Universalism or Cultural Relativism?

Case Study of Same-Sex Marriage in Taiwan

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Abstract

According to Article 23(2) of the International Covenant on Civil and Political Rights, the right of men and women of marriageable age to marry and found a family should be recognised. Traditionally, the right to marry and found a family is reserved for heterosexual couples only. This view is embodied in the 2002 United Nations Communication of *Joslin v New Zealand.* In 2013, same-sex marriage in New Zealand became legal. Nevertheless, *Joslin* is still being cited elsewhere by anti-same-sex marriage campaigners and lawyers globally.

Even in a country-specific scenario, the legal status of same-sex marriage is far from clear. For example, since 2014 same-sex marriage has become legal in England, Wales and Scotland but this does not apply to Northern Ireland. Whilst many Western countries campaign for same-sex marriage, many postcolonial countries still criminalise private male-to-male consensual sex between adults. Relying on the defence of 'Asian Values', some particularly argue that 'gay rights are not human rights'.

There seems to be a general South/North or East/West divide (developing/developed) in the global debate on same-sex marriage. Using the 2017 Taiwanese case of *Cha-Wei Chi v Taipei*, reportedly 'the first same-sex marriage case in Asia', this paper explores the validity of the above cultural relativist argument against universal human rights.

Key Words

Same Sex Marriage – Taiwan – Asia – Universalism – Cultural Relativism

Introduction

Entitled the 'first-ever United Nations resolution in support of gay rights,'[1] the 2011 United Nations Resolution 17/19 (aka the South African Resolution) has received vehement opposition from 19 countries during its adoption.[2] One representative from Asia commented that LGBT rights have 'nothing to do with fundamental human rights.'[3] Mahathir, the returned incumbent Prime Minister of Malaysia–famous for his 'Asian Values' argument,[4] also commented recently that: 'In Malaysia there are some things we cannot accept, even though it is seen as human rights in Western countries … We cannot accept LGBT, marriage between men and men, women and women.'[5]

The universalism versus cultural relativism debate and the so-called 'Asian Values' are often raised by many Asian governments to defend their lack of human rights engagement in terms of the protection of sexual minorities or even to justify their violation of international human rights law. Kipling once said: 'East is East, and West is West, and never the twain shall meet'.[6] In his seminal *History of Sexuality,* Foucault also observed such East versus West attitudes and termed them *ars erotica* and *scientia sexualis.* In his view, whilst *ars erotica* is an eastern and ancient view of sex, *scientia sexualis* is western, modern and scientific. Is the 'Asian Values' claim applicable to all Asian countries? Is there really a cultural gap between

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[1] D Austin, 'Sexual Orientation and Gender Identity' (2012) 46 *Int'l Law* 447.

[2] UNHRC, UN Doc A/HRC/RES/17/19 (14 July 2011), 'Human Rights, Sexual Orientation and Gender Identity' in accordance with the 'Follow-up and implication of the Vienna Declaration and Programme of Action'. The 19 opposition votes are from Angola, Bangladesh, Cameroon, Djibouti, Gabon, Ghana, Jordan, Malaysia, Maldives, Mauritania, Nigeria, Pakistan, Qatar, Republic of Moldova, Russian Federation, Saudi Arabia, Senegal and Uganda. Burkina Faso, China and Zambia abstained.

[3] The Guardian, 'UN Issues First Resolution Condemning Discrimination against Gay People' (17 June 2011).

[4] S Lukes, *Moral Relativism* (Profile Books 2008) 99–100.

[5] Reuters, 'Malaysia Cannot Accept Same-Sex Marriage, Says Mahathir' (21 September 2018).

[6] R Kipling, 'The Ballad of East and West' in T.S. Elliot, *Rudyard Kipling's Verse* (Macmillan 1927) 268.

the East and West in terms of fundamental human rights? On 24 May 2017, the Grand Justices of Judicial *Yuan* (equivalent to Constitutional Court) in Taiwan, a non-UN member,[7] issued Interpretation No.748, aka *Chia-Wei Chi v Department of Civil Affairs of Taipei City*, indicating Taiwan's ambition to become the 'first country in Asia to legalise same-sex marriage'.[8] Regardless of the claim, this article intends to examine whether such an East/West and relativist/universalist division is still applicable in the digital age when information is rapidly transferred, translated, and transformed on a global scale.

In terms of theoretical basis, initially this research is, and has been, informed by the Rawlsian right-based theory of justice and Foucauldian critical analysis, particularly Foucault's engagement with human rights.[9] Nevertheless, it has turned to practical documentation of local voices following critical analysis of case law. Eventually a vernacular approach has been adopted.

The first section focuses on the relativity/universality debate. It is followed by the subsequent hybrid views and their localisation, particularly the 2017 Interpretation No. 748. Specific and recent cases, such as *QT v Director of Immigration* [2018] HKCFA 28 (Hong Kong), *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 (Singapore) and *Sun Wen Lin v Bureau of Civil Affairs of Chang Sha City* [2016] Xiang 01 Xing Zhong No. 462 (Mainland China), are also introduced to illustrate personal voices. The aim is to initiate a human rights culture in Asia via vernacularisation.

The Relativity/Universality Debate

[7] VY Weng and Y-M Hsu, 'Domestication of International Human Rights Norms in Taiwan: A Dialogue through Conventionality Review under Construction' (2017) 1 AYBHRHL 166.
[8] Benjamin Haas, 'Taiwan's Top Court Rules in Favour of Same-Sex Marriage', The Guardian (24 May 2017).
[9] B Golder, *Foucault and the Politics of Rights* (Stanford University Press 2015).

The relativity/universality debate has been a contentious point since its drafting by the 1948 Universal Declaration of Human Rights ('UDHR') committee. In order to reflect its universal claim, the committee chair Eleanor Roosevelt (US) was joined by René Cassin (France), Charles Malik (Lebanon), Penchun Zhang (China) and John Humphrey (Canada).[10]

Responding to the ambitious Declaration, the American Anthropological Association ('AAA') issued the *Statement on Human Rights* and cautioned that '[t]he history of the expansion of the western world has been marked by demoralization of human personality and the disintegration of human rights among the peoples over whom hegemony has been established.'[11]

Influenced by Franz Boas, the father of modern anthropology, the AAA statement emphasised the reminiscence of colonialism and imperialism. Consequentially it called for respect for diverse cultures of different human groups. Such a cultural relativist's position considers all points of views to be equally valid. Since ethical and political beliefs are related to an individual's cultural identity, 'the coercive imposition of one culture's norms on a foreign culture is morally illegitimate.'[12]

AAA's self-reflective position on its moral legitimacy is commendable. Moral relativism, 'the idea that the authority of moral norms is relative to time and place,' is inherently controversial and worthy of a separate discussion.[13] Nevertheless, respect for diversity does not necessarily have to imply moral relativism. The UDHR is a post WWII product and it reflects the Cold War division between the Eastern bloc and the Western world in the form of

[10] G Hua, 'From a Human Rights Controversy to Consensus on Human Rights: Zhang Penchun's Contribution to the Universality of Universal Declaration of Human Rights' (2016) 4 *China Legal Sci*. 30.
[11] American Anthropological Association, 'Statement On Human Rights' in HJ Steiner, P Alston and R Goodman, (eds.), *International Human Rights in Context* (3rd ed., OUP 2007) 528.
[12] A Wolman, 'National Human Rights Commissions and Asian Human Rights Norms' (2013) 3 AsianJIL 77.
[13] S Lukes, *Moral Relativism* (Profile Books 2008).

the first and second generations of human rights, i.e. civil-political and socio-economic rights, whilst the Western world focused more on the first generation and the Eastern bloc focused more on the second generation.[14] This two-prong approach is a political compromise under the banner of universal human rights.[15] Citing Mary Ann Glendon's historical investigation on Eleanor Roosevelt and the origin of the UDHR,[16] Louis E. Wolcher argues that '[t]he idea that the same human rights norm might be understood and applied differently by different cultures (i.e. in different language-games) was well understood by the framers of the [UDHR]'.[17] Wolman goes further to suggest that the UDHR can be seen as 'embodying the universalist worldview, and in fact universalism values are often seen as the theoretical prerequisite for the current local human rights system with international monitoring and enforcement mechanisms.'[18] In sum, universalism, whether moral or cultural, is not only understood by the framers, but also ambitiously proclaimed in the title of this international Magna Carta.

