2013] SGHC 73 (HC).

⁷⁰ *Tan Eng Hong v Attorney-General* [2013] SGHC 199 (HC).

⁷¹ *Lim Meng Suang v Attorney-General* [2014] SGCA 53 (CA).

⁷² *Ibid.*, [58].

⁷³ *Lim Meng Suang* (HC) (n 69 above), [114].

⁷⁴ *Ibid.*, [118]–[119] and [126–127]. The judge noted that plaintiffs offered “no material evidence” to show that this purpose could not be achieved simply because the law was not being actively enforced. *Ibid.*, [134].

⁷⁵ In the United States, the Supreme Court’s recognition that a bare desire to demean a particular group cannot justify unequal treatment was an important factor in the gradual recognition of LGBT rights. See *Romer v Evans* 517 US 620, 634 (1996) and *Lawrence v Texas* 539 US 558, 582 (2003) (concurring opinion of Justice O’Connor).

be demonstrated that the object of the statute is illegitimate”.⁷⁶ Instead, it interpreted Art 12(1) as requiring only the following analysis: (1) is the classification based upon an intelligible differentiation; and (2) is there a rational relation between that differentiation and the statute’s object? The Court then analysed the history of s 377A in great detail and concluded (not surprisingly) that there is a “complete coincidence” between the differentiation and the statutory purpose: Parliament *differentiated* male homosexual conduct because its *purpose* was to prohibit that conduct.

By defining the test for constitutionality so narrowly, the Court of Appeal abdicated any responsibility to consider whether the statutory purpose was itself discriminatory and therefore unconstitutional. Arguments that might have compelled it to consider this issue were repeatedly dismissed by the Court as “extra-legal” points, unfit for judicial analysis. The Court justified this in part by stressing the presumption of constitutionality⁷⁷ and its obligation not to “usurp” Parliament’s role. It also compared the general language of Art 12(1) to Art 12(2) (which prohibits specific grounds of discrimination but does not list sexuality or gender). The Court’s analysis implies that Singapore’s Parliament can constitutionally enact a statute that has the purpose of discriminating against a group, so long as the group is not expressly listed in Art 12(2).

One commentator has suggested that Singapore should adopt the proportionality analysis applied by Hong Kong courts in order to assess whether the statutory purpose is legitimate.⁷⁸ While I agree, it is difficult to imagine this occurring given the huge gap in judicial approaches. Although Singapore’s Court of Appeal cited *Leung v Secretary for Justice* in its decision on standing, it did not cite any of the relevant Hong Kong jurisprudence in its judgment on the merits.

Singapore’s Court of Appeal also rejected the argument that s 377A violates the right to liberty, which is expressly protected in Art 9(1) of Singapore’s Constitution. Counsel for Lim Meng Suang and Kenneth Chee argued that Art 9(1) should be given a purposive interpretation, so as to include at least a “limited right to privacy and personal autonomy, allowing a person to enjoy and express affection and love towards another human being”.⁷⁹ The Court of Appeal declined to do so, reaffirming

⁷⁶ *Lim Meng Suang* (CA) (n 71 above), [76] and [82].

⁷⁷ *Ibid.*, especially [104]–[107]. Although the Court observed that the presumption might be slightly less compelling for a law enacted during the colonial period this did not seem to lessen its desire to defer to Parliament.

⁷⁸ Jack Tsen-Ta Lee, “Equality and Singapore’s First Constitutional Challenges to the Criminalization of Male Homosexual Conduct” (2015) 16 *Asia-Pacific Journal on Human Rights and the Law* 150.

⁷⁹ *Lim Meng Suang* (CA) (n 71 above), [43].

previous decisions that interpreted Art 9(1) narrowly, so as to include only the “personal liberty of a person from unlawful incarceration or detention”.⁸⁰

In some respects, the Court of Appeal’s decision in *Lim Meng Suang* is reminiscent of the 1986 case of *Bowers v Hardwick*,⁸¹ in which the United States Supreme Court narrowly upheld Georgia’s anti-sodomy laws. *Bowers* was a devastating blow for the gay rights movement, not only because of the outcome but also because the majority opinion was so dismissive, describing the claim that the right to liberty included a right to engage in gay sexual conduct in private as “at best, facetious”.⁸² Fortunately, *Bowers* was widely criticised by legal scholars and it was overruled in 2003, a rare event in the US legal system.⁸³ Justice Kennedy wrote the majority opinion in *Lawrence v Texas* and explained the errors that were made in *Bowers*: “To say that the issue ... was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse”.⁸⁴ Justice Kennedy emphasised “liberty” (rather than privacy rights) and made it clear that liberty includes the right to engage in consenting intimate conduct. The judgment in *Lawrence* also took a more robust approach to the right to equal protection, emphasising that courts should apply a more searching form of “rational basis review” when it is clear that a law harms a politically unpopular group.

