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**International Commission of Justice (ICJ) contribution to Equal Opportunities
Commission (EOC) Amicus Brief in *Secretary For Justice v William Roy Leung- CACV
317/2005***

I. (A) Introduction

01. The International Commission of Jurists is honoured to submit the following contribution to an *Amicus Curiae* brief of the Equal Opportunities Commission (EOC) in the case of *Secretary for Justice v William Roy Leung - CACV 317/2005*, to be heard in this Honourable Hong Kong Court of Appeal. We will address the questions of the rights to equality before the law, non-discrimination and privacy in light of Hong Kong's obligation under the International Covenant of Civil and Political Rights (ICCPR).

02. The International Commission of Jurists is a non-governmental organization working to advance understanding and respect for the rule of law as well as the protection of human rights throughout the world. It was set up in 1952 and has its headquarters in Geneva (Switzerland). It is made up of 45 eminent jurists representing different justice systems throughout the world and has 90 national sections and affiliated justice organizations. The International Commission of Jurists has consultative status at the United Nations Economic and Social Council, the United Nations Organization for Education, Science and Culture (UNESCO), the Council of Europe and the Organization of African Unity. The organization also cooperates with various bodies of the Organization of American States and the Inter-Parliamentary Union.

03. The International Commission of Jurists (ICJ) works towards full respect of human rights and the end of human rights violations, including those based on the grounds of sexual

orientation. We offer legal expertise in international human rights law and work in both country specific and thematic areas in international human rights law. Our mode of operation includes making legal interventions by way of amicus briefs in important and relevant cases of interest.

04. The subject of sexual orientation and gender identity in international human rights law is an area that we command expertise and have given focused consideration and study. The ICJ has published the “*International Human Rights References to Human Rights Violations on the Grounds of Sexual Orientation and Gender Identity*, ” which is a compilation of UN jurisprudence in the area of sexual orientation and gender identity. It is for the foregoing reasons that the ICJ is interested in the case of *Secretary for Justice v William Roy Leung* CACV-317/2005 in the Hong Kong Court of Appeal.

05. Before entering into the issues, it is worth remembering that the authorities of Hong Kong are under an obligation to ensure and protect the rights enshrined by the International Covenant of Civil and Political Rights. According to article 39 of the Basic Law of the Hong Kong Special Administrative Region’s (HKSAR’s): “*The provisions of the ICCPR, the ICESCR and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR. [...] The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this article.*” The Hong Kong Bill of Rights Ordinance (BORO) (Chapter 383 of the Laws of the HKSAR) was enacted in June 1991 specifically to give effect in local law to the provisions of the ICCPR as applied to Hong Kong.

06. The Respondent is a gay man and was 20 years old at the time he filed his action before the Hong Kong High Court. He successfully argued at the court of first instance, that Part XII of the Crimes Ordinance – in particular section 118C - discriminates against him as a gay man in that it prohibits consensual male homosexual sex until age 21 years old and criminalizes both parties to consensual male homosexual sex if either party has attained the age of 16 years but is under the age of 21. Under this same Crime Ordinance, it is legally permissible for heterosexual and lesbian couples to have consensual sex beginning at age 16

years old. The Respondent also argued that the provision of s118C constitutes an arbitrary interference in his private life.

07. In this appeal, the appellant argues that s 118C does not violate the principle of equality before the law as it is for the legislature to determine how best to protect young persons and the court should defer its sovereignty in this regard. In addition, the appellant argues that S 118C when read in conjunction with s 118D (which makes it an offence for a man to commit buggery with a woman who is under the age of 21) is neither discriminatory nor does it constitute an arbitrary interference in the private life of gay men. As a consequence, the appellant submits that there are no violations of articles 1 (“entitlements to rights without distinction”), 14 (“protection of privacy, family, home, correspondence and reputation”) and 22 (“equality before and equal protection of the law”) of the Hong Kong Bill of Rights, which reflect articles 2, 17 and 26 of the ICCPR respectively.