A similar relativist/universalist debate re-emerged during the 1990s with a different South/North (developing and developed) twist when some Asian governments ('South') were confident enough to challenge the traditionally West-centric, capitalist interpretation of universal human rights ('North').[19] As observed by Dianne Otto, the 1990s debate was 'often characterized as a struggle between "Western" and "Asian" values.'[20]

[14] 'The most basic rights from the 17th and 18th centuries were the rights to free political and economic activity and basic liberties; notably, emancipation of the slaves and the birth of democracy. These rights were basic at best and further developed in the second generation. The second generation included the protection of economic, social and cultural rights and legitimisation of the suffragette movement. They guarantee a certain basic standard of living and gave birth to the social welfare state…' See B Davies, 'Does it make sense for the law to confer rights on the environment?' (2011) 23(3) *ELM* 122.
[15] See Preamble of UDHR: 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.'
[16] MA Glendon, *A World Made New – Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House 2001).
[17] LE Wolcher, 'Cultural Diversity and Universal Human Rights' (2012) 43 *Cambrian L. Rev*. 44.
[18] Wolman (n.12).
[19] Y Onuma, 'In Quest of Intercivilizational Human Rights: Universal vs Relative Human Rights Viewed from an Asian Perspective' (2000) 1 *Asia-Pac. J. on Hum. Rts. & L.* 53.
[20] D Otto, 'Rethinking the Universality of Human Rights Law' (1997) 29 *Colum. Hum. Rts. L. Rev*. 1.

Using the 1993 Vienna World Conference on Human Rights and the 1995 Beijing Fourth World Conference on Women as examples, Otto suggests that 'the two sides of the debate are in agreement over certain fundamental points, despite the appearance of polarization and intense disagreement.'[21] Reading beyond the texts, she summarises that the debate was in fact 'fueled by competing versions of capitalism rather than by a desire to address issues of cultural diversity in human rights discourse.'[22] She therefore encapsulates that:

> deployment of the sameness/difference dualities of modernity by both sides of the debate furthers the interests of the elites of both camps rather than those of the non-elite majority … Consequently, neither side of the debate represents a transformative commitment to global multiplicity and antidiscipline. Instead, the debate is serving a variety of elite macroeconomic interests, and will continue to do so while articulated in modernity's dualistic terms.[23]

In order to provide constructive solutions, Otto proposes five strategies:

(1) Rejecting the universalising knowledge claims of modernity;
(2) Refusing the hierarchy of the generational development of human rights and insisting on their indivisibility;
(3) Replacing the myopic silencing of the language of dualistic alternatives with the consciousness of multiplicities and incommensurabilities;
(4) Decentering the nation-state in the global community; and
(5) Recognising the limits of law as a means of transformative change.[24]

Otto's critique of the misappropriated relativist-universalist debate is echoed by Yasuaki Onuma's deconstruction of universality. In his 2000 article, Onuma explores the fundamental question: are human rights universal?[25] Reflecting on Japan's imperialism and war crimes during WWII, he suggests seven steps from an equally Asian yet human rights compliant perspective. First, it should be recognised that human rights are only one of many ways to pursue the spiritual as well as material well-being of humanity. Although being one of many tools, the human rights mechanism is the most effective one as long as the modern system

[21] Otto (n 20) 6.
[22] Ibid.
[23] Otto (n 20) 7.
[24] Otto (n 20) 37.
[25] Onuma (n 19).

of sovereign nation-states still exists. Thirdly, in order to guarantee civil-political rights, a preceding or at least concurrent progress in socio-economic rights is necessary. After all, '[t]he very history of human rights in Western nations and in Japan demonstrates that the protection of civil and political rights can only go hand in hand with economic, social, and educational progress.'[26]

Historically speaking, like the governments of developed countries ('North') during their development and modernisation, the governments of developing countries ('South') are equally committing and will continue to commit human rights violations. Global monitoring of and encouragement to respect human rights are crucial. The contemporary human rights discourse is unarguably West-centric and foreign to many developing countries. It is natural that many of them are critical of such 'human rights diplomacy'. It is therefore important for the North to be equally critical of their own past and to appreciate non-Western and non-Christian cultures in order to conduct a meaningful dialogue. Finally, the human rights mechanism, far from perfect, is a living instrument. It has an aspirational nature and can be improved through constant reconceptualisation.

As the old legal proverb goes: 'before one starts to point fingers, make sure one's hands are clean'. Onuma's reflections coincide with the theoretical basis of the 2001 UNESCO Universal Declaration on Cultural Diversity. Article 4 states that '[n]o one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.' Despite such effort to establish universality on top of relativity, the dialectic South/North divide between individuals and their culture remains to affect international human rights discourse.[27]

[26] Onuma (n 19) 58.
[27] Wolcher (n 17).

In addition to lawyers, some of today's prominent anthropologists have also started to question the extreme form of cultural relativism. Jane K. Cowan, Marie-Benedicte Dembour and Richard A. Wilson contend that the relativist/universalist debate 'has reached an impasse'.[28] Elvin Hatch also proposes that, '[i]nstead of leaving culture as they are, as museum pieces, we should help to bring about change – or, better, we should help the oppressed to bring about change.'[29] Sixty years after the AAA Statement, historian Reza Afshari asserts: '[a]lmost all discussions that once populated the relativist niche have receded into background. The field is now crowded in the middle. Those who really deserve attention place their marker close to the universalist side.'[30]

This middle ground view is that cultural relativism and universalism cannot be considered independently.[31] Anthropologist/lawyer Sally Engle Merry succinctly puts it:

> rather than seeing universalism and cultural relativism as alternatives which one must choose, once and for all, one should see the tension between the positions as part of the continuous process of negotiating ever-changing and interrelated global and local norms.[32]

One representative narrative in this middle ground is Jack Donnelly's 'Relative Universality,'[33] a form of universalism that 'also allows substantial space for important (second-order) claims of relativism.'[34] This hybrid approach reflects the rejection of the over-simplistic binary view of relativism versus universalism. On the other side of this hybrid approach is Michael Goodhart's position of 'Neither Relative Nor Universal.'[35] Goodhart

[28] JK Cowan, M.-B. Dembour and RA Wilson (eds.), *Culture and Rights – Anthropological Perspectives*, (Cambridge University Press 2001) 5.
[29] E Hatch, 'Culture and Morality: The Relativity of Values in Anthropology' in Steiner, Alston and Goodman (n 11) 521.
[30] R Afshari, 'Relativity in Universality: Jack Donnelly's Grand Theory in Need of Specific Illustrations' (2015) 37 *Hum. Rts. Q.* 854.
[31] M-B Dembour, 'Following the Movement of a Pendulum: Between Universalism and Relativism' in JK Cowan, M-B Dembour and RA Wilson (eds.), *Culture and Rights–Anthropological Perspectives* (Cambridge University Press 2001) 56.
[32] S Merry, 'Human Rights and Gender Violence' in Steiner, Alston and Goodman (n 11) 525.
[33] J Donnelly, 'The Relative Universality of Human Rights' (2007) 28 *Hum. Rts. Q.* 281.
[34] J Donnelly, *Universal Human Rights in Theory and Practice* (3rd ed., Cornell Press 2013) 93.
[35] M. Goodhart, 'Neither Relative nor Universal: A Response to Donnelly' (2008) 30 *Hum. Rts. Q.* 183.

