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QUEERING ASIAN VALUES

ERICH HOU*

*One of the often-raised arguments against the global same-sex marriage movement in Asia is the traditional 'Asian values' which deems Eastern communitarian values such as filial piety, loyalty towards family, corporation, government or nation more important than the Western individual freedom and sexual rights. This renewed interest in the 'Asian values' debate is ever more important when the call for personal freedom in the region seems to be escalating. Starting from the Bangkok Declaration (1993), Samuel Huntington's *The Clash of Civilizations* (1993) and Graham Allison's *Destined for War: Can America and China Escape Thucydides Trap?* (2017), this paper intends to investigate the validity of 'Asian values' from an alternative viewpoint: Queer Legal Theory (QLT), a sexual minorities perspective of law and society. Using dialectic juxtapositions during the Asian values debate in the 1990s represented by Lee Kuan Yew and Kim Dae-jung, this paper also intends to explore the development of majoritarian rule, democracy and human rights in Asia. In short, it aims to answer the question: Is a democracy based on human rights and dignity feasible in Asia despite of its presumably different values from the rest of the world?*

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I INTRODUCTION

Shortly after Australia legalised same-sex marriage and India repealed Section 377 of the Penal Code, decriminalising private consensual sex between male adults,¹ the ex-Malaysian Prime Minister, Mahathir Mohamad, presented a speech at Chulalongkorn University, Bangkok. With the aim of protecting traditional Asian family values, he reportedly declared to the audience that Asia did not need to 'copy' the West in accepting sexual minorities and that 'we have our own values'.² A similar view was reiterated during his visit to the UK.³

Such East versus West and us versus them narratives regarding 'values' are not new. Addressing the 1993 World Conference on Human Rights in Vienna, Singapore's then foreign minister had already announced that '[h]omosexual rights are a Western issue and are not relevant to this conference'.⁴

Formalised in the 1993 Bangkok Declaration, the cultural relativist 'Asian values' narrative gained full support from several Asian states. For example, the Chinese

¹ Michael Kirby, 'Beyond Marriage Equality & Skin Curling' (2018) 6(2) *Griffith Journal of Law & Human Dignity* 1 ('Beyond Marriage Equality'); Surabhi Shukla, 'The Many Faces of Dignity in Navtej Johar' (2019) 2 *European Human Rights Law Review* 195. See also *Navtej Singh Johar v Union of India*, Writ Petition (Criminal) 76/2016.

² Iain Marlow and Randy Thanthong-Knight, 'Malaysia's Mahathir Says Asia Won't Follow Weston LGBT Rights', *Bloomberg News* (online at 25 October 2018) <www.bloomberg.com/news/articles/2018-10-25/malaysia-s-mahathir-says-asia-won-t-follow-west-on-lgbt-rights>.

³ Bernama, 'We are Free to Reject LGBT, Other Unsuitable Western Influences – Dr Mahathir', *The New Straits Times* (online at 18 June 2019) <www.nst.com.my/news/nation/2019/06/497206/we-are-free-reject-lgbt-other-unsuitable-western-influences-dr-mahathir>.

⁴ Baden Offord and Leon Cantrell, 'Homosexual Rights as Human Rights in Indonesia and Australia', (2001) 40(3-4) *Journal of Homosexuality* 233.

Government agrees that ‘Asian values’ correspond to Confucianism or similar traditional views, which sacrifice individual freedom in favour of filial piety, or loyalty towards family, corporation, government or nation.⁵ For these governments, group rights are more important than individual rights under the banner of Asian values.

This paper intends to investigate the validity of ‘Asian values’ under an alternative view — Queer Legal Theory (QLT).⁶ This non-traditional viewpoint aims to add an alternative perspective to the increasingly international and transnational Queer culture,⁷ particularly in the traditional disciplines of law and the judicial system. When different cultural or religious values clash with each other such as with the issues of same-sex marriage or the content of sexual and relationship education,⁸ can the conventional universal human rights discourse resolve these value-based disputes? Are gay rights really universal human rights? If yes, how? If no, are there any alternative options? Before the discussion, the first task is to examine some fundamental elements.

II THE CLASH OF CIVILISATIONS AND THE INEVITABLE WAR?

Since September 11, the discussion of ‘value’, ‘culture’ and ‘civilisation’ has become increasingly important, not only in law and politics, but also in other disciplines.⁹ Whilst the West questions others’ values, culture and civilisation, these discussions also prompt self-reflection. One example is *The Clash of Civilizations*, made popular by Samuel Huntington.¹⁰ In response to the internationalist approach in Francis Fukuyama’s *The End*

⁵ Michael C Davis, ‘Human Rights in Asia: China and the Bangkok Declaration’ (1995-6) 2 *Buffalo Journal of International Law* 215 (‘Human Rights in Asia’).

⁶ Francisco Valdes, ‘Afterword & Prologue: Queer Legal Theory’ (1995) 83 *California Law Review* 344 (‘Afterword & Prologue’).

⁷ Michael Kirby, ‘Sexuality and international law: the new dimension’ (2014) 4 *European Human Rights Law Review* 350 (‘Sexuality and international law’); Sally Engle Merry, ‘Transnational Human Rights and Local Activism: Mapping the Middle’ (2006) 108(1) *American Anthropologist* 38.