I. (B) Preliminary Argument

08. The argument that the restriction of male homosexual sex in section 118C is exclusively a legislative prerogative is met by the fact that the Court should not countenance an irrational legislative animus. Deference to the sovereignty of parliament will be overridden by the existence of legislative intent that is grounded in prejudice. As pointed out in the US Supreme Court case of *Romer v Evans*, “a bare ...*desire to harm a politically unpopular group [which] cannot constitute a legitimate governmental interest.*”¹ Hartman J at paragraph 147 of his judgment at first instance styled the legislative objective of s 118C as an attempt to “...*discourage vulnerable young men from what is perceived to be a chosen lifestyle of which the majority of the community disapproves...*”

09. At a practical and symbolic level, the retention of this higher age of consent for homosexual sex between gay men reinforces societal misapprehensions about male homosexuality in Hong Kong. The provision registers this societal suspicion and precludes

¹ 517 US 620 (1996)

“full moral citizenship” in the nature of an open, democratic society and cosmopolitan Hong Kong.²

10. Sachs J pointed out in the South Africa Constitutional Court case of *National Coalition of Gay and Lesbian Equality v Minister of Justice* that struck down that country’s buggery laws, that:

*“...Outside of regulatory control, conduct that deviates from some publicly established norm is usually punishable when it is violent, treacherous or in some other way disturbing of the public peace or provocative of injury. In the case of male homosexuality however, the perceived deviance is punished simply because it is deviant. It is repressed for its perceived symbolism rather than because of its proven harm ...Thus it is not the act of sodomy that is denounced by the law, but the so called sodomite who performs it, not any proven social damage, but the threat that the same sex passion in itself is seen as representing to heterosexual hegemony”*³

11. This sentiment is echoed in the Colombian Constitutional Court case of *Sentencia No C-098/96*, where the court opined as follows:

“The principle of equality (Colombia, article 13) is radically opposed to the subjugation by legal means for reasons of a sexual nature of a minority that does not share the sexual likes, habits and practices of the majority. Prejudices, whether phobic or not, and false beliefs that have historically served to anathematize homosexuals, do not confer legitimacy on laws that convert homosexuals into the object of public scorn ”

II. The principle of Non-Discrimination and the right to equality before the law

12. The principle of non-discrimination is a cornerstone of the international human rights law and it is embodied in the Charter of the United Nations⁴, the Universal Declaration of Human

² *National Coalition of Gay and Lesbian Equality v Minister of Justice*, 1998 (12) BCLR 1517 (CC) at para. 107:

“Only in the most technical sense is this case about who may penetrate whom where. At a practical and symbolical level it is about the status, moral citizenship and sense of self-worth of a significant section of the community. At a more general and conceptual level, it concerns the nature of the open, democratic and pluralistic society contemplated by the Constitution”

³ *Supra*, para 108

⁴ Articles 1 (3) and 55 of the United Nations Charter.

Rights⁵, the International Covenant on Civil and Political Rights⁶ and the International Covenant on Economic Social and Cultural Rights⁷. Indeed, article 2 (1) of the International Covenant of Civil and Political Rights (ICCPR) states that: “*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.*” This principle is directly linked with the right to equality before the law and the right to protection against discrimination and equal protection of the law that is ensured under article 26 of the ICCPR. The UN Human Rights Committee affirmed that the reference to “*equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status in Article 26 of the International Covenant on Civil and Political Rights includes discrimination on grounds of sexual orientation.*”⁸ The Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child and the UN Working Group on Arbitrary Detention have made a similar determination⁹.

13. The criminalization of sexual relationships between consenting adults of the same sex violates the right to privacy¹⁰ and the equal protection of the law without discrimination¹¹.

⁵ Articles 2, 7 and 10 of the Universal Declaration of Human Rights.

⁶ Articles 2, 3, 14, 25 and 26 of the International Covenant on Civil and Political Rights.

⁷ Article 2 of the International Covenant on Economic Social and Cultural Rights.

⁸ Human Rights Committee, Communications: Australia, CCPR/C/50/D/488/1992, April 4, 1994, paras. 8.2-8.7. See also Human Rights Committee, Communications: Australia, CCPR/C/78/D/941/2000, September 18, 2003, para. 10.4.

