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I. Introduction

This Article considers judicial approaches to the adjudication of the rights of Lesbian, Gay, Bisexual, and Transgender (LGBT)[1]

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[1] Some have critiqued the LGBT acronym as overly narrow since it may not account for cultural variabilities and not all sexual orientation or gender identity minorities necessarily identify as LGBT. *See* Holning Lau, *Sexual Orientation and Gender Identity Discrimination*, 2 COMP. DISCRIMINATION L. 1, 4 (2018). For the sake of convention and consistency, however, this Article uses "LGBT" throughout and sometimes "sexual

persons in the Hong Kong Special Administrative Region of the People's Republic of China (Hong Kong). Hong Kong provides a notable case study of litigation strategies and court responses in a jurisdiction open to international human rights law. Sodomy was decriminalized in 1991 under the former British colonial regime, and, since 2006, Hong Kong courts have decided a number of cases concerning a range of issues including transgender marriage,[2] different ages of consent for vaginal and anal intercourse,[3] other discriminatory criminal provisions,[4] restrictions on television broadcasts about relationships between gay men,[5] the rights of incarcerated transgender persons,[6] and the rights of same-sex couples.[7] Other cases are still working their way through the system and future challenges are anticipated as advocates continue to pursue a persistent litigation strategy.[8]

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orientation" and "gender identity" when referring to particular protected characteristics or prohibited grounds of discrimination.

2 *See* W v. Registrar of Marriages, [2013] 16 H.K.C.F.A.R. 112 (C.F.A.) (H.K.); W v. Registrar of Marriages, [2012] H.K.C. 88 (C.A.) (H.K.); W v. Registrar of Marriages, [2010] 6 HKC 359 (C.F.I.) (H.K.).

3 *See* Leung v. Sec'y for Justice, [2006] 4 H.K.L.R.D. 211 (C.A.) (H.K.); Leung v. Sec'y of Justice, [2005] 3 H.K.L.R.D. 657 (C.F.I.) (H.K.).

4 *See* Sec'y for Justice v. Yau Yuk Lung Zigo & Lee Kam Chuen, [2007] 10 H.K.C.F.A.R. 335 (C.F.A.) (H.K.); Sec'y for Justice v. Yau Yuk Lung & Lee Kam Chuen, [2006] 4 H.K.L.R.D. 196 (C.A.) (H.K.).

5 *See* Cho Man Kit v. Broad. Auth., [2008] H.K.E.C. 783 (C.F.I.) (H.K.).

6 *See* Navarro Luigi Recasa v. Comm'r of Correctional Services, [2018] 4 H.K.L.R.D. 38 (C.F.I.) (H.K.).

7 *See* QT v. Dir. of Immigration, [2018] 21 H.K.C.F.A.R. 324 (C.F.A.) (H.K.); Leung Chun Kwong v. Sec'y for the Civil Serv., [2018] 3 H.K.L.R.D. 84 (C.A.) (H.K.). The Court of Final Appeal is expected to consider the last two issues concerning civil service spousal benefits and joint tax filing on appeal in 2019.

8 *See* MK v. Government of the HKSAR [2019] H.K.C.U. 53 (C.F.I.); *See e.g.*, Raquel Calvarho, *Three Transgender Men Challenge Hong Kong Policy Requiring Full Sex Change before They are Legally Considered Male*, SOUTH CHINA MORNING POST (Jan. 9, 2018), https://www.scmp.com/news/hong-kong/community/article/2127525/three-transgender-men-challenge-hong-kong-policy-requiring [https://perma.cc/54DV-9T3Q]; Chris Lau, *Two Gay Men Mount First Legal Challenges to Hong Kong Laws Banning Same-sex Marriage, with Court Giving Their Applications Green Light to Proceed*, SOUTH CHINA MORNING POST (Jan. 3, 2019), https://www.scmp.com/news/hong-kong/law-and-crime/article/2180551/two-gay-men-mount-first-legal-challenges-hong-kong-laws [https://perma.cc/5FN8-WXA4]; Chris Lau & Kimmy Chung, *Woman Takes Unprecedented Step to Advance LGBT Cause in Hong Kong and Sues Government over Civil Partnerships Ban*, SOUTH CHINA MORNING POST (Aug. 24, 2018),

With some exceptions, in most of these decisions the courts have at least partially dismantled discriminatory policies. At the same time, however, government and legislative efforts have lagged behind.[9] For example, although international human rights bodies have regularly called on the Hong Kong authorities to introduce anti-discrimination legislation on the grounds of sexual orientation and gender identity, the government has thus far resisted.[10] The limited policy changes that have occurred have been in direct response to judicial review, and even then there have been delays on certain issues.[11]

Based on a study of these judgments, read in the context of developments in international human rights law, this Article considers prospects for upcoming challenges to the lack of access for same-sex couples to legal recognition in the form of same-sex marriage or civil partnerships. Several factors could influence the trajectory of these cases and LGBT rights in Hong Kong generally. First, local public opinion has shifted toward greater acceptance of LGBT rights in recent years,[12] possibly due to rapidly evolving

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https://www.scmp.com/news/hong-kong/community/article/2161287/woman-takes-unprecedented-step-advance-lgbt-cause-hong-kong [https://perma.cc/Y7GX-YKWZ].

9 *See* Carole J. Petersen & Kelley Loper, *Equal Opportunities Law Reform in Hong Kong: The Impact of International Norms and Civil Society Advocacy*, *in* REFORMING LAW REFORM: PERSPECTIVES FROM HONG KONG AND BEYOND (Michael Tilbury et al. eds., 2014). Amy Barrow and Joy Chia observe that "[g]iven the inhospitable legislative context, strategic litigation has proven to be the primary vehicle for legal reforms crucial to the advancement of LGBT rights." *See* Amy Barrow & Joy L. Chia, *Pride or Prejudice: Sexual Orientation, Gender Identity and Religion in Post-Colonial Hong Kong*, 46 H.K. L.J. 89 (2016).

10 *See, e.g.*, Concluding observations of the U.N. Committee on Economic, Social and Cultural Rights, People's Republic of China (including Hong Kong and Macao), ¶ 78, U.N. Doc. E/C.12/1/Add.107 (May 13, 2005).

11 In response to the Court of Final Appeal's decision in *W v Registrar of Marriages*, which recognized the right of a post-operative transgender woman to marry in her acquired gender, the government established an Inter-departmental Working Group on Gender Recognition (IWG) in January 2014 "to consider whether it is necessary to introduce legislation and incidental administrative measures to deal with issues concerning gender recognition in Hong Kong." *See Home*, INTER-DEPARTMENTAL WORKING GROUP ON GENDER RECOGNITION, https://iwggr.gov.hk/eng/index.html [https://perma.cc/LH77-LEDA]. Since then, the IWG has completed a comparative study and conducted a public consultation in 2017, but it has not yet produced a report or made any publicly available recommendations to the government.

12 *See* Lau, *supra* note 1; *see also* Holning Lau, Charles Lau, Kelley Loper, & Yiu-tung Suen, *Support in Hong Kong for Same-sex Couples' Rights Grew Over Four Years*

global trends. Studies indicate that rights-friendly law reform, such as recognition of same-sex marriage, is more likely to occur in societies with more tolerant attitudes.[13]

Developments in international human rights law in this area could also generate further momentum.[14] In Hong Kong, with its relatively open society and common law legal system that relies on precedent and permits the courts to cite comparative authority,[15] international legal innovations should continue to shape the outcomes of future cases. The judiciary's proclivity to rely on, and be persuaded by, international human rights law suggests prospects

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(2013-2017): Over Half of People in Hong Kong Now Support Same-Sex Marriage, *in* BRIEFING PAPER, CENTRE FOR COMPARATIVE AND PUBLIC LAW, UNIVERSITY OF HONG KONG FACULTY OF LAW; UNC LEGAL STUDIES RESEARCH PAPER (2018); Kelley Loper, Holning Lau, Charles Lau, Yiu-tung Suen, *Public Attitudes Towards Transgender People and Anti-Discriminatory Legislation*, CTR. FOR COMP. AND PUB. L., (December 2017, *revised* June 2018).

13 *See generally* Claire Felter & Danielle Renwick, *Backgrounder on Same-Sex Marriage Global Comparisons*, COUNCIL ON FOREIGN REL. (Dec. 8, 2017), https://www.cfr.org/backgrounder/same-sex-marriage-global-comparisons [https://perma.cc/CS7C-ZQSW]; ENZE HAN & JOSEPH O'MAHONEY, BRITISH COLONIALISM AND THE CRIMINALIZATION OF HOMOSEXUALITY: QUEENS, CRIME AND EMPIRE 82–86 (1st ed., 2018) (explaining, in their study of the criminalization of homosexuality in former British colonies, that factors influencing decriminalization have included openness to the outside world, access to information about global trends, and acceptance of international human rights norms. They also point out that decriminalization of same-sex conduct in Hong Kong was influenced by the introduction of the Bill of Rights Ordinance in 1991 in response to public concerns about the future protection of human rights in the run up to the territory's return to Chinese sovereignty in 1997).

14 *See* Carole J. Petersen, *International Law and the Rights of Gay Men in Former British Colonies: Comparing Hong Kong and Singapore*, 46 H.K. L.J. 109, 109–29 (2016); Carole J. Petersen, *Values in Transition: The Development of the Gay and Lesbian Rights Movement in Hong Kong*, 19 LOY. L.A. INT'L & COMP. L.J. 337 (1997); Carole J. Petersen, *Sexual Orientation and Gender Identity in Hong Kong: A Case for the Strategic Use of Human Rights Treaties and the International Reporting Process*, 14 ASIAN-PAC. L. & POL'Y J. 28, 28–83 (2013); Barrow & Chia, *supra* note 9; Joy L. Chia & Amy Barrow, *Inching towards Equality: LGBT Rights and the Limitations of Law in Hong Kong*, 22 WM. & MARY J. WOMEN & L. 303 (2016); Phil C. W. Chan, *The Lack of Sexual Orientation and Anti-discrimination Legislation in Hong Kong: Breach of International and Domestic Legal Obligations*, 9 THE INT'L J. OF HUM. RTS. 199, 199–208 (2005).

15 XIANGGANG JIBENFA art. 84 (H.K.) [Hong Kong Basic Law] (promulgated by Order No. 26, Pres. of China, Apr. 4, 1990, effective July 1, 1997) [hereinafter Basic Law] (although the Basic Law is a national law enacted by the National People's Congress of the People's Republic of China, it has the status of superior law in Hong Kong and is considered Hong Kong's constitutional instrument).

for progressive responses to issues such as gender recognition, civil unions, and/or same-sex marriage. International and comparative human rights law has had a significant influence on the Hong Kong courts' adjudication of constitutional rights generally[16] and LGBT issues specifically. The domestic incorporation of the International Covenant on Civil and Political Rights (ICCPR)[17] has reinforced judges' tendency to draw on international and comparative human rights jurisprudence for guidance.[18] In addition to comparative domestic cases, courts have cited interpretive materials produced by human rights treaty monitoring bodies, such as the United Nations (UN) Human Rights Committee[19] and judgments rendered by regional judicial organs, mainly the European Court of Human Rights (ECHR).[20]

Another key factor is how the courts continue to elaborate an emerging substantive equality doctrine. This doctrine is grounded

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16 *See, e.g.*, Sir Anthony Mason, *The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong*, 37 H.K. L.J. 299 (2007); Albert H.Y. Chen, *International Human Rights Law and Domestic Constitutional Law: Internationalisation of Constitutional Law in Hong Kong*, 4 NTU L. REV. 237 (2009); Simon N. M. Young, *Constitutional Rights in Hong Kong's Court of Final Appeal*, 27 CHINESE (TAIWAN) Y.B. INT'L L. & AFF. 67, 81–82 (2011); David S. Law, *Judicial Comparativism and Judicial Diplomacy*, 163 U. PA. L. REV. 927 (2015).