⁸ Jane Haynes, ‘Protest parents return to Parkfield School gates and say “it’s not ok to be gay”’, *Birmingham Live* (online at 9 July 2019) <www.birminghammail.co.uk/news/midlands-news/protest-parents-back-parkfield-school-16554048>.

⁹ Sean Goggin, ‘Human Rights, Anthropology and Securitization: Reclaiming Culture’ (2009) 8 *Journal on Ethnopolitics and Minority Issues in Europe* 1.

¹⁰ Samuel Huntington, ‘The Clash of Civilizations?’ (1993) 72(3) *Foreign Affairs* 22 (‘The Clash of Civilizations’); Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* (Simon and Schuster, 1996) (‘The Clash of Civilizations and the Remaking of World Order’).

of *History and the Last Man*,¹¹ Huntington argued:

It is my hypothesis that the fundamental course of conflict in this new world will not be primarily ideological or economic. The great divisions among humankind will be cultural... The clash of civilizations will dominate global politics. The fault lines between civilizations will be the battle lines of the future.¹²

The popularity of this view reached its first peak after September 11. Using culture, religion and their interaction as the 'central dividing line', Huntington mapped the world into seven or eight civilisations.¹³ His view on the 'fault line/battle line' between the West and Islam has already been debated vehemently by prominent figures; this is not the focus of this paper.¹⁴ Instead, this paper addresses the less discussed clash between East and West, particularly from the angle of Foucauldian biopolitical power of sexuality.¹⁵

The impact of Huntington's cultural clash discourse is obvious. For example, Tony Blair 'marked the attacks in London by reassessing the very concept of British cultural identity'.¹⁶ Following the Trojan Horse controversy in some Birmingham schools in 2014,¹⁷ David Cameron also raised the 'British values' claim following his 'muscular liberalism'.¹⁸ The hard approaches taken by the governments to enforce such discourse have been examined carefully under human rights scrutiny and will not be repeated here.¹⁹

¹¹ Francis Fukuyama, *The End of History and the Last Man* (Free Press, 1992). Fukuyama argues that humanity is reaching the end of ideological evolution and the universalisation of Western liberal democracy is the final form of human government.

¹² Huntington, 'The Clash of Civilizations' (n 10) 22.

¹³ Ibid 25. They are Western, Confucian, Japanese, Islamic, Hindu, Slavic-Orthodox, Latin American and possibly African civilisations.

¹⁴ Steven Lukes, *Moral Relativism* (Profile Books, 2008); Amartya Sen, 'Democracy as a Universal Value' (1999) 10(3) *Journal of Democracy* 3; Michael C Davis, 'Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values' (1998) 11 *Harvard Human Rights Journal* 109 ('Constitutionalism and Political Culture').

¹⁵ Ben Golder, *Foucault and the Politics of Rights* (Stanford University Press, 2015) 140.

¹⁶ Goggin (n 9).

¹⁷ Education Committee, House of Commons, Education – Seventh Report: Extremism in schools: the Trojan Horse affair (Report, 17 March 2015).

¹⁸ Ibid part V. See also David Cameron, 'On British Values', *The Mail on Sunday* (online at 15 June 2014).

¹⁹ Conor Gearty, 'Is attacking multiculturalism a way of tackling racism – or feeding it? Reflections on the Government's Prevent Strategy' (2012) 2 *European Human Rights Law Review* 121.

In addition to Huntington's controversial view on Islam,²⁰ he also juxtaposed the West's Christian values with China's 'Confucian heritage, with its emphasis on authority, order, hierarchy, and supremacy of the collective over the individual.'²¹ Facing all these potential clashes, he suggested North America and Europe form a moral, cultural, economic, political, and military collaboration to ensure 'the third Euro-American phase of Western economic affluence and political affluence'.²²

Such East/West dichotomy has been reignited in Graham Allison's 'Thucydides Trap' discussion.²³ Using case studies stemming from the Greco-Roman period, he warns that history often rhymes, if not repeats, itself: When a rising power threatens a ruling power, war is almost inevitable. Despite its inevitability, he nonetheless suggests four options to avoid the conflict: a) accommodate the rise of China; b) undermine China's growth; c) negotiate a long peace; or d) redefine the Sino-American relationship.²⁴

The East versus West relativist narratives in *The Clash of Civilizations* and 'Thucydides Trap' add fuel to the age-old relativist/universalist debate in the discourse of international human rights. In one of my previous papers, 'Universalism or Cultural Relativism: Case Study of Same-Sex Marriage in Taiwan', I concluded that the human rights project is an evolutionary agenda and it has the potential to destabilise the status quo supported by traditional views.²⁵ Since 'the relativity/universality binary division is often used by governments to justify elitist interests',²⁶ when universal human rights values clash with traditional values, 'a traditional culture must change for the culture of human rights to emerge'.²⁷

²⁰ Lukes (n 14) 99, quoting Huntington, 'The Clash of Civilizations and Remaking of World Order' (n 10) 317: 'He [Huntington] argues that the "underlying problem for the West is not Islamic fundamentalism. It is Islam."'