expresses his frustration on the wasted energy that scholars 'have worried too much that human rights might be relative and stained too hard to prove them universal.'[36] He suggests to leave this divisive rhetoric behind and instead emphasise their 'global appeal' which can improve the precision of legal analysis, make the legitimacy bases clearer and avoid misuse while simultaneously utilising 'the impetus for an ongoing reformulation of rights that adds to their inclusiveness and generality.'[37] Such deliberate distance from the relativist/universalist debate is shared by Vitit Muntarbhorn, the first UN Independent Expert on violence and discrimination based on sexual orientation and gender identity of the Human Rights Council, who suggests a humanist approach instead of a relative/universal one.[38]

The Arab Spring added a new lease of life to the old debate. Not entirely convinced by the pure academic discussion and 'grand theory,' Afshari cautions that 'hypothetical examples without references to specific human rights reports cannot be practically useful for monitoring and advocacy.'[39]

> Any defense of any conceivable position on the universalism-relativism spectrum can become persuasive only if the theoretical explorations are tightly interlaced with the critical assessments of the actual human rights violations that national and transnational human rights monitors have documented and analysed.[40]

Instead of grand theory, he recommends scholars to document the occurring violations and listen to the voices of victims of human rights violations. Using the example of Egypt during Arab Spring, he further suggests:

> Writing about affected lives, capturing their voices and, thus, giving substance to documentations – now in full display in the cyberspaces – ought to provide the backbone for any theory that our scholars construct. Those among the youth who click on a staggering number of websites, cataloguing and analyzing human rights violations, in so

[36] Goodhart (n 35) 193.
[37] Ibid.
[38] V Muntarbhorn, 'Asia and Human Rights at the Crossroads of the New Millennium: Between the Universalist and the Particularist?' in Robert G. Patman (ed.), *Universal Human Rights?* (Macmillan Press 2000) 81–92.
[39] Afshari (n 30) 854.
[40] Afshari (n 30) 856.

> many languages, are hardly attracted to the allure of theoretical foundations of human rights. In recent decades, their life experiences have set up a learning curve pointing toward the UDHR model as the most pertinent antidote to abuses… The collection is our hard drive – with international rubrics for registering these voices – that should remain immune to cultural relativist clatters, mild or raucous.[41]

There is an evolutive agenda in the human rights project: 'a traditional culture must change for the culture of human rights to emerge.'[42] Based on this pragmatic approach, the following case study documents such voices in Taiwan, a non-UN member and a Chinese-speaking jurisdiction under the 'soft, Confucian authoritarianism' in the digital age.[43]

A Vernacular Approach

In the West, the claim is generally valid that gender and sexuality diversity is a question of humanity.[44] Likewise, gay rights are universal human rights in most developing countries.[45] If the above claims are valid in the West, then sexual minorities elsewhere should equally enjoy the same universal human rights in theory. However, this hypothesis is far from reality, at least at present. The explanation to this conundrum is perhaps historical.

As noted by Onuma, it is irrefutable that the post-WWII modern human rights are historically Western and dominated by the North.[46] Through the civil rights movement, women's movement and gay rights movement, the expression of gay identity and sexual identities has been gradually incorporated into the sexually neutral language of rights in the

[41] Afshari (n 30) 912.
[42] Afshari (n 30) 879.
[43] Y. Ghai, 'Human Rights and Governance: The Asia Debate' (2000) 1 *Asia-Pac. J. on Hum. Rts. & L.* 9.
[44] D. Otto, 'Gender and Sexual Diversity: A Question of Humanity', (2016) 17 *Melb. J. Int'l L.* 477.
[45] Austin (n 1).
[46] Onuma (n 19).

West.[47] In order to transfer the universal value to the rest of the world, the relatively pragmatic Southern narratives deserve equal, if not more, attention on a global scale.[48]

Equivalently noteworthy are the non-legal perspectives. Merry indicates that the days of 'culture' being seen as residual cause or as holistic system have long gone.[49]

> Instead of seeing culture as referring to the integrated and relatively harmonious ideas and practices of a particular group, anthropologists increasingly see it as a repertoire of actions, practices and beliefs that are relatively flexible and open to change. … Culture provides the lens through which new institutions and practices are adopted and transformed.[50]

This is what she called 'vernacularisation' of universal human rights.[51] As noted by Wolman, similar concepts of human rights localisation are also shared by others such as Amitav Acharya,[52] who defines the displacement of a local cultural norm with foreign human rights norm as 'the active construction [of new norms] through discourse, framing, grafting, and cultural selection of foreign ideas by local actors, which results in the former developing significant congruence with local beliefs and practices.'[53]

It is undeniable that these local 'translators' of universal human rights lexicons, including political leaders, activists, academics, domestic courts, NGOs, and national/regional human rights organisations, are the key actors during such a vernacularisation process. Through the lens of human rights vernacularisation, the voices of these 'translators' from actual

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[47] Davies (n 14).
[48] Afshari (n 30).
[49] According to Geertz culture means 'a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate, and develop their knowledge about and attitudes toward life.' See Clifford Geertz, *The Interpretation of Cultures* (Basic Books 1973); Afshari (n 30).
[50] SE Merry, 'What Is Legal Culture – An Anthropological Perspective' (2010) 5 *J. Comp. L.* 40.
[51] SE Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans*, (University of Chicago Press 1990); SE Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press 2006). Also see Thomas Boellstorff, 'Dubbing Culture: Indonesian Gay and Lesbian Subjectivities and Ethnography in an Already Globalized World' (2003) 30 *American Ethnologist* 225.
[52] Wolman (n 12).
[53] A Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism' (2004) 58 *International Organization* 239.

real life human rights violations are documented in Brazil,[54] Latin America,[55] Sierra Leone,[56] South Africa,[57] India,[58] Pakistan,[59] Cambodia,[60] Indonesia,[61] Timor-Leste,[62] and even developed countries such as Norway,[63] Japan and Korea.[64] Inevitably these 'users' of human rights are mostly academics.[65] Nevertheless, there are also perspectives from NGOs working in the developing fields.[66] Through such process of vernacularisation, 'human rights language has been … transcending these circumstances since its worldwide appropriation,'[67] particularly in the digital age.

