

**A Comparative Study on the Future Developments of
Human Rights for Tongzhi in China**

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Abstract

There is an increasing movement recognizing LGBT rights in the international arena. In China, “tongzhi” (a Chinese term for LGBT) still face massive discrimination due mainly to the Chinese government’s *repressive indifference* policy. This thesis follows Kees Waaldijk’s developmental pattern theory of the recognition of gay rights, starting from decriminalisation, anti-discrimination, and reaching partnership legislation. It examines this theoretic pattern in relation to the development of sexual minority rights in the United Nations (UN), European and Canadian human rights law systems. Although every jurisdiction has its own unique aspects, each basically followed Waaldijk’s pattern. The thesis concludes that the application of privacy, equality and non-discrimination principles have helped sexual minorities to achieve equal rights in a variety of fields.

The thesis further examines whether the experiences within these three human rights systems can be adopted in the Chinese context. Since the UN laws are soft laws, they will help influence legal reform for tongzhi rights in China but will not be a decisive factor. With regard to the regional human rights model, unlike Council of Europe and the European Union, the Association of Southeast Asian Nations (ASEAN) is unlikely to push the development of human rights in China due to the lack of a strong tie between China and ASEAN member states. The Canadian experience is inspiring but will not be easily duplicated due to the lack of democratic institutions and the absence of an effective judicial review system and judicial independence in China.

It is anticipated that the Waaldijk pattern cannot be reproduced in the Chinese context. China will take a top-down reform route in terms of the tongzhi rights development. The central authorities will likely adjust relevant policies to the tongzhi group once a crisis has generated sufficient social pressure that would influence the central authorities to consider changing their *repressive indifference* policy. Same-sex marriage law is anticipated to be the first tongzhi human right legislation in China due to the Chinese traditional culture of tolerance, the support found among academics, and the current political environment.

Résumé

Il existe un mouvement croissant reconnaissant les droits des LGBT dans l'arène internationale. En Chine, « tongzhi » (terme chinois pour les LGBT) sont toujours confrontés à des discriminations massives principalement en raison de la politique de indifférence répressive du gouvernement chinois. Cette thèse fait suite à la théorie des schémas de développement de Kees Waaldijk de la reconnaissance des droits des minorités sexuelles. La thèse examine ce modèle théorique par rapport à l'évolution des droits des minorités sexuelles dans les systèmes des droits de l'homme de l'Organisation des Nations Unies (ONU), européen et canadien. Bien que chaque system a ses propres caractéristiques uniques, chacun essentiellement suivi le modèle de Waaldijk. Elle a conclu que l'application des principes de vie privée, d'égalité et de non-discrimination ont aidé les minorités sexuelles pour atteindre l'égalité des droits dans une variété de domaines.

En suite, la thèse examine si les expériences de ces trois systèmes des droits de l'homme peuvent être adoptées dans le contexte chinois. Depuis les lois de l'ONU sont des lois douces, ils aident à influencer la réforme juridique pour les droits tongzhi en Chine, mais ne sera pas un facteur décisif. En ce qui concerne le modèle régional des droits de l'homme, par opposition du Conseil de l'Europe et l'Union européenne, l'Association des nations de l'Asie du Sud-Est (ANASE) est peu probable de pousser le développement des droits de l'homme en Chine en raison de l'absence d'un lien fort entre la Chine et Etats membres de l'ANASE. L'expérience canadienne est source d'inspiration, mais ne sera pas facile à reproduire en raison de l'absence des institutions démocratiques, un système de contrôle juridictionnel effectif et l'indépendance judiciaire en Chine.

Il est prévu que le modèle de Waaldijk ne peut être reproduit dans le contexte chinois. La Chine aura une réforme d'approche descendante (« top-down ») en termes de développement des droits de tongzhi. Les autorités centrales probablement ajusteront les politiques pertinentes pour le groupe de tongzhi fois une crise a généré une pression sociale suffisante qui pourrait influencer les autorités centrales à envisager de changer leur politique de indifférence répressive. La loi sur le mariage de même sexe en Chine devrait être la première droits de l'homme concernant le group tongzhi en Chine en raison de la culture traditionnelle chinoise de la tolérance, le soutien trouvé auprès des universitaires, et le contexte politique actuel.

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INTRODUCTION

A. Background

On 15 April 2013, the United Nations (UN) Secretary-General Ban Ki-moon commented on the protection of sexual minorities in a video message to the Oslo Conference on Human Rights, Sexual Orientation and Gender Identity. He emphasized that it is the “legal duty” of governments to protect lesbian, gay, bisexual or transgender (LGBT) people and that “culture, tradition or religion” could not be used to justify the denial of basic rights.¹ And he also promised to “institutionalize our efforts to address discrimination based on sexual orientation and gender identity”.²

It was not the UN Secretary-General’s first remarks on sexual orientation or gender identity. On December 10, 2010, International Human Rights Day, he delivered a first speech regarding sexual orientation human rights in New York calling on men and women of conscience to “reject discrimination in general and in particular discrimination based on sexual orientation and gender identity”.³ Six months later in 2011, the UN Human Rights Council adopted the first ever UN resolution on sexual orientation rights, *Resolution on Human Rights Violations Based on Sexual Orientation and Gender Identity* by a narrow margin of 23 to 19, with 3 abstentions.⁴ Based on this resolution, the UN High Commissioner for Human Rights completed a report entitled *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*.⁵ Apart from reiterating the human rights principles of protecting sexual

¹ Secretary-General, Ban Ki-Moon, “Secretary-General’s video message to the Oslo Conference on Human Rights, Sexual Orientation and Gender Identity” (15 April, 2013), online: The United Nations <<http://www.un.org/>>.

² *Ibid.*

³ Secretary-General, Ban Ki-Moon, “Secretary-General’s remarks at event on ending violence and criminal sanctions based on sexual orientation and gender identity” (10 December 2010), online: The United Nations <<http://www.un.org/>>.

⁴ *Human rights, sexual orientation and gender identity*, HRC Res 17/19, UN HRCOR, 17th Sess, UN Doc A/HRC/RES/17/19 (2011).

⁵ The United Nations High Commissioner for Human Rights, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, UN HRCOR, 19th Sess, UN Doc A/HRC/19/41 (2011).

orientation, this report identified state's obligations to protect sexual minorities and confirmed that sexual orientation is a prohibited discriminatory ground. This was the first legal document in UN human rights law exclusively addressing the human right issues related to sexual orientation and gender identity. The report's findings paved the way for a panel discussion at the Human Rights Council in March 2012;⁶ which was the first time a UN intergovernmental body had held a formal debate on the subject. This represented a great victory after a long struggle for sexual orientation rights to be incorporated into international human rights law.

In May 2012, Barack Obama, the President of the United States, announced publicly his support for same-sex marriage in the United States before the presidential election.⁷ In June 2013, in a landmark case *United States v. Windsor*,⁸ the United States Supreme Court held the federal legislation restricting the interpretation of "marriage" to apply only to heterosexual couples is unconstitutional. New Jersey became the 14th state in the union to permit gay marriage.⁹ As of August 2013, Argentina, Belgium, Brazil, Canada, Denmark, France, Iceland, the Netherlands, New Zealand, Norway, Portugal, South Africa, Spain and Sweden, the United Kingdom and Uruguay have legalized same-sex marriage nationally, and many other countries recognize same-sex relationships through civil unions, domestic partnerships, and other forms.¹⁰ With their relationships being recognized, LGBTs are becoming accepted within societies in many countries in the world.

However, on the other side of the earth, LBGTs in China have a different story. In 2013, Li Yinhe, a Chinese gay rights expert, again called for support of same-sex marriage at the

⁶ The United Nations High Commissioner for Human Rights. *Human Rights Council panel on ending violence and discrimination against individuals based on their sexual orientation and gender identity*, *United Nations Human Rights Online* (7 March 2012), online:Office of the High Commission for Human Rights <<http://www.ohchr.org/Documents/Issues/Discrimination/SummaryHRC19Panel.doc>>.

⁷ Phil Gast, "Obama announces he supports same-sex marriage" *CNN News* (9 May 2012), online: CNN <<http://articles.cnn.com/>>.

⁸ *United States v. Windsor*, 570, US, (2013).

⁹ Kate Zernike & Marc Santora, "As Gays Wed in New Jersey, Christie Ends Court Fight" (21 October 2013), *New York Times*, online< <http://www.nytimes.com/>>

¹⁰ See the homepage of International Lesbian, Gay, Bisexual, Trans And Intersex Association (ILGA), online<<http://ilga.org/>>.

two meetings of the Chinese National People Congress and the Chinese People's Political Consultative Congress again.¹¹ Each year, the Chinese National People Congress (NPC), the National legislature, gathers along with the Chinese People's Political Consultative Congress (CPPCC), officially called *Lianghui* (the Two Meetings). During the Lianghui, the representatives in the NPC pass or revise relevant national laws and make important national level political decisions with the CPPCC.

It has been thirteen years since Li proposed same-sex marriage in China for the first time in 2001. None of these proposals has succeeded in gathering enough support to become a formal legal bill for discussion at the NPC. These proposals nevertheless have been successful at raising public and political awareness of the LGBT community in China. During this time, dramatic social events have also taken place. For instance, in 2009 a couple of gay men held a wedding in a gay bar in Sichuan, which was widely reported by domestic media.¹² Between April and May of 2012, several gay and lesbian couples walked out from the "closet", gathered and kissed in public, asking for social acceptance.¹³ In June 2012, a Chinese singer, Yun Qiao, posted the picture of his partner and their new-born baby on his Weibo (Weibo is known as Chinese Twitter) to build social support for gay marriages. His Weibo attracted a lot of attention to the issue of raising a child in a gay family, and his Weibo followers increased rapidly to 31,990 as of November 2013.¹⁴

All of this media attention on sexual orientation is slowly changing Chinese civil society and leading to a variety of outcomes such as increased public debate on gay rights. In fact, the research on LGBT in academia has grown considerably over the past century in

¹¹ Li Yinhe(李银河), "Guanyu Tongxing Hunyin de Tian" (关于同性婚姻的提案) [Proposal Regarding Same-sex Marriage]" (15 February 2013), online <http://blog.sina.com.cn/s/blog_473d53360102ev05.html#comment1>

¹² Huang Zhiling and Zhang Ao, "In a 'first', gay couple tie the knot in China", *China Daily* (13 January 2010), online China Daily <<http://www.chinadaily.com.cn/>>.

¹³ Caosi & Chen Yanling(曹斯/陈燕玲) "Guangzhou Zhiyuanzhe Qixi Yan Xingwei Yishu Huyu Xiaochu Qishi(广州同性恋志愿者七夕演行为艺术呼吁消除歧视)[Guangzhou gay volunteers perform art asking for eliminating discrimination], *the Southern Daily* (23 August 2012), online: Zhongshan Net <<http://www.zsnews.cn/Society/2012/08/23/2215639.shtml>> [translated by author].

¹⁴ Singer Yun Qiao (歌手匀乔), Weibo, online: Weibo <<http://www.weibo.com/ananmark>> [translated by author](last accessed: 26 November 2013).

China. Research conducted by some of China's leading scholars, such as Li Yinhe and Zhang Beichuan, has, to some extent, helped drive the gay movement in China to where it is today. The two notable achievements were the decriminalization of male same-sex acts in 1997 and the depathologizing of homosexuality in 2000.¹⁵ While homosexuality was once considered a crime and a disease in China, these two progressive developments have helped normalize homosexuality in China.¹⁶ With the popularity of the internet and increasing acceptance of their sexuality, the LGBT communities emerged slowly in big cities, and began to organize various social events within their communities.¹⁷

However, the attitude of China's political authorities is still ambivalent regarding the legal status of LGBT groups in China. There is little positive legislation recognizing sexual orientation human rights such as the right to assembly or equality rights. Many events are allowed as long as they stay underground and do not reach the public; otherwise, the police or political authorities normally interrupt the events. For instance, the Beijing Police shut down Mr. Gay China, which would have been China's first gay pageant, an hour before it was set to begin.¹⁸ Many scheduled activities during the 2009 and 2010 Shanghai Pride festivals were canceled due to pressure from the government.¹⁹ Although the subsequent 2011-2013 Shanghai Pride festivals were held in Shanghai successfully, there has been a variety of interference from the authorities.²⁰ The unclear attitude of the authorities remains one of the main obstacles for the organizers.²¹

Such legal uncertainty around LGBT issues frustrates gay activists and also leads to

¹⁵ *Infra* Chapter Two, *Decriminalizing Hooliganism and Depathologizing Homosexuality*, at p 92 and 97.

¹⁶ *Infra* note 414 and 429.

¹⁷ *Infra* note 303.

¹⁸ Dinah Gardner, "Police shut down Mr. Gay China Contest", *The Fridae* (16 January 2010), online: *Fridae News* <<http://www.fridae.asia/>>.

¹⁹ Human Rights Watch, "World Report 2010", at 291, online: Human Right Watch <<http://www.hrw.org/sites/default/files/reports/wr2010.pdf>>.

²⁰ Generally see, "History, Shanghai Pride", online: ShPRIDE<<http://www.shpride.com/>>. In a 2013 press release in the Shanghai Pride's official website, it states a few venues were pressured to pull-out at the last hour due to the Authorities' interest in these events. Nevertheless, all the events carried on without cancellations. Despite a successful week, the festival was not without challenges. Authorities have shown a greater interest in this year's events, pressuring a few venues to pull-out at the last hour.

²¹ *Ibid.*

many human rights abuses for China's LGBT community.²² The majority of LGBT people in China choose to live in the closet due to fear and massive social pressure. The invisibility of the group contributes to civil society's lack of knowledge about sexual diversity within China. The strict official control of the media also renders civil society unable to understand the LGBT group through mainstream media.

The gay movement in China is lagging behind the international trend due to this lack of protection, which puts gay activists at danger, and makes LGBT people reluctant to expose their true selves in the public. Civil society is also unlikely to understand the demand from this group because of the restrictions set by the Chinese government. The thesis tends to explore how to overcome these challenges and the feasibilities of legal reforms for LGBT rights in China under this global climate in favour of gay rights.

1. Terminology

China in this thesis refers to mainland China, but does not cover Hong Kong, Macao or Taiwan, due to different social landscapes and legal systems in these areas. Likewise, any discussion of the Chinese legal system, issues or legislation refers only to mainland China and does not cover the legal practices or applications in Hong Kong, Macao or Taiwan.

Sexual Orientation Rights: Based on the interpretation in the Yogyakarta Principles, "sexual orientation refers to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender".²³

LGBT: LGBT is a common abbreviation that refers to individuals identifying themselves as lesbian, gay men, bisexual or transgender. This term has gained universal recognition in academic and social life at present because it emphasizes a diversity of sexuality and gender

²² See *infra* Chapter Two, *Human Rights Violation: Police Repression and Harassment*, at p 91.

²³ International Panel of Experts in International Human Rights Law and on Sexual Orientation and Gender Identity, "The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity", March 2007, at 6, online: Yogyakarta Principles <www.yogyakartaprinciples.org/> [Yogyakarta Principles].

identities.

Sexual Minority: “Sexual minority” or “sexual minorities” are commonly adopted in academic research to define gay men, lesbians, bisexuals and transgender people. Generally speaking, sexual minority refers to those people whose sexuality is different from the sexual majority (i.e., heterosexual people). Specifically, sexual minority is used as an inclusive term that include those who identify as gay men, lesbians, bisexuals and transgender people, or those who have sexual practices that are different from the heterosexuals.

Homosexuals/Homosexuality: It is noticed that these terms have a long tradition in Western medicine as denoting a mental health disorder or abnormality, and they are also highly gendered to refer to cisgendered gay men, even outside medical literature.²⁴ The author tries to avoid these terms in the Western context by using same-sex or sexual minorities. In the Chinese context, however, these terms are suitable in the *translation* of the Chinese legislation or official policies of the authorities because they do imply the discriminatory attitude on sexual minorities. In addition, these terms are used in many judgements or discussion that the thesis refers to; therefore it should be clarified that using these terms in such context does not suggest that they have an ahistorical biological implication from the author’s perspective.

MSM: MSM is an abbreviation for “men who have sex with men” commonly used in the health sector. It takes a behavioral perspective. According to the Joint United Nations Programme on HIV/AIDS, MSM refers to “males who have sex with males, regardless of whether or not they have sex with women or have a personal or social gay or bisexual identity”.²⁵ This term also includes men who self-identify as heterosexual but have sex with other men.

Tongzhi: Tongzhi is a Chinese term that was originally used by Communist Party

²⁴ See Bruce MacDougall, *Queer Judgement*, (Toronto, Buffalo, London: University of Toronto Press, 2000), “What’s in Name”, at 17-31.

²⁵ The Joint United Nations Programme on HIV/AIDS (UNAIDS), “UNAIDS Terminology Guidelines” (2011) at 19, online: UNAIDS <http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2011/JC2118_terminology-guidelines_en.pdf>.

officials to refer to people who share and stand up for the identical revolution goal.²⁶

Nowadays this term is utilized commonly to describe gays and lesbians among the Chinese gay community. However, the Chinese Academy of Social Sciences denied this meaning in its new release of *2012 Modern Chinese Dictionary*. The chief editor, Jiang Lansheng, commented that “we know the *tongzhi* is commonly used among the gay community, but we refused to recognize it in our dictionary, because we do not want to promote these things (*gay community*), and (*we only want to*) focus on these things as a normalized dictionary”.²⁷ Given that this term emphasizes the significance of Chinese gays’ and lesbians’ unique characteristics in the global trend of the legalization of gay rights, this paper rejects the position of the Chinese Academy of Social Sciences, and uses *tongzhi* in the thesis. It should be clarified that *tongzhi* is an inclusive term that includes gay men, lesbians and transgendered people in a broad sense; however, given the distinctions of transpeople and gay men or lesbians, and the different challenges they face for human rights, *tongzhi* in the thesis does not refer to transgendered groups.

2. Research Questions

The central research question of the thesis is to identify paths for law reform for sexual minorities in China. Where should the sexual orientation right movement go in China? Can the development of sexual orientation rights occurring in the international arena promote legal reform in China to recognize LGBT human rights? How will these legal reforms take place in China?

In order to answer the central research questions, this thesis is divided into several sets of questions. First, how has sexual orientation human rights law been developing

²⁶ Julie Kleeman & Harry Yu, *The Oxford Chinese Dictionary*, (New York: Oxford University Press, 2010), at 743.

²⁷ Wang Xuejin(王学进), “Bianxie Cidian Mei Biyao Qiangdiao Jiazhi Guan(编写词典没必要强调价值观)[Not necessary to emphasize values in editing a dictionary]” *The China Youth* (17 July 2012), online: China Youth <http://zqb.cyol.com/html/2012-07/17/nw.D110000zgqnb_20120717_2-02.htm> [translated and emphasized by author]

worldwide? The thesis examines a developmental pattern theory of the recognition of gay rights identified by Kees Waaldijk, starting from decriminalisation, anti-discrimination, and reaching partnership legislation.²⁸ It further reviews how this pattern has been demonstrated among the three types of legal perspectives in practice: the UN human rights as an international legal perspective, the European human rights as a regional legal perspective, and Canadian human rights as a national legal perspective. The research of these three models explores a prior question, whether LGBT rights are universal or certain regions can claim that it is inappropriate to recognize LGBT rights due to cultural differences.

For each type of legal perspective reviewed, this thesis draws out the basic legal principles guiding sexual orientation human rights, how sexual orientation rights are recognized as human rights, the pattern of sexual orientation rights development and the main driving forces during these developmental processes. Furthermore, key findings that are applicable to the situation in China are highlighted. For instance, in international human rights law, the focus will be on the states' obligations to protect sexual orientation rights and China's official attitude with respect to these developments in the UN system.

The second set of research questions focuses on the tongzhi's legal status in China. What was the social and legal status of tongzhi over Chinese history? What is the legal and social status of tongzhi in China at present? The thesis argues that "*repressive indifference*" characterizes the current Chinese law in terms of tongzhi rights. Furthermore, will China follow the development pattern seen in international human rights law, European human rights law and Canadian human rights law? Could international human rights law play a key role in promoting tongzhi rights in China? Is the regional human rights model applicable in China? And can the Canadian experience help promote sexual orientation rights in China?

²⁸ See Kees Waaldijk, "Standard Sequences in the Legal Recognition of Homosexuality-Europe's Past Present and Future" (1994) 4 *Austl Gay & Lesbian LJ* 50, *infra* note 76.

The third set of questions is regarding strategic thinking for tongzhi rights development in China. The thesis explores the current obstacles and the key players involved in legal reform in China, and analyzes the route for tongzhi human rights development in China. Waaldijk's gay rights developmental pattern will be addressed in considering the reform thinking for tongzhi legal rights development. In particular, the thesis examines the question, what could force these key players to overcome the obstacles to achieving tongzhi human rights.

3. Research Methodology

a. A Theoretical Lens: Legal Positivism

Legal positivism is more a theoretical lens than a methodology. As a main theoretical assumption in the thesis, the propositions of legal positivism within a theory of law and a theory of legal science postulate that “the existence of law is a matter of *social fact* and that its description should represent it *as it is*, that is, independently of the value judgement, interpretations, or prejudices of the theorists”.²⁹ The ontological assumption is that “true and objective knowledge is possible provided that it is founded upon an objective reality, that is, empirical fact”.³⁰ That presupposes three fundamental points with regard to empirical facts summarized by Tremblay,

[F]irst, that empirical facts have fixed properties and structures on their own that exist independently of the theorist's subjective methodological standpoint; secondly, that they are identifiable and are capable of constituting the objective and neutral reference point in accordance with which the validity of a given representations verified; and thirdly, that a given proposition is *true* if its language corresponds to those facts it seeks to represent.³¹[Original emphasis]

²⁹ Luc B. Tremblay, *The Rule of Law, Justice and Interpretation*, (Montreal: McGill-Queen's University Press, 1997), at 4.

³⁰ *Ibid.*

³¹ *Ibid.*

Logically, for scholars in favor of legal positivism, the main task should be *descriptive* and to seek to represent objectively the law as it is in the external reality.³² Hence, the chapters that explore the legislative developments in international, European and Canadian sexual orientation human rights are primarily descriptive to seek whether they have followed the pattern developed by Waaldjik. Because the research covers different jurisdictions and the readers of this dissertation include Canadians and Chinese audiences among others, a basic introduction to legal and political system in both countries and the interpretation of some relevant cultural factors are necessary. These parts are primarily descriptive.

One of the important dimensions of legal positivism is the idea of law as commands.³³ Since law is considered a social invention and is man-made, whether a certain rule is considered law (i.e., creating a legal duty to comply with it) depends on its source.³⁴ A rule can become a genuine valid law even though it is grossly unjust so long as its source remains legitimate. John Austin's Command Theory explains that the roots of law are the sovereign's commands that become legally binding in society with the threat of the use of force or coercion.³⁵

In the thesis, within the Chinese context, the Communist Party of China (CPC)'s commands are the main sources of Chinese laws, and the key source of legal change in the CPC regime. The fundamental orthodox doctrine in the Chinese legal context is the need of the CPC and the supremacy of the authorities. The thesis focuses on positive laws and reforms in China and elsewhere with regard to LGBT rights, examining the pattern of development, supporting theories and driving forces, and then analyzes how these factors can impact or influence legal developments in China in terms of tongzhi human rights. Positivism serves as a suitable strategic device to consider how to improve tongzhi rights

³² *Ibid.*

³³ *Ibid.*

³⁴ Jules L Coleman and Brian Leiter, "Legal Positivism" in Dennis Patterson, ed, *A companion to Philosophy of Law and Legal Theory*, 2nd ed (Singapore:John Wiley & Sons-Blackwell, 2010) at 228-230.

³⁵ *Ibid* at 231-232.

by taking into account on what can be done to prompt legal reform within the CPC regime.

The different aspects of legal positivisms have been challenged by a number of contemporary ideologies or movement in twenty century, including American legal realism, pragmatism, American sociological jurisprudence, the jurisprudence of interest, the free-law movement, natural law, Marxist theories of law, feminism and the critical legal studies movements.³⁶ One of representative ideologies against legal positivism was launched from the perspective of *hermeneutical (interpretive)* theory that targets the positivist conceptions of “truth” and “objectivity”.³⁷

There are two different conceptions of the theory of interpretation although both distinguish between respective structures of natural and human sciences.³⁸ The first conception can be deemed as further development of the traditional legal positivism, which shares some of the basic ontological and epistemological postulates of positivism.³⁹ H.L.A Hart is deemed as the first philosopher who introduced the interpretation theory into legal theory.⁴⁰ His theory is claimed to consistent with the basic postulates of legal positivism.⁴¹ These postulates are summarised by Tremblay as follows:

The object of interpretation (a text, a social practice) exists independently from the interpreter’s own subjectivity; it has an objective meaning (determined by the intention of the text’s author, for example) that may be grasped by any rational person, observer, or scientist who proceeds according to the proper method; and the truth or validity of a given account consists of some form of correspondence criterion between interpretive propositions and “fact”(such as the author’s intention, for instance).⁴²

³⁶ Tremblay,*supra* note 29, at 4,

³⁷ *Ibid*, at 5.

³⁸ See Erwarth, “The Transformation of Hermeneutics: 19th Century Ancients and 20th Century Moderns,” 64 1981, *The Monist* 175; Phelps and Pitts, “Questioning the Text: The Significance of Phenomenological Hermeneutics for Legal Interpretation,” 29 1985, *St Louis U.L.J* 253, reprinted in Tremblay, *supra* note 29, at 238.

³⁹ Tremblay,*supra* note 29, at 5.

⁴⁰ See Dilthey, *Introduction to the Human Sciences*, reprinted in Tremblay, *supra* note 29 , at 238.

⁴¹ Tremblay, *supra* note 29 , at 6.

⁴² Tremblay, *supra* note 29 , at 5.

Ronald Dworkin, a representative of a contemporary interpretation theory, views that one can find the right interpretation of law by interpreting a legal rule in a way that makes it fit with the general principles underlying and guiding a legal system.⁴³ In David Dyzenhaus's view, it was used for lawyers and judges in South Africa to find a way to interpret a legal rule to combat racism in an apartheid legal system.⁴⁴ As elaborated *infra*, the role of the judiciary is much lesser in China than in the common law countries, so a Dworkinian focus on the judge would be inapt for the strategic thinking in the Chinese context.

The second conception focuses on more philosophical aspect than methodological perspective. It is derived from "the explanation of the conditions and characteristics that make understanding possible".⁴⁵ It argues that all interpretations and understanding are situated within a particular interpretive tradition that includes historical, cultural and linguistic factors.⁴⁶ The central point is that someone can "have access to true and objective knowledge with respect to the external world, be it a text, and intention, a natural object".⁴⁷ This interpretation approach can be helpful to seek a new interpretive perspective for existing laws to develop tongzhi rights in China. Particularly, the important role of historical and cultural implications on tongzhi should not be ignored in the development process, which will be addressed *infra*. The social or political forces in China should be taken into account in strategic consideration for future tongzhi rights development, which is different from the legal positivist's strict split between law and other social matters.

However, the thesis still mainly adopts the legal positivism lens to assess the positive law development because the hermeneutical theory that overemphasizes the role of

⁴³ See Ronald Dworkin, "All Responses: Hart and the Concepts of Law", Harvard Law Review Forum (2006) January 95.

⁴⁴ See David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (Oxford: Oxford University Press, 2010).

⁴⁵ Tremblay, *supra* note 29, at 5.

⁴⁶ *Ibid.*

⁴⁷ *Ibid* at 6.

interpretation of *existing* laws is inconsistent to the author's original intention for this research, seeking for the feasible *legal reforms* for tongzhi rights in China.

In addition, the adoption of legal positivism in the thesis relates to one of the research questions, i.e, to identify whether the developmental patterns in UN, European and Canadian laws follow the Waaldijk's model. Waaldijk's research is based on the domestic legislative development in European countries, which is done through a legal positivism lens.

b. Comparative Legal Study

Comparative law has a number of different meanings.⁴⁸ Some research areas within comparative law are listed by Mauro Bussani and Ugo Mattei:

Comparative law may be seen as the macro-comparison of the world's legal system; as the study of legal transplants- that is, of the borrowing of ideas between legal cultures and/or systems; as the most fruitful way of exploring the relationship between law and society, and the underlying perceptions of law; as well as the magnifying glass through which one best observes how state law lives side by side with other (supranational and domestic) sources of law and, thereby, how relative the notion of state power (as spread by mainstream political analysis) can be.⁴⁹

Debates on comparative law range from whether it is an independent legal discipline to the most appropriate methodology within comparative law when applied to concrete situations.⁵⁰ Some argue that comparative law is not an independent branch in legal sciences but, rather as a method.⁵¹ Professor Rene David, a representative scholar in favor of this viewpoint, claims three broad goals of comparative law: "1) to investigate historical

⁴⁸ Mauro Bussani & Ugo Mattei, *The Cambridge Companion to Comparative Law*, Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, Sao Paulo, Mexico City: Cambridge University Press, 2012), at 4.

⁴⁹ *Ibid.*

⁵⁰ Fabio Morosinni, "Globalization & Law: Beyond Traditional Methodology of Comparative Legal Studies and an Example from Private International Law", (2005) 13 *Cardozo J.Int'l & Comp. L.* 541, at 543

⁵¹ See Mitchel de S.-O.-L'E. Lasser, "The Question of Understanding", in Pierre Legrand and Roderick Munday eds, *Comparative Legal Studies: Traditions and Transitions*, (np: Cambridge University Press, 2011), at 198.

and philosophical issues related to law; 2) to help understand and improve one's own legal system; 3) to establish a better regime in international relations.”⁵²

A comprehensive view argues that comparative law is not only a method of legal research but also an independent system or a scientific model.⁵³ The two aspects are claimed to be tightly interlinked due to the nature of the comparative law itself: “the comparative approach is the means for scientific research, while comparative law is a distinct domain within the legal sciences.”⁵⁴ The critics on this view of independence of comparative law are comparative law does not exist without the concrete objects of comparison, e.g, laws, institutions and actors.⁵⁵ Comparative law essentially relies on the concrete objects for comparison.

There are different approaches in comparative law. The term of *comparative legal study* is more suitable in addressing concrete research approaches as opposed to the term of comparative law in the debate context method versus science, to reflect on the method free from preconceptions. A number of research methods are used in the comparative legal study to address different perspectives of the comparison. Some relevant approaches are addressed below.

Debate on the convergence approach and non-convergence approach is quite common.⁵⁶ The convergence approach compares different legal families or laws and legal institutions under different social systems.⁵⁷ The core of this approach is that different legal systems share a common essence, always find different ways to approach similar problems and often reach functionally similar outcomes.⁵⁸ Thus this approach should focus

⁵² Rene David, “Les Grands Systems Du Droit Contemporains” (1964) 1 Droit Compare, reprinted in Fabio Morosinni, *supra* note 50, at 543.

⁵³ Morosinni, *supra* note 50, at 544.

⁵⁴ Zhaoxiang Liu & Jinyuan Su, “Comparative Law in China: over 30 years’ Development and Paradigm Shift in Research”, (2013) Vol 1 No.1, The Chinese Journal of Comparative Law 158, at 165.

⁵⁵ Morosinni, *supra* note 50, at 544.

⁵⁶ *Ibid*, at 545.

⁵⁷ *Ibid*.

⁵⁸ *Ibid*, at 545.

on the similarities of these different legal systems.⁵⁹

The non-convergence approach, however argues that a comparative methodology should be based on differences, because “each legal culture construes its own legal identity in accordance with different necessities and movements”.⁶⁰ The rationale is that “law is a living part of the broad cultural framework of a given country” so that it is superficial to only focus on similarities of different legal systems.⁶¹

Both viewpoints are significant for addressing the research questions in the thesis. The diversity of legal traditions and legal systems results in the similarities and differences for a same/similar legal issue in jurisdictions, which should be within the research scope of the thesis. A mixed approach will be employed in the thesis to expound the similarities and differences of the three systems and compare them to the Chinese context with regard to sexual orientation rights developments. Within China, historical comparisons on legal and social status of sexual minorities over different periods are examined to understand the dynamics at present, further to consider strategies for legal reform.

The functional comparison is one of traditional methods in comparative legal study. It should identify consistent comparable contents among the different legal systems, testify the functions within the system, and conclude common practical problems, social demands and corresponding resolutions.⁶² Given the emphasis on function of legal systems, comparatists are encouraged to combine legal comparative method with research methods in other disciplines, for instance, sociology and anthropology.⁶³ In the thesis, the pattern of sexual orientation rights development is a comparable theme for conducting research within the three legal systems as well as China. Some common practical problems, such as main oppositions or challenges will be laid out in each system. The key players or factors contributing to the development of sexual orientation rights in different systems will be

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, at 546.

⁶¹ *Ibid.*

⁶² Zhaoxiang Liu & Jinyuan Su, *supra* note 54, at 182.

⁶³ *Ibid.*, 183.

identified, and testified with the counterparts in the Chinese context.

There is a trend of international standardization in the realm of public law where certain universal principles become guidance for legal reforms in domestic laws.⁶⁴ It does not necessarily mean the direct application of the same or similar legal norms into different legal systems, but refers to the recognition of the same or similar values, and some basic legal principles, such as rule of law.⁶⁵ This trend is a result of globalization of economy, and many similar legal issues or challenges commonly faced by different countries and regions. Some fields are identified such as, the spirit of popular sovereignty, recognition of universal human rights protection, judicial review mechanism, rule of law, the battle against religious extremism, national separatism and international terrorism.⁶⁶ This trend helps to raise the key research questions in the thesis, whether the development of sexual orientation rights in the international human rights law regime can prompt the legal reform of tongzhi rights in China; whether the experience in regional legal system, for instance, Europe can be borrowed in Asia; whether the key actors of factors in Canada can somehow push the counterparts in China to take actions to promote tongzhi rights.

Legal transplant is a important perspective in comparative legal study, because many legal transplants that are based on comparative studies on legal concepts, their formulation and application in different jurisdictions is part of the process of implementing legal reform.⁶⁷ Comparative legal study can support legislative process by comparing a foreign legislative solution with actual or direct insight into the effectiveness of such solution. In the process of transplanting, the legislator may examine the difference with the foreign legal system, and come up with a suitable solution.⁶⁸

Legal transplant is a different discipline from comparative law regardless of their close

⁶⁴ *Ibid*, at 179.

⁶⁵ *Ibid*.

⁶⁶ *Ibid*.

⁶⁷ Coen J.P. Van Laer and Helen Xanthaki, "Legal Transplants and Comparative Concepts: Eclecticism Defeated" 34 (2) 2013, *Statute Law Review* 128, at 128.

⁶⁸ *Ibid*, at 129.

relationships. Legal transplant tends to answer whether law can be transferred from one place to another.⁶⁹ The scope of research is broad, which includes whether these jurisdictions are interested in political reform, economic growth, and social progress or less benefits initially, further extends to the focus on a “domestication” or “localization” that assesses the counterparts of the transplantations in economic, social, political and cultural areas.⁷⁰ In the thesis, these areas in China with regard to tongzhi rights reform are significant and will be addressed to anticipate the feasibility of legal reform path in China. But the core question within legal transplants, whether LGBTs legislation in other jurisdictions can be transplanted directly in China, is beyond of the research scope of the thesis.

c. Other Issues

In addition, the thesis discusses recent developments in thinking about equality and non-discrimination. These theories are the main leading legal principles for sexual orientation rights, and so the analysis on the development of these theories will provide a theoretical cornerstone to justify sexual orientation rights.

The data used to help answer these research questions come from primary and secondary sources. Primary legal sources included human rights legal doctrines, relevant legislation, case law and legal reports. Journal articles and books that contain a number of valuable viewpoints were also reviewed. The coverage of the LGBT movement in Chinese media was examined in order to explore the social attitudes on LGBT people. Due to the official ban on homosexuality in media in China, there are only a few published Chinese books or articles addressing sexual minorities. Source constraints make the research in China mainly rely on online articles, reports and other materials. The challenges in the translation of these Chinese sources should be acknowledged during the research process.

⁶⁹ Michele Graziadei, “Legal transplants and frontiers of legal knowledge” Vol.10 (2009), *Theoretical Inquires in Law* 693, at 727.

⁷⁰ *Ibid*, at 727-729.

It should be also noted that the LGBT community is part of civil society and the social acceptance for this group is very significant for LGBT rights development. Many significant legal developments in favour of LGBT rights have the support from civil society. Therefore, during the legal research in Canada, and China, the attitudes of Chinese civil society towards sexual minorities are addressed along with the research questions.

B. Presentation of the Dissertation

Chapter One introduces the main legal principles in human rights laws to protect sexual minorities: the equality and non-discrimination principle, and the privacy protection principle. It starts with a comprehensive illustration of a development pattern in the legal recognition of gay rights by Waaldijk based on legal reforms in European countries, and introduces briefly how these principles contribute to the legal developments of sexual orientation protection. In order to better understand these principles in the human rights context, this chapter offers a brief introduction to the concept of human rights, the development of human rights in international law and the main obstacles for the development of universal human rights. Next, it explores case law, including International, European and Canadian laws related to privacy protection, equality (both formal equality and substantive equality) and non-discrimination principles respectively as they apply to sexual minorities. Whether Waaldijk's pattern will be adopted, and how these main principles apply to the Chinese context will be examined in considering the legal reform in China in following chapters.

Chapter Two aims to provide an overall picture of the tongzhi situation in China in terms of historical development, official attitude of the Communist Party, and the current trends in civil society. Before delving into these issues, Chapter Two presents the different terminologies used to refer to sexual minorities in Chinese and explains the reasons to adopt *tongzhi* to describe sexual minorities in China. Subsequently, it reviews the chronology of tongzhi social and legal status during four different phases in Chinese history.

Next it explores the tongzhi legal situation at present through a comprehensive study of the current legislation and human right practices as they relate to tongzhi rights. It is argued that the Chinese authority has adopted a *repressive indifference* policy toward tongzhi. The detailed study on the two notable developments in tongzhi human rights, namely the removal of hooliganism in the *Criminal Code* and the removal of homosexuality from the list of mental diseases, demonstrates how the Communist Party has used its repressive indifference policy in different situations. Chapter Two concludes that this official attitude is the main obstacle for the tongzhi movement and continues to leave tongzhi in a socio-legal grey area in China today.

Chapter Three presents an overview of the international human rights legal framework. It explores how the UN human rights system is constructed and operates through the adoption of the *International Bill of Human Rights*, core international human rights instruments and the corresponding monitoring mechanisms. Next, it examines the role that international human rights law plays in UN member states, specifically, the obligations of the member states to respect, protect and fulfill human rights. After having established the basic foundation of the UN human rights system and corresponding duties of member states, Chapter Three focuses on how the international human rights system has developed regarding sexual orientation. A detailed study of the landmark cases heard by the Human rights Committee under the *International Covenant on Civil and Political Rights* (ICCPR) demonstrates how the legal principles of equality, non-discrimination, and privacy protection apply to sexual minorities. Other important cases and decisions from the other UN human rights monitoring bodies illustrate the gradual recognition that sexual orientation should be protected under the non-discrimination human right principle in each of their respective treaties. The studies of human right violations of sexual minorities along with other issues raised by a variety of UN Special Rapporteurs provide an overview of human rights violations in practice with regard to sexual orientation around the world.⁷¹

⁷¹ *Infra* Chapter Three, *Special Procedures*, at p129.

Chapter Three closes with a review of some of the important and recent developments for sexual orientation rights in the UN system as well as China's official responses to these developments.

Chapter Four examines the development of sexual orientation human rights under the European human rights legal system, and how human rights law affects domestic legal reform among the European member states. The primary human rights instrument for the European Union is the *European Convention on Human Rights* (ECHR).⁷² Through an examination of the ECHR, especially the European Court of Human Rights' case law on sexual minorities, Chapter Four documents how the Court extended the ECHR's legal principles to recognize the rights of sexual minorities in different areas. Next, it reviews how the case law has influenced the corresponding development in human rights legislation at the Council of Europe (COE) and European Union (EU), which is then directly applicable within member states. Applicant States are also required to make the necessary legal reforms before securing membership in either the COE or the EU. Chapter Four also compares the European human rights system with the UN human rights system. The similar pattern in the application of principles of privacy protection and non-discrimination is found in both systems. However, due to the binding power of the EU legislation and case law, the EU human rights law is directly applicable in member states, thereby accelerating the development of sexual orientation rights at the domestic level.

Chapter Five provides a study of the development of sexual orientation rights in Canada. It first gives a brief introduction to Canadian law, and the *Canadian Charter of Rights and Freedoms* (Canadian Charter).⁷³ The second section examines how the courts have interpreted the equality provision in the Canadian Charter to protect sexual minorities. Subsequently, it illustrates how judicial decisions have driven reforms in legislation. The

⁷² *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221, Eur TS 5 [ECHR].

⁷³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK) 1982 c 11.

recent battles for sexual minorities' rights followed the symbolic victory of equality (i.e., same-sex marriage) are also examined. Ultimately, the Canadian *Charter* proved to be a significant source for the development of sexual minority rights in Canada.

Chapter Six explores the central research questions, whether and how these developments, documented in the UN human rights system, the European human rights system, and the Canadian human rights system, could promote tongzhi human rights development in China. The first section seeks to demonstrate whether sexual orientation rights recognized under UN human rights law could propel legal reforms in China. Next, it examines the general application of international human rights in China and identifies three main resistances. It uses the development of human rights for women as a case study, to demonstrate how international human rights law has successfully promoted women's rights in China to reach formal but not substantive equality. It then provides an analysis on how the UN human rights law could accelerate tongzhi human rights development in China. The second section goes on to explore whether a regional international organization could inspire the tongzhi rights development in China. The ECHR provides advanced and comprehensive human rights protection standards for sexual minorities, and it promotes legislative reforms not only among its member states but also among applicant members. The only Asian regional organization counterpart is the Association of Southeast Asian Nations (ASEAN). Through an examination of ASEAN's history, its emerging human rights system, and ASEAN's relationship with China, this chapter will provide an answer to whether the regional human rights model could be applicable in China in the near future. The last section explores whether the Canadian successful experience could be *transplanted* in China to promote tongzhi human rights by reviewing the roles of the Canadian *Charter* and other key players during the development of sexual orientation rights in Canada. It looks at the roles of China's counterparts and assesses the feasibility of a litigation strategy based on the Chinese current legal and political situation.

Chapter Seven offers a strategy for tongzhi human rights development in China based

on the discussion above. It begins with the comparison between the current tongzhi legal status in China and the human rights requirements in the Yogyakarta Principles, to see what areas require legal reform. It then explores the key players and the main forces that would be needed in order to trigger legal reforms. Same-sex marriage is anticipated as the first legal area where reform will take place, and it would be beneficial for the future of tongzhi human rights developments. Next, Chapter Seven examines how the human rights principles of equality, non-discrimination, and privacy protection could apply to the tongzhi human rights development in China. The last section provides a broad overview of the current official political environment with regards to human rights protection. The introduction of CPC's current policies, *Protecting the Vulnerable Groups, Building Up a Harmonious Society* and *People-oriented Principle* could provide a better understanding of the feasibility of the same-sex marriage strategy in China in the near future.⁷⁴

⁷⁴ *Infra* at p 284-289.

Chapter One: Main Legal Principles Guiding Sexual Orientation Protection

A. Introduction

The elaboration on main legal principles guiding sexual orientation protection, including theories and the recognition process by the judiciary provides fundamental support for strategic thinking on which principles are more feasible or better to support tongzhi right development in China. This chapter starts with a comprehensive illustration of the development pattern in the legal recognition of gay rights by Waaldijk based on legal reforms in European countries, and further tries to identify the main legal principles guiding sexual orientation rights in different stages in this pattern, namely the principle of privacy protection and the principle of equality and non-discrimination.⁷⁵

In order to better understand these principles in the human rights context, the next section introduces the concept of human rights, the development of human rights in international law and the main obstacles for the concept of universal human rights.

The third section describes the principle of privacy protection and introduces how this principle protects sexual orientation rights. In particular, the right to privacy has been critical in the process of decriminalizing homosexuality. The privacy protection provisions in the ECHR and the ICCPR serve as case studies. Finally, this section explores the disadvantages and limits of this principle to support further developments such as full affirmation and fulfillment of sexual minority human rights.

The last section of this chapter explores the principle of equality and non-discrimination. Equality and non-discrimination are always addressed together and are considered two sides of the same coin. First, the key characteristics of equality are outlined. Next, the concepts of formal equality and substantive equality are discussed along with their treatment under different jurisdictions (i.e., the UN human rights system, European human right system and the Canadian human rights system). Following this analysis, two

⁷⁵ *Infra* note 76.

different approaches to reach substantive equality are presented and compared. The jurisprudential analysis of the principle of equality highlights three key components of discrimination and examines these components with sexual minorities. These discussions on principles will be revisited within the context of China in term of the feasibility of legal reform.

B. Different Human Rights Principles during Development of the Sexual Orientation Rights

1. The Pattern of Sexual Orientation Rights Development

Kees Waaldijk argues that there is a development pattern in the legal recognition of gay rights based on legal reforms in European countries since 1960s. He draws a sexual orientation human rights development line:

Starting at (0) total ban on homo-sex, then going through the process of (1) the decriminalisation of sex between adults, followed by (2) the equalization of ages of consent, (3) the introduction of anti-discrimination legislation, and (4) the introduction of legal partnership. A fifth point [(5)] on the line might be the legal recognition of homosexual parenthood.⁷⁶

The concept of a “legal partnership” in this pattern is understood broadly as including not only same-sex marriage, but also common-law status, civil unions and domestic partnerships. Waaldijk points out that recognition of legal partnership may take long time after anti-discrimination legislation is made based on his perception of some countries, and the opening up of marriage to same-sex couples is only anticipated to take place after all the other steps are completed.⁷⁷

Besides, Waaldijk has further identified two other trends on the legal reform in some

⁷⁶ Kees Waaldijk, “Standard Sequences in the Legal Recognition of Homosexuality-Europe’s Past Present and Future” (1994) 4 *Austl Gay & Lesbian LJ* 50 at 51-52.

⁷⁷ Kees Waaldijk, “Civil Developments: Patterns of Reform in the Legal Position of Same-Sex Partners in Europe”, (2000) vol 17.1, *Canadian Journal of Family Law* 62, at 87.

European countries. For instance, the “law of symbolic preparation”, refers some symbolic legislation advancing the acceptance of sexual minorities is passed prior to the passage of actual legislation stipulating the protection for gay men and lesbians.⁷⁸ The general anti-discrimination provisions without direct reference to sexual orientation may generate a better environment for fighting for LGBT rights. The other one is called “law of small change”, which is characterized in the experience in Netherlands where the legislative change is relatively small but sufficient advancing the recognition and acceptance of sexual minorities.⁷⁹

It is demonstrated that many European countries have followed the standard sequence regardless of dissimilar speeds.⁸⁰ This model is significant in terms of providing useful guidance about what recognition of LGBTs to expect from the legislative bodies of the European countries at national level, as well as of the European Union at regional level.⁸¹

Further, although this sequence trend was based on the legislative development in European countries, this sequence has a strong internal logic so that it is identified by other scholars addressing law reforms in other jurisdictions:

[...]Once people engaging in homosexual activity are no longer seen as *criminals*, but instead as *citizens*, they can hardly be denied their civil rights, including their right not to be treated differently because of their (criminally irrelevant) sexual orientation. In this way, the step of anti-discrimination not only follows, but builds on the step of decriminalisation. Similarly, the very idea of non-discrimination with regard to sexual orientation simply demands that on one shall be disadvantaged by law because of the gender of the person he or she happens to love. In this way the links between the steps of decriminalisation, anti-discrimination, and partnership legislation are not

⁷⁸ Kees Waaldijk, “Towards the Recognition of Same-sex Partners in European Union Law: Expectations Based on Trends in National Law”, in Robert Wintemute & Mads Andenes, eds, *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Oxford: Hart Publishing, 2001), at 638-639.

⁷⁹ Kees Waaldijk, “Small Changes: How the Road to Same-Sex Marriage Got Paved in the Netherlands” in Robert Wintemute & Mads Andenes, eds, *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Oxford: Hart Publishing, 2001), at 437-464.

⁸⁰ Waaldijk, *supra* note 77, at 66.

⁸¹ Waaldijk, *supra* note 78, at 635; *supra* note 77, at 62.

only sequential (in the European countries that have gone that far), but also morally and politically compelling.⁸² (Original emphasis)

Around the world, many countries appear to be following Waaldijk's standard gay rights developmental pattern. For instance, in Canada: same-sex acts was decriminalized in 1969; the age of consent laws are facially neutral, however, the effect of the higher age of consent for anal intercourse disproportionately affects gay youth; in *Egan v Canada*⁸³, the Supreme Court of Canada acknowledged sexual orientation as an analogous ground for non-discrimination in 1995; in *M v H*,⁸⁴ the Supreme Court of Canada extended common law rights and benefits to same-sex couples, and in 2005 the government legalized same-sex marriage; and it is also the case that LGBTs enjoy equal parenthood rights including adoption rights and assisted reproduction rights.⁸⁵

Thus, with regard to tongzhi rights development in China, the following chapters will refer to Waaldijk's pattern to identify where the tongzhi rights legislative development is currently situated, anticipate what next step will be, and explore whether Waaldijk's pattern that is developed on the experiences in Europe can be duplicated in the Chinese context.

2. Analysis of the Application of the Main Human Rights Principles to the Pattern

The first two phases (i.e., (1) *decriminalizing homosexuality* and (2) *equalizing the age of consent*) ask for equal treatment of homosexuals with other heterosexual groups in the

⁸² See: B.D. Adam, J.W. Duyvendak & A.Krouwel, *The Global Emergence of Gay and Lesbian Politics. National prints of a Worldwide Movement*, (Philadelphia: Temple University Press, 1999) at 345; Jack Donnelly, "Non-Discrimination and Sexual Orientation: Making a Place for Sexual Minorities in the Global Human Rights Regime" in Peter Baehr, Cees Flinterman and Mignon Senders eds, *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights* (Amsterdam: Royal Netherlands Academy of Arts and Sciences, 1999) 93, reprinted in Waaldijk, *supra* note 77, at 86.

⁸³ *Egan v Canada* [1995] 2 SCR 513, 124 DLR(4th) 609.[*Egan*]

⁸⁴ *M v H*, [1999] 2 SCR 3.

⁸⁵ The equal parenthood rights of same-sex couples in Canada actually occurred before the legalization of same-sex marriage. One of the most significant federal legislative reform took place in 2000: the *Modernization of Benefits and Obligations Act (Bill C-23)* amended 68 statutes to effect equal application of federal laws to unmarried heterosexual and same-sex couples, and to extend some benefits and obligations previously limited to married couples to both opposite-sex and same-sex common-law couples. It will be discussed below.

criminal law context. In other words, it is a requirement of the formal equality, one perspective of equality principle that will be addressed further in this chapter.⁸⁶ Formal equality sends a message to the public that sexual minorities should be treated the same as their heterosexual counterparts regardless of their sexual orientations. During this process, privacy protection is the key principle for curtailing states from interfering in the private lives of sexual minorities, and for reaching the objective of decriminalization of same-sex acts between consenting adults.

The third phase, the introduction of (3) *anti-discrimination legislation* is aimed at eliminating discrimination based on sexual orientation in the public sphere. This is an important phase because it could have an enormous impact on a variety of aspects in society including employment, education, taxation, pensions, inheritance, health benefits, immigration, and family formation rights (marriage and adoption), among many other benefits. Non-discrimination is another key legal principle to guide such legislative reforms in practice and expands the legal protection for sexual minorities to the public sphere. It is essentially a requirement of substantive equality, the other perspective of the equality principle, which seeks special protections for this disadvantaged/different group in order to reach full equality.⁸⁷

The fourth phase introduces the notion of relationship recognition as (4) *legal partnerships*. As stated above, the legal partnership should be understood broadly, including same-sex marriage and other relationship recognition institutions. In Europe and North America, for example, many governments have created alternatives to same-sex marriage rather than changing the definition of marriage to provide different degrees of civil rights for same-sex partners, such as registered partnerships, and civil unions.⁸⁸ Substantive equality provides theoretical support for such institutions because such recognition institutions are arguably to be designed especially for homosexual groups based

⁸⁶ *Infra* at p 38.

⁸⁷ *Infra* at p 40.

⁸⁸ ILGA, *supra* note 10.

on their different/disadvantaged social situations.

However, these alternative relationship recognition institutions, which are often equally available to heterosexual couples, provide inferior rights and benefits compared to marriage in practice. So long as marriage is not an option, these types of unions simply maintain the disadvantaged social position of sexual minorities, which is inconsistent with the final aim of equality. Thus, gay rights activists still insist on claiming the right of same-sex marriage, and *Schalk and Kopf v. Austria*⁸⁹ is a representative case of the fight for same-sex marriage under the ECHR that will be addressed in Chapter Four.⁹⁰ The claim for same-sex marriage can be deemed as a formal equality request because it is to ask the identical marriage right that heterosexual people are entitled to. The legal recognition of same-sex marriage could convey a message to the public to affirm that sexual minorities are the same as the dominant heterosexual group and entitled to establish a family including marrying and raising children.

Waldijk's final phase is to have legal recognition of (5) *homosexual parenthood*.⁹¹ This equality objective should be easy to realize once same-sex marriage is recognized, however, Waldijk's order is not always strictly followed. Canada, for instance, permitted same-sex adoption prior to relationship recognition, beginning with Ontario in 1995.⁹² Still, it is considered as a substantive equality aspect because it requires the special treatment or sameness of treatment applicable to same-sex couples. Such special treatment would have to include a strict prohibition of discrimination based on sexual orientation during the adoption process or while seeking assisted reproduction services. The state would also have obligations to prohibit discrimination against children raised by same-sex parents.

To sum up, the main applicable human rights principles in terms of sexual orientation rights are right to privacy, non-discrimination and equality principles. Next, these

⁸⁹ *Schalk and Kopf v Austria*, no 30141/04, [2010] ECHR 995.

⁹⁰ *Infra* at p164.

⁹¹ Waldijk, *supra* note 76, at 52.

⁹² See e.g., *Re K Adoption*, 1995 CanLII 10080 (ON CJ).

principles will be scrutinized in-depth in the context of human rights law, along with the examination of practical development in some countries, trying to explore whether the pattern supported by these principles will inspire the tongzhi rights development in China.

C. Human Rights and Human Rights Law

Human rights are commonly understood as the basic rights that are inherent to all human beings without distinction.⁹³ Everyone is entitled to such rights simply because he or she is a human being. The concept of human rights originated and evolved in the West and crystallized in their current forms following the tragic events of the Second World War, which will be addressed below.

1. The Concept of Human Rights

The modern concept of human rights is credited to Europe and North America despite the ethical contributions from China, India and the Muslim world in the early history of human rights.⁹⁴ The development of human rights has been associated with a variety of factors in the West, such as the industrial revolution and Western standards of morality.⁹⁵ The Western forerunner of human rights was the concept of natural rights from the medieval natural law tradition.⁹⁶ The major development occurred during the European Enlightenment where modern science, the rise of mercantilism, the consolidation of the nation-state and the emergence of a middle class, provided an environment that was conducive for the development of the modern concept of human rights.⁹⁷ It should be noted that early discourse on liberal rights was based on the demands of middle-class white men, excluding women, property-less, racial minorities, homosexuals and religious

⁹³ “What are Human Rights?”, United Nation Human Rights, Office of High Commissioner for Human Rights, online < <http://www.ohchr.org/> >.

⁹⁴ Micheline R Ishay, *The History Of Human Rights: From Ancient Times To The Globalization Era* (Berkeley: University of California Press, 2006) at 6-7.

⁹⁵ *Ibid* at 65.

⁹⁶ *Ibid*.

⁹⁷ *Ibid*.

minorities, especially Jewish people, among the many others that did not have social status.⁹⁸ These groups did not gain any rights, which provoked further human rights movements, such as challenging the slavery system in the United States and the women's suffrage movement (e.g., to gain the right to vote).⁹⁹ In terms of sexual orientation human rights, the development can be seen as a fight for the inclusion of sexual orientation protection in the existing human rights protection.

The significant advances in human rights took place in the aftermath of the Second World War following the atrocities of the Holocaust.¹⁰⁰ The massacres during the Second World War and the loss of lives of countless civilians brought international attention to the notion of human rights.¹⁰¹ In 1948, the United Nations adopted the Universal Declaration of Human Rights (UDHR) in hopes of developing and strengthening human rights worldwide. The UDHR was the most important and fundamental document in international human rights law and was called the *International Bill of Human Right* along with other two instruments, the *International Covenant on Civil and Political Rights* (ICCPR) and its two Optional Protocols, and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).¹⁰² Since then, the UN has played a critical role in international human rights law.

2. International Human Rights Law

The 60s and 70s saw rapid development in a variety of international human rights instruments under the UN and its member states.¹⁰³ These core instruments, their

⁹⁸ *Ibid* at 66.

⁹⁹ *Ibid*.

¹⁰⁰ *Ibid*, at 173.

¹⁰¹ *Ibid*.

¹⁰² Office of High Commissioner for Human Rights (OHCHR), "International Human Rights Law", online: United Nations Human Rights <<http://www.ohchr.org>>. *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810,(1948).[UDHR]; *International Covenant on Civil and Political Rights* (19 December 1966), 999 UNTS 171, arts 9-14, Can TS 1976 No 47, 6 ILM 368[entered into force 23 March 1976][ICCPR]; *International Covenant on Economic, Social and Cultural Rights* (16 December 1966),999 UNTS 3, arts 5-6, ILM 360 (entered into force on 3 Januaray 1976).[ICESCR]

¹⁰³ *Infra*, at p 105.

respective monitoring bodies, and the documentation of human rights violations constitute the main human rights protection system under the UN. Several essential universal human rights are expressed in these core instruments and have attained customary international law status.¹⁰⁴ According to the UN, human rights are classified as follows: “civil and political rights, such as the right to life, equality before the law and freedom of expression; economic, social and cultural rights, such as the rights to work, social security and education; or collective rights, such as the rights to development and self-determination.”¹⁰⁵ These rights are all interrelated, interdependent and indivisible, and the improvement of one right facilitates the advancement of the others.¹⁰⁶ Likewise, the deprivation of one right adversely could affect the other rights.¹⁰⁷

International human rights law is based on the vital foundational concept of universalism, meaning that the human rights are “universal and inalienable”.¹⁰⁸ For further clarity, many international human rights instruments state that they shall apply to everyone regardless of nationality, residential place, sex, national or ethnic origin, colour, religion, language, or any other status.¹⁰⁹ This principle of non-discrimination is the cornerstone of international human rights law, and it was first emphasized in the UDHR and reiterated in numerous international human rights conventions, declarations, and resolutions.¹¹⁰

However, this principle of universal human right application has been criticized for its lack of consideration of cultures and moral differences.¹¹¹ The opponents of universalism are often referred to as relativists. The relativists are not against human rights *per se*, but argue that cultural, moral and other social contexts should be considered since human rights are socially constructed.¹¹² Various social practices may conflict with this universal

¹⁰⁴ *Infra* at p 106.

¹⁰⁵ OHCHR, “What are human rights?”, online: United Nations Human Rights, <<http://www.ohchr.org>>.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ Ishay, *supra* note 94, at 10.

¹¹² Holning Lau, “Sexual Orientation: Testing the Universality of International Human Rights Law”, (2004)

notion of human rights, given the diversity of cultures or morality around the world. The *Bangkok Declaration* (1993) adopted by many Asian countries prior to the World Conference on Human Rights in Vienna exemplifies such concern:

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 backgrounds.¹¹³

During the 1990s, leaders from Singapore and Malaysia advanced the concept of “Asian Values”. The proponents argue that the Asian Values are significantly different from Western values, for instance the inclusion of a sense of loyalty and forgoing personal freedoms for the sake of social stability and prosperity. Those proponents view that the universalism of Western human rights is a form of cultural imperialism.¹¹⁴ Lee Kuan Yew, the former Prime Minister of Singapore, provided a good description of such view:

What Asians value may not necessarily be what Americans or Europeans value. Westerners value the freedoms and liberties of the individual. As an Asian of Chinese cultural background, my values are for a government which is honest, effective, and efficient.¹¹⁵

Furthermore, the danger of universalism could be seen as a form of interference with sovereignty as many Asian countries seem cautious about accepting the universality of human rights advanced by the West due to their history with European colonization. They worry that the West will utilize human rights protection as a new excuse to interfere with the national affairs and weaken sovereign. *People Daily*, the official newspaper of the CPC,

vol 71 University of Chicago Law Review 1689, at 1692-1693.

¹¹³ Rapporteur, L.M. Singhvi, *Report of the Regional Meeting for Asia of the World Conference on Human Rights, Bangkok*, UN. Doc GeneralA/Conf.157/Pc/59, 7 April 1993.[Bangkok Declaration]

¹¹⁴ Randall Pererenboom, “Human Rights and Asian Values: The Limits of Universalism” (2000) 7:2 *China Review International* 295, at 296.

