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HCAL 160/2004

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO. 160 OF 2004

BETWEEN

LEUNG TC WILLIAM ROY Applicant

and

SECRETARY FOR JUSTICE Respondent

Before : Hon Hartmann J in Court

Dates of Hearing : 21 and 22 July 2005

Date of Handing Down Judgment : 24 August 2005

J U D G M E N T

Introduction

1. The applicant, a 20-year-old man, is homosexual. He has been conscious of his sexual orientation since puberty. The applicant is thereby a member of a minority – but nevertheless significant – section of the Hong Kong community : the gay community.

2. The applicant says that since the age of 16 he has had a number of relationships with gay men. Those relationships have been based on mutual attraction and respect. Within those relationships – in private and on an entirely consensual basis – he and his partners would have desired to give physical expression to their shared sexual orientation. However, that desire, says the applicant, has been frustrated by the existence of certain provisions of Hong Kong's criminal law contained in Part XII of the Crimes Ordinance, Cap.200 ('the Ordinance').

3. It is the applicant's case that the provisions contained in Part XII of the Ordinance, while they permit heterosexual and lesbian couples to give physical expression to their shared sexual orientation once they have reached 16 years of age, discriminate against gay couples in that they prohibit them from a similar expression of their shared desires until each of them has reached 21 years of age. The provisions, says the applicant, further discriminate against gay men by prohibiting certain intimate activities no matter how old they are. This prohibition, however, does not apply to heterosexual or lesbian couples.

4. It is the applicant's case that the provisions also constitute an arbitrary interference in his private life. It is said on the applicant's behalf by his leading counsel, Mr Dykes SC, that what takes place in the bedroom on an entirely consensual basis between two men who are both aged 16 or older is very much a matter private to them and that privacy should be protected by law just as it is protected for heterosexual and lesbian couples.

5. The applicant says that, still being under 21 years of age, the existence of the regime contained in Part XII of the Ordinance has, and continues, to place a considerable stress on his relationships with other gay men, clouding such relationships with apprehension and making it effectively impossible to develop, as he would wish, long-lasting relationships.

6. It is further the applicant's case that his knowledge that the physical desires which define his sexual orientation are perceived by the law to be a form of deviance warranting condign criminal punishment has led to feelings of low self-esteem and an on-going denial of his true identity, even to those closest to him. The result has been a sense of marginalisation and what I infer to be a profound uncertainty as to his own moral worth as a member of the Hong Kong community.

7. The applicant's sexual orientation, however, has not resulted in any form of public action being taken against him. He has not, for example, been prosecuted for any criminal offence arising out of Part XII of the Ordinance. His application for judicial review is not therefore founded on some 'decision' of a public law body applicable to him.

8. It is instead the applicant's case that under the Basic Law he has the right to equality before the law; that is, the right not to be discriminated against because of his sexual orientation. Under the Hong Kong Bill of Rights he also has the right not to be subjected to arbitrary or unlawful interference in how he seeks self-autonomy in private. But, by reason of the regime contained in Part XII of the Ordinance, both of those

rights, says the applicant, are unlawfully denied to him and other gay men over the age of 16.

9. Accordingly, the applicant has taken the step of seeking to directly challenge the provisions in Part XII of the Ordinance which he says impinge on his constitutional rights. The applicant does so, not by relying on any prerogative remedy, but by seeking declarations that those provisions are inconsistent with the Basic Law and/or the Hong Kong Bill of Rights.

10. This application therefore raises two fundamental questions. First, whether this court has jurisdiction to determine the application and, if it does, whether, in the exercise of its discretion, it should properly do so and, second, if the first question is answered in the affirmative, whether, on the merits, the provisions of Part XII of the Ordinance identified by the applicant should be declared to be unconstitutional.

11. It is the respondent's contention that this court has no jurisdiction to entertain the application. Alternatively, if it does possess jurisdiction, that jurisdiction should be exercised sparingly, especially when, as in the present case, an applicant seeks to directly challenge primary legislation and does so solely on the prospective basis that he wishes to act in the future in a way that presently offends the legislation.

12. During the course of submissions, however, Mr McCoy SC, leading counsel for the respondent, said that, if the court came to the determination that it did have jurisdiction and should determine the merits, then he was instructed to concede that, in light of the Basic Law and the

Bill of Rights, certain – but not all – of the provisions challenged by the applicant were unsustainable. I shall return later in this judgment to the nature and extent of this important concession.

13. The applicant seeks declarations that four sections contained in Part XII of the Ordinance – ss.118C, 118F(2)(a), 118H and 118J(2)(a) – are unconstitutional.

14. For the avoidance of any doubt, the applicant makes no suggestion that the minimum age of 16 imposed by the Ordinance on all forms of sexual conduct with or towards another person is in any way unlawful.

15. In addition, it is to be understood that the four sections in Part XII which are challenged, notwithstanding the deeming provisions contained in two of them, concern what are in reality entirely consensual acts carried out in private by gay men over 16 years of age.

16. The relevant acts which are prohibited in Part XII of the Ordinance fall into two categories :

(i) The first category concerns acts of 'gross indecency'. The phrase is not defined in the Ordinance but, as I see it, covers sexual conduct with or towards another person that is offensive to common propriety, each case being judged in the context of its own time, place and circumstance. For the purpose of this judgment, I shall describe it as 'sexual intimacy' by which I mean any act of such intimacy with or

towards another person that falls short of sexual intercourse; namely, penetration.

(ii) The second category concerns sexual intercourse itself, either procreative intercourse; that is, intercourse *per vagina*, or intercourse *per anum*, the form of intercourse described in the Ordinance as buggery, that term being synonymous with sodomy.

Is buggery, within the meaning of the Ordinance, a form of sexual intercourse?

17. During the course of the hearing the issue arose of whether, in terms of the Ordinance, buggery constituted sexual intercourse. For reasons which will become evident, the issue is fundamental to the applicant's case. I am satisfied, however, that in ordinary language buggery constitutes a particular form of sexual intercourse and, second, that the Ordinance has not narrowed the generic meaning of the phrase so that it only applies to intercourse *per vagina* to the exclusion of other forms of intercourse.

18. The phrase 'sexual intercourse', like the more venerable phrase 'carnal knowledge', is a polite reference to copulation and just as there may be different forms of copulation, both for procreation and pleasure, so may there be different forms of sexual intercourse. In *Archbold 2003*, at 20-13 (page 1753), it is said that the definition of the offence of buggery derives from common law and consists of 'sexual intercourse' *per anum* by man with man or, in the same manner, by man with woman. That buggery is recognised as a form of sexual intercourse

has long been recognised by the courts of England : see, for example, *R. v. Barron* [1914] 2 KB 570 (CCA).

19. In the Ordinance itself, while the term 'sexual intercourse' is used to describe intercourse *per vagina* and not *per anum*, I am satisfied that has been done as a matter of convenience only. I am unable, on an ordinary reading of the relevant sections, to read into the use of the phrase 'sexual intercourse' any intent on the part of the draftsman to convert it into a term of art; that is, from a phrase which describes a genus to a phrase which describes a specie. In any event, buggery in common law being a form of 'sexual intercourse', it seems to me to be tautologous to qualify it in the Ordinance with that phrase.

20. I am satisfied therefore that, both in common law and in the Ordinance, buggery is recognised to be a form of sexual intercourse.

The four sections challenged

21. In terms of s.146 of the Ordinance, a person, male or female, who commits an act of 'gross indecency' – an act that I have described as one of 'sexual intimacy' – with a boy or a girl under the age of 16, is guilty of an offence. Consent is not a defence. The 'threshold age' is therefore the age of 16.

Section 118H

22. The threshold age being 16, it is lawful for a man and a woman who are both of that age or older to engage in acts of sexual intimacy with each other.

23. It is equally lawful for a lesbian couple who are both 16 or older to engage in the same acts of sexual intimacy. In this regard, the Ordinance is silent and through that silence permits the conduct.