⁹ See Committee on Economic, Social and Cultural Rights, General Comment No 15, E/C.12/2002/11, January 20, 2002, para.13; General Comment No 14, E/C.12/2000/4, August 11, 2000, para.18. Committee on the Rights of the Child, General Comment No 4, CRC/GC/2003/4, July 1, 2003, para. 6; General Comment No 3, CRC/GC/2003/3, March 17, 2003, para. 8. Reports of the Working Group on arbitrary detention E/CN.4/2004/3, December 15, 2003, para. 73; E/CN.4/2003/8, December 16, 2002, paras. 68-69 and 76. Opinions adopted by the Working Group on arbitrary detention No 7/2002, Egypt, E/CN.4/2003/8/Add.1, and January 24, 2003. See also Study on non-discrimination as enshrined in article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights, Working paper prepared by Emmanuel Decaux, E/CN.4/Sub.2/2004/24, June 18, 2004, para. 22.

¹⁰ Article 12 of the Universal Declaration of Human Rights; Article 17 of the International Covenant on Civil and Political Rights.

Such criminalization reinforces attitudes of discrimination between persons on the basis of sexual orientation. The UN Human Rights Committee has expressed concern at criminalization of consensual homosexual relations, called on States to refrain from such criminalization and urged that where such laws exist, that they be repealed. In addition, the Committee has urged all States that maintain the death penalty, not to impose it for homosexual relations between consenting adults¹². Other UN Human Rights treaty-bodies, the former UN Commission on Human Rights and various UN special procedures have taken similar approaches to the issue.¹³

14. In assessing whether there is a violation of equality before the law, the court must pursue a “*situation sensitive human rights approach*” that examines how section 118C is experienced by the respondent and other gay men of comparable circumstances in Hong Kong¹⁴. The harm of this provision is that it perpetuates the taint of male homosexual desire

¹¹ Article 7 of the Universal Declaration of Human Rights; Article 26 of the International Covenant on Civil and Political Rights.

¹² See for example: Human Rights Committee, Concluding observations, Kenya, CCPR/CO/83/KEN, March 28, 2005, para. 27; Egypt, CCPR/CO/76/EGY, November 28, 2002, para. 19; Romania, CCPR/C/79/Add.111, July 28, 1999, para. 16; Lesotho, CCPR/C/79/Add.106, April 8, 1999, para. 13; Chile, CCPR/C/79/Add.104, March 30, 1999, para. 20; Cyprus, CCPR/C/79/Add.88, April 6, 1998, para. 11; Sudan, CCPR/C/79/Add.85, July 29, 1997, para. 8; On the other hand, the abrogation of provisions criminalizing relationships between same-sex consenting adults has been welcomed: see for example, Human Rights Committee, Concluding observations, Ecuador, CCPR/C/79/Add.92, August 18, 1998, para. 8 and CCPR/C/84/Add.8, January 19, 1999, paras. 182-183. See also, Committee on Economic, Social and Cultural Rights Concluding observations, Cyprus, E/C.12/1/Add.28, December 4, 1998, para. 7.

¹³ See for example: Committee on Economic, Social and Cultural Rights, Concluding observations, Kyrgyzstan, E/C.12/1/Add.49, September 1, 2000, paras. 17 and 30. Committee on the Elimination of Discrimination Against Women, Concluding observations, Kyrgyzstan, A/54/38, August 20, 1999, paras. 127-128. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, E/CN.4/2000/3, January 25, 2000, paras. 57, 70 and 116. Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, A/56/156, July 3, 2001, para. 20. Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression, E/CN.4/2002/75/Add.1, January 17, 2002, para. 124. Reports of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran, E/CN.4/1999/32, December 28, 1998; E/CN.4/1996/59, March 21, 1996, para. 44. Report of the Special Representative of the Secretary-General on the situation of human rights defenders, E/CN.4/2002/106/Add.1, March 12, 2002, para. 154. Commission on Human Rights resolutions on the question of death penalty, E/CN.4/RES/2004/67, April 21, 2004, para. 4 (f); E/CN.4/RES/2003/67, April 25, 2003, para. 4 (d); E/CN.4/RES/2002/77, April 25, 2002, para. 4 (c).

