

# Washington International Law Journal

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Volume 19 | Number 2

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4-1-2010

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### Recommended Citation

Lauren E. Sancken, Comment, *Hong Kong's Discriminatory Air Time: Family Viewing Hours and the Case of Cho Man Kit v. Broadcasting Authority*, 19 Pac. Rim L & Pol'y J. 357 (2010).  
Available at: <https://digitalcommons.law.uw.edu/wilj/vol19/iss2/6>

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# HONG KONG'S DISCRIMINATORY AIR TIME: FAMILY VIEWING HOURS AND THE CASE OF *CHO MAN KIT V. BROADCASTING AUTHORITY*

Lauren E. Sancken<sup>†</sup>

*Abstract:* Hong Kong's long standing commitment to media and press freedom came under question when the Broadcasting Authority issued a ruling against a television show about same-sex couples. In deciding *Cho Man Kit v. Broadcasting Authority*, the Court of First Instance affirmed that sexual orientation must be afforded freedom of expression in public broadcasting. However, the Court found that the Broadcasting Authority had lawfully ruled that the show be excluded from family viewing hours. Though the opinion was in many ways a legal victory for homosexuals in Hong Kong, this Comment argues that the family viewing hours ruling undermines the cornerstone principle of equality in Hong Kong society. In its analysis, the Court misconstrued the "sex and nudity" provision of the Broadcasting Authority Code of Practice in a discriminatory manner such that homosexuality was hypersexualized. In addition, the Court used a legally insufficient proportionality test to analyze the family viewing hours provision in defiance of both legal precedent and Hong Kong public policy. For this reason, the second half of the Court's opinion is infused with the very discrimination the Court sought to prevent.

## I. INTRODUCTION

On December 13, 2008, thousands of parade-goers filled Hong Kong's downtown streets with the message to "celebrate love" and queer identity in the city's first-official gay pride parade.<sup>1</sup> Amidst the crowd stood Gun Lu of Beijing, holding a sign protesting the censorship of movies and television shows that deal openly with homosexuality.<sup>2</sup> His sign was one of many, and the topic has become increasingly common in Hong Kong. Rarely are non-heterosexuals displayed in the Chinese media, and when they are, "they are portrayed as effeminate, flamboyant, sissies, perverts, or AIDS carriers."<sup>3</sup> The catalyst for much of this attention was the Broadcasting Authority's ("BA") recent attempt to regulate homosexual content on mainstream television. *Hong Kong Connection—Gay Lovers* was a television program that provided a view into the daily life of two homosexual couples. The BA issued a sharp warning to its

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<sup>1</sup> Deena Guzder & Ann Binlot, *A Gay-Pride Revolution in Hong Kong*, TIME, Dec. 14, 2008, <http://www.time.com/time/world/article/0,8599,1866308,00.html> (last visited Jan. 3, 2010).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* (quoting Dr. Ching Yau).

producers for violating the television code of practice in giving a “pro-gay” view without a counterview, and for airing the program during family viewing hours.<sup>4</sup> Such a ruling generated fervent debate in Hong Kong over the protections afforded homosexual couples and the role of the media in such a debate.<sup>5</sup> It also became the genesis of a lawsuit that marks the first legal opinion on media censorship of homosexual content in Hong Kong.

In May 2008, the Hong Kong Court of First Instance<sup>6</sup> issued *Cho Man Kit v. Broadcasting Authority*,<sup>7</sup> an opinion that was, in many ways, a victory for gay rights. The suit was brought by Joseph Cho Man-kit, one of the homosexual participants of the show. The Court rejected the BA’s ruling that *Hong Kong Connection-Gay Lovers* violated the broadcasting code on impartiality grounds.<sup>8</sup> However, the Court upheld the BA’s finding that the show belonged outside of “family viewing hours.”<sup>9</sup> The opinion provided a clear message that discrimination against homosexuality was unconstitutional, and provided activists, including Cho Man-Kit, with reassurance that the ruling could be used to “urge the government to enact anti-sexual discrimination laws as soon as possible.”<sup>10</sup> Nonetheless, this Comment argues that the Court erred in permitting the BA to censor homosexuality from family viewing hours. The Court misconstrued the BA Code of Practice (“BA Code”) in a discriminatory

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<sup>4</sup> See generally *Cho Man Kit v. Broadcasting Authority*, [2008] H.K.C.F.I. 383 (C.F.I.), available at [http://www.hklii.org/hk/jud/eng/hkcfi/2008/HCAL000069\\_2007-61024.html](http://www.hklii.org/hk/jud/eng/hkcfi/2008/HCAL000069_2007-61024.html) [hereinafter *Cho Man Kit*].

<sup>5</sup> See Polly Hui, *A Stubborn Denial of Homosexuals’ Human Rights*, S. CHINA MORNING POST, July 1, 2007, at 44 [hereinafter Hui, *A Stubborn Denial*]; Polly Hui, *Reverse Gay Show Ruling: Lawmakers; RTHK Director Says Broadcasting Authority’s Warning On Programme About Homosexuals Could Affect Creative Freedom*, S. CHINA MORNING POST, Mar. 13, 2007, at 3 [hereinafter Hui, *Reverse Gay Show Ruling*]. Several private blogs have also written about the case and its affect on media freedom throughout Southeast Asia. See Musings, <http://magnezium.blogspot.com/2008/05/broadcasting-gay-content-spore-vs-hk.html> (May 10, 2008, 3:34PM UTC) (last visited Mar. 18, 2010); Yawning Bread, [http://www.yawningbread.org/arch\\_2008/yax-878.htm](http://www.yawningbread.org/arch_2008/yax-878.htm) (May 11, 2008) (last visited Mar. 18, 2010).

<sup>6</sup> The Hong Kong judiciary is structured in the following hierarchy: The Court of Final Appeal, the High Court, comprised of the Court of Appeal and the Court of First Instance, the District Court, the Magistrates’ Courts, the Coroner’s Court, and the Juvenile Court. Disputes relating to specific, defined areas may be heard by other tribunals such as the Lands Tribunal, the Labour Tribunal, the Small Claims Tribunal and the Obscene Articles Tribunal. The Court of Appeal hears appeals on all civil and criminal matters, from the Court of First Instance, District Court, and Lands Tribunal, and may rule on questions of law referred by the lower courts. The Court of First Instance has unlimited jurisdiction in both criminal and civil matters and may exercise appellate jurisdiction to hear appeals from the Magistrates’ Courts, the Labour Tribunal, the Small Claims Tribunal, and the Obscene Articles Tribunal. See Dep’t. of Justice, *The Legal System in Hong Kong*, <http://www.doj.gov.hk/eng/legal/> (last visited Jan. 1, 2010). For an organizational chart, see Judiciary of the Hong Kong Special Administrative Region of the People’s Republic of China, *Structure of the Courts*, <http://www.judiciary.gov.hk/en/organization/courtchart.htm> (last visited Jan. 1, 2010).

<sup>7</sup> *Cho Man Kit*, supra note 4.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Yvonne Tsui, *TV Watchdog Curbed Free Speech: Judge; Broadcasting Authority Wrong on Gay-Marriage Documentary Ruling*, S. CHINA MORNING POST, May 9, 2008, at 1 (quoting *Cho Man-Kit*).

manner in order to hypersexualize<sup>11</sup> homosexuality. In addition, the Court failed to use the proper legal standard by which to analyze the family viewing hours restriction. Had the Court construed the code properly and applied the correct standard, it is likely that it would have reached a different result.

Part II of this Comment gives background on the legal status of Hong Kong's homosexuals in the context of the legislature and the judiciary. Part III explains the facts of *Cho Man Kit* and the Court's legal analysis. Part IV evaluates the Court's decision and assesses the legal standard used against relevant case law. Part V discusses the implications of the decision by analyzing both the Court's reluctance to intervene in family matters, as well as the likelihood of a chilling effect on press freedoms and the off-loading of homosexual content to non-regulated, non-mainstream forums.

## II. BACKGROUND

Hong Kong's political and judicial history provides necessary context for understanding *Cho Man Kit*. While tongzhi<sup>12</sup> in Hong Kong do not enjoy statutory protections against discrimination, tongzhi have successfully furthered their rights and protections through the courts. This section gives a brief history of Hong Kong's governmental structure and civil rights development. It then discusses legislative attempts to define and expand the civil rights of tongzhi. Lastly, this section discusses two important cases that extended equal protection under the law to tongzhi.

### A. *The Growth of Civil Liberties in the Hong Kong Special Administrative Region*

On July 1, 1997, Hong Kong became the Hong Kong Special Administrative Region ("HKSAR") of the People's Republic of China ("PRC").<sup>13</sup> This handover to the PRC marked the end of over 155 years of British rule.<sup>14</sup> The Hong Kong government took considerable measures to protect the civil liberties of its people prior to becoming an entity of the PRC.

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<sup>11</sup> The term "hypersexualize" is used to mean a state of heightened sexualization. In particular, it describes a stereotype that adult homosexuality is an aberration from sexual norms. See Robert Danay, *Leung v. Secretary for Justice: Privacy, Equality and the Hypersexualised Homosexual Stereotype*, 35 H.K. L. J. 545, 557 (2005).

<sup>12</sup> The term "tongzhi" is an indigenous word representing same-sex eroticism in Chinese societies. It was appropriated by a Hong Kong gay activist during the first Lesbian and Gay Film Festival in Hong Kong in 1989. The term is used to replace the negative medical pathology associated with "homosexual" as well as the Anglo-Saxon constructs of "gay," "lesbian," and "queer." See CHOU WAH-SHAN, *TONGZHI: POLITICS OF SAME-SEX EROTICISM IN CHINESE SOCIETIES* 1-4 (2000).

<sup>13</sup> *Tenth Annual Philip D. Reed Memorial Issue Special Report: One Country, Two Legal Systems?*, 23 *FORDHAM INT'L L.J.* 1, 9 (1999).

<sup>14</sup> NORMAN MINERS, *THE GOVERNMENT AND POLITICS OF HONG KONG* 29 (5th ed. 1991).

Two main instruments, the Basic Law of the Hong Kong Special Administrative Region (“Basic Law”) and the Hong Kong Bill of Rights Ordinance (“BORO”), provide the basis for Hong Kong’s independent authority from the PRC and for the equal treatment of all members of its society.