24. Gay couples, however, are treated differently. In respect of gay men, the legislature has delayed the lawfulness of sexual intimacy until each man is 21 years old. S.118H of the Ordinance states :

> "A man who—
>
> (a) commits an act of gross indecency with a man under the age of 21; or
>
> (b) being under the age of 21 commits an act of gross indecency with another man,
>
> shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 2 years."

25. In terms of s.118H therefore, if a gay couple, both of whom have reached the age of 16, engage in the same acts of sexual intimacy allowed to a heterosexual or lesbian couple, if one of the gay men is under the age of 21, both are criminally liable and may be sentenced to imprisonment.

Section 118J(2)(a)

26. Provided it is done in private, heterosexual and lesbian couples who are 16 or older may engage in acts of sexual intimacy with each other even though one or more other persons take part in those acts or are present to witness those acts. Put plainly, the criminal law does not punish group sexual intimacy carried out in private and consensually if it is heterosexual or lesbian.

27. Gay men, however, whatever their age, are prohibited from such acts. Even though they may engage in them consensually and behind closed doors – in reality, in private – they are deemed to have engaged in those acts in public and, as such, are liable to imprisonment. In this regard, s.118J states :

> " (1) A man who commits an act of gross indecency with another man otherwise than in private shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 2 years.
>
> (2) An act which would otherwise be treated for the purposes of this section as being done in private shall not be so treated if done—
>
> (a) when more than 2 persons take part or are present…"

Section 118C

28. Just as a heterosexual couple who are 16 years or older are permitted by the criminal law to engage in acts of sexual intimacy with each other so they are also permitted to have sexual intercourse with each other; that is, intercourse *per vagina*.

29. It is submitted, however, that gay couples are treated differently. The act of 'sexual intercourse' for a gay couple, so it said, is the act described in the Ordinance as the act of buggery. But the legislature has delayed the lawfulness of buggery between men until each man is 21. In this regard, s.118C of the Ordinance states :

> " A man who-
>
> (a) commits buggery with a man under the age of 21; or
>
> (b) being under the age of 21 commits buggery with another man,

> shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life."

30. The applicant recognises that, in terms of s.118D of the Ordinance, the legislature has also made it unlawful for a man to have sexual intercourse by way of buggery with a woman who is under the age of 21. Section 118D reads :

> " A man who commits buggery with a girl under the age of 21 shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life."

31. It is, however, the applicant's case that the existence of s.118D does not redeem the constitutional invalidity of s.118C. Gay men, it is argued, are denied until the age of 21 a choice available at 16 to those who are not gay; namely the choice of profound sexual expression with a consenting partner. Anal intercourse – buggery – is a basic form of sexual expression for gay men. By reason of s.118C, gay men who are over 16 but not yet 21 are unable to participate in consensual sexual intercourse under pain of criminal liability. Heterosexuals of the same age are subject to no such liability.

Section 118F(2)(a)

32. As the Ordinance is constituted, provided it is done in private and the woman is 21 or older, a heterosexual couple may have sexual intercourse by way of buggery with each other even though one or more other persons take part or are present to witness the act.

33. However, as with the prohibition imposed by s.118J(2)(a) on gay group sexual intimacy, gay couples, whatever their age, are prohibited

from sexual intercourse by way of buggery with each other if one or more other persons take part or are present. S.118F states :

> " (1) A man who commits buggery with another man otherwise than in private shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 5 years.
>
> (2) An act which would otherwise be treated for the purposes of this section as being done in private shall not be so treated if done—
>
> (a) when more than 2 persons take part or are present…"

The basis of the applicant's challenge

34. It is the applicant's case that each of the four sections – 118H, 118J(2)(a), 118C and 118F(2)(a) – are, in the first place, inconsistent with the Basic Law, specifically arts.25 and 39.

35. Art.25 of the Basic Law states simply that :

> "All Hong Kong residents shall be equal before the law."

36. Art.39 gives recognition to various international covenants and conventions as they are incorporated into Hong Kong's domestic law. It reads :

> "The provisions of *the International Covenant on Civil and Political Rights*, 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.
>
> 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." [my emphasis]

37. The International Covenant on Civil and Political Rights ('the ICCPR') is incorporated into the domestic law of Hong Kong by means of the Hong Kong Bill of Rights Ordinance, Cap.383. In that statute, the ICCPR finds its expression in the Hong Kong Bill of Rights.

38. It is the applicant's case that each of the four sections are inconsistent with the Bill of Rights, specifically arts.1, 14 and 22.

39. Art.1 of the Bill of Rights bears the heading 'Entitlement to rights without distinction' and reads :

> " (1) 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.
>
> (2) Men and women shall have an equal right to the enjoyment of all civil and political rights set forth in this Bill of Rights." [my emphasis]

40. Art.14 bears the heading 'Protection of privacy, family, home, correspondence and reputation'. It reads :

> " (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> (2) Everyone has the right to the protection of the law against such interference or attacks."

41. Art.22 bears the heading 'Equality before and equal protection of law'. It reads :

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons 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." [my emphasis]

42. As I have said, the applicant makes his application on the basis that, as a homosexual, he is a member of a class of persons, a class defined by status, that status being a shared sexual orientation. It is on that basis, he says, that the four sections discriminate against him in that they deny equality before the law to persons of his sexual orientation; that is, in respect of s.118H and s.118C to gay men over 16 but not yet 21 years of age, and, in respect of s.118J(2)(a) and s.118F(2)(a), to gay men whatever their age. By discriminating in this manner, the applicant says that the four sections infringe his rights under art.25 of the Basic Law as well as arts.1 and 22 of the Bill of Rights. The applicant further contends that this denial of equality must be viewed in the context of it also constituting an arbitrary and unlawful interference in his private life and the private life of others who are a member of his class. In this regard, he says, the four sections infringe art.14 of the Bill of Rights.

Can a class of persons be defined by sexual orientation?

43. At the outset, I record that Mr McCoy, for the respondent, accepted without demur that sexual orientation is capable of defining a class of persons.

44. That, in my judgment, must be correct. There can be no doubt that gay men have been historically disadvantaged by being perceived to belong to a group marked by stereotyped capacities. The Nazis, for example, had no difficulty in recognising homosexuals as a class, the status being bestowed in order to degrade them as a class. Much of

our human rights jurisprudence today springs from the need to protect against such discrimination.

45. In *Toonen v. Australia* (Vol.112 International Law Reports, 328) the United Nations Human Rights Committee, in its Communication No.488 of 1992, held that the reference to the word 'sex' in arts.2(1) and 26 of the ICCPR encompassed sexual orientation. Those Articles are found in the Bill of Rights, being arts.1(1) and 22.

46. Persuasive jurisprudence is also to be found in a series of judgments of the European Court of Human Rights – for example, *Salgueiro da Silva Mouta v. Portugal*, no.33290196 – in which it was held that sexual orientation is a concept covered by art.14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The article, in so far as it is relevant, provides that :

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, … or other status."

The declarations sought

47. The applicant has sought only declaratory relief; namely —

(i) A declaration that s.118H of the Ordinance, to the extent that it applies to a man aged 16 or over and under 21, is inconsistent with arts.25 and 39 of the Basic Law and arts.1, 14 and 22 of the Bill of Rights and is unconstitutional;

(ii) A declaration that ss.118F(2)(a) and 118J(2)(a) of the Ordinance, are inconsistent with arts.25 and 39 of the Basic

Law and arts.1, 14 and 22 of the Bill of Rights and are unconstitutional;

(iii) A declaration that s.118C of the Ordinance, to the extent that it applies to a man aged 16 or over and under 21, is inconsistent with arts.25 and 39 of the Basic Law and arts.1, 14 and 22 of the Bill of Rights and is unconstitutional.