17 *See* International Covenant on Civil and Political Rights art. 10(1), adopted Dec. 19, 1966, U.N.T.S. 171 [hereinafter ICCPR].

18 *See* Young, *supra* note 16 (noting that from 1997-2007, 75% of all of the Court of Final Appeal's citations to case authorities in rights cases were to non-Hong Kong cases, 48% were decisions made by U.K. courts, and 8% were citations to decisions of international courts and tribunals. Young observes that the jurisprudence of the European Court of Human Rights was especially influential and most of the U.K. case authorities involved the 1998 Human Rights Act which incorporates the European Convention on Human Rights into British law).

19 The independent, expert body tasked with monitoring states' implementation of the ICCPR. Hong Kong is party to seven core U.N. Human Rights instruments including the International Convention on the Elimination of all Forms of Racial Discrimination, the ICCPR, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of all forms of Discrimination against Women, the Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities. Each of these treaties has its own monitoring body that reviews states parties' periodic reports, makes recommendations in concluding observations, and issues other interpretive materials including general comments and views (jurisprudence) on individual communications.

20 Petersen, *supra* note 14, at 48–50.

in international norms which mandate attention to real disadvantage and remedies for discriminatory impact.[21] In contrast to formal *de jure* "equality before the law," substantive equality takes context into account and requires states to identify and eliminate laws, policies, and practices that have *de facto* discriminatory effects.[22] I argue that the right to equality and non-discrimination, when understood in this substantive sense, has particular relevance for furthering LGBT rights. This is especially true in jurisdictions where formal distinctions in law based on sexual orientation—such as anti-sodomy provisions—have been removed and constitutional issues now primarily involve relationship and family rights. Much of the discrimination facing LGBT persons in these environments is less direct and more multidimensional, often intersecting with marital status, gender, and other aspects of identity. It also involves stigma, prejudicial attitudes, and structures that may require transformative, positive measures.

The jurisprudence examined in this Article illustrates how these factors are playing out in Hong Kong as the courts prepare to consider one of the first same-sex marriage cases in Asia.[23] Hong Kong's constitutional equality doctrine has developed predominantly, though not exclusively, in the course of LGBT rights adjudication and reflects interpretations by international human rights authorities. As such, the Hong Kong experience serves as an instructive example of the potential of global human rights norms, chiefly the right to equality, to advance LGBT claims in the domestic sphere. It could have comparative value for other jurisdictions where courts also participate in and are influenced by a growing global judicial conversation and consensus on LGBT-related norms.

To set the stage for subsequent analysis of the salience of the right to equality, Part II summarizes the international legal position on other rights that have applied to LGBT claims. International law has increasingly elaborated the relevance of core global and

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21 *See* BEVERLEY BAINES & RUTH RUBIO-MARIN, INTRODUCTION TO THE GENDER OF CONSTITUTIONAL JURISPRUDENCE 13–14 (Beverley Baines & Ruth Rubio-Martin eds., 2004).

22 *See* Jennifer Hainfurther, *A Rights-Based Approach: Using CEDAW to Protect the Human Rights of Migrant Workers*, 24 AM. U. INT'L L. REV. 843, 862 (2009).

23 *See* Lau, *supra* note 8. In May 2017, the Taiwan Constitutional Court ruled that same-sex couples have a constitutional right to marry in Taiwan.

regional human rights instruments, despite the absence of explicit references to sexual orientation or gender identity. Part III then examines the content of the right to substantive equality and non-discrimination. It draws in part on interpretive materials produced by human rights treaty monitoring bodies to clarify the elements of a substantive equality theory and the legal tools that might be helpful to achieving its aims. While these materials are not strictly speaking binding on states, they are regarded as highly persuasive.

Part IV provides a brief overview of Hong Kong's constitutional framework and the significance of international human rights law. It then identifies features of a budding substantive equality doctrine in Hong Kong. In line with the approach of the international bodies discussed in Parts II and III, Hong Kong courts have recognized sexual orientation as a particularly invidious ground of discrimination. They have also employed a strict proportionality test when determining the validity of justifications for distinctions based on sexual orientation and gender identity. They have also accepted that fulfillment of the right to equality does not necessarily require equal treatment and, in fact, may sometimes necessitate differential treatment. This insight, along with its corollary that facially neutral measures can in some circumstances amount to unconstitutional discrimination, opens up possibilities. Furthermore, the courts have acknowledged a concept of dignity that they could build on to address the harms that LGBT persons frequently experience, thus strengthening equality's concern with impact.

Part V then considers the implications of this analysis of substantive equality for resolving LGBT rights issues going forward. The focus is on relationship rights, especially prospects for recognition of same-sex marriage and/or civil partnerships in upcoming challenges.[24] At the same time, it reflects on the likelihood that certain international bodies— which have produced reasoning the Hong Kong courts have found persuasive—could revisit their current positions on same-sex marriage. A reading of the same-sex marriage opinions of the ECHR and the Human Rights Committee reveals an inadequate grasp of the capacity of substantive equality. In contrast, in a 2017 advisory opinion, the Inter-American Court of Human Rights (IACHR) embraced

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24 *See* Lau, *supra* note 8.

substantive equality in support of same-sex marriage.[25] The untapped potential of other international human rights enforcement mechanisms, however, coupled with innovations in the ECHR jurisprudence, suggests strategies for progressing LGBT rights in Hong Kong and beyond.

II. LGBT Rights in International Law

The following provides a brief summary of the international legal position on the rights of LGBT persons as interpreted by global and regional human rights monitoring bodies and judicial organs.[26] This area of jurisprudence is advancing rapidly as these institutions and domestic courts are asked to resolve questions about the extent and nature of LGBT rights. As Langford points out, the numbers of LGBT rights cases brought before international bodies has grown considerably since the early 1990s and even more rapidly since 2010.[27] At the same time, claimants' rate of success has also increased.[28]

By definition, human rights must be guaranteed to *everyone* regardless of sexual orientation or gender identity, simply by virtue of being human.[29] None of the general or specialized global or regional human rights instruments,[30] however, explicitly mention these markers of identity. Various enforcement bodies, such as the

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[25] State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017) [hereinafter *Advisory Opinion OC-24/17*].

[26] This overview considers only a sample of issues. It is not intended to be a complete account of relevant international norms which is beyond the scope of this Article.

[27] *See* Malcolm Langford, *Same-Sex Marriage in Polarized Times: Revisiting Joslin v. New Zealand (HRC)*, *in* INTEGRATED HUMAN RIGHTS IN PRACTICE 119, 122 (Eva Brems and Ellen Desmet eds., 2017).

[28] *Id.* (noting that "[t]he data is based on our Sexual and Reproductive Rights Lawfare Database.").

[29] *See, e.g.*, *What are Human Rights?*, U.N. OFF. HIGH COMM'R FOR HUM. RTS., https://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx [https://perma.cc/3ZK9-YKPF].

[30] These include the general and specialized core United Nations (U.N.) human rights treaties and regional instruments such as the European Convention on Human Rights, *see infra* note 37, the Inter-American Convention on Human Rights, and the African Charter on Human and People's Rights.

ECHR, the UN Human Rights Committee, the UN Committee on Economic, Social and Cultural Rights, and the IACHR, have nevertheless clarified that international human rights standards apply in the LGBT context. They have elaborated on state obligations and associated violations such as the criminalization of homosexual sex, denial of family and relationship rights to same-sex couples, discrimination in access to economic, social and cultural rights, and the failure to recognize a change of gender. Soft law documents, like the Yogyakarta Principles,[31] have also been influential and cited by regional and domestic courts.[32] Especially helpful provisions when addressing the types of harm frequently affecting LGBT people include: the rights to be free from torture, other forms of cruel, inhuman or degrading treatment, and arbitrary deprivation of life; the rights to freedom of expression and association; and the rights to privacy, family life, and marriage. Given the wide range of issues and space constraints, this summary is not exhaustive. It contemplates, however, a sampling of these norms in order to provide a point of comparison for the subsequent examination of the significance of the right to equality and non-discrimination.

The Committee against Torture, the monitoring body for the Convention against Torture and other forms of Cruel, Inhuman or

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31 *See* The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, 7 (2007), *available at* http://www.yogyakartaprinciples.org/principles_en.pdf [https://perma.cc/569U-LJRA] [hereinafter Yogyakarta Principles]; *see also* The Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, (2007), *available at* http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf [https://perma.cc/P34Q-8KA8] [hereinafter Yogyakarta Plus 10].

For a discussion of these principles and their significance, see, e.g., Michael O'Flaherty and John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, 8 HUM. RTS L. REV. 207 (2008); *see also* David Brown, *Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles*, 31 MICH. J. INT'L L. 821 (2010); *See generally* Andrew Park, *Yogyakarta Plus 10: A Demand for Recognition of SOGIESC*, 44 N.C. J. OF INT'L L. 223 (2019) (discussing the creation and subsequent impact of the Yogyakarta Principles).

32 *See, e.g.*, *Advisory Opinion OC-24/17*, *supra* note 25; *see also* Naz Found. v. Gov't of N.C.T. of Delhi, WP(C) No.7455/2001, Del. H.C. (India).

Degrading Treatment or Punishment, has expressed concerns about the ill-treatment of persons based on their sexual orientation or gender identity.[33] The ECHR has also decided related cases.[34] The Committee against Torture has explained that Article 3 of the Convention requires states to refrain from expelling or returning individuals to countries where substantial grounds exist for believing they would be in danger of torture because of their sexual orientation.[35] The Human Rights Committee and the ECHR have taken similar positions when interpreting an implicit duty of *non-refoulement* (non-return) in Articles 6 and 7 of the ICCPR[36] and

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33 For example, in its concluding comments on Iraq's state report, the Committee expressed concern "at reliable reports of attacks, some of which have resulted in deaths, against individuals perpetrated on grounds of their real or perceived sexual orientation or gender identity." Comm. Against Torture [CAT], *Concluding Observations of the Comm. Against Torture: Seeking Accountability and Demanding Change: A Report on Women's Rights Violations in Iraq*, ¶ 25, U.N. Doc. CAT/C/IRQ/CO/1 (2015).

34 *See, e.g.*, M.C. and C.A. v. Romania, Eur. Ct. H.R. (2016) (deciding that the inadequate investigation of violent attacks on participants in a gay pride parade, was a violation of Article 3 of the European Convention on Human Rights). *See also* Identoba and Others v. Georgia, 66 Eur. Ct. H.R. 17 (2015).

35 Article 3(1) provides that "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3(1), Dec. 10, 1984, 1465 U.N.T.S 85.

In its views on several individual communications, the Committee Against Torture has held that States violated article 3 for denying asylum to LGBT persons at risk of torture because of their sexual orientation if returned to their counties of origin. *See, e.g.*, Stewart v. Canada, Views, Human Rights Comm., 58th Sess., No. 538/1993, U.N. Doc. CCPR/C/58/D/538/1993 (1996); *see also* Comm. Against Torture [CAT], 62nd Sess., *General Comment No.4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22*, U.N. Doc. CAT/C/GC/4 (2018).