¹¹⁵ Stefan A Halper, *The Beijing consensus: how China's authoritarian model will dominate the twenty-first century* (New York: Basic Books, 2010), at 133.

also issued an article named *The Understanding of the Substance of Western Democracy and Human Rights Output*, which states,

“Democracy and human rights output” movement is essentially a new strategy of Western monopoly capitalist class to interfere, control, and dominate regional policies and activities of developing countries indirectly, within economic, political, cultural, diplomatic and other fields after colonialism has gone bankrupt.¹¹⁶

It is evident that cultural relativism could be used as a justification for human rights abuses. For instance, various “Asian Values” can be deployed to argue for communal values over individual values, duties over rights, against certain “Western” human rights and double standard for a different prioritization of rights.¹¹⁷ This could jeopardize the objective of international human rights law that endeavours to provide the basic human rights to which everyone is entitled. The UDHR actually was drafted by people from different cultures and traditions, including an American Roman Catholic, a Chinese Confucian philosopher, a French Zionist and a representative from the Arab League.¹¹⁸ Those who have power in cultures should not use cultural or morality relativism to commit human rights abuses against universal human rights.

This thesis does not develop the extensive literature on the debate between universalism and relativism. Universalism has an influence on the international human right law that has positively promoted the protection of human rights in local and national jurisdictions or regions in the world. Constitutions in many countries, including China, have expressly recognized that the protection of human rights is a significant legal principle.¹¹⁹ Many disadvantaged groups have successfully gained a variety of human

¹¹⁶ Guofang Daxue Zhongguo Tese Shehuizhuyi Lilun Tixi Yanjiu Zhongxin(国防大学中国特色社会主义理论体系研究中心)[the Research Center for the socialism system with Chinese characteristics, National Defense University], “Renqing Xifang ‘Minzhu Renquan Shuchu’ de Shizhi(认清西方“民主人权输出”的实质)[The Understanding of the Substance of Western Democracy and Human Rights Output]” (25 May 2012), online: the People Daily, <<http://paper.people.com.cn>> [translated by author].

¹¹⁷ Karen Engle, “Culture and Human Rights: The Asian Values Debates in Context” (2000) 32 Intl’l L & Pol, 291, at 329.

¹¹⁸ Olivia Ball and Paul Gready, *The no-nonsense guide to human rights* (Oxford: New Internationalist Publications, 2006), at 34.

¹¹⁹ XIANFA (宪法) [Constitution] (promulgated by Nat’l People’s Cong. on 4 December 1982, effective on 4

rights at national levels with the support of international human rights law. The whole international community is also aware of the significance of human right protection, which is a good sign for future human rights movements likewise.

D. Right to Privacy

1. Privacy Protection in Human Rights Law

Article of 17 of the ICCPR provides the right to privacy, the fundamental human right, which states,

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.¹²⁰

The ECHR also has a similar provision, article 8, provides a right to privacy:

Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.¹²¹

It can be seen from these provisions that a right to privacy in traditional human rights law mainly refers to the restriction of the state's illegal interference with an individual's general private life. It should be noted that article 8.2 in the ECHR also provides some exceptions for interference such as for the purpose of national security, public safety or economic well-being of the country, for the prevention of disorder or crime, for the

December 1982), online: pkulaw <<http://en.pkulaw.cn/>>, at c.2, art. 33.[*Chinese Constitution*]

¹²⁰ ICCPR *supra* note 102 at art 17.

¹²¹ ECHR, *supra* note 72, at art 8.

protection of health or morals, or for the protection of the rights and freedoms of others.¹²² The right to privacy as a fundamental human right is subject to interference if it is for the public or state's interests.

2. Privacy Protection and Sexual Orientation Protection

In fact, privacy protection has played a vital role in the development of sexual orientation human rights, especially in the process of decriminalizing male same-sex acts. Same-sex acts are still considered a crime in over 70 countries today and many gay men are prosecuted due to their actual or perceived private sexual behaviour¹²³. Privacy protection has been and continues to be a powerful and successful legal principle to restrain the state from interfering in the sexual practices between consenting adult males in private.

In the groundbreaking case *Dudgeon v the United Kingdom* (1982)¹²⁴ heard by the European Court of Human Rights (ECtHR), Jeffrey Dudgeon, a gay activist, successfully challenged the criminalization of private male same-sex acts between consenting adults in Northern Ireland using the principle of privacy protection. The Court had no difficulty finding the legislation violated the applicant's right to respect for his private life, which includes his sexual life.¹²⁵ Thus, in Europe, sexual acts between consenting males in private fell within the scope of article 8 protection. The Court did not accept the North Ireland's justification of interference for "the protection of the rights and freedoms of others" and "protection of morals" aims.¹²⁶ The same finding was also made by the HRC in *Toonen v Australia* (1994), where the HRC ruled, "it is undisputed that adult consensual sexual activity in private is covered by the concept of 'privacy'."¹²⁷

Expanding the sphere of privacy protection against criminal prosecution is extremely

¹²² *Ibid.*, at art 8.2.

¹²³ The Council for Global Equality, "Countries Where Homosexuality Is Criminalized" (June 2011), online: Global Equality <<http://www.globalequality.org/>>.

¹²⁴ *Dudgeon v the United Kingdom* (1981), ECHR, 4 Eur HR Rep 149.

¹²⁵ *Ibid.*, at para. 12.

¹²⁶ *Ibid.*

¹²⁷ *Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994), at para 8.2.

important for the gay rights movement. It provides basic security for activists to continue fighting for greater human rights protection. The gay rights movement in many countries began with the decriminalization of sex between consenting adults in private.¹²⁸ However, it is important to stress the limited nature of privacy protection for sexual orientation human rights development. Not only is privacy protection largely ineffective at eliminating the societal roots of prejudice against sexual minorities; its concept implies that homosexuals should stay in the closet, which goes against the final objective of the gay rights movement. Real protection for sexual minorities must guarantee equal rights to non-discrimination in both the public and private spheres.

E. Equality and Non-Discrimination Principle

The main principle regarding the protection of sexual minority rights in human rights law is the principle of equality and non-discrimination. Equality and non-discrimination are always addressed together and are considered two sides of the same coin. However, there are some slight differences between the meanings of the two concepts. Equality is more abstract and entails positive obligations to promote the protection of human rights and freedom. Non-discrimination, uses a negative approach to ensure equality by requiring the absence of any discrimination. In other words, equality and non-discrimination are the positive and negative statements of the same-principle.¹²⁹ The relationship between both can be described as follows: “equality means the absence of discrimination, and upholding the principle of non-discrimination between groups will produce equality.”¹³⁰

1. Equality

¹²⁸ See Waaldijk, *supra* note 78, at appendix.

¹²⁹ Anne F Bayefsky, “The Principle of Equality or Non-Discrimination in International Law” (1990) 11(1-2) HRLJ at 1.

¹³⁰ Li Weiwei, “Equality and Non-Discrimination under International Human Rights Law” (2004) Research Notes, The Norwegian Centre for Human Rights, at 7 online: <<http://www.mittendrinundaussenvor.de/fileadmin/bilder/0304.pdf>>.

Having equal rights is one of the most important fundamental human rights recognized in international human rights law as well as the human rights legislation of many countries. For instance, article 7 of UDHR reads: “All are equal before the law and entitled without any discrimination of equal protection.”¹³¹ The equality provision is stated more subtly in the ECHR: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this Convention.”¹³² In Canada, the *Charter* provides that “every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law[...].”¹³³ Similarly, the *Chinese Constitution* stipulates that “All citizens of the People’s Republic of China are equal before the law.”¹³⁴

Although equality is widely recognized in many constitutional laws, its implementation varies due to the different interpretations. Early study of equality has its roots in the works of classic philosophers such as Plato and Aristotle.¹³⁵ In *Nicomachean Ethics*, Aristotle for the first time addressed the equality maxim that “things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unlikeness.”¹³⁶

In modern legal philosophical discourse, the Aristotelian definition of equality is considered to be *formal equality*. It considers the application of the law regardless of its content, and it is predominately concerned with consistency rather than substance. It emphasizes that the parties should be treated identically, no matter whether it is bad treatment or good treatment, since equally bad treatment is still equal treatment.¹³⁷

¹³¹ UDHR, *supra* note 102, at art 7.

¹³² ECHR, *supra* note 72, at art 1.

¹³³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK) 1982 c 11 at s 15(1) [Canadian Charter of Rights and Freedoms]*.

¹³⁴ *Chinese Constitution*, *supra* note 119, at c.2 art.33.

¹³⁵ Peter Western, “The Empty Idea of Equality” (1982) 95 Harv L Rev 537, at 537 and 542.

¹³⁶ Aristotle, *Ethica Nicomachean*, trans by W Ross, revised by JL Ackrill & JO Urmson, (Oxford University Press, 1980) at 112-117.1131a-1131b; Aristotle, *Politics*, Book III. Reprinted in Oddny Mjoll Arnardottir, *Equality and Non-discrimination under the European Convention on Human Rights* (Hague, London, New York: Martinus Nijhoff Publishers, 2003), at 8-9.

¹³⁷ Christa Tobler, *Indirect Discrimination, a Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law* (Oxford: Intersentia, 2005), at 25.

However, formal equality seems deficient without any consideration of the nature of the law. With regard to the rule or formula for the resolution of equality questions arising under the Canadian *Charter*, Justice McIntyre in *Andrews v Law Society of British Columbia* states:

Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application. The issues which will arise from case to case are such that it would be wrong to attempt to confine these considerations within such a fixed and limited formula.¹³⁸

Justice McIntyre's formulation of equality is essentially the requirement of *substantive equality*. Substantive equality concerns the content of the law or outcome of the law as a requirement of justice. It allows for different treatment in different situations based on the recognition of distinctions among different parties, and further requires that different treatment should aim to promote equality and benefit the underprivileged by some form of positive measures.¹³⁹

Oddny Mjoll Arnardottir has summarized three different approaches to equality, namely, the formal approach, the substantive "difference" approach and the substantive "disadvantage" approach based on Cliona J.M. Kimber's research.¹⁴⁰ In essence, the formal approach aims to simply achieve formal equality and the difference approach and disadvantage approach seeks to reach substantive equality. The following two sub-sections elaborate on the formal and substantive approaches to equality, followed by an analysis of how these approaches can help situate sexual orientation within equality discourse.

a. **Formal Equality**

Formal equality emphasizes "strict identical treatment".¹⁴¹ An individual's physical or

¹³⁸ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, at 168.[*Andrews*].

¹³⁹ Arnardottir, *supra* note 136 at 18.

¹⁴⁰ *Ibid* at 20-32.

¹⁴¹ Cliona JM Kimber, "Equality or Self-determination" in Conor Gearty and Adam Tomkins, eds, *Understanding Human Rights* (London: Mansell Publishing, 1996) at 218.

personal characteristics should be viewed as irrelevant in determining whether they deserve a right to some social benefit or gain. In practice, formal equality has been helpful in restraining governments from unfair, arbitrary and irrational decisions in legal procedures because it leaves little room for discretionary power.¹⁴² Thus, the formal equality approach has a vital role in the political and legal frameworks during the democratization process in many Western countries.¹⁴³

However, the drawbacks of the formal equality approach easily override its benefits in many circumstances. Cliona J.M. Kimber has identified three main shortcomings.¹⁴⁴ The first shortcoming is that formal equality merely emphasizes the consistency of the treatments but makes no demands on the content of those treatments.¹⁴⁵ It emphasizes that the parties should be treated equally, no matter whether it is bad treatment or good treatment. Equality protection loses its meaning and could become dangerous without a justice or substantive equality guide. For instance, Arnardottir provides a scenario: Persons with red hair should be executed.¹⁴⁶ It implies the same situation of having red hair and also equal treatment in being executed. However, it is clearly an injustice even if it accords with the requirement of formal equality.

The second shortcoming is that formal equality cannot address the issue of equality without a comparator; however, it is always difficult to have suitable or obvious comparator.¹⁴⁷ Moreover, the dependence on comparability and the emphasis on the consistency of the treatment in the formal equality approach result in that disadvantaged groups can only claim the same treatment as privileged groups. The same treatment in fact is unequal for these disadvantaged groups since they do not start on an equal footing, thereby maintaining the existing hierarchy of privilege. Examples mentioned in Kimber's

¹⁴² Brest Paul, "In Defense of the Antidiscrimination Principle" (1976) 90 Harv L Rev 1 at 1.

¹⁴³ Kimber, *supra* note 141 at 268.

¹⁴⁴ *Ibid* at 268.

¹⁴⁵ *Ibid* at 268.

¹⁴⁶ Arnardottir, *supra* note 136 at 10.

¹⁴⁷ Kimber, *supra* note 141 at 269.

study include pregnancy, part-time work and disabilities.¹⁴⁸

The third shortcoming is that formal equality normally accepts the existing standards of the dominant groups in society and does not criticize the rationality of these standards.¹⁴⁹ Many standards were created from a male perspective, and so it is evident that adopting the same standard for women is essentially unfair and does not reflect women's interests.

Furthermore, the formal equality approach neglects the rich diversity in modern society as it normally adopts a single dominant standard. In many countries, the diversity of cultures is an important part of policy consideration. Simply emphasizing consistency of treatment cannot guarantee equality for different groups with diverse characteristics in a complex modern society. Ignorance of these differences is in fact a major obstacle for reaching full equality in practice.

b. Substantive Equality

Substantive equality differs from the concept of formal equality by recognizing the difference between individuals or groups. Differential treatment in substantive equality is not only accepted but even required by some legislation.¹⁵⁰ For instance, with regard to gender equality, substantive equality should take into account women's difference of situation from biological, social, economical, cultural, and historical perspectives.¹⁵¹

Since differential treatment is encouraged under substantive equality, it should be based on a norm, which could concern justice in the form of equal opportunities or equal results. The central issue of substantive equality is how to decide the appropriate treatment of differences. Thus, substantive equality raises two sets of questions. First, under what situations should differential treatment be allowed? Second, what is the norm to judge the differential treatment to achieve substantive equality?¹⁵²

¹⁴⁸ *Ibid* at 269.

¹⁴⁹ *Ibid* at 269.

¹⁵⁰ Tobler, *supra* note 137 at 26.

¹⁵¹ *Ibid* at 26.

¹⁵² *Ibid* at 25.

Kimber advanced the second model of equality “identical treatment combined with special treatment” that is summarized as the “difference approach” by Arnardottir.¹⁵³ The difference approach admits the existence of difference between groups and therefore requires differences to be dealt with appropriately.¹⁵⁴ Kimber argued that the difference in this model should be “immutable and unchangeable”.¹⁵⁵ Examples of special treatment required for those with immutable characteristics include maternity leave, minority languages in educations, and special facilities for disability-access.¹⁵⁶ Put simply, the acknowledgement of *immutable and unchangeable* difference requires the accommodation of differences.

However, the difference approach is unable to solve the main questions raised by substantive equality. The approach merely requires the difference to be immutable and unchangeable but lacks the normative standards to determine what consists of difference.¹⁵⁷ The absence of normative standard into the treatment suggests a rephrasing of the question: Which difference should justify or require special treatment? It is questionable whether only immutable differences, such as biological differences, are included or whether all differences can be included. Furthermore, the difference needs to have a comparative standard under the model, which is often the prevailing groups in society and thus it could perpetuate the situations of privileged groups. Since the groups receiving special treatment are normally marginalized minorities, they are seldom involved in the norm-making process. Furthermore, by adopting the standard of the prevailing groups, those receiving any special treatment could be labeled, resulting in stigmatization, which may ultimately maintain their disadvantage.¹⁵⁸ Therefore this is not entirely consistent with the aim of substantive equality.

¹⁵³ Arnardottir, *supra* note 136 at 24.

¹⁵⁴ Kimber, *supra* note 141 at 270.

¹⁵⁵ *Ibid* at 270.

¹⁵⁶ *Ibid* at 270.

¹⁵⁷ *Ibid* at 271.

¹⁵⁸ Arnardottir, *supra* note 136 at 25

The inclusive normative content in the disadvantage approach seems to resolve this problem better. Kimber characterized this approach as “the subordination principle” by adoption of a contextual approach to equality focusing on “the asymmetrical structures of power, dominance and disadvantage at work in society.”¹⁵⁹ The test or requirement in this model is whether the measure under scrutiny “operates to increase or decrease the conditions of disadvantage of a disadvantaged group.”¹⁶⁰ This approach aims for equality of results by requiring eliminations of any discriminatory social and political structures rather than merely requiring special treatments as an exception to formal equality. Furthermore, any indirect discrimination can be considered as increasing disadvantages and therefore should be eliminated.¹⁶¹

In comparing these two approaches, the disadvantage approach seems to have clearer normative content as to treatment by focusing on the aim of *equality of results* through “ameliorating conditions of disadvantage, and ending relationships of hierarchy and dominance.”¹⁶² Furthermore, it could better resolve the comparability issue due to a clear standard to identify a comparator when addressing disadvantaged groups. However, labeling disadvantaged groups raises a similar issue to the difference approach, which deviates from the goal of substantive equality.

The main distinction between these two approaches is in the determination of the standards for groups or individual in pursuit of substantive equality. On the one hand, using disability as an example, the disadvantage approach requires providing special treatment to individuals with physical disabilities in order to overcome the structural faults in society. On the other hand, the difference approach would provide special treatment due to the immutable characteristics of individuals with physical disabilities.

In terms of LGBT groups, a variety of discriminations based on sexual orientation

¹⁵⁹ Kimber, *supra* note 141 at 273.

¹⁶⁰ *Ibid* at 273-274.

¹⁶¹ *Ibid*.

¹⁶² *Ibid* at 274-275.

could make LGBT a disadvantaged group. Likewise, in the difference approach, LGBT also meet the criteria because their sexual orientation is not only different from the heterosexual group, but sexual orientation/preference is often considered an immutable characteristic.¹⁶³ It should be kept in mind that substantive equality does not always require differential treatment; in some context, it requires equal treatment, which will be examined with regard to same-sex marriage discussion below.¹⁶⁴

c. Situating Sexual Orientation within Equality Discourse

Despite some obvious drawbacks, the formal equality approach could be a strong tool in the political framework to raise public awareness of some invisible disadvantaged groups. In terms of sexual minority rights, many advocates reiterate that sexual minorities are not asking for “new” human rights; rather they are seeking the protection of their country’s existing human rights and freedoms.¹⁶⁵ In essence, such a claim is a formal equality approach that seeks the identical treatment for LGBTs that any human being is entitled to. For instance, in the Chinese context, since the majority of the public have little knowledge of sexual minorities, advocating that “*we are the same*” can be a powerful political slogan to win support and acceptance from society, as well as encourage more tongzhi to come out of the closet. Formal equality also supports the same-sex marriage claim by arguing that LGBTs should have the same right to marry as all heterosexual people.

Under substantive equality, in assessing the difference approach with LGBT rights, the difference approach requires that the difference be immutable and unchangeable. The differences between men and women, racial majorities and racial minorities, and the abled and the disabled easily fit to the requirement of the difference model. Whether sexual

¹⁶³ See Canadian case *Egan*, *supra* note 83, at para 5; also *Infra* note 172.

¹⁶⁴ *Infra* at p 303.

¹⁶⁵ Michael O’Flaherty and John Fisher, “Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles” (2008) 8:2 HRL Rev 207 at 221-222.

orientation is immutable and unchangeable is still controversial.

The theories about the origins of homosexuality are introduced briefly here to help to understand the issue. Guo Xiaofei, a legal expert in Chinese gay rights research, explains two dominant theories, biological essentialism theory and social constructionist theory.¹⁶⁶ Biological essentialism theory argues the cause of homosexuality is perceived as uncontrollable (biological or genetic in origin). Sexual orientation, like gender and race is an “immutable” trait determined by accident of birth.¹⁶⁷ Hence, it is rational to provide different equal protection to homosexuals because the group has unchangeable traits and it is beyond their control.¹⁶⁸ From this theoretical perspective, sexual orientation is a good fit for the difference model and special treatment is merited in order to reach substantive equality.

However, the social constructionist theory argues that sexuality is defined against a backdrop of temporal and cultural factors under the assumption that the individual is constructed from society and times in which he or she lives.¹⁶⁹ In a constructivist’s perspective, sexuality is not innate or immutable since sexual behavior is a product of social conditioning rather than biological factors. Sexual minorities should be understood in terms of their social context, and appearance of different sexual identities, such as gay or lesbian, should be understood through the history and social context. *Queer theory* also claims that sexual identities are not fixed and therefore they cannot be categorized and

¹⁶⁶ Guo Xiaofei (郭晓飞), *Zhongguo Fashiyexia de Tongxinglian* (中国法视野下的同性恋) [Homosexuality in the Prospective of Chinese Law] (Beijing: Intellectual Property Press, 2007) at 145-146. [translated by author]

¹⁶⁷ *Ibid* at 150.

¹⁶⁸ The history of essentialism theory is more complicated. It claims that the emergence of the “homosexual” as a cultural, social and sexual category resulted from complex dynamics of discourses. Homosexuality has direct connection with its opposing concept, “heterosexuality” as a behavioural and moral standard centered on the traditional biological family.(M. Foucault, *The History of Sexuality. Volume One. An Introduction* (Paris: Editions Gallimard, 1976) at 108; reprinted in Michele Grigolo, “Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject” (2003)14 EJIL1023, at 1024) With support of essentialism theory, women have elaborated around the specificity of being a woman to seek recognition, and have achieved the improvements in major social and cultural rights.(Grigolo, at 1025)

¹⁶⁹ Guo Xiaofei, *supra* note 166 at 152.

labeled.¹⁷⁰ In this sense, sexual orientation is not “immutable” and does not meet the requirement of the difference approach. Furthermore, transgendered people seem more difficult to fit into the difference approach because transgendered people as a group consist of many varied changeable components.

The disadvantage approach seems better to fit sexual minorities than the difference approach. As there are various forms of discrimination on the basis of sexual orientation built into social and political structures in society, the disadvantage approach requires that these discriminatory practices be removed in order to reach substantive equality. The prohibition of same-sex marriage is an ideal example to illustrate that this single socio-political barrier to full participation in society creates discrimination in a host of other areas of life, such as taxation, health benefits, medical decision-making for loved ones, inheritance rights, and paternity rights, to name a few. Hence, the disadvantage approach to substantive equality would favour passing same-sex marriage legislation so that the broader discriminatory socio-political structures would be eliminated. This would also lead to equality of results, or equal treatments because LGBTs as a disadvantaged group could be equally treated as compared to their heterosexual counterparts with respect to the right to marry. Disadvantage approach in this context is also consistent with advocacy of equal treatment that formal equality asks for.

Both theories can lead to the same outcome recognizing equal rights of LGBTs, but reasonings can be different. The split in the court’s reasoning whether sexual orientation is an analogous ground in a famous Canadian same-sex equality right case, *Egan v Canada*,¹⁷¹ represents such ideological conflict in the judicial world. These theories have their own advantages and disadvantages in supporting gay rights, which are complex and

¹⁷⁰ *Ibid* at 156. Generally see Judith Butler, *Gender Trouble. Feminism and Subversion of Identity* (New York:Routledge,1990). Grigolo provides a summary regarding Queer theory at the purely theoretical level: “...in order to eliminate the dichotomy, it is necessary to contest the poles and problematize the binary construction of gender and sexuality. Instead of taking categories such as ‘sex’ or ‘homosexual’ as fixed and given, post-modern ‘queer’ theorists have stressed their artificiality and their role in reproducing a system of domination.” (Grigolo, *supra* note 168, at 1025.)

¹⁷¹ *Egan*, *supra* note 83.

beyond of the research scope of this thesis. In this case, the Supreme Court of Canada held that sexual orientation amounts to an *analogous* ground prohibited from discrimination. Justice La Forest seemed to take a biological essentialism perspective, regarding sexual orientation as “a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of section 15(1) of protection as being analogous to the enumerated grounds.”¹⁷² This reasoning seems to fit into the difference approach for substantive equality. Justice Cory, however, tended to adopt the social constructive theory by claiming “sexual orientation is demonstrated in a person's choice of a life partner, whether heterosexual or homosexual.”¹⁷³ Without mentioning biological difference, Justice Cory focused on the group’s historical disadvantage, practical discriminations and vulnerability to political and social prejudice, reaching the same conclusion that sexual orientation is an analogous ground.¹⁷⁴ This view seems to adopt the disadvantage approach by identifying the disadvantages faced by LGBT groups.

This academic discussion on these approaches to equality and the origins of sexual orientation demonstrate the complexity of the application of equality principle in practice, and so it is unlikely to adopt a single or fixed approach in practice.

2. The Principle of Non-Discrimination

As previously mentioned, equality means the absence of discrimination and the two are often treated together. Discrimination is commonly understood in the negative sense, as unfair, unreasonable, unjustifiable or arbitrary distinction. In the Canadian case *Andrews v Law Society of British Columbia*, Justice McIntyre stated “discrimination is unacceptable in a democratic society because it epitomizes the worst effects of the denial of equality, and

¹⁷² *Ibid* at para 5.

¹⁷³ *Ibid* at para 175.

¹⁷⁴ *Ibid*.

discrimination reinforced by law is particularly repugnant.”¹⁷⁵ The concept of non-discrimination may appear simpler than the principle of equality. Many jurisdictions have developed, through legislation and case law, detailed guides on how to approach questions of non-discrimination. For instance, many equality seeking groups in Canada, including gays and lesbians, have successfully challenged discriminatory legislation through the non-discrimination and equality principle stipulated in the Canadian *Charter*. However, China does not have any specific non-discrimination legislation and the Chinese equality principle can be characterized as an abstract constitutional principle without effective implementation. Before delving into a discussion on the principle of non-discrimination, it is important to review the definition of discrimination in some important international instruments as well as domestic laws.

In international human rights law, the two specific treaties addressing racial and gender discrimination provide model definitions of “discrimination”. With respect to racial discrimination, article 1 in the *International Convention on Elimination of All Forms of Racial Discrimination* (ICERD) states:

[...] the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.¹⁷⁶

Similarly for gender discrimination, article 1 in the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) states:

[...] the term “discrimination against women” shall mean any distinction, exclusion, restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political,

¹⁷⁵ *Andrews*, *supra* note 138.

¹⁷⁶ *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195 at art 1 [ICERD].

economic, social, cultural, civil or any other field.¹⁷⁷

Despite the fact that these definitions focus on specific types of discrimination, i.e., racial and gender discrimination, they are universally accepted in international human rights laws.¹⁷⁸ The Human Rights Committee (HRC) under the ICCPR confirmed the definition made by the ICERD and the CEDAW and states in *General Comment 18*:

Non-Discrimination:

While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.¹⁷⁹

In the Canadian human rights system, Justice McIntyre of the Supreme Court of Canada provided the leading definition of discrimination under section 15 of the Canadian Charter in *Andrews v Law Society of British Columbia*:

[D]iscrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.¹⁸⁰

From this discussion of the various model definitions of discrimination in different jurisdictions outlined above, it can be seen that any definition of “discrimination” should contain three key factors:

¹⁷⁷ *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 13 at art 1, GA Res 180, UN GAOR, 34th Sess, UN Doc A/RES/34/180 (1979) [CEDAW].

¹⁷⁸ Wouter Vandenhoe, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Antwerpen: Intersentia, 2005) at 35.

¹⁷⁹ Human Rights Committee (HRC), *General Comment 18, Non-discrimination (Thirty-seventh session, 1989)*, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.9 (Vol I) (2008) 195 at 197 (para 7).

¹⁸⁰ *Andrews*, *supra* note 138.

- a. There is different treatment against certain individuals or groups;
- b. Such different treatment is based on certain grounds; and
- c. It has the purpose or effect of distinction on certain individuals or groups.

a. **Differential Treatment**

As the prerequisite of discrimination, differential treatments could be found in many concrete forms. The terms “distinction, exclusion, restriction or preference” stipulated in the HRC’s definition are good descriptions of differential treatment.¹⁸¹

Equal situations require equal treatments while different situations require different treatments under the principle of equality.¹⁸² Consequently, it is hard to judge whether it results in inequality if merely assessing the treatment without considerations of the contexts. It is likely to constitute inequality when persons in relevant similar situations are treated significantly different. However, it also may result in inequality when persons whose situations are significantly different are treated identically.

Mere differential treatments, in and of themselves, do not lead to the case of discrimination. Some good examples of legitimate differential treatments have been accepted: different income tax rates in groups with different income, prohibition of the death sentence from being imposed on persons below 18 years of age and pregnant women.¹⁸³ In these cases, different treatments can be legitimate. The HRC also confirms “not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”¹⁸⁴ Similarly, in Canada, the Supreme Court formulated a relevant test for affirmative action under section 15 (2) of the *Charter* in *R v Kapp*: a program (providing different treatment to certain groups) does not violate equality guarantee if it can be demonstrated “(1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged groups identified by the enumerated

¹⁸¹ *Supra* note 179.

¹⁸² Arnardottir, *supra* note 136 at 42.

¹⁸³ HRC, *General Comment 18*, *supra* note 179 at 197 (para 8).

¹⁸⁴ *Ibid* at 198 (para 13).

or analogous grounds.”¹⁸⁵

b. Grounds of Discrimination

Li Weiwei offers three ways to stipulate prohibited grounds for discrimination in legislation.¹⁸⁶ The first one is to provide a free open equality guarantee principle without specifying any particular grounds. It allows the courts to decide what grounds should be prohibited in practice. The *American Constitution* is a good example, which stipulates that no state may “deny to any person within its jurisdiction the equal protection of the law” in the Fourteen Amendment.¹⁸⁷ The second way is to list all prohibited grounds to different treatment in legislation and the courts do not have discretion. The prohibited grounds of discrimination can be added or removed only by the legislature.¹⁸⁸ The third approach is more common in practice, which specifies a list of common prohibited grounds of discrimination, but also indicates that the list is not exhaustive. It combines the two approaches above. It offers some certain discretion for the courts to identify the analogous grounds that should be prohibited from discrimination. This approach can be found in Canadian jurisdiction and main international human rights conventions, UDHR, the ICCPR, the CESCR and the ECHR.

Some grounds are widely accepted as strictly prohibited grounds and listed explicitly in legislation, for instance, race, sex, and religion. Although not all the different treatments based on these grounds lead to discrimination, the different treatments should have strict scrutiny. In other words, if these grounds are involved in a case of discrimination, a court normally takes a high bar of justification for the different treatments on these grounds.

Apart from these listed grounds, the new issue is how to define or identify a new analogous ground in “the non-exhaustive list”. There is no simple or common standard test

¹⁸⁵ *R v Kapp* [2008] 2 SCR 483, 294 DLR (4th) 1, at para 41.

¹⁸⁶ Li Weiwei, *supra* note 130 at 12.

¹⁸⁷ US Const amend XIV, § 1.

¹⁸⁸ Li Weiwei, *supra* note 130 at 12.

for analogous grounds. For instance, the Supreme Court of Canada was divided on this issue when considering section 15 of the Canadian *Charter*. In *Andrews*, Justice La Forest argued for the inclusion of personal characteristics that are “immutable or beyond the control of the individual” while Justices Wilson and McIntyre argued for the inclusion of personal characteristics of groups “lacking in political power”.¹⁸⁹ In this sense, it is similar as our discussion above regarding different approach and disadvantage approach under substantive equality.¹⁹⁰ The similar split in the Supreme Court of Canada can be seen again in *Egan* in the Court’s reasoning on how the sexual orientation should be considered an analogous ground for non-discrimination.

Sexual orientation is also accepted as a prohibited ground of discrimination in the UN human rights law. The four core UN treaties committees, i.e., the UN Committee of Economic, Social and Cultural Rights (CESCR),¹⁹¹ the HRC,¹⁹² the UN Committee on the Elimination of Discrimination against Women (CEDAW),¹⁹³ and the UN Committee on the Rights of the Child (CRC)¹⁹⁴ have explicitly prohibited discrimination based on sexual orientation respectively. It should be noted that the approaches adopted by these committees are different. The HRC for instance, claims sexual orientation to be included in the concept of sex, rather than to be falling under “other status”. In *Toonen v Australia*, the HRC stated: “The Committee confines itself to noting, however, that in its view the

¹⁸⁹ *Andrews*, *supra* note 138. See also Patrick Macklem *et al*, *Canadian Constitutional Law*, 4th ed (Toronto: Emond Montgomery, 2010) at 1299.

¹⁹⁰ Kimber, *supra* note 141 at 273-275.

¹⁹¹ See e.g. UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No 14: the right to the highest attainable standard of health*, UN Doc E/C.12/2000/4, 11 August 2000; *General Comment No. 15: the right to water*, UN Doc E/C.12/2002/11, 26 November 2002; *General Comment No. 18: the right to work*, UN Doc E/C.12/GC/18, 24 November 2005; *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*, June 10, 2009, UN Doc E/C.12/2009/20, at para 32.

¹⁹² See e.g. *Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994); *Joslin v New Zealand*, Communication No 902/1999, UN Doc CCPR/C/75/D/902/1999 (1999); *Young v Australia*, Communication No 941/2000, UN Doc CCPR/C/78/D/941/2000 (2003).

¹⁹³ See e.g. UN Committee on the Elimination of Discrimination against Women (CEDAW), *Concluding Observations regarding Kyrgyzstan*, UN Doc E/C.12/1/Add.49, 1 September 2000, at para 17.

¹⁹⁴ See e.g. UN Committee on the Rights of the Child (CRC), *General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child*, UN Doc CRC/GC/2003/4, 1 July 2003 at para 6.

reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation."¹⁹⁵ However, unlike the HRC, the CERD and the CDESCR included sexual orientation under the category of "other status" rather than "sex".¹⁹⁶

c. Effect or Purpose

The last factor to consider in a definition of discrimination is the effect or purpose of the measure or the legislation. As shown above, many international treaties require the "effect or purpose" of "nullifying or impairing" equal treatment. This nullifying or impairing effect can be brought about by direct discrimination (either by active discrimination or passive discrimination) and indirect discrimination.

Direct active discrimination is the traditional conception where the state negates equality of certain groups through action or legislation; the other is direct passive discrimination where the state fails its positive obligations to ensure the enjoyment of human rights by inaction.¹⁹⁷ Active discrimination is common and normally includes two situations, which are captured in section 15(1) of the Canadian *Charter*: "a) imposing burdens, obligations or disadvantages on the individuals or groups not imposed upon others; b) or withholds or limits access to opportunities, benefits and advantages available to other members".¹⁹⁸ Passive discrimination is more complex because it requires the complainant to identify the positive obligations the states have where no action has been taken. The discussion *infra* on a Canadian case, *Vriend v Alberta* shows challenges and reasoning from courts.¹⁹⁹ Some might characterize the obligation to enact legislation to protection LGBT youth from bullying in schools as a positive obligation of the state, one that has been unimplemented in Ontario until July 2012 when the government passed *The Accepting*

¹⁹⁵ *Toonen v Australia*, *supra* note 192 at para 8.7.

¹⁹⁶ See e.g. CDESCR, *General Comment No. 20*, *supra* note 191 at para 32.

¹⁹⁷ Arnardottir, *supra* note 136 at 92.

¹⁹⁸ *Canadian Charter of Rights and Freedoms*, *supra* note 38 at s 15(1).

¹⁹⁹ *Vriend v Alberta* [1998] 1 SCR 493. See *infra* note 854.

Schools Act.²⁰⁰ It requires schools to discipline pupil's inappropriate behaviours, including "bullying, sexual assault, gender-based violence and incidents based on homophobia, transphobia and biphobia."²⁰¹ It further provides that schools can not refuse the establishments of activities or gay-straight alliances that promote awareness and understanding of sexual orientation and gender identity.²⁰² It should be noted that not all legislative silence is "passive" discrimination; sometimes it is active discrimination. Such cases would be where a state has turned its mind to a situation and decided to take no legislative action.

Indirect discrimination focuses on the disparate impact or disproportionate effect of a natural measure on groups of people developed in gender discrimination law.²⁰³ An example of indirect discrimination from the Canadian *Criminal Code* would be the different ages for consent for different sexual activities. The age of consent for most sexual practices is 16, whereas, the age of consent for anal intercourse is 18.²⁰⁴ The law is neutral on its face (applicable to heterosexual people as well as homosexual people), but clearly the effect of the law has a disproportionate effect on gay men.

In Canadian law, the tests for the discrimination are complex. Beginning in *Andrews*, the Supreme Court of Canada provided the definition of the discrimination and the three-stage test for the first time in 1989. Later, in 1995, the Court fragmented into three different camps on the interpretation of section 15 (1) in a trilogy of equality cases, *Miron v Trudel*,²⁰⁵ *Egan v Canada*,²⁰⁶ and *Thibaudeau v Canada*.²⁰⁷ It was not until the decision

²⁰⁰ *Accepting Schools Act*, SO, 2012, c 5.

²⁰¹ This Act amended the *Education Act*, R.S.O 1990. See *Education Act*, s 301(6).

²⁰² *Ibid* at s. 303.1.

²⁰³ Arnardottir, *supra* note 136 at 122.

²⁰⁴ Section 159 of the Canadian Criminal Code sets the age of consent for anal intercourse at 18 years, with an exception if the two partners are married. It is interesting to note that in this section has 'husband and wife' - Even though gender-neutral marriages are legal since 2005. However, courts in Ontario (1995) and Quebec (1998) have independently declared Section 159 of the Criminal Code of Canada (Anal Intercourse) unconstitutional. The Ontario case is addressed in Chapter Five.

²⁰⁵ *Miron v Trudel*, [1995] 2 SCR 418.

²⁰⁶ *Egan*, *supra* note 83.

²⁰⁷ *Thibaudeau v Canada*, [1995] 2 SCR 513.

in *Law v Canada*²⁰⁸ in 1999 that the Court agreed again on the interpretation of section 15(1) by creating another complicated test. The complexity of the test in *Law* finally led to a new development in *R v Kapp*²⁰⁹ in 2008 where the Court revisited section 15 as a whole and set up a new simplified test.

In *Kapp*, the Supreme Court of Canada confirmed the two steps to assess discriminatory impact in *Andrews*: 1) the perpetuation of prejudice or disadvantage to members of a group on the basis of personal characteristics identified in the enumerated and analogous grounds; 2) stereotyping on basis of these grounds that results in a decision that does not correspond to a claimant's or group's actual circumstances and characteristics.²¹⁰ Also some contextual factors in *Law* were also recognized in the test: 1) pre-existing disadvantage, of the claimant group; 2) degree of correspondence between the differential treatment and the claimant group's reality; 3) the nature of the interest affected.²¹¹

For the first time, the Court gave a new practical meaning to section 15(2) and interpreted section 15 as a whole. The intention of section 15(2) is to say the preference given to disadvantaged groups does not constitute discrimination despite the fact that created distinction in treatment.²¹² Thus, in *Kapp*, the Court ruled that the government's program that excluded Mr. Kapp and other non-aboriginal fishers from the fishery had an ameliorative or remedial purpose for three aboriginal bands that have indisputable social and economic disadvantages, and therefore the program at issue was protected by section 15 (2) of the *Charter*.

Differently, the HRC and the European Court of Human Rights (ECtHR) adopted a proportionality test at this stage to determine whether it amounts to discrimination. It is similar to a section 1 justification test once discrimination is found in a Canadian

²⁰⁸ *Law v Canada*, [1999] 1 SCR 497, 170 DLR (4th) 1.

²⁰⁹ *R v Kapp*, *supra* note 185.

²¹⁰ *Ibid.*

²¹¹ *Law v Canada*, *supra* note 208.

²¹² *R v Kapp*, *supra* note 185.

Charter-challenge case (known as the *Oakes* Test).²¹³ In determining whether the different treatments amount to discrimination, the HRC looks at two criteria, i.e., the aim is to achieve a legitimate purpose, and the criteria for such differentiation are reasonable and objective.²¹⁴ The ECtHR in *Belgian Linguistics* introduced an objective and reasonable justification test under article 14 of the ECHR, i.e, justification exists if the treatment pursues a legitimate aim and if there is a “reasonable relationship of proportionality between the means used and the aim sought to be realised.”²¹⁵

It should be noted that the legitimate aim in any justification test is easily to be satisfied. All treatment could be claimed to achieve some good intentions. Racial segregation has been argued to achieve the legitimate goals such as “providing public tranquility or maintaining order in society”.²¹⁶ The prohibition of homosexuality can be said to keep the morality and order of the traditional society or protect religious beliefs. Since the discovery of HIV, public health grounds have also been relied on as legitimate aim for criminalizing homosexuality.²¹⁷ It is easy to satisfy the legitimate aim test if the only consideration is the purpose. Hence a central trend in the development of discrimination law in many domestic courts has been a shift from legislative intention to basing a complaint on the recognition of the discrimination and adverse effects of the offending legislation/government action.²¹⁸ It is easier to scrutinize the effect than require intention in determining a discriminatory act.

The HRC refers to the relationship between the aim and different measures in *Van Oord v The Netherlands* (1997).²¹⁹ Mr. and Mrs. Van Oord were born in Netherlands and

²¹³ *R. v Oakes*, [1986] 1 S.C.R. 103.

²¹⁴ HRC, *General Comment 18*, *supra* note 179 at 197 (para 8).

²¹⁵ *Belgian Linguistics v Belgium* (1968), 6 ECHR, 1 EHRR 252 at para 10.

²¹⁶ *Arnardottir*, *supra* note 136 at 43. See also *South-West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)*; Second Phase, International Court of Justice (ICJ), 18 July 1966. South Africa argued that the policy of apartheid was required for the purpose of promotion of the well-being and social progress of the original inhabitants.

²¹⁷ See e.g. *Toonen v Australia*, *supra* note 192 at para 8.4.

²¹⁸ *Li Weiwei*, *supra* note 130 at 11.

²¹⁹ *Van Oord v The Netherlands*, Communication No 658/1995, UN Doc CCPR/C/60/D/658/1995 (1997).

immigrated to the United States, where they were naturalized American citizens and lost their Dutch citizenship. Mr. Van Oord contributed to his Dutch retirement pension scheme and was entitled to a certain retirement pension. Nevertheless, their Dutch pensions were taxed, whereas former Dutch citizens who had immigrated to Australia, Canada and New Zealand, and who had become the citizens of those countries, received the pensions without tax. The couple claimed the different tax treatment of their pensions violated their rights to non-discrimination under article 26 of the ICCPR. The HRC observed that the criteria used in determining the pensions entitlements were equally applied to all former Dutch citizens living in the United States. However, the difference in treatment in the former Dutch citizens in other countries was based on different treaty arrangements. Hence the HRC held that such differentiation based on reasonable and objective criteria did not amount to prohibited discrimination.

The proportionality test in the ECHR emphasizes that the purpose of the test is to assess “the *fit* between the measures taken and the aims advanced or by weighing the harshness of the measures against the importance of the aim pursued.”²²⁰ In *Belgian Linguistics*, the Belgian government’s measures to deny French-speaking students living in Dutch-speaking unilingual regions state-subsidized education in French were challenged for violations of the right to non-discrimination. The French-speaking parents argued that their children were not given admittance to French schools in peripheral regions of Brussels for their location, compared with those in the Flemish community, which was beyond this restriction. The ECtHR held that government’s measures were not discriminatory or arbitrary. The measures were based on the public interest, to ensure that all schools dependent on the state and existing in the unilingual region conducted their teaching in the language, which was essentially that of the region. The Court held that there had been no violation of non-discrimination observing that the proportionality between the

²²⁰ Arnardottir, *supra* note 136 at p 48.

measures and the aim was reasonable.²²¹ It can be seen from this decision that the legal recognition for sexual orientation rights is not linear, which is subject to the Court's discretion on the fit test to some extent.

3. Equality and Non-Discrimination and Sexual Orientation Protection

Over the past hundred years, international human rights law and many Western countries have gradually developed their human rights laws to end slavery, grant women and racial minorities the right to vote and to end discrimination on ground of race, ethnicity, religion and gender. However, the struggle for human rights protection for sexual minorities has been a slow process with immense difficulty. There is no specific international treaty regarding sexual minorities' protection so far and many sexual minorities have been experiencing widespread discrimination in many countries. Presently 76 countries still criminalize same-sex acts, seven of which still enforce the death penalty.²²²

To address whether or how the principle of non-discrimination protects sexual minorities, it is essential to have sexual orientation or sexuality recognized as a prohibited ground of discrimination. Only then would those measures or legislation leading to distinction on ground of sexual orientation be strictly scrutinized by testing its purpose or effect based on each specific case.

Sexual minorities are discriminated against or targeted by "mainstream" society because of their sexuality, and thus not entitled to the same rights as "normal" heterosexual people.²²³ The main charge against same-sex acts (i.e., that it goes "against nature") is

²²¹ *Belgian Linguistics v Belgium*, *supra* note 215.

²²² Lucas Paoli Itaborahy & Jingshu Zhu, eds, *State-Sponsored Homophobia: A world survey of laws: Criminalisation, protection and recognition of same-sex love*, 8th ed (International Lesbian Gay Bisexual Trans and Intersex Association, 2013) at 22, online: <
http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2013.pdf>.

²²³ Jack Donnelly, "Non-Discrimination and Sexual Orientation: Making a Place for Sexual Minorities in the Global Human Rights Regime" in Peter Baehr, Cees Flinterman and Mignon Senders eds, *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights* (Amsterdam: Royal Netherlands Academy of Arts and Sciences, 1999) 93 at 97-98.

easily to be defeated. Sexual orientation is arguably a genetic trait similar to race or certain disabilities characteristics that are immutable and unchangeable. Furthermore, the argument that it goes “against nature” ignores the reality that same-sex relations have been documented throughout the human history or even animal kingdom. For instance, there have been several recent cases that received considerable amount of media attention where a zoo had gay penguins.²²⁴

Returning to homosexuality among humans, many societies have had historical periods of tolerance and even highly valued male homoerotic relationships. The best known example in the West is ancient Greece.²²⁵ Pederasty was socially acknowledged relationship between an adult male and a younger male in Greece at that time.²²⁶ In Asia, male-male sexual relationships were also highly tolerated in ancient China, which will be discussed further in the next chapter.²²⁷ There is documented evidence of tolerance of same-sex relationships in various North American aboriginal groups.²²⁸ Some aboriginal groups honoured two-spirited members of a tribe (*two-spirited* is a term used to describe Aboriginal LGBTs in tribes), giving them specialized occupations.²²⁹

Another common challenge is the alleged immorality of homosexuality. Many opponents of gay rights use the language of “perversion” and “degeneracy” to describe homosexuality, and they argued that the acceptance of sexual minorities could destroy social values and is against public morals. Based on international human rights law,

²²⁴ See e.g., Christian Wenande, "Gay penguin pair become parents" (19 October 2012), online: the Copenhagen Post <<http://cphpost.dk/news/national/gay-penguin-pair-become-parents>>; Oliver Moore, "Toronto Zoo decision to separate "gay" penguins sparks international outcry"(10 November 2011), online: the Globe and Mail <<http://www.theglobeandmail.com/news/toronto/toronto-zoo-decision-to-separate-gay-penguins-sparks-international-outcry/article4180753/>>; and Dinitia Smith, "Love That Dare Not Squeak Its Name" (7 February 2004), online: the New York

Times<<http://www.nytimes.com/2004/02/07/arts/love-that-dare-not-squeak-its-name.html>>.

²²⁵ K Dover, 2nd ed, *Greek Homosexuality* (Cambridge: Harvard University Press, 1986).

²²⁶ *Ibid.*

²²⁷ *Infra* at p 65.

²²⁸ Val Napoleon, "The Raven's Garden: A Discussion about Aboriginal Sexual Orientation and Transgender Issues" (2002) 17:2 CJLS 149 at 154.

²²⁹ *Ibid.*

restrictions imposed on certain rights are justified on ground of widely accepted “public morals”. Article 19 of the ICCPR permits restriction on the right to freedom of expression that “provide for by law and are necessary [...] for the protection of [...] public health or morals.”²³⁰ For instance, Asian Values have a strong morality justification against universal human rights in some Asian countries.²³¹ However, the relationship between morality and law is complex, which is also reflected in positivism and natural law legal theories. It is difficult to determine the standard of morality because public morals are not static. Jack Donnelly argued that some of the groups explicitly recognized in non-discrimination principles were at one time also perceived as a threat to public morals in American history, for instance, those of Asian descent.²³² He reviewed the California Constitutional Convention of 1878-1879 where a provision was proposed to prevent Chinese immigration in order to protect Californians “from moral and physical infection from abroad”.²³³

However, at present, race is widely accepted as an explicitly prohibited ground of discrimination in United States and international human rights law. Similarly, sexual orientation is now in the recognition process to become an explicit prohibited ground of discrimination. The trend in international human rights law and many democratic Western countries seems to be that sexuality or sexual orientation is gradually becoming recognized as a prohibited ground for discrimination and any distinction based on sexual orientation should be strictly examined. Such development will be examined in following chapters.

F. Conclusion

²³⁰ ICCPR, *supra* note 102.

²³¹ Singapore and Malaysia are the main proponents of Asian Values. See Anna Meijknecht & Byung Sook de Vries, “Is There a Place for Minorities' and Indigenous Peoples' Rights within ASEAN?: Asian Values, ASEAN Values and the Protection of Southeast Asian Minorities and Indigenous Peoples”, (2010) vol 17, *International journal n Minority and Group Rights* 75, at 84.

²³² Donnelly, *supra* note 223 at 100-105.

²³³ Cited in Benjamin B Ringer, “*We the People*” and Others: *Duality and America's Treatment of its Racial Minorities* (New York: Tavistock, 1983) at 590.

This chapter has provided an overview of the main legal principles regarding sexual orientation protection in human rights law and puts forward the key characteristics of these principles and explored their implementation in different jurisdictions. The principles of equality, non-discrimination, and privacy protection are the main legal principles guiding sexual orientation human rights. These principles are not always used at the same time or at every stage of rights development. Rather, during different gay rights developmental phases, some principles are more effective than others from a strategic perspective. Through a careful application of these principles to their corresponding phases along the gay rights developmental continuum, equality can be achieved.

Equality is the main principle guiding sexual orientation human rights activism at the present. Despite some of its drawbacks, in terms of LGBT rights, formal equality can promote same-sex marriage claim because same-sex marriage essentially asks for the identical marriage rights that heterosexual people are entitled to. Asking for the same treatment can be a powerful political tool to bring about progressive change. However, due to the different and disadvantaged social position that sexual minorities are in, formal equality is incapable of producing complete equality. Substantive equality requires special protection for this different/disadvantaged group in order to create true and full equality protection.

There are many cases regarding the application of the principle of non-discrimination in sexual orientation human rights protections. During the analysis of the three key criteria of discrimination (i.e., distinction, prohibited ground, and the discriminatory effect or purpose of the offending legislation), it is widely accepted that sexual orientation is a protected ground of discrimination in many Western jurisdictions and it seems difficult to deny it from the cultural or morality argument. However, proving the discriminatory effect or purpose of offending legislation is relatively more complex in the judicial process.

Privacy protection is another important principle in protecting the rights of sexual minorities, in particular, during the process of decriminalizing homosexuality. The principal

was effective as persuading courts to recognize that the scope of privacy covers sexual acts between consenting two male adults and therefore criminalizing such acts was problematic. Decriminalization of homosexuality is typically the first step in gay rights development since it provided a basic security for sexual minorities and also helps being the process of eliminating social bias. The limited nature of privacy protection for sexual orientation human rights development is evident because privacy protection focusing only on the private sphere permits the continued stigmatization and discrimination of sexual minorities.

Finally, Waaldijk's pattern of gay rights development offers some insight into how to apply the various human rights principles in a strategic manner depending on the stage of gay rights development in a country. The assumptions presented in Waaldijk's model will be tested in the following chapters using the international human rights system, the European human rights system and the Canadian human rights system. These principles will be revisited in the Chinese context to see which principle is more feasible to support the strategy for legal reform for tongzhi in China.

Chapter Two Legal Status and Social Situation of Tongzhi in China

A. Introduction

This chapter aims to provide an overview of the tongzhi situation in China in terms of historical development, official governmental attitude, the current legal status and social acceptance by civil society. It tracks how the tongzhi's situation in China has evolved over the years, particularly in terms of their legal status. Through research on official attitudes towards tongzhi, the following questions should be kept in mind for further consideration in the following chapters: what are the main obstacles for the tongzhi rights movement in China? What will trigger the legal reform to tongzhi rights?

The chapter begins with a discussion of the different terminologies used in China regarding homosexuality and an introduction to tongzhi theory. The paper adopts *tongzhi* to describe sexual minorities in China, because it implies the Chinese sexual minorities' indigenous characteristics. The second section examines the chronology of tongzhi social and legal status during four different phases of China's history: the ancient time, republican era, the Maoist era and the reform era. It explores civil society's acceptance of tongzhi and their legal status through these different periods, and relevant laws regarding tongzhi or homosexuality in each period.

The third section focuses on the present tongzhi situation and offers a comprehensive study of the legislation and official state practices related to tongzhi rights. It begins with a brief overview of the Chinese legal system and outlines the key players in the system. It is argued that the current government has adopted a *repressive indifference policy* towards tongzhi. This section continues to explore how this official policy is reflected in different discriminatory legislation and human rights violations targeting the tongzhi group.

The fourth section offers a detailed study of two notable current developments, namely, the removal of hooliganism from the Chinese *Criminal Code* and the removal of homosexuality from the list of mental diseases and illnesses. This comparative study seeks

to demonstrate how the official authority exercised its *repressive indifference* policy in different situations.

This chapter ends with the conclusion that this official attitude of repressive indifference is the main obstacle for the tongzhi movement and continues to leave tongzhi in a legal grey area in China today.

B. Terminologies of Homosexuality in China

The formal Chinese word for "homosexuality" is *tongxinglian* (literal translation is *same-sex relations/love*) or *tongxinglian zhe* (*homosexual people*). *Tongxinglian* was commonly used in early medical research and study, therefore it was not welcomed within the gay community because it was heavily stigmatized.²³⁴ Rather, Chinese gay men preferred to being called "gay" in English, and Chinese lesbians prefer "lala" or "les" (derived from the pronunciation of the first part of the English word "lesbian"). This is because these terms have the implication of freedom and the imagination of legitimacy of gay civil rights in Western countries.²³⁵ Despite the incomplete understanding of Western gay culture (e.g., the emphasis on "coming out" and equality rights is not familiar for Chinese gays and lesbians), the Chinese gay community in general yearn for the freedom, liberation and civil rights, in particular the legalization of same-sex marriage recognized in a growing number of developed Western countries.²³⁶ From this perspective, the Western notion of "gay" or "being gay" is deemed as a successful representative symbol of authentic same-sex identity or the ultimate objective of Chinese gay movement among the Chinese gay community.²³⁷

However, it is questioned whether merely adopting the Western strategy will fail to guide the liberalization of gay rights in China. Chou Wan-Shan represents an important

²³⁴ Loretta Wing Wah Ho, *Gay and Lesbian Subculture in Urban China* (London: Routledge, 2010) at 134.

²³⁵ *Ibid.*

²³⁶ *Ibid* at 135.

²³⁷ *Ibid.*

voice of resistance to adopting the Westernized strategy for the gay movement in China. He argues that Chinese same-sex identity has its “indigenous” characteristics due to its historical culture of tolerance, and great influence from Confucianism, which “need not reproduce the Anglo-American experience and strategies of lesbian liberation.”²³⁸ Instead, Chou advanced *tongzhi* theory for gay liberation in China.²³⁹ The term *tongzhi* (literally “same will”) was commonly used among Communist Party officials and it originally signified “people who share and stand up for the same revolution goal”, and is always translated as “comrade(s)” in English.²⁴⁰ Today, it is commonly utilized to describe gay men and lesbians among the Chinese gay community. Chou, therefore, borrowed the term of *tongzhi* to name his theory because it contains indigenous Chinese characters and also it is easily “accepted by the community for its positive cultural references, gender neutrality, desexualization of the stigma of homosexuality, politics beyond the homo-hetero duality, and use as an indigenous cultural identity for integrating the sexual into the social.”²⁴¹ Thus, this thesis will use *tongzhi* to describe gay men and lesbians in China, because it emphasizes the significance of Chinese gays and lesbians’ indigenous characteristics.

C. History of Tongzhi in China

The following research explores the prevailing culture and corresponding laws concerning *tongzhi* over Chinese history. Not only does such analysis provide a good understanding how *tongzhi* rights developed in Chinese history, but it also provides the foundation for strategic thinking on how to inspire *tongzhi* human rights development in Chapter Seven. Travis SK Kong, a sociology scholar, divided China’s history into four phases in his research on the development of gay male identities in China: ancient China,

²³⁸ Chou Wah-shan, *Tongzhi: Politics of Same-Sex Eroticism in Chinese Societies* (New York: The Haworth Press, 2000), at 1.

²³⁹ *Ibid* at 3-9.

²⁴⁰ Day Wong, “Hybridization and the Emergence of ‘Gay’ Identities in Hong Kong and in China” (2010) 24 (1-2), *Visual Anthropology* 152, at 154.

²⁴¹ *Ibid* at 2.

the republican era, the Maoist period, and the reform era.²⁴² Due to the lack of early historical records of lesbians, this thesis will follow Kong's division of China's history of gay male identities into four periods.

1. Ancient China

The *Li* principle in Confucianism emphasized the strict sex segregation between men and women.²⁴³ Any body contact between men and women was prohibited before marriage, but same-sex intimate friendship was considered as a crucial source of emotional support.²⁴⁴ In other words, Confucianism created a cultural environment that allowed for same-sex sexual behaviour in ancient China to occur.

In Confucianism, a person is a relational individual within a structured, socially reciprocal relationship network.²⁴⁵ Therefore, individual identity is not defined by the idea of essence but rather is constructed in a familial and kinship network. Human relationship is extremely significant in ancient China.²⁴⁶ The *Three Cardinal Guides* in Confucianism were the main guidelines by which all human relationships and behaviours were organized hierarchically: sovereign-subject, father-son and husband-wife. The latter in each pairing (i.e., “subject”, “son”, and “wife”) should always be subordinate to the former (i.e., “sovereign”, “father”, and “husband”) unconditionally.²⁴⁷ Only behaviours violating social expectations and behaviours threatening or destroying these relationships were condemned and punished. Likewise, any behaviour could be tolerated as long as it did not threaten or destroy the three cardinal guides.²⁴⁸ As a result, sexual contact with the same gender, sexual contact with prostitutes, or a man having sex with several wives and concubines were usually tolerated

²⁴² Travis SK Kong, *Chinese Male Homosexualities: Memba, Tongzhi, and Golden Boy* (London: Routledge, 2011) at 151-156.

²⁴³ Chou Wan-Shan, *supra* note 238 at 20.

²⁴⁴ *Ibid* at 21.

²⁴⁵ Kong, *supra* note 242 at 151.

²⁴⁶ *Ibid*.

²⁴⁷ Chou Wan-Shan, *supra* note 238 at 27.

²⁴⁸ *Ibid* at 27.

since the male-dominated hierarchy system would not be challenged.²⁴⁹

Furthermore, the sexual world in ancient China was constructed predominantly along hierarchical class lines.²⁵⁰ The emperor or a wealthy lord could dominate social inferiors such as his wife and/or concubines freely. They could also dominate sexually any servants, male or female, who were socially inferior to him. In this regard, the gender of one's sexual partners was not a matter of concern and thus, there was no significant consideration of one's sexual identity, such as whether one was homosexual or bisexual.²⁵¹ The emphasis was predominately on "doing" (e.g., what one does, likes, enjoys; engages or indulges in, in sexual activities) but not on "being" (e.g., what one is).²⁵²

It is easy to find literature that describes a rich and relatively tolerant tradition of male same-sex eroticism in ancient China. The stories of *Duan xiu*, *Fen tao* described a same-sex relationship between the emperors or elites and their male concubines or prostitutes.²⁵³ In the most famous novel in Chinese history, *Hong Lou Meng*²⁵⁴ (Dream of the Red Chamber), Jia Lin had sexual encounters with boy servants as well as girl servants when he was unable to have sex with his wife, without feeling any difference between boys and girls. Same-sex erotic descriptions were also found in two other famous novels, *Jin Ping Mei* (The Golden Lotus) and *Rou Pu Tuan* (Prayer Mat of the Flesh) although they were not the main part of the story.²⁵⁵

There is little literature about same-sex eroticism between two women, largely due to the fact that those in power were typically upper-class male, and women were always inferior to men in ancient China. Wives generally accepted her husband having sex with other men more than with other women, because same-sex sexual contact would not threaten her status

²⁴⁹ *Ibid.*

²⁵⁰ Gerard Sullivan & Peter A Jackson, eds, *Gay and Lesbian Asia: Culture, Identity, Community* (New York: Harrington Park Press, 2001) at 30.

²⁵¹ *Ibid* at 30.

²⁵² Kong, *supra* note 242 at 151.

²⁵³ Chou Wan-Shan, *supra* note 238 at 27-28.

²⁵⁴ *Ibid* at 33.

²⁵⁵ *Ibid.*

as a wife.²⁵⁶ During the Wei Chin Dynasty, there was an interesting and famous story concerning seven famous male scholars, called the *Seven Sages*, all of whom had intimate relationships with each other.²⁵⁷ The wife of Shan Tao, one of the scholars, found her husband having sex with two other scholars, however, the wife was not angry, jealous, or hostile towards her husband; instead she made some relaxed and positive comments about their sexual relationship. It represented the rather tolerant attitude towards male homosexual acts at the time.²⁵⁸

It should be noted that no laws during this period supported or accepted homosexuality.²⁵⁹ Cultural tolerance of same-sex eroticism does not necessarily translate into legal acceptance of homosexuals' identity.²⁶⁰ That being said, homosexuality was not considered a concern of the law in ancient China.²⁶¹ Same-sex acts could be treated as a "transitional stage in the sexual life cycle of a man or as a legitimate practice for those who were, and remained, married and within the institution of family."²⁶² Thus, ancient Chinese history can be described as having "neither homophobia nor homoeroticism but rather classism, sexism and ageism."²⁶³

This cultural tolerance still has influence in society today. Many wives are still reluctant to divorce their gay husbands.²⁶⁴ Despite this cultural tolerance, a variety of factors may contribute to the reluctance of women to seek a divorce from a gay husband, such as the societal pressure not to lose face, financial concerns.²⁶⁵ Furthermore, many parents still insist or force their gay sons or lesbian daughters to enter heterosexual marriages even

²⁵⁶ *Ibid* at 24.