It is also worth noting that opposition to *Bowers* inspired a new wave of activism, fundraising and civil disobedience among the LGBT community, which helped to achieve certain legislative reforms at the state level. Of course, Singapore’s LGBT movement cannot respond to *Lim Meng Suang* with civil disobedience because that would not be tolerated and would almost certainly backfire. Given the restrictions on civil liberties and the lack of meaningful judicial review in Singapore, the movement has little choice but to continue its strategy of pragmatic resistance and incremental progress.⁸⁵

⁸⁰ *Ibid.*, [45].

⁸¹ 478 US 186 (1986).

⁸² *Ibid.*, [190]–[194].

⁸³ *Lawrence* (n 75 above).

⁸⁴ *Ibid.*, 567. Six of nine justices agreed that the Texas statute was unconstitutional but the vote was only five-to-four on whether to overrule *Bowers*; Justice O’Conner distinguished the two statutes and wrote her own opinion striking down the Texas statute on equal protection grounds.

⁸⁵ It is encouraging that the Pink Dot celebration attracted a record turnout in 2015, including celebrity participation and increased corporate sponsorship for the event; see <http://pinkdot.sg/alovenotefrom28000/>.

4. Discrimination in the Private Sector

In the context of discrimination in the private sector (where Hong Kong's BORO does not apply) Singapore and Hong Kong are more similar. Neither jurisdiction has laws expressly prohibiting discrimination on the ground of sexual orientation. Hong Kong does have legislation prohibiting discrimination on the grounds of sex, marital and family status, race and disability (and some transgender individuals have obtained remedies by alleging disability discrimination).⁸⁶ However, Hong Kong's legislation was enacted in a piecemeal fashion, beginning in 1995, and this has created different legal standards for different groups, as well as some glaring gaps.⁸⁷

In Singapore, there is a "cleaner slate" in the field of anti-discrimination law, particularly in relation to gender, sexual orientation and disability. This may provide an opportunity to campaign for a truly comprehensive law, one that can establish a right to equality for groups that currently enjoy no legal right to equality.⁸⁸ This comprehensive strategy was attempted in Hong Kong in 1994 when an appointed legislator (Anna Wu) introduced the Equal Opportunities Bill (EOB),⁸⁹ which sought to prohibit discrimination on numerous grounds, including sex, pregnancy, disability, sexuality, race and age. Given that Hong Kong had virtually no anti-discrimination legislation at the time, Wu initially hoped that all groups who experienced discrimination would join together and support her bill, as a full package. But women's groups were divided—some supported the broad EOB while others balked at the idea of prohibiting race and sexuality discrimination.⁹⁰ The Government took advantage of this divide and introduced its own narrower bills prohibiting only sex and disability discrimination, which were enacted in 1995.

Although the provisions of Wu's EOB that addressed sexuality discrimination were subsequently reintroduced, the Government also successfully opposed these bills.⁹¹ In contrast to the decriminalisation process, where the Hong Kong Government was relatively unconcerned by public opinion, the Government has insisted that public support is essential before a law prohibiting sexuality discrimination in the

⁸⁶ See Petersen (n 7 above).

⁸⁷ See Petersen and Loper (n 12 above).

⁸⁸ Association of Women for Action and Research (AWARE), "Time for Anti-Discrimination Law" (3 February 2015), available at <http://www.aware.org.sg/2015/02/time-for-anti-discrimination-law/> (visited 1 October 2015).

⁸⁹ Hong Kong Government Gazette, 1 July 1994, Legal Supp No 3, pp C1026–C1218.

⁹⁰ The author assisted Anna Wu with drafting the EOB and also presented it to several women's groups, in the hope that they would support a comprehensive bill.