²¹ Huntington, 'The Clash of Civilizations and Remaking of World Order' (n 10) 238.

²² *Ibid* 308.

²³ Graham Allison, *Destined for War: Can America and China Escape Thucydides's Trap?* (Houghton Mifflin Harcourt, 2017).

²⁴ *Ibid* 214.

²⁵ Erich Hou, 'Universalism or Cultural Relativism? Case Study of Same-Sex Marriage in Taiwan' (2019) 3 *The Asian Yearbook of Human Rights and Humanitarian Law* 55 ('Universalism of Cultural Relativism').

²⁶ *Ibid* 78.

²⁷ *Ibid* 63.

Academically, the result of the relativist/universalist debate is arguably clear, and the detailed discussion will not be repeated here. As Afshari observes:

Almost 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 markers close to the universalist side.²⁸

Despite such academic consensus among the legal scholars, the 'Asian values' argument remains to be an over-generalised concept deserving deconstruction in regional political reality.

III ASIAN VALUES: LEE KUAN YEW AND KIM DAE JUNG

When *The Clash of Civilizations* was published, the 1993 Bangkok Declaration also took a cultural relativist view in order for some Asian states to justify the sacrifice of human rights in order to pursue economic development. It states:

While human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious background.²⁹

The Bangkok Declaration raises several questions: 'Does Asia in general keep some distance from individual rights, favouring instead the concept of duties to be complied with by everyone, by individuals as well as by governments?'³⁰ Is it true that Asian values are less supportive of freedom and more concerned with order and discipline than are Western values? Are the claims of human rights in the areas of political and civil liberties less relevant in Asia than in the West?³¹ In short, does Asia have the philosophical and

²⁸ Reza Afshari, 'Relativity in Universality: Jack Donnelly's Grand Theory in Need of Specific Illustrations' (2015) 37 *Human Rights Quarterly* 854.

²⁹ *Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights*, UN Doc A/CONF.157/PC/59 (2 April 1993) para 98 (Bangkok Declaration). See also Davis, 'Human Rights in Asia' (n 5).

³⁰ Christian Tomuschat, *Human Rights – Between Idealism and Realism* (3rd ed, OUP, 2011) 230.

³¹ Amartya Sen, *Human Rights and Asian Values* (Carnegie Council on Ethics and International Affairs, 1997) 10 ('Human Rights and Asian Values').

historical underpinnings suitable for democracy? Ultimately, is a human rights-based democracy achievable in Asia?³²

These are not only theoretical but also practical questions, particularly when universal human rights are often watered down in Asia and an Asian-Pacific human rights court is yet to emerge.³³

The 'Asian values' debate may be able to shed some light on these questions. Lee Kuan Yew (LKY), the founding father of Singapore, once commented that:

Asians have little doubt that a society with communitarian values where the interests of the society take precedence over that of the individual suits them better than the individualism of America ... Asian cultures are so different from Western cultures that they are exempt from considerations of human rights.³⁴

Lee's thesis concerning human rights exemption in Asia is based on his belief that good governance and economic development come before democracy and civil political rights.³⁵ The fact that Singapore is neither a member of the ICCPR, nor the ICESCR, reflects this line of policy-making.

It is understandable that LKY's communitarian leaning is a product of the 'politics of survival' in the early years of Singapore's independence from Malaysia.³⁶ It is also suggested that LKY's 'soft, Confucian authoritarianism' derives from his negative views towards the countercultural and anti-war movement in the West during the 1960s when stability was needed in the new island nation.³⁷ Consequently, LKY became 'an effective

³² Kim Dae-jung, 'Is Culture Destiny: The Myth of Asia's Anti-Democratic Values' (1994) 73 *Foreign Affairs* 189, 190. See also Davis, 'Constitutionalism and Political Culture' (n 14) 123.

³³ Chang-ho Chung, 'The Emerging Asian-Pacific Court of Human Rights in the Context of State and Non-State Liability' (2016) 57 *Harvard International Law Journal* 44.

³⁴ Joanne R Bauer and Daniel A Bell (eds), *The East Asian Challenge for Human Rights* (Cambridge University Press, 1999) 6.

³⁵ Michael D Barr, 'Lee Kuan Yew and the 'Asian Values' Debate' (2000) 24(3) *Asian Studies Review* 309, 323; Graham Allison, Robert D Blackwill and Ali Wyne, *Lee Kuan Yew: The Grand Master's Insights on China, the United States, and the World* (MIT Press, 2013).

³⁶ Barr (n 35) 316-18, quoting Chan Heng Chee, *Singapore: The Politics of Survival, 1965-1967* (OUP, 1971).