The above relativity (or diversity)/universality tension also exists between universal human rights and 'legal pluralism.'[68] Although legal pluralism and cultural relativity (or diversity) are two separate concepts, they share a similar respect of local differences. On the one hand, the universal human rights provide the minimum guarantee of human dignity of all human beings and there should be no compromise. The UDHR is an aspirational project and it

[54] C Fonseca, 'Inequality Near and Far: Adoption as Seen from the Brazilian Favelas' (2002) 36 *Law & Soc'y Rev*. 397.
[55] K Sikkink, 'Latin America's Protagonist Role in Human Rights' (2015) 22 *SUR – Int'l J. on Hum Rts*. 207.
[56] ASJ Park, 'Consolidating Peace: Rule of Law Institutions and Local Justice Practices in Sierra Leone' (2008) 24 *S. Afr. J. on Hum. Rts*. 536.
[57] C Himonga and F Diallo, 'Decolonisation and Teaching Law in Africa with Special Reference to Living Customary Law' (2017) 20 *Potchefstroom Elec. L. J.* 1.
[58] S Grinsell, 'Caste and the Problem of Social Reform in Indian Equality Law' (2010) 35 *Yale J. Int'l L*. 199.
[59] MS Hussain, 'History, Law and Vernacular Knowledge: The Threat to Women's Collective Representation under the Guise of Androgyny in Pakistan' (2016) 7 *King's Student L. Rev*. 64.
[60] H Charlesworth, 'Swimming to Cambodia Justice and Ritual in Human Rights after Conflict' (2010) 29 *Aust. YBIL* 1.
[61] N Johnstone, 'Indonesia in the REDD: Climate Change, Indigenous Peoples and Global Legal Pluralism' (2010) 12 *APLPJ* 93. Also see A Bedner and S van Huis, 'Plurality of Marriage Law and Marriage Registration for Muslims in Indonesia: A Plea for Pragmatism' (2010) 6 *Utrecht L. Rev*. 175.
[62] J Yogaratnam, 'A Review of the 2010 Domestic Violence Law in Timor-Leste' (2013) 8 *AsJCL* 1.
[63] A Dilwyn Fisher, 'Legal Pluralism and Human Rights in the Idea of Climate Justice' (2015) 2 *Oslo L. Rev*. 200.
[64] JW Shin, 'Coming out of the Closet: A Comparative Analysis of Marriage Equality between the East and West' (2017) 49 *N.Y.U. J. Int'l L. & Pol*. 1119.
[65] M Baumgartel, 'Perspective on the User: Unpacking a Concept for Human Rights Research' (2014) 8 *Hum. Rts. & Int'l Legal Discourse* 142.
[66] G Chillier and PB Timo, 'The Global Human Rights Movement in the 21st Century: Reflections from the Perspective of a National Human Rights NGO from the South' (2014) 20 *SUR – Int'l J. on Hum Rts*. 375.
[67] R Baldissone, 'A Contribution to a Western Genealogy of the Rights of Men and Incidentally, of Women' (2011) 34 *Austl. Feminist L.J*. 89.
[68] F von Benda-Beckmann and K von Benda-Beckmann, 'The Dynamics of Change and Continuity in Plural Legal Orders' (2006) 53 *J. Legal Pluralism & Unofficial L.* 1.

contains a blatantly humanist agenda. On the other hand, any legal reforms that 'fail to recognise and support the processes of social cohesion and mutual support that characterise vernacular systems are likely to have serious unintended consequences especially insofar as they distort power relations.'[69] David M. Engel provides his observation in Northern Thailand where local women have been left in the lacuna between 'tradition' and 'modernity.'[70] Such is the problem of placing universality and cultural relativity at the two ends of a spectrum without acknowledging the possibility of their coexistence. Like gender, this binary view creates a troubled gap in the middle.

To illustrate the process of vernacularisation of universal human rights in terms of sexual minorities, the discussion turns to Taiwan, one of several East Asian jurisdictions which is presumably affected by the 'soft, authoritarian Confucianism.'[71] The outcome of this vernacular exercise is embodied in the 2017 Grand Justices Interpretation No. 748 regarding the legalisation of same-sex marriage in Taiwan from the Grand Justices of the Judicial *Yuan*.[72]

Interpretation No.748, aka *Chia-Wei Chi v Department of Civil Affairs of Taipei City*, indicates Taiwan's ambition to become the 'first country in Asia to legalise same-sex marriage'. The Grand Justices first clarified that traditionally 'the provisions of Chapter 2 on Marriage of Part IV on Family of the Taiwan Civil Code do not allow two persons of the same sex to create a permanent union of intimate and exclusive nature for the purpose of living a common life.' After heightened scrutiny from legal, cultural, societal and medical discourses, the majority of the Grand Justices decided that such provisions 'are in violation of constitution's guarantees of

[69] SM Weeks and A Claassens, 'Tensions between Vernacular Values that Prioritise Basic Needs and State Versions of Customary Law that Contradict Them – We Love These Fields that Feed Us, But Not at the Expense of a Person' (2011) 22 *Stellenbosch L. Rev*. 823.
[70] DM Engel, 'The Uses of Legal Culture in Contemporary Socio-Legal Studies: A Response to Sally Engle Merry' (2010) 5 *J. Comp. L*. 59.
[71] Ghai (n 43) 10.
[72] Grand Justices Interpretation No. 748. Equivalent to a constitutional court judgment< https://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=748 > accessed 2 July 2018.

both the people's freedom of marriage under Article 22 and the people's right to equality under Article 7.'[73]

This decision did not come without complication. Taiwan withdrew from UN before China's accession in 1971. Its Constitution, being drafted around the same time as UDHR and ICCPR, understandably lacks specific protection of sexual orientation and gender identity. Despite its *sui generis* status, Taiwan voluntarily adopted a simulation system of international human rights treaty monitoring exercise in 2009 and published its first national report in 2012.[74] Vivianne Yen-ching Weng and Yao-ming Hsu are in the view that the '[i]ntegration of international human rights norms into its domestic legal system does not necessarily require a contracting party status at the international level.'[75] Commenting on Taiwan's self-established, on-site, UN-type treaty review and focusing particularly on the abolishment of death penalty and legalisation of same-sex marriage, Yu-Jie Chen also comments that: '[the simulation monitoring] is an example of local actors claiming ownership over a human rights project while making the most of global norms, expertise and other resources despite exclusion from the UN regime.'[76]

Whether or not the Taiwanese same-sex marriage legalisation is initially a move of 'human rights diplomacy' orchestrated by the government to increase its international profile, the local 'users' such as academics, activists, and NGOs, took over the 'local-global co-ownership of international human rights project' to vernacularise the international human rights norms on sexual minorities in Taiwan.[77]

[73] Article 22, Constitution: 'All other freedoms and rights of the people that are not detrimental to social order or public welfare shall be guaranteed under the Constitution.' Article 7: 'All citizens of the Republic of China, irrespective of sex, religion, ethnic origin, class, or party affiliation, shall be equal before the law.'
[74] Weng and Hsu (n 7).
[75] Ibid, 169.
[76] Y-J. Chen, 'Localizing Human Rights Treaty Monitoring: Case Study of Taiwan as a Non-UN Member State' (2018) 35 *Wis. Int'l L.J.* 277, 288.
[77] Ibid.

For example, Interpretation No. 748 specifically recognises Chia-Wei Chi's 30-year activism for he 'has been appealing to the legislative, executive, and judicial departments for the right to same-sex marriage.'[78] Despite the lack of legal recognition, individual attempts to conduct nominal same-sex weddings never cease to exist.[79] In addition to individual effort, institutional initiatives of legalising same-sex marriage go far back as 2005/2006 although with little success until the establishment of Taiwan Alliance to Promote Civil Partnership Rights (TAPCPR) in 2009. TAPCPR is the first organisation dedicated to marriage equality in Taiwan.[80] Sensitive to the feminist critique that same-sex marriage could have become a heteronormative Gold Standard and potentially marginalised other models of living so as to 'limit the ability to imagine alternative forms of living,'[81] the founders of TAPCPR, being self-identified queer feminists, intend to bridge the two communities of women and LGBT.[82]

The timing for legalising same-sex marriage in Taiwan through the judicial branch finally arrived in 2016/17. The 2017 Interpretation No. 748 was published after the second simulation human rights treaty review.[83] The government was given two years of grace period to implement relevant laws and regulations in accordance with the Interpretation. Should the government fail to amend or enact such laws by 24th May 2019, registration of same-sex unions shall become automatic.