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid* at 25.

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² Kong, *supra* note 242 at 152.

²⁶³ Sullivan & Jackson, *supra* note 250 at 30.

²⁶⁴ Tom Mountford, *The Legal Position and Status of Lesbian, Gay, Bisexual and Transgender People in the People's Republic of China* (International Gay & Lesbian Human Rights Commission, 2010) at 28, online: IGLHRC <<http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/1107.html>>.

²⁶⁵ *Ibid.*

though they already know their sexual orientation.²⁶⁶

2. The Republican Era (1912-1948)

Ancient China seems to be different from the Western world, where the Christian church has actively oppressed same-sex behaviours after ancient Greece and Rome.²⁶⁷ Nevertheless, after homoerotic practices between men were enjoyed right up to Qing Dynasty (AD 1644-1911), that tolerant culture disappeared with the colonial importation of Western modernization in the early 1900s.²⁶⁸ *Sodomy* was cited as a crime in the late Qing dynasty Criminal Law with a minor punishment for the first time offence.²⁶⁹

The first Opium War (1839-1842) was a turning point in Chinese history. A lot of Western ideologies were adopted to govern the country after many Western countries intruded into China.²⁷⁰ There was a prevailing belief among scholars during this time that Western science would rescue China from its backwardness since many Chinese scholars were sent to Europe to learn advanced techniques.²⁷¹ Thus, in general, many believed that all Western ideologies were advanced, so the things that the Western countries criticized must be bad or lagging.²⁷² Christian homophobia was imported among the many other Western modernizations at that time.²⁷³ Within the field of medicine, Ellis's medical theory of homosexuality, which dichotomizes sexuality into normality and deviation, was imported

²⁶⁶ Dong Wanwan(董婉婉), "Nver shi Lala,Fumu Zhidao hou shi Xuezhongsongtan? Haishi Jiazhuang Buzhi(女儿是拉拉, 父母知道后是雪中送炭? 还是假装不知?) [Daughter is lesbian, Parents would help or pretend don't know]" (21 March 2013), online: Dong Wanwan's sina blog <<http://blog.sina.com.cn/djj516>>. Dong Wanwan is a regional organizer in Shenzhen for PFLAG CHINA, the LGBT organization in China promoting comprehension, acceptance and communication between LGBTs and their parents, families and friends. She is called "Dong Mama" and has worked for PFLAG since she discovered her son was gay in 2009. See:online: PFLAG < <http://www.pflag.org.cn> >.[translated by author]

²⁶⁷ For instance, see the opposing views in Canada: Ellen Faulkner, "Homophobic Hate Propaganda in Canada" (2006/7) 5 J Hate Studies 63, at 73

²⁶⁸ Guo Xiaofei, *supra* note 166, at 54.

²⁶⁹ *Ibid.*

²⁷⁰ Kong, *supra* note 242 at 153.

²⁷¹ Guo Xiaofei, *supra* note 166 at 45.

²⁷² *Ibid* at 42 and 49.

²⁷³ *Ibid* at 42.

during this period and dominated Chinese medical thinking for decades.²⁷⁴

These major changes took place during the course of state-building following the fall of the Qing Dynasty.²⁷⁵ The ideology of nationalism that addressed the proper control of sexual desire was the key to the development of a modern nation-state, and so the government encouraged people to put the revival of their nation as a priority and, therefore, any personal family affairs should be secondary.²⁷⁶ In the meantime, individual sexual desire as a bad habit was disciplined under this official discourse and sexual behaviours were strictly regulated under the name of social welfare and nation building.²⁷⁷ Consequently, marginalized pre-marital and extra-marital sexual practices, such as adultery, masturbation, prostitution, pornography as well as homosexuality, were considered as “shameful” or “abnormal”.²⁷⁸

3. The Maoist Period (1949-1978)

Since the late Qing Dynasty, China suffered from civil and world wars until 1949, when the Communist Party of China (CPC) came into power, and Chairman Mao Zhedong began to rule the country for almost three decades (1949-1978), known as the Maoist period.²⁷⁹ During this period, the country emphasized collective interests and the virtue of complete altruism.²⁸⁰ In the name of revolutionary passion, all old laws and traditional class systems, featured by Confucianism ideology were replaced with the new ruling ideology, Communism. The government exercised control of every form of culture, including films, radio, newspaper, and television, and used the media as a tool of communist propaganda.

Mao strongly emphasized the collective power during the rapid collectivization of farms; consequently reproduction was strongly encouraged during the 1950s and early 1960s. The

²⁷⁴ Kong, *supra* note 242 at 153.

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*, at 152.

²⁷⁷ *Ibid.*, at 153.

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

concubinage and arranged marriages stemming from feudal society were outlawed, and a new hegemonic model of reproductive sex within monogamous heterosexual marriage was created in the 1950 Marriage Law.²⁸¹ With strong and strict control over the media, the CPC easily indoctrinated the people on sexuality through the creation of uniform, normative standards of sexual conduct. The state produced extensive official publications on female sexuality and constructed female gender based largely on sexual difference in anatomy.²⁸² The status of women correspondingly increased and the population grew during the Maoist period.²⁸³ This compulsory heterosexual marital reproductive model left little room for outside sexualities, for instance, pre- and extra-marital sex, pornography and homosexuality.²⁸⁴

There was only one judicial decision concerning homosexuality made by the Supreme People's Court (SPC) on consensual anal sex between males, in 1957.²⁸⁵ Two adult men were discovered to have had an affair and then prosecuted for engaging in consensual anal sex in Heilongjiang province.²⁸⁶ The Mudanjiang Intermediate Court adjudicated the case, but the court was divided on the question of criminality of same sex behaviour. One opinion considered that consensual anal sex between two men was a serious violation of social morals and should be punished under the Criminal Law.²⁸⁷ The other opinion was of that the behaviour was both a bad influence and went against morals, but it should only be punished by administrative sanctions rather than the Criminal Law.²⁸⁸ The Intermediate Court

²⁸¹ *Ibid.*

²⁸² *Ibid.*

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*

²⁸⁵ *Li v Li*, reprinted in Guo Xiaofei, *supra* note 166 at 62-63.

²⁸⁶ Guo Xiaofei, *supra* note 166 at 62-63.

²⁸⁷ Heilongjiang High People's Ct, Guanyu Nanzi yu Nanzi Ziyuan Xingjiao de Xingwei Shuangfang Yingfou Fu Xingshi Zeren Wenti Xiang Zuigao Renmin Fayuan Zuochu Qingshi (Fabanzi 139)(1957年3月19日黑龙江省高级人民法院关于男子与男子自愿性交的行为双方应负刑事责任问题向最高人民法院作出请示(法办字第139号))[Question to Sup. People's Ct Regarding Whether Consensual Anal Sex Between Adults Constitutes a Crime (19 March 1957, Legal Doc. No 139)], at para2; reprinted in Guo Xiaofei, *supra* note 166 at 63[translated by author]; also see John Balzano, "Toward a Gay-Friendly China?: Legal Implications of Transition for Gays and Lesbians" (2007) 16 Law & Sexuality 1 at 24.

²⁸⁸ *Ibid.*, at para.3.

certified the case to the Provincial High Court, which then, in turn certified the case to the SPC. In a short and direct reply, the SPC stated:

[R]egarding whether consensual anal sex between adults constitutes a crime, legislation has not yet provided a resolution. While law has still not articulated a clear answer, we believe it is not appropriate to treat this as a crime on the facts that you have provided.²⁸⁹

This is first official statement from the SPC, which implied that consensual male homosexual act was not a crime under the Criminal Law.

Afterwards, Mao launched the *Great Leap Forward* and *Cultural Revolution* that devastated the Chinese economy and resulted in a massive drop in the standard of living and disorder in state administration.²⁹⁰ In terms of judicial system, there was little effort in legal system development because the judicial system and administrative system were all in chaos.²⁹¹ The whole country was ruled by a variety of levels of CPC leaders. Although some laws were passed, they did not have the function of a real modern law; but rather these laws functioned more like ruling tools of CPC leaders.²⁹² Li Yinhe's investigation found that tongzhi living during the Cultural Revolution were punished in a variety of different ways.²⁹³ For instance, those who received a light punishment might have been forced to undertake medical treatment, whereas more serious punishment included being beaten to death or sentenced to death. Others who feared that their behaviour would be discovered would

²⁸⁹ Sup. People's Ct, Zuigao Renmin Fayuan Guanyu Chengnianrenjian Ziyuan Jijian Shifou Fanzui Wenti de Pifu (最高人民法院关于成年人自愿鸡奸是否犯罪问题的批复 1957年4月29日)[The Sup. People's Ct.'s Reply Regarding Whether Consensual Anal Sex Between Adults Constitutes a Crime, 29 April 1957], Sup. People's Ct.,reprinted in Guo Xiaofei, *supra* note 166 at 63.[Translation is in Balzano, *supra* note 287, at 25]

²⁹⁰ See Michael Schoenhals, ed., *China's Cultural Revolution, 1966–1969: Not a Dinner Party* (Armonk, N.Y.: M.E. Sharpe, 1996); Roderick MacFarquhar, John K. Fairbank and Denis Twitchett, ed., *The Cambridge History of China*, (Cambridge, New York, Melbourne: Cambridge University Press, 1980) vol 15, at chapter 6.

²⁹¹ *Ibid.*

²⁹² The main pieces of legislation in this period included three previous Chinese Constitutional Laws (1954, 1975, 1978) and the 1950 Marriage Law.

²⁹³ Li Yinhe(李银河), *Tongxinglian Yawenhua*(同性恋亚文化) [Subculture of Homosexuality], (np: China Today Publishing, 1998) at 381-82.[translated by author]

commit suicide to avoid the brutal punishment.²⁹⁴ Inconsistency of applying the Criminal Law and punishing offenders uniformly is a symptom of a dysfunctional judicial system.²⁹⁵ Uncertainty in whether certain behaviours would attract the attention of the CPC leaders and uncertainty as to the corresponding punishment led to increased fear among the tongzhi during the Maoist period.²⁹⁶

4. The Reform Era (Post 1979)

The reform era (1979-present) has seen a dramatic change throughout Chinese society. Economic development became the foremost priority for the country, and the *Opening Policy* as the basic policy welcomed importation of foreign investment and cultural products.²⁹⁷ Meanwhile, a variety of reforms to government management, the legal system and market operation were also taking place. Regardless of the CPC's intent for these reforms, they have had a positive influence on tongzhi.

The Opening Policy, one of the most significant and effective policies in China, not only stimulated rapid economic development via attracting western investment, but it also caused a dramatic impact on people's sexual culture through the massive import of cultural products after an embargo of over 30 years.²⁹⁸ The strict control over publication and media has been gradually relaxed since then as well.²⁹⁹ Many cultural products, such as movies, TV shows and publications containing tongzhi roles have emerged regardless of the official prohibitory regulations which specifically address the dissemination of tongzhi related content in

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*

²⁹⁷ *Zhongguo Gongchandang Dishiyejie Zhongyang Weiyuanhui Disanci Quanti Huiyi Gongbao* (中国共产党第十一届中央委员会第三次全体会议公报) [The third plenary meeting Gazette of the Eleventh Central Committee of the Chinese Communist Party], adopted on 22 December 1978, online: CPC news <<http://cpc.people.com.cn>> [translated by author].

²⁹⁸ See "Zhongguo zhe Sanshi Nian (中国这三十年)[China: Thirty Years since 1978]", (2013) online: Culture Ifeng <<http://culture.ifeng.com/>>.

²⁹⁹ *Ibid.*

media.³⁰⁰ Since China Central Television, the most dominant TV channel in China, featured an in-depth report regarding the tongzhi situation by using the theme of AIDS prevention in 2005,³⁰¹ local TV channels have begun to touch on the tongzhi topic by featuring interviews with the tongzhi activists or scholars and investigative news reports.

Furthermore, tongzhi rights development in China seems to have been attracting a lot of attention in the academic field during the Reform period. An increasing number of studies on tongzhi issues, including same-sex marriage and gay-adoptions, have appeared.³⁰² The scholars and activists studying tongzhi issues have actively participated in a variety of media interviews to raise public awareness of the tongzhi community.³⁰³ In the early 2000s, Fudan University in Shanghai began offering China's first course in tongzhi studies.³⁰⁴ Although this course was offered to the students in medical school, it raised a number of discussions on tongzhi's social and legal issues.³⁰⁵ Furthermore, many influential Chinese scholars, for instance, Li Yinhe, Zhuang Beichuang and Zhou Dan, were invited to Fudan University classes as guest speakers.³⁰⁶ Afterwards, Fudan University published the book,

³⁰⁰ For instance, some tongzhi movies in 1990s were *Dong gong xi gong* (东宫西宫), *Intimates* (自梳), *Lan Yu* (蓝宇), *Farewell My Concubine* (霸王别姬).

³⁰¹ “Yi Shengming de Mingyi (以生命的名义) [The Name of Life]”, (9 August 2005), online: China Central TV <<http://www.cctv.com/news/china>> [translated by author].

³⁰² Generally see Gao Yanning (高燕宁) *et al*, *Fudan Dajiangtang Xilie:Tongxinglian Jiangkang Ganyu* (复旦大讲堂系列: 同性恋健康干预) [Fudan University Academic Forum: Homosexuality Health Interference] (Shanghai: Fudan University Press, 2006). The edition book includes the research that a number of Chinese scholars have conducted at early stage. [translated by author].

³⁰³ Interview of Zhang Beichuan by Zeng Zimo in “Shehui Nengjiandu:Airen Tongzhi (社会能见度: 爱人同志) [Social Visibility: Lover, Tongzhi]”, *Phoenix Television Broadcast*, (14 April 2005) online: ifeng <<http://v.ifeng.com/>>; Interview of Zhang Beichuan and Cui Zien by China Central TV in “Yi Shengming de Mingyi (以生命的名义) [The Name of Life]”, *China Central TV*, (9 August 2005) online: China Central TV <<http://www.cctv.com/news/china>>; Interview of Zhou Dan and Cui Zien by Chen Luyu in “Luyu Youyue: Airen Tongzhi Cui Zien (鲁豫有约: 爱人同志崔子恩) [A Date with Luyu: Lover Tongzhi Cui Zien]” *Phoenix Television Broadcast* (27 October 2009) online: Sina <<http://video.sina.com.cn>> [translated by author].

³⁰⁴ “Fudan Daxue Tongxinglian Kecheng Jiqi Qianceng Lang, Jiaoshi Xicheng “Saomang” (复旦大学同性恋课程激起千层浪 教师戏称“扫盲”) [The Homosexuality Course at Fudan University Arouses Ripples, Teachers Called “eliminate illiteracy”]” (21 September 2005), online: Xinhua Web <<http://news.xinhuanet.com>>. [translated by author]

³⁰⁵ *Supra* note 302.

³⁰⁶ *Ibid.*

Homosexuality Health Interference, based on the class discussions in this course.³⁰⁷

Moreover, tongzhi communities have become more visible with the gradual emergence of various tongzhi venues in urban cities, such as bars, clubs, and bathhouses.³⁰⁸ The rise of the internet has also helped Chinese tongzhi to identify one another.³⁰⁹ Tongzhi in urban cities have organized a variety of parties or gatherings to strengthen the tongzhi communities by discussing important issues such as coming out, social discrimination, public recognition and mental health.³¹⁰ A couple of gay men have even held a wedding in a gay bar in Sichuan in 2009, which was reported by many domestic mainstream media and has led to a heated public discussion on the topic of same-sex marriage in China again.³¹¹

In terms of legal developments, the government has been transferred from the *rule of man* during the Maoist period to a modern *rule of law*, which emphasizes the significance that law now plays in modern China.³¹² The new legal system has been founded and a number of new pieces of legislation have been passed.³¹³ The two main legal developments regarding tongzhi were the decriminalization of male homosexual acts in 1997 (referred to as hooliganism), and the removal of homosexuality in the mental illness list in 2001.³¹⁴ However, there is little legislation promoting tongzhi human rights *per se* and there are some discriminatory provisions in different area of laws. In practice, a number of human rights violations still occur within the tongzhi community.³¹⁵ Overall

³⁰⁷ Gao Yanning (高燕宁) *et al*, *Fudan Dajiangtang Xilie:Tongxinglian Jiangkang Ganyu* (复旦大讲堂系列: 同性恋健康干预) [Fudan University Academic Forum: Homosexuality Health Interference] (Shanghai: Fudan University Press, 2006), at *Preface*. [translated by author]

³⁰⁸ *Ibid*, at 185.

³⁰⁹ Kong, *supra* note 242 at 155.

³¹⁰ Gao Yanning, *et al*, *supra* note 307 at 97-122.

³¹¹ Huang Zhiling and Zhang Ao, "In a 'first', gay couple tie the knot in China", *China Daily* (13 January 2010), online: China Daily <<http://www.chinadaily.com.cn/>>.

³¹² The concept of "rule of law" was first acknowledged at the Fifteenth National Congress of Chinese Communist Party in 1997. See e.g., Jiang Zemin (江泽民), *Jiang Zemin zai Zhongguo Gongchandang Dishiwuci Quanguo Dabiao Dahui de Baogao* (江泽民在中国共产党第十五次全国代表大会上的报告) [Jiang Zemin's report on the Fifteenth National Congress of Chinese Communist Party], adopted on 12 September 1997, online: CPC news <<http://cpc.people.com.cn/>> [translated by author].

³¹³ *Ibid*.

³¹⁴ *Infra* at p 92 and 97.

³¹⁵ *Infra* at p 91.

the tongzhi human rights movement in China is relatively lagging behind the development of sexual minority rights internationally.

D. Tongzhi in China Today

1. Brief Introduction to the Current Chinese Legal System

After the Opening Policy, a new legal system in China was gradually developed. The current Chinese legal system is a unique legal system that is largely based in the civil law tradition but also influenced by other factors.³¹⁶ Wang Jiangyu identifies three main influences that have played roles in the legal system forming process: Westernization, Marxism and Confucianism.³¹⁷

The first was the Westernization of Chinese law in the late Qing Dynasty.³¹⁸ During this period, the Chinese government hired Shen Jiaben and Wu Tingfa (two legal experts who were influenced by Western legal theories and education) to conduct the legal reforms.³¹⁹ They insisted the Imperial legal system was “outdated and uncivilized” and that it should be updated according to Western standards.³²⁰ They began their legal reforms using the Japanese legal system, which stemmed from the German civil law system, as a reference point.³²¹ Thus, the first major step towards the current Chinese legal system began by importing a Japanese-styled civil law tradition.³²²

The second factor is Marxism. In Chinese law schools today, many legal theory textbooks introduce the notion that “law”, which according to Marxist legal theory is the

³¹⁶ Wang Jiangyu (王江雨), “Daidai Zhongguo Falv Zhidu de Jiben Tezheng, Jiegou yu Weilai Fazhan Zhangwang (当代中国法律制度的基本特征、结构与未来发展展望) [The Basic Characteristics, Structure and Future Outlook of Chinese Legal System]”(2010) 86 East Asian Institute Working Papers 1, at 2-3, online: <<http://www.eai.nus.edu.sg>> [translated by author].

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*

³¹⁹ Zhang Jinpan (张晋藩), *Zhongguo Falv de Chuantong yu Xiandai Zhuaxing* (中国法律的传统与近代转型) [the Transition From Tradition To Modern In Chinese Laws] (Beijing: Law Publishing, 1997) at 440.[translated by author].

³²⁰ *Ibid.*

³²¹ *Ibid.*

³²² *Ibid.*

reflection of the ruling class, is a tool of the ruling class.³²³ In the Chinese context, the CPC is claimed to be the representation of the “ruling class” of China, constituting the proletariats (i.e., the workers and peasants).³²⁴ Thus, Marxist legal theory would suggest that all the laws, as well as the judicial institutions should follow the leadership of the CPC.³²⁵ After 1949, the CPC abolished the previous legal systems and followed the model of the Soviet Union, which was also a civil law tradition.³²⁶ This Soviet-based judicial system is the origin of the current Chinese legal system.³²⁷ Since 1979, the current legal system has developed slowly and incrementally.

Confucianism, China’s traditional legal theory, still has influence on the current legal system.³²⁸ A number of old outdated notions in Confucianism, such as imperial power, man's superior power and emperorship supremacy, were abandoned among modern legal theories. However, some moral values, including respect for old people and social harmony, are still important social values and remain a concern for the legislatures to this day, and are reflected in legislation.³²⁹

a. **State Structure**

China is a unitary state that emphasizes the supreme power of the central authority. Wang Jiangyu explains that the “unitary” character has three aspects: first, one *Constitution*, one supreme legislative authority, one central government and one judicial system; second, the central government has supreme administrative power, the provinces must follow the leadership of the central authority; and third, the nation is a whole entity and only the

³²³ Wang Jiangyu *supra* note 316 at 3.

³²⁴ *Ibid.*

³²⁵ *Ibid.*

³²⁶ *Ibid.*

³²⁷ *Ibid.*

³²⁸ *Ibid* at 6.

³²⁹ See Laonianren Quanyi Baozhang Fa (老年人权益保障法) [Law on Protection of the Rights and Interests of the Elderly] (promulgated by the Standing Committee of the Nat’l People’s Cong., on 28 December 2012, effective 1 July 2013), art 18, online: pkulaw <<http://en.pkulaw.cn/>>, *infra* at p 296.

central government can represent China in the international community.³³⁰ In practice, the central authority refers to the CPC because the CPC is the controller of the Chinese regime. Although Deng Xiaoping advanced the principle of separation of the party and the administration in the late 1980s,³³¹ the CPC still is involved in a number of administration affairs throughout the country. For instance, the CPC leader is normally the President of China (formerly referred to as the Chairman), despite the fact that the NPC selects the President.³³² Thus, the CPC's policies have direct impact in the legislature, central governments and even the Supreme People's Court.

Under this unitary structure, the legislative power, executive power and judicial power are distributed among the three main branches: the NPC, the governments (state council and local governments) and the courts.³³³ The guiding principle for these three branches is *separation of functions and mutual cooperation*, which is notably different from the idea of the "separation of powers" in Canada and other Western democratic countries.³³⁴ The feature of *mutual cooperation* contributes to the failure of judicial independence in China.

The national legislature is the NPC. The NPC is responsible for national laws. The NPC delegates are selected according to the Chinese *Election Law* that stipulates that these delegates are elected by lower delegates rather than directly by the public, which clearly runs counter to the democracy principle.³³⁵ The current NPC has 2987 delegates and is the

³³⁰ *Ibid* at 10.

³³¹ The theory was advanced by Deng Xiaoping in 1986 and acknowledged at the Thirteenth National Congress of Chinese Communist Party in 1987. See e.g., *Zhongguo Gongchandang Dishisanci Quanguo Daibiao Dahui Ziliao* (中国共产党第十三次全国代表大会资料) [The documentations re Thirteenth National Congress of Chinese Communist Party], online CPC news <<http://cpc.people.com.cn>> [translated by author].

³³² For instance, the current CPC leader, Xi Jinping is the president of China.

³³³ "Zhonghua Renmin Gongheguo Guojia Jigou Tizhi (中华人民共和国国家机构体制) [State Structure System of People's Republic of China]", online: Chinese Government Web<<http://www.gov.cn>>.[translated by author]

³³⁴ *Ibid*.

³³⁵ *Quanguo Renmin Daibiao Dahui he Difang Geji Renmin Daibiao Dahui Xuanju Fa*(全国人民代表大会和地方各级人民代表大会选举法(2010 修正))[Electoral Law for the National People's Congress and Local People's Congresses (2010 Amendment)] (promulgated by Standing Comm. Nat'l People's Cong. on 4 July 1979, effective on 1 January 1980, the 2010 amendment was issued by Nat'l People's Cong on 14 March 2010, effective on 14 March 2010, at art 2, online: [pkulaw<http://en.pkulaw.cn>](http://en.pkulaw.cn)[*Electional Law*]

largest parliament in the world.³³⁶

b. Hierarchy of Legislation

There are three different levels in the Chinese hierarchy of legislation. National laws are the highest level and refer to the major legal codes or laws dealing with relatively significant issues such as criminal laws and marriage laws. As such, these laws require a relatively strict lawmaking process. The *Constitution of the People's Republic of China*, the highest and ultimate source of legislation, is also in this category. Article 8 of the *Law of the People's Republic of China on Legislation* stipulates that the following matters can only be regulated through national laws:³³⁷

1. matters concerning state sovereignty;
2. the formation, organization, functions and powers of people's congresses, people's governments, people's courts and people's procuratorates at various levels;
3. the national regional autonomy system, special administrative region system and grass-roots mass autonomy system;
4. *crimes and punishments*;
5. compulsory measures and penalties such as deprivation of citizens' political rights and restrictions on personal freedom;
6. acquisition of non-state-owned property;
7. the basic civil system;
8. basic economic system and basic systems on finance, taxation, customs, banking and foreign trade;
9. procedural and arbitral systems; and other matters on which the National People's Congress and its Standing Committee must enact laws.

The second level is administrative rules and regulations issued by the State Council and its departments and commissions. This category mainly aims to implement national laws and has the executive power of enforcement.³³⁸ The last level is the local legislation

³³⁶ “National People's Congress (of China)”, online: Nat'l People's Cong. <www.npc.gov.cn>.

³³⁷ Lifa Fa (立法法) [Law on Legislation] (promulgated by National People's Congress on 15 March 2000, effective on 1 July 2000), at art 8, online: pkulaw<<http://en.pkulaw.cn>> [*Law on Legislation*].

³³⁸ *Ibid* at art 56.

including regulations and by-laws passed by local governments and the People's Congresses at the provincial and municipal levels.

National laws normally could only be passed or revised by the NPC through certain procedures.³³⁹ The NPC gathers each year along with the CPPCC, officially called *Lianghui* (Two Meetings). During the *Lianghui*, the NPC passes or revises relevant national laws and makes important national level political decisions with the CPPCC.³⁴⁰ In Chinese politics, although the ruling party is the CPC, other political parties are welcomed to provide constructive suggestions on significant issues, which is recognized as a principle in the *Chinese Constitution*.³⁴¹ The CPPCC, consisting of other political parties, is the most important consultative union and has provided a number of legislative proposals for the NPC's consideration.³⁴² These proposals aim to raise awareness of certain social issues that ought to be solved in the future.³⁴³ For instance, the first same-sex marriage proposal was submitted to the CPPCC, which will be addressed below.³⁴⁴ However, whether or not proposals can reach NPC and become a bill depends on whether they can get enough support from the NPC delegates.³⁴⁵

Another important source of law is the judicial interpretations issued by the Supreme People Court. The principle of *stare decisis* does not exist in China, so the courts do not follow the precedents in their ruling. However, due to the complexity of legislative interpretation, the NPC has delegated that responsibility to the SPC in 1981.³⁴⁶ Thus, the judicial interpretations issued by the SPC are legally binding, and lower courts must follow

³³⁹ *Law on Legislation*, *supra* note 337, at art 8.

³⁴⁰ *Law on Legislation*, *supra* note 337.

³⁴¹ *Chinese Constitution*, *supra* note 119 at *preamble*.

³⁴² *Ibid.*

³⁴³ “Zhengxie Tian (政协提案)[CPPCC Proposal]”, online: CPPCC

<<http://cppcc.people.com.cn/GB/159119/13925421.html>>

³⁴⁴ *Infra* at p 297.

³⁴⁵ *Supra* note 343.

³⁴⁶ Guanyu Jiaqiang Falv Jieshi Gongzuo de Jueyi (关于加强法律解释工作的决议) [Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law] (promulgated by Standing Comm. Nat'l People's Cong. on 10 June 1981, effective on 10 June 1981), at art 1, online: pkulaw<<http://en.pkulaw.cn/>>.

the SPC's interpretations in their rulings. That being said, Chinese courts, even the SPC, do not have the power to strike down laws.³⁴⁷

2. Official Attitude on Tongzhi: *Repressive Indifference*

The attitude of the official authorities on tongzhi issues is significant for the tongzhi movement in China. Official attitude here refers to the CPC's or central government's attitudes since the CPC has *de facto* control over the regime in reality. Generally, the central authority seems unwilling to touch tongzhi topics and always remains silent on tongzhi issues, leading to what scholars have summarized as the Triple Not Policy, namely, "not encouraging, not discouraging and not promoting (不支持, 不反对, 不提倡)."³⁴⁸

However, in actual fact, the official attitude cannot be accurately described as being simply silent on tongzhi issues. The current official attitude is better characterized as *repressive indifference*. With the decriminalization of male homosexual acts in 1997, the police can no longer prosecute an individual because of homosexual acts, which has led to the mistaken belief that it is safe to live in China as a gay individual. In many other policy areas, the central government ignores this disadvantaged group by failing to provide any legislation to address active and passive forms of discrimination against tongzhi in employment, marriage, or education, to name just a few areas. It is unlikely that the authorities are ignorant of the existence of the tongzhi and discrimination against them; rather, it is more likely that it simply refuses to acknowledge these matters publicly.

The purpose of such *indifference* is to prevent the tongzhi community from gaining any exposure in civil society, sending the message to the public that there are no homosexuals in China, and thus, no protective laws are needed since there is no relevant discrimination. The final aim is to prohibit further rights-claiming from the tongzhi group without having the

³⁴⁷ *Law on Legislation*, *supra* note 337 at chp 5.

³⁴⁸ Mountford, *supra* note 264 at 3. In Jason Ng, *Blocked on Weibo: What Gets Suppressed on China's Version of Twitter (and Why)*, (New York: New Press, 2013), this policy is translated as "no approval, no disapproval, no promotion." at p 81.

support from the public.

It is not realistic to completely hide the tongzhi group from the public. A variety of cultural products, including movies and books, reflect the fact that tongzhi group live among society and account for a certain percentage of the population. As mentioned above, the tongzhi community, especially in big cities such as Shanghai and Beijing, has become more visible with the appearance of gay bars, clubs and bathhouses. Academic debates on tongzhi issues in universities have also attracted the attention of the public.

However, in the traditional media, such as TV or newspaper, that are easy to raise social awareness on tongzhi rights or have a impact on society, the authorities do not seem friendly and instead use harsh control.³⁴⁹ This is best seen in the authorities control over the media.³⁵⁰ In such areas, the authorities do not want to lose their controls and have adopted *repressive* policies to prevent any further human rights claims from the tongzhi community. As outlined below, a large number of opposing provisions against tongzhi are found in the media legislation, which stipulates any content containing homosexuality in media should be prohibited.

In practice, the central authorities have turned a blind eye to some isolated individual behaviours, such as the tongzhi wedding held in a gay bar in Sichuan in 2009. However, unlawful official interference, including police harassments and refusal of official authorization to hold events, were common during large-scales tongzhi events, which will be addressed below. Since tongzhi legal status remains in a grey area in China, it is hard to predict the official response to tongzhi events and even in the event of official interference, there are few protective laws that tongzhi can rely on. This uncertainty, created by the official attitude of repressive indifference, slows the development of a strong and united tongzhi community. Ultimately, the official attitude represents a deep reluctance to see any tongzhi movement and the refusal of any further official recognition of tongzhi rights by

³⁴⁹ *Infra* at p 82.

³⁵⁰ *Ibid.*

ignoring its sizeable population.

3. Discriminatory Legislation against Tongzhi

Tom Mountford, a scholarship recipient from *the Honourable Society of the Inner Temple*, conducted a comprehensive study in 2009 of Chinese legislation regarding tongzhi rights entitled *The Legal Position and Status of Lesbian, Gay, Bisexual and Transgender People in the People's Republic of China*.³⁵¹ This report covers most of the discriminatory legislation regarding LGBT and human right abuses against LGBT in China today.³⁵² As a result, the following section is drawn from Mountford's study and my new updates. In general, Mountford found that there is little legislation supporting tongzhi at the national law level, which could be understood as a manifestation of the official indifference policy. However, there are a number of provisions that either actively or passively discriminate against the tongzhi community. Three main areas of active discrimination presented below, include media law, adoption law, and blood donation laws. As for passive discrimination, examples are presented from the education system, family law, and employment.

a. Active Discrimination in Media Law

The most discriminatory legislation is in the field of media, where tongzhi or tongzhi behaviours are considered abnormal and immoral, which has led to a prohibition on disseminating tongzhi related contents. In 2004 and 2007, the State Administration of Radio, Film and Television (SARFT), the major state department dealing with entertainment media, issued two Official Notices *on Ensuring that Broadcasting Strengthens and Corrects the Moral Character of Adolescents*.³⁵³ Both Notices link

³⁵¹ Mountford, *supra* note 264. The Honourable Societies of the Inner Temple, together with Middle Temple, Lincoln's Inn and Gray's Inn, constitute the Innes of Court which hold the exclusive rights to call candidates to practise law at the Bar of England and Wales, and play a central role in the recruitment of student members, training of aspiring barristers and continuing professional development of established barristers. See online: the Honourable Society of the Inner Temple <<http://www.innertemple.org.uk/>>.

³⁵² *Ibid.*

³⁵³ Guangbo Yingshi Jiaqiang he Gaijin Weichengnianren Sixiang Daode Jianshe de Shishi Fang'an (广播影

homosexuality with unhealthy sexual behaviour, and recommends that such content should be prohibited. For instance, article 15 of the 2004 Notice explicitly states:

Any pornographic details, licentious scenes or lewd language should be prevented from inclusion in broadcasts. Broadcasts/films/TV shows should consider the behaviour of the adolescent audience, their ability to accept different things, and their upbringing, the correct moral and healthy mental education and development of adolescents, and should ensure the censorship of any programmes that sell based on pornography and sex. This certainly includes a prohibition against the promotion of any unhealthy content which is against normal morals. As for unhealthy sexual content such as the promotion of sexual freedom, promiscuity and sexual enjoyment together with language, scenes and plots about *homosexuality*, all of the above should be cut. In particular language, scenes and plots connected to the sexual behaviour and early [sexual] relationships of adolescents should be cut.³⁵⁴

In 2006, for effective enforcement of *the State Council's Regulation for Prohibition on Pornography Products* and the *Regulation for Prohibition on Pornography Publication*, the General Administration of Press and Publication of China, a department in charge of press and publication issued an *Interpretation Regulation for Defining Pornography*. Despite the fact that both heterosexual pornography and homosexual pornography are restricted, the regulation categorizes “homosexuality” under “abnormal sexual behavior”.³⁵⁵

视加强和改进未成年人思想道德建设的实施方案) [Official Notice on Ensuring that Broadcasting Strengthens and Corrects the Moral Character of Adolescents], (Delivered by State Administration of Radio, Film and Television (SARFT) on 13 May 2004, online: China.com <<http://www.china.com.cn/chinese/PI-c/563676.htm>> [SARFT (2004)][translated by author]; See also, Guangbo Yingshi Jiaqiang he Gaijin Weichengnianren Sixiang Daode Jianshe de Shishi Fangan (广播影视加强和改进未成年人思想道德建设的实施方案) [Official Notice on Ensuring that Broadcasting Strengthens and Corrects the Moral Character of Adolescents], (delivered by SARFT on 27 February 2007), online: SARFT <<http://www.sarft.gov.cn>> (China) [SARFT 2007][translated by author].

³⁵⁴ SARFT (2004), *supra* note 353 at art 15 [translated by Mountford, *supra* note 159 at 10] [emphasis added].

³⁵⁵ Guojia Xinwen Chubanshu guanyu Rending Yinwei ji Seqing Chubanshu de Guiding (国家新闻出版署关于认定淫秽及色情出版物的规定) [Regulation Regarding the Standard of Obscene and Pornographic Publications Issued by General Administration of Press and Publication] (promulgated on 8 January 2006), online: General Administration of Press and Publication official web <<http://www.gapp.gov.cn/>>[translated by author].

Furthermore, in 2006, SARFT issued another *Official Notice on the Restatement of Film Censorship Standards*, which had a significant influence in film censorship. The Notice explicitly provides that homosexuality related contents should be cut:

Any scenes in a film containing the following content should be cut and corrected:...(III) pornography, sex and vulgarisms, showing pornography, rape, prostitution, sex, sexual abnormalities, *homosexuality*, masturbation etc, as well as the showing of male and female genitalia; also lewd lyrics, words, background music and voices.³⁵⁶

It is reported by Beijing Aizhixing Institution, a NGO for gay right in China, that a few official internet censorship programs screen the websites containing *homosexuality* (tongxinglian).³⁵⁷ Also in July 2009, the national lesbian magazines *Les+ Journal* and *Dian* were forced to close by the Beijing authority.³⁵⁸

Due to such harsh restriction on the freedom of speech, it is unlikely for tongzhi to enjoy the freedom of assemblies and association from the authority's interference in China. Recently, the Hunan government refused a request by a gay rights activist in the central province of Hunan to set up a NGO, the Changsha Tongzhi Center. The center would combat prejudice and spread education and understanding in society.³⁵⁹ The reasons for the refusal that the government has given were because gay marriage is illegal in China; homosexuality was "against spiritual civilization construction" and "in violation of morals."³⁶⁰

It is also found the restriction of tongzhi contents in Weibo. Weibo (Sina Weibo), known as Chinese twitter, becomes popular in China as the first source for real-time

³⁵⁶ *Ibid* [emphasis added].

³⁵⁷ Beijing Aizhixing Institution(北京爱知行研究所), "Guanyu Jiangqiang Xingjiaoyude Huyu (关于加强性教育的呼吁)[Calling for sex education]", online: Love Knowledge Action < <http://www.aizhi.co/> >.[translated by author]

³⁵⁸ *Ibid*.

³⁵⁹ Didi Kirsten Tatlow, "Homosexuality 'Against Spiritual Civilization,' Hunan Government Says" (6 December 2013), online: New York Times, Sinosphere < <http://sinosphere.blogs.nytimes.com>>; Ah Qiang, "Can gay people get involved in NGO in China?" (4 December 2013), *PFLAG China*, online: Sina Blog < http://blog.sina.com.cn/s/blog_664772fb0101p0zd.html>.

³⁶⁰ *Ibid*.

information, with over 350 million registered accounts.³⁶¹ The Chinese term for lesbian, “女同 (Nv Tong)” is blocked according to Jason Ng’s research project regarding the Chinese cyber censorship from 2009-2010.³⁶² The reasons for its blockage are “probably has to do with a far more prosaic-or more salacious, depending on your view-reason: to prevent people from finding and sharing lesbian pornography.”³⁶³

b. Active Discrimination in Adoption Law

Discriminatory provisions are also commonly found in the field of adoption. There are no specific provisions against gay and lesbian adoption under the Chinese *Adoption Law*. However, without any legal recognition for same-sex marriage in China, tongzhi people cannot adopt as a couple. In terms of international adoption, the China Center for Children’s Welfare and Adoption (previously called the China Center of Adoption Affairs), the main institution for adoption authorized by the Chinese government, expressed the official position in the reply to the question “Can homosexuals adopt children from China?” on its website in 2011:

The China Adoption Center Affairs shall not identify prospective adoptive referrals for homosexuals. Legally, the Marriage Law of the People’s Republic of China recognizes *only families formed by marriage of opposite sex and does not recognize the legality of homosexual families, and the homosexual families are, therefore, not protected by laws*. From the Chinese medical point of view, the China Mental Disorder Classification and Diagnosis Standard classifies *homosexuality as sexual obstruction, belonging to psychiatric disease of the kind of sexual psychological barrier*. In terms of the Chinese traditional ethics and customs and habits, *homosexuality is an act violating public morality and therefore not recognized by the society*. In accordance with the principle that adoption shall not violate social ethics as set forth in the Adoption Law, foreign *homosexuals are not allowed to adopt children in China*.³⁶⁴

³⁶¹ Jason Ng, *supra* note 348, at xiv.

³⁶² *Ibid.*, at 81.

³⁶³ *Ibid.*

³⁶⁴ “Can homosexuals adopt children from China?” (24 March 2011), online: the China Center for Children’s Welfare and Adoption < <http://ccwa.mca.gov.cn/> > [emphasis added].

The main reasons given for the refusal of gay adoption are the absence of legal recognition for homosexuality in China, homosexuality as a psychiatric disease and homosexuality's immorality according to Chinese traditions. The statement from the China Center for Children's Welfare and Adoption is in complete contradiction to the current 2001 edition of the Chinese Classification of Mental Disorders III, which removed homosexuality from the list of mental illness.³⁶⁵ Furthermore, the reference to "foreign homosexuals" suggests that it would be equally unlikely for single tongzhi to openly adopt as gay or lesbian in China.³⁶⁶

The only solution for the tongzhi people to adopt is applying as single person without disclosing their sexual orientation. They need to meet certain conditions for the general domestic adoption, i.e., the applicant does not have a child, should not suffer from a disqualifying medical condition, should be older than 30 years old, and have ability to raise and educate the child.³⁶⁷ There is higher age requirement for a single man adopting a female child, i.e the adoptive father should be 40 years older than the daughter.³⁶⁸

c. Active Discrimination in Blood Donation Law

The third field that continues to be discriminatory is blood donation. In the 1998 the Ministry of Health issued the *Blood Station Administration Regulation (provisional)*, which listed a number of prohibited situations or groups from giving blood on account of their potential higher risk of HIV/AIDS.³⁶⁹ The *Health Examination Requirement of Blood Donor*, as the Annex of the 1998 Regulation, explicitly lists homosexuals along with

³⁶⁵ *Infra* at p 97.

³⁶⁶ Mountford, *supra* note 264 at 30.

³⁶⁷ Shouyang Fa(x1998xiuzheng) (收养法 1998 修正) [Adoption Law (1998 Amendment)](promulgated by Standing Comm. Nat'l People's Cong. on 29 December 1991, effective 1 April 1992; amended by Standing Comm. Nat'l People's Cong. on 4 November 1998), at art 6, pkulaw <<http://en.pkulaw.cn/>>.

³⁶⁸ *Ibid*, at art 9.

³⁶⁹ Xuezhān Guānlǐ Bānfǎ (Zānxíng) (血站管理办法 (暂行) [Blood Station Administration Regulation (provisional)], (promulgated by Ministry of Health on 21 September 1998, effective 1 October 1998, ineffective now), online: pkulaw <<http://en.pkulaw.cn/>>.

people having multiple sexual partners together with another 17 situations.³⁷⁰ This list was highly criticized because it contains discriminatory expression against sexual orientation.³⁷¹ The lesbian communities launched a petition campaign against this ban on the ground the WSW group (women who have sex with women) is a low-risk group and therefore should not be prohibited from giving blood.³⁷² This regulation remained in force until the new *Measures for the Administration of Blood Stations* was implemented in 2006 where the entire Annex was deleted.³⁷³

In November 2011, the Ministry of Health and National Normalization Management Committee passed a separate new *Health Examination Requirements of Blood Donor*.³⁷⁴ In the *Preface* of this new requirement, it stated that the issue of homosexuals donating blood would be revised by distinguishing lesbians from MSM (men who have sex with men) among the prohibited blood donors.³⁷⁵ This led to much criticism of the new *Requirements*. Wang Guisong, a professor from the People's University of China, criticized the prohibition stating that it discriminates against male tongzhi in China and it violates privacy by requiring men to disclose their sexual orientation before donating blood. Such regulation continues to stigmatize tongzhi group in China.³⁷⁶ Furthermore, he pointed out that there would be many obstacles to implementing such a regulation since most gay men refuse to disclose their sexual orientation due to massive social stigma and discrimination.

³⁷⁰ *Ibid*, at Annex.

³⁷¹ Zhou Dan (周丹), "Tongxinglian yu fa" (同性恋与法) [Homosexuality and Law], in Gao Yanning, *et al*, *supra* note 307 at 310.[translated by author]

³⁷² Mountford, *supra* note 264 at 30.

³⁷³ Xuezhān Guānlǐ Bānfǎ (血站管理办法) [Measures for the Administration of Blood Stations], (Issued by the Ministry of Health on 17 November 2005, effective on 1 March 2006), online: pku.law<<http://en.pkulaw.cn/>>.

³⁷⁴ Xiānxuèzhě Jiànkāng Jiànchá Yāoqiú (献血者健康检查要求) [Whole blood and component donor selection requirements] (Adopted by the Ministry of Health and Standardization Administration Committee on 30 December 2011, effective on 1 July 2012),online: Chinese government web<<http://www.gov.cn>> [translated by author].

³⁷⁵ *Ibid*, at art 6.1.19.

³⁷⁶ "Zhuānjia chéng jīn nǎntóng xiānxuè cǎozuòxíng dì, jiējīn nǚtóng wéi jiēguī guóji (专家称禁男同献血操作性低 解禁女同为接轨国际) [Experts say unrealistic to ban Male Homosexuals blood donors; allowing lesbians donating blood meets the international standards]" *Jinhua Times* (14 July 2012), online: Chinanews <<http://www.chinanews.com/jk/2012/07-14/4032548.shtml>> [translated by author].

Moreover, it is unfair to put such a legal obligation on this vulnerable group.

d. Passive Discrimination in Sex Education

Tongzhi youth are becoming increasingly at risk and vulnerable to sexually transmitted infections (STIs), due to the absence of sexual orientation in sex education within the Chinese education system. Although the Ministry of Education set out a sexual education curriculum in an official *Education Direction Regulation*, few schools have implemented this approved sex education curriculum in practice.³⁷⁷ The majority of students receive little knowledge through sex education at school.³⁷⁸ Moreover, the lack of reference to sexual orientation and the existence of LGBT people in the official sex education curriculum put young tongzhi at increased confusion about their self-identity. The ineffective sex education in most Chinese schools allows for the persistence of myths such as, HIV is a gay problem.³⁷⁹ The *Report of the Online Survey on Homophobic and Trans-phobic Bully at Educational Institutions* conducted by Aibai Culture & Education Center in partnership with Beijing LGBT Center, the Associated Gay/Les Campus in Guangzhou and UNESCO China in 2012 shows that 77% of student participants have experienced different types of bullying based on their sexual orientation and gender identity at school.³⁸⁰

e. Passive Discrimination in Family Law

³⁷⁷ Zhongxiaoxue Jiankang Jiaoyu Zhidao Gangyao (中小学健康教育指导纲要) [Guidelines for School Health Education], (delivered by Ministry of Education on 1 December 2008), online: Chinese government web <<http://www.gov.cn>> [translated by author]

³⁷⁸ The sex education in China is highly criticized in media. See “Jiangfangzhou Pengji Xingjiaoyu Henshibai (蒋方舟抨击性教育很失败) [Jiang Fangzhou criticizes Sex Education Fails]” (20 February 2010): *NewsCN*, online: NewsCN 新华社 <<http://news.xinhuanet.com>>; and “Beida Xingxue Dashi: Zhongguo Ketang Xingjiaoyue Wanquan Shibai (北大“性学大师”:中国课堂性教育完全失败) [Sex Education Expert of Beijing University: The Sex Education at Chinese School Completely Fails]” (7 November 2006), *Tencent News*, online: Edu.qq.com <<http://edu.qq.com>> [translate by author].

³⁷⁹ Mountford, *supra* note 264 at para 39.

³⁸⁰ Aibai Culture & Education Center (ACEC), *Report of the Online Survey on Homophobic and Trans-phobic Bully at Educational Institutions*, (May 2012) online: ACEC <<http://www.aibai.com>>.

Due to the absence of legal recognition on same-sex relationship, tongzhi face a variety of disadvantages in the context of family law. Many tongzhi are forced into the heterosexual marriages in China.³⁸¹ Article 32 of current *Marriage Law* provides the grounds for granting a divorce.³⁸² The court should follow these grounds to determine if the mutual affection between husband and wife no longer exists as the overriding criteria. But sexuality *per se* is not a ground for a court to grant divorce, which limits tongzhi's ability to seek divorce. The SPC interprets that in the extramarital affair or cohabitation, the third person must be of the opposite sex with the fault party, and therefore the cohabitation with same-sex third person/partner does not constitute a ground for divorce.³⁸³

The Beijing No.1 intermediate Court released a report entitled *the Research Regarding the Divorces Cases involving Homosexuals* in 2013.³⁸⁴ In terms of dividing the matrimonial property in divorce, the Court points out that it is "reasonable and acceptable" to grant less property to the gay spouses because the heterosexual spouse is normally non-fault.³⁸⁵

In terms of child custody in divorce, the court has wide discretion and the main criterion is the best interest of the child.³⁸⁶ Tongzhi parents are likely to lose the custody of

³⁸¹ *Infra* at p 281.

³⁸² Huiyin Fa 2001 (婚姻法 2001 修正) [Marriage Law (2001 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong. on 21 April, 2001), online: pkulaw <<http://en.pkulaw.cn>> [*Marriage Law 2001*]. Article 32 lists the grounds for granting divorce: "(1) bigamy or, cohabitation of a married person with any third party; (2) domestic violence or, maltreatment and desertion of one family member by another; (3) bad habits of gamble or drug addiction which remain incorrigible despite repeated admonition; (4) separation caused by incompatibility, which lasts two full years; and (5) any other circumstances causing alienation of mutual affection. Divorce shall be granted if one party is declared to be missing and the other party thereby files an action for divorce."

³⁸³ Zuigao Renmin Fayuan guanyu Shiyong <Zhongguo Renmin Gongheguo Hunyinfa> Ruogan Wenti de Jieshi Yi (最高人民法院关于适用《中华人民共和国婚姻法》若干问题的解释一) [Interpretation No. I of the Supreme People's Court on Several Issues in the Application of Marriage Law of the People's Republic of China] (Issued by Sup. People's Ct. on 25 December 2001, effective on 27 December 2001), at art 2, online: pkulaw <<http://en.pkulaw.cn>> .

³⁸⁴ The Beijing No.1 intermediate Court(北京第一人民中级法院), *Lihun Anjian Zhong She Tongxinglian Shuqiu Caichu de Diaoyan*(离婚案件中涉同性恋诉求裁处的调研) [the Research Regarding the Divorces Cases involving Homosexuals] (11 January 2013), reprinted in PFLAG China press release, online:< http://www.pflag.org.cn/News_View.asp?NewsID=388 >.[translated by author]

³⁸⁵ *Ibid*, at point 5.

³⁸⁶ *Marriage Law 2001*, *supra* note 382, at art 36.

their children because of their sexuality in the context of social misunderstanding of the tongzhi group and the official indifference policy. In the recent case of *Xiu v Quan*, Quan, a gay man, married to Xiu, a heterosexual woman. They agreed to divorce voluntarily and Quan had the sole custody of their child. But after Xiu found out Quan is a gay, she sued to the Court and asked to change the custody. The Court ruled that Xiu has sole custody of the child because “Quan’s sexual orientation is different from the normal people, which will have disadvantageous influence on the child’s future life and family”.³⁸⁷

f. Passive Discrimination in Employment Law

With respect to employment law, the *Chinese Labor Law* does not have any applicable anti-discrimination provisions on the ground of sexual orientation for the tongzhi group. Although there are a few news reports regarding tongzhi having been fired solely based on sexual orientation, many tongzhi fear that their employers or colleagues would reveal their sexuality.³⁸⁸ On 17 May 2013, the Aibai Cultural & Education Center published the first *Report of the online Survey on Chinese Sexual Minorities (LGBT) Workforce* in Beijing based on 2161 valid responses.³⁸⁹ The report shows only 6.29% of the respondents have completely come out in their workplace. Over half (53.63%) have experienced discrimination or harassment, including vocal and physical violence. With respect to teamwork, 27.58% of the respondents said that they had difficulties being an active team member due to hiding their sexual orientation in the workplace.³⁹⁰

³⁸⁷ “Qianfu shi Tongxinglian Yaoqiu Biangeng Haizi Fuyangquan (前夫是同性恋 要求变更孩子抚养权)[Ex-husband is gay Ask for change of Adoption of Child]” (9 August 2013), online: People Web, Henan <<http://henan.people.com.cn/news/2013/08/09/688665.html>>. In this news report, the court ruled Quan (the husband)’s sexual orientation is different from the normal people, which will have disadvantageous influence on the child’s future life and family. The Court held the custody should be altered to the mother. [Translated by author]

³⁸⁸ Mountford, *supra* note 264 at para 82.

³⁸⁹ Aibai Cultural & Education Center (ACEC), *Zhongguo Xingshaoshu Qunt i(LGBT) Zhichang Huangjing Diaocha Baogao* (中国性少数群体 (LGBT) 职场环境在线调查报告) [Report of the online Survey on Chinese Sexual Minorities (LGBT) workforce], 17 May 2013, online: ACEC <<http://www.aibai.com>> [translated by author].

³⁹⁰ *Ibid.*

4. Human Rights Violation: Police Repression and Harassment

The government's repressive indifference policy can be easily seen in its reactions and responses to tongzhi social assemblies and events. A number of examples of police repression and harassment took place during large-scale tongzhi events and the authorities continued its attitude of indifference by ignoring that harassments even occurred.

According to Mountford's report, a number of large-scale police harassments targeting tongzhi assemblies occurred in urban cities across the country. For instance, the police detained more than 50 tongzhi in Dongdan Park during the Beijing Olympics (2008),³⁹¹ 50 to 60 people were detained in Renmin Park in Guangzhou (2009),³⁹² the Shanghai police banned two sessions in China's first Pride Festival in (2009),³⁹³ and the Beijing police cancelled the first Mr. Gay China pageant an hour before it began (2010).³⁹⁴ Many events in Shanghai Pride festivals from 2009 to 2013 have been cancelled due to the interference of the authorities.³⁹⁵ Police harassment, extortion, and blackmail have been reported in the arbitrary detention of tongzhi people suspected of prostitution and threatened to reveal their sexuality.³⁹⁶ Gay activists are also harassed by the police, for instance, in June 2009, public security officials forced Wan Yanhai, a prominent advocate of gay issues, including AIDS, to leave Beijing for a week because they feared he might cause trouble during the 20th anniversary of the Tiananmen Square crackdown. Wan said, "Sometimes I feel like we are playing a complicated game with the government, no one knows where the line is, but

³⁹¹ Wan Yanhai (万延海), "Guanyu Sanyue Shiqiri Dongdan Gongyuan Shijian, Wan Yanhai Gei Beijing Shigonganju de Xin (关于 3 月 17 日东单公园事件, 万延海给北京市公安局长的信) [A letter to the Head of Beijing Police Re: 3/17 Dongdan Park Incident]" (30 March 2008), online: Love Knowledge Action <<http://www.aizhi.co>>. [translated by author]

³⁹² "Guangzhou gays protest police action at local park" *Fridae* (31 August 2009), online: *Fridae* <<http://fridae.asia>>.

³⁹³ Chris Hogg, "China bans parts of gay festival" *BBC New* (10 June 2009), online: BBC <<http://news.bbc.co.uk/>>.

³⁹⁴ "Gay pageant 'cancelled by police' in China" *BBC News* (15 January 2010), online: BBC <<http://news.bbc.co.uk/>>.

³⁹⁵ Human Rights Watch, *supra* note 19 at 291; Shanghai Pride websites, *supra* note 20.

³⁹⁶ Mountford, *supra* note 264 at paras 54, 61-62.

we just keep pushing.”³⁹⁷ It should be noted that such interference was not expressly on the grounds of homosexuality, but rather the police used other excuses, such as suspicion of prostitution.³⁹⁸ With the increase in police repression and harassment, it would appear as though the government is afraid that the tongzhi groups will claim more rights as a result of these assemblies and events. Furthermore, since the authorities do not want too much public awareness of tongzhi issues, they have avoided official acknowledgment of the police crackdowns on the tongzhi assemblies.³⁹⁹

5. Reconsideration of Official Repressive Indifference Policy

This section will take a closer look at the two major tongzhi rights developments in criminal law (the decriminalization of hooliganism) and in medical practice (the depathologization of homosexuality), which have recently occurred. It is worthwhile to examine how the authorities exercised the *repressive indifference* attitude during these two developments.

a. Decriminalizing Hooliganism

Criminal law is an important area for the tongzhi rights development because it is the only legislation that has gone through the reform process from criminalization of same-sex acts to decriminalization of same sex acts. Same-sex acts were once categorized into hooligan acts punished under the hooliganism crime. Due to its ambiguity, the provision of hooliganism was removed in a general revision of *Criminal Code* in 1997. It was highly praised that such removal of hooliganism was a victory for tongzhi rights development.⁴⁰⁰

³⁹⁷ Andrew Jacobs, “Gay Festival in China Pushes Official Boundaries” (14 June 2009), online: New York Times <<http://www.nytimes.com>>.

³⁹⁸ Mountford, *supra* note 264 at paras 54, 61-62.

³⁹⁹ Few official media reported these police harassment, and nor did the government respond the allegations of these harassment.

⁴⁰⁰ Bo Qing (柏青), “Tongxinglian de Shuguang (同性恋的曙光) [the twilight for homosexuals]”, 10:2005 Health Must Read Journal 53 (China) at 53; and Er Yan (二言), “Zhongguo Tongxinglian Feibinglihua Yiwei zhe Shenme (中国同性恋非病理化意味着什么) [What Chinese Gay non-pathological Means]”, online:

In fact, homosexuality as a personal characteristic has never been illegal throughout the history in China. Lesbian sexual behaviour has also never been classified as criminal behaviour. After a brief period where sodomy was criminalized during the late Qing Dynasty, adult male sexual behaviour was re-criminalized by a judicial interpretation regarding to the *hooliganism* crime issued by the SPC in 1984.⁴⁰¹

It is important to understand the historical context in which the hooliganism crime was incorporated into the 1979 *Criminal Code*. After Mao's death, the Gang of Four, led by Mao's widow Chang Ching, attempted to seize power.⁴⁰² It caused social unrest (traditionally called "ten year unrest" in Chinese history) prior to Deng Xiaoping's effective control in 1979.⁴⁰³ In such context, the first 1979 *Criminal Code* was introduced with many severe punishments.⁴⁰⁴ Hooliganism as an umbrella crime was created to cover a wide range of social misbehaviours that could not be codified in other clauses. Article 51 stated:

Where an assembled crowd engages in affrays, creates disturbances, humiliates women or engages in *other hooligan activities* that undermine public order, if the circumstances are flagrant, the offenders shall be sentenced to fixed-term imprisonment of not more than seven years, criminal detention or public surveillance.

Ringleaders of hooligan group shall be sentence to fixed-term imprisonment of not less than seven years.⁴⁰⁵

(2001) 38 Taohong Mantianxia Journal (桃红满天下) edited by the Chinese Society for Study of Sexual Minorities (CSSSM) <<http://csssm.aibai.com/>> [translated by author]

⁴⁰¹ Guanyu Dangqian Banli Liumang Aajianzhong Juti Yingyong Falv de Ruogan Wenti de Jieda (关于当前办理流氓案件中具体应用法律的若干问题的解答) [Answers Regarding the Legal issues in Processing the Hooliganism Crime Cases] (Adopted by Sup. People's Ct. on 2 November 1984, abolished in 2010), online: online: Chinalawinfo<<http://vip.chinalawinfo.com>> (China). [1984 *Hooliganism Crime Cases Interpretation*][translated by author]

⁴⁰² Qu Xinjiu (曲新久), "Zhongguo Xingfa Xiandaihua de Jiben Zouxiang(中国刑法现代化的基本走向)[Basic Trend of the Modernization of Chinese Criminal Law]" (2007) Vol 25(4), Tribune of Political Science and Law(政法论坛) 22, at 22.[translated by author]

⁴⁰³ *Ibid.*

⁴⁰⁴ *Ibid.*

⁴⁰⁵ 1979Xing Fa (1979 刑法) [1979 Criminal Law], (Promulgated by Nat'l People's Cong. on 6 July 1979, effective on 1 January 1980), at art 160, online: Lawyee <<http://www.lawyee.org>> [translated by Balzano,

Thus, homosexual acts were not explicitly included in the *hooliganism* crime at the beginning. The ambiguity surrounding the phrase “other hooligan activities” led to the judicial interpretation from the SPC in 1984 (1984 Interpretation).⁴⁰⁶ This 1984

Interpretation provided:

[...]Other [following] hooligan activities with the severe effects could constitute the hooligan:

....

6. Sodomy of young children; forcibly sodomy of juniors; or through violence, by coerce, multiple sodomy, with severe effects.

This provision was unclear but it *never* considered that the *hooliganism* included *consensual* anal sex between two adult men.

However, the lower courts took license with the hooliganism crime and expanded its application to punish gay men for their consensual sexual behaviours. Following the 1984 Hooliganism Crime Cases Interpretation, large-scale police harassment against gay men took place in Hangzhou in 1987.⁴⁰⁷ Over sixty gay men were arrested and detained, and then sentenced under the hooliganism crime by the local court.⁴⁰⁸ The reason appears to have been based on strong prejudice among judges and the public that homosexual behaviour (even between two consenting adults) was somehow wrong. Thus, there must be a way to punish it despite the lack of a clear criminal provision.⁴⁰⁹ With the 1984 Interpretation from the SPC, the courts or police had no doubt that homosexual behaviours (regardless of whether it is consensual) should be punished under the *hooliganism* crime. The following statement represented the reasoning in local courts in terms of homosexual behaviours:

[B]ecause homosexuality offends public morals, disrupts public order, and influences the physical and mental health of minors, [which satisfied the punishing purpose of Hooliganism], it is clearly a type of criminal behaviour [as the 1984 interpretation mentioned that male same-sex sexual

supra note 287 at 29] [emphasis added].