36 *See* Human Rights Comm. [HRC], 2187th Sess., *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May. 26, 2004) ("States parties must not extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant."). *See also* M.I. v Sweden, Human Rights Comm., 108th Sess., No. 2149/2012, U.N. Doc. CCPR/C/108/D/2149/2012 (2013). *See generally* M.K.H. v Denmark, Views, Human Rights Comm., 117th Sess., No. 2462/2014, U.N. Doc. CCPR/C/117/D/2462/2014 (2016) (involving a claim by an asylum seeker from Bangladesh who feared torture or other forms of cruel, inhuman or degrading treatment if returned to Bangladesh).

Article 3 of the European Convention on Human Rights.[37] With regard to transgender rights, the Committee Against Torture has suggested that requiring a transgender person to undergo surgery or forced sterilization before obtaining legal recognition of their acquired gender could amount to cruel, inhuman or degrading treatment.[38]

The rights to be free from torture, inhumane treatment and arbitrary deprivation of life, however, only apply to particularly egregious violations, and the threshold for determining what constitutes such conduct is substantial.[39] Although states cannot derogate from these obligations[40] and the prohibition against torture is absolute, these norms have limited capacity to address many of the other harms experienced by LGBT persons.

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[37] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950. 213 U.N.T.S. 222. *See, e.g.*, I.K. v. Switzerland (no. 21417/17); M.E. v. Sweden (no. 71398/12).

[38] *See* CAT, 1368th Sess., *Concluding observations on the fifth periodic report of China with respect to Hong Kong, China*, U.N. Doc. CAT/C/CHN-HKG/CO/5 (Feb. 2, 2016). In its concluding observations the Convention against Torture expressed concern "about reports that transgender persons are required to have completed sex-reassignment surgery, which includes the removal of reproductive organs, sterilization and genital reconstruction, in order to obtain legal recognition of their gender identity" and recommended that Hong Kong "[t]ake the necessary legislative, administrative and other measures to guarantee respect for the autonomy and physical and psychological integrity of transgender and intersex persons, including by removing abusive preconditions for the legal recognition of the gender identity of transgender persons, such as sterilization." *See generally* HOLNING LAU, GENDER RECOGNITION AS A HUMAN RIGHT (Nov. 28, 2018) (forthcoming chapter for *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric)* (discussing the right to bodily integrity—sometimes derived from the right to privacy and from the right to be free from torture or other forms of cruel, inhuman or degrading treatment or punishment—as one basis for a right to gender recognition).

[39] *See* Pretty v. United Kingdom, 35 Eur. Ct. H.R. 1, 33 (2002) ("As regards the types of 'treatment' which fall within the scope of article 3 of the Convention, the court's case law refers to 'ill-treatment' that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterized as degrading and also fall within the prohibition of article 3. The suffering which flows from naturally occurring illness, physical or mental, may be covered by article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible.").

[40] *See* HRC, 1950th Sess., *General Comment No. 29: Article 4: Derogations during a State of Emergency*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

The rights to freedom of expression and peaceful assembly have also been invoked. For example, the Human Rights Committee held that the Russian Federation's denial of a human rights activist's applications to organize gay pride parades and picket in front of the Iranian Embassy in Moscow to protest against Iran's execution of homosexuals violated Article 21 of the ICCPR.[41] In another case, the Committee found that the Russian Federation contravened an activist's right to freedom of expression, along with her right to equality and nondiscrimination, when she was arrested for displaying signs that read "Homosexuality is normal" and "I am proud of my homosexuality" near a secondary school.[42] The ECHR similarly decided that laws prohibiting the promotion of homosexuality violated the right to freedom of expression in conjunction with the right to non-discrimination.[43]

The rights to privacy and family life in Article 8 of the European Convention on Human Rights[44] and Article 17 of the ICCPR[45] have,

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41 Alekseev v. Russian Federation, Views, Human Rights Comm., 109th Sess., No. 1873/2009, U.N. Doc. CCPR/C/109/D/1873/2009 (Dec. 2, 2013).

42 Fedotova v. Russian Federation, Views, Human Rights Comm., 106th Sess., No. 1932/2010, U.N. Doc. CCPR/C/106/D/1932/2010 (Nov. 30, 2012) (finding a violation of Article 19, freedom of expression, in conjunction with Article 26, equality and non-discrimination).

43 Bayev and Others v. Russia, Eur. Ct. H.R. 12 (2017) (holding that the laws incompatible with the values of a democratic society, discriminatory, served no public interest, and reinforced stigma and prejudice); *see* Kaos GL v. Turkey, Eur. Ct. H.R. (2016); *but see* Vejdeland and Others v. Sweden, Eur. Ct. H.R. (2012) (holding that a ban the distribution of leaflets which are offensive to homosexuals to a secondary school is an appropriate limit on the right to freedom of expression); *see, e.g.*, Ljubjana v. Slovenia, Eur. Ct. H.R. (2014) (allowing a greater scope for expression that might be offensive).

44 Article 8 provides:

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 22.

45 ICCPR Article 17 provides:

> (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

either on their own or in conjunction with equality and non-discrimination, played a particularly important role. The right to privacy has formed the basis of successful challenges to the criminalization of consensual same-sex relations;[46] the discharge from the Royal Air Force based on homosexuality;[47] different ages of consent for same-sex relations;[48] lack of parental rights[49] and permission to adopt a child;[50] and denial of relationship rights such as succession to the tenancy[51] and pension[52] of a deceased partner. The failure to provide civil unions or other forms of registered partnerships has also, more recently, engaged the right to family life.[53] The acceptance of same-sex relationships within the notion of "family life" in these later cases is significant and allows the Court to address rights that arguably fall more squarely within public life and are not limited to the private sphere. The rights to privacy and family life have also supported the recognition of

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reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks.

ICCPR, *supra* note 17. For an interpretation of this provision see, HRC, 32nd Sess., *General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, U.N. Doc. HRI/GEN/1/Rev.1 (Apr. 8, 1988).

46 *See* Dudgeon v. United Kingdom, 4 Eur. Ct. H.R. 149 (ser. B) (1982); Norris v. Ireland, 13 Eur. Ct. H.R. 186 (1988); Modinos v. Cyprus, 259 Eur. Ct. H.R. (ser. A) (1993); *see generally* Toonen v. Australia, Views, Human Rights Comm., 50th Sess., No. 488/1992, U.N. Doc. No. CCPR/C/WG/44/D/488/1992 (1994) [hereinafter *Toonen v. Australia*] (holding that criminal provisions in Tasmania violated both the right to privacy and the right to equality and non-discrimination).

47 *See* Smith and Grady v. United Kingdom, 29 Eur. Ct. H.R. 493 (1999).

48 *See* L. and V. v. Austria, Eur. Ct. H.R., App. Nos. 39392/98, 39829/98 (2003).

49 *See* Salgueiro da Silva Mouta v. Portugal, Eur. Ct. H.R., App. No.33290/96 (1999).

50 Fretté v. France, Eur. Ct. H.R. App. No. 36515/97 (2002); *see also* E.B. v. France, Eur. Ct. H.R., App. No. 43546/02 (2008).

51 *See* Karner v. Austria, Eur. Ct. H.R., App. No. 40016/98 (2003).

52 *See* Young v. Australia, Views, Human Rights Comm., 78th Sess., No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (Sept. 18, 2003); *see also* X v. Colombia, Views, Human Rights Comm., 89th Sess., No. 1361/2005, U.N. Doc. CCPR/C/89/D/1361/2005 (Mar. 30, 2007).

53 *See* Vallianatos and Others v. Greece, Eur. Ct. H.R., App. Nos. 29381/09, 32684/09 (2013); *see also* Oliari and Others v. Italy, Eur. Ct. H.R., App. Nos. 18766/11, 36030/11 (2015).

gender identity[54] and other related claims.[55]

While the issue of same-sex marriage remains controversial, there have been signs of evolution. The IACHR has been particularly progressive and, at the time of writing, is the only international human rights enforcement body that has acknowledged a right to same-sex marriage.[56] Notably the IACHR opinion was based on an expansive interpretation of the rights to family life in Articles 11(2)[57] and 17(1)[58] of the American

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[54] *See* Lau, *supra* note 38; Goodwin v. United Kingdom, Eur. Ct. H.R., App. No. 28957/95 (2002) (holding that the right of a transgender woman to marry in her acquired gender based on the right to privacy and the right to marriage). Goodwin did not challenge the lack of same-sex marriage in the United Kingdom at that time.

In Hong Kong a post-operative transgender woman also successfully challenged a policy that did not recognize her status as a woman for the purposes of marriage. *See* W v. Registrar of Marriages, [2013] 16 H.K.C.F.A.R. 112 (C.F.A.) (H.K.). The Court of Final Appeal favorably cited Goodwin when reaching this decision. *See e.g.*, *id.* at ¶ 76.

[55] G v. Australia, Views, Human Rights Comm., 119th Sess., No. 217/2012, U.N. Doc. CCPR/C/119/D/2172/2012 (June 15, 2017) [hereinafter *G v. Australia*] (holding that Australia's denial of a transgender woman's request to change her birth certificate unless she got divorced was an arbitrary interference in the enjoyment of her privacy and family rights).

In relation to the right to privacy, the Committee also noted that jurisprudence on "'privacy' under article 17 'refers to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone.'" The Committee explained that "its established jurisprudence" clarifies "that this includes protection of a person's identity, such as their gender identity." *Id.*; *but see* Hämäläinen v. Finland, Eur. Ct. H.R., App. No. 37359/09 (2014). *Hämäläinen v. Finland* is discussed in more detail in Part III below.

[56] *See Advisory Opinion OC-24/17*, *supra* note 25.

[57] Article 11 sets out the right to privacy. Sub-paragraph 2 provides that: "No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation." American Convention on Human Rights art. 11, "Pact of San Jose," Organization of American States (OAS), Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR].

[58] Article 17 sets out the rights of the family: Sub-paragraph 1 provides that: "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the state." *Id.* at art. 17.

In its Advisory Opinion, the Court explained:

> Regarding Article 17(2) of the Convention [which sets out the right to marry and raise a family], the Court considers that although it is true that, taken literally, it recognizes the 'right of men and women of marriageable age to marry and to raise a family,' this wording does not propose a restrictive definition of how marriage should be understood or how a family should be based. In the opinion of this Court, Article 17(2) is merely establishing, expressly, the treaty-based protection of a

Convention on Human Rights and a substantive reading of the right to equality and non-discrimination.[59] Although the ECHR and the Human Rights Committee have so far upheld states' lack of same-sex marriage, they have also introduced innovations and left the door open for a possible reconsideration especially in light of global trends.[60]

While all of these norms, either on their own or in combination, have served to progress LGBT rights, their specificity may limit their capacity to address a broader range of claims. As considered in Part III, equality and non-discrimination has a more extensive reach. As both a principle and a right, it cuts across other treaty provisions and can support a more comprehensive framework for remedying the harms often experienced by LGBT persons.