¹⁴ Supra note 2, para 126 etc “ *One of the great gains achieved by following a situation-sensitive human rights approach is that analysis focuses not on abstract categories, but on the lives as lived and the injuries as experienced by different groups in our society...*”

“...*Human rights are better approached and defended in an integrated rather than a disparate fashion. The rights must fit the people, not the people the rights. This requires looking at rights and their violations from a persons-centred rather than a formula-based position, and analysing them contextually rather than abstractly.* (See Egan v Canada (1995) 29 CRR (2d) 79 at 120: L’Heureux-Dubé:

‘*In reality, it is no longer the ‘grounds’ that are dispositive of the question of*

and sustains the view that male homosexuals are perverted and repugnant.¹⁵

15. In the judicial inquiry of whether there is such a violation, the tribunal must be guided by both the context and impact on the person. In addition, the analysis should “*determine in a qualitative rather than a quantitative way if the group concerned is subjected to scarring of a sufficiently serious nature as to merit [constitutional] intervention.*”¹⁶ The South African Constitutional Court recommends that this approach does not “[adopt] *the viewpoint of the so-called reasonable lawmaker who accepts as objective all the prejudices of heterosexual society as incorporated into the laws in question, but by responding to the request of the applicants to look at the matter from the perspective of those whose lives and sense of self-worth are affected by the measures.*” The respondent’s claim is that s118C is experienced by gay men like him, as an unfair law which treats gay men differently as a consequence of their sexual orientation.

16. In the case of *S.L v Austria*¹⁷ before the European Court of Human Rights, the applicant alleged that the maintenance of Article 209 of the Australian Criminal Code, which penalized homosexual acts of adult men with consenting adolescents between fourteen and eighteen years of age, violated his right to respect for his private life and was discriminatory. The European Court of Human Rights noted that Parliament in its consideration of scientific evidence in favor of equal age of consent for both heterosexuals and homosexual had rejected

whether discrimination exists, but the social context of the distinction that matters. [C]ontext is of primary importance and that abstract ‘grounds of distinction’ are simply an indirect method to achieve a goal which could be achieved more simply and truthfully by asking the direct question: ‘Does this distinction discriminate against this group of people?’ ”

¹⁵ Supra note 2, para. 127 “ As Marshall J reminds us, ‘ . . . the lessons of history and experience are surely the best guide as to when, and with respect to what interests, society is likely to stigmatise individuals as members of an inferior caste or view them as not belonging to the community.’ In the case of gays, history and experience teach us that the scarring comes not from poverty or powerlessness, but from invisibility. It is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the expression of love, it is the denial of full moral citizenship in society because you are what you are, that impinges on the dignity and self-worth of a group.”

Also, *Norris v Ireland*, 142 Eur. Ct. H.R. (ser. A) (1998)

“One of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public”

¹⁶ Supra note 2, para 113

¹⁷ Eur Ct H.R. 2003, available at <http://www.ehcr.coe.int/eng>

the notion that “male adolescents were ‘recruited’ into homosexuality”. The Court reasoned that:

“To the extent that Article 209 of the Criminal Code embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or color”

17. The UN Human Rights Committee in its Concluding Observations on Austria in 1998 stated that it “considers that existing legislation on the minimum age of consent for sexual relations in respect of male homosexuals is discriminatory on grounds of sex and sexual orientation. It requests that the law be revised to remove such discriminatory provisions”¹⁸.

18. Similarly, the Committee on the Rights of the Child has also offered clear interpretation on the question of unequal ages of consent for heterosexuals and homosexuals. In the Concluding Observation of the Committee on the Rights of the Child (Isle of Man): United Kingdom of Great Britain and Northern Ireland¹⁹, the Committee noted as follows:

22. *The Committee expresses concern that the Isle of Man does not appear to have fully taken into account article 2 (the general principle non-discrimination) of the Convention in its legislation, its administrative and judicial decisions, or its policies and programs relevant to children. In this context, concern is expressed at the insufficient efforts made to provide against discrimination based on sexual orientation. While the Committee notes the Isle of Man's intention to reduce the legal age for consent to homosexual relations from 21 to 18 years, it remains concerned about the disparity that continues to exist between the ages for consent to heterosexual (16 years) and homosexual relations.*

23. *It is recommended that the Isle of Man take all appropriate measures, including of a legislative nature, to prevent discrimination based on the grounds of sexual orientation and to fully comply with article 2 of the Convention.*

¹⁸ Concluding Observations: Austria, CCPR/C/79/Add.103, November 19, 1998, para 13

¹⁹ 16/10/2000.CRC/C/15/Add.134 at available at <http://www.unhchr.ch/tbs/doc.nsf>.