⁴⁰⁶ 1984 *Hooliganism Crime Cases Interpretation*, *supra* note 401.

⁴⁰⁷ Zhang Beichuan (张北川), *Tongxing'ai* (同性爱) [Same-sex Love] (np: Shandong Science Technology Publishing, 1994) at 633.

⁴⁰⁸ *Ibid.*

⁴⁰⁹ Balzano, *supra* note 287 at 29.

act could constitute hooliganism].⁴¹⁰

The hooliganism crime was not removed until the new *Criminal Code* was passed in 1997.⁴¹¹ In the 1997 Criminal Code, most ambiguous umbrella or package crimes were deleted due to the conflict with the absolute principle of crimes and punishment stipulated by law.⁴¹² The hooliganism crime was codified into six specific crimes.⁴¹³ Consequently, certain offences, which had previously been charged under the hooliganism crime, were no longer contrary to any criminal statute. Therefore, the 1984 Interpretation as the supplement to “other hooligan behaviours” was void, making anal intercourse legal.

It was highly praised among gay activists that the removal of the hooliganism crime in 1997 was a landmark victory as a symbol of decriminalization of tongzhi in the gay rights movement in China.⁴¹⁴ However, despite some positive impact on the tongzhi group in practice, simply repealing the hooliganism provision *did not* represent the official intention to decriminalization of homosexuality or acceptance of tongzhi rights, because there was little official consideration of tongzhi during the *Criminal Code* revision.⁴¹⁵ The so-called “*decriminalization*” does not have as a similar significant meaning as the decriminalization process during gay right movements in European or American countries, where Western governments actually turned their minds to the issue of antiquated sodomy laws and emerging gay rights. In China removing the hooliganism crime seems to have had nothing to do with tongzhi human rights. During the period of revision, there was a debate on whether this package crimes, *the hooliganism provision* should be removed as a whole. Scholars who are favor of the removal argued the hooliganism was outdated because this crime had been created under the socialist planning economic system, which was

⁴¹⁰ Zhang Beichuan, *supra* note 407 at 633 [translated by Balzano, *supra* note 170 at 29].

⁴¹¹ Xing Fa (97 Xiuding) (刑法(97 修订) [Criminal Law(97 Revision)] (Adopted by the National People's Congress of China on July 1, 1979 and amended by National People's Cong. on March 14, 1997) online: pkulaw <<http://en.pkulaw.cn>>.

⁴¹² *Ibid.*

⁴¹³ Criminal Law(97 Revision), *supra* note 411, art 292, 293, 301, 302 and 237.

⁴¹⁴ Bo Qing, *supra* note 400; and Er Yan, *supra* note 400.

⁴¹⁵ Guo Xiaofei, *supra* note 166 at 85-86.

abolished.⁴¹⁶ Some experts claimed that it was not proper to simply decriminalize the package of crimes, since some acts still should be kept as criminal offences.⁴¹⁷ But, there was little discussion regarding the decriminalization of sodomy, or consideration on tongzhi rights. The codification of general hooliganism was merely a cleaning-up and clarification process, not a consideration of decriminalization of same-sex behaviours at all.⁴¹⁸ Thus, the reform to the 1997 *Criminal Code* did not represent the official acceptance of tongzhi in China.

The unintentional revision still had a positive effect on tongzhi people. The tongzhi communities became more visible because many tongzhi believe that consensual, private homosexual sex was no longer a crime under the 1997 *Criminal Code*. In practice, although police harassment of tongzhi people was still reported, consensual homosexual acts can not be prosecuted according to the new law.

The changing view of the courts regarding homosexuality over the years has shown a gradual development from cracking down, to ignorance, to willingness to accept diversity. In a recent case in Beijing, a man was charged for organizing gay sex parties for young men. The judge commented, although the law could not approve this method of expressing one's sexual orientation (i.e., by organizing sex parties), modern society has a respectful attitude with more acceptances of an individual's different sexual orientation.⁴¹⁹ It was claimed as a good sign because the viewpoint of this judge shows somehow the willingness of the court to separate homosexuality as an identity from criminality and sexual perversion.⁴²⁰

⁴¹⁶ Ma Kechang and Li Xihui (马克昌/李希慧), "Wanshan Xingfadian Liangge Wenti de Sikao (完善刑法典两个问题的思考) [Thoughts regarding improving two issues in Criminal Code]", 1994 (12) *Fa Xue* 43 (China).

⁴¹⁷ Chen Xingliang (陈兴良), *Xingfa Zhexue* (刑法哲学) [Philosophy of Criminal Law], (Beijing: China Political and Law University Press, 1997edition), at 8-9 [translated by author].

⁴¹⁸ Guo Xiaofei, *supra* note 166 at 67-68.

⁴¹⁹ Guo Xiaoming (郭晓明), "Nanzi zai Beijing Zuzhi Tongxinglian Jiti Yinluan (男子在北京组织同性恋集体淫乱) [Gay sex party organized in Beijing]" (20 May 2006), online: Sina News<<http://news.sina.com.cn>> [translated by author].

⁴²⁰ Balzano, *supra* note 287 at 31.

Another issue highly criticized in criminal law context is that only women can be victims of rape (article 236 of the Criminal Code) or sexual assault (article 237 of the *Criminal Code*). Many cases have raised public and academic awareness of this issue.⁴²¹ In these cases, the offenders normally are convicted of causing intentional injuries, or only held civilly responsible in damages without any criminal liability.⁴²² Although it is direct discrimination on men on ground of gender, gay men are more vulnerable since many potential victims are gay in such situation.⁴²³

b. Depathologizing Homosexuality

The removal of homosexuality as a mental illness in the Chinese Classification of Mental Disorders III (CCMD III) is another notable tongzhi development in China. Different from the decriminalization of same-sex acts, the depathologizing process was a real tongzhi victory because it successfully garnered a lot of public attention and academic debate on tongzhi issues, and has had a deep impact on the tongzhi community.

In 1992 the World Health Organization removed homosexuality from the tenth version of the International Classification of Diseases (ICD-10), but homosexuality was still considered as a mental disease in China at that time.⁴²⁴ In order to update the Chinese Classification of Mental Disorders (CCMD) for practical medicine, the Chinese Ministry of Health provided funding to set up a CCMD-III working group composed of 41 psychiatric organizations to vet 24 categories of mental disorders. The CCMD-III research was conducted over 5 years from 1996-2000, with reference to international and American

⁴²¹ Qin Hanjie, Cenggang and Wang Xiaofan (韩俊杰、程刚、王晓凡): “Nanzi Zao tongxing Qiangbao, Shibaozhe Wufa Bei Zuijiu Xingshi Zeren [男子遭同性强暴，施暴者无法被追究刑事责任]” (17 February 2005) *China Youth Daily*; and “Tongxian Xingqinfan Zaoyu Falv Nanti (同性性侵犯遭遇法律难题) [Same-sex sexual harassment facing legal challenge]”, (6 January 2005) *Fazhi Daily*; See also, for discussion Guo Xiaofei, *supra* note 166 at 133-135.

⁴²² Guo Xiaofei, *supra* note 166 at 143-144.

⁴²³ *Ibid.*

⁴²⁴ World Health Organization (WHO), “International Classification of Diseases (ICD)”, online: WHO <<http://www.who.int/classifications/icd/en/>>

classification.⁴²⁵

With regard to homosexuality, the working group seemed careful. They conducted an investigation on 51 gay men for more than one year, and found that only 5 needed professional psychotherapy.⁴²⁶ A heated academic debate on this issue emerged in 1997 in the academic journal *Psycho and Medicine Communication*, and many psychiatric experts published articles to discuss the issue from a medical perspective.⁴²⁷ During the long process Aichi Association, a gay NGO, worked closely with the group by translating a number of advanced foreign medical research reports, organizing academic seminars and publishing internet magazines to provide sufficient and updated academic information about homosexuality.⁴²⁸ The CCMD III, which depathologized homosexuality, was finally assessed and published by the Chinese Society of Psychiatry in 2000.

This new CCMD III represented a great victory for the gay movement by declassifying homosexuality as a mental disease. The process of depathologizing homosexuality in China has had several significant effects.⁴²⁹ First, the heated academic and medical debates on homosexuality successfully won a great deal of public attention and allowed the public to learn more about the existence of the tongzhi community.⁴³⁰ Second, depathologizing homosexuality helped provided support for tongzhi individuals to disclose their sexuality to their family given the recent medical acceptance.⁴³¹

By removing the stigma of mental illness along with the recent decriminalization of

⁴²⁵ Chinese Society of Psychiatry, “Zhongguo Jingshen Zhangai Feilie yu Zhenduan Biaozhun Disanban(中国精神障碍分类与诊断标准第3版) [3rd Edition of the Chinese Classification of Mental Disorders and Diagnostic Criteria (CCMD-3)]”, online: Chinese Society of Psychiatry <<http://www.21jk.com.cn>> [translated by author]

⁴²⁶ Guo Xiaofei, *supra* note 166 at 92.

⁴²⁷ The Zhejiang Psychiatry Health Research Institution has published 9 articles in its academic journal, *Psychiatry Health Communication*, regarding the issue of depathologizing homosexuality between August 1997 and February 1998, reprinted in Chinese Society for Study of Sexual Minorities (CSSSM) ed, “Taohong Mantianxia: Zhongguo Tongxinglian Binglihua/Fei Binglihua Bianluan Zuanji (桃红满天下:中国同性恋病理化 / 非病理化辩论专辑) [Chinese gay pathological / non-pathological debate special issue]”, (1998) 12 *Taohong Mantianxia Journal*, online: CSSSM <<http://csssm.aibai.com>>[translated by author]

⁴²⁸ *Ibid.*

⁴²⁹ Guo Xiaofei, *supra* note 166 at 91; Balzano, *supra* note 287 at 36.

⁴³⁰ Guo Xiaofei, *supra* note 166 at 92.

⁴³¹ *Ibid.*

male same-sex acts, the tongzhi community began to emerge in urban cities, which coincided with the appearance and/or increase in the tongzhi events, such as Pride Shanghai and Tongzhi movie exhibitions.⁴³² Furthermore, academic interest in tongzhi issues began to increase, especially within the medical and social rights fields. During the first medical course exclusively on homosexuality at the University of Fudan, many discussions involved the tongzhi rights in social and legal aspect after the implementation of the CCMD III.⁴³³

It can be deemed as significant progress that the authorities did not oppose the removal of homosexuality in the influential CCMD III. However, it should be noted that there was little government involvement apart from the funding.⁴³⁴ This development basically is limited in the medical field, and the outcome was already widely recognized within the international community. Moreover, this health-related medical research seems unlikely to reach the large numbers of the population, in particular in rural areas.

From the closer look at the official role played throughout these two recent major tongzhi developments, it is apparent that the authorities are unwilling to formally touch the topic of tongzhi issues. Nevertheless, the official attitude of indifference leaves some room for the development of tongzhi issues in the academic arena. The ban on tongzhi issues in the media still exists in the administrative regulations, but it is not strictly enforced. For instance, the public debate on homosexuality in academic journals and on television did not receive official resistance or sanction.⁴³⁵ However, these victories remain fragile because it is unpredictable whether or when the authorities would ban tongzhi issues from the media or even within academia. The official ambiguous attitude makes the development of future tongzhi rights rather precarious.

⁴³² Shanghai Pride Festival Events, online Shanghai Pride Festival official website <<http://www.shpride.com/pride2012/>>; “Shoujie Zhongguo Tongxinglian Dianyingjie Richeng Anpai (首届中国同性恋电影节日程安排) [The First China Gay Movie Festival Agenda]” (12 December 2001), online: Friend Don’t Cry <<http://www.pybk.com/>> [translated by author].

⁴³³ See Gao Yanning, *et al*, *supra* note 307 for a collection of the speeches of guest speakers and class discussion.

⁴³⁴ Generally see *supra* note 425.

⁴³⁵ Examples are Gao Yanning, *et al*, *supra* note 307 and Guo Xiaofei, *supra* note 166.

E. Conclusion

The historical research on the relevant ruling theories and corresponding tongzhi social and legal status over different Chinese historical periods provides a better understanding on tongzhi issues today. The tolerant culture in ancient time helps us to understand why the homowives/homohusbands refuse to divorce when they find out their spouses are tongzhi, as well as for the current phenomena that parents allow their gay sons/daughters to maintain same-sex partners as long as they enter the heterosexual marriages. It should be noted that the first criminalization of homosexual acts in history was accompanied with the colonization process during the republic era. Later, homosexual acts were marginalized with the creation of heterosexual marriage for purpose of procreation in Maoist era. During the reform era, the Opening Policy dramatically changed the people's thinking and resulted in a number of reforms in state structure and legal fields. During this time, tongzhi communities emerged in big cities.

Following this historical discussion, this chapter reviewed the current legislation containing explicitly provisions against homosexuality, and practical human rights violation situations on ground of sexual orientation. Although the central government does not officially condemn homosexual acts openly, the human rights violations remain unchallenged within civil society who still know little about tongzhi group. The message is that tongzhi are too wrong to deserve protection.

It seems unlikely that the authorities are ignorant of the ongoing direct or passive discrimination against tongzhi group caused by domestic legislation. This official policy towards tongzhi can be characterized as *repressive indifference*. It implies an official reluctance to address tongzhi issues, which has doubtlessly worsened the tongzhi situation and has slowed down their acceptance by civil society in China. The final aim of this *repressive indifference* policy is to prohibit further rights claims from the tongzhi.

Despite the symbolic victories of decriminalizing hooliganism and removing

homosexuality from the list of mental illness, the role of the official authorities during these events can nevertheless be characterized as repressive indifference: the authorities did not have any intention of promoting tongzhi rights in China, but may compromise when some claims are consistent with the international trend as well as are limited to certain fields. Having a full understanding of the repressive indifference policy and the massive discrimination that tongzhi face against on ground of sexual orientation over history and today, it can easily set out the futher analysis for the central research question infra, what/how need to be done to change this policy.

Chapter Three

Sexual Orientation Protection in International Human Rights Law

A. Introduction

To date, China has signed a number of core international human rights treaties, so these treaties currently have direct or indirect impact on human rights practice in China.⁴³⁶ In terms of tongzhi rights, will the international human rights law play a role to achieve the legal reform in China? The research should start from what sexual orientation rights are acknowledged in international human rights law at present and how these developments have been achieved. It then can provide basis to further consider whether these international laws can prompt domestic legal reform in China *infra*.

This chapter first gives a brief introduction of the international human rights law framework, which is narrowly defined as the human rights law developed under the UN system. This is contrasted with *regional* international human rights law, which is addressed in Chapter Four and draws mostly on the European system. This section offers a basic idea of how the UN human rights system is constructed and operates through the *International Bill of Human Rights*, a variety of issue-specific human rights instruments and monitoring mechanisms. It also examines what role international human rights law plays in domestic legal reform at a national level, and what obligations member states have under international human rights law.

The second section concentrates on the development of sexual orientation rights within the UN human rights law system. While the sexual orientation protection within the international human rights system developed rapidly in the post-Cold War period, prior to the 1990s, sexual orientation rights appear to have not been on the UN human rights agenda. In the mid-1990s, the success in a series of cases regarding sexual orientation

⁴³⁶ *Infra* note 1000.

rights heard by the Human Rights Committee (HRC) promoted and rapidly dispersed sexual orientation rights throughout the UN system. The detailed study of these cases demonstrates how the legal principles of privacy protection, equality and non-discrimination figured prominently not only in the advocates of sexual orientation rights, but also among the opponents of sexual orientation rights.

The third section explores the active follow-ups from the core human rights treaty monitoring bodies in the UN after the HRC's decisions. Most of the human rights treaty monitoring bodies gradually recognized that sexual orientation should be protected under the human rights principle of non-discrimination in their respective fields. Furthermore, this section reviews the human rights violations of sexual minorities along with other issues raised by the Economic and Social Council's Special Procedures (e.g., UN Special Rapporteurs), providing an overview of human rights violation in practice with regard to sexual orientation around the world.

The final section examines several recent and important developments in the UN system. In particular, this section explores the main resistance and voices of opposition during these events, with an emphasis on China's position. The landmark legal document, the Yogyakarta Principles, along with its influence in international human rights law, will be examined last.⁴³⁷

B. Overview of International Human Rights Law

1. Sources of International Human Rights Law

Broadly speaking, international human rights law comprises all international laws designed to promote and protect human rights at the international, regional and domestic levels. As a form of international law, the two main sources of international human rights law are treaties and customary international law. Treaties are law-making agreements between two or more states intended to have binding legal effect. Treaties have a variety of

⁴³⁷ *Supra* note 23.

alternative names, including conventions, covenants, and protocols, to name a few.⁴³⁸

Customary international law is formed through the general and often universal state practice undertaken by states acting with the belief that such state practice is a legal obligation called *opinio juris*.⁴³⁹

There are also non-legally binding international human rights instruments passed by the human rights experts or other non-government organizations. They are important sources for international human rights law because they contribute to the implementation, adherence and progressive development of international human rights law to some extent. Finally, as previously mentioned, international human rights law also includes the regional human rights systems. Currently there are only three functioning human rights instruments that are regional in scope: *the European Convention on the Protection of Human Rights and Fundamental Freedoms*, *the American Convention on Human Rights* and *the African Charter on Human and Peoples' Rights*. European human rights law will be addressed in the next chapter, since the European human rights system has dealt with the issue of sexual orientation rights first and the most extensively among the three regional systems.

How international human rights law can be implemented at domestic level depends on the approaches what states take to enforce them. The main approaches will be addressed in Chapter Six within the Chinese context.

2. Human Rights Law in the UN

The UN is the most significant and influential international organization worldwide with 193 member states.⁴⁴⁰ The UN Charter explicitly stipulates that “promoting and encouraging respect for human rights” is one of its defining purposes.⁴⁴¹ Thus, the most

⁴³⁸ Neil Craik and Craig Forcese et al., *Public law: Cases, Materials and Commentary*, 2nd ed (Toronto: Edmond Montgomery, 2011) at 67.

⁴³⁹ *Ibid.*

⁴⁴⁰ United Nations, “Growth in United Nations membership, 1945-present”, online: United Nations <<http://www.un.org/>>.

⁴⁴¹ *Charter of the United Nations*, 26 June 1945, Can T S 1945 No 7, at art 1(3).

important UN organs also have mandates encompassing elements of human rights. For instance, the UN General Assembly is authorized to initiate studies and make recommendations for the purposes “assisting in the realization of human rights and fundamental freedoms of all without distinction of race, sex, language or religion.”⁴⁴² The Third Committee (Social, Humanitarian & Culture) of the UN General Assembly “discusses the advancement of women, the protection of children, indigenous issues, the treatment of refugees, the promotion of fundamental freedoms through the elimination of racism and racial discrimination, and the right to self-determination.”⁴⁴³ Another important principal organ of the UN that focuses on human rights is the Economic and Social Council (ECOSOC), which created the Special Rapporteurs and human rights working groups in 1967 through the Special Procedures resolution.⁴⁴⁴

The Universal Declaration of Human Rights (UDHR) adopted by the UN General Assembly in 1948 is the foundation of international human rights law. It sets up for the first time in human history the “basic civil, political, economic, social and cultural rights that all human beings should enjoy.”⁴⁴⁵ The UDHR, widely accepted as the fundamental norms of human rights, together with the International Covenant on Civil and Political Rights and its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights are often referred to jointly as the *International Bill of Human Rights*.⁴⁴⁶

A series of international human rights treaties addressing specific human rights issues have also been developed. To date, there are nine core international human rights treaties: the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD, 1965), the *International Covenant on Civil and Political Rights* (ICCPR, 1966), the *International Covenant on Economic, Social and Cultural Rights* (ICESCR, 1966), the

⁴⁴² *Ibid* at art 13 (1).

⁴⁴³ *UN General Assembly – Third Committee – Social, Humanitarian & Cultural*, online: United Nations <<http://www.un.org/en/ga/third/index.shtml>>.

⁴⁴⁴ UN Economic and Social Council, “Communications concerning human rights”, Resolution 1235 (XLII) of the Economic and Social Council, UN Doc E/4393 (1967).

⁴⁴⁵ OHCHR, “International Human Rights Law”, *supra* note 102.

⁴⁴⁶ *Ibid*.

*Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984), the Convention on the Rights of the Child (CRC, 1989), the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW, 1990), the Convention on the Rights of Persons with Disabilities (CRPD, 2006), and the International Convention for the Protection of All Persons from Enforced Disappearance (CPED, 2006).*⁴⁴⁷ All the UN member states have ratified at least one human rights treaty and 80% of States have ratified four or more core treaties.⁴⁴⁸

By becoming parties to these treaties, States are committing themselves, at the national level, to respect, protect, and fulfill these human rights and ensuring that domestic laws are compatible with their international obligations. These legal obligations are described on the website of the Office of High Commissioner for Human Rights (OHCHR) as follows:

The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.⁴⁴⁹

At the international level, one of the main concrete treaty obligations of member states is to submit regular reports regarding the human rights practice in their country related to the rights guaranteed by the specific treaty. For example, article 18 of the CEDAW states:

1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect:

(a) Within one year after the entry into force for the State concerned;

⁴⁴⁷ OHCHR, "Human Rights Treaty Bodies", online: United Nations Human rights <<http://www.ohchr.org/>>.

⁴⁴⁸ OHCHR, "What are human rights?", *supra* note 105.

⁴⁴⁹ OHCHR, "International Human Rights Law", *supra* note 102.

- (b) Thereafter at least every four years and further whenever the Committee so requests.
2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention.⁴⁵⁰

Under the UN human rights system, there are a variety of human rights mechanisms to monitor State Parties' compliance and to ensure their adherence to these human rights treaties. These include the Universal Periodic Review, the Human Rights Council, and Special Procedures. The Universal Periodic Review is a unique process in which all UN member states review their human rights records under the auspices of the Human Rights Council once every 4 years.⁴⁵¹ The Human Rights Council, which replaced the Commission on Human Rights in 2006, is a significant UN body composed of 47 elected member states, aiming to prevent abuses, inequality and discrimination, protect the most vulnerable, and expose perpetrators.⁴⁵² The Special Procedures are designed to address either a specific country's human right situation or thematic human rights violation issue across the world. Special Procedures could be an individual, or a working group appointed by the Human Rights Council.⁴⁵³ The OHCHR is a separate entity from the Human Rights Council, and it mainly provides expertise and substantive support for the Council, and follow-up to the Council's deliberations.⁴⁵⁴

Each international human rights treaty also has a committee composed of independent experts that monitor the implementation of their specific treaty provisions by State parties. Normally they perform their function through consideration of State's parties' reports as well as publishing general comments or recommendations on the treaties to raise the awareness of certain issues.⁴⁵⁵ Most of the human rights treaties also permit individuals to

⁴⁵⁰ CEDAW, *supra* note 177.

⁴⁵¹ OHCHR, "Universal Periodic Review", online: United Nations Human rights Office of High Commissioner for Human Rights < <http://www.ohchr.org/> >.

⁴⁵² OHCHR, "Human Rights Treaty Bodies", *supra* note 447.

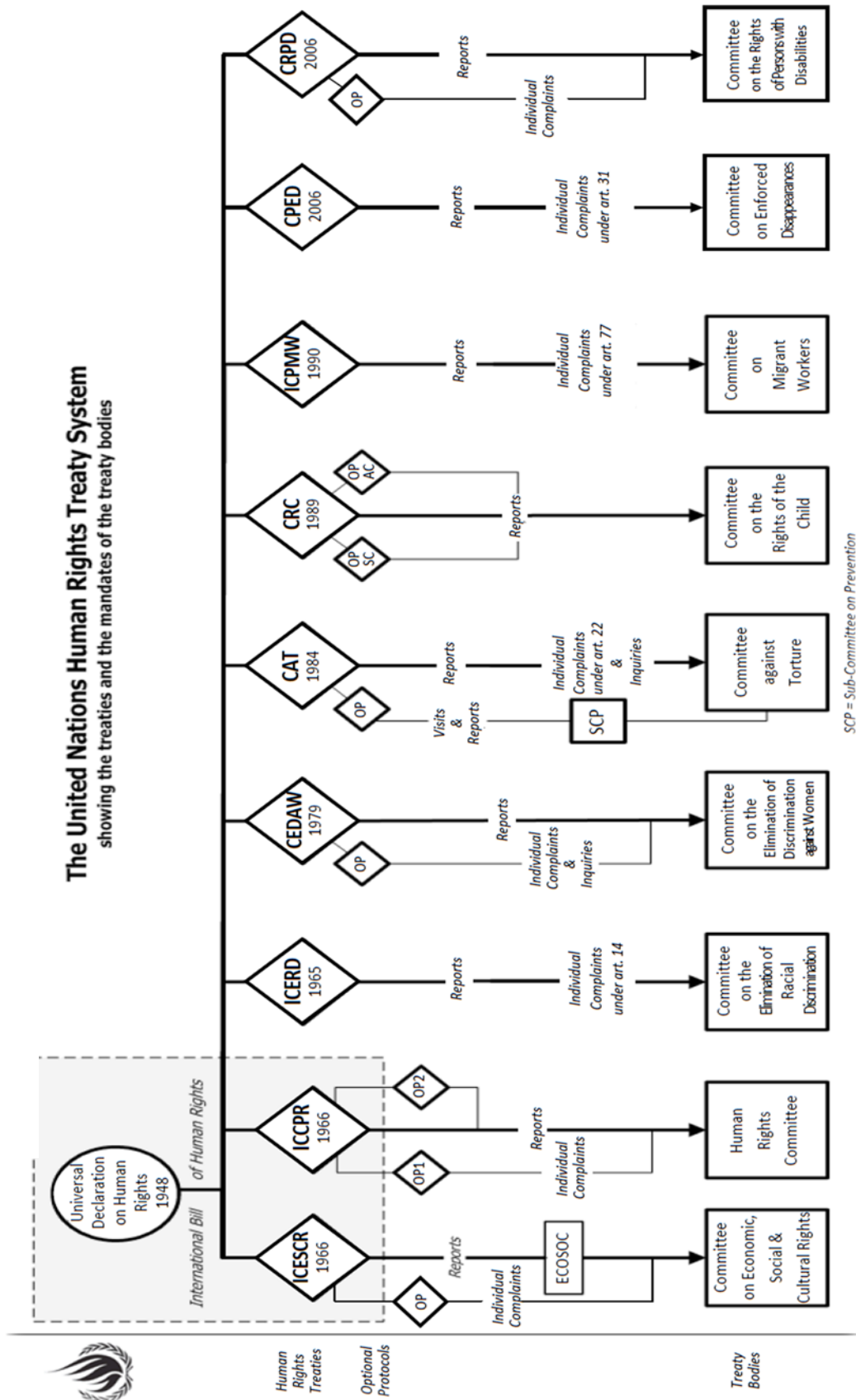
⁴⁵³ *Ibid.*

⁴⁵⁴ *Ibid.*

⁴⁵⁵ *Ibid.*

submit complaints or communications to the committees. Currently only the Committee on the Rights of the Child does not have the authority to hear individual complaints (see Figure 1 below).

Figure 1: OHCHR, “The United Nations Human Rights Treaty System” (2005), online: <<http://www2.ohchr.org/english/bodies/docs/UNHRTS.gif>> [updated by James Anderson].



There are also other UN organs and partners specializing in human rights: for instance, the UN High Commissioner for Refugees, the Economic and Social Council, the UN Development Program, the International Court of Justice, and the World Health Organization, to name a few.⁴⁵⁶

C. Sexual Orientation Rights Development

Equality and non-discrimination have been the major principles adopted by the advocates for sexual orientation human rights at the international level. The *International Bill of Rights* (i.e., the UDHR, the ICCPR and the ICESCR) recognizes the principle of universal human rights and provides the lists of grounds on which discrimination is prohibited: all the rights contained in the covenants are guaranteed without distinction (discrimination) of any kind, such as “race, color, sexual language, religion, political or other opinion, national or social origin, property, birth or other status.”⁴⁵⁷ This enumerated list is non-exhaustive, and given the phrase “without distinction (discrimination) of any kind”, it should apply to everyone including sexual minorities. The struggling journey of human rights for sexual minorities could be summarized as a fight for the inclusion of sexual orientation as a prohibited ground of discrimination.

1. Early Development

International human rights law development and the gay rights movement both evolved following the discovery of the large scale human suffering that occurred during the Second World War.⁴⁵⁸ Despite the fact that a large number of sexual minorities were persecuted during the Holocaust, sexual orientation was not explicitly included as one of the

⁴⁵⁶ OHCHR, “Other United Nations Bodies”, online: United Nations Human Rights, <<http://www.ohchr.org/EN/HRBodies/Pages/OtherUnitedNationsBodies.aspx>>.

⁴⁵⁷ UDHR, at art. 2; ICCPR, at art. 2; ICESCR, at art.2; *supra* note 102.

⁴⁵⁸ Douglas Sanders, “Human Rights and Sexual Orientation In International Law” (2002) 25(1) Int’l J of Public Admin 13 at 14.

enumerated grounds of non-discrimination in the *International Bill of Rights*.⁴⁵⁹ Compared with other vulnerable groups, the struggle for sexual minorities' human rights has been a much slower and more difficult process over the past century. International human rights treaties focusing on racial discrimination, women, and children developed gradually, and today, the human rights of these vulnerable groups are well recognized in international human rights law. However, the groups advocating for sexual minority rights have been lobbying international organizations for years largely without success.

The first UN document focusing specifically on sexual orientation was a 1987 study on the legal and social problems of sexual minorities, including male prostitution. The report was completed by Mr. Fernand-Laurent (France), the UN Special Rapporteur, under the former UN Sub-Commission on the Prevention of Discrimination of Minorities.⁴⁶⁰ The report was criticized as a poor-quality, superficial and with dubious conclusions and no follow-up resolution.⁴⁶¹ It said, for instance, "there would be fewer lesbians if men were able to be more affectionate, attentive and tactful."⁴⁶² It was fortunate that the report attracted little attention in the UN and that there were no follow-up resolutions.⁴⁶³

The subject of homosexuality did not arise again formally within the UN until the 1990s, when a number of different agencies, treaty bodies, and conferences began to refer to or decide on sexual orientation issues in a more informal fashion, due in part to the increased NGOs' involvement as well as to sympathetic employees inside various UN bodies.⁴⁶⁴

In 1992, the World Health Organization removed homosexuality from the 10th revision of the International Classification of Diseases (ICD-10), a decision that went into effect in

⁴⁵⁹ *Nazi Persecution of Homosexuals 1933-1945*, online: United States Holocaust Memorial Museum <<http://www.ushmm.org/>>.

⁴⁶⁰ Yael Danieli, Elsa Stamatopoulou & Clarence J Dias, ed, *The Universal Declaration of Human Rights: Fifty Years and Beyond* (New York: Baywood Publishing Company, 1999) at 230.

⁴⁶¹ Sanders, *supra* note 458 at 24.

⁴⁶² UN Doc E/CN.4/Sub.2/1988/31(1988) at 27-28.

⁴⁶³ Danieli, *et al*, *supra* note 460 at 230.

⁴⁶⁴ *Ibid*.

1993.⁴⁶⁵ This decision, while it occurred after numerous countries' medical professionals had already declassified homosexuality in their equivalent national instruments, has had significant impact internationally. For instance, during the process of the depathologizing homosexuality in China, the medical experts referred to the ICD-10 as well as the comments by World Health Organization experts.⁴⁶⁶

In 1993, the UN High Commissioner for Refugees issued advisory opinions on political asylum cases with regard to persons fleeing persecution based on their sexual orientation and interpreted the "social group" category of refugees to include lesbians and gay men.⁴⁶⁷ It also was considered as an important step forward within the UN because it was the first time that a UN organization recognized sexual minorities legally. This interpretation resulted in many countries, such as Australia, Canada and the United States, beginning to accept individual sexual minority refugees from Argentina, Brazil and China based on this expanded interpretation of "social group".⁴⁶⁸

Also in 1993, three lesbian and gay organizations were authorized to attend the UN World Conference on Human Rights in Vienna. It was the first time that LGBT organizations had been accredited for a UN event.⁴⁶⁹ The issues of lesbians and gay men had been referred to the Conference by five governments: Australia, Austria, Canada, Germany and the Netherlands.⁴⁷⁰ As a response, Singapore presented a statement called "the Real World of Human Rights", which defended "traditional" marriage as being between members of the opposite sex and, therefore, opposed human rights in relation to

⁴⁶⁵ WHO, "International Classification of Diseases (ICD)", *supra* note 424.

⁴⁶⁶ Chen Yanfang (陈彦方), CCMD-3group leader, CCMD-3 XU (CCMD-3 序) [CCMD-3 Preface], online: Chinese Society of Psychiatry <<http://www.21jk.cn/>> [translated by author].

⁴⁶⁷ Danieli, *et al*, *supra* note 460 at 231.

⁴⁶⁸ Sanders, *supra* note 458: Clyde Farnsworth, "Homosexuals is Granted Refugee Status in Canada" (14 January 1992) *New York Times*; Estanislao Oziewicz "Homosexual Granted Status as Refugee" (11 January 1992) *Globe and Mail*; "Australian Asylum to Chinese Gay Couple" (June 1992), *Passport Magazine*; and The Supreme Court of Canada recognized that homosexuals fell within the phrase "social groups" in *Canada v Ward*, [1993] 2 SCR 689 at 737-39.

⁴⁶⁹ Sanders, *supra* note 458 at 25.

⁴⁷⁰ *Ibid.*

sexual orientation.⁴⁷¹ Eventually, the paragraph in the final statement for the Vienna conference on human rights, which simply included the “equality principle”, but deleted the list of prohibited grounds.⁴⁷²

A similar situation occurred in the Fourth World Conference on Women held in Beijing in 1995. The Beijing Conference was the first time in UN history where representatives of *all member states* had a substantive discussion on the issue of “sexual orientation”, debating whether references to “sexual orientation” should be included in the conference’s official final document – “Platform For Action”.⁴⁷³ There were four references to “sexual orientation” in the draft “Platform For Action” in the beginning.⁴⁷⁴ However, after a long drafting committee meeting, all references with regard to “sexual orientation” were deleted due to disagreements as claimed by the chair Mrs. Patricia Licuanan (Philippines).⁴⁷⁵ Rather, it was still viewed as a minor victory because of the following passage: “the human rights of women include their right to have control over and decide freely and responsibly on matters related to *their sexuality*.”⁴⁷⁶

2. The Landmark Decisions of the Human Rights Committee

There is currently no universal international court to administer international human rights law. As such, most human rights treaty monitoring bodies have set up quasi-judicial mechanisms, which permits the monitoring bodies to receive complaints or communications from individuals who claim that their rights under the treaties have been

⁴⁷¹ Danilo Türk, Special Rapporteur, *The Realization of Economic, Social and Cultural Rights*, UN Doc E/CN.4/Sub.2/1992/16 at para 185.

⁴⁷² Sanders, *supra* note 458 at 25.

⁴⁷³ Danieli, *et al*, *supra* note 460 at 232.

⁴⁷⁴ Two references were in a “diversity paragraph” addressing discrimination against women on multiple grounds, such as sex and race, sex and disability, sex and sexual orientation. The third one called upon member states to take measures to prevent any discrimination in employment on the grounds of sexual orientation. The final one called on member states to take measures to eliminate persecution on the basis of sexual orientation.

⁴⁷⁵ Sanders, *supra* note 458 at 26.

⁴⁷⁶ Danieli, *et al*, *supra* note 460 at 232 [emphasis added].

violated under certain conditions (see figure 1 above).⁴⁷⁷

The groundbreaking development with respect to sexual orientation human rights within the UN system occurred in such a quasi-judicial field. After the early struggle for the recognition of sexual minority rights, it was not until 1994 that the Human Rights Committee (HRC), the treaty monitoring body established under the ICCPR, made its landmark decision in *Toonen v Australia*.⁴⁷⁸ In *Toonen*, sexual orientation was officially recognized as a prohibited ground against discrimination for the first time within the UN human rights system. Existing international jurisprudence regarding sexual orientation rights is based on the ICCPR and dealt with by the HRC. Thus the in-depth examination of some significant HRC decisions provides a better understanding on how the international human rights law recognizes sexual orientation rights by adopting the principles of privacy, non-discrimination and equality.

a. *Hertzberg v Finland*

Hertzberg v Finland (1982)⁴⁷⁹ was the first case in which the HRC had to deal with the issues of gay rights. In this case, Hertzberg argued that the Finnish government's ban on television programs dealing with homosexuality was a breach of freedom of expression as stipulated in article 19 (2) of the ICCPR. However, the HRC ruled that homosexual contents in TV program could have the harmful effects on minors, and that the exercise of the rights provided in article 19 (2) "carries with it special duties and responsibilities" and freedom of expression in the case could be limited.⁴⁸⁰ The HRC went on to say that:

It has to be noted, first, that public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities.⁴⁸¹

⁴⁷⁷ OHCHR, "Human Rights Treaty Bodies", *supra* note 447.

⁴⁷⁸ *Toonen v Australia*, *supra* note 127.

⁴⁷⁹ *Hertzberg et al v Finland*, 1982 HRC, Communication No 61/1979.

⁴⁸⁰ *Ibid* at para 10.4.

⁴⁸¹ *Ibid* at para 10.3.

From this statement, it can be seen that the HRC accepted the moral justification to reject sexual orientation rights.

b. *Toonen v Australia*

Twelve years later in 1994, the HRC adopted a different view in *Toonen v Australia*.⁴⁸² Nicholas Toonen, a gay activist, complained that Tasmanian law in Australia criminalizing consensual sex between adult males in private was a violation of his right to privacy under article 17 of the ICCPR, and in violation of article 26 distinguishing between people on the basis of sexual orientation and identity.⁴⁸³ The Tasmanian government argued that the intent of such law was to control the spread of HIV/AIDS, and also used a moral argument for the prohibition.⁴⁸⁴ The HRC ruled that such legislation criminalizing homosexual activity only rendered it more difficult to prevent HIV infection which was confirmed by the World Health Organization, and accepted by the former High Commission on Human Rights and the Australian federal government.⁴⁸⁵ Regarding the moral argument, the applicant conceded that privacy protection was also important for all Australians.⁴⁸⁶

The HRC accepted the argument that “the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV.”⁴⁸⁷ With regard to the argument between privacy and moral justification, the HRC concluded that the criminalization of sexual acts between consenting adults was a breach of a right to privacy and cannot be justified by the moral argument used in *Hertzberg*:

The Committee cannot accept that for the purposes of Article 17 of the Covenant, moral issues are exclusively a matter of domestic concern, as

⁴⁸² *Toonen v Australia*, *supra* note 127.

⁴⁸³ *Ibid* at para 2.1-3.3.

⁴⁸⁴ *Ibid* at para 6.5.

⁴⁸⁵ *Ibid* at para 8.5.

⁴⁸⁶ *Ibid*.

⁴⁸⁷ *Ibid*.

this would open the door to withdrawing from the Committee’s scrutiny a potentially large number of statutes interfering with privacy. It further notes that with the exception of Tasmania, all laws criminalizing homosexuality have been repealed throughout Australia and that, even in Tasmania, it is apparent that there is no consensus as to whether Sections 122 and 123 should not also be repealed. Considering further that these provisions are not currently enforced, which implies that they are not deemed essential to the protection of morals in Tasmania, the Committee concludes that the provisions do not meet the “reasonableness” test in the circumstances of the case, and that they arbitrarily interfere with Mr. Toonen's right under article 17, paragraph 1.⁴⁸⁸

What is more important, in this case, is that the HRC interpreted “sex”, which is a listed prohibited ground for discrimination in article 26 of the ICCPR, to include sexual orientation.⁴⁸⁹ It is groundbreaking victory because sexual orientation rights were finally acknowledged under the UN human rights system. Since *Toonen*, the non-discrimination principle stipulated in article 26 of the ICCPR now prohibits discrimination based on sexual orientation. After the decision, Tasmania finally repealed the criminal prohibition in 1997 three years later.

c. *Young v Australia*

The second historical victory for sexual orientation rights is found in the HRC’s decisions in *Young v Australia* (2003).⁴⁹⁰ It is a noteworthy case from the HRC because “the decision transcends *Toonen* by moving the principles of non-discrimination and equal protection beyond the narrow confines of privacy and applying them to other areas of civil, economic, and social entitlements.”⁴⁹¹

Mr. Young was in a same-sex relationship with Mr. C, a war veteran for thirty-eight years. Mr. C died in 1998. The relevant law in Australia refused to pay Mr. Young a

⁴⁸⁸ *Ibid* at para 8.6.

⁴⁸⁹ *Ibid* at para 8.7.

⁴⁹⁰ *Young v Australia*, *supra* note 192.

⁴⁹¹ Ignacio Saiz, “Bracketing Sexuality: Human Rights and Sexual Orientation – a Decade of Development and Denial at the UN” (2004) 7:2 *Health and Human Rights* 48 at 54.

veteran's dependent's pension because pensions to a veteran's partner were provided only if the person was married to the veteran or had been in a *de facto* relationship with a veteran of the opposite sex. Mr. Young brought his complaint to the HRC, claiming that the legislation violates the ICCPR.

In response, Australia first challenged the admissibility of the complaint because the complainant was not a victim; he failed to substantiate his case; and had not exhausted all other domestic remedies.⁴⁹² With respect to the merits, Australia did not have strong views and just argued that there was insufficient evidence to support the claim that Mr. Young was in fact the partner of Mr. C.⁴⁹³

The HRC denied Australia's arguments on the admissibility of the complaint because the applicant had successfully established that he was a victim and also had exhausted all domestic remedies, finding "no other reason to consider the communication inadmissible."⁴⁹⁴ In consideration of the discrimination in this case, the HRC firstly contended that the distinction between married and unmarried couples was reasonable and objective because different duties and obligations exist between married and unmarried couples and also the couples in question had the choice to marry with all legal consequences, however, the HRC found that same sex partners in this system did not have the possibility of entering into marriage due to the absence of a legal recognition of same-sex marriage.⁴⁹⁵ As a consequence, Mr. Young could only apply for the pension as a cohabiting partner of Mr. C. The pension fund refused to pay the survivor benefits because only permitted unmarried opposite-sex couples were eligible to make claim. Therefore it was apparent that the Australian government made a distinction between unmarried heterosexual partners and unmarried same-sex partners in the case of pension applications.

⁴⁹² *Young v Australia*, *supra* note 192 at para 4.1-4.8.

⁴⁹³ *Ibid* at para 4.9-4.13.

⁴⁹⁴ *Ibid* at para 9.4.

⁴⁹⁵ *Ibid* at para 10.4.

The Committee members, Mrs. Ruth Wedgwood and Mr. Franco De Pasquale, provided their concurring opinions on such distinction violating article 26 of ICCPR in the Appendix to the decision:

The State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced.⁴⁹⁶

They also drew attention to the limits of the decision's scope that the HRC did not examine the full array of "reasonable and objective" tests on the essential issue between same-sex and opposite-sex unmarried couples, but jumped directly to the conclusion that the distinction was discriminatory.⁴⁹⁷

d. *Joslin v New Zealand*

Joslin v New Zealand (2002)⁴⁹⁸ was the case concerning same-sex marriage in the UN human rights law system. Two lesbian couples that had lived together for over 10 years and 6 years respectively, claimed that the refusal of same-sex marriage by New Zealand constituted discrimination on the basis of sexual orientation.⁴⁹⁹ They also claimed such refusal violated their right to marry, right to privacy and family life, and their right to equal protection under the law.⁵⁰⁰ It was the first time to challenge the traditional heterosexual definition of marriage by utilizing article 26 of the ICCPR.

In *Toonen* and *Young*, the HRC decided in favor of sexual orientation rights, however in this case, the HRC was not ready to challenge the powerful cultural concept of *marriage* by making a compromise with the cultural relativism argument. The HRC held that the scope of the right to marry under article 23 of the ICCPR does not cover same-sex marriage by

⁴⁹⁶ *Ibid* at Appendix.

⁴⁹⁷ *Ibid*.

⁴⁹⁸ *Joslin, v New Zealand, supra* note 192.

⁴⁹⁹ *Ibid* , at para 3.1.

⁵⁰⁰ *Ibid* , at para 3.6-3.8.

interpreting marriage as “only the union between a man and woman wishing to marry each other”, and further interpreted article 23 is “...the only substantive provision in the Covenant which defines a right by using the term ‘men and women’, rather than the phrases used elsewhere in the Covenant-‘every human being’, ‘everyone’ and ‘all persons’.”⁵⁰¹ Consequently, the HRC ruled that the mere refusal to provide for same-sex marriage by a member state was not a violation of article 26.

It is a problematic ruling. Ignacio Saiz has summarized three unconvincing points from *Joslin*: First of all, as the right to marriage is a universal human right, the HRC failed to justify the denial of this right to same-sex couples based on “reasonable and objective criteria.”⁵⁰² Secondly, the HRC’s interpretation on marriage scope based on article 23 is not convincing without further consideration on the concepts or values of marriage.⁵⁰³ The HRC failed to explain why same-sex couples are not entitled to enjoy the right to marriage as heterosexual couples. Last but not least, this decision was inconsistent with the previous decisions and view stated by the HRC itself.⁵⁰⁴ Although the HRC interpreted that “sex” in article 26 in *Toonen* should be taken to include sexual orientation and therefore any discrimination on ground of sexual orientation should be prohibited.⁵⁰⁵ Same-sex couples should enjoy the equal right to marry as the heterosexual couples.

The inconsistency within the HRC decisions raises concerns whether a non-discrimination approach is sufficient to protect sexual minorities in international human rights laws. By comparing *Young* and *Joslin*, the success through the non-discrimination argument seemed very limited.⁵⁰⁶

e. *X v Colombia*

⁵⁰¹ *Ibid* at para 8.2.

⁵⁰² Saiz, *supra* note 491 at 54

⁵⁰³ *Ibid.*

⁵⁰⁴ *Ibid.*

⁵⁰⁵ *Toonen v. Australia*, *supra* note 127 at para 8.7.

⁵⁰⁶ Saiz, *supra* note 491 at 63.

After the setback in *Joslin*, the HRC reaffirmed the equality protection for sexual minorities in *X v Colombia* (2007).⁵⁰⁷ Like in *Young*, Colombia's pension regulatory scheme permitted unmarried opposite-sex couples to be eligible for pension benefits from their long term partners, but not same-sex couples. The HRC ruled that the State's action constituted a violation of article 26 of the ICCPR by denying X's right to his life partner's pension on the grounds of sexual orientation largely due to the fact that Colombia failed to provide sufficient evidence on how the distinction between homosexual and heterosexual couples was objective and reasonable.⁵⁰⁸

The dissenting opinions of two Committee members, Mr. Amor and Mr. Khalil, are worth addressing here.⁵⁰⁹ Their dissenting opinion represented the voice of opposition to human rights of sexual minorities. First, they argued that article 26 of the ICCPR did not explicitly stipulate discrimination based on sexual orientation so that the HRC's interpretation extending sexual orientation as a new prohibited ground seemed too far from the text of article 26 itself.⁵¹⁰ Any interpretation of article 26, they argued, should not create a new right for a group.⁵¹¹ Second, the recognition of sexual orientation as a human right seemed not to be accepted by all States universally.⁵¹² Therefore, the HRC's pioneering and standard-setting role in the field of recognition of sexual orientation rights had gone too far from the legal reality.⁵¹³ Third, they contended that same sex couples were not a family under the generally accepted meaning of the ICCPR and therefore benefits should only be derived from a concept of family, as being "the natural and fundamental group unit of society" between "men and women of marriageable age" according to article 23 of the ICCPR.⁵¹⁴

⁵⁰⁷ *X v Colombia*, 2007 HRC, Communication No 1361/2005.

⁵⁰⁸ *Ibid* at para 7.1-10.

⁵⁰⁹ *Ibid* at Appendix.

⁵¹⁰ *Ibid*.

⁵¹¹ *Ibid*.

⁵¹² *Ibid*.

⁵¹³ *Ibid*.

⁵¹⁴ *Ibid*.

Through review of these decisions, it can be seen that privacy protection under article 8 of the ICCPR played a vital role in the initial phase of journey, notably in the decriminalization of homosexuality (*Toonen*), but non-discrimination principle in article 26 was more effective to challenge discrimination in pension benefits (*Young and X*). Also the landmark decision in *Toonen* acknowledges sexual orientation as being included under the “sex” category as a prohibited ground under the non-discrimination principle. This significant interpretation has deeply influenced legislative developments around the world with regard to sexual orientation human rights. However, it should note that the HRC is still hesitant to provide sexual minorities’ full equal protection, especially in the area where cultural arguments remain persuasive, such as marriage and family.

f. *Fedotova v Russian Federations*

The recent case ruled by the HRC regarding the sexual orientation rights is *Fedotova v Russian Federations* (2012).⁵¹⁵ Fedotova is a gay right activist and displayed posters that declared “Homosexuality is normal” and “I am proud of my homosexuality” near a secondary school in the city of Ryazan, Russia.⁵¹⁶ According to local laws, the propaganda of promoting of homosexuality among minors is banned; therefore Fedotova was convicted of an administrative offence.⁵¹⁷

The HRC had no difficulty in finding that there has been a restriction on the exercise of the applicant’s right to freedom of expression guaranteed by article 19 of ICCPR.⁵¹⁸ The HRC further considered whether such a restriction can be justified, article 19 also provides for two reasons, i.e for respect of the rights or reputations of others and for the protection of national security or of public order, or of public health or morals.⁵¹⁹ The HRC reiterates

⁵¹⁵ *Fedotova v Russian Federations*, 2012, HRC, Communication No. 1932/2010. UN Doc CCPR/C/106/D/1932/2010.

⁵¹⁶ *Ibid*, at para 2.2

⁵¹⁷ *Ibid*, at para 2.1 and 10.2.

⁵¹⁸ *Ibid*, at para 10.2

⁵¹⁹ *Ibid*, at para 10.3.

that the freedom of expression is a significant right and any restrictions must conform to “the strict tests of necessity and proportionality” and only applied for “the purposes for which they were prescribed and must be directly related to the specific need on which they are predicted.”⁵²⁰

With regard to article 26, non-discrimination, the HRC also found that the Ryazan law, that establishes administrative liability for “public actions aimed at propaganda of homosexuality (sexual act between men or lesbianism)” among minors, constitutes discrimination against the applicant based on sexual orientation.⁵²¹ Article 26 also allows the State to justify the alleged legislation as it is based on reasonable and objective criteria, in pursuit of an aim that is legitimate.⁵²² Russia claimed that the objective was to “protect the morals, health, rights and legitimate interests of minors”.⁵²³ The HRC recalls that the limitation of protecting morals must be based on the “universality of human rights and the principle of non-discrimination”, rather than merely “deriving exclusively from a single tradition.”⁵²⁴

The HRC ruled the applicant’s act was to express her sexual identity and seek for understanding for it, but the State failed to demonstrate why the restriction was necessary for one of the legitimate purposes of article 19.⁵²⁵ It also failed to meet the reasonable and objective criteria on the restriction of the right to freedom of expression in relation to “propaganda of homosexuality” as opposed to propaganda of heterosexuality or sexuality general among minors in article 26.⁵²⁶ It is important to see in this case that the HRC emphasizes that moral protection is subject to the universal human rights protection principles, and the right freedom of expression for LGBTs are guaranteed by the ICCPR. It

⁵²⁰ *Ibid.* citing the *Official Records of the General Assembly, Sixty-sixth session, Supplement No. 40*(UN Doc A/66/40(Vol. I), annex V, at para 2 and 22.

⁵²¹ *Ibid.*, at para 10.6.

⁵²² *Ibid.*

⁵²³ *Ibid.*

⁵²⁴ *Ibid.*, at para 10.5, citing the General Comment No. 34, para 32.

⁵²⁵ *Ibid.*, at para 10.8.

⁵²⁶ *Ibid.*, at para 10.6.

provides a strong support for tongzhi rights in the Chinese context by facing the challenges from Asian Values.

3. The Active Response from UN Human Rights Bodies

a. Human Rights Committee's Reports

Since the HRC acknowledged that sexual orientation was a prohibited ground of discrimination in *Toonen*, the HRC has made a series of follow-up actions. In 1995, the HRC cited sodomy laws in the United States that needed to be eliminated in response to a compliance report of the United States under the ICCPR.⁵²⁷ Sudan and Chile were respectively cited by the HRC in 1997 and 1999 with respect to the criminalization of homosexuality.⁵²⁸ The HRC also criticized the “social cleansing” of killing sexual minorities in Colombia in 1997⁵²⁹ and in El Salvador in 2003.⁵³⁰ During the years 2000 to 2013, the HRC frequently addressed a variety of human rights issues with regard to sexual minorities among many countries in its concluding observations reports. In addition to addressing the most serious forms of discrimination, i.e., the criminalization of same sex relations,⁵³¹ the HRC emphasized the failure to prevent discrimination in

⁵²⁷ HRC, *Concluding Observation: United States of America*, UN Doc CCPR/C/79 Add.50 (1995) at para 287.

⁵²⁸ HRC, *Concluding Observation: Chile*, UN Doc CCPR/C/79/Add.104 (1999) at para 20; and HRC, *Concluding Observation: Sudan*, UN Doc CCPR/C/79Add.85 (1997) at para 8.

⁵²⁹ HRC, *Concluding Observation: Colombia*, UN Doc CCPR/C/79Add.76 (1997) at para 16.

⁵³⁰ HRC, *Concluding Observation: El Salvador*, UN Doc CCPR/C/78/SLV (2003) at para 16.

⁵³¹ See e.g., HRC, *Concluding Observation: Belize*, UN Doc CCPR/C/BLZ/CO/1 (2013) at para 13; HRC, *Concluding Observation: Philippines*, UN Doc CCPR/C/PHL/CO/4 (2012) at para 10; HRC, *Concluding Observation: Maldives*, UN Doc CCPR/C/MDV/CO/1 (2012) at para 8; HRC, *Concluding Observation: Malawi*, UN Doc CCPR/C/MWI/CO/1 (2012) at para 7; HRC, *Concluding Observation: Yemen*, UN Doc CCPR/C/YEM/CO/5 (2012) at para 13; HRC, *Concluding Observation: Turkmenistan*, UN Doc CCPR/C/TKM/CO/1 (2012) at para 21; HRC, *Concluding Observation: Islamic Republic of Iran*, UN Doc CCPR/C/IRN/CO/3(2011) at para 10; HRC, *Concluding Observation: Kuwait*, UN Doc CCPR/C/KWT/CO/2 (2011) at para 30; HRC, *Concluding Observation: Jamaica*, UN Doc CCPR/C/JAM/CO/3 (2011); HRC, *Concluding Observation: Ethiopia*, UN Doc CCPR/C/ETH/CO/1 (2011) at para 12; HRC, *Concluding Observation: Togo*, UN Doc CCPR/C/TGO/CO/4 (2011) at para 14; HRC, *Concluding Observation: Cameroon*, UN Doc CCPR/C/CMR/CO/4 (2010) at para 12; HRC, *Concluding Observation: Uzbekistan*, UN Doc CCPR/C/UZB/CO/3 (2010) at para 22; HRC, *Concluding Observation: Grenada*, UN Doc CCPR/C/GRD/CO/1 (2009) at para 21; HRC, *Concluding Observation: Tanzania*, UN Doc CCPR/C/TZA/CO/4(2009) at para 22; HRC, *Concluding Observation: Botswana*, UN Doc CCPR/C/BWA/CO/1(2008) at para 22; HRC, *Concluding Observation: St. Vincent and The Grenadines*, UN

employment-related fields,⁵³² the lack of the category of sexual orientation in anti-discrimination legislation,⁵³³ the absence of education to combat discriminatory attitudes,⁵³⁴ the issue with regard to minimum age of consent for same sex relations,⁵³⁵ and the prohibition of immigration for sexual minorities.⁵³⁶ Where legislative improvements have been made, the HRC has welcomed news of member states decriminalizing same-sex acts,⁵³⁷ adding sexual orientation to their anti-discrimination legislation⁵³⁸ and recognizing the same-sex relationship legally.⁵³⁹

Doc CCPR/C/VCT/CO/2(2008) at para 8; HRC, *Concluding Observation: Algeria*, UN Doc CCPR/C/DZA/CO/3(2007); HRC, *Concluding Observation: Sudan*, UN Doc CCPR/C/SDN/CO/3 (2007) at para 19; HRC, *Concluding Observation: Zambia*, UN Doc CCPR/C/ZMB/CO/3(2007) at para 24; HRC, *Concluding Observation: Barbados*, UN Doc CCPR/C/BRB/CO/3(2007) at para 13; HRC, *Concluding Observation: Chile*, UN Doc CCPR/C/CHL/CO/5 (2007) at para 16; HRC, *Concluding Observation: Kenya*, UN Doc CCPR/CO/83/KEN (2005) at para 25; HRC, *Concluding Observation: Egypt*, UN Doc CCPR/Co/76/EGY (2002) at para 19; HRC, *Concluding Observation: Romania*, UN Doc CCPR/C/79/Add.111 (1999) at para 16; HRC, *Concluding Observation: Lesotho*, UN Doc CCPR/C/79/Add.106 (1999) at para 13; HRC, *Concluding Observation: Chile*, UN Doc CCPR/C/79/Add.104 (1999) at para 20; HRC, *Concluding Observation: Cyprus*, UN Doc CCPR/C/79/Add.88 (1998) at para 11; HRC, *Concluding Observation: Sudan*, UN Doc CCPR/C/79/Add.85 (1997) at para 8; and HRC, *Concluding Observation: United States*, UN Doc A/50/40 (1995) at para 287.

⁵³² See e.g., HRC, *Concluding Observation: Hong Kong, China*, UN Doc CCPR/C/CHN/HKG/CO/3 (2013) at para 23; HRC, *Concluding Observation: Islamic Republic of Iran*, UN Doc CCPR/C/IRN/CO/3(2011) at para 10; HRC, *Concluding Observation: Russian Federation*, UN Doc CCPR/C/RUS/CO/6(2009) at para 27; HRC, *Concluding Observation: Japan*, UN Doc CCPR/C/JPN/CO/5(2008) at para 29; HRC, *Concluding Observation: Austria*, UN Doc CCPR/C/AUT/CO/4 (2007) at para 8; HRC, *Concluding Observation: United States*, UN Doc CCPR/C/USA/CO/3/Rev.1 (2006) at para 25.

⁵³³ See e.g., HRC, *Concluding Observation: Peru*, UN Doc CCPR/C/PER/CO/5(2013) at para 8; HRC, *Concluding Observation: Hong Kong, China*, UN Doc CCPR/C/CHN/HKG/CO/3 (2013) at para 23; HRC, *Concluding Observation: Philippines*, UN Doc CCPR/C/PHL/CO/4 (2012) at para 10; HRC, *Concluding Observation: Turkey*, UN Doc CCPR/C/TUR/CO/1(2012) at para 8; HRC, *Concluding Observation: Islamic Republic of Iran*, UN Doc CCPR/C/IRN/CO/3(2011) at para 10; HRC, *Concluding Observation: Poland*, UN Doc CCPR/C/POL/CO/6 (2010) at para 5; HRC, *Concluding Observation: Trinidad and Tobago*, UN Doc CCPR/CO/70/TTO (2000) at para 11; HRC, *Concluding Observation: Philippines*, UN Doc CCPR/CO/79/PHL (2003) at para 18; HRC, *Concluding Observation: Namibia*, UN Doc CCPR/CO/81/NAM (2004) at para 22; and HRC, *Concluding Observation: Poland*, UN Doc CCPR/CO/82/POL (2004) at para 18.

⁵³⁴ See e.g., HRC, *Concluding Observation: Peru*, UN Doc CCPR/C/PER/CO/5(2013) at para 8; HRC, *Concluding Observation: Philippines*, UN Doc CCPR/C/PHL/CO/4 (2012) at para 10; HRC, *Concluding Observation: Turkey*, UN Doc CCPR/C/TUR/CO/1(2012) at para 8; HRC, *Concluding Observation: Armenia*, UN Doc CCPR/C/ARM/CO/2 (2012) at para 10; HRC, *Concluding Observation: Mexico*, UN Doc CCPR/C/MEX/CO/5(2010) at para 21; HRC, *Concluding Observation: Russian Federation*, UN Doc CCPR/C/RUS/CO/6(2009) at para 27; HRC, *Concluding Observation: Philippines*, UN Doc CCPR/CO/79/PHL (2003) at para 18.

⁵³⁵ HRC, *Concluding Observation: Austria*, UN Doc CCPR/C/79/Add.103 (1998) at para 13.

⁵³⁶ HRC, *Concluding Observation: Zimbabwe*, UN Doc CCPR/C/79/Add.89 (1998) at para 24.

⁵³⁷ HRC, *Concluding Observations: Ecuador*, UN Doc CCPR/C/79/Add.92 (1998) at para 8.