1. *The Basic Law Provides Hong Kong’s Constitutional Structure*

The Basic Law was the product of decades of negotiation surrounding the transfer of Hong Kong from Great Britain to the PRC. Formal negotiations about the handover began in the 1970s,<sup>15</sup> culminating in the Joint Declaration of Great Britain and Northern Ireland and the People’s Republic of China on the Question of Hong Kong (“Joint Declaration”).<sup>16</sup> In June 1985, the PRC began drafting the Basic Law that established the constitutional system in Hong Kong.<sup>17</sup> On April 4, 1990, China’s National People’s Congress officially adopted the Basic Law.<sup>18</sup>

Though Hong Kong is ultimately subject to the PRC Constitution of 1982,<sup>19</sup> the Basic Law stipulates that the PRC’s policies be consistent with the sovereignty and self-determination provisions of the Joint Declaration.<sup>20</sup> This essentially provided a framework for “one country, two systems.”<sup>21</sup> Accordingly, the Basic Law allows Hong Kong “a high degree of autonomy,”<sup>22</sup> as well as the right to an executive, a legislature, and an independent judiciary.<sup>23</sup> In addition, the Basic Law permitted Hong Kong to maintain its capitalistic system and way of life for fifty years,<sup>24</sup> and codified the PRC’s promise to

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<sup>15</sup> See *id.* at 6. During the 1950s, an informal understanding was reached between Great Britain and China: China would not interfere with the British administration of Hong Kong, if Great Britain ensured that China’s interests would not be threatened in Hong Kong. This agreement was not memorialized in writing, but was rather the consensus reached by a prominent Hong Kong political commentator.

<sup>16</sup> See YASH GHAI, HONG KONG’S NEW CONSTITUTIONAL ORDER 35-80 (2d ed. 1999). The Joint Declaration was signed on December 19, 1984. The recovery of Hong Kong was seen as way for China to assist in its economic and technological development, as well as consolidate the political authority of Den Xiaoping.

<sup>17</sup> *Id.* at 35.

<sup>18</sup> The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (1997) Cap. 2101. (H.K.), available at <http://www.basiclaw.gov.hk/en/basiclawtext/index.html> [hereinafter Basic Law].

<sup>19</sup> *Id.* art. 1 (“The Hong Kong Special Administrative Region is an inalienable part of the People’s Republic of China.”).

<sup>20</sup> *Id.* pmb1.

<sup>21</sup> *Id.* (“under the principle of ‘one country, two systems,’ the socialist system and policies will not be practised in Hong Kong”); see also YASH GHAI, *supra* note 16, at 38-43.

<sup>22</sup> Basic Law, *supra* note 18, art. 2. (“The National People’s Congress authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative, and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law.”).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* art. 5.

respect the rights and freedoms of Hong Kong residents,<sup>25</sup> including the right of equal legal status for all.<sup>26</sup>

## 2. *The Bill of Rights Ordinance Provides Additional Protections Against Discrimination*

Despite the autonomy granted under the Basic Law, people in Hong Kong became skeptical of whether China would uphold its promise of non-interference. The Tiananmen Square massacre, which took place in June 1989, shortly after the passage of the Joint Declaration, triggered skepticism among many of Hong Kong's citizens.<sup>27</sup> The violent suppression of student protests by the PRC government created outrage throughout Hong Kong,<sup>28</sup> and one million people in Hong Kong marched to show solidarity with those who had died.<sup>29</sup> To assuage public fear about the protection of civil liberties under PRC law, the Hong Kong legislature ("Legco") passed the Hong Kong Bill of Rights Ordinance ("BORO") on June 8, 1991.<sup>30</sup>

Hong Kong drafted its BORO in order to assure that civil liberties would survive the complete resumption of Chinese control in 1997. The BORO contained provisions that directly mirrored the articles of the International Covenant on Civil and Political Rights of 1966 ("ICCPR"),<sup>31</sup> a treaty the PRC agreed will remain in effect in Hong Kong.<sup>32</sup> In relevant part, the BORO

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<sup>25</sup> *Id.* art. 4 ("The Hong Kong Special Administrative Region shall safeguard the rights and freedoms of the residents of the Hong Kong Special Administrative Region and of other persons in the Region in accordance with law."); *id.* art. 27 ("Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike.")

<sup>26</sup> *Id.* art. 25.

<sup>27</sup> YASH GHAL, *supra* note 16, at 27.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Hong Kong Bill of Rights Ordinance, (1997) Cap. 383. (H.K.), available at [http://www.legislation.gov.hk/blis\\_pdf.nsf/6799165D2FEE3FA94825755E0033E532/AE5E078A7CF8E845482575EE007916D8/\\$FILE/CAP\\_383\\_e\\_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/AE5E078A7CF8E845482575EE007916D8/$FILE/CAP_383_e_b5.pdf) [hereinafter BORO].

<sup>31</sup> Basic Law, *supra* note 18, art. 39 ("The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region."); see also Carole J. Petersen, *Values in Transition: The Development of the Gay and Lesbian Rights Movement in Hong Kong*, 19 LOY. L.A. INT'L & COMP. L.J. 337, 346 (1996) [hereinafter Petersen, *Values in Transition*].

<sup>32</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21, U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (Dec. 16, 1966), entered into force Mar. 23, 1976, available at <http://www2.ohchr.org/english/law/ccpr.htm> [hereinafter ICCPR]. The ICCPR is a United Nations Treaty based on the Universal Declaration of Human Rights. Because the treaty was ratified by the United Kingdom in 1976, it was also made applicable to Hong Kong. When the United Nations ratified the International Covenant on Civil and Political Rights, the provisions of Article 2 of the treaty automatically applied to all individuals within British territory and subject to British jurisdiction. However by not ratifying the Optional Protocol to the ICCPR, the United Kingdom prevented Hong Kong inhabitants from exercising the right of individual petition to

provides “the rights recognized in this Bill of Rights shall be enjoyed without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>33</sup>

*B. The Hong Kong Legislature Has Not Passed Protective Legislation for Tongzhi*

Legco has yet to enact sexual orientation or gender identity discrimination legislation. The most significant action taken by Legco was the decriminalization of sodomy in 1991,<sup>34</sup> a law that had been in existence since British colonization.<sup>35</sup> Legco has not been able to pass comprehensive sexual orientation discrimination legislation despite several attempts. This failure is in violation of Hong Kong’s international obligations.

*1. Legco’s Prior Attempts to Pass Sexual Orientation Anti-Discrimination Legislation Have Been Unsuccessful*

Legco has recognized the need to implement protective policies and outreach services for tongzhi. In 1994, legislators Anna Wu and Christine Loh<sup>36</sup> drafted the Equal Opportunities Bill.<sup>37</sup> Though the bill failed, it aspired to grant substantial protection to tongzhi through comprehensive anti-discrimination legislation.<sup>38</sup> In its place, Legco passed two much more modest, scaled-down bills—the Sex Discrimination Bill<sup>39</sup> and the Disability Discrimination

the Human Right Committee. For a list of all treaties and international agreements applicable to Hong Kong, see Dep’t. of Justice, *List of Treaties in Force and Applicable to the Hong Kong Special Administrative Region*, [www.Legislation.gov.hk/interlaw.htm](http://www.Legislation.gov.hk/interlaw.htm) (last visited Jan. 8, 2010).

<sup>33</sup> BORO, *supra* note 30, art.1, §1.

<sup>34</sup> Hong Kong Crimes Ordinance, (1991) Cap. 200, §118M. (H.K.) See Petersen, *Values in Transition*, *supra* note 31, at 339-40. The Sexual Offences Act of 1967 decriminalized homosexual acts in private between consenting adults, defined as persons twenty-one years of age or older. Though Great Britain repealed its anti-sodomy laws in 1967, Hong Kong’s laws remained in effect until Hong Kong enacted the BORO in 1991.

<sup>35</sup> Offences Against the Person Ordinance, (1981) Cap. 212. (H.K). Hong Kong adopted the same prohibition on sodomy as Great Britain, in which “Abominable Offenses” in the Ordinance prohibited all male homosexual conduct. See Petersen, *Values in Transition*, *supra* note 31, at 339-40.

<sup>36</sup> Hong Kong’s governor at the time, Chris Patten, was a strong proponent of equal rights and appointed both Anna Wu and Christine Loh to the Legislative Council. See Petersen, *Values in Transition*, *supra* note 31, at 352.

<sup>37</sup> *Id.* Original source for Equal Opportunities Bill not available.

<sup>38</sup> *Id.* The Equal Opportunities Bill prohibited discrimination on grounds of sex, marital status, pregnancy, family responsibility, disability, sexuality, race, age, political, and religious conviction and “spent conviction.”

<sup>39</sup> Sex Discrimination Bill (1994) H.K. Gov’t Gazette, Oct. 14, 1994, Legal Supp. No. 3, at C1382, *found in* Carol J. Petersen, *Equality as a Human Right: The Development of Anti-Discrimination Law in Hong Kong*, 34 COLUM. J. TRANSNAT’L L. 335, 385 (1996). Original source for Sex Discrimination Bill not available.

Ordinance.<sup>40</sup> These bills created an Equal Opportunities Commission, which enforced laws prohibiting discrimination on the basis of disability, gender, family status, and race.<sup>41</sup> Discrimination based upon sexual orientation, however, was not included.

As a consolation to disappointed activists and legislators,<sup>42</sup> the government issued a public consultation survey on whether sexual orientation anti-discrimination laws were needed.<sup>43</sup> The survey, however, was criticized because its phrasing tended to elicit negative responses.<sup>44</sup> For example, certain questions asked if a respondent would go swimming with a homosexual or a bisexual, while other questions asked if a respondent would patronize a hotel that admitted homosexuals.<sup>45</sup> Activists claimed that the suggestive phrasing of the questions prompted respondents to view sexual minorities as outsiders and informed respondents that the “average” Hong Kong person did not accept homosexuals or favor anti-discrimination legislation.<sup>46</sup> Accordingly, many were not surprised when the Home Affairs Bureau (“HAB”)<sup>47</sup> confirmed the results that most people did not support legislation that banned sexual orientation discrimination.<sup>48</sup>

## 2. *Hong Kong Continues to Receive International Disapproval for Legislative Failures*

Hong Kong's lack of protective legislation has been met with international dissent, as it is not in compliance with the ICCPR<sup>49</sup> and the International

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<sup>40</sup> Disability Discrimination Ordinance, No. 395, (1997), found in Petersen, *supra* note 39; see also Allyson Singer, Sex Discrimination in the Hong Kong Special Administration Region: The Sex Discrimination Ordinance, the Equal Opportunities Commission, and a Proposal for Change, 11 *IND. INT'L & COMP. L. REV.* 215, 227 (2000). Original source for Disability Discrimination Ordinance not available.