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[78] See Grand Justice Interpretation No. 748, para 10. Also see C.-W. Chi (祁家威), 'Why Should Same-Sex Marriage Be Allowed (為何該許同姓相婚)' (2014) *Jan Taiwan Bar Journal* 47.

[79] S. B. Boyd, '"Marriage Is More Than Just a Piece of Paper": Feminist Critiques of Same Sex Marriage' (2013) 8 *NTU L. Rev*. 263.

[80] V. H.-W. Hsu, 'Colors of Rainbow, Shades of Family' (2015) 16 *Geo. J. Int'l Aff*. 154.

[81] Boyd (n 79) 275.

[82] Hsu (n 80) 156. 'Leaders of TAPCPR, who self-identify as "queer, feminist women," were once long-term participants in the Taiwan women's rights movement. Another long-term advocate in the women's rights movement, legislator Yu Mei-nu was a key supporter of the proposal of the "Marriage Equality" bill and its initial review in the Legislative Yuan on 22 December 2014. In other words, leaders of the TAPCPR, who previously served in the Taiwan women's rights movement, serve as a bridge between these two movements'.

[83] Chen (n 76).

This vernacular experience in Taiwan has demonstrated how local sexual minorities and civil society adopt cultural, social, political and legal identities on a global scale through connecting their own local experiences to the universal struggle. Through such transferable experience, they acquire different ways of understanding themselves, layering new identities on to their existing ones.[84] The 'global' element in this local vernacular exercise requires some reading between the lines. For example, in terms of the lack of specific protection of sexual orientation and gender identity in the original Article 7 of the Constitution, the Grand Justices followed the practice in the 1994 UN Human Rights Committee case *Toonen v Australia* and read 'sexual orientation' into 'sex.'[85] Although the borrowing of equality and due process arguments from foreign cases was less apparent in the text of the Interpretation, the Grand Justices specifically cited *Obergefell v Hodges* and the declassification of homosexuality as a mental disease in the 1990 World Health Organisation (WHO) International Classification of Diseases and Related Health Problems in the footnotes to reinforce the medical discourse utilised to justify their decision.[86] Local lawyers who are familiar with Rawls can also identify the link between the equality argument and the concept of fairness as justice in a constitutional democratic society.[87] Such a 'bottom up' civil movement undoubtedly employs 'the right-based litigation as a strategy of social movement'.[88]

Regarding the usual suspect of Confucianism influence,[89] there was no such trace in the majority opinion. Instead, it appeared in the Dissenting Opinion by Grand Justice Chen-Huan

[84] Merry (n 50).
[85] *Toonen v Australia* (488/1992), UN Doc. CCPR/C/50/D/488/1992 (1994). See P. Gerber and J. Gory, 'The UN Human Rights Committee and LGBT Rights: What Is It Doing – What Could It Be Doing' (2014) 14 *Hum. Rts. L. Rev.* 403.
[86] *Obergefell v Hodges*, 576 U.S. (2015); (2015) 41 BHRC 160. See R Robson, 'Justice Ginsburg's Obergefell v Hodges' (2016) 84 *UMKC L. Rev*. 837.
[87] H-C Wei, 'Using Rawls' Principles of Justice to Examine the Possibility of Same-Sex Marriage' (2016) National Taipei University LLM Dissertation. Also see J. Rawls, *Political Liberalism* (Columbia University Press 2005).
[88] Weng and Hsu (n 7).
[89] J Chia, 'Piercing the Confucian Veil: Lenagan's Implications for East Asia and Human Rights' (2012) 21 *Am. U. J. Gender Soc. Pol'y & L*. 379. Also see H Lau, 'Sexual Orientation: Testing the Universality of International Human Rights Law' (2004) 71 *U. Chi. L. Rev*. 1698.

Wu.[90] Using a strictly textual interpretation of *Joslin v New Zealand*,[91] Wu considered the wording of 'men and women' in UDHR Art. 16 and ICCPR Art. 23(2) to be limited to one man and one woman only. Commenting on the European Court of Human Rights ('ECtHR') jurisprudence such as *Schalk and Kopf v Austria*,[92] he also upheld the constitutionality of the current heteronormative marriage between one man and one woman exclusively. Relying on the figures of UN members legalising same-sex marriage (21 out of 193, roughly 10 per cent), he also proclaimed that 'same-sex marriage is not universal human rights (同性婚姻不是普世保障之人權).'[93] In terms of reproduction, he ignored the majority opinion and justified the differential treatment between different-sex couples and same-sex couples. In his view, courts were not the appropriate fora to change the historical institution of marriage. Citing a series of post-*Schalk* ECtHR cases,[94] he emphasised the importance of the 'deep-rooted social and cultural connotations which may differ largely from one society to another.'[95] Using a narrative akin to the margin of appreciation principle,[96] he proposed to solve this issue with a referendum.

The Chinese proverb that 'even the wisest judge cannot adjudicate family disputes' is perfect to summarise the situation and yet at the same time poignant.[97] One of the aims of

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[90] Dissenting Opinion in Interpretation No. 748 by Grand Justice Chen-Huan Wu (吳大法官陳鐶提出之不同意見書) < https://www.judicial.gov.tw/constitutionalcourt/p03_01_1.asp?expno=748> accessed 5 July 2018.
[91] *Joslin v New Zealand* (902/1999), UN Doc. CCPR/C/75/D/902/1999. See Gerber and Gory (n 77).
[92] *Schalk and Kopf v. Austria* (2011) 53 EHRR 20.
[93] See Dissenting Opinion of Grand Justice Chen-Huan Wu (n 90), Reason 3, page 7.
[94] *Vallianatos v Greece* [2013] ECHR 29381/09 and 32684/09; *Hämäläinen v Finland* [2014] E.C.H.R 37359/09; [2015] 37 BHRC 55; *Chapin and Charpentier v France* [2016] E.C.H.R. 40183/07 and *Oliari and Others v Italy* (2017) 65 EHRR 26.
[95] See Dissenting Opinion of Grand Justice Chen-Huan Wu (n 90), Reason 2(1), pp 4-5.
[96] Under the ECtHR jurisprudence, the respect for national or cultural difference and its conflict with universalism often reflects in the application of the Margin of Appreciation ('MoA') doctrine. See J. Gerards, 'Case Law of the European Court of Human Rights' (2018) 18(3) HRLR 495. Shany, the incumbent chair of the UN Human Rights Committee ('UNHRC'), also argues on his academic rather than official capacity that the MoA equivalence or substitute has been adopted in UNHRC cases. See Y. Shany, 'All Roads Lead to Strasbourg?: Application of the Margin of Appreciation Doctrine by the European Court of Human Rights and the UN Human Rights Committee' (2018) 9(2) J Int. Disp. Settlement 180. Worth noting is that Gerards argues that the MoA paradigm has shifted to incrementalism within the ECtHR in recent.
[97] J Chia (n 89).

human rights law is to counter-balance the possible problems created by popular votes against minorities in any given democracy. Notwithstanding Justice's Wu's dissent, human rights is not and should not be a numbers game. The mechanism of constitutional or judicial review directly addresses the potential majoritarian vice. Furthermore, the dissent's intentional disregard of *Joslin*'s critique of not being 'good law' reflects the complication of this ongoing debate at a global level.[98] Whilst Grand Justice Wu selectively focuses on a few outdated ECtHR cases, he also fails, either intentionally or unintentionally, to mention the development in the Court of Justice of the EU (CJEU). This lack of engagement with the most recent jurisprudence from both ECtHR and CJEU is particularly confusing when both European courts have recently released some forward-thinking decisions which will be discussed in the next section.[99]