Jurisdiction

48. In judicial review this court exercises what has been described as a 'supervisory jurisdiction'. The question may be asked : what is supervised? I know of no concise, all-embracing answer. What can be said, however, is that traditionally judicial review has been employed to ensure that the rights of citizens are not abused by the unlawful exercise of executive power. That today, in all but the most exceptionable cases, remains the basis of the jurisdiction. Invariably, therefore, what is supervised are the decisions of public bodies.

49. In *Council of Civil Service Unions v. Minister for the Civil Service*[1985] 1 AC 374 (at 408E), Lord Diplock said :

> " Judicial review … provides the means by which judicial control of administrative action is exercised. The subject matter of every judicial review is a decision made by some person (or body of persons) whom I will call the 'decision-maker' or else a refusal by him to make a decision."

In the later case of *Mercury Energy Ltd v. Electricity Corporation of New Zealand Ltd*[1994] 1 WLR 521(at 526A), Lord Templeman said :

> "Judicial review was a judicial invention to secure that decisions are made by the executive or by a public body according to law even if the decision does not otherwise involve an actionable wrong."

50. In the present case, however, it is accepted that there has been no such decision-making, not at least in a manner that impacts on the applicant. Instead, the applicant seeks to go direct to the provisions of the Ordinance itself.

51. It is the respondent's first submission that, in the absence of a decision by a public law body, this court has no jurisdiction. It certainly has no jurisdiction to go direct to and strike down primary legislation.

52. The Basic Law, it has been argued on behalf of the respondent, recognises the separation of powers; that is, the sovereignty of the legislature to make laws and the sovereignty of the judiciary to interpret and apply them. That is correct. The observations of Lord Diplock, made with reference to the separation of powers in the United Kingdom apply with equal force to Hong Kong :

> "My Lords, at a time when more and more cases involve the application of legislation which gives effect to policies that are the subject of bitter public and parliamentary controversy, it cannot be too strongly emphasised that the British constitution, though largely unwritten, is firmly based upon the separation of powers; Parliament makes the laws, the judiciary interpret them …[T]he role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral." (*Duport Steels Ltd v. Sirs* [1980] 1 WLR 142, at 157)

53. But, as Lord Diplock noted, the British constitution is largely unwritten. The constitution of the Hong Kong Special Administrative

Region is not. More than that, art.11(2) of our constitution states in clear terms :

> "No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law."

54. It follows that under the Basic Law the judiciary's role of interpreting the laws made by the legislature includes interpreting them to ensure they comply with the Basic Law. The Chief Justice, in *Ng Ka Ling v. Director of Immigration* [1999] 1 HKC 291, at 322, expressed it as follows :

> "In exercising their judicial power conferred by the Basic Law, the courts of the Region have a duty to enforce and interpret that law. They undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. The exercise of this jurisdiction is a matter of obligation, not of discretion so that if inconsistency is established, the courts are bound to hold that a law or executive act is invalid at least to the extent of the inconsistency. Although this has not been questioned, it is right that we should take this opportunity of stating it unequivocally. In exercising this jurisdiction, the courts perform their constitutional role under the Basic Law of acting as a constitutional check on the executive and legislative branches of government to ensure that they act in accordance with the Basic Law."

55. But does this jurisdiction permit the courts, in appropriate circumstances, to go direct to those laws or must there always be a decision of some public authority pursuant to those laws which must first arise to give body and context to the examination?

56. It seems to me that the Basic Law, in terms of its inherent structure and purpose, must allow for a remedy in appropriate

circumstances to those who say that their fundamental rights have been undermined by primary legislation, and not an indirect remedy but a direct one, one that permits the courts to go direct to the legislation. If it was otherwise there would be cases in which the Basic Law would hold out to Hong Kong residents the protection of fundamental rights while denying them the means of securing those rights. Art.35(1) is directly relevant. It provides that —

> "Hong Kong residents shall have the right to … access to the courts … for timely protection of their lawful rights and interests … and to judicial remedies."

57. The applicant's case is illustrative. He contends that, as a gay man, the provisions he has identified in the Ordinance have undermined a fundamental right given to him by the Basic Law. But how is he to enforce that right? If his cause of action must be founded on the exercise of executive power by a public authority, he must bring about a relevant exercise of power by such an authority. In the present case that authority would have to be the police and the only way he could get the police to act would be to commit a criminal offence or series of offences under Part XII of the Ordinance. In short, the applicant would have to break the law – risking imprisonment – in order to challenge it.

58. In *Union de Reguenos Agricultures v. Council of the European Union* [2003] QB 893, at 906, the Court of Justice of the European Communities dealt succinctly with the bleak conundrum that has faced the applicant :

> "The fact that an individual affected by a Community measure might, in some instances, be able to bring the validity of a Community measure before the national courts by violating the rules laid down by the measures and rely on the invalidity of

> those rules as a defence in criminal or civil proceedings directed against him does not offer the individual an adequate means of judicial protection. Individuals clearly cannot be required to breach the law in order to gain access to justice."

59. That same principle, I believe, must apply under the Basic Law. A litigant, such as the applicant in this case, is not required to break the law in order to secure the route to an effective remedy. If, however, the Basic Law guarantees a remedy – without imposing any obligation to break the law in order to challenge it – where is that remedy to be found? Without the need to cast the net further out into jurisprudential waters, it is to be found in the procedure adopted by the applicant in this case; that is, by way of seeking declaratory adjudication.

60. S.21K of the High Court Ordinance, Cap.4, expressly provides that an application for declaratory relief can be made in judicial review proceedings, giving to this court the power to grant relief if it considers it 'just and convenient'. S.21K(2), in so far as it is relevant, states :

> "An application for a declaration … may be made in accordance with rules of court by way of an application for judicial review, and on such an application the Court of First Instance may grant the declaration … if it considers that, having regard to—
>
> (a) the nature of the matters in respect of which relief may be granted by orders of mandamus, prohibition or certiorari;
>
> (b) the nature of the persons and bodies against whom relief may be granted by such orders; and
>
> (c) all the circumstances of the case,
>
> it would be just and convenient for the declaration to be made …"

61. The relevant 'rules of court' are those contained in O.53, r.1(2) of the Rules of the High Court, that rule bearing the same wording as the old English rule : R.S.C., O.53, r.1(2).

62. As the law has been clarified by a number of judgments of the English courts, a declaratory order may be made in judicial review proceedings in favour of an applicant who has *locus standi* whether or not a prerogative order – *certiorari*, *mandamus* or prohibition – could be made. The jurisdiction to grant declaratory relief is not founded solely upon a decision of a public authority and may, in appropriate cases, be employed for the purpose of obtaining an adjudication on the validity of legislation, in so far as that legislation affects an applicant.

63. Direct authority for this is *R. v. Secretary of State for Employment, ex parte Equal Opportunities Commission* [1995] AC 1, a judgment of the House of Lords. The factual context may be stated as follows. The Equal Opportunities Commission ('the EOC') wrote to the Secretary of State asserting that certain employment legislation indirectly discriminated against women and was therefore in conflict with European Community law. The Secretary of State replied by letter saying that any differentiation in treatment was justifiable. The EOC then applied for judicial review, the 'decision' under challenge being the Secretary of State's letter. It was held by their Lordships that the letter from the Secretary of State did not constitute a 'decision', merely a statement of a point of view. It was held, however, that the lack of a 'decision' did not deprive the courts of jurisdiction to grant *declaratory relief* under R.S.C., O.53, r.1(2) – from which we draw our own O.53, r.1(2) – that declaration

being to the effect that the primary legislation was incompatible with Community law. The headnote reads :

> "… the Secretary of State's letter of 23 April 1990 had not constituted a 'decision;' but that under R.S.C., Ord. 53, r. 1(2) the Divisional Court had jurisdiction to declare that primary legislation, viz. the threshold provisions of the Act of 1978, was incompatible with Community law notwithstanding that there was no decision in respect of which one of the prerogative orders would be available under Ord. 53, r. 1(1);…"

64. A declaration does no more than declare the law and the rights of a party under the law. It may be described as a remedy of clarification. In his work, *Administrative Law* (9th Ed.), Sir William Wade described it in the following terms (page 569) :

> "A declaratory judgment by itself merely states some existing legal situation. It requires no one to do anything and to disregard it will not be contempt of court. By enabling a party to discover what his legal position is, it opens the way to the use of other remedies for giving effect to it, if that should be necessary."