<sup>41</sup> See Petersen, *Values in Transition*, *supra* note 31, at 355.

<sup>42</sup> See *id.* at 384. Anna Wu's proposed bills received support from women's organizations, gay rights groups, and groups representing individuals with disabilities. The Secretary for Home Affairs publicly stated that if the bills were defeated, the government would commence a public opinion survey.

<sup>43</sup> See Hong Kong Gov't, Equal Opportunities: A Study on Discrimination on the Ground of Sexual Orientation—A Consultation Paper app. III (1996), found in Petersen, *Values in Transition*, *supra* note 31.

<sup>44</sup> Petersen, *Values in Transition*, *supra* note 31, at 358-59.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> HAB is a government agency charged with civic and community public administration. See Home Affairs Bureau, [http://www.hab.gov.hk/en/about\\_us/haborg.htm](http://www.hab.gov.hk/en/about_us/haborg.htm) (last visited Jan. 1, 2010), for more information on the operations of HAB.

<sup>48</sup> Hong Kong Gov't, Equal Opportunities: A Study on Discrimination on the Ground of Sexual Orientation—A Consultation Paper app. III (1996), found in Petersen, *Values in Transition*, *supra* note 31, at 358-59.

<sup>49</sup> See HONG KONG HUMAN RIGHTS MONITOR, SEXUAL ORIENTATION AND HUMAN RIGHTS IN HONG KONG (2005), <http://www.hkhrm.org.hk/PR/sexualorientationpaper.htm> (last visited Jan. 22, 2010) [hereinafter HUMAN RIGHTS MONITOR]. In 1994, the United Nations Human Rights Committee declared that discrimination on the basis of sexual orientation is a violation of the fundamental rights codified in the ICCPR. Article 2 § 1 of the



Covenant on Economic, Social and Cultural Rights (“UNCESCR”).<sup>50</sup> Hong Kong adopted the ICCPR and the UNCESCR on December 16, 1966, thereby obligating itself to follow these covenants.<sup>51</sup> Accordingly, in 1999, the UN Human Rights Committee expressed concern “that no legislative remedies [were] available to individuals in respect of discrimination on the grounds of race or sexual orientation.”<sup>52</sup> In 2001, UNCESCR issued sharp words of criticism to Hong Kong: “the failure of the HKSAR to prohibit discrimination on the basis of sexual orientation [is a] principal subject of concern.”<sup>53</sup> In May, 2005, after a continued failure to legislate, UNCESCR reiterated “its concern [that] . . . present anti-discrimination legislation [in Hong Kong] does not cover discrimination on the basis of . . . sexual orientation.”<sup>54</sup> This local and international disapproval prompted the Hong Kong government to consider enacting a Sexual Orientation Discrimination Ordinance (“SODO”).

### 3. *Despite Support for a SODO, Attempts to Enact Legislation Have Been Frustrated*

In October 2005, HAB initiated a consultation telephone survey to gauge public opinion on the possibility of enacting a SODO.<sup>55</sup> The results confirmed that nearly 40% of Hong Kong residents believed that the government should legislate sexual orientation anti-discrimination provisions in the field of

ICCPR provides, “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” In addition, art. 2, § 2 provides, “Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” See ICCPR, *supra* note 32, art. 2, §§ 1, 2.

<sup>50</sup> International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N.GAOR, Supp. (No. 16) at 49, U.N. Doc. A/6316 (Dec. 16, 1966), entered into force 1967, *available at* <http://www2.ohchr.org/english/law/cescr.htm> [hereinafter UNCESCR]. Article 2 § 2 provides that “[t]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>51</sup> China signed, but did not ratify, the ICCPR on October 5, 1998. United Nation Treaty Collection, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en#4](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#4) (last visited Jan. 8, 2010). “Upon resuming the exercise of sovereignty over Hong Kong, China notified the Secretary-General that the [ICCPR] will also apply to the Hong Kong Special Administrative Region.”

<sup>52</sup> HUMAN RIGHTS MONITOR, *supra* note 49.

<sup>53</sup> *Id.*; see also Hui, *A Stubborn Denial*, *supra* note 5.

<sup>54</sup> HUMAN RIGHTS MONITOR, *supra* note 49.

<sup>55</sup> CONSTITUTIONAL AND MAINLAND AFFAIRS BUREAU, SURVEY ON PUBLIC ATTITUDES TOWARDS HOMOSEXUALS (2006), [http://www.cmab.gov.hk/en/issues/public\\_homosexuals.htm](http://www.cmab.gov.hk/en/issues/public_homosexuals.htm) (last visited Jan. 15, 2010) [hereinafter SURVEY ON PUBLIC ATTITUDES 2006]. The survey was intended to assess public awareness of different sexual orientations, as well as assess public attitudes towards homosexuals and their rights.

employment, education, and provision of services, facilities, or goods.<sup>56</sup> Additionally, 41.6% of respondents said that addressing discrimination by means of public education was not sufficient.<sup>57</sup> Finally, 47.8% of respondents believed that a sexual orientation anti-discrimination law would make Hong Kong a more harmonious and accommodating society, while 38.4% disagreed.<sup>58</sup> Despite these numbers favoring legislation, no SODO has been enacted.

Government hesitation was a result of pressure by oppositional groups. Upon initiating the survey, Legco received hostility from religious and conservative family-orientated groups.<sup>59</sup> On April 29, 2005, the Hong Kong Alliance for Family took out a four-page newspaper advertisement listing the signatures of 10,000 individuals and 370 organizations opposed to the legislation.<sup>60</sup> Legco also received 50,000 letters opposing SODO.<sup>61</sup> On the other side of the debate, tongzhi supporters organized a gay rights march to show support for the proposed legislation and to mark the first International Day Against Homophobia on May 16, 2005.<sup>62</sup> Despite these efforts by tongzhi activists, the immediacy and force of opposition succeeded in making Legco question the public's support of SODO.

Still, the government did take a positive step towards protecting tongzhi by establishing the Gender Identity and Sexual Orientation Unit ("GISOU") through the Constitutional and Mainland Affairs Bureau in May, 2005.<sup>63</sup> The main functions of the unit were to monitor funding, provide support for the Sexual Minorities Forum, maintain a hotline for inquiries and complaints,

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<sup>56</sup> *Id.* at 21. 41.6% of respondents "strongly agreed/agreed" that the Government should legislate in the field of employment, and 37.3% and 37.2% supported legislation in the field of education and in the provision of services, facilities or goods respectively. 24.9% of respondents "strongly disagreed/disagreed" on legislating in employment.

<sup>57</sup> *Id.* at 21.

<sup>58</sup> *Id.* at 27.

<sup>59</sup> The Society for Truth and Light, a Christian group opposed to homosexuality, reported that 2,000 individuals and more than 100 groups signed a petition organized by an umbrella group, the Hong Kong Alliance for Family, against legislation. In addition, the group sent over 2,000 faxes outlining arguments against legislation to the Equal Opportunities Commission, the Home Affairs Bureau, and the Chief Executive's Office. According to a fax, legislating against discrimination "will send the wrong message to the community that homosexuality is as normal as heterosexuality, which is against the prevalent view." Sylvia Hui, *Tough Battle Ahead for Gay Groups*, STANDARD, April 25, 2005, available at <http://www.thestandard.com.hk/stdn/std/Metro/GD25Ak07.html>.

<sup>60</sup> Scarlet Tsao, *The Debate Over the Proposed Sexual Orientation Anti-Discrimination Legislation in Hong Kong: What's the Controversy Really About?*, 5 Regent J. Int'l L. 203, 203 (2007).

<sup>61</sup> *Id.* at 204.

<sup>62</sup> Norma Connolly, *Hundreds March for Law to Protect Gays*, S. CHINA MORNING POST, May 17, 2005, at 3. The specific date of May 16, 2005 was chosen to commemorate the removal by the World Health Organization of homosexuality from its list of mental disorders fifteen years earlier on May 17, 1990.

<sup>63</sup> Constitutional and Mainland Affairs Bureau, Gender Identity and Sexual Orientation Unit, [http://www.cmab.gov.hk/en/issues/equal\\_gender.htm](http://www.cmab.gov.hk/en/issues/equal_gender.htm) (last visited Jan. 15, 2010).

engage in outreach efforts, and research relevant issues for tongzhi.<sup>64</sup> The government also issued a Code of Practice against Discrimination in Employment on the Ground of Sexual Orientation.<sup>65</sup> However, this code amounts to little more than suggestion. All measures are voluntary with no enforcement mechanism to ensure implementation.<sup>66</sup> Without legislation that provides a cause of action for discrimination on the basis of sexual orientation, the current protection afforded by the GISOU is largely futile.

### C. *The Role of the Hong Kong Judiciary in Establishing Tongzhi Rights*

Without protective legislation, Hong Kong courts remain the exclusive means for establishing and expanding tongzhi rights. The legal momentum of recent years, specifically two important cases that decided questions of *de jure* discrimination, provides the basis upon which *Cho Man Kit* was decided. *Leung v. Secretary for Justice*<sup>67</sup> established that laws could not discriminate on the basis of sexual orientation, while *Secretary for Justice v. Yau Yuk Lung Zigo & Anor*<sup>68</sup> established sexual orientation as a protected class. Both cases were instrumental in advancing tongzhi rights in Hong Kong.

#### 1. *Leung TC William Roy v. Secretary of Justice Outlawed Laws Discriminating on the Basis of Sexual Orientation*

In August 2005, *Leung v. Secretary of Justice* became the first gay rights victory in Hong Kong.<sup>69</sup> The plaintiff challenged four provisions of the Hong Kong Crimes Ordinance<sup>70</sup> for violating fundamental human rights protected in the Basic Law and BORO—the right to equality before the law and the right not to be subjected to arbitrary or unlawful interference in private life.<sup>71</sup> The

<sup>64</sup> *Id.*

<sup>65</sup> See CONSTITUTIONAL AND MAINLAND AFFAIRS BUREAU, CODE OF PRACTICE AGAINST DISCRIMINATION IN EMPLOYMENT ON THE GROUND OF SEXUAL ORIENTATION, <http://www.cmab.gov.hk/en/issues/sexual.htm> (last visited Jan. 15, 2010).