19. In order to develop a full rather than a merely formal sense of common citizenship among heterosexuals and homosexuals, laws that reinforce the inequality of gay men must be reviewed. In describing the normative scope that underpins the framework for equality before the law, Sachs J in *National Coalition of Gay and Lesbian Equality v Minister of Justice*, opined as follows:

*“ ... What the Constitution requires is that the law and public institutions acknowledge the variability of human beings and affirm the equal respect and concern that should be shown to all as they are. At the very least, what is statistically normal ceases to be the basis for establishing what is legally normative. More broadly speaking, the scope of what is constitutionally normal is expanded to include the widest range of perspectives and to acknowledge, accommodate and accept the largest spread of difference. What becomes normal in an open society, then, is not an imposed and standardized form of behaviour that refuses to acknowledge difference, but the acceptance of the principle of difference itself, which accepts the variability of human behaviour.”*²⁰

20. Courts from around the world are increasingly accepting the notion that differential treatment based on sexual orientation, violates the right to equality before the law and the protection against discrimination.²¹

²⁰ *Supra* note 2, para 134

²¹ Ecuador: The Constitutional Court of Ecuador, Sentencia No 111-97-TC, *Registro Oficial (Official Registry)*, Supp, No 203, Nov. 27, 1997, at 67, in invalidating a sodomy law as a violation of equality:

“Homosexuals are, above all, bearers of all the rights of the human person and thus have the right to exercise them in conditions of full equality, which does not imply the absolute identity but rather a proportional equivalence between two or more beings, that is, their rights to enjoy legal protection, whenever in the manifestation of their conduct they do not infringe the rights of others just as is the case with all other persons”.

Danilowitz, 48(5) P.D. 749 ¶ 17 (1994), the Israeli Court held that the state airline’s policy of extending certain employee benefits to different-sex but not same-sex couples violated the constitutional guarantee of equality:

“This discrimination—against homosexuals and lesbians—is improper. It is contrary to equality.”

Vriend v Alberta [1998] 1 S.C.R. 493, available at 1998

S.C.R. LEXIS 76. Section 15(1) of Canadian Charter of Rights and Freedoms, www.efc.ca/pages/laws/charter/charter.head.html, provides:

“[e] very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination

... based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

Court said that Section 15 requires that sexual orientation be “read into” a province’s general anti-discrimination law).

Young v Australia, Communication No. 941/2000: Australia, CCPR/C/78/D/941/2000, September 18, 2003:

III. Right to Privacy

21. The right to privacy is protected by article 17 of the International Covenant on Civil and Political Rights. The criminalization of sexual relationships between same-sex consenting adults has been found to violate the right to privacy. The UN Human Rights Committee has reiterated that the criminalization of homosexual relations between consenting adults is not in conformity with the obligation of the States Parties under article 17 of the ICCPR to ensure and protect the right to privacy.²² In its observation to Chile, the Human Rights Committee stated that *“The continuation in force of legislation that criminalizes homosexual relations between consenting adults involves violation of the right to privacy protected under article 17 of the Covenant and may reinforce attitudes of discrimination between persons on the basis of sexual orientation.”*²³ The existence of the criminal sanctions of section 118C constitutes a violation of the respondent's right to privacy, in that he cannot express his sexuality until he is age 21 years old.

22. In *Toonen v Australia*, a case on the question of criminalization of private homosexual behaviour by criminal law, the UN Human Rights Committee ruled that: *“In as much as article 17 is concerned, it is undisputed that adult consensual sexual activity in private is covered by the concept of “privacy””*²⁴. The Human Rights Committee recalled that pursuant to its General Comment 16 on article 17, the *“introduction of the concept of arbitrariness is intended to guarantee that every interference provided for by the law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the circumstances. The Committee interprets the requirement of*

“The (UN Human Rights Committee) recalls its earlier jurisprudence that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation” and found that the State party had violated article 26 of the ICCPR by denying the author a pension on the basis of his sex or sexual orientation.

²² See inter alia, Human Rights Committee, Concluding Observations: Romania CCPR/C/79/Add.111, July 28, 1999, para 16; Concluding Observations: Lesotho, CCPR/C/79/Add.106, April 8, 1999, para. 13; and Concluding Observations: Chile, CCPR/C/79/Add.104, March 30, 1999 para. 20.

²³ Concluding Observations: Chile, CCPR/C/79/Add.104, March 30, 1999, para. 20.