III. The Salience of the Right to Equality

In some cases that arguably involve discriminatory treatment on the basis of sexual orientation or gender identity, international and domestic courts have nevertheless failed to employ a right to equality and non-discrimination. Other times, although invoking equality, they have applied an overly formal discrimination analysis and missed an opportunity to further develop a substantive equality doctrine. This limits the potential of human rights law to tackle a fuller array of rights violations which LGBT persons commonly confront and which frequently involve discrimination on the grounds of sexual orientation, gender identity, or a combination of characteristics. Better actualization of rights requires a more comprehensive assessment of correlated discriminatory effects beyond formal classifications. This can also enhance the precedential value of cases decided on the basis of equality and non-discrimination. For example, Lau observes that striking down laws that criminalize homosexual conduct on the basis of discrimination

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> specific model of marriage. In the Court's opinion, this wording does not necessarily mean either than this is the only form of family protected by the American Convention.

See Advisory Opinion OC-24/17, *supra* note 25, at ¶ 182.

59 "States must ensure full access to all the mechanisms that exist in their domestic laws, including the right to marriage, to ensure the protection of the rights of families formed by same-sex couples, without discrimination in relation to those that are formed by heterosexual couples." *Id*. at ¶ 218.

60 *See infra* Part V.

"affirms a nondiscrimination principle that can shape subsequent cases" including those "concerning issues such as partnership and marriage rights."[61] Basing such a decision on privacy grounds, however, "may not have the same downstream effects."[62]

In order to circumvent any dangers arising from a formal methodology, however, such an equality principle must be substantive. As Fredman remarks, the United States Supreme Court refrained from an equality analysis when ruling that anti-sodomy laws in Texas were unconstitutional to avoid a possible "leveling down" solution.[63] Indeed, formal equal treatment could still allow prohibitions of conduct (i.e. sodomy) by *both* different-sex *and* same-sex partners.[64] Substantive equality, however, demands remedies that would dismantle such laws and ensure consistency with human dignity.

Bearing this in mind, this discussion examines the content of the right to equality and non-discrimination in international law and explains its implications for the advancement of LGBT rights. It notes that substantive equality, according to interpretations by UN human rights treaty bodies, requires a number of legal tools that can assist in ameliorating *de facto* disadvantage. For example, an expansive approach to the prohibited grounds of discrimination that is non-exhaustive and includes intersectional realities can more accurately reflect the complexity of identity. An equality doctrine must prohibit indirect as well as direct discrimination including measures that have a discriminatory effect even without intent. Courts should also recognize that differential treatment and discrimination are not necessarily the same thing; in other words, special measures may be consistent with equality while seemingly neutral policies may in fact discriminate. Therefore, a robust evaluation of the legitimacy of differences is essential. Dignity is also an important principle for diagnosing the consequences of stigma and prejudice and is therefore a key component of substantive equality in international law. The following focuses on the legal position in global (UN) human rights law because of the

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[61] Lau, *supra* note 1, at 41.

[62] *Id.*

[63] SANDRA FREDMAN, DISCRIMINATION LAW 10 (2011) (citing Justice Kennedy's language in Lawrence v. Texas, 123 S. Ct. 2472 (2003)).

[64] *Id.*

special status of the ICCPR in Hong Kong constitutional law[65] and the applicability of other international human rights treaties.[66] The treaty-monitoring bodies for several instruments have, over time, clarified the meaning of substantive equality.

Nearly all of the global and regional human rights treaties express a right to equality and non-discrimination. The two general UN human rights treaties, the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[67] which, along with the Universal Declaration of Human Rights, constitute the International Bill of Rights, obligate states to realize all of the rights enumerated in these instruments without discrimination of any kind followed by a non-exhaustive list of prohibited "grounds."[68] Regional human rights instruments articulate similar duties.[69] These are subordinate norms since a

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[65] *See infra* Part IV.

[66] These include, for example, the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), and the Convention on the Rights of Persons with Disabilities (CRPD).

[67] International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3 [hereinafter ICESCR].

[68] Article 2(1) of the ICCPR states,

> 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.

ICCPR, *supra* note 17, at art. 2(1).

Article 2(2) of the ICESCR provides that "[t]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." ICESCR, *supra* note 67, at art. 2(2).

[69] For example, Article 14 of the European Convention on Human Rights states:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." Article 1 of the American Convention on Human Rights provides that "[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion,

discrimination claim cannot be made unless the issues in a case are somehow connected to another right in the treaty.[70] Article 26 of the ICCPR[71] and Article 24 of the American Convention on Human Rights,[72] however, are autonomous, standalone provisions which allow for application beyond the particular rights in the treaties themselves.[73]

Global and regional human rights bodies have clarified that states must ensure substantive, as well as formal, equality. They have elaborated on the elements of a substantive equality doctrine and the legal tools mentioned above in a number of ways.

For example, according to the Committee on Economic, Social and Cultural Rights, the list of protected categories (race, sex, etc.) is illustrative, non-exhaustive, and should be broadly construed.[74]

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national or social origin, economic status, birth, or any other social condition.

ACHR, *supra* note 57, at art. 14.

[70] The European Court of Human Rights explains:

> As the Court has consistently held, Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to 'the enjoyment of the rights and freedoms' safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter.

Schalk and Kopf v. Austria, Eur. Ct. H.R., App. No. 30141/04 (2010) at ¶ 89.

[71] "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." ICCPR, *supra* note 17, at art. 26.

[72] "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law." ACHR, *supra* note 57, at art. 24.

[73] *See* F. H. Zwaan-de Vries v. the Netherlands, Views, Human Rights Comm., 10th Sess., No. 182/1984, ¶ 12.3, U.N. Doc. No. A/42/40 (July 23, 1985) (stating that "[Article] 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.").

[74] The Committee on Economic, Social and Cultural Rights explains:

> The inclusion of 'other status' indicates that this list is not exhaustive and other

Although sexual orientation and gender identity are not explicitly included, the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the European Court of Human Rights have read these characteristics into other grounds such as "sex"[75] and "other status."[76] States must also prohibit discrimination on multiple or intersectional factors[77] and on the basis of association or perception.[78] A formal comparator evaluation based on one ground—often required in domestic discrimination law—can ignore the contextual realities of disadvantage that might be present in a given society. In other words, "[e]liminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations."[79]

Two cases involving equivalent facts—*Hämäläinen v. Finland*[80]

> grounds may be incorporated in this category." It adds that "[t]he nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of "other status" is thus needed in order to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognized grounds in article 2, paragraph 2. These additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization.

Comm. on Econ., Soc., and Cultural Rights, 42nd Sess., *General Comment 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*, at ¶¶ 15, 27, U.N. Doc. E/C.12/GC/20 (May 25, 2009) [hereinafter *General Comment 20*].

[75] *See Toonen v. Australia*, *supra* note 46.

[76] *See, e.g.*, *General Comment 20*, *supra* note 74 (stating that "'[o]ther status' as recognized in article 2, paragraph 2, includes sexual orientation … In addition, gender identity is recognized as among the prohibited grounds of discrimination."). The Committee cited its previous General Comments (14 and 15) as well as the Yogyakarta Principles.

[77] "Some individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying." *Id.* at ¶ 17.

[78] "Membership also includes association with a group characterized by one of the prohibited grounds (e.g. the parent of a child with a disability) or perception by others that an individual is part of such a group (e.g. a person has a similar skin colour or is a supporter of the rights of a particular group or a past member of a group)." *Id.* at ¶ 16.

[79] *Id.* at ¶ 8.

[80] Hämäläinen v. Finland, Eur. Ct. H.R., App. No. 37359/09 (2014).

(decided by the ECHR) and *G v. Australia*[81] (decided by the Human Rights Committee) —illustrate how formal or substantive comparator analyses can produce different outcomes. In both cases, the applicants challenged a requirement that transgender persons be unmarried in order to obtain official gender recognition in their acquired gender.

In *Hämäläinen v. Finland*, the ECHR held that there had been no breach of Article 8 of the European Convention on Human Rights (privacy and family life) taken in conjunction with Article 14 (non-discrimination) since, in the Court's view, a transgender person was not similarly situated to a cissexual person.[82] This identification of a comparator based on a single characteristic—in this case a cissexual woman—in order to prove differential treatment is bluntly formal.[83] The dissenting judges in the case made this point when observing that:

> The difficult question … concerns the identification of the group to which the applicant and her spouse can be compared. The applicant argues that she has been treated differently vis-à-vis cissexuals, with regard to the refusal to issue her with a new identity card, and also vis-à-vis heterosexuals, with regard to the protection of her marriage to a heterosexual spouse. We regret that the majority rejects these issues simply on the ground that the applicant's situation is not similar enough to that of cissexuals …[84]

> … we are not convinced that the applicant has not been subjected to discrimination contrary to Article 14 of the Convention taken in conjunction with Article 8 and consider that the Court's examination should have gone into more depth in this regard.[85]

In 2017, the Human Rights Committee, on the other hand, held that requiring a transgender woman to divorce before changing her

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[81] *G v. Australia*, *supra* note 55.

[82] *See Hämäläinen v. Finland*, at ¶¶ 111–12.

[83] *See* Peter Dunne & Dr. Jule Mulder, *Beyond the Binary: Towards a 'Third' Sex Category in Germany?*, 19 GER. L.J. 638, 627–48 (2018).

[84] *Hämäläinen v. Finland*, at ¶¶ 18, 19.

[85] *Id.* at ¶ 21.

sex on her birth certificate violated Article 26 of the ICCPR.[86] The Committee interpreted the grounds of discrimination broadly, recognizing the intersection of marital and transgender status. It explained that "differential treatment between married and unmarried persons who have undergone a sex affirmation procedure and who request to amend their sex on their birth certificate is not based on reasonable and objective criteria, and therefore constitutes discrimination …"[87] The Committee essentially accepted her contention that she had not been granted equal protection "compared with a non-transgender woman or compared with an unmarried transgender woman." She had, therefore, faced discrimination "on the basis of her marital status, her transgender identity and/or a combination of both. Both fall within the concept of 'other status' in article 26."[88]

Commentators have pointed out that an overly narrow notion of identity, according to a formal, "grounds-based" methodology, could reinforce socially constructed identities and create assimilationist tendencies.[89] This critique, however, does not take into account the more recent elaborations of a substantive, intersectional theory. Traditional non-discrimination examinations have indeed emphasized single characteristics—being gay, lesbian, or transgender—and require comparisons with others who are not members of the same group, but who are otherwise similarly situated. This is often problematic, especially when a comparator is not evident. Substantive equality's attention to the complexity of identity by addressing discrimination on more than one ground in combination, however, can mitigate these risks and strengthen the value of an equality and non-discrimination doctrine.

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[86] *See G v. Australia*, *supra* note 55.

[87] *Id.* at ¶ 7.15.

[88] *Id.* at ¶ 5.1.2.

[89] *See* FREDMAN, *supra* note 63, at 11 (explaining the assimilationist tendencies of a formal "equal treatment" approach to non-discrimination. The need to find a similarly situated comparator "who does not share the characteristic in question . . . assumes that individuals can be considered in the abstract apart from their colour, religion [etc.] . . . the basic premise, namely that there exists a 'universal individual' is deeply deceptive. Instead the apparently abstract comparator is clothed with the attributes of the dominant gender, culture, religion, ethnicity, or sexuality . . . The result of the assumption of the 'universal individual' is therefore to create powerful conformist pressures."); *see also* Lau, *supra* note 1, at 29 (discussing debates about identitarianism).