<sup>66</sup> See *id.* § C.9.1 (the Code merely “encourage[s]” employers to “make a commitment to employment procedures and practices that are non-discriminatory and that provide equal opportunities for all employees”).

<sup>67</sup> *Leung TC William Roy v. Secretary for Justice*, [2005] 3 H.K.C. 77 (C.F.I.) [hereinafter *Leung*].

<sup>68</sup> *Secretary for Justice v. Yau Yuk Lung Zigo & Anor* [2007] H.K.C.U. 1195 (C.F.A.) [hereinafter *Yau*].

<sup>69</sup> See *Leung*, *supra* note 67; see also Robert Danay, *Leung v. Secretary for Justice: Privacy, Equality and the Hypersexualised Homosexual Stereotype*, 35 H.K. L. J. 545 (2005).

<sup>70</sup> Sections 118J(2)(a), 118H, 118C, and 118F(2)(a). See Crimes Ordinance, (1997) Cap 200. (H.K.), available at <http://www.legislation.gov.hk/eng/home.htm> [hereinafter Crimes Ordinance]. The Hong Kong Crimes Ordinance is a comprehensive criminal code that was originally enacted in 1971 and revised in 1997. Hong Kong courts recognize a constitutional obligation to review existing legislation against the Basic Law. See *Leung*, *supra* note 67, at 86.

<sup>71</sup> The plaintiff had not violated any of the provisions, but rather made a free-standing application for a declaration of the unconstitutionality of four sections of the Crimes Ordinance that disparately impact male homosexuals. See *Leung*, *supra* note 67, at 80, 89. Sections 118J(2)(a), 118H, 118C, and 118F(2)(a) violated

Ordinance criminalized male homosexual acts but did not criminalize the same acts between heterosexuals or between women.<sup>72</sup> Specifically, the Ordinance based the legal age of consent on gender and sexual preference—homosexual males had to be twenty-one years of age while homosexual females and heterosexuals could give consent at age sixteen.<sup>73</sup> A violation of the ordinance also resulted in different punishments—homosexual males could be given life imprisonment, while heterosexuals and females could be given up to five years imprisonment.<sup>74</sup> The Hong Kong Court of First Instance struck down all four provisions as violations of both the Basic Law and BORO.<sup>75</sup> This decision cemented the principle that Hong Kong laws cannot discriminate on the basis of sexual orientation. On appeal, the Court of Appeal affirmed the decision of the Court of First Instance.<sup>76</sup>

## 2. *Secretary for Justice v. Yau Yuk Lung Zigo & Anor Case Made Tongzhi a Protected Class*

In July 2007, the Hong Kong Court of Final Appeal, the highest court in Hong Kong, decided *Secretary for Justice v. Yau Yuk Lung Zigo & Anor*.<sup>77</sup> *Yau* is arguably the most important opinion for Hong Kong tongzhi activists, as it affirmed that homosexuals constitute a protected class.<sup>78</sup> In doing so, it established a legal analysis for determining when discrimination based on sexual orientation is unlawful.<sup>79</sup> This precedent is binding on all courts in Hong Kong, and must be applied when faced with cases of disparate treatment in the law, such as the case of *Cho Man Kit*.<sup>80</sup>

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Articles 25 and 39 of the Basic Law, as well as Articles 1, 14, and 22 in Section 8 of the Hong Kong Bill of Rights. Additionally, a law that criminalizes sexual contact between consenting men without at the same time criminalizing such contact between women is in violation of the ICCPR. ICCPR, art. 26, *supra* note 32. See generally Danay, *supra* note 69.

<sup>72</sup> See Crimes Ordinance, *supra* note 70, sections 118J(2)(a), 118H, 118C, and 118F(2)(a).

<sup>73</sup> *Id.* Section 118H criminalized gross indecency between men whenever one partner is under 21, while no comparable provision existed for gross indecency between opposite-sex partners or same-sex female partners.

<sup>74</sup> *Id.* Section 118C stipulated that the age of consent for buggery between men was age 21 and offenders were punishable with life imprisonment. Section 124 stipulated that the age of consent for vaginal sex was set at age sixteen and punishable by only five years of imprisonment.

<sup>75</sup> See *Leung*, *supra*, note 67; see also Holning Lau, *Sexual Orientation & Gender Identity: American Law in Light of East Asian Developments*, 31 HARV. J. L. & GENDER 67, 80 (2008).

<sup>76</sup> *Leung TC William Roy v. Secretary for Justice*, [2006] Civil Appeal No. 317 of 2005 (C.A.) available at [http://legalref.judiciary.gov.hk/lrs/common/ju/ju\\_body.jsp?DIS=54227&AH=&QS=&FN=&currpage](http://legalref.judiciary.gov.hk/lrs/common/ju/ju_body.jsp?DIS=54227&AH=&QS=&FN=&currpage) (last visited January 30, 2010) [hereinafter *Leung II*].

<sup>77</sup> *Yau*, *supra*, note 68.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* para. 21 (“Where one is concerned with differential treatment based on race, sex or sexual orientation, the court will scrutinize with intensity whether the difference in treatment is justified.”).

<sup>80</sup> *Yau* was decided by the highest court in Hong Kong, the Court of Final Appeal. The Dept. of Justice provides that “[w]hile [the common law] is flexible and adaptable, the doctrine of precedent often makes it

In *Yau*, the respondents were charged with violating the Crimes Ordinance by engaging in homosexual buggery<sup>81</sup> in a parked car. The Ordinance, though facially neutral, criminalized male buggery in public, giving rise to discriminatory effects against male homosexuals.<sup>82</sup> The Court ruled that discrimination on the ground of sexual orientation was unconstitutional under both the Basic Law and BORO,<sup>83</sup> each of which prohibit discrimination based upon “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>84</sup> The Court ruled that sexual orientation was contained within the phrase “other status.”<sup>85</sup>

However, such discrimination can be legally justified if there is a “legitimate aim” that warrants a genuine need for the difference in treatment.<sup>86</sup> Such an aim must be “reasonable and objective . . . free from bias whether conscious or unconscious.”<sup>87</sup> The *Yau* Court deemed safeguarding standards of public decency to be a legitimate aim, but only if applied to all persons equally.<sup>88</sup> To determine when a discriminatory law or government action may be justified, Hong Kong courts use a “proportionality test” or “justification test.”<sup>89</sup> The proportionality test used by Hong Kong courts rests upon three factors: 1) the difference in treatment must pursue a legitimate aim, the legitimacy of which is based upon an established genuine need for the difference; 2) the difference in treatment must be rationally connected to the legitimate aim; and, 3) the difference in treatment must be no more than is necessary to accomplish the legitimate aim.<sup>90</sup> This test must be used to determine the legality of a difference in treatment based on sexual orientation. The Court in *Cho Man Kit* applied this

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difficult for judges to change well-established legal doctrines.” See Judiciary of the Hong Kong Special Administrative Region of the People’s Republic of China, *supra* note 6.

<sup>81</sup> Hong Kong uses the term “buggery” for sodomy, or anal sexual intercourse. BLACK’S LAW DICTIONARY 207 (8th ed. 1999). Sodomy is defined as “oral or anal copulation between humans, esp. those of the same sex.” *Id.* at 1425.

<sup>82</sup> Crimes Ordinance, Section 118F(2)(a) criminalized buggery between men in the presence of more than two persons, but no comparable section criminalized vaginal intercourse or opposite-sex buggery in the presence of more than two persons. In addition, section 118J (2)(a) made it criminal for a man to commit gross indecency with another man in any context involving more than two persons (even in private settings), while no similar laws to regulate gross indecency in opposite-sex and female-female contexts existed.

<sup>83</sup> Basic Law, *supra* note 18, art. 25; BORO, *supra* note 30, art. 22.

<sup>84</sup> *Yau*, *supra* note 68, para. 110.

<sup>85</sup> *Id.* para. 11.

<sup>86</sup> *Id.* para. 25.

<sup>87</sup> *Id.* para. 42.

<sup>88</sup> *Id.* para. 28.

<sup>89</sup> See *Yau*, *supra* note 68, para. 20 (noting that the proportionality and justification tests are the same, and were first used in *R. v. Man Wai Keung* [1992] 2 H.K.C.L.R. 207, 217 (C.F.A.) and in *So Wai Lun v. HKSAR* [2006] 9 H.K.C.F.A.R. 530, para. 20 (C.F.A.)).

<sup>90</sup> *Yau*, *supra* note 68, para. 20.

test to the BA's ruling on impartiality, but applied it very loosely to its ruling on family viewing hours, ignoring the interpretive guidance of both *Leung* and *Yau*.

### III. FACTUAL AND LEGAL BASES OF *CHO MAN KIT V. BROADCASTING AUTHORITY*

*Cho Man Kit* has generated significant attention in Hong Kong and throughout Southeast Asia.<sup>91</sup> The BA's highly controversial decision rested on two alleged violations of the code of practice—impartiality and family viewing hours. This section provides the background facts of the lawsuit, as well as the allegations that formed the basis of the complaint.

#### A. *Background of the Lawsuit*

Radio Television Hong Kong (“RTHK”)<sup>92</sup> broadcast “Hong Kong Connection-Gay Lovers,” a twenty-five-minute show, on July 9, 2006, on the Jade Channel at 7:35 p.m., and on October 19, 2006, on the Pearl Channel at 7:10 p.m.<sup>93</sup> Hong Kong Connection is a weekly show on Hong Kong culture and life that has aired for nearly thirty years.<sup>94</sup> Gay Lovers was an episode of Hong Kong Connection that featured same-sex couples discussing their fears and aspirations as well as their hopes for legalized marriage.<sup>95</sup> Cho Man Kit, the twenty-six year-old plaintiff, appeared with his partner on the show, along with a lesbian couple. Each couple spoke about their hope that Hong Kong would recognize civil unions between same-sex couples.<sup>96</sup> The show was preceded by an advisory caption that stated, “[p]lease note that this programme involves homosexuality.”<sup>97</sup>

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<sup>91</sup> See Hui, *A Stubborn Denial*, *supra* note 5.

<sup>92</sup> Richard Cullen, *Media Freedom in Chinese Hong Kong*, 11 *TRANSNAT'L LAW* 383, 395 (1998). Radio Television Hong Kong (“RTHK”) is Hong Kong's sole public, governmentally regulated broadcaster. Under British rule, RTHK developed into a government-funded but still independent broadcaster modeled on the British Broadcasting Company.