⁹¹ For discussion of failed attempts to legislate, see Petersen (n 46 above).

private sector can be enacted. This ignores one of the key goals of anti-discrimination law—to protect minority groups from discrimination by the majority. Moreover, at times, the consultation documents distributed by the Government seemed designed to create prejudice rather than promote equality.⁹² Although recent surveys of public opinion have been more positive,⁹³ the Government has declined to propose anything stronger than non-binding codes of practice.⁹⁴

It is, however, encouraging to see that the Hong Kong's Equal Opportunities Commission (EOC) and certain elected legislators have begun to support the LGBT community.⁹⁵ In 2014, the EOC commissioned the Gender Research Institute at Chinese University of Hong Kong to conduct a comprehensive study of both sexuality and gender identity discrimination. Published in January 2016, the study concluded that discrimination against LGBT individuals is common in Hong Kong and also that public support for a law prohibiting such discrimination has significantly increased in the past decade.⁹⁶ The chairperson of the EOC at the time (Dr York Chow) thus called upon the Government to stop delaying and consult the public on the actual content of an anti-discrimination law.⁹⁷ However, social conservatives have already challenged the EOC-sponsored study, accusing it of bias.⁹⁸ Moreover, a Government advisory body recently released its own report on the subject, which reported about divided opinion but fell well short

⁹² For examples of biased questions, see Petersen (n 8 above).

⁹³ See Kelley Loper, Holning Lau and Charles Lau, "Public Attitudes towards Gays and Lesbians and towards Sexual Orientation Anti-discrimination Legislation" (October 2014), available at [http://www.law.hku.hk/ccpl/pub/Policy%20Paper%202%20\(English%20Final\).pdf](http://www.law.hku.hk/ccpl/pub/Policy%20Paper%202%20(English%20Final).pdf) (reporting data from a 2013 telephone survey).

⁹⁴ Constitutional and Mainland Affairs Bureau, Code of Practice against Discrimination on the Ground of Sexual Orientation, available at <http://www.cmab.gov.hk/en/issues/sexual.htm> (visited 1 October 2015).

⁹⁵ For examples of this trend, see Petersen and Loper (n 12 above). Ironically, Art 74 of Hong Kong's Basic Law now requires legislators to obtain the Chief Executive's consent before introducing a bill relating to Government policies. Had a comparable restriction applied in the colonial era, Anna Wu could not have introduced her EOB in 1994.

⁹⁶ Equal Opportunities Commission, "Report on Study on Legislation against Discrimination on the Grounds of Sexual Orientation, Gender Identity and Intersex Status" (commissioned by the Hong Kong EOC and conducted by the Gender Research Center, Chinese University of Hong Kong) (January 2016), available at <http://www.eoc.org.hk/eoc/upload/ResearchReport/20161251750293418312.pdf> (visited 15 February 2015).

⁹⁷ Jennifer Ngo, "Hong Kong Ready for Anti-Discrimination Laws to Protect LGBT People—and Government Must Act Now, Study Says", *South China Morning Post* (27 January 2016), available at <http://www.scmp.com/news/hong-kong/politics/article/1905782/hong-kong-ready-anti-discrimination-laws-protect-lgbt-people?page=all> (visited 15 February 2015). Dr Chow completed his term as chairperson at the end of March 2016 and was replaced by Professor Alfred Chan Cheung-ming.

⁹⁸ Ng Kang-chung, "Pro-Family and Anti-Gay Groups Don't Believe Hong Kong Public Supports Law to Protect LGBT People", *South China Morning Post* (31 January 2016), available at <http://www.scmp.com/news/hong-kong/politics/article/1907981/pro-family-and-anti-gay-groups-dont-believe-hong-kong-public?page=all> (visited 15 February 2015).

of recommending binding legislation.⁹⁹ The Government may use this report as an excuse for inaction.

In any event, in this author's opinion, the best way forward is not to draft an entirely new law but rather to amend the language of s 5 of the Hong Kong Sex Discrimination Ordinance so as to prohibit discrimination on the ground of sex, sexual orientation, gender identity and intersex status. This would help to maintain consistent standards and avoid the sort of inconsistencies that were introduced when Hong Kong's Race Discrimination Ordinance was drafted.