The Human Rights Committee has also clarified that discrimination encompasses discriminatory effects (indirect discrimination) as well as purpose.[90] It confirmed that equal treatment is not always required[91] and that differential treatment may not be discriminatory if the "criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."[92] Indeed, according to the Committee, "the principle of equality sometimes requires … affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant."[93] States must also report on "problems of discrimination in fact, which may be practiced either by public authorities, by the community, or by private persons or bodies" as well as discrimination in law.[94]

The Committee on Economic, Social, and Cultural Rights has further built on these principles. It confirmed that "[m]erely addressing formal discrimination will not ensure substantive equality." States are therefore obligated to "immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination …"[95] The meaning of discrimination includes both its "direct and indirect forms" and "indirect discrimination refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination."[96] Like the Human Rights Committee, the Committee on Economic, Social and Cultural Rights has also informed states that eliminating "substantive discrimination" may require the adoption of "special measures to attenuate or suppress conditions that perpetuate discrimination" as long as they "represent reasonable, objective and proportional means to redress de facto

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[90] HRC, 37th Sess., *General Comment 18: Non-discrimination*, at ¶ 7, U.N. Doc. HRI/GEN/1/Rev.9 (Nov. 10, 1989) [hereinafter *General Comment 18*].

[91] *Id.* at ¶ 8.

[92] *Id*. at ¶ 13.

[93] *Id.* at ¶ 10.

[94] *See id.* at ¶ 9.

[95] *See General Comment 20*, *supra* note 74, at ¶¶ 8–10.

[96] *Id.*

discrimination."[97]

The Committee on the Elimination of Discrimination against Women,[98] has explained that CEDAW also requires substantive equality.[99] Its General Recommendation on special measures states that "a purely formal legal or programmatic approach is not sufficient."[100] Indeed, "[u]nder certain circumstances, non-identical treatment of women and men will be required."[101] Furthermore, "[t]he lives of women and men must be considered in a contextual way, and measures adopted towards a real transformation of opportunities, institutions and systems."[102]

The Committee on the Rights of Persons with Disabilities, the monitoring body for the UN Convention on the Rights of Persons with Disabilities (CRPD), has reconceptualized substantive equality as "inclusive" equality.[103] It sets out a four-dimensional framework embracing "a substantive model of equality and extends and elaborates on the content of equality."[104] The four elements of the model include:

> (a) a fair redistributive dimension to address socioeconomic disadvantages; (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality; (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through

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[97] *Id.* at ¶ 9.

[98] The monitoring body for the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).

[99] *See* Comm. on the Elimination of all Forms of Discrimination Against Women [CEDAW Committee], *General Recommendation No. 25, Article 4, Paragraph 1, of the Convention on the Elimination of all Forms of Discrimination Against Women (Temporary Special Measures)*, at ¶ 8, U.N. Doc. HRI/GEN/1Rev.7 (2004), *available at* http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf [https://perma.cc/KV67-ULAU].

[100] *Id.* at ¶ 8.

[101] *Id.* at ¶ 8.

[102] *Id.* at ¶ 10.

[103] *See* Comm. on the Rights of Persons with Disabilities, 19th Sess., *General Comment No. 6 on Equality and Non-Discrimination*, U.N. Doc. No. CRPD/C/GC/6 (Apr. 26, 2018) [hereinafter *General Comment No. 6*].

[104] *Id.*

> inclusion in society; and (d) an accommodating dimension to make space for difference as a matter of human dignity.[105]

The Committee further emphasized the significance of dignity to a substantive equality framework: "[e]quality and non-discrimination are among the most fundamental principles and rights of international human rights law. Because they are interconnected with human dignity, they are the cornerstones of all human rights."[106]

Although here the Committee is interpreting equality in the Convention on the Rights of Persons with Disabilities in particular, these principles can be generally applied since they are consistent with the other treaty bodies' deliberations and are likely to influence the right to equality in international law more broadly. Indeed, human rights bodies have attempted (although not always successfully) to harmonize standards and avoid fragmentation of norms across treaties.[107] The emphasis on disadvantage, effect, inclusion, and dignity could be especially helpful for considering LGBT persons' experiences of discrimination, which are often not directly or explicitly based on sexual orientation but involve indirect discrimination and violations of dignity.[108]

Once again, the various legal tools that can be utilized to promote a substantive equality model as articulated in these materials include: 1) expansion of the grounds of discrimination including multiple or intersectional discrimination, 2) prohibition of indirect discrimination, 3) sensitivity to context and impact when determining the validity of justifications for differential treatment,

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[105] *Id.* This reflects Sandra Fredman's model of substantive equality, *see* FREDMAN, *supra* note 63, at 25–33, which includes four overlapping aims. She refers to these as: (1) The redistributive dimension (breaking the cycle of disadvantage; (2) The recognition dimension (respect and dignity); (3) The transformative dimension (accommodating difference and structural change); and (4) The participative dimension (social inclusion and political voice). She explains that substantive equality aims "to promote respect for the equal dignity and worth of all" and that it is "the dimension of equality which speaks to our basic humanity." *Id.* at 19–25, 28.

[106] *General Comment No. 6*, *supra* note 103, at ¶ 4.

[107] *See, e.g.*, Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, at 25, UN Doc A/CN.4/L.682 (Apr. 13, 2006) (explaining the "strong presumption against normative conflict" in international law).

[108] *See* Lau, *supra* note 1, at 41.

and 4) developing the principle of dignity. As noted above, these tools and the scope of substantive equality arguably enhance its precedential value when compared with other rights, such as privacy and family life.[109]

Part IV first examines the significance of international and comparative human rights law within the Hong Kong legal system. It then reflects on how the concept of equality in international law has influenced the emergence of a substantive equality doctrine in Hong Kong and judicial approaches to LGBT rights claims.

IV. Substantive Equality and LGBT Rights in Hong Kong

A. Impact of International and Comparative Human Rights Law

As mentioned above, courts have frequently applied comparative case law, including international human rights standards, when reviewing challenges to government policies that limit fundamental human rights. Hong Kong, a former British colony, became a Special Administrative Region (SAR) of the People's Republic of China (PRC) on July 1, 1997. Hong Kong's constitutional document, the Basic Law, grants the SAR a high degree of autonomy including a separate, common law legal system and an independent judiciary. The constitutional framework also incorporates international human rights standards. Article 39 specifies that "[t]he 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 Hong Kong [SAR]."[110] The ICCPR's continued application to Hong Kong since 1997, although the PRC is not a state party, is a notable element of Hong Kong's autonomy.[111] Hong Kong reports on its own to the Human Rights Committee which then issues Concluding Comments for the Hong Kong and Macau SARs only.

The Bill of Rights Ordinance,[112] a statute adopted in 1991,[113]

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[109] *See id.*; Frances Hamilton, *The Case for Same-Sex Marriage Before the European Court of Human Rights*, 65 J. OF HOMOSEXUALITY 1582, 1586 (2018).

[110] Hong Kong Basic Law, *supra* note 15, at art. 39.

[111] *Id.* at art 2.

[112] Hong Kong Bill of Rights Ordinance, (1991) Cap. 383, (L.H.K.).

[113] *See* Richard Swede, *One Territory: Three Systems? The Hong Kong Bill of Rights*,

essentially duplicates the text of the ICCPR and has now achieved constitutional status. As a result, despite Hong Kong's dualist, common law legal system which does not permit the courts to rely directly on international treaties unless they have been incorporated into domestic law, the courts have frequently cited materials produced by international and comparative judicial and quasi-judicial institutions. The Basic Law explicitly allows the courts to "refer to precedents of other common law jurisdictions."[114] Judgments rendered by the Privy Council, the UK House of Lords, and now the UK Supreme Court, have been particularly influential.[115]

After the enactment of the Bill of Rights and even before the change of sovereignty in 1997, Hong Kong courts began referencing international and comparative human rights jurisprudence. In one of the earliest of these cases, *R v. Sin Yau-ming*,[116] concerning the right to be presumed innocent until proven guilty, the Court of Appeal pointed out that when interpreting the Bill of Rights, Hong Kong courts could derive guidance from other common law jurisdictions with a "constitutionally entrenched Bill of Rights" and "decisions of the European Court of Human Rights" and international human rights monitoring bodies, especially the Human Rights Committee.[117] While submitting that these materials are not strictly binding, they are "of the greatest assistance" and the Court would "give to them considerable weight … in so far as they reflect the interpretation of articles in the Covenant and are directly related to Hong Kong legislation."[118] The Court also explained that "the glass through which we view the interpretation of the Hong Kong Bill [of Rights] is a glass provided by the [ICCPR]."[119] The Court of Appeal confirmed the importance of comparative and

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44 INT'L & COMP. L. Q. 358, 359 (1995) ("[T]he Bill of Rights was adopted in 1991 in a response to fears in Hong Kong about the looming return to Chinese sovereignty, especially after the Chinese government's massacre of unarmed civilians in Beijing on 4 June 1989 ending the peaceful democracy protests in Tiananmen Square.").

[114] Hong Kong Basic Law, *supra* note 15, at art 84.

[115] *See* Young, *supra* note 16.

[116] R v. Sin Yau-ming, [1992] 1 H.K.L.R. 127 (C.A.) (H.K.).

[117] *Id.*

[118] *Id.*

[119] *Id*.

international human rights jurisprudence in *R v. Man Wai-keung (No 2)* (*Man Wai-keung*),[120] a case about the right to equality before the courts and tribunals, and set out a test that has since provided the basis for the development of the equality doctrine discussed below.

Hong Kong courts are cognizant of their own contribution to a growing transnational judicial conversation about the meaning of constitutional rights.[121] In *QT v. Director of Immigration*, a case concerning the denial of a dependent visa to the same-sex partner of a foreign resident working in Hong Kong, the Court of Final Appeal observed that "[t]here has been a notable convergence in the approaches of various courts, including our own, to what constitutes discrimination, influenced by international human rights instruments."[122] It then stated that "[t]he jurisprudence of the [ECHR] and its interaction with the jurisprudence of the House of Lords, the Privy Council and the United Kingdom Supreme Court relating to the Human Rights Act 1998 and domestic anti-discrimination legislation are of particular relevance in the present case."[123]

B. Substantive Equality

This section traces the growth of a constitutional equality

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[120] The Queen v. Man Wai-keung, [1992] 2 H.K.C.L.R. 207 (C.A.) (H.K.) ("It was held in R v. Sin Yau-Ming . . . that in interpreting the Hong Kong Bill of Rights, this Court can be guided by decisions of supra-national tribunals such as the European Court of Human Rights, and that even greater assistance can be derived from decisions of the domestic courts in jurisdictions, such as the United States of America and Canada, which have constitutionally entrenched Bills of Rights. It was held also, that although the Hong Kong Bill did not contain a 'justification' provision similar to s. 1 of the Canadian Charter of Rights . . . such a provision is to be implied. Finally, in addressing a challenge to a statutory provision on the ground of inconsistency with the Bills of Rights, the court in Sin Yau-Ming applied the rationality test and the proportionality test.").

[121] *See, e.g.*, Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487 (2005); Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J.L. STUD. 499, 516–29 (2000); Michael Kirby, *Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges*, 9 MELB. J. INT'L L. 171 (2008).

[122] *See* QT v. Dir. of Immigration, [2018] 21 H.K.C.F.A.R. 324, at ¶ 30 (C.F.A.) (H.K.).

[123] *Id*.

doctrine in LGBT rights cases in Hong Kong since 2006. It draws on the insights about equality in international human rights law in Part III to explore the courts' application of legal tools that strengthen a substantive model. It concludes that these decisions have led to the elaboration of a fairly robust, if not quite explicit, substantive equality doctrine that could have significant implications for LGBT rights claims going forward, including same-sex marriage as considered in Part V.