<sup>93</sup> LEGISLATIVE COUNCIL PANEL ON INFORMATION TECH. AND BROAD., *RADIO TELEVISION HONG KONG'S COMPLIANCE WITH CODES OF PRACTICE ON PROGRAMME STANDARDS ISSUED BY BROADCASTING AUTHORITY* para. 8 (2007) [hereinafter *RTHK COMPLIANCE PAPER*].

<sup>94</sup> Hong Kong Connection is a weekly television series concerned with “uncovering and delving into every local and international topic that concerns the people in Hong Kong, whether it be political, economic, educational, commercial, environmental or technological . . . . It is Hong Kong Connection's mission to provide the public with information and analyses as well as an opportunity for rational discussion.” See Hong Kong Connection home page, <http://www.rthk.org.hk/rthk/tv/hkce/> (last visited Jan. 1, 2010).

<sup>95</sup> *Cho Man Kit*, *supra* note 4, paras. 83, 86.

<sup>96</sup> *Id.* para. 26.

<sup>97</sup> *Id.* para. 27.

The BA investigated the show on January 20, 2007, after receiving twenty-three public complaints.<sup>98</sup> As a public broadcaster, RTHK is subject to the BA,<sup>99</sup> an independent statutory regulator of broadcasting services.<sup>100</sup> Though RTHK is technically editorially independent,<sup>101</sup> it is still subject to stringent and detailed content regulation.<sup>102</sup> The BA determined that RTHK had breached the Generic Code of Practice on Television Programme Standards,<sup>103</sup> finding that *Gay Lovers* was unfair, partial, and biased towards homosexuality with the effect of promoting homosexual marriage.<sup>104</sup> The BA then issued a ruling that “strongly advised” RTHK to observe more closely the relevant provisions of the TV Programme Code in relation to the policy on family viewing hours, the likely effects of television materials on children, and the impartiality requirement of factual programs.<sup>105</sup>

On the same day, RTHK issued a response rejecting the ruling because it would have an editorial impact on the station’s current affairs programs, and therefore, necessitated public discussion.<sup>106</sup> RTHK maintained:

The programme did not debate sexual orientation from a legal or ethical perspective. Instead, it featured a story focusing on several

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<sup>98</sup> While this is not an unusually high number of complaints, the Broadcasting Authority (“BA”) initiates an investigation even if it receives only one complaint. See RTHK COMPLIANCE PAPER, *supra* note 93, Annex A, para. 2.

<sup>99</sup> RTHK is subject to a Memorandum of Understanding (“MOU”) between the BA, the policy bureau, and RTHK. Under the MOU, RTHK agrees to comply with the relevant codes of practice on program standards issued by the BA, and the BA has license to investigate complaints about any RTHK Broadcasting Authority program. Complaints from the public on alleged breaches of the codes are handled by the Complaints Committee for consideration and recommendation. The BA is entitled to classify the complaint as trivial, frivolous, unjustified, partially justified, or justified, with advice or warning given to the broadcaster concerned should a breach be found. If the complaint is substantiated, the BA may impose financial and non-financial sanctions. RTHK COMPLIANCE PAPER, *supra* note 93, para. 7.

<sup>100</sup> Though the BA is technically independent of the government, all of the members of the BA are appointed by the Chief Executive of the HKSAR. The BA consists of nine non-official community members and three public officers. See Yan Mei Ning, *Broadcast Media Regulation*, in HONG KONG MEDIA LAW: A GUIDE FOR JOURNALISTS AND MEDIA PROFESSIONALS 230 (2007).

<sup>101</sup> RTHK’s editorial functions are defined in the Framework Agreement between the Secretary for Commerce, Industry, and Technology, and the Director of Broadcasting. RTHK COMPLIANCE PAPER, *supra* note 93, para. 5.

<sup>102</sup> “Since they are the most pervasive of all the four categories of television programme services, it is reasonable for the audience to expect more stringent standards for protection of minors and public morality.” See Broadcasting Authority, *Generic Code of Practice on Television Programme Standards*, ch.1, para. 4, available at [http://www.hkba.hk/en/doc/code\\_tvprog\\_e.pdf](http://www.hkba.hk/en/doc/code_tvprog_e.pdf) (last visited Jan. 24, 2010). [hereinafter *Generic Code of Practice*]. The Director of Broadcasting is the Chief Editor and responsible for monitoring the activities of the networks, and ensuring that a system of editorial control provides “fair, balanced and objective news, public affairs, and general programming that inform, educate, and entertain the public.” RTHK COMPLIANCE PAPER, *supra* note 93, para 5.

<sup>103</sup> *Id.* ch. 5, para. 5.

<sup>104</sup> RTHK COMPLIANCE PAPER, *supra* note 93, Annex C.

<sup>105</sup> *Id.*; see also *Cho Man Kit*, *supra* note 4, para. 55.

<sup>106</sup> RTHK COMPLIANCE PAPER, *supra* note 93, Annex D.

aspects of homosexual life. It aimed to reflect social phenomena within a minority group that the public may not be familiar with. It conducted interviews with these couples through which the pressures faced by homosexuals were exposed.<sup>107</sup>

The BA's decision was highly controversial in Hong Kong. The Equal Opportunities Commission received 1,103 inquiries into the case, most of which expressed disapproval with the BA's decision.<sup>108</sup> Other legal professionals, like Mr. Law Yuk-Kai of the Hong Kong Human Rights Monitor, saw the decision as a sign that Hong Kong's government was going back to the more "orthodox position" of the P.R.C.: "In the run-up to the handover, Hong Kong's goal was to fight for equality and freedom . . . . But now the goal is to get the approval of Beijing. Rights issues are way down the line."<sup>109</sup> On March 12, 2007, Legco unanimously passed a motion demanding that the BA withdraw its ruling on the grounds that it was unfair, partial, and biased.<sup>110</sup>

### B. *Statement of the Case*

Cho Man Kit filed a complaint with the Court of First Instance asserting several civil rights violations against the BA and requesting that the Court reverse the BA's decision. The Court of First Instance heard arguments on February 18 and 19, 2008,<sup>111</sup> and Judge Michael Hartmann issued the opinion for the Court on May 8, 2008.<sup>112</sup>

The complaint asserted that: 1) the BA's ruling constituted sexual orientation discrimination with no reasonable and objective justification; 2) the ruling interfered with the constitutionally protected right to freedom of speech and expression; 3) the ruling was a decision which no reasonable decision-maker could have reached and was therefore unreasonable; and, 4) the ruling was based on a misinterpretation of the code of practice.<sup>113</sup> As a preliminary matter, the Court found that the BA had acted within its code of practice and had not gone beyond its statutory powers.<sup>114</sup> Therefore, this Comment will focus on the way in which the Court resolved Cho Man Kit's first three contentions.

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<sup>107</sup> *Id.*

<sup>108</sup> See Hui, *A Stubborn Denial*, *supra* note 5.

<sup>109</sup> *Id.*

<sup>110</sup> See Carol Chung, *Legco Panel Attacks Gay Show Ruling*, STANDARD, Mar. 13, 2007, available at [http://www.thestandard.com.hk/news\\_detail.asp?pp\\_cat=11&art\\_id=40014&sid=12629052&con\\_type=1](http://www.thestandard.com.hk/news_detail.asp?pp_cat=11&art_id=40014&sid=12629052&con_type=1).

<sup>111</sup> *Cho Man Kit*, *supra* note 4.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* para. 38.

<sup>114</sup> *Id.* para. 55.



In response, the BA denied that its sanction was in violation of any constitutional rights and argued that its determination was based on two permissible findings: 1) the program failed to meet the requirement of impartiality when dealing with sensitive factual matters, and 2) the program should have been broadcast outside of family viewing hours to decrease the likelihood that unsupervised children would be watching.<sup>115</sup> At issue was whether the BA's ruling was neutral on these grounds, or whether the BA had unfairly targeted homosexuals as the basis of such media restriction.

1. *The Court of First Instance Held that the BA's Ruling on Impartiality Constituted an Unreasonable Restraint on Freedom of Speech and Expression*

a. *The Standard of Review for a Restriction on Freedom of Speech*

The Basic Law recognizes that freedom of speech, which includes the freedom of expression, is a fundamental freedom.<sup>116</sup> It is not, however, an unqualified right,<sup>117</sup> and the Court recognized that the BA had authority both to generally regulate public broadcasting<sup>118</sup> and to ensure that public broadcasting conformed with Hong Kong's standards of taste and decency.<sup>119</sup> Though the BA has such a power to regulate content, the BORO ensures that any restrictions on freedom of speech must be provided by law and must be necessary a) for respect of the rights or reputations of others, or b) for the protection of national security, public order, public health, or public morals.<sup>120</sup> In addition, a Court interprets any restriction on freedom of speech narrowly.<sup>121</sup>

b. *The BA's Ruling Was Discriminatory and Must Pass a Proportionality Test*

Under the Basic Law, all persons are equal before the law.<sup>122</sup> The BORO clarifies that fundamental rights are to be enjoyed without regard to "race, color, sex, language, religion, political or other opinion, national or social origin,

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<sup>115</sup> *Id.* para. 32(i)-(ii).

<sup>116</sup> *Id.* para. 6.

<sup>117</sup> *Id.* para. 7 (The right to freedom of speech is not one that can be exercised without restraint but is subject to restrictions in order to "(a) respect the rights or reputations of others; or (b) for the protection of national security or of public order, or of public health or morals.").

<sup>118</sup> *Id.* para. 16 (deeming this regulation to be within the allowable restrictions of the BORO).

<sup>119</sup> *Id.* para. 15.

<sup>120</sup> BORO, *supra* note 30, art 16; *see also Cho Man Kit, supra* note 4, para. 7.

<sup>121</sup> *See Cho Man Kit, supra* note 4, para. 8 (citing to HKSAR v. Ng Kung Siu and Another [1999] 2 H.K.C.F.A.R. 442, 457 (C.F.A.)).