⁵³⁸ See e.g., HRC, *Concluding Observation: Lithuania*, UN Doc CCPR/C/LTU/CO3 (2012) at para 3; HRC, *Concluding Observation: El Salvador*, UN Doc CCPR/C/SLV/CO/6(2010) at para 3; HRC, *Concluding*

b. Responses from Other Human Rights Treaty Bodies

The other treaty-based bodies have also taken action in response to human rights violations of sexual minorities. The Committee on Economic, Social and Cultural Rights (CESCR), established under the ICESCR, called upon the member states to repeal discriminatory laws criminalizing homosexuality in 1998⁵⁴⁰ and lesbianism in 2000.⁵⁴¹ Afterwards, the CESCR explicitly recognized sexual orientation as a prohibited ground of discrimination in its important general comments and concluding observations, including the General Comments No. 14: The Right to Highest Attainable Standard of Health (2000);⁵⁴² No.15: The Right to Water (2005);⁵⁴³ No. 18: The Right to Work (2006);⁵⁴⁴ No. 19: The Right to Social Security (2008);⁵⁴⁵ and No. 20: Non-discrimination in Economic, Social and Cultural Rights (art.2 ,para. 2).⁵⁴⁶ Unlike the HRC, the CESCR categorized “sexual orientation” as a prohibited ground falling under the category of “other status”.⁵⁴⁷ The CESCR has also commented favourably on member states that have taken steps to protect sexual minorities, such as by decriminalizing homosexuality⁵⁴⁸, creating programs to protect and promote the sexual minorities⁵⁴⁹ and preventing violence in same-sex

Observation: Sweden, UN Doc CCPR/C/SWE/Co/6(2009) at paras 3,4 &8; HRC, *Concluding Observation: Denmark*, UN Doc CCPR/C/DNK/CO/5 (2008) at para 4; HRC, *Concluding Observation: Ecuador*, UN Doc CCPR/C/84/Add.8 (1999) at para 183.

⁵³⁹ See e.g., HRC, *Concluding Observation: New Zealand*, UN Doc CCPR/C/NZL/CO/5(2010) at para 3; HRC, *Concluding Observation: United Kingdom of Great Britain and Northern Ireland*, UN Doc CCPR/C/GBR/CO/6(2008) at para 5.

⁵⁴⁰ Committee on Economic, Social and Cultural Rights [CESCR], *Concluding Observations: Cyprus*, UN Doc E/C.12/1/Add.28 (1998) at para7

⁵⁴¹ CESCR, *Concluding Observation: Kyrgyzstan*, UN Doc E/C.12/1/Add.49 (2000) at paras 17 and 30.

⁵⁴² CESCR, *General Comment No 14: The Right To The Highest Attainable Standard of Health*, UN Doc E/C.12/2000/4(2000) at para 18.

⁵⁴³ CESCR, *General Comment No 15: The Right To Water*, UN Doc E/C.12/2002/11(2002) at para 13.

⁵⁴⁴ CESCR, *General Comment No 18: The Right To Work*, UN Doc E/C.12/GC/18 (2006), at para 12(b)(i).

⁵⁴⁵ CESCR, *General Comment No 19: The Right To Social Security*, UN Doc E/C.12/GC/19 (2008), at para 29.

⁵⁴⁶ CESCR, *General Comment No 20: Non-discrimination in Economic, Social and Cultural Rights* (art.2 ,para. 2), UN Doc E/C.12/GC/20 (2009) at para 11.

⁵⁴⁷ *Ibid* at para 32.

⁵⁴⁸ CESCR, *Concluding Observation: Cyprus*, UN Doc E/C.12/1/Add.28 (1998) at para 7.

⁵⁴⁹ CESCR, *Concluding Observation: Brazil*, UN Doc E/C. 12/CO/BRA/2 (2009) at para 3.

relationship.⁵⁵⁰

The Committee on the Rights of the Child (CRC Committee), the treaty monitoring body of the *Convention on the Rights of the Child*, also paid a lot of attention to the issue of sexual orientation. In its general comments on HIV/AIDS and adolescent health in 2003, the CRC Committee indicated the harmful influence of sexual-orientation discrimination and noted that sexual orientation should be covered in the prohibited grounds of discrimination as other grounds of “race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status”.⁵⁵¹ Along the same topic, the CRC Committee expressed concern that in the United Kingdom “homosexual and transsexual young people do not have access to the appropriate information, support and necessary protection to enable them to live their sexual orientation.”⁵⁵² The CRC Committee also noted in its concluding observations that the disparity between ages for sexual consent between heterosexual and homosexual relations could constitute discrimination.⁵⁵³ The CRC Committee expressed its concern with some countries, for instances, China, Slovakia, Malaysia and Australia for a lack effective legislation prohibiting discrimination based on sexual orientation with regard to child protection.⁵⁵⁴

The Committee on the Elimination of Discrimination against Women (CEDAW) has addressed the intersection of discrimination against sexual orientation and women, gender,

⁵⁵⁰ CESCR, *Concluding Observation: Sweden*, UN Doc E/C/12/SWE/CO/5 (2008) at para 9.

⁵⁵¹ See e.g., Committee on the Rights of the Child [CRC Committee], *General Comment No 3 (2002): HIV/AIDS and the Rights of the Child* (2003), UN Doc CRC/GC/2003/3, at para 8; CRC Committee, *General Comment No. 4 (2003): Adolescent health and development in the context of the Convention on the Rights of the Child* (2004), UN Doc CRC/GC/2003/4, at para 6.

⁵⁵² CRC Committee, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, UN Doc CRC/C/15/Add.188 (2002) at para 43.

⁵⁵³ CRC Committee, *Concluding Observations: Overseas Territories, United Kingdom of Great Britain and Northern Ireland*, UN Doc CRC/C/15/Add.135 (2000) at para 25; CRC Committee, *Concluding Observations: Isle of Man, United Kingdom of Great Britain and Northern Ireland*, UN Doc CRC/C/15/Add.134 (2000) at para 22-33.

⁵⁵⁴ See e.g., CRC Committee, *Concluding Observations: China*, UN Doc CRC/C/CHN/CO/2 (2005) at paras 31-32; CRC Committee, *Concluding Observations: Malaysia*, UN Doc CRC/C/MYS/CO/1(2007) at paras 31&32; CRC Committee, *Concluding Observation: Slovakia*, UN Doc CRC/C/SVK/CO/2 (2007) at para 27; CRC Committee, *Concluding Observation: Australia*, UN Doc CRC/C/AUS/CO/4(2012) at para29&30.

immigrant status, among others. For instance, this issue of multiple forms of discrimination of women intersecting with sexual orientation was raised in the CEDAW Committee's concluding observations for Uzbekistan,⁵⁵⁵ Ukraine,⁵⁵⁶ Panama,⁵⁵⁷ Korea⁵⁵⁸ and Chile.⁵⁵⁹ Specifically, in Recommendation 19 (1999), the CEDAW Committee indicated a range of obstacles impeding women's access to sexual health and called on the obligation of States to prevent and punish gender-based violence, particularly with reference to the experiences of lesbian, gay, bisexual, and transgender people.⁵⁶⁰ The CEDAW Committee also recommended that, "lesbianism be reconceptualised as a sexual orientation and that penalties for its practice be abolished."⁵⁶¹ The CEDAW committee has also applauded UN member states that have added protection from discrimination on grounds of sexual orientation in several of its concluding observations.⁵⁶² Notably, since December 2010, CEDAW has begun to consider sexual orientation and gender identity as vulnerable grounds in its General Recommendations regularly, particularly addressing the intersectional and multiple forms of discrimination against women.⁵⁶³

⁵⁵⁵ Committee on Elimination of Discrimination Against Women [CEDAW Committee], *Concluding Observation: Uzbekistan*, UN Doc CEDAW/C/UZB/CO/4 (2010) at para 40.

⁵⁵⁶ CEDAW Committee, *Concluding Observation: Ukraine*, UN Doc CEDAW/C/UKR/CO/7 (2010) at para 42.

⁵⁵⁷ CEDAW Committee, *Concluding Observation: Panama*, UN Doc CEDAW/C/PAN/CO/7 (2010) at para 22.

⁵⁵⁸ CEDAW Committee, *Concluding Observation: Republic of Korea*, UN Doc CEDAW/C/KOR/CO/7 (2011) at para 14.

⁵⁵⁹ CEDAW Committee, *Concluding Observation: Chile*, UN Doc CEDAW/C/CHL/CO/5-6 (2012) at paras 10,11,16,17 and 46.

⁵⁶⁰ CEDAW Committee, *General Recommendation 19: Violence against Women*, UN Doc A/47/38 (1992); CEDAW Committee, *General Recommendation 24: Women and Health*, UN Doc A/54/38/Rev. 1 (1999).

⁵⁶¹ CEDAW Committee, *Concluding Observation: Kyrgyzstan*, UN Doc A/54/38/Rev.1 (1999) at para 128.

⁵⁶² See e.g., CEDAW Committee, *Concluding Observation: Brazil*, UN Doc CEDAW/C/BRA/CO/7(2012) at para 7; CEDAW Committee, *Concluding Observation: Germany*, UN Doc CEDAW/DEU/CO/6 (2009) at para 5; CEDAW Committee, *Concluding Observation: Sweden*, UN Doc A/56/38 (2001) at para 334; CEDAW Committee, *Concluding Observation: Ireland*, UN Doc A/54/38 (1999) at para 162; CEDAW Committee, *Concluding Observation: Canada*, UN Doc A/52/38/Rev.1 (1997) at para 310; and CEDAW Committee, *Concluding Observation: New Zealand*, UN Doc A/49/38 (1994) at para 612.

⁵⁶³ See CEDAW Committee, *General Recommendation 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc CEDAW/C/GC/28 (2010) at para 18; CEDAW Committee, *General Recommendation 29 on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, Economic consequence of marriage, family relations and their dissolution*, UN Doc CEDAW/C/GC/29 (2013), at paras 16,17 &24.

The Committee against Torture (CAT Committee), which monitors state compliance with the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, noted in its General Comment No 2 that:

The protection of certain minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill-treatment. States parties must ensure that, insofar as the obligations arising under the Convention are concerned, their laws are in practice applied to all persons, regardless of [...] sexual orientation, transgender identity [...]⁵⁶⁴

In its concluding observations for Egypt,⁵⁶⁵ Argentina,⁵⁶⁶ and Ecuador,⁵⁶⁷ the CAT committee noted with concern that sexual minorities were ill-treated and tortured. The CAT Committee also expressed concern regarding “complaints of threats and attacks against sexual minorities and transgendered activists” in Venezuela.⁵⁶⁸ The CAT Committee expressed concern on the situations of LGBTprisoners in different countries, such as Costa Rica and Paraguay.⁵⁶⁹ The police harassment against sexual minorities was addressed by CAT Committee in its concluding observation for Peru in 2013.⁵⁷⁰ General discrimination and reported episodes of hate speech or hate crimes were noted in the concluding observations for Latvia, Poland, Bulgaria and Norway.⁵⁷¹ However, not all is bad, the CAT Committee commended improvements in legislation in Lithuania,⁵⁷² Portugal,⁵⁷³ and Sweden,⁵⁷⁴ resulting in strong protections from torture for sexual minorities.

⁵⁶⁴ Committee Against Torture (CAT Committee), *General Comment No 2: Implementation of article 2 by States parties*, UN Doc CAT/C/GC/2 (2008) at para 21.

⁵⁶⁵ CAT Committee, *Concluding Observation: Egypt*, UN Doc CAT/C/CR/29/4 (2002) at para 5 (e).

⁵⁶⁶ CAT Committee, *Concluding Observation: Argentina*, UN Doc CAT/C/CR/33/1 (2004) at para 6 (g).

⁵⁶⁷ CAT Committee, *Concluding Observation: Ecuador*, UN Doc CAT/C/ECU/CO/3 (2006) at para 17.

⁵⁶⁸ CAT Committee, *Concluding Observation: Venezuela*, UN Doc CAT/C/CR/29/2 (2002) at para 10(d).

⁵⁶⁹ CAT Committee, *Concluding Observation: Costa Rica*, UN Doc CAT/C/CRI/CO/2 (2008) at para 18;

CAT Committee, *Concluding Observation: Paraguay*, UN Doc CAT/C/PRY/CO/4-6 (2011) at para 19.

⁵⁷⁰ CAT Committee, *Concluding Observation: Peru*, UN Doc CAT/C/PER/Co/5-6 (2013) at para 22.

⁵⁷¹ CAT Committee, *Concluding Observation: Latvia*, UN Doc CAT/C/LAT/CO/2 (2008) at para 19; CAT Committee, *Concluding Observation: Poland*, UN Doc CAT/C/POL/CO/4 (2007) at para 20; CAT Committee, *Concluding Observation: Bulgaria*, UN Doc CAT/C/BGR/Co/4-5 (2011) at 28; CAT Committee, *Concluding Observation: Norway*, UN Doc CAT/C/NOR/CO/6-7 (2012) at para 21.

⁵⁷² CAT Committee, *Concluding Observations: Lithuania*, UN Doc CAT/C/LTU/CO/2 (2009) at para 4(a).

⁵⁷³ CAT Committee, *Concluding Observations: Portugal*, UN Doc CAT/C/PRT/CO/4 (2008) at para 17.

⁵⁷⁴ CAT Committee, *Concluding Observations: Sweden*, UN Doc CAT/C/SWE/CO/2 (2008) at para 5(a).

c. Special Procedures

Although there is no Special Procedure exclusively focusing on sexual orientation rights, many Special Rapporteurs have expressed concern regarding the treatment of sexual minorities. Specifically, the Special Rapporteurs have commented on the following examples of human rights violations of sexual minorities: the negative impact that stigma and discrimination have on the right to the enjoyment of the highest attainable level of health;⁵⁷⁵ the mistreatment, abuse and murder of transgendered individuals;⁵⁷⁶ the mistreatment, including physical and sexual abuse of lesbians;⁵⁷⁷ the murder and

⁵⁷⁵ See e.g., Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Addendum: Mission to Viet Nam*, UN Doc A/HRC/20/15/Add.(2012) at paras 43,59, 63 &64; Human Rights Council, *The Secretary-General transmitting the interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UN Doc A/66/254 (2011) at para 9 and 59; Human Rights Council, *Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health*, UN Doc A/HRC/14/20 (2010) at paras 6-26; and Commission on Human Rights, *Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health*, UN Doc E/CN.4/2004/49 (2004) at paras 32-33.

⁵⁷⁶ See e.g., Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences*. UN Doc A/HRC/20/16/Add.2(2012) at para (Addendum expressed concern regarding the violence against the transgender inmates in the male prisons in Italy); Commission on Human Rights, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UN Doc E/CN.4/2005/51/Add.1 (2005) at para 50 (concerned with alleged police abuse and rape of transgender individuals in Nepal); Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc A/HRC/4/34/Add.1 (2007) at paras 471-473 (concerning the mistreatment of transgender individuals in Nepal); Commission on Human Rights, *Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc E/CN.4/2003/3 (2003) paras 66-67 (expressed concern regarding credible reports of transsexuals being murdered without a proper investigation in Venezuela); Commission on Human Rights, *Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc E/CN.4/2003/3/Add.2 (2002) at para 68 (expressed concern regarding the death threats and murders of transsexuals in Honduras without any police investigation); and Commission on Human Rights, *Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc E/CN.4/1998/68/Add.1 (1997) at para 41 (expressed concern regarding the murders of a transvestite in Brazil without a proper police investigation).

⁵⁷⁷ See e.g., Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc A/67/227(2012) at para 27; Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences*. UN Doc A/HRC/20/16/Add.2(2012) at paras 14-18; Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences*. UN Doc A/HRC/17/26/Add.1(2011)at paras 204-213 (Addendum concerning sexual harassment of a lesbian in South Africa); Commission on Human Rights, *Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN Doc E/CN.4/2001/64 (2001) at para 176 (concerned with Kuwait sentencing two women for being lesbians); Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc E/CN.4/2002/83 (2002) at para 102 (refers to corrective rape of a lesbian woman in Zimbabwe); Human

“social-cleansing” of homosexuals;⁵⁷⁸ the torture, arbitrary arrest and detention of homosexuals;⁵⁷⁹ the targeting and killing of human rights defenders who support sexual

Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, UN Doc A/HRC/4/34/Add.1 (2007) at paras 631-633 (concerning the murder of a lesbian in South Africa); Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc E/CN.4/2005/72 (2005) at para 27 (refers to lesbians being raped); Commission on Human Rights, *Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc E/CN.4/2000/9 (2000) at para 145 (concerned with a lesbian couple that were arrested, physically and sexually abused by the police in Brazil); Commission on Human Rights, *Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc E/CN.4/2002/74 (2002) at paras 62-65 (expressed concern regarding two women having been sentenced to death for “exercising unnatural behaviour” in Puntland, Somalia); and Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc E/CN.4/1997/47 (1997) at para 8 (concerned that women who live out their sexuality in ways other than heterosexuality are often subjected to violence and degrading treatment by their communities).

⁵⁷⁸ See e.g., Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc A/HRC/17/28/Add.2(2011) at para 42(Addendum concerning social cleansing targeting LGBT activists in Ecuador; Commission on Human Rights, *Joint report of the Special Rapporteur on the question of torture and the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc E/CN.4/1995/111 (1995) at para 49 (expressed concern regarding the murder of homosexuals in Brazil); Commission on Human Rights, *Joint report of the Special Rapporteur on the question of torture and the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc E/CN.4/1995/111 (1995) at para 49 (deplored the “social-cleansing” of homosexuals in Colombia); Commission on Human Rights, *Report of the High Commissioner for Human Rights on the situation of human rights in Colombia*, UN Doc E/CN.4/2005/10 (2005) at para 127 (concerned with abuses, discrimination, mistreatment and acts of “social cleansing” on the basis of one’s sexual orientation); Commission on Human Rights, *Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc E/CN.4/2002/74 (2002) at paras 62-65 (expressed concern regarding the death threats and murders of homosexuals in Argentina, Eduardo, Jamaica, and Mexico); Commission on Human Rights, *Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc E/CN.4/2001/9 (2001) at paras 48-50 (expressed concern regarding the death threats and murders of homosexuals in Brazil and El Salvador); Commission on Human Rights, *Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc E/CN.4/2000/3 (2000) at paras 54-56 (expressed concern regarding the death threats and murders of homosexuals in Brazil, Romania and Mexico); Commission on Human Rights, *Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc E/CN.4/1999/39 (1999) at para 76 (disturbed by reports from Brazil, Colombia and Mexico, where “death-squads” have allegedly murdered a large of number of sexual minorities); and Commission on Human Rights, *Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc E/CN.4/2003/3 (2003) paras 66-67 (expressed concern regarding credible reports of suspected homosexuals being buried alive in Afghanistan).

⁵⁷⁹ See e.g., Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/22/53,(2013) at paras 36-38, 76-79, 88.(expressed concerns the torture to LGBTs In health-care settings); *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.*, UN Doc A/HRC/16/52/add.1, (2011) (Addendum – Summary of information concerned cases involving LGBTs in Cameron, Malawi and Zimbabwe); Commission on Human Rights, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc E/CN.4/2003/68/Add.2 (2003) at para 42 (addendum regarding alleges torture of homosexuals in Uzbekistan); Commission on Human Rights, *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc E/CN.4/2004/56/Add.1 (2004) at para 1327 (homosexuals were subject to physical and verbal abuse and extortion attempts by the police in the Philippines); Commission on Human Rights, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc

minority rights;⁵⁸⁰ and the general discrimination faced by sexual minorities.⁵⁸¹

In addition to all of these concerns expressed by various Special Rapporteurs, a reoccurring theme among their reports has been the little, if any, official response or investigation to these human rights violations.⁵⁸² The indifference leads to a failure to

E/CN.4/2002/76 (2001) at 11 (regarding torture and discrimination against sexual minorities); Commission on Human Rights, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN Doc E/CN.4/2002/75/Add.1 (2002) at para 122, note 30 (concerned with allegations of torture, arbitrary arrest and detention of sexual minorities in Argentina); UN General Assembly, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/56/156 (2001) paras 17-25 (regarding torture and discrimination against sexual minorities); and Commission on Human Rights, *Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc E/CN.4/2000/9 (2000) at para 151 (concerned with a gay HIV/AIDS activist that was beaten in Brazil), and paras 726-727 (concerning the arrest and physical and sexual assault of someone who had allegedly been sodomized by the Anwar Ibrahim, the former Deputy Prime Minister of Malaysia).

⁵⁸⁰ Human Rights Council, *Report of the Special Rapporteur on the situation of human rights defenders*, UN Doc A/HRC/22/47 (2013) at para 119 (calls on special protections to human rights defenders for sexual minorities); *Report of the Special Rapporteur on the situation of human rights defenders. Addendum: Mission to Honduras*, UN Doc A/HRC/22/47/Add.1, (2012), at paras 90,91 & 113 (addendum regarding the allegation of killing a human right activist and stigmatization of human rights defenders); Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions.*, UN Doc A/HRC/20/22/Add.2, 15 (2012) (Addendum recalled the killings of LGBT activists in Colombia) at paras 5 & 55; Human Rights Council, *Special Representative of the Secretary-General on the situation of human rights defenders*, UN Doc A/HRC/4/37/Add.2 (2006) at para 32 (concerned with LGBT activists being threatened, beaten and even killed in Brazil); Commission on Human Rights, *Report of the Special Representative of the Secretary-General on human rights defenders*, Commission on Human Rights, 22 March 2006, E/CN.4/2006/95/Add.1 at para 290-291 (concerned with the murder of an HIV/AIDS activist in Jamaica); Commission on Human Rights, *Report of the Special Representative of the Secretary-General on human rights defenders*, UN Doc E/CN.4/2002/106/Add.2 (2002) at para 173 (concerned with the verbal and physical abuse of a human right activist sympathetic to gay rights by security guards at the University of Antioquía).

⁵⁸¹ See e.g., Human Rights Council, *Report of the independent expert on minority issues*, UN Doc A/HRC/13/23 (2010) at para 56; Commission on Human Rights, *Report of the Special Representative of the Secretary-General on human rights defenders*, UN Doc E/CN.4/2002/106/Add.2 (2002) at paras 172-174 (concerned with the discrimination, threats, and harassment of sexual minorities); and Commission on Human Rights, *Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, UN Doc E/CN.4/1999/15/Add.1 (1999) at para 14 (concerned with discriminatory practices in South Africa).

⁵⁸² See e.g., Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences.*, UN Doc A/HRC/17/26/Add.1 (2011) (Addendum concerning sexual harassment of a lesbian in South Africa) at paras 204-213; Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences.*, UN Doc A/HRC/17/26/Add.1 (2011) (Addendum concerning sexual harassment of a lesbian in South Africa) at paras 204-213; Commission on Human Rights, *Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc E/CN.4/2005/7/Add.1 (2005) at para 370 (concerned that there has not yet been fair, effective and adequate investigation into the murder of gay man in Jamaica); Commission on Human Rights, *Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc E/CN.4/2005/7 (2004) at para 71 (expressed concern with State inaction regarding killings directed at homosexuals); Commission on Human

accept legal responsibility for acts of violence. The Commission of Human Rights (now Human Rights Council), commending the work of the Special Rapporteurs, has passed numerous resolutions calling upon member states to protect the rights to life of sexual minorities by properly investigating cases of violence against sexual minorities.⁵⁸³

Many Special Rapporteurs have raised concerns regarding the criminalization of homosexuality as well as transsexuality.⁵⁸⁴ Iran, for example, has been the subject of several Special Rapporteur reports where the death penalty remains as a possible punishment for homosexuality.⁵⁸⁵ A few reports addressed serious concerns on the passage of the recent anti-Homosexuality legislation in Uganda that criminalizes the basic human rights advocacy for sexual minorities through restrictions on expression, association and

Rights, *Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc E/CN.4/1998/68/Add.1 (1997) at paras 39 and 41 (expressed concern regarding the murders of homosexual in Brazil without a proper police investigation); Human Rights Council, *Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc A/HRC/4/20/Add.2 (2007) at paras 32-24 (concerned with the impunity for attacks targeting sexual minorities in Guatemala); and Commission on Human Rights, *Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc E/CN.4/2003/3/Add.2 (2002) at para 68 (expressed concern regarding the death threats and murders of homosexuals in Honduras without any police investigation); and Commission on Human Rights, *Report of the Special Rapporteur on the independence of judges and lawyers*, UN Doc E/CN.4/2002/72 (2002) at paras 57 and 64 (concerned with the lack of access to lawyers/legal advice following the arrest of 56 men for 'homosexual activities' in Egypt).

⁵⁸³ See e.g., Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary. Addendum: Follow-up country recommendations: Colombia*, UN Doc A/HRC/20/22/Add.2, (2012), at 76 (urges the State to significantly strengthen efforts to establish accountability for extrajudicial executions.. take preventive protection measures for vulnerable groups (including LGBT groups)); *Commission on Human Rights Resolution 2000/31 Extrajudicial, Summary or Arbitrary Executions*, UN Doc E/CN.4/RES/2000/31 (2000) at para 6 (calls upon Governments concerned to investigate promptly and thoroughly cases of ... all killings committed for any discriminatory reason, including sexual orientation...); Commission on Human Rights, *Resolution 2002/36 Extrajudicial, Summary or Arbitrary Executions*, UN Doc E/CN.4/RES/2002/36 (2002) at para 6 (calls upon Governments to investigate promptly and thoroughly all cases of killings committed for any discriminatory reason, including sexual orientation).

⁵⁸⁴ See e.g., Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc A/HRC/14/24 (2010), (addendum concerned the death penalty for homosexuals or criminalization of homosexuality in Indonesia at paras 348-349; Iran, at paras 450-453; Uganda at paras 1126-1158.

⁵⁸⁵ See e.g., Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc A/HRC/14/24 (2010), Addendum: Communications to and from Governments, Iran: Concern about executions based on charges of homosexuality, at 450-453; Commission on Human Rights, *Reports of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran*, UN Doc E/CN.4/1996/59 (1996) at para 44; and Commission on Human Rights, *Reports of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran*, UN Doc E/CN.4/1999/32 (1998) at Annex IV.

assembly further imposes the death penalty for “aggravated homosexuality.”⁵⁸⁶ The reports have culminated in the previous Commission on Human Rights passing numerous resolutions stating that the death penalty should not be imposed on sexual relations between consenting adults.⁵⁸⁷

Another important issue highlighted by Special Rapporteurs is the fact that homophobia in schools and homes can often force children who are either sexual minorities or are still questioning their sexuality, to run away. This can lead to more serious social problems, such as leading homeless young people into forced prostitution and being at greater risk of sexual transmitted infections, such as HIV.⁵⁸⁸ This echoes much of the work undertaken by the CRC Committee, namely protecting children from discrimination based on sexual orientation and providing them with age-appropriate information on sex and sexuality.⁵⁸⁹

All these developments in the international human rights law definitely to some extent

⁵⁸⁶ Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover*, UN Doc A/HRC/14/20 (2010) .at para 15; Human Rights Council, *Report of the Special Rapporteur on the situation of human rights defenders. Addendum: Summary of cases transmitted to Governments and replies received*, UN Doc A/HRC/16/44/Add.1(2011), Uganda at para 2310; *Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions. Addendum: Communications to and from Governments*, UN Doc A/HRC/14/24/Add.1,(2010), Uganda: Death in custody of Brian Mpadde, at paras 1126-1135.

⁵⁸⁷ The most recent report of Human rights council, *Question of the death penalty – Report of the Secretary-General*, UN Doc A/HRC/24/18(2013), at para 73, addresses the existence of death penalty laws against homosexuals reinforce stigma, and fuels discrimination and violence against anyone perceived to be gay or lesbian; Commission on Human Rights, *Resolutions 2005/59: Question of the Death Penalty*, UN Doc E/CN.4/RES/2005/59 (2005) at para 7(f); Commission on Human Rights, *Resolutions 2004/67: Question of the Death Penalty*, UN Doc E/CN.4/RES/2004/67 (2004) at para 4(f); Commission on Human Rights, *Resolutions 2003/67: Question of the Death Penalty*, UN E/CN.4/RES/2003/67 (2003) at para 4(d); Commission on Human Rights, *Resolutions 2002/87: Question of the Death Penalty*, UN Doc E/CN.4/RES/2002/77 (2002) at para 4 (c).

⁵⁸⁸ Commission on Human Rights, *Reports of the Special Rapporteur on sale of children, child prostitution and child pornography*, UN Doc E/CN.4/2004/9 (2004) at paras 118 and 124; Commission on Human Rights, *Reports of the Special Rapporteur on the right to education*, UN Doc E/CN.4/2001/52 (2001) at para 75; and Commission on Human Rights, *Reports of the Special Rapporteur on sale of children, child prostitution and child pornography*, UN Doc E/CN.4/2000/73 (2000) at paras 110 and 139; and Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc E/CN.4/2003/75/Add.1 (2003) at para 1508 (which presented statistics on discrimination, violence and suicide ideation experienced by European sexual minority youths).

⁵⁸⁹ Some efforts have been made, see e.g. Human Rights Council, *Report of the Special Rapporteur on the sale of children, child prostitution and child Pornography*, UN Doc A/65/221, 4(2010), at para 16. (Indicated few cases regarding sexual exploitation of children reported owing to taboos and laws prohibiting homosexuality.

generate supportive international environment for tongzhi legal reform in China. Scholars can utilize such legal recognitions in UN laws to lobby tongzhi rights in China.

4. The Recent Battles for Sexual Minority Rights at the UN

Given the increased inclusion of sexual orientation within human rights bodies, human rights violations against sexual minorities have affected a considerable amount of awareness within the UN human rights system and are beginning to spill into discussion on the floor of the UN General Assembly. Nevertheless, resistance exists from religious countries which have united together to oppose sexual orientation rights. For instance, Pakistan on behalf of the Organization of the Islamic Conference indicated, “sexual orientation is not a human rights issue.”⁵⁹⁰ Tanzania claimed that studies on human rights violations based on sexual orientation were outside the scope of the UN’s work in accreditation of NGOs working on sexual orientation issues.⁵⁹¹ Thus, the start of the 21st century has seen a series of heated battles for the sexual orientation human rights in the international arena.

a. The 2003 Brazilian Proposal of Resolution

The fate of the Brazilian proposal for a resolution to the former UN Commission on Human Rights (now Human Rights Council) regarding human rights and sexual orientation encountered strong resistance. In 2003, Brazil presented a draft resolution on *Human Rights and Sexual Orientation* in order to draw awareness of the issue in the UN.⁵⁹² The response on the resolution was aggressive. Pakistan claimed that this draft resolution was

⁵⁹⁰ Letter from the permanent Mission of Pakistan to the United Nations and Other International Organizations, No. Pol/SO/2012, at para 8, online: United Nations Watch <<http://www.unwatch.org/atf/cf/%7B6deb65da-be5b-4cae-8056-8bf0bedf4d17%7D/OIC%20TO%20PRESIDENT.PDF>>.

⁵⁹¹ United Nations, “Economic and Social Council Takes Action on Texts Concerning Consultative Status of Non-Governmental Organizations”, Press Release, ECOSOC/6231, 25 July 2006, online: United Nations Information Service <<http://www.unis.unvienna.org/unis/en/pressrels/2006/ecosoc6231.html>>.

⁵⁹² United Nations Economic and Social Council, *Draft Resolution: Human Rights and Sexual Orientation*, UN Doc E/CN.4/2003/L.92 (2003).

an insult to the 1.2 billion Muslims in the world.⁵⁹³ The opposing states adopted procedural maneuverings by introducing amendments to the resolution that would have completely changed its nature, which left little substantive debate on the original resolution.⁵⁹⁴ In the end, the Commission on Human Rights had to consider postponing the resolution to the 2004 session. The 23 member states voted in favor of postponement, and 17 members voted against postponement and 10 countries abstained.⁵⁹⁵ China voted in favor of the postponement at that time. As a result, the discussion of the draft was deferred to the 2004 session.⁵⁹⁶ However, in 2004, the discussion of the resolution was again postponed due to pressure from member states belonging to religious bodies such as the Organization of Islamic Conference. In 2005, Brazil gave up proceeding with the resolution and therefore the draft disappeared from the agenda.

Cultural difference is the typical justification of member states opposing such initiatives over the past few decades and remains the principal objection against human rights of sexual minorities. Opposing states frame the issue of sexual orientation as a social and cultural issue rather than a universal human rights issue, and argue that the UN should not interfere with individual States in this regard. In addition, they also claimed that new human rights of sexual minorities could not be created arbitrarily because the principle of non-discrimination should not apply to sexual minorities, as it does not appear in any UN human rights treaties.⁵⁹⁷

⁵⁹³ Action Canada for Population and Development, *An NGO Guide to Human Rights and Sexual Orientation at the UN Commission on Human Rights* (Ottawa: Action Canada for Population and Development, 2003), at 31.

⁵⁹⁴ Françoise Girard, "Negotiating Sexual Rights and Sexual Orientation at the UN", in Richard Parker, Rosalind Petchesky and Robert Sember, eds, *Sex Politics: Reports from the Front Line* (np: Sexuality Policy Watch, 2007) at 344, online: <<http://www.sxpolitics.org>>. It is the outcome of a project launched by Sexuality Policy Watch in 2004: a transnational, cross-cultural research initiative and the research was performed in eight countries - Brazil, Egypt, India, Peru, Poland, South Africa, Turkey, and Vietnam - and in relation to two global institution, the United Nations and the World Bank.

⁵⁹⁵ *Ibid.*

⁵⁹⁶ Commission on Human Rights, *Report on the 59th session, 17 March-24 April 2003*, UN Doc E/CN.4/2003/135 at paras 575-85.

⁵⁹⁷ *Letter from the Permanent Mission of Pakistan on behalf of the Organization of Islamic Conference, 2/26/04*, and *Letter from the Permanent Mission of the Holy See, 3/1/04*, reprinted in Saiz, *supra* note 491, at footnote 59.

b. The 2008 UN Statement on Human Rights, Sexual Orientation and Gender Identity

After the Brazilian proposal failed in 2005, New Zealand, on behalf of 32 other member states, delivered a joint statement on sexual orientation and human rights calling on the Commission on Human Rights to respond to the issue of sexual orientation because the human rights violations based on sexual orientation cannot be ignored.⁵⁹⁸ In 2006, Norway proposed a drafted resolution to the Human Rights Council addressing human rights violations relating to sexual orientation on behalf of 54 states, including 18 members of the Human Rights Council.⁵⁹⁹ This resolution condemned the human rights violations based on sexual orientation and gender identity, such as killings and executions, torture, arbitrary arrest, and deprivation of economic, social, and cultural rights on such grounds.⁶⁰⁰ It furthermore called on states to “promote and protect human rights of all persons, regardless of sexual orientation and gender identity”.⁶⁰¹

Learning from the failed experience of the Brazilian Resolution, France adopted the strategy of submitting written statements in the UN General Assembly based on this resolution proposal. On December 18, 2008, the Joint Statement on *Human Rights, Sexual Orientation and Gender Identity* was delivered by Argentina on behalf of 65 other member states.⁶⁰² As a response, Syria on behalf of 53 other like-minded countries delivered an opposing statement in the same meeting of the UN General Assembly.⁶⁰³ Syria affirmed the significance of the equality principle but rejected expanding the equality protection to

⁵⁹⁸ New Zealand on behalf of 32 States, *Promotion and protection of human rights, Commission on Human Rights*, 61st session, 14 March-22 April 2005.

⁵⁹⁹ “HRC 3rd Session. Joint statement on Human Rights violations based on sexual orientation and gender identity” (1 December 2006), online: Norway delegations in Geneva <<http://www.norway-geneva.org>>.

⁶⁰⁰ *Ibid.*

⁶⁰¹ *Ibid.*

⁶⁰² Joint Statement on Sexual Orientation, Gender Identity and Human Rights at United Nations, 2008, online: ILGA-Europe <<http://www.ilga-europe.org/>>.

⁶⁰³ United Nations, News Release, “Sixty-Third General Assembly Plenary, 70th & 71st Meetings: General Assembly Adopts 52 Resolutions, 6 Decisions Recommended by Third Committee”, online: United Nations <<http://www.un.org/News/Press/docs>>.

sexual minorities. Syria also continued to claim that sexual orientation right is a new human right that falls into domestic jurisdiction, and whether such human rights should be protected is a domestic matter. Finally, Syria condemned homosexuality as immoral and stated that the protection of the family as “the natural and fundamental group unit of society” should trump the so-called sexual orientation human rights.⁶⁰⁴

These two statements kicked off the battle for sexual human rights among the UN member states. Most Western nations and countries in Latin America supported the 2008 UN Joint Statement. Only Armenia, Japan, Nepal and Timor-Leste from Asia supported the 2008 Statement. No member of the Association of Southeast Asian Nations supported the 2008 Statement and some (Brunei, Indonesia, and Malaysia) supported Syria’s opposing statement. China did not support either statement in 2008.⁶⁰⁵

The UN High Commissioner of Human Rights, Navanethem Pillay, also publically supported this statement at the UN General Assembly by saying, “those who are lesbian, gay, or bisexual, those who are transgender, transsexual or intersex, are full and equal members of the human family, and are entitled to be treated as such.”⁶⁰⁶

The 2008 UN Statement was highly praised as a breakthrough for sexual orientation human rights, because it was the first time that the issues of sexual minority rights reached the floor of the UN General Assembly. It implied a great victory after a long struggle for the recognition of human rights of sexual minorities. It also continued the optimistic trend favouring sexual orientation human rights in international human rights law.

On March 22, 2011, 85 of the 192 nations signed a new version of the statement, which was delivered by the United States representative at a session of the UN Human Rights Council.⁶⁰⁷ Unlike in 2008, there was no opposing statement delivered. Moreover,

⁶⁰⁴ *Ibid.* See also Douglas Sanders, “At the UN: 66 to 57, with 69 abstentions” *Fridae News* (22 December 2008), online: <<http://www.fridae.asia>>.

⁶⁰⁵ “Joint Statement on Sexual Orientation, Gender Identity and Human Rights at United Nations”, 2008, online: ILGA-Europe <<http://www.ilga-europe.org/>>.

⁶⁰⁶ United Nations Office of the High Commissioner for Human Rights, 2008, “Statement by Navanethem Pillay, High Commissioner of Human Rights, to the United Nations General Assembly”, 18 December 2008.

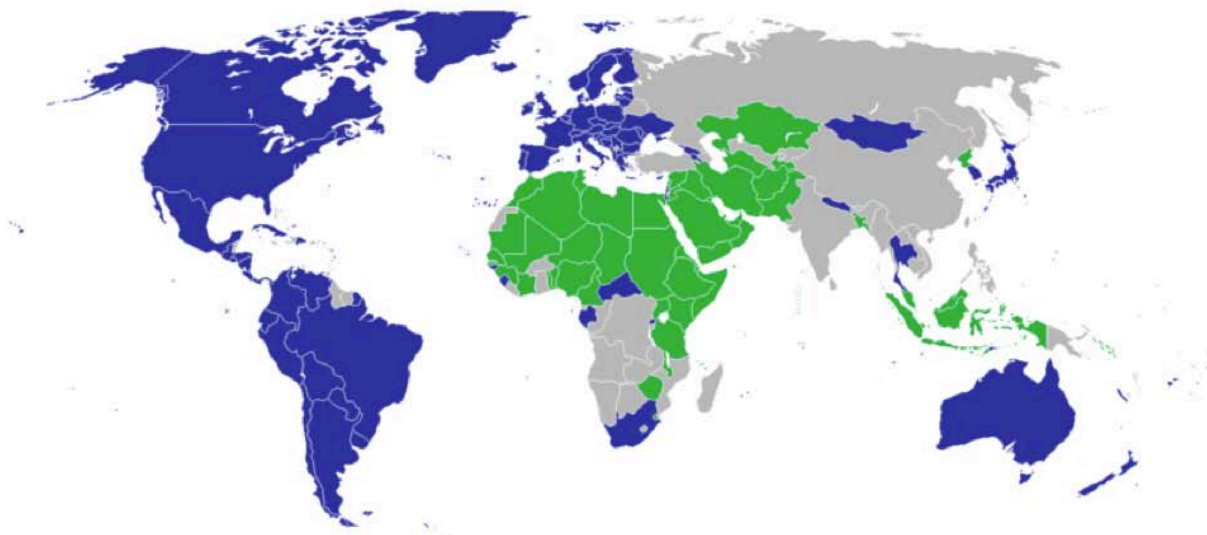
⁶⁰⁷ US Mission Geneva, “Over 80 Nations Support Statement at Human Rights Council on LGBT”, online:

in 2011, three UN member states that had supported Syria's statement in 2008, namely Rwanda, Sierra Leon, and Fiji, reversed their position and supported the 2011 UN statement on human rights, sexual orientation and gender identity.⁶⁰⁸ It shows a trend that the supporting courtiers for human rights of sexual minorities are increasing, however China still keeps silent on this statement.

US Mission Geneva <<http://geneva.usmission.gov>>.

⁶⁰⁸ *Ibid.*

Figure 2: The 85 countries that support the 2011 statement are in blue and the remaining countries, which supported Syria’s 2008 statement are in green.⁶⁰⁹



c. LGBT NGOs Granted Consultative Status to the Economic and Social Council

The *UN Charter* authorizes consultative status to non-governmental organizations to allow these organizations to attend UN’s work, including organizing panel discussion, and making oral and written interventions.⁶¹⁰ The status is granted by the UN Economic and Social Council, and there are 3743 organizations granted consultative status as of June 1, 2013.⁶¹¹ Although LGBT NGOs have been applying for consultative status since 1992, it was not until 2006 when the first groups LGBT NGOs were finally granted consultative status; the International Wages Due Lesbians (United States), the Coalition of Activist Lesbian (Australia), ILGA-Europe (the European region of International Lesbian, Gay, Bisexual, Trans And Intersex Association), LSVD (the Lesbian and Gay Federation in Germany – Lesben – und Schwulenverband in Deutschland).⁶¹² Shortly afterwards, ILGA

⁶⁰⁹ Wikipedia, “Sexual orientation and gender identity at the United Nations” June 28, 2012, online: <http://en.wikipedia.org/wiki/Sexual_orientation_and_gender_identity_at_the_United_Nations>.

⁶¹⁰ “Introduction to ECOSOC Consultative Status”, online: United Nations, NGO Branch <<http://csonet.org>>.

⁶¹¹ “Consultative Status with ECOSOC and other accreditations”, online: ECOSOC <<http://esango.un.org>>.

⁶¹² Kelly Kollman & Matthew Waites, “the Global Politics of Lesbian, Gay, Bisexual and Transgender Human Rights: an introduction” (2009) 15:1 Contemporary Politics 1 at 5.

was granted consultative status in 2008.⁶¹³

The most recent notable development was that the International Gay and Lesbian Human Rights Commission (IGLHRC) was granted consultative status in 2010, which makes the IGLHRC the tenth NGO working primarily for sexual minorities human rights to gain consultative status at the UN. The IGLHRC high-profile application process took three years involving many “deferrals, homophobic questioning and roadblocks in the ECOSOC NGO Committee.”⁶¹⁴ Along with strong support from the United States, a group of over 200 NGOs from 59 countries also sent a letter to all UN member states, asking for the fair treatment of the IGLHRC application.⁶¹⁵ The resolution passed with 23 in favor, 13 against, and 13 abstentions and 5 absences. China was among the States that voted against the IGLHRC application.⁶¹⁶

These NGOs with consultative status to the UN can work in a closer relationship with the UN to address sexual diversity issues, and the admittance of these organizations into the UN signals an increasing trend of openness in the UN with regard to sexual orientation rights.

5. Milestone Developments

On December 10, 2010, International Human Rights Day, the UN Secretary-General Ban Ki-moon made the first speech regarding ending violence and criminal sanctions based on sexual orientation and gender identity:

We know how controversial the issues surrounding sexual orientation can be. In the search for solutions, we recognize that there can be very different perspectives. And yet, on one point we all agree -- the sanctity of human rights. As men and women of conscience, we reject discrimination

⁶¹³ *Ibid* at 6.

⁶¹⁴ International Gay and Lesbian Human Rights Commission (IGLHRC), Press Release, “United Nations Grants Official Status to U.S.-based International LGBT Rights Group” (19 July 2010), online: IGLHRC <<http://www.iglhrc.org/>>.

⁶¹⁵ *Ibid*.

⁶¹⁶ *Ibid*.

in general, and in particular discrimination based on sexual orientation and gender identity.⁶¹⁷

In June 2011, Greece and seven other countries proposed to the Human Rights Council that the High Commissioner for Human Rights draft a report to review the human rights practice of sexual minorities across the world in compliance with the Vienna Declaration and Programme of Action. The resolution passed with 34 votes in favour, 19 votes against and 3 abstentions.⁶¹⁸ It should be noted that China, along with Burkina Faso and Zambia abstained in this vote.⁶¹⁹ This Human Rights resolution was highly praised as the first such resolution within the UN human rights system historically.

The resulting report of the UN High Commissioner for Human Rights, entitled *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on their Sexual Orientation and Gender Identity* was submitted to the Human Rights Council in November 2011.⁶²⁰ This was the first legal document in the UN human rights law exclusively and entirely addressing sexual orientation and gender identity human rights issues. It outlined the guiding principles, including universality, equality, and non-discrimination, and then detailed the five main state obligations under international human rights law:

- 1) to protect right to life, liberty and security of persons irrespective sexual orientation or gender identity;
- 2) to prevent torture and other cruel, inhuman or degrading treatment on ground of sexual orientation or gender identity;
- 3) to protect the right to privacy and against arbitrary detention on the basis of sexual orientation or gender identity;
- 4) to protect individual from discrimination on grounds of sexual orientation and gender identity; and

⁶¹⁷ *Supra* note 3.

⁶¹⁸ *Supra* note 4.

⁶¹⁹ *Ibid.*

⁶²⁰ *Supra* note 5.

- 5) to protect the right to freedom of expression, association and assembly in non-discrimination manner.⁶²¹

The report documented human rights violations on ground of sexual orientation worldwide including violence, discriminatory laws, and practices. The UN High Commissioner for Human Rights concluded the report by calling on member states to promptly and effectively investigate and record incidents of hate crime; and to repeal laws criminalizing homosexuality, inequitable ages of consent, and other discriminatory laws on basis of sexual orientation.

D. The Yogyakarta Principles

In 2006, a distinguished group of international human rights experts met in Yogyakarta, Indonesia to outline a set of international principles relating to sexual orientation and gender identity, which have become known as the Yogyakarta Principles. The 29 member panel included one former UN High Commissioner for Human Rights, 13 current or former UN human rights Special Rapporteurs or treaty body members, two judges of domestic courts and legal academics and activists.⁶²²

The Yogyakarta Principles affirm that discrimination against anyone on the grounds of sexual orientation or gender identity is a human rights violation.⁶²³ It does not attempt to create new rights, but interprets how the current international human rights law is to be applied in relation to sexual minorities. It also reaffirms that it is the State's duty to implement the legal obligation. According to the Michael O'Flaherty and John Fisher's summary, the Yogyakarta Principles address concerns on various aspects in response to the patterns of human rights abuse based on sexual orientation or gender identity:

- Principles 1 to 3 set out the universality of human rights and their application to all persons without discrimination, as well as the right of all people to recognition before the law;

⁶²¹ *Ibid* at 5-8.

⁶²² *The Yogyakarta Principles, supra* note 23.

⁶²³ *Ibid*, at Preamble.

- Principles 4 to 11 address fundamental rights to life, freedom from violence and torture, privacy, access to justice and freedom from arbitrary detention;
- Principles 12 to 18 set out the importance of nondiscrimination in the enjoyment of economic, social and cultural rights, including employment, accommodation, social security, education and health;
- Principles 19 to 20 emphasize the importance of the freedom to express oneself, one's identity and one's sexuality, without State interference based on sexual orientation or gender identity, including the rights to participate peaceably in public assemblies and events and otherwise associate in community with others;
- Principles 22 and 23 highlight the right to seek asylum from persecution based on sexual orientation or gender identity;
- Principles 24 to 26 address the right to participate in family life, public affairs and the cultural life of their community, without discrimination based on sexual orientation or gender identity;
- Principle 27 recognises the right to defend and promote human rights without discrimination based on sexual orientation and gender identity, and the obligation of States to ensure the protection of human rights' defenders working in these areas; and
- Principles 28 and 29 affirm the importance of holding rights' violators accountable, and ensuring appropriate redress for those who face rights' violations.⁶²⁴

Although it is not a binding legal document, the Yogyakarta Principles have been adopted by states and international organizations as guidelines on how to deal with human rights violations related to sexual orientation and gender identity in legal practice. Following the launch of the Yogyakarta Principles, the Czech Republic, Switzerland, Denmark, Finland, Iceland, Sweden and Norway, Slovenia and Ireland respectively have cited the Yogyakarta Principles in 2007 and 2008 during proceedings of the Human Rights Council.⁶²⁵ Also, the 2007 Annual Report on Human Rights in the World published by the European Parliament also "refers to Yogyakarta principles: '...fully supports the Yogyakarta Principles on the application of international human rights law in relation to

⁶²⁴ O'Flaherty & Fisher, *supra* note 165 at 234-235.

⁶²⁵ "Human Rights Council Document", the Principles In Action, online: <<http://www.ypinaction.org/>>.

sexual orientation and gender identity.”⁶²⁶ At the national level, the Finnish government made references to the Yogyakarta Principles for their policy development in the 2010 Universal Periodic Review.⁶²⁷ In India, the High Court of Delhi referred Yogyakarta Principles in response to challenges to the Criminal Code criminalizing non-heterosexual sex in the case of *Naz Foundation v Government of NCT of Delhi*.⁶²⁸ Although the two member bench of the Supreme Court of India overturned the decision of the Delhi High Court in December 2013 by ruling that it should be Parliament’s role as opposed to a court to change a law, the Supreme Court of India will consider granting rehearing this case in 2014.⁶²⁹ Thus it can be seen that the Yogyakarta Principles has been a significant human rights development for sexual minorities and it continues to establish a standard to measure the application of various human rights for sexual minorities in UN member states.

E. Conclusion

The chapter examined sexual orientation human rights development in international human rights law. Without any explicit provisions protecting sexual orientation in any of the main UN human right instruments, the early development was relatively slow prior to the 1990s. In the 1990s, sexual orientation human rights law began to develop rapidly.

Since HRC’s landmark decisions in *Toonen v Australia* in 1994, which ruled that sexual orientation was one of prohibited ground against discrimination under the ICCPR, nearly all of the UN treaty bodies have addressed human violations relating to sexual orientation and gradually recognized the human rights protection in their respective treaties

⁶²⁶ EC, *Annual Report on Human Rights in the World 2007 and the European Union's Policy on the Matter*, [2009] OJ, C 271 E/7, at para 142.

⁶²⁷ *Recommendations Received by Finland During the Consideration of its Human Rights Situation by the Working Group on the Universal Periodic Review In March 2008, and the Actions Undertaken by the Government of Finland in Response to these Recommendations*, 14th Session of the Human Rights Council; Item 6 – Universal Periodic Review, 11 June 2010, online: Universal Periodic Review <<http://lib.ohchr.org/HRBodies/UPR>>.

⁶²⁸ *Naz Foundation v Government of NCT of Delhi* (2009), WP(C) No.7455/2001, High Court of Delhi, online: the Principles In Action <<http://ypinaction.org/>>.

⁶²⁹ *Suresh Kumar Koushal and another v NAZ Foundation and others*, Civil Appeal No. 10972 of 2013, at 97; *NAZ Foundation Trust v Suesh Kumar Koushal and Others, Record Proceeding*, 22 April 2014, CU.P.(C) 88-102/14, online: JIS India <<http://courtnic.nic.in>>.

apply to sexual minorities. Furthermore, a variety of Special Rapporteurs have also raised awareness of the serious human rights violations on the grounds of sexual orientation occurring around the world.

This revolutionary journey has also followed the pattern advanced by Kees Waaldijk in his research on the standard sequences in the legal recognition of sexual minorities based on European law. First, the HRC relied on the privacy protection to rule the legislation criminalizing the male same-sex acts violate the ICCPR. The following cases focused on equal rights regardless of sexual orientation in the public context, such as employment, social benefits, and family rights by relying on the non-discrimination principle. Equality and non-discrimination became the dominant principle guiding sexual minority rights development after privacy protection helped decriminalize same-sex behaviour between consenting adults.

During this process, massive opposition to the universality claim of human rights for sexual minorities was seen at the UN. One of the greatest obstacles in the struggle for sexual minority rights was the cultural relativism argument, which considers the issue of sexual orientation as a social and cultural issue rather than universal human rights issues, and therefore the UN should not intervene in this matter. The champions of this opposition are mainly from Islamic countries. However, the political opinion of sexual minority rights from Asia has not been supportive either. Apart from Japan, many Asian countries oppose or simply do not support the notion that universal human rights apply to sexual minorities. Asian Values, discussed earlier in Chapter One, has been one of the justifications for opposing sexual orientation human rights for these Asian countries. Due in part to this opposition, the HRC also made a compromise with regard to same-sex marriage. While deciding that benefits available to unmarried heterosexual couples must also be available for unmarried same-sex couples (*Young v Australia*), the HRC ruled that marriage, as defined in the ICCPR, is limited to opposite-sex couples (*Joslin v New Zealand*).

These events have been followed by proactive member states adopting different

strategies to raise this issue in various UN arenas. Brazil proposed a resolution for sexual orientation right but it encountered strong resistance, which resulted in Brazil abandoning its proposal in 2005. Learning the lessons from the Brazilian proposal, France and Argentina avoided the direct vote in the UN and delivered a historical Statement on the human rights, sexual orientation and gender identity in the UN General Assembly in 2008. This was met by an opposing statements delivered by Syria, fearing creating “new” human rights for sexual minorities, and by the Holy See, which was concerned that the statement could lead to same-sex marriage.⁶³⁰ In 2011, the international community saw another historical victory after passing the first Resolution of HRC requesting a report on the human rights practice regarding sexual minorities across the world. In addition, the launch of the Yogyakarta Principles in 2007 has been influential among States and international organizations and has helped shape international human rights law by providing guidelines on how to deal with human rights violations related to sexual orientation and gender identity in legal practice.

China’s position with regard to human rights for sexual minorities has changed slightly based on China’s voting history in recent UN resolutions. China opposed the Brazilian proposal by voting to postpone it in 2003. However, in 2008 UN Joint Statement to support sexual minority, and 2011 statement delivered to Human Rights Council, China abstained. Although it is a good sign that Chinese authority did not take strong opposing view, it confirms the China’s authorities’ repressive indifference policy: it has not changed any laws to respond to massive discrimination on sexual minorities and has not supported officially tongzhi rights. We will review whether the impact that these developments will have in China’s policy of repressive indifference in the following chapter.

⁶³⁰ UN General Assembly, Official Records, UN Doc A/63/PV.71 (18 December 2008): Holy See.

Chapter Four

Sexual Orientation Protection in European Human Rights Law

A. Introduction

It can be seen that a regional human rights law can play an important role in domestic laws in state members. This chapter examines the development of sexual orientation human rights under the European human rights system, and how this development has affected domestic legal reform in member states, which provides basics for further analysis on whether the Association of Southeast Asian Nations, the only regional international organization in Asia, will push China to pass tongzhi rights legislation *infra*. This chapter also looks at the legislative developmental pattern in the European system, which provides insights for strategic thinking whether tongzhi rights movement can take the same path *infra*.

The first section starts with the introduction to the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR). The right to privacy and the non-discrimination principle in the ECHR are the main guiding principles adopted by the European Court of Human Rights (ECtHR) to deal with the sexual orientation human rights cases.

The next section of this chapter gives a detailed study of the case law related to sexual minority rights under the ECHR. In particular, it highlights how the main guiding principles (privacy and non-discrimination) were interpreted to recognize sexual minority rights in different areas, such as criminal law, employment and family law.

The subsequent section reviews the corresponding human right legislative development in the Council of Europe (COE) and European Union (EU) under the influence of the case law in the ECHR. The recommendations, resolutions, and directives adopted by the COE and the EU cover many fields to ensure the equality and non-discrimination protection for sexual minorities. It should be noted that the decisions

delivered by the ECtHR and a variety of recommendations, resolutions, and directives adopted by the COE and the EU are binding on their member states. The following section explores how these international human rights laws in Europe promote or push the domestic legal reform in member states or even applicant states to these organizations.

The last section of this chapter presents a comparative study between the UN human rights law system and the European human rights law system. The similar pattern in the application of the principles of privacy protection and non-discrimination is found in both systems. Generally speaking, human rights protection for sexual orientation in Europe has been accelerating faster than any other region in the world. This is largely due to the binding power that the ECtHR has on the domestic laws of the EU members States, which has helped advance the legal reforms regarding sexual orientation rights throughout Europe.

B. Jurisprudence regarding Sexual Orientation Rights under the ECHR

1. Overview of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*

The ECHR is one of the important regional human rights instruments that have established a mature human rights system on a regional basis. The ECHR is a regional international treaty signed and ratified by the 47 member states of the COE.⁶³¹ The COE is responsible for the ECHR that came into force in the 1950s. Founded in 1949, the COE, separate from the EU, is a broad political organization aiming towards European integration.⁶³² All the EU member states have ratified the ECHR, and now, the EU is under process of acceding to the ECHR.⁶³³ In the event of the EU's accession, individual

⁶³¹ "47 Countries – 800 million citizens – Council of Europe", online: Council of Europe <<http://hub.coe.int/>>.

⁶³² "Who we are", online: Council of Europe <<http://hub.coe.int/>>.

⁶³³ "European Convention on Human Rights, Accession of the European Union", online: Council of Europe, <<http://hub.coe.int/what-we-do/human-rights/eu-accession-to-the-convention>>. As of May 4, 2013, according to the press release, negotiators of the 47 Council of Europe member states and the EU have finalised the draft accession agreement of the EU to the European Convention on Human rights.

applications could bring cases directly against the EU and it will be treated in the same way as applications against any other State Party to the ECHR.⁶³⁴

The ECHR has comprehensive provisions concerning the protection of basic human rights and fundamental freedoms for everyone within the jurisdiction of any member state. It also plays a leading role in human rights protection in the world to date. The human rights stipulated in the ECHR include the right to life, to protection against torture and inhuman treatment, to freedom and safety, to a fair trial, to respect for private and family life, to freedom of expression (including freedom of the press), thought, conscience, and religion, and to freedom of peaceful assembly and association.⁶³⁵ Non-discrimination and equality are also important principles recognized in the ECHR. The judicial bodies of the COE, the European Commission on Human Rights⁶³⁶ and the ECtHR hear cases under the ECHR, which has developed a substantial volume of case law. With over 60 years of operation and jurisprudence, the ECHR have become the most important standard for human rights protection in Europe.

Although there are no explicit stipulations regarding sexual orientation protection within the ECHR, the ECHR judicial bodies have recognized sexual orientation human rights in a variety of fields by focusing on article 8's right of privacy and family life, and the right to non-discrimination contained in article 14 of the ECHR and article 1 of Protocol 12 to ECHR. Article 8 states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.⁶³⁷

⁶³⁴ *Ibid.*

⁶³⁵ ECHR, *supra* note 72 at 223.

⁶³⁶ The now defunct European Commission on Human Rights heard cases under the ECHR until 1999.

⁶³⁷ ECHR, *supra* note 72 at Art 8.

The right to privacy is a fundamental human right for sexual minorities. Sexuality and sexual life are at the core of such a fundamental right, therefore state intervention is justified only if demonstrably necessary to prevent damage to others, and thus, the moral convictions of a majority cannot justify the interference. The strategy of privacy protection was successful in gaining human rights protection for gays and lesbians in the criminal sector at the early stage due to the absence of a general equality provision in the ECHR, as seen in some of the early ECtHR decisions such as *Dudgeon v the United Kingdom*, which will be discussed in detail below.⁶³⁸ Despite the decriminalization of same-sex conducts, the doctrine of privacy in the ECHR also made a significant contribution to equalizing the ages of consent between heterosexual and same-sex sexual activities, and granting the permission of non-sado-masochistic group sexual activity in private.

The prevailing principle for protection of LGBTs at present in international human rights laws is the principle of non-discrimination and equality, which is enshrined in article 14 of the ECHR and article 1 of Protocol 12 to the ECHR. Article 14 of the ECHR states:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.⁶³⁹

Article 1 of Protocol 12 to the ECHR states:

1. The enjoyment of any rights set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.⁶⁴⁰

⁶³⁸ Sanders, *supra* note 458 at 15.

⁶³⁹ ECHR, *supra* note 72, at art. 14.

⁶⁴⁰ *Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 11 April 2000, Rome, 4.XI.2000, ETS 177, at art. 1.

Although the two provisions are similar, the scopes of their application are different. Article 14 of the ECHR has the nature of “autonomous but accessory” therefore it is likely reviewed only in conjunction with other Convention provisions.⁶⁴¹ The ECtHR explained the nature of article 14 in *Rasmussen v Denmark*:

Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded by those provisions. Although the application of Article 14 does not necessarily presuppose a breach of those provisions-and to this extent it has an autonomous meaning-, there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter.⁶⁴²

As a result, in order to strengthen the ECHR’s protection of equality and non-discrimination in a broader scope, the COE’s Steering Committee for Human Rights initiated Protocol 12 including a general independent non-discrimination article, i.e., article 1 of Protocol 12. The purpose of the new Protocol was to broaden in a general fashion the field of application of article 14.”⁶⁴³

Similar to the ICCPR, these two provisions do not explicitly include “sexual orientation” as a protected category. However, like the UN HRC has done with interpreting the ICCPR, so too has the ECtHR and European Commission on Human rights recognized sexual orientation as a prohibited discriminatory ground in their case law.⁶⁴⁴ From the following case studies, it can be seen that the ECtHR has taken a leading role in the recognition of human rights for sexual minorities, in a variety of specific fields, such as, criminal laws, employment law (including military service), parental rights, and partnerships rights. The detailed examination of these cases provides a brief description of the path on how sexual orientation human rights were developed under the European

⁶⁴¹ Arnardottir, *supra* note 136 at 35.