³⁷ Yash Ghai, 'Human Rights and Governance: The Asia Debate' (2000) 1(1) *Asia Pacific Journal on Human Rights & Law* 9, 10. See also Barr (n 35) 318 and Davis, 'Constitutionalism and Political Culture' (n 14) 129.

spokesman and intellectual leader of the nascent “Asian values” consensus’.³⁸ Also, thanks to the Singaporean people and their *kiasu* (afraid to miss out) spirit, the popularity of the Singapore model transcends cultures and national boundaries.³⁹ Akin to the content of ‘Asian values’, a similar argument of ‘universal traditional values’ has also been developed by Russia’s anti-LGBTQ+ campaign which involves ‘an explicit rejection of sexuality rights and invites international allies to use the issue to distinguish themselves from the West’.⁴⁰

Ironically, the popularity of ‘Asian values’ made it the victim of its own success. The first problem of this ‘Asian values’ claim is the sheer size of Asia ‘where about 60 percent of the total world population lives’.⁴¹ With its geopolitical span from the Bering Sea to the Bosphorus, and cultural difference from Shinto to Islam, ‘any commentator might be unable even to identify the object referred to’.⁴² Subsequently, the ‘Asian values’ narrative was rebranded as ‘Chinese values’, ‘Sinic values’ or ‘Confucian values’ and geographically limited to East Asia only.⁴³

Even within East Asia, consensus is hard to find. The East-Asian diversity, particularly in liberal democratic states such as Japan, South Korea and Taiwan, renders Lee’s thesis over-generalised.⁴⁴ Using the democratisation and industrialisation process in South Korea after the Gwangju Uprising, Kim Dae Jung, the 2000 Nobel Peace Prize recipient, argued that:

Asia has a rich heritage of democracy-oriented philosophies and traditions. Asia has already made great strides toward democratization and possesses the necessary conditions to develop democracy even beyond the level of the West... There are no ideas more fundamental to democracy than the teachings of Confucianism, Buddhism, and the Tonghak ... Although Asians developed these ideas long before the Europeans did, Europeans formalized comprehensive

³⁸ Barr (n 35) 310-314.

³⁹ Andrea Tan and Shamim Adam, ‘U.K. Can’t Use Singapore as Post-Brexit Model, Premier Lee Says’, *Bloomberg News* (online at November 6, 2018) <www.bloomberg.com/news/articles/2018-11-06/u-k-can-t-use-singapore-as-post-brexit-model-premier-lee-says>.

⁴⁰ Jonathan Symons and Dennis Altman, ‘International norm polarization: sexuality as a subject of human rights protection’ (2015) 7(1) *International Theory* 61, 86.

⁴¹ Sen, ‘Human Rights and Asian Values’ (n 31) 13.

⁴² Tomuschat (n 30) 218.

⁴³ Barr (n 35) 310, 313.

⁴⁴ Lukes (n 14) 100.

and effective electoral democracy first ... The fact that this system was developed elsewhere does not mean that 'it will not work' in Asia.⁴⁵

Kim unequivocally rejected the 'human rights exemption in Asia' thesis and counter-proposed that 'Asia's destiny is to improve Western concepts, not ignore them'.⁴⁶ Using statistics, he also demonstrated an often-overlooked fact that most Asian countries had been democratised by 1990 and exceeded a 45% democratisation rate worldwide. He predicted that Asia will enjoy both democratic development and economic prosperity soon and he attributed his optimism to the aspirations of the people. Kim emphasised that:

Asia has no practical alternative to democracy; it is a matter of survival in an age of intensifying global economic competition. The world economy's changes have already meant a greater and easier flow of information, which has helped Asia's democratization process.⁴⁷

Back in 1993, whilst the official Bangkok Declaration was released, several Asian Non-Governmental Organisations (NGOs) also corresponded with a shadow document — the Bangkok NGO Declaration.⁴⁸ Amartya Sen concludes that:

The recognition of diversity within different cultures is extremely important in the contemporary world, since we are constantly bombarded by oversimple generalizations about "Western civilization," "Asian values," "African cultures," and so on. These unfounded readings of history and civilization are not only intellectually shallow, they also add to the divisiveness of the world in which we live.⁴⁹

Michael Kirby comments that 'Sen acknowledges that the champions of 'Asian values' are often concerned with a need to resist Western hegemony. But he [Sen] insists that human rights and political liberties are important in every country, including in the countries in

⁴⁵ Kim (n 32) 191-192.

⁴⁶ Holning Lau, 'Grounding Conversations on Sexuality and Asian Law' (2011) 44(3) *UC Davis Law Review* 773, 802, quoting Kim (n 32) 1.

⁴⁷ Kim (n 32) 193.

⁴⁸ Coalition for Peace and Development, 'The Bangkok NGO Declaration' (1993) 3(57) *Law and Society Fortnightly Review* 5.

⁴⁹ Sen, 'Human Rights and Asian Values' (n 31) 31.

Asia.⁵⁰ Kirby further asserts: ‘The case for liberty and political rights turns ultimately on their basic importance and on their instrumental role. This case is as strong in Asia as it is elsewhere.’⁵¹

When global tensions are being fuelled by protectionist, nationalist or regionalist ‘Asian values’ discourse, or similar discourses such as ‘British values’ or ‘Make America Great Again’, the merit of revisiting and deconstructing such debates becomes ever more important. It reminds us that perhaps idealism is not so idealistic after all. It is merely another name for long term and peaceful solutions. The exploration of the ‘Asian values’ debate also helps explain the tension between the aforementioned ‘universal traditional values’ and the global LGBTQ+ legal movement as the paper will next discuss.