<sup>122</sup> Basic Law, *supra* note 18, art. 25.

property, birth or other status.”<sup>123</sup> The Hong Kong Court of Final Appeal has defined discrimination as “any departure from identical treatment.”<sup>124</sup> Since *Yau*, courts review charges of sexual orientation discrimination using the three-pronged proportionality test.<sup>125</sup> Accordingly, the Court of First Instance applied this test to both the impartiality and family viewing hours provisions at issue.<sup>126</sup> The BA had the burden of proof to show that its rulings against RTHK were justified.<sup>127</sup>

c. *The BA's Impartiality Ruling Did Not Survive Scrutiny*

The BA argued that its sanction upon RTHK was based upon the station's failure to present an impartial viewpoint in *Gay Lovers*. The BA found that “the absence of different views on homosexual marriage had the effect of promoting the acceptance of homosexual marriage.”<sup>128</sup> Accordingly, the BA found that the lack of a two-sided presentation on homosexual marriage constituted partiality.<sup>129</sup>

Under the BA Code, all programs dealing with news or factual issues must be given due impartiality if the content addresses matters of “public policy” or “controversial issues of public importance.”<sup>130</sup> The BA defines “due impartiality” as dealing “even-handedly when opposing points of view are presented in a programme or programme segment.”<sup>131</sup> This requires that the presentation seek a balance of viewpoints, but does not mandate absolute neutrality.<sup>132</sup>

The Court of First Instance rejected the BA's impartiality reasoning on the grounds that it was a misrepresentation of the program, and also that it was unrealistic in its definition of impartiality. First, Judge Hartmann pointed out with certainty that “the programme was *not* about same-sex marriage . . . [nor] a

<sup>123</sup> BORO, *supra* note 30, art. 1.

<sup>124</sup> *Yau*, *supra* note 68, para. 36 (clarifying that if an action is discriminatory “it will offend against equality before the law . . . [i]t will so offend whether discrimination is its objective or merely its effect”).

<sup>125</sup> The Court in *Cho Man Kit* slightly altered the phrasing of the test: “a restriction on freedom of speech, or a difference in treatment of persons who are otherwise entitled to equality of treatment, will be impermissible unless the restriction, or difference in treatment, is rationally connected to some legitimate purpose and the means used is no more than is necessary to accomplish that legitimate purpose.” *Cho Man Kit*, *supra* note 4, para. 24.

<sup>126</sup> *Id.*

<sup>127</sup> *Yau*, *supra* note 68, para. 21 (“the burden is on the Government to satisfy the court that the justification test is satisfied”).

<sup>128</sup> *Cho Man Kit*, *supra* note 4, para. 78, 79 (quoting a letter from the BA to RTHK dated January 22, 2007).

<sup>129</sup> *Id.* para. 79.

<sup>130</sup> Generic Code of Practice, *supra* note 102, ch. 9, para. 2.

<sup>131</sup> *Id.* para. 3.

<sup>132</sup> *Id.*

‘political’ programme attempting to advance any sort of public cause.”<sup>133</sup> Rather, the Court recognized that “RTHK did no more than faithfully record the fears, hopes, travails and aspirations of persons who happened to be gay. It did so faithfully, in an unprejudiced manner.”<sup>134</sup> The Court viewed the program as “a study of gay people involved in stable, long-term relationships,”<sup>135</sup> and was “not designed as a vehicle to ‘advocate’ any particular point of view.”<sup>136</sup> Moreover, the Court viewed the BA’s ruling on this point as “a threat to well-established and entirely legitimate forms of documentary film-making.”<sup>137</sup>

Second, the Court held that it was unrealistic for the BA to require impartiality on all matters of public policy, as not every issue would necessarily be two-sided.<sup>138</sup> The Court gave the examples of a program on hunter-gatherers, or a daughter caring for her invalid mother at home, as evidence that all shows could not reasonably be expected to present multiple viewpoints.<sup>139</sup> Though the BA has ultimate authority with regards to RTHK’s responsibilities,<sup>140</sup> the Court ruled that a definition of impartiality be sufficiently broad and equitable.<sup>141</sup> By re-characterizing the BA’s criteria for “impartiality” in a more flexible, context-specific manner, the Court found the BA’s ruling to be “plainly wrong.”<sup>142</sup> The Court noted that the definition of “impartial” also encompassed “unprejudiced, unbiased, [and] fair.”<sup>143</sup> The restriction based on impartiality was “founded materially on a discriminatory factor; namely, that homosexuality, as a form of sexual orientation, may be offensive to certain viewers.”<sup>144</sup> Importantly, this ruling established the Court as the final arbiter of the BA Code.

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<sup>133</sup> *Cho Man Kit*, *supra* note 4, para. 81.

<sup>134</sup> *Id.* para. 86.

<sup>135</sup> *Id.* para. 83.

<sup>136</sup> *Id.* para. 82.

<sup>137</sup> *Id.* para. 85.

<sup>138</sup> *Id.* para. 71.

<sup>139</sup> *Id.* para. 83. It is interesting that the Court would analogize homosexuality to pre-civilized society, as well as to individuals with disabilities. A more apt analogy would have been to interracial couples. The Court’s own biases may be revealed by this point.

<sup>140</sup> See RTHK COMPLIANCE PAPER, *supra* note 93, Annex A (RTHK agreed to be subject to the BA code of practice through the MOU).

<sup>141</sup> *Cho Man Kit*, *supra* note 4, para. 73. The Court of First Instance provided guidance that “a code of practice that requires all factual programmes dealing with matters of public policy or controversial public issues to be appropriately impartial may still comply with the constitutional requirement to uphold freedom of speech and expression if the term is given a broad and suitably equitable meaning.”

<sup>142</sup> *Id.* para. 86.

<sup>143</sup> *Id.* para. 74 (citing SHORTER OXFORD ENGLISH DICTIONARY (6th ed. 2007)).

<sup>144</sup> *Id.* para. 91.

d. *The BA's Family Viewing Hours Ruling Survived Scrutiny*

The BA also argued that RTHK violated the family viewing hours provision of the code of practice. Specifically, the BA argued that, “children and young viewers watching the programme might have no knowledge of homosexuality and might be adversely affected by the partial contents of the programme if parental guidance was not provided.”<sup>145</sup> During family viewing hours, between 4:00 p.m. and 8:30 p.m.,<sup>146</sup> the BA prohibits content that is “unsuitable” for children since this is when children are more likely to be watching TV without parental guidance.<sup>147</sup> A program might be considered unsuitable for children if it includes violence, bad language, innuendo, sex and nudity, or any matter likely to lead to hysteria, nightmares or other undesirable emotional disturbances.<sup>148</sup> After 8:30 p.m., parents “may reasonably be expected to share responsibility for what their children are permitted to watch.”<sup>149</sup>

In response to the BA's determination regarding the violation of the family viewing hours provision, the Court found that the “the Authority [was] on much firmer ground.”<sup>150</sup> The Court read the BA's code as providing “a clear *caveat* in respect of ‘sex and nudity’; sex, that is, in all its forms, heterosexual as well as homosexual.”<sup>151</sup> By equating the homosexual participants of the program with the “sex and nudity” category of the Family Viewings Hours provision, the Court was able to justify the BA's sanction of RTHK.<sup>152</sup> Accordingly, the Court held that “the protection of the sensibilities of young viewers is a permissible restriction on freedom of speech and expression.”<sup>153</sup> The Court justified its holding on the grounds that: 1) children may be confused as to sexual matters; and 2) children may form hostile prejudices toward homosexuals as a result of watching the program without guidance. Judge Hartmann writes: “[t]he understanding of sexual matters in a way that avoids confusion, concern, even prejudice, demands a certain maturity and ideally . . . the guidance of parents or teachers.”<sup>154</sup> Furthermore, “presentation to immature viewers who have no relevant knowledge of matters going to sex and sexual attraction—in all its permissible forms—may in some cases arouse emotions which are hostile,

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<sup>145</sup> *Id.* para. 93.

<sup>146</sup> Generic Code of Practice, *supra* note 102, ch. 2, para. 2.

<sup>147</sup> *Id.* para. 7.

<sup>148</sup> *Id.* para. 3.

<sup>149</sup> *Id.* para. 2.

<sup>150</sup> *Cho Man Kit*, *supra* note 4, para. 99.

<sup>151</sup> *Id.* para. 105.

<sup>152</sup> *Id.* para 105.

<sup>153</sup> *Id.* para. 98.

<sup>154</sup> *Id.* para. 105.

emotions even of confused revulsion, emotions which embed prejudice rather than remove it.”<sup>155</sup>

The opinion gives no explanation as to why and how a program that is, in fact, “impartial” as “a study of gay people involved in stable, long-term relationships,” will embed prejudice in children. Thus, it appears the Court issued conclusory statements on the protection of children, but failed to recognize any of its previous statements offered to support a holding of impartiality. Ironically, the BA findings were held to be lawful by the Court of First Instance, despite citing no case law for the justification or the means used to restrict the hours of the program.

#### IV. THE COURT’S RULING ON FAMILY VIEWING HOURS WAS BASED ON AN ERRONEOUS INTERPRETATION OF THE “SEX AND NUDITY” PROVISION OF THE BA CODE AND A LEGALLY INSUFFICIENT PROPORTIONALITY TEST

The Court of First Instance erred in its analysis of the BA’s family viewing hours policy. The Court misconstrued “homosexuality” as “sex and nudity” in its interpretation of the BA Code. Furthermore, the Court erroneously applied the proportionality test for family viewing hours, as it rested on incorrect assumptions that had been contradicted by prior case law and public policy.

##### A. *The Family Viewing Hours Provision of the BA Code Does Not Apply to “Hong Kong Connection-Gay Lovers”*

The BA requires that depictions of sex and nudity during family viewing hours be “incidental, extremely discreet and absolutely necessary to the story line or programme context.”<sup>156</sup> “Sex and nudity” is not explicitly defined in the BA Code, but may constitute “crude expressions with sexual connotations,”<sup>157</sup> or involve incest, child abuse, a sexual relationship with a child, or a non-consensual sexual relationship.<sup>158</sup> Nothing in the BA Code suggests that “sex and nudity” applies to sexual orientation. The only requirement for “sex and nudity” is that it be “discreet and defensible in context.”<sup>159</sup> While RTHK was sanctioned because of a violation of this provision, the BA did not provide any evidence as to the “sex” or “nudity” in the actual show; after watching the program,<sup>160</sup> Judge Hartmann stated, “[t]here were *no* scenes of nudity or undue

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<sup>155</sup> *Id.* para. 106.

<sup>156</sup> Generic Code of Practice, *supra* note 102, ch. 5, para. 5.

<sup>157</sup> *Id.* ch. 4, para. 5.