While the process of enacting anti-discrimination legislation is inherently local, international human rights law can still be influential.¹⁰⁰ One strategy that has been used by human rights organisations in Hong Kong (and to some extent by Singaporean groups) is to engage the UN human rights monitoring bodies with issues that are important to LGBT individuals. As a result of non-governmental organization (NGO) alternative reports, the Human Rights Committee has frequently criticised the Hong Kong Government for its failure to address sexuality discrimination.¹⁰¹ Similarly, the Committee on Economic, Social and Cultural Rights described the need to better protect LGBT rights as a "principal subject of concern" in Hong Kong.¹⁰² Although it is difficult to measure the impact of this critique, similar comments from treaty-monitoring bodies did help to persuade the Government to introduce race discrimination legislation.¹⁰³ The Government has also implemented recommendations of the Committee on the Elimination of Discrimination against Women (CEDAW),¹⁰⁴ including its suggestion that the Domestic Violence Ordinance be amended to include same-sex relationships.¹⁰⁵

⁹⁹ Constitutional and Mainland Affairs Bureau, "Report of the Advisory Group on Eliminating Discrimination against Sexual Minorities, at Executive Summary", available at http://www.cmab.gov.hk/en/issues/equal_advisory_group.htm (visited 15 February 2016).

¹⁰⁰ See Petersen and Loper (n 12 above).

¹⁰¹ UN Human Rights Committee, Concluding Observations: Hong Kong, 15 November 1999, CCPR/C/79/Add.117, para 15, and Concluding Observations: Hong Kong, 29 April 2013, CCPR/CHN/-HKG/CO/3, para 23.

¹⁰² UN Committee on Economic, Social and Cultural Rights, Concluding Observations, China: Hong Kong, 21 May 2001, E/C.12/1/Add.58, para 15(c); Committee on Economic, Social and Cultural Rights, Concluding Observations: People's Republic of China (including Hong Kong and Macao), 13 May 2005, E/C.12/1/Add.107, para 78(a).

¹⁰³ Petersen and Loper (n 12 above), pp 181–186.

¹⁰⁴ Carole J Petersen and Harriet Samuels, "The International Convention on the Elimination of All Forms of Discrimination against Women: A Comparison of Its Implementation and the Role of Non-Governmental Organizations in the United Kingdom and Hong Kong" (2002) 26 *Hastings International and Comparative Law Review* 1.

¹⁰⁵ Domestic Violence (Amendment) Ordinance 2009 (No 18 of 2000). Hong Kong Government Gazette, A381–A397 (29 December 2009).

Although Singapore has been slow to ratify human rights treaties, it is now a state party to CEDAW, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities. The monitoring bodies for these treaties will question Singapore regarding LGBT issues if they are included in NGO alternative reports. For example, when the CEDAW Committee reviewed Singapore's report in 2011, it asked the Government several questions regarding discrimination against lesbians,¹⁰⁶ which were prompted by an alternative report from Sayoni.¹⁰⁷ The Committee urged Singapore to enact legislation prohibiting "discrimination against women on all grounds".¹⁰⁸ In 2011, the Committee on the Rights of the Child questioned Singapore's excessive controls on freedom of association and assembly,¹⁰⁹ which greatly hinder LGBT advocacy.¹¹⁰

While the Singaporean Government is less sensitive to international critique than the Hong Kong Government, no government likes to receive negative comments from human rights monitoring bodies. This is why the Singaporean Government recently tried to reassure the UN Human Rights Council, as part of "universal periodic review", that the LGBT community suffers no discrimination in Singapore.¹¹¹ However, NGO reports have countered this claim, pointing to discriminatory actions in civil service employment, public housing and the private employment market.¹¹² There is little doubt that s 377A, which labels all gay men as likely criminals, helps to perpetuate this discrimination. During the recent "universal periodic review" of Singapore, numerous governments, including traditional allies, called for the repeal of s 377A and asked the Singaporean Government to explain how it reconciles

¹⁰⁶ Chua (n 10 above), pp 131–133; and Grace Poore, *Amazing Responses by CEDAW to Address LGBT Discrimination in Singapore*, International Gay and Lesbian Human Rights Commission (27 July 2011), available at <https://iglhrc.wordpress.com/2011/07/27/amazing-responses-by-cedaw-to-address-lgbt-discrimination-in-singapore> (visited 1 August 2015).