IV QUEER LEGAL THEORY: AUTHORITARIAN ASIA VS. DEMOCRATIC ASIA

On the 24th of May 2019, Taiwan legalised same-sex marriage and reportedly became the first country in Asia to do so.⁵² This historical move has its significant meaning for many Taiwanese and its ruling party’s human rights diplomacy.⁵³ Not only does it lift the veil of ‘Asian values’, it also proves that Kim, Sen and Kirby are correct — Asian values are not Asian, they are often evoked to justify authoritarianism.

Around the same time, the World Health Organisation delisted transgender health issues as mental and behavioural disorders.⁵⁴ A month later, the highest court in Hong Kong rendered a favourable decision to the LGBTQ+ community and ensured equal protection to same-sex couples in terms of socioeconomic rights such as spousal benefits and joint tax reporting;⁵⁵ strengthening the previous decision from the same court on the issue of same-sex spousal visas.⁵⁶ In the beginning of 2020, research indicates that there is

⁵⁰ Michael Kirby, ‘Health care and global justice’ (2011) 7(3) *International Journal of Law in Context* 273, 282.

⁵¹ Ibid quoting Sen, ‘Human Rights and Asian Values’ (n 31) 30.

⁵² Hou, ‘Universalism of Cultural Relativism’ (n 25).

⁵³ Po-Han Lee, ‘LGBT rights versus Asian values: de/re-constructing the universality of human rights’ (2016) 20(7) *International Journal of Human Rights* 978.

⁵⁴ Sabrina Barr, ‘Transgender no longer classified as “mental disorder” by World Health Organisation’, *Independent* (online at 28 May 2019) <www.independent.co.uk/life-style/transgender-world-health-organisation-mental-disorder-who-gender-icd11-update-a8932786.html>.

⁵⁵ *Leung Chun Kwong v Secretary for the Civil Service and Commissioner of Inland Revenue* [2019] HKCFA 19.

⁵⁶ *QT v Director of Immigration* [2018] HKCFA 28.

increasing public support for LGBTQ+ rights in Hong Kong.⁵⁷ Following these developments, there are also movements in Vietnam, Thailand, South Korea and Japan.⁵⁸ Such a domino effect further suggests that homosexuality is not just a 'western issue'.⁵⁹ Equality, diversity and human dignity are part and parcel of universal values and UN member states have the legal duty to prioritise these universal values over any conflicting regional values after local adjustment.⁶⁰ Academically, this universalising process and local adjustment has also been discussed under the concepts of 'vernacularisation' or 'constitutional indigenization'.⁶¹

While Western homosexuality may have experienced a different developmental path through religious condemnation, legal criminalisation and medical pathologisation, the existence of homosexuality in different cultures is nonetheless the same.⁶² Since the 1969 Stonewall Riots,⁶³ global LGBTQ+ issues such as decriminalisation or same-sex marriage have become politicised and legalised with the support of universal human rights instruments such as the ICCPR.⁶⁴ This paradigm shift is evident not only in Western countries in North America, Europe and Australia, 'but also in Latin American countries

⁵⁷ Yiu Tung Suen, Randolph Chun Ho Chan and Eliz Miu Yin Wong, *Public Attitudes towards LGBTQ+ Legal Rights in Hong Kong 2019/20* (Sexualities Research Programme, The Chinese University of Hong Kong, January 2020).

⁵⁸ Erich Hou, 'How a Hong Kong tax assessment decision could influence attitudes toward LGBTQ+ rights across Asia', *The Conversation* (Web Page, July 11 2019) <www.theconversation.com/how-a-hong-kong-tax-assessment-decision-could-influence-attitudes-towards-lgbt-rights-across-asia-118470>.

⁵⁹ Symons and Altman (n 40) 62.

⁶⁰ *Universal Declaration on Cultural Diversity*, UN Doc, 31st sess (entered into force 2 November 2001) art 4: 'No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.' See also Hou, 'Universalism of Cultural Relativism' (n 25).

⁶¹ Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans* (University of Chicago Press, 1990); Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press, 2006). For 'constitutional indigenization' see Davis, 'Constitutionalism and Political Culture' (n 14) 138.

⁶² Jing Wu Ma, 'From "Long Yang" and "Dui Shi" to Tongzhi: Homosexuality in China' (2003) 7 *Journal of Gay and Lesbian Psychotherapy* 132; Raja Halwani, 'Essentialism, Social constructionism, and the History of Homosexuality' (2008) 35(1) *Journal of Homosexuality* 25.

⁶³ Valdes, 'Afterword & Prologue' (n 6).