<sup>158</sup> *Id.* ch. 5, paras. 3-4, 6.

<sup>159</sup> *Id.* ch. 8, para. 4(c).

<sup>160</sup> *Cho Man Kit*, *supra* note 4, paras. 60-61. Judge Hartmann noted, “during the course of the hearing, the programme itself was screened...I will shortly make certain observations concerning the contents . . . . It is to be

intimacy.”<sup>161</sup> He further added that the program was “a study of the human condition” and agreed that it was “moderate in tone and tasteful in presentation.”<sup>162</sup> On these grounds, Gay Lovers could not have violated the “sex and nudity” provision of the BA Code. The logical leap required to give validity to a sanction on these grounds is that homosexuality is, by its very nature, “sex and nudity.”

The Court did not explicitly define these terms or resolve the lack of definition within the BA Code. Rather, the Court provided a vague definitional grouping: “what must be remembered is that the code of practice issues a clear *caveat* in respect of ‘sex and nudity’; sex that is, in all its forms, heterosexual as well as homosexual.”<sup>163</sup> Had the program actually featured “sex” or “nudity,” this grouping would be less problematic. However, the Court readily acknowledged the absence of sex and intimacy in the program. Accordingly, the result is the erroneous and implicit hypersexualization of homosexuality.

### B. *The Court's Analysis of Family Viewing Hours Is Legally Insufficient*

The Court applied a legally insufficient proportionality test to the family viewing hours provision. The “protection of sensibilities of young viewers” is not a legitimate purpose, and restricting Gay Lovers to time periods outside family viewing hours does not accomplish such a purpose, even if it were in fact legitimate.

#### 1. *The Protection of Sensibilities Is Not a Legitimate Purpose*

In order for the restriction on family viewing hours to be justified, the Court’s proffered justification—that such restriction is necessary for the “protection of the sensibilities of young viewers”<sup>164</sup>—must constitute a legitimate purpose. Furthermore, the means used—banning the program from family viewing hours—must be no more than is necessary to accomplish that purpose.<sup>165</sup>

In order for a purpose to be legitimate, a “genuine need for differential treatment” must be established.<sup>166</sup> In *Secretary for Justice v. Yau Yuk Lung &*

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stressed, however, that I do so for the limited purpose only of having a better understanding of the nature of the subject matter of this judgment; that is, of the programme itself.”

<sup>161</sup> *Id.* para. 82 (emphasis added).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* para. 105.

<sup>164</sup> *Id.* para. 100.

<sup>165</sup> *Id.* para. 24 (quoting *Leung Kwok Hung and Others v. HKSAR* [2005] 8 H.K.C.F.A.R. 229, 253 (C.F.A.)).

<sup>166</sup> *Yau*, *supra* note 68, para. 38.

*Anor*, the Court of Final Appeal attempted to clarify this phrase by stating, “[w]hat would be plainly unacceptable is for the courts to proceed on some unarticulated standard when deciding the question of genuine need.”<sup>167</sup> The Court stated a genuine need must be one that “sensible and fair-minded people would recognize,”<sup>168</sup> and is the “first step toward pluralism and respect for otherness.”<sup>169</sup> In *Yau*, the Court declined to define this standard strictly, but rather placed importance on using a flexible human rights framework: “administration of constitutional justice is strengthened and enhanced when seen to be carried out according to *the good in people*.”<sup>170</sup> Though this standard is hardly strict, it does provide an important sentiment that pluralistic values deserve a place in Hong Kong’s legal analysis.<sup>171</sup>

These pluralistic sentiments, however, were not at the heart of *Cho Man Kit*. The Court provided two justifications for protecting the sensibilities of young viewers: 1) the program contained content that might “have an adverse affect on young viewers” and parental guidance was warranted;<sup>172</sup> and 2) presentation of the program to immature viewers may actually embed prejudice.<sup>173</sup> The genuine need—“protecting the sensibilities of young viewers”—was not articulated, as the Court failed to define which sensibilities are being protected. In addition, the Court based its conclusion on the speculative nature of hostility as a result of pluralism. Such a contention is contrary to the guidance of *Yau*, which rests on the presumption of the “good in people.” By upholding a justification for discrimination based on a speculative fear of “adverse effects” resulting from exposure to other lifestyles, the Court contradicted the precedent of *Yau*.

## 2. *Restricting “Hong Kong Connection-Gay Lovers” to Outside Family Viewing Hours Does Not Accomplish the Goal of Protecting the Sensibilities of Young Viewers*

Even if protecting the sensibilities of young viewers was a legitimate purpose, the restriction on RTHK does not accomplish such ends and stands in

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.* paras. 37, 38 (citing *R. Man Wai-keung* [1992] 2 H.K.C.L.R. 207 (C.F.A.)).

<sup>169</sup> *Id.* para. 38.

<sup>170</sup> *Id.* para. 40 (emphasis added); *see also id.* para. 40 (citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)) (“[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality”); *see also id.* para. 41 (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)) (“the traditions and conscience of our people”).

<sup>171</sup> *Id.* para. 38.

<sup>172</sup> *Cho Man Kit*, *supra* note 4, para. 104.

<sup>173</sup> *Id.* para. 106 (“presentation to immature viewers who have no relevant knowledge of matters going to sex and sexual attraction . . . may in some cases arouse emotions which are hostile, emotions even of confused revulsion, emotions which embed prejudice rather than remove it”).

sharp contrast to judicial precedent and public policy. Protecting the sensibilities of young viewers is not accomplished by disparately allowing air-time based upon sexual orientation. The intention of the BA is to protect children from “sex and nudity” on television. The BA’s code of practice is sufficient to accomplish this, and the portrayal of homosexuals as inherently more sexual than heterosexuals runs counter to the sentiments of *Yau*. In addition, according to the HAB, the proper means to avoid confusion and prejudice are to teach tolerance and pluralism, not to restrict the forums in which these lessons may be taught.<sup>174</sup>

Furthermore, the Court’s aims are contradictory and logically flawed—one cannot protect a group from discrimination by discriminating against that group. This form of discrimination differs from reform-minded discriminatory policies like affirmative action, in which discrimination against majority groups alleviates the effects of past and future discrimination against minority groups, in addition to providing greater access to social and economic opportunity.<sup>175</sup> In the case of *Cho Man Kit*, discrimination denies access to media forums rather than increasing it. The Court of Final Appeal in *Yau* held that the protection of public decency cannot be achieved through disparate punishment of offenders, emphasizing that “law is a problem-solver while discrimination is a problem and never a solution.”<sup>176</sup>

The Court’s decision also runs afoul of public policy.<sup>177</sup> The Education Department has issued guidelines on sex education to enhance and support teaching on sexual orientation in school curriculum, as well as to incorporate appreciation of individual differences into other school subjects.<sup>178</sup> The

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<sup>174</sup> See LEGISLATIVE COUNCIL PANEL ON HOME AFFAIRS, DISCRIMINATION ON THE GROUND OF SEXUAL ORIENTATION para. 5. (2000), <http://www.legco.gov.hk/yr00-01/english/panels/ha/papers/207e01.pdf> (last visited Jan. 3, 2010) [hereinafter PANEL ON SEXUAL ORIENTATION PUBLIC POLICY] (“teaching on sexual orientation . . . aims at helping students recognise the diversity of lifestyles, sexual preference and demonstrate tolerance towards people with different sexual orientations”).

<sup>175</sup> See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 737 (3d ed. 2006) (providing in-depth discussion of affirmative action).

<sup>176</sup> *Yau*, *supra* note 68, para. 47.

<sup>177</sup> PANEL ON SEXUAL ORIENTATION PUBLIC POLICY, *supra* note 174, para. 2 (“The Government is firmly committed to promoting equal opportunities for all, including people of different sexual orientations. We are opposed to any form of discrimination on the ground of sexual orientation.”); see also Family Planning Association of Hong Kong (“FPAHK”) website, FPAHK website, [http://www.famplan.org.hk/sexedu/En/resource/Resource\\_details.asp?reID=280](http://www.famplan.org.hk/sexedu/En/resource/Resource_details.asp?reID=280) (last visited Jan. 24, 2010), which provides information on a range of sexuality related issues, including five resources on sexual orientation and online counseling. In conjunction with the Equal Opportunities Commission, the FPAHK website allows viewers and educators to purchase teaching tool kits related to sexual orientation as well as an educational pamphlet titled “What if I am not Heterosexual?”

<sup>178</sup> See PANEL ON SEXUAL ORIENTATION PUBLIC POLICY, *supra* note 174, paras. 5-6. The Education Dept. issued Guidelines on Sex Education in Schools in order “to enhance teachers’ understanding of and capability for handling sexuality related topics in the school curriculum.” In addition, the Education Dept. issued teaching aids “to support the teaching on sexual orientation, including homosexuality, bisexuality and heterosexuality.”



Legislative Council on Home Affairs describes these measures as “highly relevant to promotion of non-discrimination on the ground of sexual orientation.”<sup>179</sup> Even within Legco, support was generated for showing Gay Lovers in the classroom as a part of the sexual education curriculum.<sup>180</sup> Legislator Emily Lau Wai-Hing, who introduced the unanimously supported motion to withdraw the BA’s ruling on Gay Lovers, proposed that the show be used in primary and secondary schools.<sup>181</sup>

To be sure, showing the program in a classroom setting provides children with beneficial education, should they have any questions related to the program’s content. This form of viewing is ideal for most matters that deal with subjects in which children may be too young to fully understand the issues involved. This Comment does not dispute the intention of the Court to protect children. However, in order for the Court’s reasoning to be consistent, the propriety of family viewing hour standards should govern all interpersonal romantic dynamics, not just those of same-sex couples. If the basis of the need for supervision is the homosexual content rather than the complexity of human romantic relationships, the family viewing hours restriction is inherently discriminatory, regardless of the justification with regard to children’s sensibilities. In short, if children need supervision to understand all romantic relationships on television, the BA should not target the relationships of only same-sex individuals under Hong Kong law.

Given past judicial precedent indicating that the protection of public sensibilities cannot justify discrimination, and the social value Hong Kong places on teaching sexual identity education in its public schools, excluding same-sex couples from television during family viewing hours is blatant discrimination. The proper means to avoid confusion and prejudice are to teach tolerance and pluralism, not to restrict the forums in which these lessons may be taught.