²⁴ Communication No. 488/1992: Australia, CCPR/C/50/D/488/1992, Nicholas Toonen v. Australia, April 4, 1994, para. 8,2.

*reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case...the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of HIV/AIDS ...The Committee cannot accept either that for the purposes of article 17 of the Covenant, moral issues are exclusively a matter of domestic concern, as this would open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes interfering with privacy"*²⁵ The Human Rights Committee concluded that buggery laws in the Australian state of Tasmania were a violation of the right to privacy in article 17 of the ICCPR. This decision has founded the basis for protection of consensual homosexual relations within the jurisprudence of the UN human rights system.²⁶

23. The European Court on Human Right's ruling in *Dudgeon v UK* is also applicable:

*"the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for private life (which includes his sexual life) ...In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life ...either he respects the law and refrains from engaging - even in private with consenting male partners - in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution"*²⁷

24. The reasoning in *Dudgeon* was affirmed by the European Court on Human Right in the later cases of *Norris v Ireland*²⁸ and *Modinos v Cyprus*²⁹. The Court also found that there was a violation of the right to privacy in conjunction with the right against discrimination in *SL v Austria*³⁰, where the court also considered the question of criminal sanctions and a higher age of consent for male homosexuals.

²⁵ Ibid, paras. 8,4, 8,5 8,6.

²⁶ See International Commission of Jurists (ICJ) *International Human Rights References to Human Rights Violations on the Grounds of Sexual Orientation and Gender Identity* at http://www.icj.org/news.php?id_article=3687#=en

²⁷ 45 Eur Ct H.R. (ser. A) (1981)

²⁸ 142 Eur Ct. H.R. (ser. A) (1988),

"one of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals leading, on occasions to depression and the serious consequences which can follow"

²⁹ 259 Eur. Ct. H.R. (ser. A) 1993

³⁰ Supra note 7

25. In the South Africa *National Coalition of Gay and Lesbian Equality v Minister of Justice* case in the Constitutional Court, the notion of [decisional] privacy was described as follows: *"Privacy recognizes that we have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If in expressing our sexuality we act consensually and without harming one another, invasion of that precinct will be in breach of our privacy."*

26. The SA Constitutional Court further pointed out that the interference in the lives of gay men by laws proscribing consensual homosexual sex, are not merely symbolic. It noted that the existence of these criminal offences put gay men at risk of arrest, prosecution and conviction for activities that are a part of their experience as human beings. These laws, apart from entrenching social stigma, *"build insecurity and vulnerability in the lives of gay men."*³¹

27. In the Colombia Constitutional Court, this protection has been expressed in terms of the right to personality and was described by the Court as follows:

*"Sexuality, whether heterosexual or homosexual, is an essential element of humans and their psyche and, therefore, is included in the broader framework of sociability. The full constitutional protection of the individual in the form of the rights to personality and its free development (Colombian Constitution, Articles 14 and 16) includes in its essential core the process of autonomous assumption and decision regarding one's sexuality. It would be senseless if sexual self determination were to remain outside the limits of the rights to personality, and its free development given that identity and sexual conduct occupy in the development of the person and in the unfolding of his liberty and autonomy such a central and decisive place."*³²

IV. Limiting principles

³¹ Supra note 2, para 28, *National Coalition of Gay and Lesbian Equality v Minister of Justice*; See also Ryan Goodman, "Beyond the Enforcement Principle: Sodomy Laws, Social Norms and Social Panoptics", *California Law Review*, Volume 89, Number 3, May 2001

³² Sentencia No C-098/96 (Corte Constitucional, 1996) (Colombia Constitutional Court), available at <http://bib.minjusticia.gov.co/jurisprudencia/CorteConstitucional?1996?Constitucionalidad/C-098-96.htm> (unoff.trans.).

28. All democratic societies acknowledge the role of a governmental interest in limiting even private behaviour. This governmental interest is engaged because of a perceived harm. In private relations, persons may be penalized for inter-generational, intra-familial and cross species sex in public or private.³³ Sex involving violence, deception, voyeurism, intrusion or harassment is sometimes punishable or made actionable, wherever they take place.