1. Prohibited grounds of discrimination

As discussed above, an adaptable theory that recognizes disadvantage based on context as well as complexity when identifying the prohibited grounds of discrimination is an element of a substantive equality doctrine. The courts have broadly interpreted the lack of explicit grounds in Article 25 of the Basic Law, which simply states: "[a]ll Hong Kong residents shall be equal before the law," and the non-exhaustive list in Articles 1 and 22 of the Bill of Rights, which duplicate Articles 2(1) and 26 of the ICCPR. When determining which "grounds" are invidious, they have relied on comparative human rights jurisprudence.

For example, in *Leung v. Secretary for Justice*,[124] a case challenging different ages of consent for "buggery" and heterosexual intercourse as elaborated below, the Court of First Instance cited the Human Rights Committee's views in *Toonen v. Australia*.[125] This was one of the first times a Hong Kong court recognized that sexual orientation is a constitutionally prohibited ground of discrimination. The Court also cited "a series of judgments of the [ECHR]" in support.[126] In the same case on appeal, the Court of Appeal noted the government "accepted that homosexuality was a status for the purposes of Articles 1 and 22 of the Bill of Rights."[127] When invalidating the directly discriminatory offence of "homosexual buggery committed otherwise than in private" in *Secretary for Justice v. Yau Yuk Lung*, the Court of Final Appeal also confirmed that "[d]iscrimination on the ground of

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[124] *See* Leung v. Sec'y of Justice, [2005] 3 H.K.L.R.D. 657 (C.F.I.) (H.K.).

[125] *Id.* at ¶ 45; *see also Toonen v. Australia*, *supra* note 46.

[126] *See Leung v. Sec'y of Justice*, 3 H.K.L.R.D. at ¶ 46.

[127] *Id.*

sexual orientation would plainly be unconstitutional" and "sexual orientation is within the phrase 'other status'" in the equality provisions in the Bill of Rights and the ICCPR.[128]

In these cases, the courts were inclusive, interpreting new, implicit, proscribed characteristics into the ICCPR's non-exhaustive list, in line with the human rights treaty bodies' jurisprudence considered above. While Hong Kong courts have not yet overtly acknowledged intersectional discrimination, their approaches to indirect discrimination and fluid discussion of marital status and sexual orientation in *QT v. Director of Immigration* (examined below) suggest a degree of openness to this aspect of substantive equality.

2. Meaning of discrimination

Another key feature of Hong Kong's substantive equality doctrine is the acknowledgement that differential treatment is not necessarily the same as discrimination. In *Man-wai Keung*, the Court of Appeal distinguished between "a discrimination, as opposed to a distinction."[129] It added that "given the nature of the [Bill of Rights] … [o]ne must look to the interests of society and to all the circumstances which the legislature had in mind when creating what the courts find to be a distinction amounting to a discrimination."[130] It cited the Human Rights Committee's General Comment on non-discrimination to explain that equality "does not mean identical treatment in every instance … not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."[131] This attention to context and the plurality of forms that discrimination might take has continued to infuse equality principles, especially in LGBT rights adjudication. In these cases, substantive equality is reflected in both the courts' recognition that indirect discrimination is unconstitutional as well as the nature of the proportionality test for establishing when differential treatment is justified.

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[128] *See* Sec'y for Justice v. Yau Yuk Lung Zigo & Lee Kam Chuen, [2007] 10 H.K.C.F.A.R. 335, at ¶ 11 (C.F.A.) (H.K.).

[129] The Queen v. Man Wai-keung, [1992] 2 H.K.C.L.R. 207 (C.A.) (H.K.).

[130] *Id.*

[131] *Id.* at ¶ 33; *see also General Comment 18*, *supra* note 90, at ¶ 8.

a) *De facto* effects and indirect discrimination

If differential treatment is not always discrimination, it follows that facially *neutral* measures might amount to discrimination under certain circumstances. In other words, both direct and indirect discrimination are unconstitutional. This can be helpful when addressing LGBT rights claims, which frequently concern discriminatory effects, but where facial classifications based on sexual orientation or gender identity may not be clearly drawn.

In *Leung v. Secretary for Justice*,[132] the applicant, a gay man who was under the age of 21, challenged the constitutionality of criminal provisions setting out different ages of consent for homosexual "buggery"[133] and sexual intercourse between a man and a woman.[134] The Court of Appeal explained that this was not formal "direct" discrimination because the age of consent for "buggery" between a male and female was also 21. Instead it held that the difference constituted "disguised" discrimination in contravention of the right to equality in the Basic Law and the Bill of Rights. This was the first time a Hong Kong court determined that indirect discrimination is unconstitutional. The Court of Appeal agreed with the first instance decision that "[d]enying 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."[135]

The courts have confirmed this approach in subsequent cases. For example, in *Leung Chun Kwong v. Secretary for the Civil Service*, the courts contemplated whether Mr. Leung, a civil servant who entered into a same-sex marriage abroad, is entitled to the same benefits and allowances that the Government provides to the "spouses" of other civil servants married to persons of the opposite

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[132] *Leung v. Sec'y of Justice*, 3 H.K.L.R.D.

[133] *Id.*

[134] *See* Crimes Ordinance, (1997) Cap. 200, § 118(C) (H.K.) ("[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.").

[135] *Leung v. Sec'y of Justice*, 3 H.K.L.R.D. at ¶ 48.

gender. The Court of First Instance decided that there was unjustifiable discrimination, reasoning that "although the differential treatment is, on the face of the matter, based on the legal marital status of the officer … it should also be regarded as being based, indirectly, on sexual orientation."[136] Although the Court of Appeal reversed this decision, accepting the government's justifications, it acknowledged that the differential treatment would have otherwise amounted to indirect sexual orientation discrimination.

In *QT v. Director of Immigration*, the Court of Final Appeal (and the lower courts) similarly confirmed that indirect discrimination is unlawful. In this case a lesbian expatriate couple claimed the immigration policy denying a dependent visa to the same-sex partner of a sponsor who had been admitted to Hong Kong to take up employment discriminated on the basis of sexual orientation.[137] A different-sex spouse could have applied to join him/her for residence.[138] At issue was "whether the policy constitutes discrimination based on sexual orientation … because of the differential treatment concerning eligibility by reason of marital status."[139]

The Court explained that the converging views of various courts, including the ECHR, on the meaning of discrimination includes general recognition that adverse treatment amounting to discrimination can take three forms. The first two: "'[l]ike cases should be treated alike, unlike cases should not be treated alike'"[140]

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[136] *See* Leung Chun Kwong v. Sec'y for the Civil Serv., [2018] 3 H.K.L.R.D. 84, ¶ 53 (C.A.) (H.K.).

[137] *See* QT v. Dir. of Immigration, [2018] 21 H.K.C.F.A.R. 324, ¶ 29 (C.F.A.) (H.K.).

[138] *Id.* at ¶ 142.

[139] *Id.* at ¶ 41. In *QT v. Director of Immigration*, the Court of Final Appeal held it was not necessary to directly determine the constitutionality of the denial of a dependent visa for a same-sex spouse. Instead, it applied the weaker administrative law test of *Wednesbury* unreasonableness and found there was no reasonable connection between the policy and the aims it was trying to achieve. It therefore found no need to apply a stricter proportionality test. The court explained that "[QT's] claim is primarily and sufficiently framed as one for judicial review on the basis that refusing her a dependent visa . . . amounts to unlawful discrimination which is irrational and unreasonable in a *Wednesbury* sense." *Id.* at ¶ 102.

[140] *Id.* at ¶ 6 (citing Lord Nicholls, Ghaidan v Godin-Mendoza [2004] 2 AC 557, ¶ 9 and Li CJ, Sec'y for Justice v. Yau Yuk Lung Zigo & Lee Kam Chuen, [2007] 10 H.K.C.F.A.R. 335, ¶ 19 (C.F.A.) (H.K.)).

represent a formal articulation. The third "involves indirect discrimination where the measure complained of appears neutral on its face but is significantly prejudicial to the complainant in its effect."[141]

The Court of Final Appeal agreed with the Court of Appeal's logic: "[s]ince all unmarried couples, heterosexual or homosexual, are similarly excluded, the Director has not singled out same-sex couples for differential treatment."[142] The policy nevertheless *indirectly* discriminated on the basis of sexual orientation because "a heterosexual unmarried couple may make themselves eligible by getting married if they so wish. But a homosexual unmarried couple cannot do so because they cannot marry in the sense as understood according to the law of Hong Kong."[143] This element of choice, or lack thereof, is noteworthy and may factor into the courts' review of upcoming cases concerning same-sex marriage and civil partnerships.[144]

b) Test for justification of differential treatment

The proportionality test developed by the courts for determining when differential treatment is justified and when it amounts to unconstitutional discrimination also contains features of substantive equality. The Court of Appeal suggested such a test in *Man-wai Keung*, explaining that since "distinctions can be lawful" and "discrimination may amount to an unlawful distinction," it is necessary to "look to the rationality, the reasonableness and the proportionality of the distinction or discrimination."[145]

The Court of Final Appeal expounded on this test[146] in *Secretary*

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[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *See supra* note 8 and accompanying text; *see infra* Part V discussion about how Hong Kong should be distinguished from the European context since Hong Kong does not provide any options at all for legal recognition of same-sex relationships.

[145] The Queen v. Man Wai-keung, [1992] 2 H.K.C.L.R. 207, ¶ 33 (C.A.) (H.K.).

[146] The test has three parts and requires: (1) The difference in treatment must pursue a legitimate aim. For any aim to be legitimate, a genuine need for such difference must be established. (2) The difference in treatment must be rationally connected to the legitimate

for Justice v. Yau Yuk Lung.[147] Again, consistent with *Man-wai Keung* and the Human Rights Committee's position, the Chief Justice explained that if a distinction can be justified then it was not discriminatory in the first place. In this way, he distinguished between the justification test for equality and that used for other constitutionally-protected rights:

> In requiring differential treatment to be justified, the view has been expressed that the difference in treatment in question is an infringement of the constitutional right to equality but that the infringement may be constitutionally justified. This approach is not appropriate. *Where the difference in treatment satisfies the justification test, the correct approach is to regard the difference in treatment as not constituting discrimination and not infringing the constitutional right to equality.* Unlike some other constitutional rights, such as the right of peaceful assembly, it is not a question of infringement of the right which may be constitutionally justified.[148]

This observation contains the seeds of a substantive equality doctrine. Since differential treatment aimed at addressing disadvantage would be consistent with, and not a *prima facie* breach of, the constitutional equality guarantee, special measures, or other remedies in cases involving *de facto* discrimination, might be necessary, proportionate *distinctions* and therefore valid. Such a determination goes beyond formal equal treatment. It requires attention to the real impact, disadvantage, and detriment experienced by members of marginalized groups. The Court's explanation suggests that the right to equality and non-discrimination has an absolute nature: unjustifiable distinctions (direct or indirect) are *always* discriminatory and, therefore, unconstitutional.

In other words, a deviation from equal treatment that is justified

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aim. (3) The difference in treatment must be no more than is necessary to accomplish the legitimate aim." Sec'y for Justice v. Yau Yuk Lung Zigo & Lee Kam Chuen, [2007] 10 H.K.C.F.A.R. 335, ¶ 20 (C.F.A.) (H.K.).