65. One of the criticisms raised by the respondent is that the applicant has sought to challenge the provisions of the Ordinance on a prospective basis; on the basis, that is, that he wishes to conduct his private life in the future in a way that presently offends those provisions. But assuming that a challenge concerning the existence of fundamental human rights can be so described – and I have my doubts in that regard – I do not see that in the present case making a prospective challenge undermines this court's jurisdiction or should of itself be a determining factor in whether the court should, as a matter of discretion, grant a declaration. In this regard, the editors of De Smith, Woolf and Jowell's *Judicial Review of*

Administrative Action (5th Ed.) at 18-002, say the following in respect of the use to which declaratory judgments are increasingly being put :

> "Because it merely pronounces upon the legal position, it is well suited to the supervisory role of administrative law in England. In addition, by careful draftsmanship the declaration can be tailored so as not to interfere with the activities of public bodies more than is necessary to ensure that they comply with the law. In many situations all that is required is for the legal position to be clearly set out in a declaration for a dispute of considerable public importance to be resolved. It usually relates to events which have already occurred. *However, as will be seen, it is increasingly being used to pronounce upon the legality of a future situation and in that way the occurrence of illegal action is avoided*." [my emphasis]

66. A case in point is *R. (Rushbridger and Another) v. Attorney General* [2003] 1 AC 357, at 366 and 367. The proposed conduct in that case was the publication of a series of articles urging the abolition of the monarchy, conduct which may have infringed the Treason Felony Act of 1848, a statute still in force although there had been no prosecution under it since 1883. A declaration was sought by the proposed publishers that the 1848 Act, read in the light of the 1998 Human Rights Act, did not apply to persons who advocated a republic unless the stated intent was to do so by means of force or other unlawful means. Lord Steyn based his findings on the principle enunciated by Lord Hobhouse in *R. (Pretty) v. Director of Public Prosecutions* [2002] 1 AC 800, a case in which the applicant had sought a declaration that it was lawful for Mrs Pretty to be assisted by her husband to commit suicide. As to jurisdiction, Lord Hobhouse had said, at 851 :

> "In exceptional circumstances it may be proper for a member of the public to bring proceedings against the Crown for a declaration that certain proposed conduct is lawful and name the Attorney General as the formal defendant to the claim. But that is not what occurred here and, even then, the court would

> have a discretion which it would normally exercise to refuse to rule upon hypothetical facts. Had the case raised by the appellant been one where it was appropriate to grant a declaration as to legality or compatibility, the court would no doubt have adopted that approach."

Commenting on that principle, Lord Steyn noted that counsel had not advocated its revision in any way and went on to say :

> "For my part the principle as formulated is as necessary after the advent of the Human Rights Act 1998 as it was before. It must be maintained. Normally, the seeking of a declaration in a civil case about the lawfulness of future conduct will not be permitted. But in *truly exceptional* cases the court may allow such a claim to proceed." [my emphasis]

67. Jurisdiction was not therefore the issue in *Rushbridger*. The issue instead went to the criteria that should guide the exercise of the court's discretion. In short, to use Lord Steyn's expression, what would constitute a 'truly exceptional' case?

68. In the result, I conclude that this court does have jurisdiction to determine applications of the kind brought by this applicant. Whether the court should exercise its jurisdiction to grant a remedy is, of course, another matter.

The exercise of discretion

69. The respondent has been concerned that if the court agrees to determine this application, it will open the floodgates to persons with no real standing to make direct attacks on primary and secondary legislation. I do not see a flood of litigation. Declaratory relief is discretionary and courts are quite capable of maintaining the integrity of their own processes. As Lord Steyn commented in *R. v. Lambert* [2001] 3 WLR 206 :

> "A healthy scepticism ought to be observed about practised predictions of an avalanche of dire consequences likely to flow from any new development."

70. Our courts are not supine. In *Administrative Law* (9th Ed.), at 570, Sir William Wade wrote :

> "The declaration is a discretionary remedy … There is thus ample jurisdiction to prevent its abuse; and the court always has inherent powers to refuse relief to speculators and busybodies, those who ask hypothetical questions or those who have no sufficient interest."

71. How then is the discretion whether or not to grant declaratory relief to be exercised?

72. In *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd* [1921] 2 AC 438, at 448, Lord Dunedin said (with reference to the ancient Scottish action of declarator) :

> "The rules that have been elucidated by a long course of decisions in the Scottish courts may be summarized thus: the question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought."

73. In *In re F (Mental Patient : Sterilisation)* [1990] 2 AC 1, at 82, a judgment of the House of Lords, Lord Goff held that these principles were also to be found in the English cases. He expressed them in the following manner :

> "… a declaration will not be granted where the question under consideration is not a real question, nor where the person seeking the declaration has no real interest in it, nor where the

> declaration is sought without proper argument, e.g. in default of defence or on admissions or by consent."

74. In *Canadian Council of Churches v. Canada* [1992] 1 SCR 236, at 253, when looking to 'public interest standing' to make a challenge under the charter to constitutional protections, the court held that three aspects had to be considered :

> "First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?"

75. Drawing from these authorities, it would seem to me that the following questions should be put.

76. First, is there a more appropriate procedure open to the applicant? For example, does there exist a decision made by a public authority which affects the applicant and which may be made the subject of the proceedings, giving to them a factual context? In the present case, clearly there is not.

77. Second, has the applicant raised a real question, one that is of genuine present concern and is not hypothetical or academic? The courts should be slow to hear disputes in respect of issues, even constitutional issues, when they are floating in the ether of theory. In *R. v. Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450 Lord Slynn said, at 457 :

> "The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are

> academic between the parties should not be heard unless there is good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

78. In the present case, I am satisfied that the applicant has raised a real question. By reason only of their sexual non-conformity, he and many others like him find themselves marginalised as a group, their moral worth under question. As Sachs J expressed it in *National Coalition for Gay and Lesbian Equality v. Minister of Justice* (1998) 6 BHRC 127, at 163, a judgment of the Constitutional Court of South Africa :

> "At a practical and symbolical level [the question] 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 of the Republic of South Africa."

79. The third question is whether the applicant has sufficient interest in the matter or, as Lord Goff expressed it, 'a real interest' in raising the issue.

80. In my judgment, the applicant clearly has sufficient interest and, as such, has *locus standi*. He is an admitted homosexual. At the beginning of this judgment I have set out the deleterious manner in which the provisions in the Ordinance which he challenges have affected his life and continue to do so on a day-to-day basis. I have no reason to doubt that the applicant, and others like him, have been, and continue to be, burdened in the manner described.

81. The fourth question is whether the issue can be fully argued. Clearly, that is of paramount importance if a declaration of the true meaning of a law and the right of an individual under it is to be made. In the present case, all the issues have been canvassed in depth, the respondent being represented by senior counsel. In short, to use Lord Dunedin's phrase, a proper contradictor has been secured.

Delay

82. It is the applicant's case that the provisions of Part XII of the Ordinance which he challenges as being unconstitutional first affected him when he turned 16. He did not, however, institute these proceedings for judicial review until he turned 20.

83. For the respondent, Mr McCoy has argued that this constitutes an entirely unreasonable delay, one which the applicant has not attempted to explain or excuse. If the delay is calculated from the date when the applicant turned 16 it was one of 4 years. It is unacceptable, Mr McCoy has said, to permit of an approach whereby provisions of the criminal law are subject to haphazard challenge by any member of the public, no matter how long after their enactment.

84. In judicial review delay is, of course, a relevant issue. It may even be determinative. S.21K(6) of the High Court Ordinance, Cap.4, reads :

> " (6) Where the Court of First Instance considers that there has been undue delay in making an application for judicial review, the Court may refuse to grant-
>
> (a) leave for the making of the application; or

(b) any relief sought on the application,

if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration."