In April 2018, Taiwan's Central Election Commission accepted two anti-same-sex-marriage proposals for referendum. If around 280,000 signatures (equate to 1.5 percent of the eligible voters) are collected, the referendum will be held in Taiwan. By then, hopefully the situation will be clearer to see whether human rights progress is really 'two steps forward, one step back'.[100]

In terms of referendum, perhaps something can be learned from Ireland. On 22 May 2015, Ireland became the first country to approve same-sex marriage by popular vote, followed by the 34th Amendment of the Constitution.[101] Against the strong religious background, the

[98] P Gerber, K Tay and A Sifris, 'Marriage: A Human Rights for All' (2014) 36 *Sydney L. Rev*. 643.
[99] *P.B. & J.S. v Austria* (2012) 55 EHRR 31*; Taddeucci & McCall v. Italy* [2016] ECHR 51362/09. Also see C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* (2008) 2 CMLR 32; C-13/94; and C-673/16 *Coman & Hamilton v Romania* [2018].
[100] R Drillsma, 'Judicial Yuan SG: Constitutional Court Ruling on Same-Sex Marriage Cannot Be Overridden by Referendums', *Taiwan News* (29th November 2018). Eventually, the same-sex marriage was rejected in the 24th November 2018 referendum but Taiwan's Judicial Yuan Secretary General Lu Tai-lang publicly announced on the 29th November 2018 that the passage of anti-equality referendums cannot override Interpretation No.748.
[101] M Harding, 'Marriage Equality: A Seismic Shift for Family Law in Ireland' (2016) *Int'l Surv. Fam. L*. 255.

Irish marriage equality movement also started with an individual lawsuit.[102] As most human rights lawyers could possibly profess, behind each individual case there is a personal story.[103]

If history is indicative, the proposed referendum in Taiwan to overturn Interpretation No.748 may be an opportunity for the sexual minorities and civil society to once again engage with the wider general public and to consolidate the learned human rights lessons. This challenge may trigger the whole society to rethink marriage, family, adoption, education, religion, culture, and most importantly, equality and human dignity.

The Next Stop?

One question deserves further investigation during the discussion of relativity/universality: should economic progress be built on the disenfranchisement of civil political rights?[104]

The 1993 Vienna Declaration and Programme of Action states that 'all human rights are universal, indivisible, and interdependent and interrelated'. The legal recognition of same-sex relationship is no exception: it has civil-political elements as well as socio-economic ones. This can be observed in the following cases in other Chinese-speaking jurisdictions of Hong Kong, Singapore and Mainland China.

Despite the increasing influence from Mainland China, Hong Kong courts in general 'have been the primary driver of LGBT rights.'[105] Following the Common Law tradition, 'Hong Kong lawyers and judges are adept at applying international norms when assessing the

[102] *Zappone v Revenue Commissioners* [2006] IEHC 404.
[103] AL Gilligan and K Zappone, *Our Lives Out Loud: In Pursuit of Justice and Equality* (The O'Brien Press 2008).
[104] Onuma (n 19).
[105] JL Chia and A Barrow, 'Inching towards Equality: LGBT Rights and the Limitations of Law in Hong Kong' (2016) 22 *Wm. & Mary J. Women & L.* 303.

constitutionality of Hong Kong statutes and government actions that discriminate on the ground of sexual orientation.'[106] These claims are once again proven valid by a recent case that made international headline concerning resident permit, a socio-economic yet simultaneously civil-political issue, as well as private international law.

On 4th July 2018, after four years of high-profiled legal proceeding, a British national QT was finally granted the right to reside in Hong Kong as a spousal dependant of her same-sex partner SS who was both South African and British.[107] QT and SS entered into a civil partnership in England in 2011.[108] Soon afterwards, SS obtained employment in Hong Kong with an employment visa. QT entered Hong Kong with SS as a visitor. In 2014, QT submitted her application for a dependant visa and it was rejected by the Director of Immigration because QT's relationship with SS was 'outside the existing policy' which admitted a spouse as a dependant only if he or she was a party to a monogamous marriage consisting of one male and one female. QT's discrimination claim based on sexual orientation was dismissed by the HK Court of First Instance. After her appeal, the HK Court of Appeal unanimously allowed QT's appeal and considered the discrimination claim valid.[109] Subsequently the Director filed an appeal to the HK Final Court of Appeal but it was rejected. Eventually, the HK Court of Appeal decision stayed.

From a comparative point-of-view, *QT* is equivalent to the ECtHR decision of *Taddeucci and McCall v Italy.*[110] The CJEU took a similar view in *Coman & Hamilton v Romania* where legally married same-sex couples have the same residency rights as

[106] CJ Petersen, 'Sexual Orientation and Gender Identity in Hong Kong: A Case for the Strategic Use of Human Rights Treaties and the International Reporting Process' (2013) 14 *APLPJ* 28.
[107] *QT v Director of Immigration* [2018] HKCFA 28.
[108] Civil Partnership Act 2004, c.33.
[109] *QT v Director of Immigration* [2017] CACV 117/2016.
[110] *Taddeucci & McCall v. Italy* [2016] ECHR 51362/09. See N Koffeman, 'Taddeucci and McCall v Italy: Welcome Novelty in the ECtHR's Case-Law on Equal Treatment of Same-Sex Couples' < https://strasbourgobservers.com/2016/07/27/taddeucci-and-mccall-v-italy-welcome-novelty-in-the-ecthrs-case-law-on-equal-treatment-of-same-sex-couples/> accessed 6 July 2018.

heterosexual spouses under the EU freedom of movement principle even if the same-sex marriage is not legally recognised in the country they move to.[111]

In addition to international compliance, the significance of *QT* is not only socio-economic but also civil-political. In terms of socio-economic right, the business case of equality is made clear. *QT* received the support from 15 banks, 16 law firms and Amnesty International.[112] They publicly backed QT and argued diverse hiring practices was required in order to attract top talent and this was acknowledged by the court.[113] In terms of civil-political right, Hong Kong's judiciary system once again proved that the minimum protection of fundamental rights was maintained after Mainland China's takeover in 1997.

With cautious optimism, the *QT* effect remains to be observed. A month before the success of *QT*, another case received a defeat in HK Court of Appeal – *Leung Chun Kwong.*[114] Leung, a civil servant, applied for spousal benefits for his British partner and his application was rejected because their lawful marriage in New Zealand was not recognised in Hong Kong. Consequentially, his legally wedded partner was not considered as his 'spouse.'[115] As of writing, *Leung* is still pending in the HK Final Court of Appeal.

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[111] C-673/16 *Coman & Hamilton v Romania* [05.06.2018]. In *Coman*, the CJEU clarified the freedom of movement issue of the same-sex spouse of an EU citizen. Nevertheless, the issue of the same-sex 'registered partner' of an EU citizen, e.g., the UK Civil Partnership, remains unresolved. See A. Tryfonidou, 'Awaiting the ECJ Judgment in Coman: Towards the Cross-border Recognition of Same-Sex Marriage in the EU?' (5 March 2017), < http://eulawanalysis.blogspot.com/2017/03/awaiting-ecj-judgment-in-coman-towards.html> accessed 6 July 2018.

[112] BBC, 'British Lesbian QT Wins Right to Hong Kong Spouse Visa' (4 July 2018) < https://www.bbc.co.uk/news/world-asia-44707333> accessed 6 July 2018.