[147] Li CJ also explained … that "[e]quality is the antithesis of discrimination. The constitutional right to equality is in essence the right not to be discriminated against. It guarantees protection from discrimination." He also links the constitutional framework in Hong Kong to the global context, and explicitly mentions the ICCPR. *Id.* at ¶ 1.

[148] *Id.* at ¶ 22 (emphasis added).

is not an "exception" to equality but may be part of the substantive equality duty. While the Court's reasoning may not affect the actual outcomes of many discrimination cases in practice (formal equality may still achieve the same results), its substantive language nevertheless strengthens equality's potential. A substantive doctrine in Hong Kong constitutional law—infused by international human rights law—could support a range of discrimination claims beyond LGBT rights issues.

The Court of Final Appeal's confirmation in *QT v. Director of Immigration*[149] that the proportionality test would be applied more stringently in cases involving a marginalized group is also significant. "The court will subject the impugned measure to 'particularly severe scrutiny'" in cases "where a person is subjected to differential treatment on any of the suspect grounds, including sexual orientation" which narrows "the government's margin of discretion."[150] It added, citing ECHR jurisprudence, "[t]hat does not mean that the measure can never pass muster, but it will require the government to provide 'very weighty reasons' or 'particularly convincing and weighty reasons' to justify the challenged difference in treatment, applying the standard of reasonable necessity."[151]

3. Dignity

As discussed above, dignity is a hallmark of substantive equality. This principle is repeated often, alongside equality, and placed in a prominent position in human rights treaties and many national constitutions. Cases involving discrimination on the grounds of sexual orientation or gender identity, including some in Hong Kong, regularly refer to dignity.[152] Although Hong Kong courts tend to mention dignity in a somewhat perfunctory manner

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[149] In the end, the court did not actually need to consider the constitutionality of the discriminatory treatment but nevertheless held in favor of the same-sex couple by applying a weaker rational connection test. *See* QT v. Dir. of Immigration, [2018] 21 H.K.C.F.A.R. 324, ¶ 29 (C.F.A.) (H.K.).

[150] *Id.* at ¶ 108.

[151] *Id.*

[152] *See* Michele Finck, *The Role of Human Dignity in Gay Rights Adjudication and Legislation: A Comparative Perspective*, 14 INT'L J. OF CONST. L. 26–53 (2016) (noting that dignity has increasingly played a key role in the "evolution of gay rights," especially cases concerning marriage equality).

and without elaboration, such judicial acknowledgement nevertheless signals an apparent appreciation of substantive equality and its relevance to the LGBT context. It also sets the groundwork for fuller development of the scope and parameters of dignity as a nascent constitutional principle.

For example, in *QT v. Director of Immigration*, the Hong Kong Court of Final Appeal commented, "[i]t hardly needs to be pointed out that unlawful discrimination is fundamentally unacceptable."[153] In support it cited Lord Walker of Gestingthorpe's use of dignity to evoke substantive equality in *R (Carson) v. Secretary of State for Work and Pensions*.[154] He writes that "[i]n the field of human rights, discrimination is regarded as particularly objectionable because it disregards fundamental notions of human dignity and equality before the law."[155] He adds that discrimination is demeaning because it treats a person unfavorably on the grounds of sexual or racial stereotypes rather than on the basis of merit.[156]

The *QT v. Director of Immigration* judgment also cites a reference to dignity by the Canadian Supreme Court in *Law v. Canada*,[157] generally considered one of Canada's landmark substantive equality cases.[158] In that decision, Justice Iacobucci explains that "[h]uman dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits."[159] He also clarifies that the constitutional equality guarantee in Canada includes substantive equality.[160]

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[153] *See QT v. Dir. of Immigration*, 21 H.K.C.F.A.R., at ¶ 27.

[154] R (Carson) v. Secretary of State for Work and Pensions [2006] 1 AC 173, ¶ 49 (UKHL).

[155] *Id.*

[156] *See id.*

[157] *See QT v. Director of Immigration*, 21 H.K.C.F.A.R., at ¶ 107 n.137 (quoting Law v. Canada (Minister of Employment and Immigration), [1999] S.C.R. 497 (Can.)).

[158] Patricia Hughes, *Recognizing Substantive Equality as a Foundational Constitutional Principle*, 22 DALHOUSIE L.J. 5, 23 (1999).

[159] *See QT v. Director of Immigration*, 21 H.K.C.F.A.R., at ¶ 107 n.137 (quoting Law v. Canada (Minister of Employment and Immigration), [1999] S.C.R. 497 (Can.)).

[160] In *Law v. Canada*, the judge explained:

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is

V. Prospects for Same-sex Relationship Recognition in Hong Kong

This section contemplates prospects for judicial recognition of same-sex marriage in Hong Kong with reference to this emerging substantive equality doctrine in Hong Kong constitutional law.[161] Although to date Hong Kong courts have not yet deliberated on the issue of a constitutional right to legal recognition of same-sex relationships, they have occasionally emphasized, *in obiter*, its absence from Hong Kong law. For example, and most recently, in *QT v. Director of Immigration*, the Court of Final Appeal reiterated that "[m]arriage in [Hong Kong] is … heterosexual and monogamous. By definition, it is not a status open to couples of the same sex, the right to marriage in Hong Kong does not make marriage available to same-sex couples."[162] It also noted that the "the European Convention on Human Rights does not impose obligations on states to grant same-sex couples the right to marry."[163] This remark and the courts' predilection to rely on the ECHR jurisprudence could foreshadow possible approaches to the

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> enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?

Law v. Canada (Minister of Employment and Immigration), S.C.R. at ¶ 53; *see also* Sophia Moreau, *Promise of Law v. Canada*, 57 U. TORONTO L.J. 415 (2007) (reflecting on the value of dignity as considered in *Law v. Canada*).

[161] For an earlier discussion of this issue focusing on the right to marriage in the Hong Kong Bill of Rights and the ICCPR, see Michael Ramsden & Luke Marsh, *Same-Sex Marriage in Hong Kong: The Case for a Constitutional Right*, 19 THE INT'L J. OF HUM. RTS. 90, 90–103 (2015).

[162] *See QT v. Director of Immigration*, 21 H.K.C.F.A.R., at ¶ 25.

[163] *Id.*; *see* Schalk and Kopf v. Austria, Eur. Ct. H.R., App. No. 30141/04 (2010); Hämäläinen v. Finland, Eur. Ct. H.R., App. No. 37359/09 (2014); Chapin and Charpentier v. France, Eur. Ct. H.R., App. No. 40183/07 (2016).

In *W v. Registrar of Marriages*, the court granted a post-operative transgender woman the right to marry her male partner in her acquired gender, the Court of Final Appeal clarified that "nothing in this judgment is intended to address the question of same sex marriage." W v. Registrar of Marriages, [2013] 3 H.K.L.R.D. 90, ¶ 2 (C.A.) (H.K.).

upcoming same-sex marriage challenge.[164] This Part therefore reflects on whether the positions of the ECHR and the Human Rights Committee—as expressed in *Schalk and Kopf v. Austria* and *Joslin v. New Zealand*—are appropriate for application in Hong Kong. Can they be distinguished? What should the courts bear in mind when evaluating their persuasive value?

Although a number of domestic courts have ruled in favor of marriage for same-sex couples, as mentioned above only one international human rights body, the IACHR, has identified a right to same-sex marriage.[165] In 2002, the Human Rights Committee decided that the New Zealand Marriage Act, which defined marriage as between a man and a woman, did not breach the right to marriage in ICCPR Article 23.[166] In a terse eight-sentence consideration of the merits, the Committee noted that the reference to "men and women" of marriageable age "rather than the general terms used elsewhere in … the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation … is to recognize as marriage only the union between a man and a woman wishing to marry each other."[167] It then refrained from analyzing the discrimination claim, or any of the other rights that had been invoked by the applicant. As discussed below, this stark avoidance of equality may have been an attempt to side-step controversy and threats to the legitimacy of the UN treaty body process.

In *Schalk and Kopf v. Austria*,[168] the ECHR held that denial of marriage to a same-sex couple was consistent with Article 8 (family life) and Article 12 (marriage), read in conjunction with Article 14 (non-discrimination) of the European Convention on Human Rights. Although the Court adopted an inclusive understanding of family life, extending its meaning to same-sex relationships for the first time,[169] it also avoided a fuller examination of the

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[164] *See supra* note 8 and accompanying text.

[165] *See supra* note 25 and accompanying text.

[166] *See* Ms. Juliet Joslin et al. v. New Zealand, Views, Human Rights Comm., No. 902/1999, U.N. Doc. A/57/40, at 214 (July 17, 2002).

[167] *Id*. at ¶ 8.2.

[168] *See* Schalk and Kopf v. Austria, Eur. Ct. H.R., App. No. 30141/04 (2010).

[169] "[T]he relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of 'family life,' just as the relationship

discrimination issue. It relied largely on what it believed to be a lack of consensus among member states of the Council of Europe and applied a wide margin of appreciation.[170]

A reconsideration of these decisions appears probable, however, for a number of reasons. First, global trends are shifting largely in favor of same-sex marriage. This could be especially influential for the ECHR's position given its emphasis on consensus when determining the appropriate scope of the margin of appreciation. Their mention of the building of a consensus in Europe, a "tendency [that] has developed rapidly over the past decade" suggests possibilities.[171] There was also notable division among the judges with three of seven dissenting.[172]

The Court also acknowledged the strength of equality and non-discrimination since serious reasons are necessary to justify differential treatment on the grounds of sexual orientation. Falling back on the margin of appreciation doctrine, however, may have been a convenient way to avoid the controversy that a positive ruling based on equality may have generated.[173] Paradoxically, by *avoiding* equality, the Court actually seemed to be signaling its *appreciation* of equality's potential. Indeed, had it utilized a stringent proportionality test to evaluate the validity of differential treatment between same-sex and different-sex couples with regard to marriage, the Court may have come to a different conclusion. It

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of a different-sex couple in the same situation would." *Id.* at ¶ 94.

[170] The Court explained that "[t]he scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States." Despite recognizing an "emerging European consensus towards legal recognition of same-sex couples" the Court held that "[n]evertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes." *Id.* at ¶ 105. *See generally*, Dominic McGoldrick, *A Defence of the Margin of Appreciation and an Argument for its Application by The Human Rights Committee*, 65 INT'L & COMP. L.Q. 21 (2016) (discussing the margin of the appreciation doctrine).

[171] *Schalk and Kopf v. Austria*, at ¶ 105. It then decided, however, that there was still no established consensus, and therefore States enjoyed a margin of appreciation in this area.

[172] *Id.* ¶¶ 109, 115.

[173] *See* Hamilton, *supra* note 109, at 1588.

would have likely been difficult to accept the reasons put forward for justifying the differential treatment—the denial of marriage—had it reflected on the requirements of substantive equality. As discussed above, it would have needed to take an expansive approach to the prohibited grounds, provide a nuanced interpretation of the meaning of discrimination, pay attention to impact, and appreciate the stigma (dignity harms), and exclusion that same-sex couples experience when denied access to the institution of marriage.