Pursuant to s.54 of the High Court Ordinance, O.53, r.4(1) of the Rules of the High Court reads :

" An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made."

85. In his notice of application to apply for judicial review, however, the applicant did not raise the issue of delay. It was clearly his case that it was not relevant, not when he remains affected day-by-day by what he considers to be unconstitutional criminal restraints. In my view, there is cogency in that approach. The protection of fundamental rights under the Basic Law are on-going.

86. It is significant, said Mr Dykes, his leading counsel, that both s.21K(6) of the High Court Ordinance and O.53, r.4(1) of the Rules of the High Court pre-date the Basic Law. They were not drafted therefore with a view to issues of compatibility under the Basic Law. In looking to the question of alleged delay, he submitted that I must have regard to the obligation now imposed by the Basic Law to examine whether legislation is compatible with that law. As Mr Dykes put it, "it would be detrimental to the rule of law, let alone good administration, to let persons be arrested and prosecuted under unconstitutional laws".

87. In the present case, of course, the respondent has accepted that certain of the provisions challenged by the applicant are indeed inconsistent with the Basic Law and/or the Bill of Rights.

88. What must be remembered is that, even if there is a lack of promptness, the court possesses a discretion to condone it. In exercising that discretion, one of the matters to be taken into account will be the general importance of the matter raised. If the matter, as in the present case, goes to the fundamental human rights of a class of persons, that, it seems to me, in the interests of public policy, must be material : see, for example, *R. v. North West Leicestershire District Council, ex parte Moses* [2000] ENV LR 443, at 452.

89. In the present case, therefore, even if there was a lack of promptness on the part of the applicant, I am satisfied that it should not stand as a bar to him. I do not see how in this instance delay could be said to cause substantial hardship to any person or prejudice his rights. Nor do I see it as being detrimental to good administration. Indeed, the opposite, I believe, is the case.

Moving to the merits

90. For the reasons given, I am satisfied that this court has the jurisdiction to grant the applicant a remedy by way of declaration and that, in the exercise of its discretion, it should determine the application. I therefore move to the merits.

The history of the legislation

91. The four sections of the Ordinance that are challenged were incorporated into the Ordinance in 1991, some fourteen years ago.

92. The primary purpose of the amendments was, according to the Government, to 'decriminalise homosexual acts performed in private by consenting adult males' – provided both men were 21 years of age. Previously all homosexual acts, whatever the age of the participants, were subject to criminal penalty. The Government proposed the amendments on the basis that men over 16 but under 21 still required the protection of the law. Three reasons were given :

(i) that men under 21 often have only a limited and perhaps distorted knowledge of homosexual activity and its ramifications;

(ii) that they may be curious about, and inclined to experiment with, new activities and could be led into homosexual activities this way, and

(iii) that they are often dependent, emotionally and financially, on others and are thereby more likely to be tempted by material and other incentives to consent to homosexual acts.

93. In addition, although it was more indirectly stated, the executive was of the view that men under 21 – and women too – 'may not be aware of the greater risk of AIDS from buggery than other forms of sexual intercourse'.

94. As to the age limit of 21 placed also on heterosexual buggery, the legislation was proposed on the basis that there was 'an equivalence'

between homosexual buggery and heterosexual buggery and that public opinion in Hong Kong would want young women to be protected from buggery in the same manner as young men.

95. As to why, with homosexual buggery under the age of 21, both men would be criminally liable while, with the heterosexual act, only the man (and not the woman) would be liable, the legislation was passed on the basis that if only one male partner was made criminally liable – presumably a man over 21 having intercourse with a partner under 21 – it would create potential for blackmail, the one not liable to criminal sanction being able to extort money from the other. No mention was made of a woman who agreed to heterosexual buggery having the potential to blackmail her partner.

96. Leaving aside the risk of AIDS or other sexual diseases, it is apparent that the 1991 amendments challenged by the applicant were brought into law on the assumption that for a large number of young men homosexuality was a lifestyle choice, a chosen deviance – similar to drug addiction – which could be avoided if the necessary legal deterrents were in place. Buggery, even heterosexual buggery, was seen as a morally reprehensible deviance springing from homosexuality, sodomy being the deviance of sodomites; that is, gays.

97. Three years later, however, in 1994, the British Medical Association submitted a report to the effect that in the opinion of most researchers sexual orientation was usually established before the age of puberty in both boys and girls. In its judgment in *Sutherland v. UK* [1997] EHRLR 117, the European Commission of Human Rights made reference

to that report, recording that the BMA now recommended that the age of consent for both homosexuals and heterosexuals should be 16. The European Commission cited from the report's conclusion which were as follows :

> "Of prime concern to the [BMA] … and to the medical profession as a whole, are the concerns that the present law may inhibit efforts to improve the sexual health of young homosexual and bisexual men. The average age of first homosexual encounter has been found to be 15.7, and it is vital that these young homosexual men receive effective health education and health care.
>
> Previously the BMA proposed that the age of consent for homosexual men should be set at 18 to reflect their slower rate of biological development. However, most researchers now believe that sexual orientation is usually established before the age of puberty in both boys and girls.
>
> The purpose of age of consent legislation is to protect vulnerable young people from sexual exploitation and abuse, but there is no clear justification for a differential age for homosexual male activity and other sexual activity. Although homosexual experimentation may be quite common among adolescent boys (despite the present law), extensive recent research does not indicate that men aged 16-21 are in need of special protection because they may be 'recruited' into homosexuality. Unwelcome sexual attractions of a seriousness warranting criminal prosecution are equally offensive whether the victim is a man or a woman: the same law should therefore apply to all.
>
> Evidence would suggest that reducing the age of consent to 16 would be unlikely to affect the number of men engaging in homosexuality activity, either in general or within specific age groups. Commencement of sexual activity well below the age of 21 has been established …
>
> There is no convincing reason against reducing the age of consent for male homosexuals to 16 years, *and to do so may yield some positive health benefits*." [my emphasis]

98. The European Commission went on to record that :

> "An equal age of consent was also supported by the Royal College of Psychiatrists, the Health Education Authority and the

> National Association of Probation Officers as well as by other bodies and organisations concerned with health and social welfare."

The respondent's concession

99. As to the constitutional validity of the sections challenged by the applicant, as I have earlier indicated, it was conceded by the respondent that certain of the sections were in fact unsustainable in law. The concession was made in respect of three of the four sections; namely, ss.118H, 118J(2)(a) and 118F(2)(a). In my judgment, the concession in respect of each section was correctly made. I consider that each of them discriminates against the applicant (and those of his class) and, in addition, arbitrarily interferes with his right (and those of his class) to self-autonomy in private. Each concession may be described as follows :

(i) The Ordinance permits heterosexual and lesbian couples to engage in acts of sexual intimacy provided they have reached the age of 16. S.118H of the Ordinance does not permit gay couples to engage in the same conduct until they are 21. This is unsustainable and s.118H must be read down so that references to 'under the age of 21' are to be read as references to 'under the age of 16'.

(ii) The Ordinance permits heterosexual and lesbian couples who are 16 to engage in acts of sexual intimacy with each other even though one or more other persons take part or are present. Gay couples, however, whatever their age, are prohibited from such conduct. S.118J(2)(a) deems such conduct to be in public and subject to criminal sanction. This deeming provision is unsustainable.

(iii) The Ordinance further permits both homosexual and heterosexual buggery provided, in the first instance, both men are 21 and, in the second, the woman is 21. But, while a heterosexual couple may (subject to that age limit) commit buggery even though one or more other persons take part or are present, gay couples, whatever their age, are prohibited from such conduct. S.118F(2)(a) is a mirror of s.118J(2)(a) in that it deems such conduct to be in public and subject to criminal sanction. This deeming provision too is unsustainable.