29. In the European Court on Human Rights case of *Laskey, Jaggard & Brown v United Kingdom*,³⁴ the Court emphasized the harm principle in declining to extend *Dudgeon v UK* to protect consensual sado-masochistic sexual activity in the home, stating that “not every sexual activity carried out behind closed doors necessarily falls within the scope of article 8 privacy.” The privacy interest was overcome because of the perceived harm. It is important to note that there has been no challenge of a prosecution for consensual incest as being a violation of the right to privacy invoking *Dudgeon* line of cases. The European Commission has rejected commercial sexual conduct in the home as enjoying protection under the privacy provisions of the ECHR.³⁵

V. Pacta sunt servanda and international obligations

30. It is a universally recognized general principle of international law that States must implement treaties and the obligations arising from them in good faith. A corollary of this general principle of international law is that the authorities of a particular country cannot escape their international commitments by arguing that domestic law prevents them from doing so. They cannot cite provisions of their Constitution, laws or regulations in order not to carry out their international obligations or to change the way in which they do so. This is a general principle of the law of nations that is recognized in international jurisprudence³⁶.

³³ Supra note 2, para 118

³⁴ 24 Eur. H.R. Rep 39 [1997]

³⁵ *F v Switzerland*, 55 Eur Comm H R Dec & Rep.178 [1988].

³⁶ Permanent Court of International Justice, Advisory Opinion of 4 February 1932, *Traitement des nationaux polonais et autres personnes d'origine ou de langue polonaise dans le territoire de Dantzig* [Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory], *Recueil des arrêts et ordonnances*, Série A/B, N° 44; Permanent Court of International Justice, Advisory Opinion of 31 July 1930, *Question des communautés greco-bulgares* [Greco-Bulgarian “Communities”], *Recueil des arrêts et ordonnances*, Série A, N° 17; Permanent Court of International Justice, Advisory Opinion of 26 April 1988, *Obligation d'arbitrage* [Applicability of the Obligation to Arbitrate]; Judgment of 28 November 1958, *Application de la Convention de 1909 pour régler la tutelle des mineurs (Pays Bas/Suède)* [Application of the 1909 Convention for regulating the guardianship of Minors (Netherlands/Sweden)]; Permanent Court of

The *pacta sunt servanda* principle and its corollary have been refined in articles 26 and 27 of the Vienna Convention on Treaty Rights. China acceded to the Convention on 3 September 1997.

31. International Human Rights Law is no stranger to the *pacta sunt servanda* principle and its corollary, as has been frequently pointed out by the Inter-American Court of Human Rights. In its Advisory Opinion on “International Responsibility for the Promulgation and Enforcement of Laws in violation of the American Convention”, the Inter-American Court on Human Rights recalled that:” *Pursuant to international law, all obligations imposed by it must be fulfilled in good faith; domestic law may not be invoked to justify non- fulfilment. These rules may be deemed to be general principles of law and have been applied by the Permanent Court of International Justice and the International Court of Justice even in cases involving constitutional provisions*”.³⁷ The UN Human Rights Committee has pointed out that: “*national legislation cannot modify the international obligations contracted by a State party by virtue of the Covenant.*”³⁸

VI. CONCLUSIONS

32. Section 118 C prohibits gay men from lawfully engaging in sexual intercourse until they attain the age of 21 years old. The act prohibited is clustered around the definition of their sexual orientation – homosexual orientation. Heterosexual and lesbian partners may lawfully pursue sexual relations beginning at age 16. Given this context, the provision of s 118C is experienced by gay men as differential treatment as a result of their sexual orientation.

33. It has been shown that the perceived harm of the legislative provision of s118C is founded on prejudice. The objective of the provision – that of protecting young boys from a homosexual lifestyle- has been examined in other jurisdictions and in light of the available jurisprudence that exists on the human rights of privacy and equality before the law. Its

International Justice, Judgment of 6 April 1955, *Nottebohm (2e. Phase) (Lichtenstein/Guatemala)* and Decision by S.A Bunch, *Montijo (Colombia v. United States of America)*, 26 July 1875.

³⁷ Inter-American Court of Human Rights, International Responsibility for the Promulgation and Enforcement of Laws which violate the Convention (Arts. 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94 of 9 December 1994, Series A, No. 14, paragraph 35.

³⁸ United Nations document CCPR/C/79/Add.67, paragraph 10. [Spanish original, free translation]

perceived harm is not sustainable when examined in light of the principles of human rights law. Accordingly, the appellant's appeal should be rejected.