¹⁰⁷ Sayoni, "Report on Discrimination against Women in Singapore Based on Sexual Orientation and Gender Identity", available at http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/SGP/INT_CEDAW_NGO_SGP_49_10025_E.pdf (visited 6 January 2016).

¹⁰⁸ CEDAW Committee, *Concluding Observations: Singapore*, 16 December 2012, CEDAW/C/SGP/CO/4 Rev 1, para 10.

¹⁰⁹ Committee on the Rights of the Child, *Concluding Observations: Singapore*, 4 May 2011, CRC/C/SGP/CO/2-3, paras 37–38.

¹¹⁰ See generally, Chua (n 10 above).

¹¹¹ National Report of Singapore (n 15 above), paras 5 and 111–113, available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/SGSession24.aspx> (visited 6 January 2016).

¹¹² See Summary of Stakeholders' Information (prepared by the Office of the UN High Commissioner for Human Rights in connection with the 2016 Universal Periodic Review of Singapore), UN Doc A/HRC/WG.6/24/SGP/3 (6 November 2015), especially paras 5, 33, 48, 50, 61 and 63, available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/SGSession24.aspx> (visited 6 January 2016).

s 377A with its stated policy of non-discrimination.¹¹³ The Government's response—that it will not actively enforce the law and intends to let society evolve gradually—only ensures that international human rights bodies will continue to monitor violations of LGBT rights in Singapore. Interestingly, in its press release following the review, the Singapore Government acknowledged that s 377A had attracted negative international commentary.¹¹⁴ At some point, this commentary may help the Government to persuade social conservatives that the law needs to be repealed.

5. Conclusion

In the context of gay rights, one commentator characterised international law as a replacement for colonial law and “the new policing mechanism of the West to monitor and discipline the East”.¹¹⁵ However, in this author's view, that comment exaggerates the power of international human rights law, which employs notoriously soft and diplomatic enforcement processes. It also oversimplifies the views of different communities: the West includes many people who strongly oppose LGBT rights on religious and cultural grounds, while Asia includes many advocates for equality.

This article demonstrates that two Asian jurisdictions, which share similar cultural and legal traditions, can respond quite differently to international human rights norms due to their political contexts. In the case of Hong Kong, although the public may not have welcomed every reform that was adopted to comply with the ICCPR, it strongly supported the incorporation of the ICCPR into its domestic constitution—and almost certainly wants Hong Kong judges to continue enforcing the ICCPR against the unelected government. Moreover, even in nations where the public elects the government, there are always individuals with little political influence, who cannot rely upon the democratic process to protect themselves from discrimination. As demonstrated by the Singapore case law, local judges also cannot be counted upon to interpret or enforce domestic constitutional rights in a robust manner. There is

¹¹³ UN Human Rights Council, Twenty-Fourth Session, Draft Report of the Working Group on the Universal Periodic Review: Singapore, UN Doc A/HRC/WG.6/24/L.14 (4 February 2016), available at http://www.upr-info.org/sites/default/files/document/singapore/session_24_-_january_2016/a_hrc_wg_6_24_l.14.pdf (visited 20 February 2016).

¹¹⁴ Ministry of Foreign Affairs, “Singapore's Participation in the Second Cycle of the Universal Periodic Review, UN Human Rights Council in Geneva, Switzerland, 27 January 2016”, available at http://www.mfa.gov.sg/content/mfa/overseasmission/geneva/press_statements_speeches/2016/201601/press_20160128.html (visited 20 February 2016).

¹¹⁵ Stewart L. Chang, “The Postcolonial Problem for Global Gay Rights” (2014) 32 *Boston University International Law Journal* 309.

also a real danger, particularly in the case of LGBT citizens, that the discourse of religion and “local cultural values” will be used to perpetuate discrimination. Indeed, in some jurisdictions, this discourse has been used to justify horrific acts of violence.

Thus, while the practical impact of international human rights law will vary from country to country, it provides a modest and necessary tool for addressing this imbalance of power. It is therefore a positive sign that human rights treaty-monitoring bodies and the UN Human Rights Council are paying greater attention to the rights of the LGBT community.¹¹⁶

¹¹⁶ See the works referred to in notes 4 and 5 above.