100. The one section that the respondent does not concede is unconstitutional is s.118C. It is this section that makes it unlawful for a gay couple to commit buggery with each other if either of them is under the age of 21.

The respondent's case

101. As I have understood the respondent's case in respect of the constitutional validity of s.118C, it is based on two contentions. First, it is asserted that it is for the legislature to determine how best to protect young persons and the courts should defer to its sovereignty in this regard. Second, in respect of s.118C itself, it is asserted that the section, 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.

Giving deference to the legislature

102. Mr McCoy submitted that it is entirely legitimate for the legislature to legislate to protect those who, by reason of their youth, are seen to be vulnerable. It is equally legitimate for the legislature to seek to protect the vulnerable not only physically, psychologically and economically but morally too. The legislature, he said, is in a better position than the courts to judge prevailing 'social norms and values' in Hong Kong. In the democratic process, the legislature must be able to give expression to those norms and values by, for example, holding that homosexual activity involving adolescents should – if necessary on moral grounds alone – be prohibited.

103. As a general principle, no issue can be taken with this. It is not for the courts to embark on what Mr McCoy described as social engineering. In *Modinos v. Cyprus* (1993) 16 EHRR 485, at 491, the European Commission of Human Rights accepted that —

> "…some degree of regulation of male homosexual conduct, as indeed of other forms of sexual conduct, by means of the criminal law can be justified 'as necessary in a democratic society.' The overall function served by the criminal law in this field is to preserve public order and to protect the citizen from what is offensive or injurious. Furthermore, this necessity of some degree of control may even extend to consensual acts committed in private, notably where it is necessary to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence."

104. To illustrate his point, Mr McCoy said that, in determining the minimum age of 21 for both homosexual and heterosexual buggery, it was for the legislature, not the judiciary, to set the mark. The age may

perhaps have been set at 18 or 16 but the legislature chose to set it at 21. As it was expressed by Judge LJ in *R. v. Kirk and Another* [2002] EWCA Crim.1580 (at page 5) :

> "In one sense, of course, the choice of any age is arbitrary. All such choices, 13 years old or 14 years old, or 16 years old, or 24 years old, all of which appear in the Sexual Offences Act, are because different boys and girls mature at different speeds and in different ways. But that does not introduce an element of disproportionality in using age as a basis for definition. *It is for Parliament to decide where the appropriate line should be drawn.* That is what Parliament has done. We cannot discern the slightest problem or difficulty arising from those definitions." [my emphasis]

105. Mr McCoy submitted that it was for the legislature, if it wished, to reflect the conservative attitude of the Hong Kong community in matters of sexual mores. In this regard, he cited the observations of McNally JA in his judgment in *Banana v. State*, a decision of the Supreme Court of Zimbabwe, (2000) 8 BHRC 345, at 388 :

> "In the particular circumstances of this case, I d not believe that the 'social norms and values' of Zimbabwe are pushing us to decriminalise consensual sodomy. Zimbabwe is, broadly speaking, a conservative society in matter of sexual behaviour. More conservative, say, than France or Sweden; less conservative than, say, Saudi Arabia. But, generally, more conservative than liberal.
>
> I take that to be a relevant consideration in interpreting the constitution in relation to matters of sexual freedom. Put differently, I do not believe that this court, lacking the democratic credentials of a properly elected parliament, should strain to place a sexually liberal interpretation on the constitution of a country whose social norms and values in such matters tend to be conservative."

106. During the course of the hearing, however, no evidence was put before me to demonstrate what today – if it can be ascertained – is the

prevailing view of the Hong Kong community towards matters of homosexual activity carried out consensually and in private. In a cosmopolitan society like Hong Kong 'social norms and values' change, often rapidly.

107. Of greater significance, in my view, is to recognise that the legislation which is challenged was passed in 1991, several years before the Basic Law. The Hong Kong courts today have a constitutional obligation to consider whether legislation accords with the Basic Law and in that regard I consider it legitimate to look to the nature and purpose of the Basic Law itself rather than make a hazardous attempt to identify shifting social values.

108. As to the Basic Law, in its protection of a wide range of rights, I see it as contemplating an open and essentially democratic society, one based on equality of all persons before the law and on the dignity of the individual, by which I mean all persons – in their sameness and difference – being worthy of respect.

109. In *Lau Cheong and Another v. HKSAR* [2002] 2 HKLRD 612, at 641, the Court of Final Appeal spoke of the respective roles of the legislature and the judiciary under the Basic Law in the following manner :

> " The Basic Law enshrines the principle that there must be a separation of powers as between the executive, the legislature and the judiciary. The legislature is constitutionally entitled to prescribe by legislation what conduct should constitute criminal offences and what punishment those found guilty by the courts should suffer: *Hinds v The Queen* [1977] AC 195 at pp.225G-226D. But in the exercise of their independent judicial power, the courts have the duty to decide whether legislation enacted is consistent with the Basic Law and the Bill of Rights.

> If found to be inconsistent, the duty of the courts is to hold that legislation invalid …"

110. In discharging this constitutional obligation, the court acknowledged that it may be appropriate to give 'particular weight' to the views and policies of the legislature. In this respect, the court looked to the speech of Lord Hope in *R. v. DPP, ex parte Kebilene* [2000] 2 AC 326, at 381, citing the following portion :

> "In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention."

111. However, it is important in the context of the present case to emphasise that Lord Hope went on to say the following :

> "… the area in which these choices may arise is conveniently and appropriately described as the 'discretionary area of judgment.' It will be easier for such an area of judgment to be recognised where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified. *It will be easier for it to be recognised where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection*." [my emphasis]

112. The degree of deference to be given to the legislature is dependent therefore on the subject matter under consideration. When matters of 'high constitutional importance' – such as constitutionally entrenched individual rights – are under consideration, the courts are obliged, in discharging their own sovereign jurisdiction, to give

considerably less deference to the legislature than would otherwise be the case.

113. In *R. (Alconbury Ltd) v. Environment Secretary* [2001] 2 WLR 1389, at 1411, Lord Hoffmann spoke of the approach in a way, I think, which cannot be bettered :

> " There is no conflict between human rights and the democratic principle. Respect for human rights requires that certain basic rights of individuals should not be capable in any circumstances of being overridden by the majority, even if they think that the public interest so requires. Other rights should be capable of being overridden only in very restricted circumstances. These are rights which belong to individuals simply by virtue of their humanity, independently of any utilitarian calculation. The protection of these basic rights from majority decision requires that independent and impartial tribunals should have the power to decide whether legislation infringes them and either (as in the United States) to declare such legislation invalid or (as in the United Kingdom) to declare that it is incompatible with the governing human rights instrument. But outside these basic rights, there are many decisions which have to be made every day (for example, about the allocation of resources) in which the only fair method of decision is by some person or body accountable to the electorate."

114. It is manifest that the two constitutional rights upon which the applicant relies are recognised in this jurisdiction as fundamental human rights; as Lord Hoffmann put it, as rights which belong to individuals simply by virtue of their humanity, independent of any utilitarian calculation.

115. Discrimination before the law is the opposite of equality before the law. When a group of people, such as gays, are marked with perversity by the law then their right to equality before the law is undermined. Sachs J expressed the concept as follows :

> "People are subject to extensive prejudice because of what they are or what they are perceived to be, not because of what they do. The result is that a significant group of the population is, because of its sexual non-conformity, persecuted, marginialised and turned in on itself. I have no doubt that when the drafters of the Bill of Rights decided expressly to include sexual orientation in their list of grounds of discrimination that were presumptively unfair, they had precisely these considerations in mind …" [*National Coalition for Gay and Lesbian Equality v. Minister of Justice*, cited in para.78 above]

116. As for the right to privacy, this is not simply a right to be left alone. It is, to use the words again of Sachs J, the "right to get on with your life, express your personality and make fundamental decisions about your intimate, relationships without penalisation. He continued : "Privacy [must] be regarded as suggesting at least some responsibility on the state to promote conditions in which personal self-realisation can take place". I would agree with that affirmative approach as being the manner in which the privacy provision in the Hong Kong Bill of Rights should be interpreted.