[113] *QT v Director of Immigration* [2018] HKCFA 28, para. 16.

[114] *Leung Chun Kwong v Secretary for the Civil Service* [2018] HKCA 318. See The Chief Justice's Foot Blog, 'Societal Consensus Resurrected? Leung Chun Kwong in the Court of Appeal' < https://thechiefjusticesfoot.wordpress.com/2018/06/03/societal-consensus-resurrected-leung-chun-kwong-in-the-court-of-appeal/ > accessed 6 July 2018.

[115] *Leung Chun Kwong v Secretary for the Civil Service* [2017] HKCFI 736 (28 April 2017). Also see *Infinger v Hong Kong Housing Authority* (HCAL2647/2018, unpublished). In *Infinger*, the Housing Authority rejected the applicant's application for public rental housing because same-sex couples are not qualified as 'ordinary family' according to the Authority's policy. In terms of housing, see ECtHR cases such as *Karner v Austria* (2004) 37 EHRR 24 and *Kozak v Poland* (2010) 51 EHRR 16 as well as the UK case of *Mendoza v Ghaidan* [2004] UKHL 30.

Residency and spousal benefits are fundamental socio-economic issues for any couple, same-sex or not. In the ECtHR, similar cases such as *P.B & J.S* concerning social security has been examined.[116] In the CJEU, there was also *Maruko* concerning pension rights for the surviving spouse.[117] In the U.S., *Windsor* can also provide some reference in terms of tax.[118] As suggested by Onuma previously, these preceding or concurrent socio-economic cases provided the basis for civil-political rights advancement.

The shared colonial past and common law system of Hong Kong and Singapore provide an opportunity for comparative study.[119] Originally the 'Asian values' debate can be traced back to the 1993 Word Conference on Human Rights in Vienna.[120] The governments of Singapore, China and Malaysia argued that the denial of political liberty and basic civil rights helped to stimulate economic growth.[121] Whilst other governments, such as India, Japan and South Korea, insisted that it was neither justifiable nor appropriate to deny some human rights in order to guarantee others.[122] This 'elitist' governmental debate explains the background of Otto's comment regarding universalism/relativism and Onuma's alternative Asian perspective of human rights.

The 'Asian values' debate can be further illustrated by the Singaporean anti-sodomy law, Penal Code Section 377A which criminalises private and consensual male-to-male sex. Homosexual criminalisation such as §377A in Singapore, Malaysia and India is a colonial

[116] *P.B. & J.S. v Austria* (2012) 55 EHRR 31.
[117] C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* (2008) 2 CMLR 32.
[118] *U.S. v Windsor*, 570 U.S. 744 (2013).
[119] LJ Chua and M Hor, 'The Life and Future of British Colonial Sexual Regulation in Asia' (2016) 46 *Hong Kong L.J.* 1.
[120] C Tomuschat, *Human Rights – Between Idealism and Realism* (2nd ed., OUP) 89.
[121] For example, Lee Kuan Yew once said: 'I am often accused of interfering in the private lives of citizens. Yet, if I did not…, we wouldn't be here today… we would not have made economic progress.' C Tremewan, *The Political economy of social control in Singapore* (Macmillan Press 1994) 2.
[122] J Donnelly, *Universal Human Rights In Theory & Practice* (2nd ed. Cornell University Press) 112.

legacy.[123] Back home in the UK and Europe, homosexual criminalisation has become a non-issue since *Dudgeon*.[124] At UN level, the decriminalisation in *Toonen* also sets the international benchmark.[125] Nevertheless, the Anglican legacy of homosexual criminalisation still lingers in the Commonwealth.[126] Under the Singaporean 'Lee thesis' style post-colonial paternalism or 'Authoritarian Capitalism,' §377A continues to regulate the sex and love of post-colonial gays.[127] Cases such as *Lim Meng Suang* make Singaporean gays 'unarrested criminals.'[128]

Using examples of postwar Japan and Germany, South Korean and Taiwan in the 1970's, and the more recent Brazil and India, economist Amartya Sen suggests that the post-colonial, paternalistic and capitalist method adopted by Singapore is not the only formula for economic development. Like Onuma, Sen also deems that there is no justification to sacrifice human rights in order to gain success. He even proclaims: 'developing and strengthening a democratic system is an essential component of the process of development' sustainably.[129] Both Sen and Onuma's observations bring the discussion of development versus human rights to China, a growing economic superpower with space for human rights improvement.

Afshari observes that 'the Chinese are enthusiastically embracing anything Western but are not ready to adopt Western-style democracy.'[130] 'Ready' is the keyword here. After being internationally criticised following the 1989 Tiananmen Square protests, the Chinese

[123] D Panditaratne, 'Decriminalizing Same Sex Relations in Asia: Socio-Cultural Factors Impeding Legal Reform' (2016) 31 *Am. U. Int'l L. Rev*. 171. Also see S Chang, 'Legacies of Exceptionalism and the Future of Gay Rights in Singapore' (2016) 46 *Hong Kong L.J.* 71.
[124] *Dudgeon v UK* (1981) 4 EHRR 149; *Norris v Ireland* (1991) 13 EHRR 186; *Modinos v Cyprus* (1993) 16 EHRR 485; and *Lawrence v Texas*, 539 U.S. 558 (2003).
[125] *Toonen v Australia*, Communication No.488/1992, UN Doc. CCPR/C50/D/488/1992.
[126] M Kirby, 'Legal Discrimination against Homosexuals – A Blind Spot of the Commonwealth of Nations?' (2009) 1 *EHRLR* 21.
[127] A Sen, 'Human Rights and Asian Values' (Carnegie Council on Ethics and International Affairs 1997); Sixteenth Morgenthau Memorial Lecture on Ethics & Foreign Policy. See also C. Kingle, *Singapore's Authoritarian Capitalism* (The Locke Institute 1996).
[128] JT-T Lee, 'The Limits of Liberty: The Crime of Male Same-Sex Conduct and the Rights to Life and Personal Liberty in Singapore: Lim Meng Suang v Attorney-General [2015] 1 SLR 26' (2016) 46(1) *Hong Kong L. J*. 49. Also see JL Neo, 'Equal Protection and the Reasonable Classification Test in Singapore: After Lim Meng Suang v Attorney-General' (2016) *Sing. J. Legal Stud*. 96.
[129] A Sen, *Development as Freedom* (OUP 1999) 147.
[130] Afshari (n 30) 876.

government has discovered 'human rights diplomacy' as a counter-discourse against its critique. Since 1991, it has been publishing its own whitepapers, *Human Rights in China*. In response to the *Country Reports on Human Rights Practices* issued by the U.S. State Department, the Beijing government also published a report on the U.S. violation of human rights in 2017.[131] Nevertheless, no policy regarding protection of sexual minorities is mentioned in the white papers or China's 2013 Universal Periodic Review report to the UN Human Rights Council.[132]

Although homosexuality was decriminalised in 1997 and removed from the official list of mental disorder in 2001, most sexual minorities refrain from publicly discussing their sexual orientation or gender identity in China.[133] The government claims that antidiscrimination measures to protect sexual minorities are 'implemented' but this is challenged by several NGOs.[134] One issue being discussed often by the media is marriage fraud amongst the lesbian and gay community due to societal discrimination and pressure to conform to family expectations.[135] A more recent issue is conversion therapy.[136]

In terms of academic discussion, monographs and journal articles published in Mandarin Chinese are available but not easily accessible due to the language barrier.[137] Online