⁶⁴² *Rasmussen v Denmark* (1984), 87 ECHR (Ser A) 1.

⁶⁴³ Council of Europe, *Explanatory Report of Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, CETS No.: 177,(Rome:EC, 2000), at para 10.

⁶⁴⁴ *Infra* note 659.

regional human rights system, and its effect at a national level in transforming domestic laws throughout Europe.

2. Criminal Law

a. Ban on same-sex activity

The first wave of litigations challenging sexual orientation discrimination began in the criminal law field, arguing for the decriminalization of the same-sex acts and the equal age of consent for same-sex sexual activities and opposite-sex sexual activities. *Dudgeon v the United Kingdom*⁶⁴⁵ was the first successful case heard by the ECtHR dealing with the criminalization of same-sex conduct in Northern Ireland in 1981. Although the United Kingdom had decriminalized consensual sex between men in England and Wales in 1967, Northern Ireland still prohibited such activities in its criminal law. Jeffrey Dudgeon, a gay activist, challenged this law claiming that it violated his right to privacy. The Court found no difficulty in ruling that this law violated the right to privacy guaranteed in article 8 of the ECHR because such laws were out of step with other European countries by that time.⁶⁴⁶ The Court also rejected Northern Ireland's justification of interference for "the protection of the rights and freedoms of others" and "protection of morals" aims.⁶⁴⁷ The Court further ruled that in the case law relevant to restrictions concerning "a most intimate part of an individual's private life", there must exist "particularly serious reasons" to justify the interference with private rights.⁶⁴⁸

The European human rights system was pioneering for its time with respect to sexual orientation rights; it took the UN human rights system another 13 years before a similar judgment to *Dudgeon* was made by the HRC in *Toonen v Australia*. After *Dudgeon*, the ECtHR made similar judgments in *Norris v Iceland*⁶⁴⁹ in 1988 and *Modinos v Cyprus*⁶⁵⁰

⁶⁴⁵ *Dudgeon v the United Kingdom* (1981), 45 ECHR (Ser A) 1.

⁶⁴⁶ *Ibid* at para 40.

⁶⁴⁷ *Ibid* at para 57-61.

⁶⁴⁸ *Ibid* at para 52.

⁶⁴⁹ *Norris v Ireland* (1988), 142 ECHR (Ser A) 1.

in 1993, both cases ruling that the criminalization of same-sex activity was a violation of the privacy protection in article 8 of the ECHR. Following these decisions, Iceland and Cyprus repealed the offending provisions in their criminal laws, thereby legalizing same-sex acts.

b. Unequal Ages of Consent for Homosexual Activity

The issue of different ages of consent between heterosexual and same-sex activity was challenged under the protection of privacy and non-discrimination provisions in the ECHR. It was not until 1997 that the first successful case regarding unequal age of consent was heard by the European Commission of Human Rights in *Sutherland v United Kingdom*. The Commission adopted the privacy reasoning to strike down an unequal age of consent for same-sex and heterosexual acts.⁶⁵¹ It also referred to the depathologization of homosexuality by the World Health Organization,⁶⁵² and concluded that the law “might inhibit efforts to improve the sexual health of young gay and bisexual men.”⁶⁵³ In 2000, the United Kingdom passed the *Sexual Offences (Amendment) Act* equalizing the age of consent for homosexual acts between consenting males to 16, and therefore the ECtHR decided to strike out the case from its list.⁶⁵⁴

The ECtHR also came to the same conclusion in the similar cases of *L. and V. v Austria* (2003)⁶⁵⁵ and *S.L. v Austria* (2003)⁶⁵⁶ with regard to issue of the age of consent for same-sex acts. Austria argued that the law was intended to protect a young, maturing person “from developing sexually in the wrong way.”⁶⁵⁷ The ECtHR found it could not “amount to sufficient justification for the differential treatment any more than similar

⁶⁵⁰ *Modinos v Cyprus* (1993), 259 ECHR(Ser A) 1.

⁶⁵¹ *Sutherland v the United Kingdom* (1997), 7 Eur Comm’n HR 1.

⁶⁵² The World Health Organization deleted homosexuality from its international Classification of Diseases in 1993.

⁶⁵³ *Sutherland*, *supra* note 651 at para 59.

⁶⁵⁴ *Sutherland v the United Kingdom* [GC] (striking out), No 25186/94 (27 March 2001).

⁶⁵⁵ *L and V v Austria*, No 39392/98, [2003], I ECHR 29.

⁶⁵⁶ *SL v Austria*, No 45330/99, [2003] I ECHR 71.

⁶⁵⁷ *Ibid* at para 17.

negative attitudes towards those of a different race, origin or colour” because it “embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority.”⁶⁵⁸ The Court in *S.L. v. Austria* emphasized that “sexual orientation is a concept covered by article 14...Just like difference [in treatment] based on sex,... differences based on sexual orientation require particularly serious reasons by way of justification.”⁶⁵⁹

c. Ban on Group Sexual Activities in Private

In *A.D.T. v the United Kingdom*,⁶⁶⁰ the applicant was charged with gross indecency due to having homosexual activities with up to four other men in private. The existing legislation in the UK regarded consensual sexual behaviours between more than two men in private as gross indecency for the purpose of protecting morals and protecting the rights and freedom of others.⁶⁶¹ The ECtHR first affirmed that the aim of the legislation was legitimate.⁶⁶² However, the Court found that the applicant had no intention to expose these acts or the taped recording of these acts to the public domain; therefore, these consensual sexual behaviours should be in the scope of the ECHR’s privacy protection.⁶⁶³ The interference with these private sexual behaviours could not be justified in accordance with the purpose of the legislation, and so this legislation violated the applicant’s right to respect for his privacy.⁶⁶⁴

It should be noted that the right to privacy in article 8 of the ECHR does not protect consensual sado-masochistic sexual activities. In the case of *Laskey, Jaggard and Brown v the United Kingdom*,⁶⁶⁵ a group of gay men were imprisoned after the police discovered video tapes depicting these men engaging in consensual sado-masochistic acts in private.

⁶⁵⁸ *Ibid* at para 44.

⁶⁵⁹ *SL v Austria*, *supra* note 656, at para 37.

⁶⁶⁰ *ADT v the United Kingdom*, No 35765/97, [2000] IX ECHR 295.

⁶⁶¹ *Ibid* at para 12.

⁶⁶² *Ibid* at para 37.

⁶⁶³ *Ibid* at para 38-39.

⁶⁶⁴ *Ibid*.

⁶⁶⁵ *Laskey, Jaggard and Brown v the United Kingdom*, No. 21627/93; 21628/93; 21974/93 (19 February 1997), online: HUDOC <hudoc.echr.coe.int>.

Like *A.D.T.*, the ECtHR found that the aim of legislation, which was the *protection of health or morals*, was legitimate.⁶⁶⁶ However, unlike *A.D.T.*, the Court held that the applicants' behaviour was not included as private protection and not exempted from the State's intervention due to the physical injury that result from such behaviour.⁶⁶⁷ Thus the Court concluded the interference was justified and that there had been no violation of article 8 of the ECHR.⁶⁶⁸

It is likely that other discrimination by criminal law against private, non-commercial consenting same-sex sexual activities without involving any physical harm, is held as violating article 8 (respect for private life) on its own or with article 14.

3. Employment

Privacy arguments were also successful in conjunction with the principle of non-discrimination protection in cases concerning a ban on military recruitment for homosexuals: *Lustig-Prean and Beckett v the United Kingdom* (1999),⁶⁶⁹ *Smith and Grady v the United Kingdom* (1999),⁶⁷⁰ and *Perkin and R v the United Kingdom* (2002).⁶⁷¹

Lustig-Prean is one of the early cases within international human rights law systems dealing with this controversial subject. *Lustig-Prean* was a British naval official who was discharged after his sexual orientation was discovered.⁶⁷² He challenged that the Military Police's investigation into his sexuality violated his right to privacy under article 8 of the ECHR, and that his dismissal, which was solely based on his homosexuality, breached the right to non-discrimination in article 14 of the ECHR.⁶⁷³

The Court mainly scrutinized article 8, right to respect for private life, and held there

⁶⁶⁶ *Ibid.*, at para 42.

⁶⁶⁷ *Ibid.*, at para 45.

⁶⁶⁸ *Ibid.*, at para 50-51.

⁶⁶⁹ *Lustig-Prean and Beckett v the United Kingdom*, No31417/96 (27 September 1999), online: HUDOC, <<http://hudoc.echr.coe.int/>>. [Lustig-Prean]

⁶⁷⁰ *Smith and Grady v the United Kingdom*, No33985/961999,[1999] VI ECHR 45.[Smith and Grady]

⁶⁷¹ *Perkins and R v the United Kingdom*, No 43208/98, (22 October 2002).[Perkin]

⁶⁷² *Lustig-prean*, *supra* note 669, at para 11-16.

⁶⁷³ *Ibid.*, at para 62 and 102.

was no separate issue of article 14 in this case.⁶⁷⁴ The Court had no difficulty in concluding the investigation process was intrusive and offensive in terms of the detailed questions being asked about the applications' particular sexual practices and preference.⁶⁷⁵ By taking account of the policy advanced by the government, the Court ruled that there were no convincing and weighty reasons to justify the interference with the privacy right in this case.⁶⁷⁶ The Court affirmed that "a predisposed bias on the part of a heterosexual majority against a homosexual minority, their negative attitudes cannot ... amount to sufficient justification for interference with the applicants' rights."⁶⁷⁷ The ECtHR upheld the applicant's allegation and decided that inquiries into sexual orientation and dismissals based on one's sexuality violated article 8.

The same reasoning while addressing the State's justification was adopted in *Smith and Grady* and *Perkin*. The Court reiterates in *Smith and Grady*:

To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes [of heterosexual members of the armed forces] cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the [sexual orientation] rights...any more than similar negative attitude towards those of a different race, origin or colour.⁶⁷⁸

It can be concluded that so-called mainstream heterosexual people's negative attitude against the sexual minorities cannot be a *convincing and weighty* reason for discrimination against sexual minorities. Although these cases addressed the narrow military context where the Court did not find that such interference pursue a well-defined legitimate aim of "the interests of national security" and "the prevention of disorder",⁶⁷⁹ therefore it will be difficult to advance convincing and weighty reasons for dismissal on ground of sexual

⁶⁷⁴ *Ibid* at para 109.

⁶⁷⁵ *Ibid*, at paras 84-86.

⁶⁷⁶ *Ibid*, at para 90.

⁶⁷⁷ *Ibid*.

⁶⁷⁸ *Smith and Grady*, *supra* note 670 at para 97.

⁶⁷⁹ *Ibid* at para 74.

orientation in the general employment context.

4. Parenting Rights

a. Child Custody

In *Salgueiro Da Silva Mouta v Portugal*,⁶⁸⁰ Mr. Mouta was granted access to his child after divorce with his ex-wife.⁶⁸¹ However, his ex-wife did not comply with the agreement by refusing to grant Mr. Mouta his visiting rights with their daughter.⁶⁸² The Lisbon Family Affairs Court awarded Mr. Mouta's rights to visit at the first trial.⁶⁸³ But the Lisbon Court of Appeal in Portugal denied granting the applicant child custody based on two grounds, namely the best interest of the child and the fact that the applicant was a homosexual and cohabitating with another man.⁶⁸⁴ Then Mr. Mouta brought an application to the ECtHR and claimed that the judgment of Lisbon Court violated article 8 and article 14 of the ECHR.⁶⁸⁵

The ECtHR first held that there was a difference in treatment between the applicant and his ex-wife based on the applicant's sexual orientation, which triggered the non-discrimination test under article 14 of the Convention.⁶⁸⁶ If the State could not have an objective or reasonable justification, namely, whether there was a legitimate aim or reasonable relationship of proportionality between the means employed and the aim sought to be realized, it could amount to discrimination that was not acceptable under the Convention.⁶⁸⁷ During the test, the ECtHR accepted that the protection of the child's health and the child's rights were legitimate aims.⁶⁸⁸

Then the Court examined whether the Lisbon court's comments regarding the

⁶⁸⁰ *Salgueiro da Silva Mouta v Portugal*, No 33290/96,[1999] IX ECHR 309.

⁶⁸¹ *Ibid* at para 10.

⁶⁸² *Ibid*.

⁶⁸³ *Ibid* at para 12.

⁶⁸⁴ *Ibid* at para 14.

⁶⁸⁵ *Ibid* at para 23-24.

⁶⁸⁶ *Ibid* at para 27-28.

⁶⁸⁷ *Ibid* at para 29.

⁶⁸⁸ *Ibid* at para 30.

applicant's homosexuality was mere *obiter dictum* (i.e., not the rationale behind the court's decisions) or whether it was a decisive factor.⁶⁸⁹ The Lisbon court had stated that "the child must live in a traditional Portuguese family" and "it is unnecessary to examine whether or not homosexuality is an illness or sexual orientation towards people of the same sex. Either way, it is an abnormality and children must not grow up in the shadow of abnormal situations."⁶⁹⁰ After reviewing these statements, the ECtHR decided that applicant's sexual orientation was a decisive factor considered by the Lisbon court. The Court therefore held that there was a discrimination against sexual orientation that violated article 14 conjunction with article 8 of the EHCR.⁶⁹¹

In *Salgueiro Da Silva Mouta*, the Court reiterated that a distinction based on considerations of one's sexual orientation is not acceptable under the Convention.⁶⁹² Arnardottir, a law professor, argued that the victory in *Salgueiro Da Silva Mouta* was a logical development of an earlier series of ECtHR' cases concerning homosexuality commencing with *Dudgeon v the United Kingdom* in 1981.⁶⁹³ Many early judgments with regard to sexual orientation only concerned a violation of the right to privacy in article 8, but these early cases did not find it necessary to review the non-discrimination clause. Nevertheless, these early judgments were important because they promoted, to some extent, the acceptance of LGBTs. These cases have also helped the ECtHR apply the equality clause to cases of discrimination based on the ground of sexual orientation as *suspect category* that requires more *convincing and weighty reasons* to justify the discrimination.⁶⁹⁴

b. Adoption

Following *Salgueiro Da Silva Mouta*, there was a setback in the progressive

⁶⁸⁹ *Ibid* at para 33.

⁶⁹⁰ *Ibid* at para 14.

⁶⁹¹ *Ibid* at para 34-36.

⁶⁹² *Ibid* at para 36.

⁶⁹³ Arnardottir, *supra* note 136 , at 154.

⁶⁹⁴ *Ibid*.

development of gay parenting rights in *Fretté v France*⁶⁹⁵ in 2002, which represented the conflict between traditional concepts of family life and gay rights. Mr. Fretté, a gay man, was refused a prior authorization to adopt a child based on the ground that “the type of home that he was likely to offer a child could pose substantial risks to the child's development”, (and) “did not provide the requisite safeguards – from a child-rearing, psychological and family perspective – for adopting a child.”⁶⁹⁶ He claimed that denial amounted to discrimination on grounds of his sexual orientation.

The ECtHR did find that there had been a different treatment based on the applicant's sexual orientation, but it should consider the State's *margin of appreciation* that means “it was not for the Court to take the place of the national authorities and take a categorical decision on such a delicate issue by ordaining a single solution.”⁶⁹⁷ The Court ruled in this case, since there was little common ground between member states regarding the conditions for granting adoptions, a broad margin of appreciation should be given to the authorities of each State.⁶⁹⁸ With regard to the competing interests of the applicant and adoptable children, the Court made a comment that there was no certain scientific evidence to show a positive consequence of children being brought up by one or more gay parents, and therefore it should be more appropriate to give deference to the authorities in each State to evaluate the local conditions.⁶⁹⁹ It was apparent that the Court made a compromise with the so-called “best interest of the child” while considering gay adoption rights in this case.

Fortunately, this judgment was overruled a few years later in the similar case *E.B. v France*⁷⁰⁰ in 2008. E.B. was a lesbian who was refused her application to adopt a child by French authorities based on two grounds: first, the attitude of E.B.'s current partner; and,

⁶⁹⁵ *Fretté v France*, No 36515/97, [2002] I ECHR 303.

⁶⁹⁶ *Ibid* at para 16.

⁶⁹⁷ *Ibid* at para 36.

⁶⁹⁸ *Ibid* at para 41.

⁶⁹⁹ *Ibid* at para 42.

⁷⁰⁰ *EB v France* [GC], No 43536/02 (22 January 2008).

second, the lack of a paternal referent in the household. She brought an application to the ECtHR, claiming that this refusal amounted to discrimination on grounds of sexual orientation that was incompatible with article 14 in conjunction with article 8 of the ECHR.

The Court found that the attitude of the applicant's partner who lived in the same household was relevant in the assessment, and that the refusal based on the lack of the consent from her partner was reasonable. Regarding the second ground, the French authorities argued that it was also related to the needs and interests of an adopted child but not the applicant's sexual orientation. However, the Court decided that the applicant's sexual orientation was a decisive factor to refuse her application.⁷⁰¹ The Court further considered whether there was a reasonable relationship of proportionality existed between the means employed and the aim pursued.⁷⁰² It was hard for the French authorities to make out this justification because French law allowed for a single person to adopt a child without the necessity of a referent of the other sex, therefore the Court finally ruled the refusal violated article 14 and article 8 of the Convention.⁷⁰³ From this perspective, it can be concluded that, if it cannot be reasonably justified, any official refusal of an adoption application based on the grounds on the applicant's sexual orientation could amount to discrimination that is incompatible with the Convention.

It should be noted that in *E.B. v France* the Court did distinguish the situation in its case from the case of *Fretté v France*.⁷⁰⁴ By consideration of the paramount principle of the interest of the child, the Court noted there was a significant difference in this case, specifically, the fact that E.B. was in a stable relationship, unlike the applicant in the *Fretté* case, and thus, E.B. was not deemed to have "difficulties in envisaging the practical consequences of the upheaval occasioned by the arrival of child."⁷⁰⁵

The recent different two decisions concerning adoption rights for same-sex couples are

⁷⁰¹ *Ibid* at para 89.

⁷⁰² *Salgueiro da Silva Mouta*, *supra* note 680 at para 29-36.

⁷⁰³ *Ibid* at para 94.

⁷⁰⁴ *Fretté v France*, *supra* note 695.

⁷⁰⁵ *EB*, *supra* note 700 at para 28.

worthy to address here, *Gas and Dubois v France* (2012)⁷⁰⁶ and *X and Others v Austria* (2013)⁷⁰⁷. Both cases concerned second-parent adoption in a same-sex partnership, i.e., whether one of the same-sex partners should have the right to adopt the child of the other partner. Same-sex marriage is not available in both countries. In *Gas and Dubois v France*, the Court found that there has no evidence of difference in treatment based on the applicants' sexual orientation, as heterosexual couples who had entered into civil partnership were likewise prohibited from obtaining the similar adoption order.⁷⁰⁸ So the Court held that there had been no violation of article 14 taken in conjunction with article 8.⁷⁰⁹

In the case of *X and Others v Austria*, the Court differentiates three situations of adoptions: individual adoption, i.e, a person may wish to adopt on his or her own; second-parent adoption, i.e, one partner in a same-sex couple may wish to adopt the other partner's child; joint adoption, i.e, a same-sex couple may wish to adopt a child together.⁷¹⁰ The Court revisited the decisions of *Fretté v France*, *E.B. v France* and *Gas and Dubois v France*, and reiterated that “differences based on sexual orientation require particularly serious reasons by way of justification or, as is sometimes said, particularly convincing and weighty reasons”, “differences based solely on considerations of sexual orientation are unacceptable under the Convention.”, and “the State's margin of appreciation is narrow” under article 14.⁷¹¹

Different from *Gas and Dubois v France*, in this case, there has been difference in treatment between the applicants and an unmarried opposite-sex couple in granting an adoption order.⁷¹² The State failed to advance convincing reasons to justify such different

⁷⁰⁶ *Gas and Dubois v France*, No. 25951/07, (15 March 2012), online: HUDOC <<http://hudoc.echr.coe.int/>>.

⁷⁰⁷ *X and Others v Austria*, [GC] No. 19010/07, (19 February 23), online: HUDOC <<http://hudoc.echr.coe.int/>>.

⁷⁰⁸ *Gas and Dubois v France*, *supra* note 706, at para 63.

⁷⁰⁹ *Ibid*, at para 73.

⁷¹⁰ *Ibid*, at para 100.

⁷¹¹ *Ibid*, at para 99.[emphasized by author]

⁷¹² *Ibid*, at para 100.

treatments, so the Court held that there had been a violation of article 14 taken in conjunction with article 8.⁷¹³ However, in consideration of the difference between the applicants' situation with a married couple in the same adoption issue, the Court found no violation because the ECHR does not oblige States to extend the right to second-parent adoption to unmarried couples.⁷¹⁴ The Court also said that member states have a wide *margin of appreciation* in the sphere of adoption law for same-sex couples, because there was no consensus on the issue of second-parent adoption by same-sex couples among member countries.⁷¹⁵ The rationale is that a member country should treat unmarried heterosexual couples and same-sex couples equally, the ECHR does not obligate member countries to pass special protective legislation for LGBTs. This similar viewpoint will be seen in the following while addressing why the ECtHR refuses same-sex couples' claim for access to marriage.

5. Partnership Rights

Karner v Austria (2003)⁷¹⁶ is an important case in the recognition of same-sex partnership rights. Mr. Karner, an Austrian gay man who had lived with his same-sex partner in an apartment rented under his partner's name since 1989. His partner died in 1994 and designated Karner as his heir. However, the landlord of the apartment brought a process of termination of tenancy against Mr. Karner. The District Court and the Vienna Regional Civil Court dismissed the application of termination by interpreting the term "life companion" in the *Rent Act* should include same sex couples "who had lived together for a long time without being married against sudden homelessness".⁷¹⁷ However, the Supreme Court of Austria disagreed with these interpretations and upheld the termination of tenancy.

Based on the ruling of the Supreme Court of Austria, it constituted a different treatment

⁷¹³ *Ibid*, at para 132-153.

⁷¹⁴ *Ibid*, at para 105-110.

⁷¹⁵ *Ibid*, at para 147.

⁷¹⁶ *Karner v Austria*, No 40016/982003,[2003] IX ECHR, 199.

⁷¹⁷ *Ibid* at para 14.

between heterosexual and same-sex partners as heirs in terms of renting an apartment. The ECtHR reiterated that under article 14 of the ECHR the justification for differential treatment on the grounds of sexual orientation should have very *weighty reasons*. The issue in this case was whether there was a sufficient weighty reason required to justify such a distinction. The ECtHR accepted Austria's argument that the "protection of the traditional family unit" was a legitimate aim of the statute.⁷¹⁸ However, the Court found the government failed in the proportionality test because there were a broad variety of concrete measures to achieve this legitimate aim, instead of excluding all same-sex partners.⁷¹⁹ Thus, the Court ruled that the principle of non-discrimination stipulated in article 14 was violated due to the absence of convincing and weighty reasons to justify such difference. As such, *Karner* was a victory in same-sex relationship recognition in Europe.

In a more recent case, *Vallianatos and others v Greece* (2013),⁷²⁰ the Court held again the exclusion of same-sex couples from partnership registration violates article 14 and article 8 (right to respect for private and family life). In the decision, the Court found that the 19 States parties to the Convention granted some form of registered partnership other than marriage, while Lithuania and Greece are the only ones to reserve this exclusively to opposite sex couples.⁷²¹ Given the Greek government could not provide sufficient evidence to justify this restriction, the Court held that the exclusion is inconsistent with the Convention. It can be seen the ECtHR seems more comfortable with declaring violations in terms of facing the challenge on the restriction of partnership registration to same-sex couples due to the common practice in Europe, while this is not the case in same-sex marriage claims.

6. Same-sex Marriage

⁷¹⁸ *Ibid* at para 39.

⁷¹⁹ *Ibid* at para 41.

⁷²⁰ *Vallianatos and others v Greece*, no. 29381/09 and 32684/09, (7 November 2013), online: HUDOC<<http://hudoc.echr.coe.int/>>.

⁷²¹ *Ibid*, at para 91.

There has been an emerging tendency towards legal recognition of same-sex relationships in Europe in recent years. As of the August 2013, Belgium, Denmark, France, Iceland, the Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom (England and Wales) have legalized same-sex marriage.⁷²² In addition to same-sex marriage, many other European countries⁷²³ have adopted alternative means to provide different degrees of civil rights for same-sex partners, such as registered partnership or civil union. However, these alternative unions have different legal implications compared to same-sex marriage, and therefore some claims asking for marriage have also reached the ECtHR.

*Schalk and Kopf v Austria*⁷²⁴ is an important case that addresses the issue of same-sex marriage under the ECHR. In this case, it can be seen that equal protection under the non-discrimination principle did not guarantee the legalization of same-sex marriage. The Court held that the right to marry guaranteed by the Convention did not apply to same-sex couples.⁷²⁵ In this case, Horst Michael Schalk and Johann Franz Kopf were a same-sex couple residing in Austria. They were not permitted to marry on the grounds that marriage was only to be contracted between two persons of the opposite sex.⁷²⁶ Consequently, in 2004 they lodged an application to the ECtHR arguing that the right to marry in article 12 should be given to same-sex couples based on the principle of non-discrimination in Article 14 and the right to respect for one's private and family life under article 8.⁷²⁷ With regard to the first issue, whether the same-sex couples have the right to marry protected under the Convention, the ECtHR answered this questions in the negative.⁷²⁸ The Court first addressed that the absence of a requirement to procreate in civil marriages did not

⁷²² *Supra* note 10.

⁷²³ Andorra, Austria, Czech Republic, Finland, Germany, Greenland, Hungary, Ireland, Isle of Man, Jersey, Liechtenstein, Luxembourg, Slovenia, Switzerland, and the United Kingdom (Northern Ireland and Scotland).

⁷²⁴ *Schalk and Kopf v Austria*, No 30141/04, [2010] ECHR 97.

⁷²⁵ *Ibid.*, at para 61.

⁷²⁶ *Ibid.*, at para 3.

⁷²⁷ *Ibid.*, at para 39, 65 & 76.

⁷²⁸ *Ibid.*, at para 58.

necessarily allow for the conclusion that article 12 imposes an obligation on member states to grant marriage for the same-sex couples.⁷²⁹ The Court further interpreted that the ECHR does not limit the right to marry between two persons of the opposite sex, however it decided to leave the decision whether or not to allow same-sex marriage to member state's national legislation under the margin of appreciation.⁷³⁰ With respect to articles 14 and 8, the Court reaffirmed that different treatments based on sexual orientation required particularly weighty reasons for justification. Nevertheless, the Court reiterated that articles 14 and 8 could not force member states to provide access to marriage for same-sex couples, on the contrary, the States have a margin of appreciation to have alternative means of recognition.⁷³¹ Since the Austrian *Registered Partnership Act* came into effect in 2010, the applicants' same-sex relationship is now formally recognized by the State. However, it was not in the Court's mandate in *Schalk and Kopf* to examine whether such means would constitute a violation of article 14 taken in conjunction with article 8 of the ECHR by comparing the difference in treatment between a traditional marriage and a registered partnership.⁷³²

Schalk and Kopf is not a convincing decision. The ECtHR reaffirmed that the procreation of children was not a decisive element in a marriage, which is universally accepted. However, the Court failed to explain why equality protection under article 14 should not extend to same-sex marriage by merely indicating it is within the scope of national jurisdiction and adopting *margin of appreciation* as a shield.⁷³³ The Court's main point was the diverse social and cultural acceptance of same-sex marriage among member states and, therefore, the national authorities were the best decision makers to assess and respond to the needs of society.⁷³⁴ This rationale is clearly antithetical to the spirit of

⁷²⁹ *Ibid* at para 56 & 63.

⁷³⁰ *Ibid* at para 60.

⁷³¹ *Ibid* at para 108.

⁷³² *Ibid* at para 109.

⁷³³ *Ibid* at para 109.

⁷³⁴ *Ibid* at para 92.

universal human rights protection in international human rights law. Since the right to marry is a universal human right that everyone is entitled to enjoy, justifications based on cultural differences and state sovereign should not trump this basic human right. Furthermore, the Court failed to examine the substantial difference for the same sex couples with regard to parental rights caused by the alternative forms of relationship recognition by simply saying “the Court is not called upon in the present case to examine each and every one of these differences in detail.”⁷³⁵

As a result, the sexual orientation rights development in Europe is not linear, particularly with regard to equal rights to marry. The current human rights treaties do not guarantee the equal rights to marry to same-sex couples, which may be seen as a strong opposing viewpoint against the claim for same-sex marriage in China.

C. The Legislative Development within the Council of Europe and European Union

Beyond these significant judicial decisions, there have also been several important legislative developments promoting sexual orientation human rights at the Council of Europe (COE) and the European Union (EU). The ECHR, as the principal human rights law for Europe, has taken a guiding role on human rights legislative developments within the COE and the EU. With the increasing recognition of sexual orientation rights from the ECtHR’s case law, the COE and EU have made great contributions on promoting equality rights for gays and lesbians through the adoption of various recommendations, resolutions, and directives. The developments in this area are highlighted below.

1. The Development of Sexual Orientation Rights within the Council of Europe

The COE is comprised of 47 member states across Europe, and the Parliamentary Assembly of the COE, which acts as the COE’s legislative body, has adopted several

⁷³⁵ *Ibid* at para 109. Article 14 of *Registered Partnership Act*, explicitly prohibits the same-sex couples from adopting a child, even step-child adoption or artificial insemination.

recommendations and resolutions that address the issues of sexual orientation human rights.

The first official Recommendation of the Parliamentary Assembly of the COE addressing the issue of discrimination on ground of sexual orientation was made in 1981, which happened to be the same year as the *Dudgeon* decision under the ECtHR.⁷³⁶ In this Recommendation, the Parliamentary Assembly called on:

- (a) the World Health Organization to remove homosexuality from its list of diseases;
- (b) urging member states to decriminalize homosexual acts and apply equal ages of consent for homosexual and heterosexual acts and
- (c) seeking equal treatment for lesbians and gay men in employment.⁷³⁷

This Recommendation was one of most significant early international legislative documents addressing sexual orientation rights. However, the Recommendation fell short of addressing same-sex partnership or marriage, which likely had a negative impact on these same-sex partnership litigations at the ECtHR.

In 2000, the Parliament Assembly of the COE adopted another historical Recommendation calling for equality of lesbians and gay men.⁷³⁸ The 2000 Recommendations indentified some new unequal situations for sexual minorities, highlighting homophobia in schools, the medical profession, the armed forces and the police, and unequal treatment of sexual minorities in employment.⁷³⁹ Significantly, the 2000 Recommendation called for the recognition of same-sex partnerships with regard to the immigration rights, by indicating “immigration rules applying to couples should not differentiate between homosexual and heterosexual partners.”⁷⁴⁰ In response to this

⁷³⁶ Council of Europe, PA, 33rd Ordinary Sess, *Discrimination Against Homosexuals*, Texts Adopted, Rec 924 (1981).

⁷³⁷ Council of Europe, PA, 33rd Ordinary Sess, Texts Adopted, Rec 924 (1981) and Res 756 (1981).

⁷³⁸ Council of Europe, PA, 2000 Ordinary Sess (Third Part), *Situation of gays and lesbians in Council of Europe member states*, Documents vol 5, Doc 8755, (2000).

⁷³⁹ *Ibid.*

⁷⁴⁰ Council of Europe, PA, 24th Sitting, *Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of Council of Europe*, Texts Adopted, Rec 1470 (2000) at para 5.

Recommendation, the Committee of Ministers promised to take specific actions in member states' domestic law and practice through agreements. Importantly, the response of the Committee of Ministers claimed that "homosexuality can still give rise to powerful cultural reactions [...] but this is not a valid reason for governments or parliaments to remain passive."⁷⁴¹ With regards to the questions of asylum and immigration, the European Committee of Migration included this issue on its future agenda and considered developing a guideline for the treatment of homosexual refugees.⁷⁴²

In 2004, the Parliament Assembly of the COE adopted the Committee of Migration, Refugees and Population's Recommendation entitled *Human mobility and the right to family reunion* addressing the issue of human mobility in Europe.⁷⁴³ The Recommendation suggested that the right to family reunion derives from the right to family that is a fundamental right protected by the ICCPR and the ECHR. It also had a series of measures to protect fundamental human rights to family, and it interpreted the definition of family in a way that *same-sex partners* can be included.

In 2010, the Committee of Ministers of the COE adopted an historical Recommendation on *Measures to combat discrimination on grounds of sexual orientation or gender identity*.⁷⁴⁴ The Recommendation first reaffirms and specifies the case law of the ECtHR in protection of sexual orientation, and then addresses the various actions to combat discrimination for member states in general, including: the elimination of existing discriminatory legislative measures; the effective implementation of anti-discrimination

⁷⁴¹ Council of Europe, Committee of Ministers, the 765th meeting of the Minister's Deputies, *Final Reply to Situation of lesbians and gays in Council of Europe member states - Parliamentary Assembly Recommendation 1474 (2000)*, CM/AS(2001)Rec1474finalE, at para 7.

⁷⁴² Council of Europe, Committee of Ministers, the 744th meeting of the Minister's Deputies, *Final Reply to Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe - Parliamentary Assembly Recommendation 1470 (2000)*, CM/AS(2001)Rec1470finalE.

⁷⁴³ Council of Europe, Standing Committee of PA, 2004 session, *Recommendation 1686 (2004) Human mobility and the right to family reunion*, Texts Adopted, CM/Del/Dec(2004)908/3.1.

⁷⁴⁴ Council of Europe, Committee of Ministers, the 1081st meeting of the Ministers' Deputies, *Recommendation CM/Rec(2010)5 of Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity*, Documents, CM-Rec(2010)5E,(2010).

laws; the adoption of a comprehensive strategy aimed at tackling discriminatory or biased attitudes and behavior; effective access to legal remedies for victims of discrimination based on sexual orientation; and the dissemination of the Recommendation to educate the public and acceptance of review from the Committee of Ministers.⁷⁴⁵ The Recommendation details the rights where discrimination based on sexual orientation is prohibited, including: the right to life, security and protection from violence; freedom of association; freedom of expression and peaceful assembly; the right to respect for private and family life; the right to employment; the right to education; the right to health; the right to housing; the right to sports; and the right to seek asylum.⁷⁴⁶

2. The Development of Sexual Orientation Rights within the European Union (EU)

The EU is a separate legal entity from the COE. The EU is a regional economic cooperation union with 28 European countries as of December 2013.⁷⁴⁷ The respect for human rights is deemed to be at the core of the EU's mission, with article 2 stating:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member states in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.⁷⁴⁸

One way in which the EU ensures respect for human rights is by requiring all member states of the EU as well as candidate members to also be party to the ECHR.

With respect to sexual orientation rights, the EU has taken direct measures to protect sexual minorities. For instance, the *Treaty of Amsterdam* in 1997, which amended the *Treaty on European Union* in 1997, was the first international binding treaty that explicitly

⁷⁴⁵ *Ibid.*

⁷⁴⁶ *Ibid*, Appendix to Recommendation CM/Rec(2010)5.

⁷⁴⁷ "Europa – Countries", online: European Union<http://europa.eu/about-eu/countries/index_en.htm>.

⁷⁴⁸ *Consolidated version of the Treaty of European Union and the Treaty on the Functioning of the European Union*, 30 March 2010, OJ C 83/1 at 17 (art 2).

stipulates sexual orientation as a protected category covered by the anti-discrimination provision.⁷⁴⁹ The treaty empowered the EU to act against any discrimination on ground of sexual orientation:

The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin or belief, disability, age or sexual orientation.⁷⁵⁰

Earlier in 1993, the Committee on Civil Liberties and Internal Affairs of the European Parliament delivered a report called the *Roth Report*, which provided a detailed study on various types of discrimination against lesbians and gay men in the EU.⁷⁵¹ In response to the *Roth Report*, the EU Parliament passed a resolution on the abolition of all forms of sexual orientation discrimination in 1994, calling for member states to decriminalize same-sex acts, to take action against homophobic violence, to provide state-funding for homosexual social and cultural organizations, and to provide equal rights in social benefits, housing, adoption and marriage.⁷⁵²

The resolution was historical due to its unprecedented support for marriage or registered partnerships and equal access to adoption rights for same sex partners.⁷⁵³ At the time that the resolution was passed, registered partnerships for same-sex couples were legalized in only a few European states, and the even the countries favoring registered partnership laws also had restrictions on adoption for same-sex couples.⁷⁵⁴ Furthermore, the encouragement of recognizing and co-operating with lesbian and gay organizations was

⁷⁴⁹ *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts*, 2 October 1997, 1997 OJ (C 340), 37 ILM 56 (entered into force May 1, 1999) [Treaty of Amsterdam].

⁷⁵⁰ *Ibid* at art 6.a.2.

⁷⁵¹ Claudia Roth, *Report of the Committee on Civil Liberties and Internal Affairs on Equal Rights for Homosexuals and Lesbians in the European Community*, 1994, Doc_EN\RR\244\24467.

⁷⁵² EC, *Resolution on equal rights for homosexuals and lesbians in the European Community*, [1994] OJ C 61/40.

⁷⁵³ Sanders, *supra* note 458 at 20.

⁷⁵⁴ Denmark, Norway, Sweden and Iceland.

highly praised.⁷⁵⁵ A few years later, the EU Parliament reapproved this resolution in 1996 by reconfirming the need for member states to abolish all discrimination against homosexuals.⁷⁵⁶

In 2000 the EU Council⁷⁵⁷ adopted a binding Directive (Council Directive 2000/78/EC) establishing a general framework for equal treatment in employment and occupation. Besides the commonly prohibited grounds of gender, race and ethnic origin, this Directive aims to prohibit discrimination in employment on other grounds, specifically religion or belief, disability, age and sexual orientation. A difference of treatment on these grounds can only be justified in limited circumstances to meet the requirement of the legitimate objective and proportionality test, and such justification should be provided to the Commission.⁷⁵⁸ The Directive is binding upon the current member states in the EU, while the applicant states also are required to have completed national implementation of the Directive before joining the EU. It also provides detailed sanctions, implementation and report sections to ensure effective enforcement.

Also in 2000, the EU Parliament, Council and Commission of the EU proclaimed the *European Union Charter of Fundamental Rights* in Nice, France. Sexual orientation is explicitly stipulated as one of enumerated prohibited grounds of discrimination in article 21.⁷⁵⁹ The Charter has become legally binding on the member states with the entry into force of the *Treaty of Lisbon*, in December 2009.⁷⁶⁰

⁷⁵⁵ Sanders, *supra* note 458 at 20.

⁷⁵⁶ Committee on Civil Liberties and Internal Affairs, *Report on respect for human rights in the European Union*, (1996), EU Doc A4.0223/96.

⁷⁵⁷ “The European Council was created in 1974 with the intention of establishing an informal forum for discussion between Heads of State or Government. It rapidly developed into the body which fixed goals for the Union and set the course for achieving them, in all fields of EU activity. It acquired a formal status in the 1992 Treaty of Maastricht, which defined its function as providing the impetus and general political guidelines for the Union’s development. On 1 December 2009, with the entry into force of the Treaty of Lisbon, it became one of the seven institutions of the Union” (EC, “The Institution”, online: <<http://www.european-council.europa.eu/the-institution?lang=en>>).

⁷⁵⁸ EC, *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*, [2000] OJ, L303/16, at preface (23).

⁷⁵⁹ EC, *Charter of Fundamental Rights of Europe Union*, [2000] OJ, C 364/1, 2000/C 364/01, at art 21.

⁷⁶⁰ *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, 13 December 2007, 2007 OJ (C306), ILM 50, (entered into force 1 December 2009). [Treaty of

With respect to same-sex partnership rights, the EU adopted a mobility Directive (2004/38/EC) in July 2004, which was required to be incorporated into the national legislation of member states within a certain timeframe, and report to the EU.⁷⁶¹ Basically, the Directive adopted measures to protect EU citizens and their family members' right to move and reside freely within any member state. It interprets "family member", to include a same-sex partner of an EU citizen who has been registered under the laws of a member state.⁷⁶² It is the first EU law recognizing same-sex partners, which mandates the recognition of same-sex partners in all EU member states.

In February 2010, in the plenary session, the European Parliament adopted three reports on the accession to the EU for Croatia, the Former Yugoslav Republic of Macedonia, and Turkey. These three reports criticized the candidate states on discrimination on ground of sexual orientation, and called upon them to provide genuine protection to lesbian, gay, bisexual and transgender minorities. It finally reiterates the protection of all minorities is a non-negotiable condition to accede to the EU.⁷⁶³ These reports are also significant because they push the legislation in these candidate countries to support LGBT groups since they affirm that the decriminalizing homosexuality is a condition to join the EU.

D. Impact on Domestic Legal Development

1. Implementation of the decisions of the ECtHR

The decisions of the ECtHR have a two-fold impact in member states. First, the binding judgments have a direct legal consequence to the member state(s) involved in the litigation. Once the Court finds a violation, the correspondent member states must take all necessary measures, i.e., legislative reforms to prevent similar violations, and, where appropriate,

Lisbon]

⁷⁶¹ EC, *Directive 2004/38/EC of The European Parliament and of the Council of 29 April 2004*, [2004], OJ, L229/35 at art 39 &40.

⁷⁶² *Ibid* at Preface, (5).

⁷⁶³ "European Parliament reaffirms LGBT rights are a condition to join the European Union" (2 October 2010), online: European Union Commission on Sexual Orientation Law <<http://www.sexualorientationlaw.eu/index.html>>.

individual measures to erase the consequence of the violation for the individual(s) concerned.⁷⁶⁴ For instance, as follow-up to *Dudgeon v the United Kingdom*, the United Kingdom repealed its relevant provisions in the criminal law against same sex conduct.⁷⁶⁵ After *Salgueiro da Silva Mouta v Portugal*, Mr. Mouta's new application was re-examined in 1999, and the Portuguese authorities guaranteed no discrimination on the ground of sexual orientation in the re-assessment.⁷⁶⁶ In 2000, in response to the *Lustig-Pream and Beckett* and the *Smith and Grady* cases, the United Kingdom introduced *The Armed Forces Code of Social Conduct Policy Statement* lifting the ban on gays serving in the military.⁷⁶⁷

2. Enforcement of the Legislation in the COE and the EU

The COE and the EU devised a whole series of monitoring mechanisms to ensure compliance with the implementation of their respective Convention among its member states. Any domestic legislation in a member state in violation of the Convention, the COE and/or the EU could require the violation to be corrected. More directly, for the States seeking membership, the ratification of ECHR is a prerequisite. With respect to sexual orientation in particular, the applicant States are required to repeal any domestic anti-gay criminal laws, specify an equal age of consent for sexual activity and prohibit discrimination against sexual minorities before starting the application process.⁷⁶⁸ This is precisely what happened for Albania and Moldova, where both States had to repeal their total bans on homosexual acts before being admitted in the COE.⁷⁶⁹

⁷⁶⁴ "Supervision of the execution of judgments and decisions", online: Council of Europe <<http://hub.coe.int/web/coe-portal>>.

⁷⁶⁵ *Supra* note 645.

⁷⁶⁶ Council of Europe, Committee of Ministers, the 997th meeting of the Ministers' Deputies, *Execution of the judgment of the European Court of Human Rights Salgueiro da Silva Mouta against Portugal*, Resolution CM/ResDH(2007)89.

⁷⁶⁷ Council of Europe, Committee of Ministers, the 792nd meeting of the Ministers' Deputies, *Resolution concerning the judgments of the European Court of Human Rights of 27 September 1999 (final on 27 December 1999) and of 25 July 2000 (final on 25 October 2000) (Article 41) in the case of Lustig-Pream and Beckett against the United Kingdom*, ResDH(2002)34.

⁷⁶⁸ Sanders, *supra* note 458 at 17.

⁷⁶⁹ *Ibid.*

After the European Council adopted the binding Directive (Council Directive 2000/78/EC) requiring members States and applicant States to eliminate discriminatory laws on sexual orientation in employment, the 2005 report on Equality and Discrimination made by the European Commission showed 24 member states of the EU as well as the candidate countries of Romania and Bulgaria have already banned such discrimination in their national laws since 2000.⁷⁷⁰

As mentioned above, the binding Directive (2004/38/EC) regarding the right to mobility in member states adopted by the EU in 2004 interprets “family member” to include a same-sex partner, which to some extent has advanced the process of same-sex relationship recognition among the member states. For instance, following the implementation of that binding Directive, the United Kingdom and Spain passed national laws to provide an alternative means to legally recognize same-sex partnerships.⁷⁷¹ To date, Europe has a large number of states legalizing same-sex partnerships via a variety of legal forms.

In 2010, the European Union Agency for Fundamental Rights published a comparative legal report addressing the six major developments that occurred in the EU member states.⁷⁷² The major developments were found in the field of equal treatment in free movement and family reunification law. Austria, France, Hungary, Ireland, Luxembourg, Portugal and Spain had expanded or have planned to expand the definition of “family member” to include the sexual minorities.⁷⁷³ In terms of asylum for sexual minorities, an increasing number of member states explicitly provide for such protection.⁷⁷⁴ Another major development was seen in freedom of assembly. Specifically, pride marches in Poland,

⁷⁷⁰ European Commission, *Equality and non-discrimination Annual report* (April 2005), online: European Commission <<http://ec.europa.eu/old-address-ec.htm>>.

⁷⁷¹ The United Kingdom passed the Civil Partnership Act in 2004; In Spain, a bill was passed to legalize same-sex marriage in 2005.

⁷⁷² European Union Agency for Fundamental Rights, *Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity: 2010 update*, online: European Union Agency for Fundamental Rights <<http://fra.europa.eu/en>>.

⁷⁷³ *Ibid* at 45-56.

⁷⁷⁴ *Ibid* at 45-51.

Romania and Bulgaria were held successfully for their first time.⁷⁷⁵ There had also been an expansion of non-discrimination legislation protection for sexual minorities.⁷⁷⁶ The increase in protection against abuse and violence, including hate speech and hate crime were found in Greece, Lithuania, Slovenia and the United Kingdom.⁷⁷⁷ Furthermore, a number of member states also took actions to foster education and dialogue to increase awareness of sexual minorities' human rights in civil society, namely in Estonia, France, Germany, the Netherlands, Spain and the United Kingdom.⁷⁷⁸ It should be noted that some setbacks still occurred. In Lithuania the 2010 Baltic Pride was threatened with cancellation at short notice.⁷⁷⁹ In Bulgaria, Estonia and Romania, same-sex partnerships are still considered invalid, which makes it more difficult for same-sex partners or spouses to reunite.⁷⁸⁰

E. Comparative Study with UN Human Rights Law

It can be seen from the analysis above that Europe has a comprehensive regional human rights protections system for sexual minorities, while the development in the UN human rights system has been relatively slower. For instance, the ECtHR made its first important decision regarding sexual orientation human rights in 1981 (*Dudgeon v the United Kingdom*),⁷⁸¹ whereas the UN HRC made its groundbreaking decision for sexual orientation human rights for the UN human rights system in 1994 (*Toonen v Australia*).⁷⁸² Following *Toonen*, there have been a series of HRC decisions with regard to sexual orientation, and the principles of privacy protection and non-discrimination were adopted as the main principles guiding the development of sexual orientation human rights at the

⁷⁷⁵ *Ibid* at 32-33.

⁷⁷⁶ *Ibid* at 19-26.

⁷⁷⁷ *Ibid* at 40.

⁷⁷⁸ *Ibid* at 7.

⁷⁷⁹ *Ibid* at 33.

⁷⁸⁰ *Ibid* at 10.

⁷⁸¹ *Dudgeon v the United Kingdom*, *supra* note 645.

⁷⁸² *Toonen v Australia*, *supra* note 127.

UN.⁷⁸³ The other human rights treaty monitoring bodies in the UN also began to support the recognition of sexual orientation protection within their respective treaties. In the early part of the new century, the UN has seen a large number of dramatic developments. The Human Right Council endorsed the Yogyakarta Principles in 2007. The joint statement on Human Rights, Sexual Orientation and Gender Identity presented in the UN General Assembly in 2008 represented yet another significant victory for sexual orientation rights at the UN. In 2011 the Human Rights Council passed the first UN resolution regarding sexual orientation human rights, which requested the High Commissioner for Human Rights to conduct a review concerning the human rights practice of sexual minorities across the world. The resulting report, entitled *Discriminatory Laws and Practices and Acts of Violence against Individuals Based on their Sexual Orientation and Gender Identity*, was submitted to the Human Rights Council in December 2011.

Generally speaking, there are a number of similarities in the development of sexual orientation rights between these two human rights systems. The judicial or quasi-judicial bodies, i.e. the ECtHR and the HRC, played an icebreaking role in the recognition of sexual orientation protection in their respective human rights treaties. These two bodies delivered a series of decisions in favor of sexual orientation rights, and impelled further developments within their respective international organizations, which resulted in legal reforms in domestic legislation of numerous member states.

The judicial reasoning employed by both the ECtHR and the HRC during the developing of sexual orientation rights shared many similarities. Both groundbreaking victories (*Dudgeon* and *Toonen*) occurred by adopting privacy protection arguments. While the developments in Europe were relatively more rapid than in the UN human rights system, both have had similar results. To date, the ECtHR has stated explicitly that sexual orientation is a prohibited ground for discrimination and that sexual orientation should be

⁷⁸³ See above, e.g., *Young v Australia*, *supra* note 192; *X v Columbia*, *supra* note 507 and *Fedotova v Russian Federations*, *supra* note 515.

protected under the non-discrimination principle. Differences in treatment, according to the ECtHR, could only be justified by *weighty* reasons. Relying on the non-discrimination principle in conjunction with privacy protection, the ECtHR gradually expanded the equality protection for sexual minorities to employment, parental rights, and partnership rights. The developments in the HRC decisions have faced more resistance than in the Europe. Nevertheless, several decisions made by the HRC demonstrated that the principle of non-discrimination stipulated in article 26 of the ICCPR could also be expanded to employment law and same-sex partnership recognition.

With regard to same-sex marriage, both the HRC and the ECtHR made compromises on cultural justification, when faced with rigid opposition based on the traditional heterosexual definition of marriage. The two judicial bodies were careful with the cultural concept of “marriage” despite the notable social change occurring at present. Both judicial bodies also refused to consider in greater depth the values of marriage and they refused to provide a new interpretation to marriage in their relevant judgments. Furthermore, they both refused to address the right to marry as a universal human right that everyone should enjoy.

However, the jurisprudence in the ECtHR is more influential at the national level since it has binding power. Once the ECtHR finds a violation, the offending State(s) must take all necessary measures to prevent a similar violation, and individual measures to erase the consequences of the violation for individual(s) concerned. Furthermore, both the EU and the COE have confirmed that the recognition of sexual orientation rights is a condition to accede to these organizations. Thus, it has had a significant practical impact on many candidate States as well as current member states, which have had to repeal their discriminatory laws with regard to sexual orientation.

The decisions of the HRC are not legally binding (even among the parties to the dispute). They do serve as an authoritative interpretation of the ICCPR and the application of its treaty provisions to various scenarios. Typically, the effectiveness of the HRC’s

decisions and their enforcement is through domestic jurisdiction. In the case of *Toonen*, it took three years for the Tasmanian government to repeal the criminal prohibition after the HRC's decision.

Even as judicial bodies took the leading role in human rights recognition of sexual orientation, the other UN human rights bodies, the EU and the COE have also continued to endeavor to improve human rights protections for sexual minorities. It is notable that the *Treaty of Amsterdam*, the first binding international treaty explicitly stipulating the protection of sexual orientation, was signed in 1997 under the EU. The EU continues to force the development of LGBT human rights, for instance the enforcement of two binding Directives to guarantee non-discrimination on grounds of sexual orientation in employments and movement respectively in 2000 and 2004. Sexual orientation is explicated stipulated as a prohibited ground of discrimination in the *European Union Charter of Fundamental Rights* that took effective in 2010.

The recent years have seen a few major developments with regard to sexual orientation rights in the UN, such as the 2011 resolution passed by the Human Rights Council to review the human rights violations of sexual minorities. Despite these victories, there remain many challenges for the UN to adopt an international human rights treaty exclusively on sexual orientation and gender identity, due in large part to resistance from religious UN member states.

F. Conclusion

This chapter explored the developments of sexual orientation human rights in Europe. The first series of successful international cases concerning sexual orientation were heard by the ECtHR. The journey began with criminal law: decriminalization of same-sex acts, removal of unequal of ages for consent for same-sex acts, and legalizing same-sex group sexual activities in private. Building on these earlier cases, the ECtHR relied on the principle of non-discrimination to extend sexual orientation rights to the employment law

(notable cases involving the military) and the Court concluded that any investigation or inquires about sexuality could also amount to violation of privacy in employment. The Court also ruled that the same-sex couples should not be discriminated against in the fields of the child custody rights, adoption rights and partnership rights.

Furthermore, with the Court's increasing recognition on sexual orientation rights, the COE and the EU have adopted a variety of important legislation to promote the human rights protection for sexual minorities. These documents addressed a variety of human rights violations in order to raise public awareness and call for corresponding ameliorative measures.

It is important to note that these developments with respect to sexual orientation rights in the European regional human rights system shared the same progressive pattern seen in the UN human rights system. One of the key differences between these two systems is that the European developments are relative more advanced and progressed more rapidly than the UN developments. This is due in large part to the binding power of the ECtHR's decisions and the supportive climate within the COE and the EU that passed various regional legislative measures to protect sexual orientation rights.

Same-sex marriage, however, remains a challenge for the European human rights system as well as for the UN human rights system. In both systems, there appears to be little willingness to extend the fundamental right to marry, contained in both the ECHR and the ICCPR beyond the traditional opposite-sex definition of marriage. By relying on "cultural differences" as a key rationale for not extending the right to marry to same-sex couples, it is likely that similar legal reasoning and cultural compromise would occur in Asia, especially China. As previously discussed, the issue of Asian Values remains influential among human rights discourse in Asia. In China, for instance, there is such a strong homogenous culture that official party members and Chinese courts may find it difficult to embrace same-sex marriage, and would see it as a loss of traditional values and cultures. The further examination on the claim for same-sex marriage in China will be

addressed in Chapter Seven.

Chapter Five

Sexual Orientation Protection in Canadian Human Rights Law

A. Introduction

Since the Canadian gay community won its first victory with the decriminalization of sodomy on the grounds of privacy protection in the 1960s, human rights protection of sexual orientation has developed gradually and finally reached the symbolic victory in 2005 with the legalization of same-sex marriage. Canada is one of the leading countries worldwide in terms of the legal protection for sexual minorities.⁷⁸⁴ To date, sexual minorities in Canada have enjoyed a comprehensive package of rights against discrimination in employment, access to social benefits and marriage.

The aim of this chapter is to introduce the development of sexual orientation rights in Canada, and to uncover what factors have played significant roles during the process. Lessons learned from the Canadian experience will be examined in the subsequent chapter to see if the counterparts could facilitate the legal reform for tongzhi rights in China. Canada has seen a rapid legal development in terms of human rights for sexual minorities in past decades, which will provide some insights for considering whether counterparts in China can play roles for tongzhi rights. In addition, Canada is an immigration country that attracts a number of immigrants from diversified backgrounds while China is one of main source countries sending immigrants to Canada, the conflicts in recognizing sexual orientation rights between two countries will be addressed in considering the strategies for tongzhi rights infra.

This chapter is divided into three parts. The first section gives a brief overview of

⁷⁸⁴ Robert Wintemute, "Sexual Orientation and the Charter: The Achievement of Formal Legal Equality (1985-2005) and Its Limits" (2004) 49 McGill LJ 1143 at 1143. Generally see, Robert Wintemute & Mads Andenes, eds, *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Oxford: Hart Publishing, 2001); Robert Wintemute, , *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter* (Oxford:Oxford University Press,1995).

Canadian law and an introduction to the *Canadian Charter of Rights and Freedom* (*Charter*), specifically sections 1, 15 and 33. The second section offers an in-depth examination of the development of gay rights in Canada. Several significant decisions are examined in order to see how the courts interpreted and adopted the equality provision in the *Charter* to the emerging issue of sexual orientation rights. These judicial decisions have also propelled numerous other legislative reforms. The process of legalization of same-sex marriage is also addressed at length as it represents the achievement of formal equality for gay men and lesbians in Canada. The last section reviews the key actors and players in these developments and indicates the significance of Canadian Constitutional principles in safeguarding this legal reform.

B. Canadian Law in Context

Canada is a constitutional monarchy under the British Crown.⁷⁸⁵ Canada consists of ten provinces and three territories under a common central federal government as a federal state.⁷⁸⁶ Canadian legislative, executive and judicial powers are separated into three discrete bodies. For example, at the federal level, legislative power rests in the House of Commons and the Senate; the executive power resides with the Prime Minister and Cabinet; and the Supreme Court of Canada (SCC) and the courts in the provinces exercise the state's judicial power.⁷⁸⁷

Federalism, one of the five major principles of the Canadian Constitution, divides the legislative jurisdiction between the federal and provincial governments.⁷⁸⁸ The federal government has exclusive power over certain matters while the provincial governments have exclusive powers on other matters. On some matters, such as immigration, the federal and the provincial governments share jurisdiction and, therefore, there is overlapping

⁷⁸⁵ Craik and Forcese *et al.*, *supra* note 438, at 149-150.

⁷⁸⁶ The provinces are British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Nova Scotia, Newfoundland, and Prince Edward Island. The territories are Northwest Territories, Yukon and Nunavut.

⁷⁸⁷ Craik and Forcese *et al.*, *supra* note 438, at 110-112.

⁷⁸⁸ Macklem *et al.*, *supra* note 189, at 4.

legislative authority between both levels of governments.⁷⁸⁹ The issue of same sex marriage, for instance, is somewhat complex in that the federal government has exclusive jurisdiction over marriage and divorce, including the capacity to marry (i.e., *who* can marry), whereas the provinces have exclusive jurisdiction over the solemnization of marriage in a province (i.e., *how* a marriage is to be performed in order to have legal effect).⁷⁹⁰

1. *Canadian Charter of Rights and Freedoms*

The *Canadian Charter of Rights and Freedoms* came into effect in 1982.⁷⁹¹ The introduction of the *Charter* has had a dramatic legal change in how Canadian constitutional challenges are litigated and it is considered as a significant development in Canadian legal history.⁷⁹² Section 52(1) of the *Constitution Act* provides that any law that is inconsistent with the Constitution is of no force or effect.⁷⁹³ The SCC interpreted this provision as enabling courts to strike down or amend any unconstitutional legislation.⁷⁹⁴ Prior to the 1982 *Charter*, constitutional cases were almost exclusively about federal/provincial jurisdictional challenges, arguing that the federal government (or the provincial government) had enacted legislation that was *ultra vires* (outside their jurisdiction), and thus unconstitutional. With the *Charter*, courts were able to scrutinize all legislation (both provincial and federal) along with the governmental action against a high standard of fundamental rights and freedoms. Thus, the *Charter* plays a significant role in the protection of individual human rights, a notion that was echoed by Supreme Court Justice Iacobucci in *Vriend v Alberta*:

⁷⁸⁹ Macklem *et al*, *supra* note 189, at 253; Donald G Casswell, “Any Two Persons in Canada’s Lotusland, British Columbia”, in Robert Wintemute & Mads Andenes, eds, *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Oxford: Hart Publishing, 2001) at 217.

⁷⁹⁰ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91 and 92, reprinted in RSC 1985, App II, No 5.

⁷⁹¹ *Supra* note 133.

⁷⁹² Casswell, *supra* note 789 at 218.

⁷⁹³ *Canada Act 1982* (UK) 1982 c 7 at s 52(1).

⁷⁹⁴ *Schachter v Canada*, [1992] 2 SCR 679.

When the *Charter* was introduced, Canada went, in the words of former Chief Justice Brian Dickson, from a system of Parliamentary supremacy to constitutional supremacy.... Simply put, each Canadian was given individual rights and freedoms which no government or legislature could take away.⁷⁹⁵

2. Relevant Provisions

The following provisions in the *Charter* are important and also relevant to the discussion below:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

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

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

33.(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under

⁷⁹⁵ *Vriend v Alberta*, [1998] 1 SCR 493 at para 131 [*Vriend*].

subsection (4).

The equality provision of section 15(1) has been critical in challenging discriminatory legislation on the ground of sexual orientation. Although *sexual orientation* was not included in the enumerated prohibited grounds of discrimination in the section 15(1) text, which includes *race, national or ethnic origin, color, religion, sex, age or mental or physical disability*, the Minister of Justice affirmed during the *Charter* debates that the list was non-exhaustive and allowed judicial determination as to other grounds of discrimination.⁷⁹⁶ In 1995, the SCC in *Egan v Canada*⁷⁹⁷ held that sexual orientation constituted an *analogous* ground and therefore the discrimination on ground of sexual orientation was prohibited under the *Charter* subject to Section 1 justification.