117. Of course, equality before the law – the constitutional protection against discrimination – does not imply that all persons must in all circumstances be treated identically. In this regard, the seminal statement was made by Bokhary J (as he then was) in *R. v. Man Wai Keung (No.2)* (1992) 2 HKPLR 164, at 179 :

> " Clearly, there is no requirement of literal equality in the sense of unrelentingly identical treatment always. For such rigidity would subvert rather than promote true even-handedness. So that, in certain circumstances, a departure from literal equality would be a legitimate course and, indeed, the only legitimate course. But the starting point is identical treatment. And any departure therefrom must be justified."

118. However, in order to justify a departure from identical treatment, Bokhary J said that it must be shown :

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

119. Complementary to that, in respect of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights has established case law to the effect that —

> "… a difference in treatment is discriminatory for the purposes of art 14 if it 'has no objective and reasonable justification', that is if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'." [*Schmidt v. Germany* [1994] ECHR 13580/88, para.24]

120. As to the right to privacy (art.8 of the European Convention) it is well established in the case law of the European Court of Human Rights that sexual orientation is included in that right : "concerning as it does a most intimate aspect of the applicant's private life (*Dudgeon v. UK* [1981] ECHR 7525/76, para.52).

121. In respect of both the European Convention's equality and privacy provisions, it is equally established that any interference with a person's sexual sphere and any difference in treatment based on sexual orientation requires 'particularly weighty reasons' : see, for example, *Smith v. UK* [1999] ECHR 33985/96, para.94.

122. In *R. v. Sin Yau Ming* [1992] 1 HKCLR 127, a case pre-dating the Basic Law and looking only to the Bill of Rights, the Court of Appeal said that, in respect of any interference with fundamental rights, 'cogent and persuasive' reasons would be required.

123. In summary, while deference must be given to the legislature, when fundamental human rights are in issue – as in the present case – that deference will be limited. Such rights are not easily to be set aside because the majority wishes it or because there may be relevant utilitarian considerations. Indeed, if any inconsistency is demonstrated, then cogent and persuasive reasons to justify that inconsistency must be given.

The respondent's submissions particular to s.118C

124. In respect of s.118C itself, Mr McCoy's submissions, as I have understood them, were centred on the contention that the section, taken together with s.118D, reveals that the legislature, in passing those two sections into law, was concerned not with the sexual orientation of one or more groups of persons but instead with a single act of copulation : the act of buggery. S.118C prohibits buggery by or on a man who is under the age of 21. S.118D prohibits buggery on a woman who is under the age of 21. In both instances the maximum criminal penalty is the same : life imprisonment.

125. The legislative purpose in bringing the two sections into law, said Mr McCoy, was plain. It was to attempt to ensure the protection of adolescents, both male and female, from conduct of a specific nature, the carrying out of the act of buggery : penetration *per anum*. There is therefore no inequality before the law and, if there is an interference in the

private lives of young people, it applies equally to young heterosexual as well as gay couples and is justified as a rational means of ensuring their protection.

126. As to the age of 21 set for both young men and young women, Mr McCoy reiterated that it was for the legislature to set the mark. In this regard, see *R. v. Kirk and Another* cited in para.104 above.

127. In my judgment, however, s.118C is discriminatory. First, it is directly discriminatory, albeit in a limited manner. Second, it is indirectly discriminatory in a more general and profound manner.

a. Direct discrimination

128. In terms of s.118C, when homosexual buggery takes place, both men are made criminally liable. In terms of s.118D, when heterosexual buggery takes place, only the man is made criminally liable, not the woman, even though she has been a willing partner. That is a direct inequality of treatment.

129. In proposing s.118D, the executive, recognising that the woman would not be made liable, only the man, said simply : "It is not proposed that the girl should be criminally liable – this is consistent with the existing provisions designed to protect women or girls where the female party to the sexual act is not made criminally liable."

130. This approach, it may be said – *in respect of this particular provision* – demonstrates a reliance on the stereotyped view that the female is *per se* submissive, the man always sexually the active partner; the

proposer, the one upon whom responsibility lies for any perceived deviance.

131. The more substantive reason put forward by the Government was that in homosexual buggery, unless both partners were made criminally liable, there was a potential for blackmail.

132. In respect of this rationalisation, I can do no better than cite from a report dated August 2001 prepared by the Equal Opportunities Commission for a Legislative Council Panel. The report (in part) reads :

> " First of all, there is no empirical data offered to support the premise that males under 21 who commit consensual buggery are more likely to blackmail their partners than females under 21 who commit consensual buggery. At best, this premise is based on anecdotal evidence; at worst, it exemplifies the stereotypical assumptions made of the homosexual community.
>
> Secondly, these sections in the Crimes Ordinance were added ten years ago, at a time when homosexuality was criminal and unlawful. This caused homosexuals to hide their activities, thereby making themselves vulnerable to blackmail. Given that homosexuality was decriminalized 10 years ago, the situation should be changing. Even if it were not, and the Administration's claim that 'homosexuality is still a sensitive and controversial subject within the community, which in turn still gives rise to potential for blackmail' is correct, it is difficult to see how making a male homosexual under 21 criminally liable for the act of buggery is going to in itself act as a deterrent for blackmail in the homosexual community generally.
>
> Thirdly, the difference in treatment of males under 21 compared to females under 21 in sections 118C and 118D of the Crimes Ordinance must be rational and proportional in terms of the objective of the legislation. If the objective is to safeguard the interest of the male partner (who is taking part in consensual buggery with a male under 21), surely the male partner's interest is safeguarded by those criminal provisions which deal with blackmail *per se*."

b. Indirect discrimination

133. In this respect, it is important, in my opinion, to have regard not to each of the sections challenged by the applicant in isolation but instead to view them together as a legislative scheme.

134. It is important also to recognise, as Mr Dykes, for the applicant, has advocated, that for gay couples the only form of sexual intercourse available to them is anal intercourse; that is, the act of buggery. And buggery, as I have determined, is properly to be viewed in law as a form of sexual intercourse.

135. The position therefore is as follows :

(i) Gay couples (not yet 21) may not engage in any form of sexual intimacy with each other even though heterosexual and lesbian couples are free to do so. This legislation, in my view, discriminates against gay men by reason of their sexual orientation. The provision has been accepted to be unsustainable.

(ii) Gay couples (of whatever age) may not engage in sexual intimacy with a third person even though heterosexual and lesbian couples are free to do so from 16. This legislation too discriminates against gay men by reason of their sexual orientation. The provision has been accepted to be unsustainable.

(iii) Gay couples (not yet 21) are prohibited from engaging in the only form of sexual intercourse available to them while heterosexual couples are free to have sexual intercourse in a manner natural to them; that is, *per vagina*. That, in my

judgment, also discriminates against gay men. Put plainly, heterosexual couples may have sexual intercourse under the age of 21, homosexual couples may not.

136. Seen in that context, in my judgment, the legislative restrictions on the act of buggery cannot be gender neutral. My conclusion, however, is not in any way original. It has been reached by other courts when considering legislation to the same effect as ss.118C and 118D of the Hong Kong Ordinance.

137. The authority of the most direct relevance is to be found in the 1995 judgment of Abella JA in a decision of the Ontario Court of Appeal : *R. v. C.M* 98CCC (3d) 481. The judge summed up the issue requiring determination as follows :

> "Anyone who is 14 or older, whether married or not, can consent to most forms of non-exploitive sexual conduct, including vaginal intercourse, without criminal consequences. On the other hand, unless they are married, no one under 18 can agree to anal intercourse without being liable to criminal prosecution. The issue in this appeal is whether this difference is constitutional."