⁶⁴ *Toonen v Australia*, Communication No.488/1992; UN Doc CCPR/C/50/D/488/1992 (1994); *Joslin et al v New Zealand*, Communication No.902/1999; UN Doc CCPR/75/D/902/1999 (2002); *Young v Australia* Communication No.941/2000; UN Doc CCPR/C/78/D/941/2000 (2003).

and South Africa as well'.⁶⁵ With colonial legacy such as Section 377,⁶⁶ the 'wind of change' has now arrived in Asia-Pacific region and even the UN.⁶⁷

With such a recent and rapid development, observing society and law from a sexual minority perspective, or Queer perspective, is up and coming.⁶⁸ Back in 1995, QLT was still in its embryonic form.⁶⁹ Being part of the Critical Legal Theory (CLT) family, QLT takes stock from Critical Race Theory, Feminist Legal Theory and Gay Legal Theory. Its name suggests its relationship with Queer Theory — a perspective from the subordination of non-heterosexual individuals in a mainly heteronormative world. Valdes defines QLT as:

A self-conscious, self-defined, and self-sustaining body of liberational legal scholarship that voices and pursues the interests of sexual minorities as its particular contribution toward the end of sex/gender subordination.⁷⁰

50 years after Stonewall, the landscape has changed in the US with *Romer*,⁷¹ *Lawrence*,⁷² *Windsor*,⁷³ and *Obergefell*.⁷⁴ In Europe, there are also comparative cases such as *Dudgeon*,⁷⁵ *Karner*,⁷⁶ *X & Others*,⁷⁷ and *Orlandi & Others*.⁷⁸ In Baisley's words: 'international human rights norms pertaining to SOGI [sexual orientation and gender identity] are emerging'.⁷⁹ On the foundation laid down by *Toonen* and similar cases,⁸⁰ the latest Asian development in Confucian or Sinic Taiwan and Hong Kong has made QLT a truly

⁶⁵ Jessica Brown, 'Human Rights, Gay Rights, Or Both? International Human Rights Law and Same-Sex Marriage' (2016) 28(2) *Florida Journal of International Law* 217, 239.

⁶⁶ Douglas Sanders, '377 and the Unnatural Afterlife of British Colonialism in Asia' (2009) 4 *Asian Journal of Comparative Law* [ii].

⁶⁷ Michael Kirby, 'A close and curious vote upholds the new UN mandate on sexual orientation and gender identity' (2017) 1 *European Human Rights Law Review* 37.

⁶⁸ Francisco Valdes, 'From Law Reform to Lived Justice: Marriage Equality, Personal Praxis, and Queer Normativity in the United States' (2017) 26 *Tulane Journal of Law and Sexuality* 1 ('From Law Reform').

⁶⁹ Valdes, 'Afterword & Prologue' (n 6) 352.

⁷⁰ *Ibid* 349.

⁷¹ *Romer v Evans* 517 U.S. 620 (1996).

⁷² *Lawrence v Texas* 539 U.S. 558 (2003).

⁷³ *United States v Windsor* 133 S. Ct. 2675 (2013).

⁷⁴ *Obergefell v Hodges* 135 S. Ct. 2584 (2013).

⁷⁵ *Dudgeon v UK* (1982) 4 EHRR 149.

⁷⁶ *Karner v Austria* (2004) 37 EHRR 24.

⁷⁷ *X & Others v Austria* (2013) 57 EHRR 14.

⁷⁸ *Orlandi & Others v Italy* [2017] ECHR 26431/12.

⁷⁹ Elizabeth Baisley, 'Reaching the Tipping Point: Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity' (2016) 38 *Human Rights Quarterly* 134, 136.

⁸⁰ Communication No.488/1992; Communication No.902/1999; Communication No.941/2000.

international and transnational discourse. No longer merely a theory from the West, QLT is now an established jurisprudence with substantive legal principles and case law.

Originally a concern of human rights law, QLT is now observed in other legal disciplines such as public international law. For example, Otto builds on the Foucauldian concept of the 'biopolitical' nature of heteronormative law and suggests that:

Queering international law means 'taking a break' from the ordinary way of doing things in international law, in order to open new ways of seeing international legal problems and expose some of the limitations of international law's 'norm' response to them, even when that normal response might be a feminist response.⁸¹

In terms of its function:

A queer perspective can bring an array of presently marginalized knowledge to bear on the taken-for-granted assumptions that underpin international legal doctrine and practice, asking different questions that may lead to solutions that will ensure – rather than threaten – the proliferation of diverse practices of freedom and pleasure.⁸²

As a non-traditional theory, QLT naturally attracts critiques.⁸³ One of the strongest shared by many CLT critiques is that CLT only criticises and deconstructs with no real construction.⁸⁴ From an Eastern point-of-view, deconstruction, construction and the process from one to another jointly form a life cycle. Artificial dichotomies such as light/darkness, good/evil, East/West, male/female, heterosexual/homosexual and us/them may be convenient dialectic tools, but such over generalisation is far from reality. Between black and white, there are spectrums of colours. Construction,

⁸¹ Dianne Otto, 'Taking a Break from Normal: Thinking Queer in the Context of international Law' (2007) 101 *American Society of International Law Proceedings* 119, 122.

⁸² *Ibid* 122.

⁸³ For example, Levit reports that 'A recent New Republic article by Lee Siegel criticized queer theory for "the sexualisation of everything"' [citation omitted]: Nancy Levit, 'A Different Kind of Sameness: Beyond Formal Equality and Anti-subordination Strategies in Gay Legal Theory' (2000) 61 *Ohio State Law Journal* 867.

⁸⁴ Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009); David Jabbari, 'From Criticism to Construction in Modern Critical Legal Theory' (1992) 12(4) *Oxford Journal of Legal Studies* 507.

deconstruction and their interaction coexist simultaneously. From a macro-perspective, they are all part and parcel of reality.