## V. IMPLICATIONS OF THE DECISION

If judicial consistency in upholding equal rights and equal application of the law is an indication of progress, *Cho Man Kit* marks a bittersweet victory. While the decision gives tongzhi the right to government media forums without requiring “impartiality” in presentation, it is a freedom restricted to outside family viewing hours. The many social and cultural factors that may have played into the Court’s decision are beyond the scope of this Comment.

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<sup>179</sup> *Id.* para. 7.

<sup>180</sup> Hui, *Reverse Gay Show Ruling*, *supra* note 5.

<sup>181</sup> *Id.*

However, a few distinguishing factors are worth discussing. *Cho Man Kit* presented a case that dealt with sexual orientation discrimination by a regulatory agency rather than discrimination as a result of a specific law.<sup>182</sup> In addition, the Court was likely sensitive to any disturbance of Hong Kong's family structure via the intimate nature of the television broadcast inside the home. In both cases, the lasting implication of the Court's ruling was to encourage the offloading of homosexual content to non-mainstream forums.

A. *Hong Kong Courts May Be Reluctant to Expand Rights on Non-Statutory Grounds*

The Court may have been reluctant to intervene in the family sphere of Hong Kong life on non-statutory grounds. Unlike the two sexual orientation cases of preceding years,<sup>183</sup> the Court was forced to decide if and when same-sex couples could be portrayed on television based on the BA code of practice. Past decisions regarding sexual orientation discrimination have dealt with discriminatory laws—a law creating disparate consent ages and a law criminalizing homosexual acts. This case was handled on non-statutory grounds, and held that a public broadcaster could not censor homosexual content on the basis that it be “impartial.” But by permitting the BA's ruling on family viewing hours to stand—equating “sex and nudity” with homosexuality—the Court allowed the legal effect of the BA's code of practice to place a disparate impact on same-sex couples' access to television air time.

In both *Leung* and *Yau*, the Court decided the question of discrimination based upon disparate impact due to the Hong Kong Crimes Ordinance.<sup>184</sup> In *Leung*, the Court analyzed disparate age of consent laws,<sup>185</sup> while in *Yau*, the Court's analysis focused on sexual acts occurring outside of private places.<sup>186</sup> *Cho Man Kit* is the first case to deal with issues of homosexuality in which the disparate impact arose out of the interpretation of the BA's code of practice. For this reason, the Court of First Instance was on novel, and perhaps even more controversial, ground.

A ruling that broadly opens the door to cases of sexual orientation discrimination would undeniably increase judicial visibility in a controversial matter. Given that Legco specifically declined to enact a SODO,<sup>187</sup> which would

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<sup>182</sup> The BA's ruling against RTHK was a discriminatory interpretation of Gay Lovers such that the show violated the BA code of practice, while *Leung*, *supra* note 67 and *Yau*, *supra* note 68, both dealt with the disparate impact of a law on homosexuals.

<sup>183</sup> *Leung*, *supra* note 67; *Yau*, *supra* note 68.

<sup>184</sup> See generally *Leung*, *supra* note 67; see generally *Yau*, *supra* note 68.

<sup>185</sup> See *Leung*, *supra* note 67.

<sup>186</sup> See *Yau*, *supra* note 68.

<sup>187</sup> See Constitutional and Mainland Affairs Bureau, *supra* note 63.

have provided citizens with a cause of action for sexual orientation discrimination, the Court may have been hesitant to open the doors of the courts through an alternative means.

*B. The Court was Reluctant to Intrude on the Family Structure*

The Court may have feared overstepping into a sanctified family space. Hong Kong society is infused with Confucian ethics that dictate the primacy of family status, as opposed to a more Western notion of the “individuated self.”<sup>188</sup> Under more traditional Confucian ethics, non-heteronormative<sup>189</sup> sexualities are a rejection of Hong Kong family values, and these “discourses challenge the fundamental basis of Chinese culture—the kin-family—not by denying it but by queering it.”<sup>190</sup> Having already denied the BA’s impartiality ruling, a ruling against the family viewing hours provision would have made a judicial statement that runs counter to the primacy of heteronormative Hong Kong family life, as evidenced by the reluctance of Legco to support a SODO or similar legislation.<sup>191</sup>

*C. Controversial Content Is Delegated to Non-Mainstream Forums*

While showing same-sex couples on television at nine o’clock at night or eleven in the morning does not seem, on its face, to be an affront to advocacy efforts, the message of impropriety that is sent to broadcasters, media outlets, and the public is problematic. The struggle for Hong Kong’s same-sex couples to be accepted into the social mainstream is undermined when they are deemed unsuitable, or too sexualized, for family viewing hours.

Whether as a result of the Court’s decision or as part of the greater movement towards awareness and acceptance of sexual orientation diversity, the discussion surrounding sexual orientation has moved to non-regulated forums. Many of these are internet-based. The Hong Kong government does not monitor radio or television stations that stream over the Internet, and because Internet radio sites can operate without a license, they are subject only to the fairly liberal

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<sup>188</sup> CHOU WAH-SHAN, *supra* note 12, at 253 (describing the normative and behavioral tendency of an individual to place familial interests above the interests of society and other individuals and groups).

<sup>189</sup> Non-heteronormative is used to mean a variance from the social norm of heterosexuality, which connotes a male erotic attraction to females and a female erotic attraction to males. Many argue that heterosexuality is not only a norm, but a standard that transforms a social custom into a legal control mechanism. See Jillian Todd Weiss, *The Gender Caste System: Identity, Privacy, and Heteronormativity*, 10 *LAW & SEXUALITY* 123, 124 (2001).

<sup>190</sup> See CHOU WAH-SHAN, *supra* note 12, at 293. Many tongzhi come out to their families not by denying their cultural identity, but by negotiating within the family for acceptance and face-saving strategies.

<sup>191</sup> See *supra* Part II.B.3.

rules that regulate the print press.<sup>192</sup> In April 2007, almost a year after Hong Kong Connection was aired, an online series portrayed homosexual couples and issues. This series was aired by Phoenix Satellite Television, the new media arm of Hong Kong-based Phoenix TV Media Troup.<sup>193</sup> In February 2008, GDotTV launched Hong Kong's first online gay television channel in order to help bring greater public awareness to the city's sexual minority groups.<sup>194</sup> The series was an effort to combat what founders felt were "gay-bashing" elements in Hong Kong's mainstream media,<sup>195</sup> and to help show that sexual orientation is "not a big deal."<sup>196</sup> In addition, Radiorepublic.com offers over twenty internet radio channels that deal with typically controversial or religious topics ranging from a phone-in show about homosexual love problems, to advice for prostitutes, to Islamic religious services.<sup>197</sup> While any form of public broadcast is laudable for helping to bring sensitive issues to light, it is nonetheless unfortunate that same-sex couples, by the nature of their sexual orientation and not by the actual content of the program, are viewed as a threat to children.

## VI. CONCLUSION

Inevitable tension is created between citizens and their governments when courts support attempts to silence and hamper civil advocacy. While many in Legco support enacting protective anti-discrimination legislation, many private groups, like the Society for Truth and Light,<sup>198</sup> stand in strong opposition to such efforts.<sup>199</sup>

In order to live in and embrace a plural society, one must grow up with the knowledge that a plural society indeed exists. By substantiating a view of the world, and specifically, a view of Hong Kong, in which same-sex couples are not legitimately a part of mainstream life and culture, the Court of First Instance has enabled the very discrimination it sought to prevent. In sexualizing same-sex couples by asserting that same-sex content was inappropriate for family viewing hours, the Court revealed prejudicial assumptions. Though *Cho Man*

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<sup>192</sup> Most internet service providers are self-regulating and abide by the Hong Kong Internet Service Providers Association of Obscene and Indecent Material Codes of Practice. Laurie Lande, *Technology Journal: Sense of Site—Radio Free Internet*, ASIAN WALL ST. J., Sept. 25, 2000 (discussing the Code of Practice's content rating system, but subject only to voluntary classification by webmasters); see also Yan Mei Ning, *Print and Online Regulation and Self-Regulation*, in HONG KONG MEDIA LAW: A GUIDE FOR JOURNALISTS AND MEDIA PROFESSIONALS 226 (2007).

<sup>193</sup> Raymond Li, *Gays Get Online TV Forum*, S. CHINA MORNING POST, Apr. 3, 2007, at 4.

<sup>194</sup> Dennis Chong, *Web TV Channel for Homosexuals*, S. CHINA MORNING POST, Feb. 4, 2008, at 3.

<sup>195</sup> *Id.*

<sup>196</sup> Chong, *supra* note 194.

<sup>197</sup> Lande, *supra* note 192.

<sup>198</sup> See Hui, *supra* note 59.

<sup>199</sup> *Id.*

*Kit* is unmistakably a victory against explicit media censorship of homosexuality, it is also undeniably, and unfortunately, a jurisprudential failure in its disregard of precedent and public policy.

As Hong Kong grows increasingly more connected with China, both economically and culturally,<sup>200</sup> the implications of this type of “forum censorship” for the rights and equality of Hong Kong’s tongzhi population become more tenuous, and therefore more important to protect. It may be several years, if at all, before Hong Kong decides to enact a SODO. And it may be several more years before same-sex couples have their rightful place on television, without exclusion from family viewing hours under misguided definitions and discriminatory interpretations. Until then, as Hong Kong moves forward, perhaps the words to be echoed most loudly and heeded most carefully are those of Judge Michael Hartmann himself: “[w]ithout freedom of speech . . . the vibrancy that marks successful societies—like Hong Kong—is constrained . . . all too often one of the characteristics of failed states—along with dictatorship and rule by decree—is an overbearing, all-stifling regime of censorship.”<sup>201</sup>

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<sup>200</sup> See MICHAEL F. MARTIN, CONGRESSIONAL RESEARCH SERVICE, HONG KONG: TEN YEARS AFTER THE HANDOVER 22, 25 (2007). “One of the largely unexpected effects of the Handover has been rapid increase in economic interaction between the economies of Hong Kong and the Chinese mainland.” The Chinese mainland is presently more important for Hong Kong’s economy than Hong Kong is for China’s economy, a trend that could eventually lead to the integration of Hong Kong into the Chinese mainland economy.

<sup>201</sup> Justice Michael Hartmann, *Forward* to DOREEN WEISENHAUS, HONG KONG MEDIA LAW: A GUIDE FOR JOURNALISTS AND MEDIA PROFESSIONALS, at ix (2007).