Section 1 allows reasonable restrictions on the rights and freedoms contained in the *Charter* as long as the limits can be “demonstrably justified in a free and democratic society.” The test was identified by the SCC in *R v Oakes* and is commonly referred to as the *Oakes test*.⁷⁹⁸ The four key parts of the Oakes test are that there is a pressing and substantial objective (not a trivial objective), that the legislation is rationally connected to that objective, that it impairs the rights or freedom as little as possible, and finally, there must be a balancing between the beneficial effects of the legislation and its deleterious effects.⁷⁹⁹

Section 33, *the Notwithstanding Clause*, gives the federal or a provincial government the power to continue enforcing an unconstitutional law. The governments can enact legislation which expressly declares that it will operate “notwithstanding” the fact that it

⁷⁹⁶ Former Minister of Justice, Jean Chretien said: “We have explained that there are other grounds of discrimination that will be defined by the courts. We wanted to have an enumeration of grounds and we do not think it should be a list that can go on forever.” See *Minutes of Proceeding and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 1st Sess, 32d Parl, 48 at 48:33.

⁷⁹⁷ *Egan*, *supra* note 83..

⁷⁹⁸ *R v Oakes*, [1986] 1 SCR 103.

⁷⁹⁹ *Ibid* at paras 69-70.

may, or even patently does, violate certain provisions of the *Charter*.⁸⁰⁰ Such a declaration enacted under section 33 only lasts for five years, but may be renewed.⁸⁰¹ It does not have to be enacted proactively in the legislation, in other words, the governments could invoke section 33 following a court decision that found a piece of legislation violates the *Charter*. It should be noted that section 33 only applies to rights stipulated in section 2 or sections 7 to 15, but does not to other section, such as section 35, aboriginal rights.⁸⁰² However, any arbitrary adoption of the Notwithstanding Clause would be highly controversial and politically perilous because the rights and freedom stipulated in the *Charter* are so deeply embedded in Canada's legal and democratic culture, it is argued that the use of the notwithstanding clause needs to have strong and powerful support.⁸⁰³ Thus it has never been used by the federal government but has been invoked by provincial governments for a few times (e.g. Quebec used it in nearly all of its legislation after the *Charter* was enacted for matters related to the use of French language).⁸⁰⁴ In the context of gay rights, only Alberta invoked *the Notwithstanding Clause* on definition of marriage in Bill 202, *The Marriage Amendment Act*, which expired in 2005 when Premier Ralph Klein chose not to renew it.⁸⁰⁵

C. Sexual Orientation Rights Development

The legal recognition of same-sex marriage is often considered as a significant symbol of victory for sexual orientation human rights despite of critiques from feminist, queer or other left viewpoints.⁸⁰⁶ It took Canada almost 35 years to legalize same-sex marriage in

⁸⁰⁰ *Canadian Charter*, *Supra* note 133, s 33 (1)(2).

⁸⁰¹ *Ibid*, s 33 (3).

⁸⁰² *Ibid*, s 33 (1).

⁸⁰³ Luke McNamara, *Human Rights Controversies: the Impact of Legal Form* (Oxford, New York: Routledge-Cavendish, 2007) at 105-108.

⁸⁰⁴ Macklem *et al*, *supra* note 189, at 791 and 796. Other examples can be seen that in Saskatchewan, the government used it to immunize back to work legislation; the Alberta government attempted to immunize its legislative definition of marriage as an opposite sex relationship (that will be addressed *infra*).

⁸⁰⁵ This legislation re-asserted the definition of marriage as a union between a man and a woman, excluding gay couples by using "notwithstanding" clause to override any future court decision grating gay marriage.

⁸⁰⁶ *Supra* at p 212.

2005 from the decriminalization of sodomy between consenting adults in 1969. The following examination of sexual orientation rights development in Canada is divided into three parts: first, it reviews the decriminalization of same-sex acts, which came about as a result of privacy arguments and the emergence of a gay and lesbian social movement; second, it scrutinizes the crucial role played by the courts in the development of equality and non-discrimination protection for lesbians and gay men, due in large part of the advent of the *Charter*; and third, it explores the legalization process of same-sex marriage, including both the legislative and the jurisprudential elements.⁸⁰⁷

1. The pre-*Charter* era

The 1960s saw the earliest modern developments for gays and lesbians in Canada. Two organizations of gays and lesbians in Canada were formed in 1964 and 1965: the *Vancouver Association for Social Knowledge* and the *Ottawa Council on Religion and the Homosexual*.⁸⁰⁸ The year 1969 proved important in Canada for gays and lesbians when Parliament preserved anal intercourse as an indictable offence, legislating an exception for two consenting adult persons in private in the Canadian *Criminal Code*.⁸⁰⁹ The principle of the protection of privacy was the main argument for the decriminalization of sodomy, as famously expressed by former Prime Minister of Canada, Pierre Trudeau (he was the Minister of Justice at that time), “[the amendments] knocked down a lot of totems and overrode a lot of taboos and such repeal was justified on the grounds that the State had no business in ‘the bedrooms of the nations’ and ‘what’s done in private between adults’.”⁸¹⁰

⁸⁰⁷ Mary C Hurley, *Sexual Orientation and Legal Rights* (Ottawa: Library of Parliament, 2010) at 1, online: Parliament of Canada < <http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0849-e.htm> > [Hurley (2010)].

⁸⁰⁸ Paul Mazur, “Gay and Lesbian Rights in Canada: a Comparative Study” (2002) 25(1) *Intl’l J Pub Admin* at 51.

⁸⁰⁹ Jane Adolphe, “The Case Against Same-Sex Marriage in Canada: Law and Policy Considerations” (2004) 18, *BYU J of Public Law* 479, at 487. Consensual same-sex sexual activity was decriminalized with the passing of Bill C-150, *the Criminal Law Amendment Act*.

⁸¹⁰ “Trudeau’s Omnibus Bill: Challenging Canadian Taboos” *CBC Archives* (21 December 1967), online: CBC News <<http://www.cbc.ca/>>.

The repeal of the sodomy law led to the rise of the gay liberation movement in Canada in 1971. Many small lesbian and gay groups from different cities came together to form a nation-wide coalition aiming for equality and to fight against homophobia and heterosexism.⁸¹¹ These groups claimed for identity recognition and protection in areas such as employment and housing during 1970s by concentrating on building community and social institutions at the local level.⁸¹² By the 1980s, various gay and lesbian social institutions had been established in major cities in Canada, such as LGBT media, recreational groups, community centers, and self-help service organizations.⁸¹³

The appearance of these institutions had a great impact on Canadian society and therefore social change began to take place in Canada.⁸¹⁴ It helped move civil society towards acceptance and recognition of gays and lesbians.⁸¹⁵ In 1977, Quebec became the first province to add sexual orientation to the list of prohibited grounds for discrimination in the Quebec *Charter of Human Rights and Freedoms*.⁸¹⁶ Regardless the AIDS crisis in the 1980s, these early gay and lesbian's rights movements provided the social understanding and public support required for the successes of the contemporary gay rights movements during the *Charter* era.

2. The *Charter* era

The *Charter* has had, and continues to have, a great impact on Canadian human rights protection. The ability to use the *Charter* to challenge existing legislation became a key factor to promote sexual orientation rights in Canada. It is unlikely to have anticipated that the *Charter* would finally lead to the legalization of same-sex marriage.

The issue of whether *sexual orientation* should be in the list of prohibited grounds for

⁸¹¹ Miriam Smith, "Recognizing Same-Sex Relationships: the Evolution of Recent Federal and Provincial Policies" (2002) 45(1) Can Pub Admin 1, at 4.

⁸¹² *Ibid.*

⁸¹³ *Ibid.*

⁸¹⁴ *Ibid.*

⁸¹⁵ *Ibid.*

⁸¹⁶ Hurley (2010), *supra* note 807, at 2-3. *Charte des droits et libertés de la personne, L.R.Q. c. C-12, art.10.*

discrimination was controversial during the legislative drafting process leading to the *Charter*. Member of Parliament Svend Robinson proposed an amendment to add sexual orientation to the list. In 1981, a parliamentary committee had rejected the proposal by 22-2; therefore, initially when section 15 took effect in 1985, there was no *Charter* protection from discrimination based on sexual orientation in section 15.⁸¹⁷ Religious groups contributed the main resistance on sexual orientation rights.⁸¹⁸

However, such denial spurred various gay and lesbian rights organizations to fight for the equality rights in the *Charter*. They shifted the strategy from liberation rights rhetoric to an equality-seeking rhetoric. For instance, *Equality for Gays And Lesbians Everywhere* (EGALE Canada), one of the most influential national advocacy organizations advancing lesbian-gay rights, was established for equality seeking by focusing on litigation strategies in 1986.⁸¹⁹ Other pre-existing gay liberation groups also pushed for lesbian and gay equality recognition. Furthermore, lesbian and gay trade unionists increasingly took up the issue of same-sex benefits in collective bargaining.⁸²⁰

With assistance from these organizations, the first wave of *Charter* litigation and complaints seeking equality rights for gays and lesbians took place, which ultimately resulted in the inclusion of sexual orientation as an analogous protected category in section 15(1) of the *Charter*.

a. Inclusion of Sexual Orientation as an Analogous Prohibited Ground of Discrimination

i. Analogous Grounds of Discrimination

In the first wave of equality seeking litigation, the judicial decisions questioned the

⁸¹⁷ *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 1st Sess, 32d Parl, Issue No 48 at 48:20-21, and 48:31-34.

⁸¹⁸ *Infra* note 871.

⁸¹⁹ “About EGALÉ”, online: Egale Canada <<http://egale.ca/about-egale/>>.

⁸²⁰ *Policy statement: Sexual orientation*, Canadian Labour Congress, 20th Constitutional Convention 1994, at paras 3 & 4, online: Canadian Labour Congress <<http://www.canadianlabour.ca/>>.

exclusion of sexual orientation from the list of prohibited grounds for discrimination in the *Charter*.⁸²¹

In 1989, in *Andrews v Law Society of British Columbia*, the SCC had introduced the concept of *enumerated or analogous grounds of discriminatory* under section 15(1). In assessing infringement under section 15, the Court adopted the substantive equality approach but rejected the formal equality approach by emphasizing the core meaning of *without discrimination* in the section 15. It was interpreted that any distinction based on grounds on “personal characteristics of the individual or group” imposing disadvantageous effects on these groups could amount to discrimination.⁸²² Then the Court unanimously held that the grounds of discrimination enumerated in section 15(1) are not exhaustive, but included grounds that were *analogous* to the enumerated grounds relating to *personal characteristics of the individual or group*.⁸²³

ii. Sexual Orientation as an Analogous Ground of Discrimination

Egan v Canada was the first case to argue that sexual orientation was an *analogous* ground at the SCC.⁸²⁴ In this case, a gay couple who had been together for 42 years argued that the refusal of federal government to grant them a spousal pension benefit on the ground that they were not spouse was discriminatory.⁸²⁵ The definition of *spouse* that excluded same-sex partner in the *Old Age Security Act* was challenged as discrimination based on one’s sexual orientation.⁸²⁶

In this case, the Court recalled the reasons regarding the analogous grounds analysis in *Andrews* and other cases, and indicated that apart from “discrete and insular” character of a minority, the fundamental consideration was “whether the basis of distinction may serve to

⁸²¹ Smith, *supra* note 811 at 6.

⁸²² *Andrews*, *supra* note 138, *citing* section 15(1) of the *Charter*.

⁸²³ *Ibid.*

⁸²⁴ *Egan*, *supra* note 83.

⁸²⁵ *Ibid.*, at p 513.

⁸²⁶ *Ibid.*, at p 513.

deny the essential human dignity of the *Charter* claimant.”⁸²⁷

The Crown argued that sexual orientation should only be considered as analogous ground if the couple can prove that they as homosexuals suffered a specific form of economic disadvantage due to the alleged legislation.⁸²⁸ The Court disagreed with it, stating that economic discrimination has close relations with other forms of discrimination, such as discriminatory social and political attitudes that always have adverse economic consequence on these affected groups.⁸²⁹ The Court reiterated the key issue was to look at “in the context of the place of the group in the entire social, political and legal fabric of our society”.⁸³⁰ The Court unanimously held that sexual orientation amounts to an *analogous* ground prohibited from discriminatory under section 15(1), although Justices reached this conclusion from different perspectives, as addressed in Chapter One.

In a 5-4 opinion, the Court held that equal rights of the couple were violated. However, in the assessment that whether discrimination against sexual orientation can be justified under section 1 of *Charter*, Justice Sopinka, agreeing with the viewpoint of the violation of section 15, held that such violation can be justified. Given the fact the LGBT group was a fairly new equality-seeking group, he was of the view that the government should have “some flexibility in extending social benefits and does not have to be pro-active in recognizing new social relationships.”⁸³¹

His viewpoint led to the dismissal of the appeal and upholding the constitutionality of the definition of *spouse* in the *Old Age Security Act*. Justice L’Heureux-Dubé, writing in dissent, commented:

Given the marginalized position of homosexuals in society, the message that flows almost inevitably from excluding same-sex couples from such an important social institution [family] is essentially that society considers such relationships to be less worthy of respect, concern and consideration

⁸²⁷ *Egan*, *supra* note 83, at para 171.

⁸²⁸ *Ibid* at para 172.

⁸²⁹ *Ibid*.

⁸³⁰ *Ibid*.

⁸³¹ *Ibid*, at para 104.

than relationships involving members of the opposite sex.⁸³²

Egan was a groundbreaking victory within a defeat because for the first time, sexual orientation was confirmed as an analogous ground for discrimination under section 15(1) of the *Charter* from the SCC. However, as Brenda Cossman has suggested, “equality discourse was in ascendance, but not yet sufficient to displace the hold of fiscal and social conservatism.”⁸³³

At the provincial level, a notable development took place in Ontario. The section 159 of the *Criminal Code* provided the age of consent for anal sex is higher than for other kinds of sexual activity regardless of the sex of the participants.⁸³⁴ This law is neutral on its face and applicable to heterosexual people as well as LGBTs. In the case of *R v CM*,⁸³⁵ courts in Ontario had chances to examine whether this section of the *Criminal Code* violated the *Charter*. The trial judge found that it violated section 7 of the *Charter*, but did not consider section 15.⁸³⁶ The Court of Appeal of Ontario provided the section 15 analysis in its ruling. The Court reiterates, “[equality comprehended by s. 15] means sometimes treating individuals the same, despite their group differences, and it means sometimes treating them as equals by acknowledging their group differences.”, and “there can be no doubt that gay and lesbian individuals have been historically disadvantaged”⁸³⁷

When addressing the constitutionality of section 159, the Court traced back the legislative history of this provision, ‘to prevent gay sex’, and rule that such was discrimination. In terms of the results or effects on sexual minorities, the Court stated:

s. 159 arbitrarily disadvantages gay men by denying to them until they are 18 a choice available at the age of 14 to those who are not gay, namely,

⁸³² *Ibid* at para 90.

⁸³³ Brenda Cossman, “Lesbians, Gay Men, and the Canadian Charter of Rights and Freedoms” (2002) 40, Osgoode Hall LJ 230.

⁸³⁴ *Criminal Code*, R.S.C. 1985, c. C-46, s.152.

⁸³⁵ *R v C.M.*, 1995 CanLII 8924 (ON CA), online <

<http://www.canlii.org/en/on/onca/doc/1995/1995canlii8924/1995canlii8924.pdf>> (no page and para numbers in the decision.)

⁸³⁶ *Ibid*.

⁸³⁷ *Ibid*.

their choice of sexual expression with a consenting partner to whom they are not married. Anal intercourse is a basic form of sexual expression for gay men. The prohibition of this form of sexual conduct found in s. 159 accordingly has an adverse impact on them. Unmarried, heterosexual adolescents 14 or over can participate in consensual intercourse without criminal penalties; gay adolescents cannot. It perpetuates rather than narrows the gap for an historically disadvantaged group -- gay men -- it does so arbitrarily and stereotypically, and is, therefore, a discriminatory provision which infringes the guarantee of equality.⁸³⁸

The Court did not find that this denial can be justified under section 1, and declared that section 159 of the *Criminal Code* is unconstitutional, and to be of no force and effect.⁸³⁹ It is the first victory for sexual minorities in Canada by using the *Charter* to strike down a discriminatory provision. It is interesting to note in this judgment striking down this on-face neutral but discriminatory provision, the Court commented that “the exemption for ‘husband and wife’ is clearly illusory for a gay couple”.⁸⁴⁰ However, after ten years, the gender-neutral marriage became legal in Canada.

iii. Legislative Development

The most significant development in federal legislation following *Egan* was the passage of Bill C-33, *An Act to amend the Canadian Human Rights Act*, to add sexual orientation among the Act’s prohibited grounds of discrimination.⁸⁴¹

The *Canadian Human Rights Act (CHRA)* is the main federal human rights legislation that applies to federal government departments and agencies, Crown Corporations, and federally regulated businesses.⁸⁴² Each province and territory has its own human rights legislation (e.g. Quebec’s *Charter of Human Rights and Freedoms*, mentioned earlier). The difference between the *Charter* and these human rights legislation is, that the *Charter*

⁸³⁸ *Ibid.*

⁸³⁹ *Ibid.*

⁸⁴⁰ *Ibid.*

⁸⁴¹ Hurley (2010), *supra* note 807 at 3.

⁸⁴² *Canadian Human Rights Act*, R.S.C., 1985, c. H-6.

applies only to relations between governments and private persons (including corporations), while human rights legislation (whether it is the federal *CHRA*, or a provincial human rights code) prohibits discriminatory practices in both the private and public sectors, but only with respect to certain economic activities, such as employment and publicly available services, such as housing accommodation.⁸⁴³ Both the *Charter* and the *CHRA* share human rights principles, including the equality principle.⁸⁴⁴ Like the *Charter*, there was also no explicit mention of sexual orientation as a protected category in *CHRA* in its original form when it was adopted in 1977.⁸⁴⁵

The Canadian Human Rights Commission (Commission) is the administrative body created by the *CHRA*.⁸⁴⁶ The Commission was a strong supporter for equality for LGBTs. It recommended adding “sexual orientation” to the *CHRA* in its annual report in 1979 and successive annual reports up to and including 1995.⁸⁴⁷ The first positive response from the federal government occurred in 1986, when it expressed the belief that sexual orientation was encompassed by section 15(1) guarantees, and made a commitment to “take whatever measures are necessary to ensure that sexual orientation is a prohibited ground of discrimination in relation to all areas of federal jurisdiction.”⁸⁴⁸ No action was taken until 1992 when the issue was raised in court in *Haig v Canada*.⁸⁴⁹ The Ontario Court of Appeal ruled that section 3 of the *CHRA* violated section 15 of the *Charter* and that sexual orientation should be read in to the *CHRA*. The federal government decided not to appeal the decision, but did nothing until the issues was raised in *Egan* in 1995.

With respect to the federal government’s inaction following their earlier commitment to the amendments of the *CHRA* in 1985 and following the *Haig* decision in 1992, the

⁸⁴³ Nancy Holmes, *Human Rights legislation and the Charter: A Comparative Guide* (Ottawa: Library of Parliament, 1992, revised on 18 September 1997), online: Government of Canada Publications <<http://publications.gc.ca/>>.

⁸⁴⁴ *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, s. 2.

⁸⁴⁵ *Ibid.*

⁸⁴⁶ Canadian Human Rights Commission, online: <<http://www.chrc-ccdp.ca/eng/content/about-us>>.

⁸⁴⁷ Hurley (2010), *supra* note 807 at 26.

⁸⁴⁸ *Ibid* at 2.

⁸⁴⁹ *Haig v Canada* [1993] 2 SCR.

Commission's 1995 annual report criticized government inactions as "undermining Canada's human rights reputation and the citizenship rights of lesbians and gays in Canadian society."⁸⁵⁰ Meanwhile, EGALE and other lesbian-and gay rights groups endeavoured to lobby for LGBT legal rights.

Finally, in 1996, the combined pressure from the SCC's ruling in *Egan* and lobbying from interest groups, such as the EGALE, led the federal government to pass the Bill C-33, which amended the *CHRA* to include sexual orientation as a prohibited ground for discrimination.⁸⁵¹ The employees in the federal government or federally regulated organizations could not be discriminated against on the grounds of sexual orientation.

At the provincial level, after the federal amendment to the *CHRA*, only four jurisdictions (Alberta, Newfoundland, Prince Edward Island, and the Northwest Territories) still refused to add sexual orientation to their respective provincial anti-discrimination legislation.⁸⁵² After the decision in *Egan*, a controversial federalism question still remained: does the *Charter* oblige all Canadian legislatures, i.e. the provinces, to include sexual orientation into their legislation?⁸⁵³

b. Applying the *Charter* to provincial human rights legislation

The SCC answered this federalism question in *Vriend v Alberta*,⁸⁵⁴ which was a case regarding equal access to employment for sexual minorities. In *Vriend*, Delwin Vriend, a laboratory coordinator, was dismissed from his job at a Christian college in Edmonton because of his sexual orientation.⁸⁵⁵ He brought a challenge against the province under the *Alberta Individual Rights Protection Act (Alberta IRPA)* for excluding sexual orientation as

⁸⁵⁰ Canadian Human Rights Commission, Annual Report 1995 (Ottawa: Supply and Services Canada, 1996), p. 15 (Cat. No. HR1-1995), cited in Annette Nierenbisch, Mark Searl & Charles Theroux, "Human Rights Commissions and Public Policy: the Role of the Canadian Human Rights Commission in Advancing Sexual Orientation Equality Rights in Canada" (2008) 51:2 Can Pub Admin 23, at note 38.

⁸⁵¹ *The Act to amend the Canadian Human Rights Act*, R.S.C., 1996, c. 14, s. 1.

⁸⁵² Hurley (2010), *supra* note 807 at 26.

⁸⁵³ Wintemute, *supra* note 784 at 1151.

⁸⁵⁴ *Vriend*, *supra* note 795.

⁸⁵⁵ *Ibid* at para 7.

a prohibited ground of discrimination, to the Alberta Human Rights Commission, but was told that he “he could not make a complaint under the *Alberta IRPA*, because the Act did not include sexual orientation as a protected ground.”⁸⁵⁶ Next, Vriend sought declaratory relief from the Alberta Court of Queen’s Bench, that the *Alberta IRPA* was discriminatory based on Section 15 of the *Charter*.⁸⁵⁷ At this stage, Vriend was successful; however, the Alberta government appealed the decision.

In a 2:1 decision from the Alberta Court of Appeal, it was held that there was no government action to which the *Charter* could apply and that the absence of sexual orientation in the *Alberta IRPA* did not amount to government “action”, therefore there was nothing in the *Alberta IRPA* that distinguished between heterosexual and homosexuals.⁸⁵⁸ As a response, Supreme Court Justices Cory and Iacobucci held there was a distinction between heterosexuals and homosexuals due to the exclusion of the ground of sexual orientation in the *Alberta IRPA*, which also clearly “has a disproportionate impact on (gays and lesbians) as opposed to heterosexuals.”⁸⁵⁹

The Alberta government argued that Section 1 applied and that the Court should defer to the provincial legislature to mediate between competing interests: religious freedom versus LGBT equal rights.⁸⁶⁰ In response, the SCC rejected Alberta’s arguments as both inappropriate and a poor basis for justifying “rational connection”, stating:

Far from being rationally connected to the objective of the impugned provisions, the exclusion of sexual orientation from the Act is antithetical to that goal. Indeed, it would be nonsensical to say that the goal of protecting persons from discrimination is rationally connected to, or advanced by, denying such protection to a group which this Court has recognized as historically disadvantaged.⁸⁶¹

⁸⁵⁶ *Ibid* at para 8.

⁸⁵⁷ *Ibid* at para 11.

⁸⁵⁸ *Ibid* at para 18-21.

⁸⁵⁹ *Ibid* at para 82.

⁸⁶⁰ *Ibid* at para 59.

⁸⁶¹ *Ibid* at para 119.

In terms of the balance between the competing rights of religious freedoms and protections of gays and lesbians, Justice Iacobucci noted that the *Alberta IRPA* had an internal mechanism, which is more than capable of mediating and balancing competing rights-seeking groups.⁸⁶² Furthermore, he noted that the exclusion of sexual orientation in the *Alberta IRPA* “constitutes total, not minimal, impairment of the *Charter* guarantee of equality.”⁸⁶³

The Court unanimously ruled that *Alberta IRPA* violated section 15 of the *Charter* in its failure to provide legal protection against sexual orientation discrimination, and that sexual orientation should be read in to *Alberta IRPA* as a prohibited ground of discrimination. *Vriend* was a huge victory for LGBT rights because the SCC confirmed that the refusal of formal equality to lesbians and gays was discriminatory, and that the omission was not a reasonable limit within section 1 of the *Charter*.⁸⁶⁴ In reaching that conclusion, Justice Iacobucci stated that:

[T]he overall goal of IRPA is the protection of the dignity and rights of all persons living in Alberta. The exclusion of sexual orientation from the Act effectively denies gay men and lesbians such protection. In my view, where, as here, a legislative omission is on its face the very antithesis of the principles embodied in the legislation as a whole, the Act itself cannot be said to indicate any discernible objective for the omission that might be described as pressing and substantial so as to justify overriding constitutionally protected rights.⁸⁶⁵

The Court also concerned *substantive equality* to address the distinction between a heterosexual individual and gay men and lesbians by facing discrimination against on the ground of sexual orientation, assuring that law’s full protection requirement for gay men and lesbian acknowledging such difference, not their essential sameness.⁸⁶⁶ Furthermore, the SCC ruled that section 15(1) of the *Charter* required that a similar step to include

⁸⁶² *Ibid* at para 124

⁸⁶³ *Ibid* at para 127.

⁸⁶⁴ Cossman, *supra* note 833 at 231.

⁸⁶⁵ *Vriend*, *supra* note 795 at para 116.

⁸⁶⁶ *Ibid* at para 82, 83 and 86.

sexual orientation as a prohibited ground from discretionary should be taken in those provinces and territories that had not yet already done so.⁸⁶⁷ The ruling confirms that provincial governments not only have a *negative* obligation to refrain from discriminating in its own laws, but also a *positive* obligation to act by providing legal protection against sexual orientation discrimination.⁸⁶⁸ Following the *Vriend* decision, four other provinces and territories (Nunavut, the newest territory, was established in 1999) amended their human rights legislations to protect sexual orientation discrimination in anticipation that similar litigation might occur: Newfoundland (1997), Prince Edward Island (1998), the Northwest Territories (2002) and Nunavut (2003).⁸⁶⁹ Alberta, however, was the last province in Canada to add sexual orientation as an explicit protected ground in *Alberta Human Rights Act* in October 2009.⁸⁷⁰

3. Legalizing Same-sex Marriage

Religion still remains the main and most powerful resistance against same-sex human rights in Canada. A number of religious groups united to form anti-gay organizations to resist the development of sexual minority rights. Some opinions collected by Ellen Faulkner from the Coalition for Lesbian and Gay Rights Ontario are relatively representative of the religious arguments opposing same-sex marriage in particular, and expanding gay rights in general.⁸⁷¹

In response to the *Egan* decision, some religious groups became more vocal in their opposition to extending rights to same-sex couples and asserted such claims: “society would be more prepared to eat excrement than it is prepared to accept homosexual

⁸⁶⁷ *Ibid* at para 96.

⁸⁶⁸ Wintemute, *supra* note 833 at 1152.

⁸⁶⁹ *Ibid*.

⁸⁷⁰ “Notice of changes to Alberta’s human rights legislation” (October 2009), online: Alberta Human Rights Commission, <

<http://www.albertahumanrights.ab.ca/NoticeOfChangesToAlbertasHumanRightsLegislation.pdf>>. Note: the name of Alberta’s human rights legislation changed over the years.

⁸⁷¹ Ellen Faulkner, “Homophobic Hate Propaganda in Canada” (2006/7) 5 *J Hate Studies* 63, at 73.

relationships.”⁸⁷² Other religious groups used hate propaganda to suggest the homosexual movement has purportedly “undermined the Bible” and “turned the Bible into hate literature.”⁸⁷³ Calgary Bishop Fred Henry “equated the lesbian and gay relationships with prostitution, adultery, and pornography, and claimed that Catholic politicians might not get to heaven if they supported equality for lesbian and gay relationships.”⁸⁷⁴ With regard to the issue of same-sex marriage, he stated “it was suggested that the very institutions of society [would] be undermined if such marriages [were] allowed.”⁸⁷⁵ The Roman Catholic Archbishop of Toronto, Cardinal Aloysius Ambrozic, published a letter to suggest the Prime Minister use the notwithstanding clause to override the *Charter* otherwise “Canada would be tipped into an uncharted sea fraught with risks to some of the country’s most significant social institutions, such as public education.”⁸⁷⁶ In fact, Paul Martin, the Prime Minister of Canada during the same-sex marriage debates, was threatened with excommunication by various members of the Roman Catholic Church.⁸⁷⁷

Despite this religious resistance, Canadian civil society and other religions, for instance United Church of Canada were willing to accept same-sex relationship including same-sex marriages.⁸⁷⁸ Such acceptance has provided a strong foundation for legal reform, and the dramatic developments that occurred at the start of the 21st century.

a. M v H

⁸⁷² *Ibid* at 75.

⁸⁷³ *Ibid*.

⁸⁷⁴ *Ibid* at 76.

⁸⁷⁵ *Ibid* at 75.

⁸⁷⁶ *Ibid*.

⁸⁷⁷ Terrance Carter & Anne-Marie Langan, “Dissension in the Ranks: the Relationship between law, Political and Church Discipline” (15 November 2005), 14 Church Law Bulletin, online: Carters & Associates Professional Corporation < <http://www.carters.ca/pub/bulletin/church/2005/chchlb14.pdf>>.

⁸⁷⁸ “Chronology of Marriage and Equality Rights in the United Church”, online: United Church of Canada, <<http://www.united-church.ca/>>, see the year of 2000: “In 2000 the 37th General Council of the United Church adopted the policy to affirm and work toward the civil recognition of same-sex partnerships. As a result, some United Church congregations began to record the services of same-sex couples in their marriage registers and to forward these registrations to provincial governments for licensing.”; public support can be seen *infra* note 890.

M v H (1999) was another influential *Charter* case concerning same-sex relationship recognition.⁸⁷⁹ In that case, a lesbian couple ended their relationship after living together for ten years.⁸⁸⁰ M brought an application for spousal support from H under the *Ontario Family Law Act (Ontario FLA)* but her application was denied because the *Ontario FLA* did not recognize a support obligation between same-sex couples.⁸⁸¹ M challenged the exclusion of same-sex couples under the term *spouse* in section 29 of *Ontario FLA* (which includes unmarried opposite couples) as a violation of section 15 of the *Charter*.⁸⁸² The case was decided in favor of M in the lower courts, and the Ontario government appealed the decision to the SCC.⁸⁸³

Although *M v H* presented a similar challenge to the definition of *spouse* as seen earlier in *Egan*, the SCC came to a different decision. The Court held the definition of *spouse* in the *Ontario FLA*, which included unmarried opposite-sex but not same-sex couples, constituted unjustifiable sexual orientation-based discrimination by making a clear distinction between unmarried opposite-sex and unmarried same-sex couples under section 15 of the *Charter*. Justices Cory and Iacobucci stated as follows:

It implies that they [same-sex couples] are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples, without regard to their actual circumstances. Such exclusion perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence.⁸⁸⁴

With respect to whether the distinction between unmarried same-sex and unmarried opposite sex relationships fell within the scope of section 1 (reasonable limits) again, the Ontario government asserted two objectives of the *Ontario FLA*, namely promoting “the equitable resolution of economic disputes that arise when intimate relationships between

⁸⁷⁹ *M v H*, [1999] 2 SCR 3 [*M v H*].

⁸⁸⁰ *Ibid.*, at p 4.

⁸⁸¹ RSO 1990, c F 3 [FLA].

⁸⁸² *M v H*, *supra* note 879 , at p 4.

⁸⁸³ *Ibid.*

⁸⁸⁴ *M v H*, *supra* note 879 , at p 7.

individuals who have been financially interdependent break down” and the alleviation of “the burden on the public purse by shifting the obligation to provide support for needy persons to those parents and spouses who have the capacity to provide support these individuals.”⁸⁸⁵ However, the Court held these two objectives would only be furthered if unmarried same-sex couples were included in the definition of “spouse”.⁸⁸⁶

With regard to the remedy, Justice Iacobucci held that the *read in* remedy used in *Vriend* would be inappropriate in this case, and instead invalidated the definition of *spouse* in *Ontario FLA* with a suspension on the invalidity for six months to enable the legislature to consider ways of bringing this provision to compliance with the equality section in the *Charter*.⁸⁸⁷

Following the decision in *M v H*, the Ontario government passed an omnibus bill entitled *An Act to Amend Certain Statutes because of the Supreme Court of Canada Decision in M. v. H.*,⁸⁸⁸ which amend 67 different pieces of legislation. The Ontario government replaced *spouse* throughout these 67 pieces of legislation with the term *spouse or same-sex partners* in order to comply with the SCC’s decision in *M v H*, however some have argued that this created a “separate but equal” scheme.⁸⁸⁹

The judgment resulted in intense controversy with respect to same-sex relationship recognition in academia, politics and even in the whole of Canadian society. Such dramatic attention from society hastened a second wave of litigations for gay and lesbian rights: the claim for same-sex marriage.

b. Aftermath of *M v H*: Bill C-23

Public support of gay and lesbian rights in Canada had been increasing in the years

⁸⁸⁵ *Ibid* at p 7-8.

⁸⁸⁶ *Ibid* at p 10.

⁸⁸⁷ *Ibid* at p 89.

⁸⁸⁸ Bill 5, *An Act to amend certain statutes because of the Supreme Court of Canada decision in M. v. H.*, 1st Sess, 37th Leg, Ontario, 1999 (assented to 28 October 1999).

⁸⁸⁹ Hurley (2010), *supra* note 807 at 9.

leading up to *M v H*. Shortly after the decision of *M v H*, one of the mainstream media, the *Globe and Mail* newspaper, together with the Angus-Reid polling firm, conducted a nationwide poll of 1,500 Canadians' opinion of same-sex marriage.⁸⁹⁰ The result showed that 53% of Canadians supported the legalization of same-sex marriage, with younger Canadians (ages 18-34) being even more accepting of same-sex marriage with 66% in support.⁸⁹¹

Despite this support, the opposition claiming for protection for “traditional family and marriage” against same-sex relationships remained powerful.⁸⁹² Shortly after the *M v H* decision, the House of Commons adopted a motion that upheld that monogamous and heterosexual notion of marriage and maintained that Parliament would do what was required to preserve this definition.⁸⁹³

However, due to the wave of litigation the federal government decided to pass an omnibus measure to bring equal rights for same-sex couples, so in February 2000 the federal government introduced Bill C-23, *Modernization of Benefits and Obligations Act*.⁸⁹⁴ It proposed to extend the benefits and obligations previously limited to married couples to both opposite-sex common-law and same-sex couples, while maintaining a separate status in law for married and non-married couples.⁸⁹⁵ The bill would alter 69 statutes concerning spousal benefits and obligations to ensure equal application of federal laws to unmarried heterosexual and same-sex couples.⁸⁹⁶

The reaction to Bill C-23 from both sides was unsatisfying. From the perspective of lesbian and gay equality advocates, the proposed legislation had flaws despite its positive elements. For instance, EGALE criticized that the Bill did not change the *Evidence Act*

⁸⁹⁰ Mazur, *supra* note 808 at 58.

⁸⁹¹ *Ibid.*

⁸⁹² Hurley (2010), *supra* note 807 at 22.

⁸⁹³ *Ibid.*

⁸⁹⁴ Bill C-23, *An Act to Modernize the Statutes of Canada in Relation to Benefits and Obligations*, 2nd Session, 36th Parliament, 1999-2000.

⁸⁹⁵ *Ibid.*

⁸⁹⁶ *Ibid.*

where spouses cannot be compelled to testify against each other, further, it did not amend the *Immigration Act* that refused same-sex sponsorship.⁸⁹⁷ In response to this latter point, the House of Commons and the Senate passed Bill C-11 in 2001 to reform the immigration legislation, *Immigration and Refugee Protection Act* and *Immigration and Refugee Protection Regulations*.⁸⁹⁸ The *Regulations* employs gender-neutral terms to define “marriage”, “common-law partner”, and “conjugal partner”.⁸⁹⁹ It permits Canadian citizens and permanent residents to sponsor members of the family class (including same-sex spouses, common-law partners and conjugal partners) to immigrate to Canada.⁹⁰⁰

Similarly, the opponents of same-sex relationship recognition concerned that the gender-neutral definition and absence of a definition of marriage in the bill would have a negative impact on the institution of marriage. In response to this criticism, the Minister of Justice emphasized that Bill C-23 was not about and did not affect the institution of marriage or the legal definition of the term *spouse*.⁹⁰¹

In addition, while the federal government introduced the *Assisted Human Reproduction Act* in 2004, it contains a provision explicitly barring discrimination against persons undergoing assisted reproduction procedures on the basis of *sexual orientation*.⁹⁰²

c. Provincial Response and Further Developments in Provincial Case Law

Faced with a series of court decisions, the provinces had different reactions to the recognition of lesbian and gay relationships. Some welcomed the recognition of same-sex relationship while others were indifferent and possibly hostile to lesbian and gay rights, which will be addressed below. These dramatic changes in the provinces played an

⁸⁹⁷ *EGALE Submissions to the House of Commons Standing Committee on Justice and Human Rights: Bill C-23: the Modernization of Benefits and Obligations Act*, online: Egale Canada, at <<http://egale.ca/equal-families/equal-marriage/c-23submission/>>.

⁸⁹⁸ *Immigration and Refugee Protection Act*, S.C.2001[IRPA]; *Immigration and Refugee Protection Regulations*, SOR/2002-227.

⁸⁹⁹ *Immigration and Refugee Protection Regulations*, *Ibid* at ss. 1,2 and 117(1).

⁹⁰⁰ *IRPA*, at ss 13.(1).

⁹⁰¹ Hurley (2010), *supra* note 807 at 22.

⁹⁰² *Assisted Human Reproduction Act*, S.C.2004, at s 2.

important role in the impetus for same-sex marriage legislation that was eventually passed at the federal level in 2005.

i. The Response from Alberta

Alberta was the main province opposed to same-sex marriage. In reaction to the SCC's decision in *M v H*, the Alberta government introduced Bill 202 to amend the Alberta *Marriage Act* to define *marriage* as "a marriage between a man and a woman" and also proposed to use the section 33 of *Charter* in 2000.⁹⁰³ By activating the notwithstanding clause, the Alberta *Marriage Act* was exempted from the challenge based on violations of *Charter* rights from the federal government or the courts for five years.⁹⁰⁴

ii. Judgements in British Columbia, Ontario, and Quebec

Meanwhile, the courts in British Columbia, Ontario and Quebec also addressed the issue of same-sex marriage in a series of landmark decisions.

In *EGALE Canada Inc v Canada (AG)*,⁹⁰⁵ several gay and lesbian couples and EGALE challenged the federal and provincial governments for the recognition of same-sex marriage in British Columbia. In October 2001, the Supreme Court of British Columbia, in dismissing the challenge, held that the exclusion of same-sex couples from civil marriage is direct sexual orientation discrimination contrary to section 15(1) *Charter*, but justified under section 1 of *Charter*. Pitfield J. reasoned the changes to common law should be made "in incremental steps";⁹⁰⁶ the meaning of "marriage" was not open to *Charter* scrutiny and Parliament had no authority to enact legislation to redefine "marriage" to include same-sex couples due to the division of powers in the Constitution;⁹⁰⁷ and also the exclusion of

⁹⁰³ "Anti-gay marriage bill passes" *CBC News* (16 March 2000), online: CBC News <<http://www.cbc.ca/news/story/2000/03/16/gay000316.html>>.

⁹⁰⁴ It may be questioned that such clarification is inconsistent of the federalism principle because marriage rights is federal jurisdiction. However, it is beyond of the scope of the discussion in the thesis.

⁹⁰⁵ *EGALE Canada Inc v Canada (AG)*, 2001 BCSC 1365 [*EGALE*].

⁹⁰⁶ *Ibid* at para 9 and paras 89-92.

⁹⁰⁷ *Ibid* at paras 122-124.

same-sex couples in marriage is because “the one factor in respect of which there cannot be similarity is the biological reality that opposite-sex couples may, as between themselves, propagate the species and thereby perpetuate human kind. Same-sex couples cannot.”⁹⁰⁸

Conversely, in the case of *Halpern v Canada (AG)*⁹⁰⁹ in Ontario, the Ontario Superior Court of Justice (Divisional Court) held unanimously, in July 2002, that the existing common law rule defining marriage in opposite-sex terms was a violation of section 15(1) of the *Charter* and *cannot* be justified under section 1. Thus, the Ontario court rejected the B.C. Court’s conclusion that the federal government lacked the authority to legislate a modified legal meaning of “marriage” according to 1867 Constitution, emphasizing that the term “marriage” is not defined in the *Constitution* and that Pitfield J.’s decision contravened the basic constitutional principle that the *British North America Act* is a “living tree”.⁹¹⁰ Also, with regard to the argument that the purpose of marriage is procreation, LaForme J. held,

[...] [I]t is well-established in annulment cases that a marriage is valid and not voidable despite the fact that one spouse refused to have sexual intercourse, or is infertile, or insists contraceptives when having sexual intercourse. [...]

I reach the same conclusion when I look to those cases where husband is unable to consummate the marriage due to impotence resulting from advanced age. In those cases, Canadian courts have consistently ruled that the marriage is understood to be for the purpose of “companionship” and is therefore valid, and not voidable.

[I]t could be reasonably be argued [...] that [the objective of procreation] appears to be a mere pretext used to rationalize discrimination against lesbians and gays.

[...] There is simply no evidentiary basis to support the proposition that granting same-sex couples the freedom to marry would either diminish the number of children conceived by heterosexual couples, or reduce the

⁹⁰⁸ *Ibid* at para 205.

⁹⁰⁹ *Halpern v Canada (Attorney General)*, 2002 CanLII 42749 (ON SCDC) [*Halpern*].

⁹¹⁰ *Ibid* at para 104-106.

quality of care with which heterosexual couples raise their children.

Same-sex couples experience, and raise children as a result of variety of reproductive and parenting arrangements, none of which is unique to same-sex partners.⁹¹¹

He then finally concluded:

The restriction against same-sex marriage is an offence to the dignity of lesbians and gays because it limits the range of relationship options available to them. The result is they are denied the autonomy to choose whether they wish to marry. This in turn conveys the ominous message that they are unworthy of marriage. For those same-sex couples who do wish to marry, the impugned restriction represents a rejection of their personal aspirations and the denial of their dreams.⁹¹²

With respect to the remedy, the Ontario Court suspended its declaration invalidating the common law rule for 24 months to enable the Parliament to remedy the law of marriage in accordance with constitutional values. The common law rule would be reformulated, and same-sex couples in Ontario would be entitled to marriage licenses in 24 months if the federal government had not acted by then.⁹¹³

In the Quebec case, *Hendricks c Quebec (PG)*,⁹¹⁴ the plaintiff challenged the constitutionality of the legislated rules explicitly limiting marriage to one woman and one man. Like the Ontario court, the Superior Court of Quebec held that the 1867 *Constitution* did not prevent a new legislated definition of marriage. Lemelin J. rejected the argument that the “civil union” allowed by Quebec legislation for same-sex couples was identical to a civil marriage for all purposes of provincial law.⁹¹⁵ Under the legislation, gay couples only had the options of being “de facto spouses” (which is similar to a common law relationship) or “civil union spouses” but could not be “married spouses” while heterosexual couples

⁹¹¹ *Ibid* at para 239-240, 242, and 248-249.

⁹¹² *Ibid* at para 261.

⁹¹³ *Ibid* at para 267-270; 288-308.

⁹¹⁴ *Hendricks c Quebec (PG)*, 2002 CanLII 23808 (QC CS).

⁹¹⁵ *Ibid* at para 180-181.

could have three choices.⁹¹⁶ Thus she recalled the statement of Justice Linden in *Egan*, and concluded the so-called “separate but almost equal” situation actually contributed to a difference of treatment between heterosexual and same-sex couples that amounted to discrimination.⁹¹⁷ She also agreed that procreation was not a requirement of marriage.⁹¹⁸ Like the Ontario court, it suspended its remedy for 24 months, presenting no substitute definition to take effect in the absence of parliamentary action.⁹¹⁹

All three of these decisions were appealed; in the B.C. case, the plaintiff couples and EGALE appealed the decision, and the federal government appealed the decisions in Ontario and Quebec.

The BC Court of Appeal reversed the decision of Pitfield J. in *EGALE* in May 2003. In the decision of *Barbeau v British Columbia (Attorney General)*,⁹²⁰ Prowse J.A. was in favour of the reasoning of LaForme J. in *Halpern*, finding that Parliament has the authority to legislate a modified definition of marriage.⁹²¹ She also agreed with the comments of Justices Cory and Iacobucci in *Egan* where they failed to see “how according same-sex couples that benefits flowing to opposite-sex couples in any way inhibits, dissuades or impedes the formation of heterosexual union” instead of the view of trial judges “permitting same-sex couples to marry would diminish the procreative potential for marriage.”⁹²² In conclusion, the Court provided the remedy: a declaration that the common-law bar against same-sex marriage is of no force or effect and a reformulation of *common-law* definition as the “lawful union of two persons.”⁹²³ The Court suspended the remedy until the expiration of the suspension in the *Halpern* decision.

Shortly after the BC decision, the Ontario Court of Appeal unanimously upheld the

⁹¹⁶ *Ibid* at para 133.

⁹¹⁷ *Ibid* at paras 134 and 155.

⁹¹⁸ *Ibid*, at para 146.

⁹¹⁹ *Ibid* at para 211.

⁹²⁰ *Barbeau v British Columbia (Attorney General)*, 2003 BCCA 251.

⁹²¹ *Ibid* at para 5.

⁹²² *Ibid* at para 127.

⁹²³ *Ibid* at paras 158-161.

Divisional Court's decision in *Halpern v Canada (AG)* in June 10, 2003.⁹²⁴ The Court found the common law definition of marriage as an unjustified violation of section 15 of *Charter*. The Court reasoned that the denial of access to marriage for same-sex couples constitutes a formal distinction between opposite-sex and same-sex couples, and such a distinction amounted to "discrimination" under section 15. They went on to say that,

In many instances, benefits and obligations do not attach until the same-sex couples has been cohabiting for a specified period of time. Conversely, married couples have instant access to all benefits and obligations.⁹²⁵

In this case, same-sex couples are excluded from a fundamental societal institution – marriage. The societal significance of marriage, and the corresponding benefits that are available only to married persons, cannot be overlooked. Indeed, all parties are in agreement that marriage is an important and fundamental institution in Canadian society. It is for that reason that the claimants wish to have access to the institution. Exclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships.⁹²⁶

With response to the justification under section 1 from federal lawyers, the objective of an exclusive heterosexual institution was to encourage the birth and raising children and companionship, the Court pointed out that many opposite-sex couples choose not to or are unable to have children.⁹²⁷

With respect to the remedy, unlike the BC Court of Appeal, the Ontario Court of Appeal rejected the federal government's request for a two-year suspension. Instead, the Court declared the existing common law definition of marriage was invalid and that "marriage" would be reformulated, as the "voluntary union for life of two persons", effective in Ontario immediately.⁹²⁸

⁹²⁴ *Halpern v. Canada* 2003 CanLII 26403 (ON CA).

⁹²⁵ *Ibid* at para 104.

⁹²⁶ *Ibid* at para 107.

⁹²⁷ *Ibid* at para 121-123.

⁹²⁸ *Ibid* at para 154.

This groundbreaking remedy/decision accelerated the process of legalization of same-sex marriage. After seven days, the Prime Minister, Jean Chretien, announced that the federal government would not appeal these Ontario, B.C. and Quebec decisions.

d. The Success of Bill C-38

On July 17, 2003, the federal government drafted legislation entitled, *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes*, which recognized same-sex marriage for civil purposes and acknowledges religious organizations' authority to continue to solemnize marriage in accordance with the precepts of their faith.⁹²⁹ Meanwhile, the federal government had referred four questions to the SCC regarding same-sex marriage:

1. Is the annexed *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes* within the exclusive legislative authority of the Parliament of Canada? If not, in what particular or particulars, and to what extent?
2. If the answer to question 1 is yes, is section 1 of the proposal, which extends capacity to marry to persons of the same sex, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars, and to what extent?
3. Does the freedom of religion guaranteed by paragraph 2(a) of the *Canadian Charter of Rights and Freedoms* protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?
4. Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in section 5 of the *Federal Law–Civil Law Harmonization Act, No. 1*, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?⁹³⁰

With the consent of the federal Attorney General, the Quebec Court of Appeal ended

⁹²⁹ Bill C-38, *An Act respecting certain aspects of legal capacity for marriage for civil purposes*, 1st Sess, 38th Parl, 2005.

⁹³⁰ *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698 [*Marriage Reference*].

the suspension of the remedy imposed by the lower court, thus enabling same-sex couples to access civil marriage in the province with immediate effect. As of March 19, 2004 all same-sex couples living in British Columbia, Ontario and Quebec had access to civil marriage, which is significant considering that the three provinces account for seventy-five percent of the population in Canada.⁹³¹ The trend to legalize same-sex marriage seemed inevitable in the other provinces and territories. For instance, the courts in Yukon,⁹³² Saskatchewan,⁹³³ and Newfoundland and Labrador⁹³⁴ legalized same-sex marriage in their respective jurisdiction as consequence of the *Charter* decisions respectively.

In December, the SCC issued their opinions in the reference questions regarding same-sex marriage:

1. The proposed legislation authorizing same-sex marriage is within Parliament's exclusive legislative authority over legal capacity for civil marriage under subsection 91(26) of the *Constitution Act*, 1867.
2. The proposed legislation is consistent with the *Canadian Charter of Rights and Freedoms*.
3. The religious freedom guarantee in s. 2(a) of the *Charter* is sufficiently broad to protect religious officials from being compelled by the state to perform same-sex marriages against their religious beliefs.⁹³⁵

The Court refused to answer the fourth question because “an answer to Question 4 has the potential to undermine the government’s stated goal of achieving uniformity in respect of civil marriage across Canada.”⁹³⁶ The court explained that the government would

⁹³¹ Canada 2006 Census of Population, online: *Statistics Canada*, <<http://www12.statcan.gc.ca/census-recensement/2006/index-eng.cfm>>.

⁹³² *Dunbar & Edge v Yukon (Government of) & Canada (AG)*, 2004 YKSC 54.

⁹³³ *W(N) v Canada (Attorney General)*, 2004 SKQB 434, [2004] SJ No 669 (Sask QB).

⁹³⁴ *Pottle et al v Attorney General of Canada et al*, 2004 OIT 3964.

⁹³⁵ *Marriage Reference*, *supra* note 930 at p 700-701.

⁹³⁶ *Ibid* at 701.

proceed with the legislation irrespective of the Court's opinion and the married same-sex couples relying on previous decisions deserved protection.⁹³⁷

Faced with strong pressure from the judiciary, which seemed to be unanimous in their view that a definition of marriage that excludes same-sex couples is unconstitutional, the federal government could only invoke the Notwithstanding Clause to resist the legalization of same-sex marriage. After consideration, the Prime Minister, Paul Martin decided not to rely on the Notwithstanding Clause, stating,

The notwithstanding clause is part of the *Charter of Rights*. But there's a reason that no Prime Minister has ever used it. For a prime minister to use the powers of his office to explicitly deny rather than affirm a right enshrined under the *Charter* would serve as signal to all minorities that no longer can they look to the nation's leader and to the nation's Constitution for protection, for security, for the guarantee of their freedoms. We would risk becoming a country in which the defence of rights is weighed, calculated and debated based on electoral or other considerations.⁹³⁸

On February 1, 2005, the federal government introduced Bill C-38, *An Act respecting certain aspects of legal capacity for marriage for civil purposes*, or more commonly known as the *Civil Marriage Act* in the House of Commons.⁹³⁹ On June 28, 2005, the House of Commons passed Bill C-38.⁹⁴⁰ The Act expanded on the traditional common law understanding of marriage as an exclusively heterosexual institution to include "the lawful union of two persons to the exclusion of all others" and thus for the first time codified the definition of marriage in Canadian legal history.⁹⁴¹ Furthermore, this new definition of marriage applied in all ten provinces and three territories, giving all gay and lesbian Canadians the same right to marry as their heterosexual counterparts.

⁹³⁷ *Ibid.*

⁹³⁸ "Paul Martin's speech on same-sex marriage", (16 February 2005) online: Yawningbread <<http://www.yawningbread.org/>>.

⁹³⁹ *Supra* note 929.

⁹⁴⁰ *Civil Marriage Act*, SC 2005, c 41.

⁹⁴¹ *Ibid*, s 2.

With respect to the Alberta *Marriage Act*, the Notwithstanding Clause expired on March 23, 2005 and it was not renewed, allowing the *Civil Marriage Act* to come into effect in Alberta as well.

With the enactment of the *Civil Marriage Act*, Canada became the fourth country in the world to legalize same-sex marriage nationwide. It is considered as a symbolic achievement of formal legal equality for gays and lesbians in Canada. It only took six years for the federal government to change its policy from oppositional (Bill C-23 which defined marriage only is “the lawful union of one man and one women to the exclusion of all others”)⁹⁴² to supportive by legalizing same-sex marriage (Bill C-38 which defined marriage as “the lawful union of two *persons* to the exclusion of all others”).⁹⁴³ It is doubtless that the decisions from the three provincial courts played significant roles in this process. Furthermore, the support of same-sex marriage in the reference opinion from the SCC also contributed to the legalization of same-sex marriage. In many ways, the courts forced the federal government to legalize same-sex marriage.

The legalization of same-sex marriage is a significant victory for LGBT’s rights development. In the battle against cultural relativism, Canadian courts refused a compromising attitude and ruled that same-sex couples are entitled to marry just as heterosexual couples. Same-sex marriage, in essence, is a reflection of formal equality as providing the identical right to marry to same-sex couples. However, the critiques on this grant of formal equality to gay men and lesbians from feminist, queer or other left viewpoints should not be ignored. They have challenged the limitations of formal equality for same-sex marriage by lack of taking into account on critiques of marriage institution, its relationship to unequal power, domestic abuse, economic dependency and poverty.⁹⁴⁴ The passage of same-sex marriage would worsen the marginalization of those unlikely to enter

⁹⁴² Bill C-23, *supra* note 894 at cl 1.1.

⁹⁴³ Mary C.Hurley, *Bill C-38: the Civil Marriage Act*, (Ottawa: Parliament of Canada, 2005), online: Parliament of Canada <<http://www.parl.gc.ca/>> [Hurley (2005)].

⁹⁴⁴ Clarie Young & Susan Boyd, “Losing the Feminist Voice? Debates on the Legal Recognition of Same Sex Partnerships in Canada”, (2006) 14 *Feminist Legal Studies* 213, at 235.

the marriage, so major forms of exclusion, violence and discrimination continue to exist.⁹⁴⁵ Legal recognition does not necessarily guarantee the full social acceptance of sexualities and lives of sexual minorities in Canada.⁹⁴⁶ As mentioned above, formal equality is not sufficient and substantive equality is the final objective. New battles for substantive equality have begun recently in Canada, including fighting for the elimination of bullying in schools and introduction of same-sex family model in elementary school education.⁹⁴⁷ The following section introduces some other Canadian legal issues in terms of sexual orientation rights.

D. Other Sexual Orientation Legal Issues in Canada

From decriminalizing homosexuality up to legalizing same-sex marriage, a variety of other legal issues regarding substantive equality for LGBT in Canada were fought and won, such as the previous treatment of sexual minorities by the military (*Douglas v Canada*),⁹⁴⁸ the discriminatory treatment of gay and lesbian literature by customs (*Little Sisters Book and Art Emporium v Canada (Minister of Justice)*),⁹⁴⁹ sexual orientation related reading material and educational resources for elementary school (*Chamberlain v Surrey School Board No 36*),⁹⁵⁰ parental rights with same-sex marriage (*M.D.R. v Ontario (Deputy Registrar General)*)⁹⁵¹ to name a few. The next part addresses two important legal issues by examining the relevant cases and legislative development, violence against sexual minorities, and the refusal of marriage commissioners to perform same-sex marriage.

⁹⁴⁵ Gary Kinsman & Patrizia Gentile, *The Canadian War on Queers*, (Vancouver, Toronto: UBC Press, 2010), at xvi.

⁹⁴⁶ *Ibid.*

⁹⁴⁷ See EGALE, online<<http://egale.ca/>>. The Ontario Health and Physical Education elementary curriculum (Grade 1-8) does not include learning diversity of families, but address the inclusive education regardless of sexual orientation and anti-discrimination principles including on ground of sexual orientation (p 57); definition of sexual orientation (p 217); impact of stereotypes, including homophobia (218), online: Ministry of Education, Ontario< <http://www.edu.gov.on.ca/eng/curriculum/elementary/healthcurr18.pdf>>.

⁹⁴⁸ *Douglas v Canada (T.D)*, [1993] 1 FC 264.

⁹⁴⁹ *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, [2000] 2 SCR 1120; *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] 1 SCR 38.

⁹⁵⁰ *Chamberlain v Surrey District School Board No 36*, [2002] 4 SCR 710, 2002 SCC 86.

⁹⁵¹ *M.D.R. v Ontario (Deputy Registrar General)*, [2006] 19053 (ON SC)(CanLII).

1. Hate Crime

Violence against lesbians and gay men remains a serious issue of concern worldwide. It was also a serious matter in Canada, particularly, in metropolitan cities, such as Montreal, Toronto, and Vancouver.⁹⁵² In 2012, Statistics Canada released a new hate crime report that showed two-thirds of 218 crimes motivated by sexual orientation between 2009 and 2010, were violent.⁹⁵³ The Toronto Police 2011 Annual Hate/Bias Crime statistical report showed that sexual orientation has become the second most frequently occurring motivation factor for hate crimes in the past 5 years, with religion remaining the most common.⁹⁵⁴

In 1995, Parliament enacted Bill C-41, *an Act to amend the Criminal Code (Sentencing) and other Acts in consequence*, which stipulates, evidence that a crime was motivated by bias, prejudice or hate based on a number of listed personal characteristics constitutes an aggravating circumstance for which a sentence should be increased.⁹⁵⁵ Sexual orientation was included in the list of personal characteristics. After a heated debate regarding to the inclusion of sexual orientation, Bill C-41 came into force in September 1996. The provisions states,

A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
 - (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, *sexual orientation*, or any other similar

⁹⁵² Hurley (2010), *supra* note 807, at 20.

⁹⁵³ Statistics Canada, "Police reported hate crime in Canada, 2010" (12 April 2012), online: <<http://www.statcan.gc.ca/>>.

⁹⁵⁴ Toronto Police Service – Hate Crime Unit, *2011 Annual Hate/Bias Crime Statistical Report 2011* (Toronto: Toronto Police Service, 2011) at 11-12, online:

<<http://www.torontopolice.on.ca/publications/files/reports/2011hatecrimereport.pdf>>.

⁹⁵⁵ Bill C-41, *An Act to amend the Criminal Code (Sentencing) and other Acts in consequence*, 1st Sess, 35th Parl, 1995 (assented to 13 June 1995).

factor.⁹⁵⁶ [emphasis added]

It should be kept in mind that it is merely an aggravating sentencing provision rather than a crime. The Canadian *Criminal Code* does not have a separate offence called “hate crime”, which is distinct from “hate propaganda” (sections 318-320 of the *Criminal Code*), discussed below.

In April 2004, MP Svend Robinson introduced Bill C-250 to amend hate propaganda provisions in *Criminal Code*, expanding the definition of “identifiable group” to include any section of the public distinguished by sexual orientation.⁹⁵⁷ The inclusion of sexual orientation sparked considerable opposition from religious organizations during Parliamentary committee hearings.⁹⁵⁸ The opponents argued that the measure would criminalize religious expressions.⁹⁵⁹ Thus the Bill was amended to add good faith expression of opinion based on belief in a religious text as a defense against a charge of willful promotion of hatred.⁹⁶⁰ It was passed by both the House and Senate and was given Royal Assent on April 29, 2004.⁹⁶¹ The relevant provisions read,

Section 319(2): Everyone who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of:

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction.

Section 319(7): “identifiable group” has the same meaning as in section 318;

Section 318(4): In this section, “identifiable group” means any section of

⁹⁵⁶ *Criminal Code*, *supra* note 834, s 718.2.

⁹⁵⁷ Bill C-250, *An Act to amend the Criminal Code (hate propaganda)*, 2nd Sess, 37th Parl, 2004 (assented to 29 April 2004).

⁹⁵⁸ *Ibid.*

⁹⁵⁹ “Report stage, c-250 AN ACT TO AMEND THE CRIMINAL CODE (HATE PROPAGANDA)”, online:LEGISinfo <<http://www.parl.gc.ca/>>.