A theory without practice is purely an academic exercise. In regard to QLT's praxis, Valdes suggests after the success of *Obergefell* that:

We can now get busy constructing the freer normative future Queers say we need and want... Now that so many of us can marry legally, let's make sure that if we do, we then really do live increasingly happily ever after, and as a multiply-diverse and queered nation of equality lived justice for all.⁸⁵

In short, the lessons learned from QLT and its corresponding traditional disciplines empower sexual minorities everywhere, may it be East or West, to 'take a break' from the norm and appreciate legalisation and equality without necessarily falling into heteronormalisation.⁸⁶

V THE CULTURAL 'CLASH/WAR' v UNIVERSAL HUMAN VALUES IN QLT

When it comes to the discussion of civilisation clash or cultural war, Huntington and Allison consider the universality of humanity as naïve and politically correct.⁸⁷ Their view is understandable if the conflicts are viewed exclusively from the cultural and religious differences and the prioritisation of Western interests. The problem of their approach is: human dignity cannot and should not be overlooked.⁸⁸

Using examples such as slavery, burning of widows and female genital mutilation, Tomuschat states that:

The notion of human rights cannot be made [to?] disappear. The only-and-eternal question is how to find an adequate balance between individual rights

⁸⁵ Valdes, 'From Law Reform' (n 68) 51.

⁸⁶ Otto (n 81). Regarding the concern that sexual minorities might fall into heteronormalisation through simulating heterosexual marriage via same-sex marriage, see Rosemary Auchmuty, 'Same-Sex Marriage Revived: Feminist Critique and Legal Strategy' (2004) 14(1) *Feminism & Psychology* 101.

⁸⁷ Allison (n 23) 147.

⁸⁸ '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': *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) preamble.

and freedoms and the requirements of the common interest... it is debarred from invoking the Bangkok Declaration to support treatment to that effect.⁸⁹

If ancient history could really mirror modern politics, then it should be remembered that there is a 'high degree of shared history' among the three successors of the Roman Empire: the Byzantine, the Papacy and Islam.⁹⁰ Focusing disproportionately on historical Greco-Roman, Judeo-Christian and West-centric views can lead to incomprehensive understanding. Extreme cultural relativist views are as damaging as any bias which can 'contribute the social construction of false binaries, either pitting the West against the East or pitting the West against the rest of the world in an exaggerated fashion'.⁹¹ With the rise of protectionism, nationalism and regionalism, there is a hard lesson to learn from the crimes against humanity during the Nuremberg Trials.

From an international and transnational human rights perspective, it is also poignant to identify the omission of contribution from Asian, African and other non-Western civilisations in the post-WWII international peace-building project of the United Nations.⁹² While recognising the civil, political, social, economic and cultural differences in the world, the drafters of the 1948 *Universal Declaration of Human Rights* (UDHR) also emphasised the common interests shared by all people and enshrined these fundamental values in this international Magna Carta.

It is true that today's UN is far more complicated than the original plan drawn up by representatives from different cultures.⁹³ Nevertheless, it is still the *de jure* forum for reconciling international and transnational interests through political and legal mechanisms such as treaties, conventions, resolutions and communications. The bottom line is that most of the 193 UN member states are voluntarily bound by the International Covenant on Civil Political Rights (ICCPR) and International Covenant on Social Economic

⁸⁹ Tomuschat (n 30) 230.

⁹⁰ Rowan Williams, 'Civil and religious law in England: a religious perspective' (2008) 10(3) *Ecclesiastical Law Journal* 262.

⁹¹ Holning Lau, 'The Language of Westernization in Legal Commentary' (2013) 61 *American Journal of Comparative Law* 507, 511 [citations omitted].

⁹² Lydia H Liu, 'Shadows of Universalism: The Untold Story of Human Rights around 1948' (2014) 40(4) *Critical Inquiry* 385.

⁹³ Guoyu Hua, 'From A Human Rights controversy to Consensus on Human Rights: Zhang Pengchun's Contribution to The Universality of Universal Declaration of Human Rights' (2016) 4 *China Legal Science* 30.

and Cultural Rights (ICESCR).⁹⁴ Some issues can only be effectively resolved through international and transnational cooperation such as non-state actors, environment, disease, trade, technology, human traffic, gender violence, sexuality and their intersection.⁹⁵ The traditional nationalistic view based exclusively on sovereignty is no longer sufficient to provide effective solutions. Under public international law and international human rights law, member states are under a duty to settle interstate disputes in a peaceful manner.⁹⁶

With an alternative lens such as QLT, perhaps it is acceptable here to 'take a break' from the traditional international relations, public international law and human rights discourses and refocus on the underlying concept of humanity.⁹⁷

In terms of legalising same-sex marriage in Singapore, LKY once promised: 'We will follow the world. A few respectable steps behind'.⁹⁸ The 'Crazy Rich Asian' style wedding of LKY's grandson and his male partner in South Africa made international headlines.⁹⁹ One could take this blessing as a gesture to gradually close the generation gap and to heal a divided society. Meanwhile in Thailand, reports suggest that the Land of Smiles may become the first country in South East Asia to recognise same sex union.¹⁰⁰ On the 4th of March 2020, the Hong Kong Court of First Instance once again reaffirms that the

⁹⁴ The US has signed and ratified the ICCPR (1992) and signed the ICESCR but not ratified it. China has signed and ratified the ICESCR (2001) and signed the ICCPR but not ratified it. Singapore is neither a member of the ICCPR nor the ICESCR.