Some have suggested that the Human Rights Committee might also arrive at a different view if asked to reevaluate its position on same-sex marriage. For example, Gerber, Tay, and Sifris argue that *Joslin v. New Zealand* is no longer "good law" in light of international legal developments since 2002 and human rights treaty bodies' acceptance that core human rights treaties are "living instruments."[174] They maintain that the Human Rights Committee's reading was overly narrow and not in line with the rules of treaty interpretation in the Vienna Convention on the Law of Treaties.[175] In 2013, Sarah Joseph observed that *Joslin v. New Zealand* had been deliberated nearly a decade earlier and predicted that "it is only a matter of time before the topic of same-sex marriage returns to the [Human Rights Committee]" and expected "a global tipping point to be reached, where the [Committee] will decide a similar case differently."[176] Indeed, if it applied its substantive equality doctrine, the Committee would likely have difficulty justifying the direct or indirect harms arising from the denial of marriage.

In two recent cases involving relationship rights, the Hong Kong Court of Appeal avoided a substantive equality analysis and its implications. For example, although holding in favor of the applicant in *QT v. Director of Immigration*,[177] the Court of Appeal introduced a categorization of "core rights" associated with marriage that could be shielded from judicial review.[178] These core

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[174] *See* Paula Gerber, Kristine Tay & Adiva Sifris, *Marriage: A Human Right for All?*, 36 SYDNEY L. REV. 643, 644-48 (2014).

[175] *Id.* at 649.

[176] Sarah Joseph, *Latest Case Law Trends: The International Covenant on Civil and Political Rights*, CASTAN CTR. FOR HUM. RTS. L. (Oct. 28, 2013), https://castancentre.com/2013/10/28/latest-case-law-trends-the-international-covenant-on-civil-and-political-rights/ [https://perma.cc/QDY9-T9WL].

[177] *See* QT v. Director of Immigration, [2017] 5 H.K.L.R.D. 166 (C.A.) (H.K.).

[178] *See id.* at ¶ 11.

rights would be immune from challenge even when direct or indirect differential treatment on the basis of sexual orientation is involved. The Court explained that:

> There are certainly areas of life which are, whether by nature or by tradition or long usage, closely connected with marriage such that married couples should and do enjoy rights and shoulder obligations which are unique to them as married people. The rights and obligations in these areas of life which go with the status of marriage must be regarded as core rights and obligations unique to a relationship of marriage, so much so that the entailing privileged treatments to married couples as compared with unmarried couples (including same sex couples) should simply be considered as treatments that require no justification because the difference in position between the married and the unmarried is self-obvious.[179]

This somewhat awkward device appears designed to allow the courts some flexibility to circumvent a robust justification test—already available in the context of LGBT discrimination claims—in cases involving same-sex relationship rights. Indeed, the Court of Appeal affirmed in *Leung Chun Kwong v. Secretary for the Civil Service*[180] that the "concept of core rights and obligations … was precisely an attempt to protect and ring fence the institution and status of marriage that is heterosexual marriage in Hong Kong."[181]

Like the ECHR and the Human Rights Committee, the Hong Kong court may be indirectly—and paradoxically—signaling its acknowledgment of the potential of the constitutional equality doctrine. As in *Schalk and Kopf v. Austria* and *Joslin v. New Zealand*, if the court needs to apply a stringent equality review to a same-sex marriage claim, it is difficult to imagine that the government's justifications—even to preserve the traditional

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[179] *Id.* at ¶ 14.

[180] *See* Leung Chun Kwong v. Sec'y for the Civil Serv., [2018] 3 H.K.L.R.D. 84 (C.A.) (H.K.).

[181] *Id.* at ¶ 3. *See generally*, Po Jen Yap, *Spouses without Benefits: 'Ring-Fencing' Marriage after W and QT Have Unbolted its Gates?*, 48 H.K. L.J. 365 (2018) (discussing how the Court of Appeal's decision in *Leung Chun Kwong* is inconsistent with its own precedent and the Court of Final Appeal).

concept of marriage—could be "weighty" enough.[182] A dignity principle could also at the same time unveil the underlying stigma associated with this type of argument; an exclusionary reason for denying marriage based on prejudice would surely fall foul of substantive or "inclusive" equality as discussed in Part III above. The Court of Final Appeal in *QT v. Director of Immigration* rejected the lower court's attempt to ring fence marriage rights, however,[183] and has therefore reopened possibilities for a stronger review of relationship policies based on substantive equality.

The Hong Kong challenges can also be distinguished from *Schalk and Kopf v. Austria* for a number of additional reasons. First, at the time of the decision, Austria had recently introduced registered partnerships for same-sex couples, which gave the applicants an alternative for recognition of their relationship short of marriage. The ECHR noted that "[g]iven that at present it is open to the applicants to enter into a registered partnership, the Court is not called upon to examine whether the lack of *any* means of legal recognition for same-sex couples would constitute a violation … if it still obtained today."[184] If neither marriage nor registered partnerships had been available, the Court may well have come to a different conclusion. In Hong Kong, however, there are no options for the legal recognition of same-sex relationships on the basis of equality with different sex couples. The *absence* of choice for same-sex couples could be a determinative factor in the upcoming judicial reviews.[185]

Furthermore, the European Court's concern with consensus, which was the primary reason for its decision *against* same-sex marriage, is not appropriate in a domestic jurisdiction like Hong Kong.[186] Hong Kong does not face the same demands as an

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[182] For a critique of the Court of Appeal's conception of traditional marriage in Hong Kong, see Marco Wan, *Sexual Orientation and the Historiography of Marriage in Leung Chun Kwong v. Secretary for the Civil Service*, 48 H.K. L.J. 605 (2018).

[183] *See* QT v. Dir. of Immigration, [2018] 21 H.K.C.F.A.R. 324, ¶ 110(b) (C.F.A.) (H.K.) ("We do not accept that differential treatment requires no justification if based on marital status and if said to involve core rights and obligations unique to marriage.").

[184] *See* Schalk and Kopf v. Austria, Eur. Ct. H.R., App. No. 30141/04, ¶ 103 (2010) (emphasis added).

[185] *See supra* note 153 and accompanying text in relation to *QT v. Director of Immigration*.

[186] *See* Holning Lau & Derek Loh, *Misapplication of ECHR Jurisprudence in W v*

international organization made up of diverse member states. Some have suggested that the European Court of Human Rights relied on consensus and a wide-margin of appreciation in order to avoid controversy and protect the Court's legitimacy in a divided Council of Europe.[187] Similarly, Langford contends that the Human Rights Committee in *Joslin* may have been trying to prevent a backlash at a time when a minority of states parties to the ICCPR had ratified the Optional Protocol allowing individual communications and shortly before two had denounced it.[188]

There may be fewer apprehensions in Hong Kong about how rulings involving LGBT rights could affect the legitimacy of judicial institutions. To be sure, Hong Kong's constitutional status as an autonomous entity within an authoritarian state poses unique challenges, and some have noted worrying signs that judicial independence is under threat.[189] LGBT rights, however, do not engage particularly sensitive political issues concerning Hong Kong's relationship with Mainland China. In a study measuring the Hong Kong courts' degree of deference to the government when adjudicating human rights cases, Chan found that the courts have been *less* deferential when the right to equality of a vulnerable minority group is at stake.[190] She also discovered (contrary to her initial hypothesis) that they have also been less deferential in cases

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Registrar of Marriages, 41 H.K. L.J. 75 (2011).

[187] Helen Fenwick, *Same Sex Unions at the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court's Authority via Consensus Analysis?*, 3 EUR. H.R. L. REV. 249, 259 (2016).

[188] Langford, *supra* note 27, at 119–20 (citing Christof Heyns & Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, 23 HUM. RTS. Q. 483, 517–18 (2001)). *See also* Natalia Schiffrin, *Jamaica Withdraws the Right of Individual Petition Under the International Covenant on Civil and Political Rights*, 92 AM. J. OF INT'L L. 563, 564 (1998); Joseph, *supra* note 176; Gerber, Tay, & Sifris, *supra* note 174. Jamaica and Trinidad and Tobago had recently denounced the Optional Protocol and therefore rejected the Committee's competence to consider individual communications brought against them.

[189] For a discussion of particular challenges facing the Hong Kong judiciary, see Johannes Chan, *A Storm of Unprecedented Ferocity: The Shrinking Space of the Right to Political Participation, Peaceful Demonstration, and Judicial Independence in Hong Kong*, 16 INT'L. J. OF CONST. L., 373, 373–88 (2018) (commenting on the courts' difficult balance between maintaining the common law system and the rising authoritarian regime in China).

[190] *See* Cora Chan, *Rights, Proportionality and Deference: A Study of Post-Handover Judgments in Hong Kong*, 48 H.K. L.J. 51, 66 (2018).

involving "moral controversy."[191]

Despite the strong equality arguments for same-sex marriage and reasons to distinguish the Hong Kong situation, courts may nevertheless uncritically follow the current position of the ECHR and the Human Rights Committee (however incorrectly reasoned and susceptible to a reversal). Acceptance of a right to some form of civil partnership has a better chance of success, however, and the ECHR's jurisprudence would more readily reinforce such an outcome.[192] Rapidly changing attitudes in Hong Kong and majority public support for same-sex couple rights generally, including marriage,[193] should mitigate any qualms that the courts might have about the need for societal consensus. The more robust equality analysis in the IACHR's advisory opinion should also resonate in Hong Kong, given the strength of the SAR's constitutional rights framework and acceptance of substantive equality.

VI. Conclusions

This Article contends that a right to substantive equality and non-discrimination has significant capacity to further LGBT claims before international bodies and domestic courts. Prospects for the eventual recognition of same-sex marriage in Hong Kong, or at least some form of civil partnership that grants rights consistent with marriage to same-sex couples, likely hinges on developments in international and comparative human rights law. Whether the UN Human Rights Committee and the European Court of Human Rights revisit their previous positions in *Joslin v. New Zealand* and *Schalk and Kopf v. Austria* could impact the outcome of future cases in Hong Kong and elsewhere. As examined above these bodies have arguably not yet fully embraced the implications of the robust substantive equality doctrine elaborated in their interpretive materials at least with regard to marriage. This untapped potential suggests possible legal strategies for Hong Kong and beyond.

If Hong Kong courts do leverage the promise of their constitutional equality doctrine, they could contribute more concretely to the global convergence of LGBT rights norms (and

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[191] *Id.* at 74.

[192] *See supra* note 53 and accompanying text.

[193] *See generally supra* note 12 and accompanying text (discussing greater acceptance of LGBT rights in Hong Kong).

human rights norms generally). This would not require inappropriate judicial activism and is unlikely to undermine the judiciary's legitimacy or independence. Courts in a number of other jurisdictions have already relied on substantive equality when recognizing a right to same-sex marriage even in contexts where public support was more limited.[194] A closer consideration of LGBT rights jurisprudence in Hong Kong may also contribute to broader debates about the effectiveness of international human rights law on domestic implementation and internalization of norms.[195] Indeed, the Hong Kong cases illustrate the potential of international human rights law for the advancement of LGBT rights in domestic legal systems where the courts look to comparative experience for guidance.

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[194] *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); Minister of Home Affairs v. Fourie 2005 (1) SA 524 (CC) (S. Afr.); *see also* Holning Lau, *Marriage Equality and Family Diversity: Comparative Perspectives from the United States and South Africa*, 85 FORDHAM L. REV. 2615 (2017).

[195] *See, e.g.*, KATHRYN SIKKINK, EVIDENCE FOR HOPE: MAKING HUMAN RIGHTS WORK IN THE 21ST CENTURY (2017); STEPHEN HOPGOOD, THE ENDTIMES OF HUMAN RIGHTS (2013).