138. The legislation which made 'anal intercourse' a criminal offence in Ontario for all persons, other than married couples, under the age of 18 was s.159 of the Criminal Code. The constitutional provision against which it was tested by Abella JA was s.15 of the Canadian Charter of Rights and Freedoms. S.15(1) of the Charter states that :

> "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

139. In finding that s.159 of the Criminal Code discriminated against gay men – even though the section prohibited both heterosexual as well as homosexual buggery under the age of 18 – Abella JA said the following :

> " In my view, s.159 arbitrarily disadvantages gay men by denying to them until they are 18 a choice available at the age of 14 to those who are not gay, namely, their choice of sexual expression with a consenting partner to whom they are not married. *Anal intercourse is a basic form of sexual expression for gay men. The prohibition of this form of sexual conduct found in s.159 accordingly has an adverse impact on them. Unmarried, heterosexual adolescents 14 or over can participate in consensual intercourse without criminal penalties; gay adolescents cannot*. It perpetuates rather than narrows the gap for an historically disadvantaged group – gay men – it does so arbitrarily and stereotypically and is, therefore, a discriminatory provision which infringes the guarantee of equality." [my emphasis]

140. To the same effect as Abella JA, O'Connor J made the following observation, albeit *obiter*, in giving a majority opinion in *Lawrence v. Texas* (2003) 15 BHRC 111, at 126, a decision of the Supreme Court of the United States :

> " Where a sodomy law that is neutral both in effect and application … would violate the substantive component of the due process clause is an issue that need not be decided today. I am confident, however, that so long as the equal protection clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society. In the words of Jackson J:
>
> > 'The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution

> that might be visited upon them if larger numbers were affected.'"

141. Denying persons of a minority class the right to sexual expression in the only way available to them, even if that way is denied to all, remains discriminatory when persons of a majority class are permitted the right to sexual expression in a way natural to them. During the course of submissions, it was described as 'disguised discrimination'. It is, I think, an apt description. It is disguised discrimination founded on a single base : sexual orientation.

142. On the wider basis of legislative discrimination based on sexual orientation, common law authorities, including the United States and South Africa, as well as European Community authorities, indicate that over the past 15 years, with increasing recognition that sexual orientation is determined not chosen, there has been a move to rule discrimination invalid. In this respect, a watershed case in the European Community was that of *Sutherland v. UK* (cited in para.97 above).

143. In *Sutherland*, the European Commission of Human Rights had before it legislation which set different ages of consent for young heterosexuals and homosexuals : 16 for the first, 18 for the latter. The European Commission held that the different minimum ages was a difference based on sexual orientation.

144. The arguments mounted by the United Kingdom to justify the difference was summed up by the Commission in the following terms :

> "Two principal arguments emerge from the speeches in Parliament and are adopted and repeated in the Government's

submissions. In the first place it is argued that certain young men between the ages of 16 and 18 do not have a settled sexual orientation and that the aim of the law is to protect such vulnerable young men from activities which will result in considerable social pressures and isolation which their lack of maturity might cause them later to repent: it is claimed that the possibility of criminal sanctions against persons aged 16 or 17 is likely to have a deterrent effect and give the individual time to make up his mind. Secondly, it is argued that society is entitled to indicate its disapproval of homosexual conduct and its preference that children follow a heterosexual way of life."

145. In coming to its judgment, the Commission had before it considerable medical and scientific evidence (to which I have made reference in para.97 above) which indicated that lowering the age of consent for homosexuals to 16 might in fact have positive beneficial results. In its judgment, the Commission said :

" The Commission does not consider that either argument offers a reasonable and objective justification for maintaining a different age of consent for homosexual and heterosexual acts or that maintaining such a differential age is proportionate to any legitimate aim served thereby. As to the former argument, as was conceded in the Parliamentary debates, current medical opinion is to the effect that sexual orientation is fixed in both sexes by the age of 16 and that men aged 16-21 are not in need of special protection because of the risk of their being 'recruited' into homosexuality. Moreover, as noted by the BMA, the risk posed by predatory older men would appear to be as serious whether the victim is a man or woman and does not justify a differential age of consent. Even if, as claimed in the Parliamentary debate, there may be certain young men for whom homosexual experience after the age of 16 will have influential and potentially disturbing effects and who may require protection, the Commission is unable to accept that it is a proportionate response to the need for protection to expose to criminal sanctions not only the older man who engages in homosexual acts with a person under the age of 18 but the young man himself who is claimed to be in need of such protection.

As to the second ground relied on – society's claimed entitlement to indicate disapproval of homosexual conduct and its preference for a heterosexual lifestyle – the Commission cannot accept that this could in any event constitute an objective or reasonable justification for inequality of treatment under the

criminal law. As the Court observed in its Dudgeon judgment in the context of Article 8 (Art. 8) of the Convention:

> 'Decriminalisation' does not imply approval, and a fear that some sectors of the population might draw misguided conclusions in this respect from reform of the legislation does not afford a good ground for maintaining it in force with all its unjustifiable features.'"

146. In the result, the Commission found that there was no objective and reasonable justification for the maintenance of a higher age of consent for gay men in respect of both sexual intimacy and sexual intercourse.

Are s.118C and the other three sections nevertheless constitutionally valid?

147. In my judgment, s.118C, together with the three other sections challenged, discriminate on the basis of sexual orientation. The four sections are demeaning of gay men who are, through the legislation, stereotyped as deviant. The sections also constitute, in my view, a grave and arbitrary interference with the right of gay men to self-autonomy in the most intimate aspects of their private lives. What is to be remembered is that the four sections all go to consensual activities in private. The sections are not designed to punish sexual exploitation nor are they designed to protect against health risks. The primary purpose of the four sections is to discourage vulnerable young men from what is perceived to be a chosen lifestyle of which the majority of the community disapprove. This discouragement is achieved by the threat of severe sentences of imprisonment – indeed life imprisonment for a breach of s.118C – for conduct which, as I have said, is entirely consensual and if carried out in

the same circumstances by a heterosexual or lesbian couple would be entirely lawful.

148. I fail to see how imprisoning young men because of their sexual orientation, when there has been no abuse or exploitation of a third party, can today be said to represent a proportionate response to any perceived need to protect those young men against moral degradation.

149. The question may also be asked : if young men who are unsure of their sexuality are to be deterred in this way, why not young women too? Where is the justification for holding that 'recruitment' into homosexuality deserves imprisonment but 'recruitment' into lesbianism does not?

150. In so far as the risk of AIDS or similar diseases may rationally require some difference of treatment between anal intercourse and intercourse *per vagina*, I fail to see how it can be said that the four sections which are challenged provide a rational response or a proportionate one. In respect of the issue of health, I can do no better than cite from the judgment of Abella JA in *R. v. CM* (para.137 *supra*) :

> " The health risks from unprotected anal intercourse are real and ought to be aggressively addressed. But, in my view, the measures chosen in s.159 to protect young people from risk are arbitrary and unfair, compared to the measures used to protect against the health risks for individuals who prefer other forms of sexual conduct. There is no evidence that threatening to send an adolescent to jail will protect him (or her) from the risks of anal intercourse. I can see no rational connection between protecting someone from the potential harm of exercising sexual preferences and imprisoning that individual for exercising them. There is no proportionality between the articulated health objectives and the Draconian criminal means chosen to achieve them."

151. In summary, applying the approach enunciated by Bokhary J and set out in para.118 above, I am satisfied that each of the sections challenged are inconsistent with the Basic Law and/or the Bill of Rights, and that declarations should be made to that effect.

Conclusion

152. For the reasons given in this judgment, I have therefore made the following determinations :

(i) That this court does have jurisdiction to grant the applicant the remedies he seeks.

(ii) That, in the exercise of its discretion, the application should be determined by this court.

(iii) The declarations which the applicant has sought, and to which I have made reference in para.47 of this judgment, are each granted.

(iv) That there is an order *nisi* awarding costs to the applicant, that order to be made final in 30 days if the matter is not earlier set down for argument.

(M.J. Hartmann)
Judge of the Court of First Instance,
High Court

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Mr Gerard McCoy, SC leading Mr Stephen Wong, DSG and
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