⁹⁵ Emily B Rodio and Hans Peter Schmitz, 'Beyond norms and interests: Understanding the evolution of transnational human rights activism' (2010) 14(3) *International Journal of Human Rights* 442.

⁹⁶ *Charter of the United Nations* art 2, para 3: 'All Members shall settle their international dispute by peaceful means in such a manner that international peace and security, and justice, are not endangered.' See also art 33: '1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. 2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.'

⁹⁷ Otto (n 81).

⁹⁸ Simon Obendorf, 'A few respectable steps behind the world? Gay and lesbian rights in contemporary Singapore' in Corinne Lennox (eds), *Sexual orientation, gender identity and human rights in the Commonwealth: struggles for decriminalisation and change* (School of Advanced Study Press, University of London, 2013) 231.

⁹⁹ Anna Maria, 'Wedding of Lee Kuan Yew's grandson and his boyfriend maybe a watershed moment for LGBT rights in Singapore', *The Independent* (online at 29 May 2019) <www.theindependent.sg/wedding-of-lee-kuan-yews-grandson-and-his-boyfriend-maybe-a-watershed-moment-for-lgbt-rights-in-singapore/>.

¹⁰⁰ Randy Thanthong-Knight, 'Thailand May Be First in Southeast Asia to Allow Same-Sex Unions', *Bloomberg News* (online at 27 August 2019) <www.bloomberg.com/news/articles/2019-08-27/thailand-may-be-first-in-southeast-asia-to-allow-same-sex-unions>.

government's refusal to provide eligible same-sex couples the access to public housing, another socioeconomic right, is unconstitutional.¹⁰¹ Even in China, the issue of legalising same-sex marriage has been officially acknowledged by the government during the revision of China's Civil Code.¹⁰² Hopefully soon, community leaders and people with traditional heteronormative views will embark on the journey to appreciate new interpretations of existing cultural or religious values, such as Queer Islam.¹⁰³ With optimism, culture does and can change for the better in small steps.¹⁰⁴

VI CONCLUSION

History suggests that the clash of values, cultures and civilisations has always existed. Old traditions such as slavery, racism, misogyny, discrimination against minority groups are constantly challenged by modern social-engineering projects such as human rights. Such conflicts between traditional values and modernity do not only appear at personal and communal levels — they also appear at national, international and transnational levels.

As illustrated by the contrast between LKY and Kim, the crux of the 'Asian values' debate is intrinsically postcolonial as well as Maslowian: once the fundamental needs of people are satisfied, citizens, may they be Eastern or Western, equally aspire to participate in the decision-making process regardless of their differences. The basic instinct of self-autonomy generates the concept of freedom, universal suffrage, democracy and individual rights. However, as Oscar Wilde put it in *The Soul of Man*: 'High hopes were once formed of democracy; but democracy means simply the bludgeoning of the people by the people for the people.'¹⁰⁵

Majoritarian rule is a double-edged sword. It is the foundation of democracy but it can also lead to majoritarian vice on the expenses of the minorities. The objective of the

¹⁰¹Nick Infinger v The Hong Kong Housing Authority [2020] HKCFI 329.

¹⁰² Global Times, 'Lawmakers urged to include gay marriage in civil code', *Global Times* (online at 20 December 2019) <www.globaltimes.cn/content/1174233.shtml>.

¹⁰³ Lily Jamaludin, 'LGBT rights in "new" Malaysia still have a long way to go after activists' portraits are removed from photo exhibition', *South China Morning Post* (online at 9 September 2018). See also Scott Siraj al-Haqq Kugle, *Homosexuality in Islam – Critical Reflection on Gay, Lesbian, and Transgender Muslims* (One World, 2010).

¹⁰⁴ Kees Waaldijk, 'Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands' in Robert Wintemute and Mads Andenas (eds), *Legal Recognition of Same-Sex Partnership – A Study of National, European and International Law* (Hart, 2001).

¹⁰⁵ Oscar Wilde, *The Soul of Man under Socialism* (1891).

universal human values in QLT is exactly to compensate this heteronormative majoritarian vice. Without the balance and check of human rights focusing on the protection of individual equality, diversity and dignity, the narrowest form of democracy is just a number's game.

Fortunately, culture is not stagnant, and it can and must adapt. In order to ensure the progress of society, reconciliation of previous conflicts and pacific disputes resolution should be the way going forward. These are not dogmatic teachings or legalese but hard-learned lessons from past human atrocities. When facing the fourth industrialisation, population growth, public health, pollution and climate change, the need to address the common interest shared by all humankind is increasingly pressing, despite our differences. These ever more complicated issues require international and transnational cooperation alongside traditional concepts of sovereignty and nation states. For both East and West, traditional and modern, queer and straight, female and male, as well as all the spectrum in between, there is still a lot to learn from each other as long as we cohabitate on the same planet.

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