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[131] Xinhua, *Human Rights Record of the United States in 2017*, < http://www.xinhuanet.com/english/2018-04/24/c_137134060.htm> accessed on 10 July 2018.
[132] Human Rights Council, *Universal Periodic Review – China*, A/HRC/WG.6/17/CHN/1 (22 October 2013).
[133] US. Department of State, *The U.S. Congress Reports on China* (2010 and 2017).
[134] ILGA et al, *Shadow Report of the 2013 Universal Periodic Review - China*. Accessed at << https://ilga.org/wp-content/uploads/2016/02/Outcomes-of-the-17th-UPR-session-Final-adoption-Country-Reports-UN-Human-Rights-Council-25th-session.pdf>> on 10 July 2018.
[135] DK Tatlow, 'Shining a Light on Gay-Straight Marriages in China' (The New York Times Blog) < https://sinosphere.blogs.nytimes.com/2015/05/13/shining-a-light-on-gay-straight-marriages-in-china/ > accessed 10 July 2018.
[136] US. Department of State, *The U.S. Congress Reports on China* (2017).
[137] H-F Guo, *Homosexuality from Chinese Legal Perspective (中國法視野下的同性戀)* (Intellectual Property Publishing 2007); D Zhou, *Pleasure and Discipline: Jurisprudential Imagination of Same-Sex Desire in Chinese Modernity (愛悅與規訓-中國現代性中的同性慾望的法理想像)* (Guangxi Normal University Press 2009); J-C Xiong, *On the Legal Recognition of Civil Partnership (同性結合法律認可研究)*, (Law Press China 2010); P Ma, *Constitutional Thinking of Homosexuality (同性戀問題的憲法學思考)* (Law Press China 2011); X-F Guo, 'Discrimination Unproven – The Relationship between Sexual Orientation Discrimination and Sexual Discrimination (論性傾向歧視和性別歧視的關係)' (2011) 3 *Law and Social Development* 105; Y-L Xia, 'A

discussion is also observed in Chinese social media but cyberspace freedom in China is a general concern.[138] The most notable work can be attributed to Li Yinhe, a sociologist, sexologist and LGBT+ activist.[139] Since 2003, Li has repeatedly attempted to bring the issue of same-sex marriage before both of China's representative bodies (the National People's Congress and the Chinese People's Political Consultative Congress). Under the unofficial 'don't ask don't tell' policy, there has been no significant progress.

Perhaps the government's reluctance to actively engage with the same-sex marriage debate can be found in judicial decisions. The *Sun Wen Lin* case provides such an example.[140] In 2015, Sun and his partner Hu applied for marriage registration in Changsha City, Hunan Province. It was rejected by the local government and the couple filed an appeal. Confirming that marriage in China required a man and a woman, their appeal was denied by the court of second instance. Despite the legal failure and lack of legal recognition, reportedly Sun and Hu conducted a ceremony on 17 May 2016. According to them, this was only the first wedding of a hundred and they had also proposed their own version of civil code amendment to include same-sex marriage.[141]

Encouraged by Taiwan's Interpretation No.748, Li comments:

> I think the meaning of this move is tremendous. In the past, the same-sex marriage narrative has been relying on those twenty or so Western European and Norther American countries which have legalised same-sex marriage. People say the Western sex culture is not like ours. Their social custom is not like ours. These are all excuses. If Taiwan can legalises same-sex marriage, then it proves that same-sex marriage can

Legislative Study of the Marriage and Family Chapter in PRC Civil Code (民法分则婚姻家庭编立法研究')' (2017) 3 *China Legal Science*.

[138] See Zhihu, 'How to See Same-Sex Marriage Legalisation (如何看待同性婚姻合法化)' < https://www.zhihu.com/question/19932017> accessed 10 July 2018.

[139] J Balzano, 'Toward a Gay-Friendly China: Legal Implications of Transition for Gays and Lesbians' (2007) 16 *Law & Sexuality: Rev. Lesbian, Gay, Bisexual & Transgender Legal Issues* 1.

[140] See *Sun Wen Lin v Bureau of Civil Affairs of Chang Sha City* [2016] Xiang 01 Xing Zhong No.462.

[141] '100 Tongzhi Wedding – The First One: Sun Wen Lin and Hu Ming Liang (Hunan Changsha)' < http://pingjia.lgbt/zh/?p=240 > accessed 27 November 2018.

> be accepted by Chinese culture and in Chinese societies. I think this is a particularly great encouragement for Chinese *tongzhi*. It means that if Taiwan can, so can we.[142]

Such narrative that 'if Taiwan can, so can we' should not be underestimated. It is the proof of effective human rights acculturation which provides an alternative to the traditional methods of coercion and persuasion from the outside, e.g., naming and shaming.[143] Acculturation requires self-reflection, self-initiation and self-determination. The problem is, acculturation is a process of change and change takes time. 'Justice delayed is justice denied.' How many stories like the death of Jacques Picoux do the civil society still have to witness?[144] How can the governments escape from their positive obligation to protect their own citizens?

Conclusion

The 'clean hand' principle dictates that we must reflect on our own situation before we point fingers at others. In the UK, although equal marriage/civil partnership is now applicable in England, Wales and Scotland particularly after the 2018 UK Supreme Court decision to allow different-sex couples to enter civil partnership, marriage is still an aspiration for same-sex couples in Northern Ireland.[145] Within Europe, legislations in terms of equal marriage also require harmonisation. Globally, although equal marriage has been accepted in many UN

[142] Phoenix TV, 'Li Yinhe: Realisation of Same-Sex Marriage in Taiwan Is an Inspiration to Chinese Lesbians and Gays (李銀河:台灣實現同性婚姻合法對大陸同性戀是鼓舞)' < http://phtv.ifeng.com/a/20170526/44626351_0.shtml > accessed 10 July 2018.
[143] R Goodman and D Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54 *Duke L. J.* 621.
[144] N Smith, 'Professor's Death Could See Taiwan Become First Asian Country to Allow Same-Sex Marriage', (*The Guardian*, 28 October 2016) < https://www.theguardian.com/world/2016/oct/28/professors-death-could-see-taiwan-become-first-asian-country-to-allow-same-sex-marriage > accessed 10 July 2018.
[145] *Steinfeld and Keiden v Secretary of State for Education* (2018) UKSC 32.

member states following a teleological interpretation of ICCPR Article 23(2), *Joslin* remains to be the existing UN authority regarding the application of Article 23(2) to same-sex couples. Before its repeal, bad law is still law.

As we have seen, the relativity/universality binary division is often used by governments to justify elitist interests. Nevertheless, governments cannot be equated with civil societies. Amongst fevered political languages and fake news, the 'hard drive activism' forms a reverse discourse against grand theories and propaganda. The civil society in Taiwan has proven that even if their government is not part of the official UN mechanism, its people, particularly the vulnerable minorities, still form part of the international citizenship. The 'if Taiwan can, so can we' narrative is useful to vernacularise the universal human rights culture in other societies such as China. The personal struggles in Hong Kong and Singapore also indicate the pragmatic side of this battle: both civil-political rights and socio-economic rights are equally important during this process of acculturation. 'People's suffering must never be allowed to remain the silent residue of politics.' [146] Eventually it is the duty of every international citizen to challenge the *status quo* until it falls.

[146] M Foucault '*Face aux Gouvernements, les Droits de l'Homme*' (1984) 968 *Libération* 22. Also see J Whyte, 'Human Rights: Confronting Governments? Michel Foucault and the Right to Intervene' in M Stone, I rua Wall, & C Douzinas (eds.) *New Critical Legal Thinking: Law and the Political* (Routledge 2012) 11.