⁹⁶⁰ *Ibid.*

⁹⁶¹ *An Act to amend the Criminal Code (hate propaganda)* S.C. 2004, c. 14.

the public distinguished by colour, race, religion, ethnic origin or *sexual orientation*.⁹⁶² [Emphasis added]

To date, Canada has legislated protection for sexual minorities to be free from violence and hate speech based on their sexual orientation. The inclusion of sexual orientation among grounds that constitutes a hate crime does not grant special rights to gays and lesbians but the argument is that it helps to deter people who would target their victims of crime or hate propaganda based solely on their sexual orientation. The message behind the legislation was that the basic security of gays and lesbians was guaranteed, and should be protected from any form of violence. It is believed that this safeguard should ultimately better promote equal rights for all Canadians.

2. Refusal of Marriage Commissioners to Perform Same-sex marriage

After same-sex marriage became legal in Canada, the new issue whether marriage commissioners are entitled to refuse to perform same-sex marriage arose. The issue finally reached the court in Saskatchewan. In the case of *Nichols v M.J.*, Orville Nichols, a civil marriage commissioner in Regina refused to perform same-sex marriage because his Christian beliefs forbade him from taking part in the marriage of two men.⁹⁶³ M. J., who is a gay man requesting the service, filed a complaint against Nichols with the Saskatchewan Human Rights Commission for violating his equal right to marry.⁹⁶⁴ The Saskatchewan Human Rights Commission found that Nichols had discriminated against M.J on ground of sexual orientation.⁹⁶⁵ Nichols appealed that decision to the Human Rights Tribunal in October 2006.⁹⁶⁶ After the Tribunal upheld the decision of the Saskatchewan Human Rights Commission, Nichols then appealed to the Court of Queen's Bench in 2009.⁹⁶⁷

⁹⁶² Criminal Code, *supra* note 834.

⁹⁶³ *Nichols v MJ*, 2009 SKQB 299 (CanLII) at para 1.

⁹⁶⁴ *Ibid.*

⁹⁶⁵ *Ibid.*

⁹⁶⁶ *Ibid.*, at para 2-4.

⁹⁶⁷ *Ibid.*

McMurtry J. agreed with both the Commission and Tribunal, stating that “[i]n his capacity as a marriage commissioner, however, he is holding himself out to the public as a government official. In that capacity, his personal religious beliefs do not matter.”⁹⁶⁸

As a consequence of the *Nichols* litigation, the Saskatchewan government asked the Saskatchewan Court of Appeal to examine the constitutionality of two proposed bills that would allow civil marriage commissioners to decline to perform marriages which run contrary to their personal religious belief.⁹⁶⁹ The core question for the Court to consider is whether marriage commissioners in public service are within their *Charter* rights to refuse to conduct ceremonies that offend their religious beliefs. It was the first time to evaluate if that refusal meets the standards of the *Charter* although in some provinces, such as Alberta, British Columbia, New Brunswick, Prince Edward Island and Quebec have granted the right of decline to their marriage commissioners.⁹⁷⁰

The Court found no difficulty in concluding that both bills will have the “significant and genuinely offensive” effects on same-sex couples:

[i]t is not difficult for most people to imagine the personal hurt involved in a situation where an individual is told by a governmental officer “I won’t help you because you are black (or Asian or First Nations) but someone else will” or “I won’t help you because you are Jewish (or Muslim or Buddhist) but someone else will”. Being told “I won’t help you because you are gay/lesbian but someone else will” is no different.⁹⁷¹

The Court acknowledged that there is a conflict between section 2(a) and section 15(1) of the *Charter*, the bills tried to manage the “intersection of the freedom of religion of marriage commissioners on the one hand, and the equality rights of gay and lesbian individuals on the other.”⁹⁷² The Court reiterated that there is no hierarchy of the *Charter*

⁹⁶⁸ *Ibid*, at para 76.

⁹⁶⁹ *Marriage Commissioners Appointed under the Marriage Act (Re)*, 2011 SKCA 3(CanLii) [*Re: Marriage Commissioners*].

⁹⁷⁰ Geoffrey Trotter, “The Right to Decline Performance of Same-Sex Civil Marriages: The Duty to Accommodate Public Servants- A Response to Professor Bruce MacDougall” (2007) 70 Sask L Rev 386.

⁹⁷¹ *Re: Marriage Commissioners*, *supra* note 969, at para 41.

⁹⁷² *Ibid*, at para 66.

rights, and neither interests under section 2(a) nor the interests in section 15 can trump the other.⁹⁷³

The Court further conducted that the *Oakes* analysis to assess these proposed accommodations for marriage commissioners can be justified in section 1. These proposed measures were held to be concerned only with the ability of marriage commissioners to act on their belief in the world at large, rather than focusing on the core of freedom of religion, i.e., holding the religious beliefs as he/she wishes.⁹⁷⁴ The Court noted that there would be a less restrictive alternative than the one the government proposed, a “single entry point” system for same-sex couples who intend to marry to contact the Director of the Marriage Unit rather than an individual commissioner.⁹⁷⁵ With regard to the deleterious effects of these proposed measures, the Court held that:

[it] would perpetuate a brand of discrimination which our national community has only recently begun to successfully overcome...Negative effects of this sort would not be restricted to those gay and lesbian individuals who are directly denied marriage services. A more generalized version of it would obviously be felt by the gay and lesbian community at large and, indeed, there is no doubt it would ripple through friends and families of gay and lesbian persons and the public as a whole...It would undercut the basic principle that governmental services must be provided on an impartial and non-discriminatory basis.⁹⁷⁶

The Saskatchewan Court of Appeal unanimously ruled that both proposals offend the section 15(1) of the Charter and can not be justified under section 1 in 2011.⁹⁷⁷ From this case, it can be seen that after the landmark victory of legalizing same-sex marriage in Canada, there are a variety of issues relating to substantive equality for sexual minorities. So it should be kept in mind that in the Chinese context, it is likely to have a long way to go

⁹⁷³ *Ibid*, at para 66.

⁹⁷⁴ *Ibid*, at para 93.

⁹⁷⁵ *Ibid*, at para 85.

⁹⁷⁶ *Ibid*, at paras 94-98.

⁹⁷⁷ *Ibid*, at para 162.

after the claim for same-sex marriage would succeed.

there is a long road to reach the substantive equality for sexual minorities even after the landmark victory legalizing same-sex marriage in Canada.

E. Key Players in Canadian Development

The journey of sexual orientation rights development in Canada started with the decriminalization of same-sex acts by use of privacy protection, followed by equality and non-discrimination protection for lesbians and gay men in the early *Charter* years, which culminated in the legalization of same-sex marriage. This pattern of sexual orientation rights development is similar to those in international human rights law and European human rights law.

Among a variety of factors at play in the development, the main ones include the *Charter*, the courts, support from civil society, and the advocacy of various interest groups. Each will be examined in turn.

The journey that led to the achievement of formal equality in same-sex marriage in Canada is an illustration of the potential power of human rights legislation. The Canadian *Charter* operates to protect individuals from violation by governmental actors, and grants the courts the power to strike down or amend (i.e., read-in or read-down) any unconstitutional legislation. The equality provision, section 15 of the *Charter*, is the main tool protecting minorities from discrimination. A number of pieces of legislation discriminating against sexual orientation were struck down by *Charter* litigations under section 15's equality protection. At the time the *Charter* was adopted, few could have anticipated that within a period of exactly 20 years,⁹⁷⁸ gay and lesbian groups would have successfully challenged the traditional definition of marriage to embrace same-sex couples.

Canadian courts have played important roles along the equality-seeking road for sexual

⁹⁷⁸ Although the *Charter* came into force in 1982, the equality provisions in section 15 did not come into force until 1985, in order to give the government time to amend legislation, policy and practice in line with section 15. Thus, in reality, from the 1985 to the passing of the *Civil Marriage Act* in 2005 was only 20 years.

minorities by making many vital decisions. The landmark cases include, the inclusion of sexual orientation as an analogous prohibited ground for discrimination (*Egan*), recognition of same sex relationships (*M v H*), and the legalization of same-sex marriage (*Halpern*). Without the courts, the road to equality for gays and lesbians in Canada would probably have been tortuous. Furthermore, the principle of constitutional interpretation that characterizes the Canadian *Constitution* as a “living tree” permitted the Courts to reformulate the definition of marriage in line with the realities of modern society. The principle of constitutional supremacy states that any law that is inconsistent with the Constitution has no force or effect. Finally, the separation of powers and judicial independence principles provide the courts with the authority to test the constitutionality of ordinary legislation, and the ability to strike down unconstitutional laws.

The relationship between social change and legal reform is also important along this journey. The support for sexual orientation human rights from civil society generated pressure on governments, which helped pass various legislative reforms, such as the *Civil Marriages Act* and the amendment to the *Canadian Human Rights Act*. Although both of those amendments followed judicial decisions, were it not for the support from civil society, politicians might not have followed through with the progressive developments in sexual orientation rights in Canada. Also the SCC identified respect for minority rights as another fundamental principles recognized in the *Constitution*.⁹⁷⁹ The public has showed increasing acceptance of gay and lesbians, in particular among young people. For instance, during the heated controversy on the issue of same-sex marriage, a public survey showed that 56 percent of Canadians support permitting same-sex marriages and that 63 percent of Canadians believe that those in same-sex relationships should be entitled to spousal benefits.⁹⁸⁰ Thus it can conclude that civil society not only supported the courts decisions, but also pressured the legislative branch to legalize same-sex rights.

⁹⁷⁹ *Reference re Secession of Quebec*, [1998] 2 SCR 217.

⁹⁸⁰ *Supra* note 890.

These tremendous changes in Canadian law also accelerated social change. The direct impact is felt in the sexual minorities' community. Today, same-sex couples are entitled to marry, and have equal access to employment and other social benefits. These legal changes convey the message to society that the sexual minorities are part of society and therefore deserve equal protection because any discrimination on the ground of sexual orientation is wrong and illegal. These legal protections made sexual minorities community more visible, which helped speed up the acceptance of the whole of society.

Finally, the role of interest groups in this process must not be ignored. The appearance of gay and lesbian interest groups from the early beginning of the gay rights movements helped give visibility, and has given this group their own political voice. Since the *Charter*, interest groups have developed their strategy to seek equality using legal and litigation activism. For example, EGALE, the most prominent national gay and lesbian activist group, focuses on *Charter* litigations for formal legal equality and has played an important part in the story of the success of sexual orientation human rights in Canada. The intensive pressures generated from different waves of *Charter* litigations and lobbying successfully pushed governments' policy-making.

Although substantive equality was examined during this process, for instance in *Vriend*,⁹⁸¹ formal equality arguments dominated the equality litigation and the legalization of same-sex marriage. There are many new battle grounds for substantive equality in Canada, for instance, the current anti gay-bullying in school campaigns and the introduction of inclusive curricula in elementary education, which includes same-sex families.⁹⁸²

F. Conclusion

Since homosexuality was decriminalized in the 1960s in Canada, the real development

⁹⁸¹ *Supra* note 866.

⁹⁸² *Supra* note 947.

for sexual orientation rights in the legal field emerged after the equality provisions of the *Charter* came into effect in 1985. This chapter mainly examined the legal development post-*Charter* and explored the key factors and actors during the process.

The Canadian *Charter* is an important tool used by gay rights activists to challenge discriminatory legislation. The whole path could be described as how the courts interpreted section 15 from different angles and provided equal protections for sexual minorities in different fields, which finally reached same-sex marriage. Since sexual orientation was first recognized as an analogous prohibited discriminatory ground in the SCC's decision in *Egan* in 1995, it took ten years for Canada to legalize same-sex marriage federally. Finally the three provincial decisions legalizing same-sex marriage in Ontario, Quebec and British Columbia led to the final passage of Bill C-38 to recognize same-sex marriage federally. It was claimed that the social situation of gays and lesbians in Canada would not be what it is today without judicial activism.⁹⁸³ The discussion on hate crime and refusal of marriage commissioners to perform same-sex marriage also offers some thoughts regarding battles for sexual minorities' rights in Canada to continue to reach substantive equality after formal equality was achieved with the legalization of same-sex marriage.

During this process, the significance of interest groups and civil society should not be ignored. Many *Charter* litigations were supported by a number of interest groups. The lobbying of the interest groups also raised a great deal of awareness in the public about sexual minority rights issues, and therefore has successfully generated pressure on both the federal and provincial governments. This greater understanding of gay and lesbian issues along with the support from civil society has also provided a cornerstone for the legal reforms. Likewise, the significant change in Canadian law has also led to a considerable amount of social change in terms of social status of sexual minorities, thereby increasing their acceptance within civil society.

⁹⁸³ Bruce MacDougall, "The Celebration of Same-Sex Marriage" (2000-2001) 32:2 *Ottawa L Rev* 235 at 238-239.

These important factors and key actors will be examined in consideration of Chinese legal reform in Chapter Six to see whether the Chinese counterparts could play similar roles in promoting sexual orientation rights in China.

Chapter Six

Discussion: The Applicability of the Three Human Rights Models in China

A. Introduction

Many different forces could contribute to legal reform in a country. In today's interconnected and interdependent world, the trends in international law and the legal developments in developed countries do play an important role. As discussed in previous chapters, the UN human rights system and the European human rights system have recognized that human rights for sexual minorities are universal, and that this realization brings a variety of obligations for member states to respect, protect, and fulfill the human rights of sexual minorities. In a national perspective, Canada has anti-discrimination protection for sexual minorities. This chapter aims to explore the central research question, whether and how these developments in different human rights systems could promote tongzhi rights development in China based on the examination of the three models development.

The first section seeks to demonstrate whether sexual orientation rights recognized under international human rights law (i.e. at the UN level), could impel the necessary legal reforms in China. It first starts with a brief introduction to the two major approaches to applying international treaty law in the domestic jurisdictions, with a particular focus on the approach used in China. Next it offers an overview of the core of international human right treaties that China has ratified, and explores the three main sources of resistance against the application of universal human rights in China: Asian Values, economic development and state sovereignty. In addition, it uses the development of human rights for women as a case study to explore how international human rights law has promoted the rights of women in China to reach formal equality. The last part of this section provides an analysis of the research issue with regard to tongzhi development in China and international human rights by reviewing the overall situations discussed above.

The next section goes on to explore whether the lessons learned from a regional international organization could inspire tongzhi rights development in China. The European Convention on Human Rights provides an example of a comprehensive regional human rights protection model which has great influence in the human rights practice in Europe. With the current heated debate on the EU's accession to the ECHR, human rights protection will be strengthened across Europe. By way of comparisons, ASEAN is currently the only regional international organization in Asia. This section provides an overview of ASEAN's history, current human rights laws, and its relationship with China. This is followed by an examination of whether the regional human rights law model could be applicable in China in the near future by a comprehensive study on both human rights laws, and other relevant factors.

The last section explores whether the successful experience in Canada could be transplanted in China to promote tongzhi human rights. This is done by reviewing the influential role played by the Canadian *Charter* and the courts during the development of human rights protection for sexual minorities in Canada. It looks at the roles of Chinese counterparts and assesses the feasibility of the litigation strategy based on the overall analysis of the Chinese current legal and political system.

B. International Human Rights Law Model

1. Implementation of International Law in Chinese Jurisprudence

International law has two significant sources: treaty law and customary international law. Due to the wide range of state practice regarding sexual minority rights, from marriage on one end to the death penalty on the other, it would be hard to argue that there is any solidified customary international law on sexual orientation protection. That being said, the focus of the chapter will be on the incorporation of treaty-based law. Generally speaking, dualism and monism are the two approaches with regard to adoption of international

treaties in domestic jurisdiction.⁹⁸⁴ The dualistic approach implies that any rule of international law must be transformed into domestic law through the adoption of specific implementation legislation. Differently, the monistic approach automatically regards international law as part of the domestic law once the country ratifies the treaty. Canada, for instance, follows a dualist approach and the Law Commission of Canada states explicitly in *Crossing Borders: Law in Globalized World*:

Canada traditionally considers domestic law and treaty law as two distinct universes. By approaching these two spheres of law as separate solitudes, Canada is a “dualist” jurisdiction. An international treaty may require Canada, as a matter of international law, to change its domestic law. But in the dualist tradition, that treaty has no direct effect in domestic law until domestic legislation is passed to “transform” or “implement” it into Canadian law.⁹⁸⁵

a. A Mixed Approach in China

Since China gained admission to the United Nations (UN) in 1971, China actively took part in the international community through participation in a variety of international treaty negotiations. At present, China is now party to over 300 multilateral treaties.⁹⁸⁶ As such, international law has become a significant part of Chinese law. Due to the absence of explicit provisions regarding the application and implementation of international treaties in China's domestic law in the *Chinese Constitution* or in *Law on Legislation*, China has adopted a mixed approach to implement treaty obligations, namely, execution by transformation, direct application and administrative measures.⁹⁸⁷

The transformation itself is a dualistic approach that requires the legislature to pass

⁹⁸⁴ Catherine Kuo-Shu Chang, *Violence Against Women In Post-Mao China: International Human Rights Norms and Local Law* (PhD Thesis, University of Washington, 2003), (np: UMI Dissertations Publishing, 2003) at 264.

⁹⁸⁵ Craik *et al*, *supra* note 438, at 68.

⁹⁸⁶ Xue Hanqin and Jin Qian, “International Treaties in the Chinese Domestic Legal System” (2009) 8 *Chinese Journal of International Law* 299 at 303.

⁹⁸⁷ *Ibid* at 305.

special national legislation or amend existing domestic laws to carry out treaty obligations. For example, after China signed the 1982 UN *Convention on the Law of the Sea*, the Standing Committee of the NPC enacted the *Law on the Territorial Sea and Contiguous Zone* that incorporated the relevant provisions of the Convention in 1992.⁹⁸⁸ Amending existing domestic laws to comply with the international treaties seems the most common approach for China at present. China's WTO participation process is another good example. To ensure compliance with WTO rules, China has repealed, abrogated, revised, enacted and promulgated more than 300 domestic laws, administrative regulations and administrative orders.⁹⁸⁹

Direct application is also understood as a process by which international treaties are incorporated into domestic legal system without being transformed into domestic laws.⁹⁹⁰ The direct application approach is commonly used with regard to international standards or principles as a supplementary function.⁹⁹¹ Moreover, in practice, such direct application still carries the feature of transformation because the specific national laws normally have the provisions that refer to the relevant treaties.⁹⁹² For example, in the 2002 *Regulations for the Implementation of the Trademark Law*, article 12 states, “Applications for international registration of trademarks shall be dealt with in accordance with the relevant international treaties to which China has acceded.”⁹⁹³ The Chinese *Regulation of the Use of Mark of the Red Cross*, article 23 states, “if there is anything that is not regulated in this concerned regulation regarding the protection of the mark of the Red Cross, the Geneva Convention and its Protocol should be applied.”⁹⁹⁴

⁹⁸⁸ *Ibid* at 307.

⁹⁸⁹ *Ibid* at 308.

⁹⁹⁰ *Ibid* at 309-310.

⁹⁹¹ *Ibid*.

⁹⁹² *Ibid*.

⁹⁹³ Shangbiaofa Shishi Tiaoli (商标法实施条例) [Regulations for the Implementation of the Trademark Law of the People's Republic of China] (Promulgated by Decree No.358 of the State Council on August 3, 2002, and effective on September 15, 2002), at art 12, online: Chinese Government Web <<http://www.gov.cn/>> [translated by author]

⁹⁹⁴ Hongshizi Biaozhi Shiyong Banfa (红十字标志使用办法) [Measures on the Use of the Sign of the Red

The administrative measure normally applies to the bilateral economic cooperation agreements and memoranda of understanding (MOUs) concluded by a governmental department or government. These agreements and MOUs are treaties, but seldom give rise to legal disputes in domestic law.

There are approximately 70 domestic laws with explicit provisions that reference international treaty obligations.⁹⁹⁵ In cases of conflicts between the treaty and domestic law, these provisions tend to give the treaty law prevailing status over the domestic law unless China made a reservation to that effect.⁹⁹⁶ For instance, the *Law of Civil Procedure*, article 260 stipulates, “If an international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those found in this Law, the provisions of the international treaty shall apply, unless the provisions are the ones on which China has announced reservations.”⁹⁹⁷ In judicial practice, the priority of international treaty implementation is also confirmed. The Supreme People’s Court, the Supreme Procurate, the Ministry of Foreign Affairs, the Ministry of Public Safety and Ministry of Nation Security and the Ministry of Justice jointly issued a regulation in 1987, stating “where there is conflict between domestic legislation or regulations and international treaties ratified by China, the treaties shall prevail. China shall not use domestic regulation as an excuse to refuse to fulfill its treaty obligations.”⁹⁹⁸

b. International Human Rights Law in China

In order to win international recognition on its role in the international stage, China is increasingly active in a variety of human rights-related events. From November 17

Cross] (Promulgated by Decree No.194 of the State Council and Central Military Commission and effective on January 29, 1996), at art 23, online: pkulaw<<http://en.pkulaw.cn/>>.

⁹⁹⁵ Xue Hanqin and Jin Qian, *supra* note 986 at 303.

⁹⁹⁶ *Ibid* at 303.

⁹⁹⁷ Minshi Susong Fa (2012 Xiuzheng) (民事诉讼法 (2012 修正) [Civil Procedure Law(2012 Amendment)] (Adopted by the National People's Congress on April 9, 1991; amended for the first time by the Standing Comm. Nat'l People's Cong. on October 28, 2007; and amended for the second time by the Standing Committee of the National People's Congress on August 31, 2012), at art 260, online:pkulaw <<http://en.pkulaw.cn/>> .

⁹⁹⁸ Chang, *supra* note 984 at 274.

to 26, 2006, China held a “Human Rights Exhibition” in Beijing, showcasing China's achievements in Human rights.⁹⁹⁹ To date, China has signed all the core international human rights treaties, with the notable exception of the International Covenant on Civil and Political Rights that is yet to be ratified. The details concerning China's participation in treaties are as followed.

Table 1: China's Ratification of International Human Rights Treaties¹⁰⁰⁰

Treaty	Signed	Ratified
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	July 17, 1980	November 4, 1980
International Convention for Elimination of Racial Discrimination (CERD)	-	December 29, 1981 (accession)
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	December 12, 1986	October 4, 1988
Convention on the Rights of the Child (CRC)	August 29, 1990	March 2, 1992
International Covenant on Economic, Social, and Cultural Rights (ICESCR)	October 27, 1997	March 27, 2001
International Covenant on Civil and Political Rights (ICCPR)	October 5, 1998	Not ratified yet

c. Three Sources of Resistance to Universal Human Rights in China: Asian Values, Economic Development and State Sovereignty

During the extensive development of international human rights law in the 1990s, the notions of the universality of human rights in the UN Charter calls for member states to promote universal respect for human rights and fundamental freedoms on “a common standard of achievement for all peoples and all nations”.¹⁰⁰¹ The non-Western countries were concerned such universal standards were based on Western standards, and considered

⁹⁹⁹ “Human Rights in China exhibition to open in Beijing” (November 15, 2006), online: China People’s Daily<<http://english.peopledaily.com.cn/>>.

¹⁰⁰⁰ The data are from: “Chapter IV: Human Rights”, online: United Nations Treaty Collection<<http://treaties.un.org/>>.

¹⁰⁰¹ UDHR, *supra* note 102, at Preamble.

the regional context in the protection and promotion of human rights.¹⁰⁰²

In the Asian context, the concept of “Asian Values” was adopted to address such concerns.¹⁰⁰³ Asian Values is a comprehensive theory and representative of the cultural relativism discourse, which argues that international human rights law, should not necessarily be applied to Asian countries because all these human rights norms were created in accordance with Western democracies’ values without careful consideration of Asian cultural values, such as, Confucianism.¹⁰⁰⁴ The following statement made by a Chinese author captures the features of these values:

“Asian values [put] emphasis on a quest for consensual solutions, communitarianism rather than individualism, social order and harmony, respect for elders, discipline, a paternalistic state, and the primary role of government in economic development.”¹⁰⁰⁵

In 1993, representatives of some Asian countries gathered and issued the *Bangkok Declaration*, which was prepared for the World Conference on Human Rights in Vienna.¹⁰⁰⁶ The Declaration, a representative document reflecting Asian Values, claimed that, while human rights are universal in nature, the definition of such rights should be contextualized for a diversity of historical experiences, cultures and social and political arrangements for a particular nation.¹⁰⁰⁷ The Declaration reaffirmed their commitment to the principles of the *UN Charter* and the UDHR but addressed their view of the interdependence and individuality of human rights and stressed the need for universality, objectivity and non-selectivity of human rights.¹⁰⁰⁸ These states argued that human rights in current international law are not really universal but instead are a reflection of Western

¹⁰⁰² Meijknecht & Vries, *Supra* note 231, at 82.

¹⁰⁰³ *Ibid.*, at 83.

¹⁰⁰⁴ *Ibid.*, at 84-87.

¹⁰⁰⁵ Reprinted in C. Tomuschat, *Human Rights. Between Idealism and Realism* (Oxford: Oxford University Press, 2003), at p 70.

¹⁰⁰⁶ Bangkok Declaration, *supra* note 113.

¹⁰⁰⁷ *Ibid.*

¹⁰⁰⁸ *Ibid.*

culture and values.¹⁰⁰⁹ Women's universal human rights are one of the targets of the cultural relativism argument.¹⁰¹⁰

Economic Development is another strong argument for developing countries that are trying to deny universal human rights protection. Most countries in Asia were colonies of Western states and had relatively lagging economies in the 1950s. Lee Kuan Yew, Prime Minister of Singapore from 1959 to the 1990s, frequently made statements to the effect that the first priority was to build up the country and to develop it, while all the rest, in particular the rights and freedoms of citizens, was a matter of secondary importance.¹⁰¹¹ He also relied on the basic value of respect for authority in Confucianism to support his position.¹⁰¹² The successful economic development in Singapore influenced many Asian countries and increased the general support for the Asian Values development model. China made similar arguments supporting the economic development strategy over human rights protection. Chinese Vice-Foreign Minister stated at the Vienna World Conference on Human Rights,

For the vast number of developing countries, to respect and protect human rights is first and foremost to ensure the full realization of the rights to subsistence and development. When poverty and lack of adequate food and clothing are commonplace... priority should be given to economic development.¹⁰¹³

State sovereignty is yet another powerful source of resistance against the universalism of human rights in China. The propaganda from the central government emphasizes that state sovereignty is prerequisite of any individual citizen's civil and political rights.¹⁰¹⁴ It also argues the criticism concerning human rights in China from Western countries is an illegal interference in its internal affairs according to the principles of international law.

¹⁰⁰⁹ Chang, *supra* note 984 at 283.

¹⁰¹⁰ *Ibid.*

¹⁰¹¹ MC Davis, "The Price of Rights: Constitutionalism and East Asian Economic Development" (1998) 20 HQ 303 at 309.

¹⁰¹² *Ibid.*

¹⁰¹³ Chang, *supra* note 984 at 91.

¹⁰¹⁴ *Ibid* at 286.

The comments from a member of the CPPCC criticized the United States and the other Western countries of the North Atlantic Treaty Organization for using human rights banner as a cover to intrude in other countries' internal affairs.¹⁰¹⁵

The 2012 Human Rights Records of the United States issued recently by the State Council Information Office of China excoriated the United States for judging human rights situations in more than 190 countries by pretending to be "the world's human rights defender".¹⁰¹⁶ The *Foreword* of this report states:

The State Department of the United States recently released its Country Reports on Human Rights Practices for 2012, posing as "the world judge of human rights" again. As in previous years, the reports are full of carping and irresponsible remarks on the human rights situation in more than 190 countries and regions including China. However, the U.S. turned a blind eye to its own woeful human rights situation and never said a word about it. Facts show that there are serious human rights problems in the U.S. which incur extensive criticism in the world. The Human Rights Record of the U.S. in 2012 is hereby prepared to reveal the true human rights situation of the U.S. to people across the world by simply laying down some facts.

It is the fourteenth time that the State Council Information Office of China has officially issued similar documents in response to United State's annual human rights reports, since 1996.¹⁰¹⁷

2. Case Study: the Influence of International Human Rights Law in the Development of Human Rights for Women in China

¹⁰¹⁵ "Jie Renquan Zhiming Xing Baquan Zhishi (借人权之名行霸权之实) [Using the name of human right to operate hegemonism]" (8 May 2005), in Renquan Zhuanti: Zhongguo Renquan Fazhan Zhilu (人权专题: 中国人权发展之路) [Human Rights Special Issue: Chinese Human Rights Development Road] online: Chinese Central Television Web <<http://www.cctv.com/zhuanti/renquan>> [translated by author].

¹⁰¹⁶ Zhongguo Guowuyuan Xinwen Bangongshi (中华人民共和国国务院新闻办公室)[The State Council Information Office of China], *2012 Meiguo Renquan Jilv* (2012 年美国的人权纪录) [*The 2012 Human Rights Records of the United States*], (21 April 2013), online: *Xinhua News*<http://news.xinhuanet.com/english/world/2013-04/21/c_132327175.htm>.

¹⁰¹⁷ Zhongguo Renquan Baogao(中国人权报告)[Chinese Human Rights Reports], available online: Research Center for Human Rights and Humanitarian Law, Peking University Law School< <http://www.hrol.org> >.

Despite the resistance to the universality of human rights in China, there have been some steps towards the realization of human rights in China that can be attributed to the influence of international human rights law.¹⁰¹⁸ The development of a comprehensive social security system and health service system and the passage of legislation to reach formal equality for women are examples that show the Chinese government's willingness to improve human rights.¹⁰¹⁹ The following will examine how women's human rights have been promoted in modern China under the influence of international human rights development. This case study provides a perspective to argue whether international human rights laws could be used to influence tongzhi human rights legal reforms in China.

Women's rights are often used as a comparative subject while doing research on gay rights, both internationally as well as in China.¹⁰²⁰ This is because women have a long history of being discriminated against in China, and such discrimination is made on the grounds of sex, which has similarities with the tongzhi group. In International Commission of Jurist's submission to the Supreme Court of Nepal, the commission stated:

As a matter of international law, sexual orientation discrimination is a form of sex discrimination. Indeed, the former is not possible without reference to the sex of the individual. [...] Discrimination on the grounds of sex is often the consequence of behaviour that is not in conformity with the popularly understood sex or gender role.¹⁰²¹

Similarly, in China the tongzhi are discriminated against because their sexual desires are different from what society expects for their gender, therefore the discrimination

¹⁰¹⁸ Francine Kavanagh, "Chinese Human Rights: towards a Theory of Success" (2005) 1 European Law Students' Association SPEL at 26.

¹⁰¹⁹ *Ibid.*

¹⁰²⁰ Balzano also used women right as case study to research gay rights development in China. See Balzano, *supra* note 287 at 15.

¹⁰²¹ International Commission of Jurists, "Submission to the Supreme Court of the State of Nepal, Providing the Basis in International Human Rights Law for the Prohibition of Discrimination Based on Sexual Orientation and Gender Identity and Other Connected Matters" (January 9, 2008) at 5. Reprinted in James Anderson, *Human Rights Protections for Sexual Minorities in Insular Southeast Asia: Issues and Implications for Effective HIV Prevention* (Bangkok: UNESCO Asia and Pacific Regional Bureau for Education, 2011) at 56.

against gays or lesbians could be characterized as discrimination on grounds of sex. Some challenges against women's human rights development in China seem similar for tongzhi rights development. The change in women's legal and social status to some extent reflects China's evolving understanding of sexual diversity, which could provide a good foundation for the future development of gay rights.¹⁰²²

a. Women's Human Rights Protection in International Human Rights Law

Although women constitute over half the population of the world, they have been excluded from early human rights protective instruments despite the fact that the treaty language is gender neutral. International human rights law was male-oriented in the beginning, evidenced by early Western lawyers and philosophers who understood civil and political rights were to protect men in public life and their relationship with government instead of considering women.¹⁰²³ Hence, the status of women in the world was deemed inferior in the past due to the lack of any international recognition. Discrimination against women is common, including gender-based abuses, such as sexual assault and domestic violence, denial of reproductive freedom, and inequality of opportunity in education, employment, housing and healthcare.¹⁰²⁴ The political and civil rights for women were not guaranteed. Even now, women's political and civil rights are still unequal in many countries.¹⁰²⁵

Despite gender-neutral laws, the international arena has begun to pay attention to the differences between women and men since the 1950s. An increasing awareness and acknowledgement of women's rights has arisen with the appearance of some international

¹⁰²² Balzano, *supra* note 287 at 15.

¹⁰²³ Rebecca J Cook, ed, *Women and International Law Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994), at 12.

¹⁰²⁴ Julie Peters & Andrea Wolper, eds, *Women's Rights, Human Rights: International Feminist Perspectives* (New York: Routledge, 1995) at 2.

¹⁰²⁵ The United Nation Department of Economic and Social Affairs, "The World's Women 2010 Trends and Statistics, Executive Summary" (20 October 2010), online: United Nation Statistics Division <<http://unstats.un.org/unsd/demographic/products/Worldswomen/WW2010pub.htm>>.

treaties exclusively addressing women's issues, such as the *Convention on Political Rights of Women* (1953),¹⁰²⁶ the *Convention on the Nationality of Married Women* (1957).¹⁰²⁷ The most important international document for women's human rights to date is the *Convention on Elimination of All forms of Discrimination against Women* (CEDAW). It was adopted in 1979, and entered into force in 1981; until now there are 187 signatory country parties.¹⁰²⁸ The CEDAW stipulates a series of human rights for women, establishing equality for all women in both the public and private spheres, including health, education, family and political participation.¹⁰²⁹ The UN has also held a series of World Women Conferences, in Mexico in 1975, Copenhagen in 1980, and Nairobi in 1985 and Beijing in 1995, which have focused world attention on women's human rights promotion and development.¹⁰³⁰

b. Challenges against Universal Human Rights Protection for Women in China

China attempted to play a more active role in world affairs since the economic reforms in the late 1970s by ratifying a variety of international instruments.¹⁰³¹ In order to show its resolution in promoting equality of women, China hosted the 5th World Women Conference in Beijing and passed the notable *Beijing Declaration and Platform for Action*.¹⁰³² However, there were two major barriers against the universality of women's human rights in China: first, the subordinate role of women in traditional Chinese culture, and second, the general lack of a concept or notion of *human rights* among the Chinese people.

¹⁰²⁶ *Convention on the Political Rights of Women*, 7 July 1954, 193 UNTS 135.

¹⁰²⁷ *Convention on the Nationality of Married Women*, 11 August 1958, 309 UNTS 65.

¹⁰²⁸ CEDAW, *supra* note 177.

¹⁰²⁹ See e.g., articles: 7(elimination of discrimination against women in political and public life), 10 (education), 11 (employment), 13 (equality for women in economic and social life including the right to family benefits), 14(2)(b)(right of women to have access to adequate health facilities), 15 (right of women to conclude contracts and administer property), 16 (equal rights of women to marriage and family relations, including choice of name, choice of spouse, management of property and parental rights).

¹⁰³⁰ The United Nations Department of Public Information, "The Four Global Women's Conferences 1975 – 1995: Historical Perspective" DPI/2035/, May 2000, online: Division for the Advancement of Women Department of Economic and Social Affairs<<http://www.un.org/womenwatch/>>.

¹⁰³¹ *Supra* note 1000.

¹⁰³² *Ibid.*

i. The Subordinate Role of Chinese Women in Traditional China

The historical record has shown that men and women were not equal in traditional China.¹⁰³³ The position of women has been subordinate to men for centuries and the control over women was common both within the family and within society in traditional China.¹⁰³⁴

A general principle of gender relationships in Confucianism, the dominant philosophical ideology in traditional China, is male domination over women.¹⁰³⁵ According to Confucianism, a woman was subject to the moral guide of “the three obediences”, which meant a Chinese woman was subordinate to her father when she was unmarried, to her husband when she was married, to her son when and if she was a widow.¹⁰³⁶

Confucianism, which was adopted as the ruling ideology in most dynasties, had a significant influence in traditional China for over a thousand years. The status of women in traditional China was subordinate under men.¹⁰³⁷ In employment, women were prohibited to serve in governmental positions because they did not have access to the examination system that was a major path to a political career in traditional China.¹⁰³⁸ Also, in marriage, men and women were unequal because monogamy only applied to women whereas polygamy was legal for men.¹⁰³⁹ Husbands could divorce his wife for seven reasons but a woman could not ask for divorce voluntarily.¹⁰⁴⁰ After divorce, a wife only took her personal property that she brought to her husband, and could not ask for separation of

¹⁰³³ Chang, *supra* note 984 at 67.

¹⁰³⁴ *Ibid.*

¹⁰³⁵ Kong, *supra* note 242, at 151.

¹⁰³⁶ *Ibid.*

¹⁰³⁷ Elisabeth Croll, *Feminism and Socialism in China* (London, Henley and Boston: Routledge & Kegan Paul, 1978) at 12.

¹⁰³⁸ *Ibid* at 15.

¹⁰³⁹ Qin Yadong & Huang Dawei(秦亚东&黄大威), “Zhongguo Gudai Hunyin Zhidu Tanxi(中国古代婚姻制度探析)[Investigation and Analysis about Chinese Ancient Marriage]”, (2007) *Journal of Qiqihar University (Phi & Soc Sci)*, 57 at 57.[translated by author]

¹⁰⁴⁰ *Ibid* at 59.

mutual property.¹⁰⁴¹

Although Confucianism was abolished as the ruling ideology during the Cultural Revolution, it remained influential. The general preference for male babies provides a good example.¹⁰⁴² This is due to several reasons, including the fact that a daughter cannot perpetuate the family name and will be sent out to other families. Another reason is the concern that, due in large part to the historical subordinate status of women, daughters would suffer a lot of discrimination or unequal treatment in their future. For instance, the high unemployment rate of women in China is a consequence of the exclusion of women in the employment market.¹⁰⁴³ Massive domestic violence against women also originates from the traditional thoughts that consider women are subordinate to men.¹⁰⁴⁴

ii. The Lack of a Concept or Notion of Human Rights

As stated above, the idea of *human rights* originated in Western societies, and it emphasizes the rights to which an individual is entitled to from his or her birth regardless of other factors. However traditional Chinese culture emphasized collective rights rather than individual rights and the collective interest should always be prioritized in conflicts with the rights of individuals. An individual's rights and duties are conditional on their contribution to the good of the whole society.¹⁰⁴⁵ Chang summarized some major differences between Confucianism, representing the mainstream of traditional Chinese cultural thinking, and Western human rights concepts:

Confucianism does not accept asocial individuals but emphasizes the importance of social beings living in society or a community. For

¹⁰⁴¹ *Ibid* at 59.

¹⁰⁴² Tania Branigan, "China's great gender crisis" (2 November 2011), *the Guardian*, online <<http://www.theguardian.com/>>

¹⁰⁴³ Li Yinhe (李银河), *Nyxing de Xianzhuang yu weilai*(女性的现状与未来)[*The current Status and future of Women*], ebook, published on aizhi (爱知)< <http://www.aizhi.org/book/book2/00.htm>>, at chapter two, employment and income.

¹⁰⁴⁴ *Ibid*, at chapter three: new issues.

¹⁰⁴⁵ Yuchao Zhu, "China and International 'Human Rights Diplomacy'" (2011) 9 (2), *China: An International Journal*, 217, at 220-221.

example, when modern human rights advocates claim that human beings have rights regardless of personal characteristics such as cultural background, this goes against the Confucian view of humanity.

[T]he common knowledge of a Confucian's view of society is that it is based on families...any assertion of human rights would be premised on the view that human beings are egoistic[...]seems to run counter to the Confucian ideal of familial relationships.

[T]he ideas of hierarchy and paternalism in Confucianism seem to be incompatible with Western human rights ideas based on individual...

[T]he non-litigious nature of Confucian society...reject[s] modern human rights concepts because advocating rights would turn social relationships from harmonious to conflicting or litigious.¹⁰⁴⁶

The concept of human rights was not accepted during Mao's period prior to 1979 due to fundamental ideological disagreements with Western democracies. Mao viewed "human rights as a product of Western Capitalism, "are ideological expression of class (bourgeois) egoism."¹⁰⁴⁷ Mao never considered the concept of human rights protection when they came to power.¹⁰⁴⁸ Instead, Mao adopted "socialist man" to establish the "totalitarian political control".¹⁰⁴⁹ John Cooper provides an explanation:

Mao's notion of a complete 'socialist man' assumed the Marxian proposition that "so-called human rights" in the West gave the individual special protections and therefore subordinate the individual personality by making certain rights or freedoms more important than others. Mao's thinking seemed to derive naturally from Marx's idea that bourgeois human rights were "against another person" and that they stemmed from the competitive struggle in class societies under capitalism.¹⁰⁵⁰

The coincidental combination of the traditional Chinese cultural thinking on individual

¹⁰⁴⁶ Chang, *supra* note 984, at 124-126.

¹⁰⁴⁷ *Ibid.*

¹⁰⁴⁸ *Ibid.*, at 127.

¹⁰⁴⁹ *Ibid.*, at 128.

¹⁰⁵⁰ John F. Cooper, "Defining Human Rights in the People's Republic of China", YUAN-LI WU ET AL., *Human Rights In The People's Republic Of China* (1988) 10, at 11, reprinted in Chang, *supra* note 984, at 128.

rights and Mao's ruling ideas rendered the concept of human rights unfamiliar within the Chinese society.¹⁰⁵¹ Until 1979, the concept of human rights was first recognized and developed gradually following the economic reform and Open policy. The gradual development of the human rights process has been intertwined with the development of a modern legal system.¹⁰⁵² The economic reform and developing demand for the safeguards of a corresponding legal system, and therefore, the synergies between the economic reform and the massive legal reform led to greater attention to human rights protection. Following a great deal of Western criticism of massive human rights violations in China in the 1990s, the discussion of human rights protection in China has become common in academia and in the mass media.¹⁰⁵³ By the turn of the century and new century, the concept of human rights was familiar in Chinese society by the introduction of human rights in the *Constitution*.¹⁰⁵⁴

c. Development in Legislation Regarding Women's Protection under the Influence of International Human Rights Law

The systematic protection of women's human rights in Chinese jurisdictions has been built gradually. In terms of specific women's human rights, China has enacted a variety of new pieces of legislation or legal amendments aiming to eliminate serious discrimination against women under the pressure of international human rights law.

i. Constitution

Since its first *Constitution* in 1954, China has had three different *Constitutions*, in 1975,

¹⁰⁵¹ *Ibid.*

¹⁰⁵² *Ibid.* at 79.

¹⁰⁵³ *Zhongguo Renquan Fazhan 50nian* (中国人权发展 50 年) [Human Rights Development in China: 50 Years] (February 2000), Guowuyuan Gongbao (国务院公报) [St. Council GAZ.], Beijing, online: Chinese Government <<http://www.gov.cn/gongbao/>> (China) [translated by author].

¹⁰⁵⁴ *Infra* note 1055.

1978 and 1982.¹⁰⁵⁵ The 1982 Constitution is the current *Chinese Constitution* and it has been amended four times, in 1988, 1993, 1999 and 2004.¹⁰⁵⁶ After these amendments, the concepts of human rights protection, rule of law and democracy are expressly stipulated in the current *Constitution*.¹⁰⁵⁷

The 1982 Constitution reaffirms the equal rights for women in articles 48 and 50.

Article 48

Women in the People's Republic of China enjoy equal rights with men in all spheres of life, in political, economic, cultural, social and family life. The State protects the rights and interests of women, applies the principle of equal pay for equal work to men and women alike and trains and selects cadres from among women.

Article 50

Marriage, the family and mother and child are protected by the state. Both husband and wife have the duty to practice family planning. Parents have the duty to rear and educate their children who are minors, and children who have come of age have the duty to support and assist their parents. Violation of freedom of marriage is prohibited. Maltreatment of old people, women, and children is prohibited.

Since 1985, the Chinese government has launched a series of national legal education campaigns in order to address the general lack of legal knowledge in public.¹⁰⁵⁸ During these campaigns, the study of the *Constitution* was the primary focus, and consequently, the public awareness of the principle of equality of men and women was raised.¹⁰⁵⁹ It has accelerated the adoption of other legislation addressing the issue of equality for women to some extent.¹⁰⁶⁰

¹⁰⁵⁵ “Zhongguo XIANFA de Zhiding he Xiugai (中国宪法的制定和修改) [the Enactment and Amendments of Chinese Constitutions]”, online: Xinhua News <<http://news.xinhuanet.com/ziliao>> [translated by author].

¹⁰⁵⁶ *Ibid.*

¹⁰⁵⁷ *Ibid.*

¹⁰⁵⁸ Xie Sufang (谢素芳), “Quanmin Pufa: Shenzhou Dadishang de Guannian Geming (全民普法: 神州大地上的观念革命) [National Legal Education: Ideology Revolution in wonderland (China)]” (16 May 2011), online: the National People's Congress of China Website, <<http://www.npc.gov.cn/>>.[translated by author]

¹⁰⁵⁹ *Ibid.*

¹⁰⁶⁰ *Ibid.*

ii. Law on the Protection of Rights and Interests of Women

With the accession to CEDAW, China enacted special law to protect women's rights in 1992, i.e., *The Law on the Protection of Rights and Interests of Women* (LPRIW), which represented a victory in women's human rights development. The main objectives of the LPRIW are to set out a series of legal norms guiding social relationships between the sexes and to guarantee women's rights and interests. As such, the LPRIW has a semi-constitutional character.¹⁰⁶¹ The LPRIW essentially enumerates the provisions of CEDAW. It affirms the fundamental principle of equality between the two sexes, it lists a series of human rights for women, and it establishes equality for all women in both the public and private spheres, including health, education, family and political participation.

However, some scholars criticized the implementation of the LPRIW due to lack of an effective legal enforcement mechanism.¹⁰⁶² In response to this criticism, the Chinese government made an amendment in 2005 to strengthen its enforcement. The 2005 amendment clarifies the government's responsibilities, including the executive branch, the obligations of other parties, and it detailed remedies.¹⁰⁶³ The LPRIW is important legislation in the history of protecting women's rights in China under the efforts of the central government and the UN. Its implementation is far from scholars' expectations but at least theoretically, the traditional idea of the subordinate role of women in history has been changed to some extent.¹⁰⁶⁴

iii. Other Legislation

¹⁰⁶¹ Funv Quanyi Baozhang Fa (妇女权益保障法) [Law on the Protection of Rights and Interests of Women] (adopted by the National People's Congress of China On April 3, 1992, effective on October 1, 1992) 1992, NPC, online: pkulaw <<http://en.pkulaw.cn>>. [IPRIW]

¹⁰⁶² Chang, *supra* note 984 at 311.

¹⁰⁶³ Funv Quanyi Baozhang Fa (2005 Xiuzheng) (妇女权益保障法 (2005 修正)) [Law on the Protection of Women's Rights and Interests (2005 Amendment)] (Amended by Standing Committee of the National People's Congress of China on August 28, 2005), online: pkulaw <<http://en.pkulaw.cn>>.

¹⁰⁶⁴ Chang, *supra* note 984 at 311.

Under pressure from the international community and from international treaties, China has actively encouraged governmental departments to adopt a variety of regulations or laws to address women's equality in different fields.

With regard to employment, between 1988 and 2012, there were a few specific pieces of legislation addressing women's human rights that were passed by different ministries, for instance: *the Regulations Concerning the Labor Protection of Female Staff and Workers* (1988),¹⁰⁶⁵ *the Law of the People's Republic of China on Maternal and Infant Health Care* (1994),¹⁰⁶⁶ and *the Special Rules on the Labor Protection of Female Employees* (2012).¹⁰⁶⁷

As to the serious issue of trafficking women in China, the 1997 new *Criminal Law* enhanced the punishment of traffickers in the *Decision Regarding the Severe Punishment of Criminals Who Abduct and Traffic in or Kidnap Women or Children*.¹⁰⁶⁸ Compared to the 1979 Criminal Law, the 1997 Criminal Law addresses the issue of trafficking women in much greater detail by defining "trafficking", categorizing different situations and corresponding punishments.¹⁰⁶⁹ According to article 240, the offence of "trafficking women" is a severe crime and the penalty can reach imprisonment of five to ten years in addition to fines.¹⁰⁷⁰ The following more serious situations could lead to over ten years imprisonment or life in prison: trafficking in more than three women and/or children, raping the victims, forcing victims into prostitution, kidnapping through coercive means for

¹⁰⁶⁵ Nvzhigong Laodong Baohu Guiding (女职工劳动保护规定) [Regulations Concerning the Labor Protection of Female Staff and Workers] (Adopted on 28 June 1988 by the State Council, promulgated on 21 July 1988 and effective from 1 September 1988), online: pkulaw <<http://en.pkulaw.cn>>.

¹⁰⁶⁶ Muying Baojian Fa (母婴保健法) [Law on Maternal and Infant Health Care] (adopted at by the Standing Committee of the Nat'l People's Cong. on October 27, 1994, effective as of June 1, 1995), online: pkulaw <<http://en.pkulaw.cn>>.

¹⁰⁶⁷ Nv Zhigong Laodong Baohu Tebie Guiding(女职工劳动保护特别规定) [Special Rules on the Labor Protection of Female Employees] (adopted by the State Council and effective on April 18, 2012), online: pkulaw <<http://en.pkulaw.cn>>.

¹⁰⁶⁸ Guanyu Yancheng Guaimai, Bangjiang Funv, Ertong de Fanzuifenzi de Jueding (全国人大常委会关于严惩拐卖、绑架妇女、儿童的犯罪分子的决定) [Decision Regarding the Severe Punishment of Criminals Who Abduct and Traffic in or Kidnap Women or Children] (Adopted by the Standing Committee of the Seventh Nat'l People's Cong. on September 4, 1991), online: pkulaw <<http://en.pkulaw.cn>>.

¹⁰⁶⁹ Xing Fa (97 Xiuding) (刑法(97 修订) [Criminal Law(97 Revision)] (Adopted by the National People's Congress of China on July 1, 1979 and amended by National People's Cong. on March 14, 1997) c 4, art 240, online: pkulaw <<http://en.pkulaw.cn>>.

¹⁰⁷⁰ *Ibid.*

the purpose of selling the victims, selling women or children across China's borders.¹⁰⁷¹ In May 2009, Chinese central Police Department launched a special campaign targeting the crime of trafficking women and children, in which a number of women were rescued.¹⁰⁷² As reported, in 2013, the national railway police took effective measures against traffickers in railway stations cross the country, and successfully rescued 118 women and children.¹⁰⁷³

d. Evaluation of Human Rights for Women in China

There is still a big gap between the stipulations contained in the law and the enforcement of the law in China with regard to women's human rights protection.¹⁰⁷⁴ Under Maoism, law was considered as the will of ruling class, i.e., CPC in China, as opposed to a method of protecting individual rights.¹⁰⁷⁵ Although there have been a number of legislative development for women's human rights, it does not have the same implication and influence as in Western countries. The *Chinese Constitution* is a state policy guideline rather than a bill of individual rights. Chang also criticized: granting so-called collective women's rights as a whole in legislation does not change the fact that each individual woman is still "subject to the dictatorship of the proletariat, and this concept does not necessarily recognize a woman as having inalienable human rights imply by being a human being".¹⁰⁷⁶

The absence of meaningful and effective mechanisms for human rights law enforcement in China is another serious issue. There are no effective systems to ensure

¹⁰⁷¹ *Ibid.*

¹⁰⁷² Quanguo Gong'an Jiguan "Dagui" Zhuanxiang Yundong Jianyao Qingkuang (全国公安机关"打拐"专项行动简要情况) [Briefing on National Police's a Special Action Against Trafficking Women and Children], 7 May 2009, Ministry of Public Security, online: Ministry of Public Security of China <<http://www.mps.gov.cn/>> [translated by author].

¹⁰⁷³ Shi Jingnan & Zhou Wei(史竞男&邹伟), Quanguo Tielu Gong'an Yanda Guaimai Fanzui, Jie Jiu Funv Ertong 118 Ming (全国铁路公安严打拐卖犯罪 解救妇女儿童118名) [National Railway Police takes Serious Measures against traffickers, Rescue 118 Women and Children](5 September 2013),online: Chinese Government Web< www.gov.cn>.[translated by author]

¹⁰⁷⁴ Chang, *supra* note 984 at 311.

¹⁰⁷⁵ *Ibid* at 129.

¹⁰⁷⁶ *Ibid* at 130.

constitutional supremacy; the principles stipulated in the Constitution are guidelines. The LPRIW was criticized as a “paper tiger” or set of propaganda without the guarantee of detailed articles stipulating the implementation.¹⁰⁷⁷ Women's situation in China has also been claimed as worsening: gender-based employment discrimination, sexual harassment and domestic violence against women have become more serious and worse in the new century.¹⁰⁷⁸

However, the enactment of these laws has raised public awareness on the issue of sexual inequality and the LPRIW demonstrates the government's intention to solve the problem. The principle of equality in the *Constitution* provides formal equality for women, which has been beneficial to shift the traditional thinking of the subordination of women. International human rights law has also helped overcome resistance to human rights in China during this journey.

The government also hopes to take the opportunity to upgrade the traditional idea of human rights among Chinese society to guarantee its citizens that they enjoy the basic human rights stipulated in international human rights law.¹⁰⁷⁹ Therefore it can be seen that with regard to the promotion of women’s human rights, the government's active attitude in supporting women’s equal rights has had a significant impact on traditional thinking of women’s subordination and a certain amelioration of the situation of women in China.

3. Discussion: How International Human Rights Law Can Contribute to Tongzhi

¹⁰⁷⁷ *Ibid* at 311.

¹⁰⁷⁸ Balzano, *supra* note 287 at 16. “Gender-based employment discrimination (including sexual harassment) and violence against women are common problems. In a 2000 survey done by the Chinese Academy of Social Sciences of six hundred women in Shenzhen City, 32% said they had been victims of sexual harassment. A similar survey in Beijing revealed that 71% of the participants had been victims (mostly in the workplace) of sexual harassment. Women are often seriously deprived of educational opportunities as well. One survey indicated that of the 2.6 million children that did not enter school in 2004, two-thirds were female, and 70% of China's illiterate population is female. Alarming, despite numerous laws and regulations enacted since the early 1990s to protect women, violence and discrimination seem to have increased in the last few years. In 2003, surveys indicated that the rate of domestic violence had risen 8.2% since 2000, and the number of cases of domestic violence leading to death increased over 50% between 2002 and 2003.”[footnotes omitted]

¹⁰⁷⁹ Chang, *supra* note 984 at 291.

Rights Development in China

With the increasing tendency towards strengthening human rights protection in the international community, the Chinese government has been willing to forge a good international image through ratifying and/or acceding to a variety of international treaties, and through participating in various international human rights events. A notable development at the domestic level was the 2004 *Constitution Amendment* explicitly stipulates that “the State respects and protects human rights”.¹⁰⁸⁰ It was highly praised as a “constitutional guarantee for the protection of human rights and for the implementation of human treaties in Chinese domestic law.”¹⁰⁸¹ As a consequence of these developments, some have claimed that it is a good time for gay rights advocacy because legalization of same-sex marriage will help China to win a good international image as the first county in Asia to legalize same-sex marriage.¹⁰⁸²

The increasing recognition of gay and lesbian rights in the core international treaty bodies could compel the Chinese government to change its repressive indifference policy. The aim of the current Chinese repressive indifference policy is to block sexual minorities and make this group invisible in society. The rapid development in international human rights law supporting the protection of sexual minority rights could play an ice-breaking role and provide a theoretical foundation for academic discussion.¹⁰⁸³ The massive exposure of this topic in the academic or political arena, along with tongzhi community events, could raise great awareness of tongzhi issues in society. This has already been seen with the depathologizing of homosexuality in China in line with international medical

¹⁰⁸⁰ XIANFA Xiuzhengan (2004) (宪法修正案 (2004) [Amendments to the Constitution (2004)] (promulgated by the National People’s Congress of China on March 14, 2004, effective on March 14, 2004), art 24. online: pkulaw <<http://en.pkulaw.cn>> [Amendments to the Constitution (2004)].

¹⁰⁸¹ Xue Hanqin and Jin Qian, *supra* note 986 at 309.

¹⁰⁸² Li Yinhe (李银河), Wo Tiyi Tongxing Hunyin Hefahua de Wuge Liyou (我提议“同性婚姻合法化”的五个理由) [My Five Reasons To Propose Legalization of Same-Sex Marriage], online: 163.com, Lady Channel <<http://lady.163.com>> [translated by author] [Yinhe, “My Five Reasons To Propose Legalization of Same-Sex Marriage”].

¹⁰⁸³ Zhou Dan, *supra* note 371 at 307.

standards.¹⁰⁸⁴

However, it is still questionable how far that international law can influence tongzhi rights development in China due to the three main obstacles for the universality of human rights in China.

The two major resistances against universality of international human rights, i.e. cultural difference and the importance of economic over legal rights, appear to be weakening in China on the topic of tongzhi rights.¹⁰⁸⁵ Unlike Western countries, China does not have strong religious opposition to the tongzhi community. In fact, the tolerance of homosexuality in Confucianism culture helps weaken the cultural differences argument against the universality of human rights. In response to the primacy of the economy argument, there are no supporting evidences showing that suppression of human rights of sexual minorities can yield economic benefits. Conversely, studies show positive economic impacts by ending discrimination against LGBTs. For instance, according to a study by the Williams Institute at University of California, Los Angeles School of Law, same-sex weddings could create hundreds of job opportunities and generate capital benefits into the local economy.¹⁰⁸⁶

State sovereignty, the third major obstacle to the universality of human rights, is likely to be used by the central government in response to the tongzhi human rights issue. The CPC is suspicious of other Western countries using human rights as a guise to impose Western political standards and modes of development on China.¹⁰⁸⁷ It was claimed that the political reason behind the repression of Falun Gong is that any growing power might threaten the CPC's supremacy in China.¹⁰⁸⁸ Consequently the central government strongly

¹⁰⁸⁴ WHO, *supra* note 424. In 1992, the World Health Organization removed homosexuality from the 10th revision of the International Classification of Diseases (ICD-10), a decision that went into effect in 1993.

¹⁰⁸⁵ Cultural differences see the discussion at p 135; the importance of economic development, see the discussion at p 231.

¹⁰⁸⁶ “Study: Gay marriage good for economy” (June 9, 2008), online CBSNews< <http://www.cbsnews.com>>.

¹⁰⁸⁷ Kavanagh *supra* note 1018 at 23.

¹⁰⁸⁸ Zhi Gen (志根), “Gongchandang Weishenme Yao Zhenya Falungong (共产党为什么要镇压法轮功) [Why did the Communist party repress Falun Gong?]” (13 April 2009), *Epochtimes*, online: Epochtimes <<http://www.epochtimes.com>> [translated by author].

resists any criticism of human rights issues related to Falun Gong from the international community by claiming that such criticism does not take into account the CPC's perceived threat to its sovereignty.¹⁰⁸⁹ It is difficult to predict whether or how the central authority will adopt the state sovereignty argument to respond to the international human rights criticism regarding tongzhi rights. It could be argued the central authority might change its repressive indifference policy because granting tongzhi some human rights is unlikely to threaten the CPC's supremacy as tongzhi equality claims are relatively not politically driven as compared to the human rights claims made by the Falun Gong or the Tibetan independence movement. The next chapter will take a closer examination on what forces or factors could lead the central authority to take actions on tongzhi rights on their own, without external pressures.

It should be noted that the major difference between women's right and tongzhi rights is the official authority's attitude. During Mao's period, the CPC and the central authority supported the theme of *women rights protection*.¹⁰⁹⁰ With reference to tongzhi human rights issues, it is clear from the repressive indifference policy that the Chinese authority does not currently support tongzhi rights. This policy is also reflected in China's voting record on sexual orientation issues at the UN. China abstained at two significant votes regarding to sexual orientation human rights: 2008 Joint Statement in UN General Assembly and 2011 Human Rights Council's Resolution for the study on human rights issues regarding sexual orientation and gender identity.

Another issue of concern that might limit the influence of international human rights law is the fact that China has not ratified the ICCPR. As such, many decisions and general comments in favour of sexual orientation rights made by the HRC are not binding on China. Also since there is no separate international treaty regarding sexual minority human rights,

¹⁰⁸⁹ “Zhongguo Fandui Meiguo Liyong “Falungong” Ganshe Zhongguo Neizheng (中国反对美国利用“法轮功”问题干涉中国内政) [China Opposes United States interference with China domestic affairs using the issue of Falun Gong]” (4 November 1999), *Sina News*, online: Sina <<http://news.sina.com.cn/>> [translated by author].

¹⁰⁹⁰ Chang, *supra* note 984 at 115.

there is still a long road to achieve equality for sexual minorities within the UN on the same scale as was legally or theoretically achieved for women.

Thus, depending solely on international human rights law to develop tongzhi human rights in China would be insufficient. In fact, the central battlefields for human rights law are local and national; the principles recognized in international human rights law are generally supplementary to and supportive to the national development.¹⁰⁹¹ International human rights law can provide the legal doctrines and guiding principles for a national discussion on tongzhi rights in China. It can raise the awareness of the tongzhi human rights practice. It is important to recall that effective domestic judicial processes and human rights institutions are important mechanisms of international human rights law enforcement. However, China lacks such effective implementation mechanisms. It is easier to have equality principles stipulated in the *Constitution* than establishing an effective mechanism to ensure equality. The mere introduction of equality in the *Constitution* can be seen as formal equality. In practice, the *Constitution* is not invoked in any equality claims in Chinese judicial practice, which has the practical effect of denying judicial recourse for a person whose constitutional rights were infringed. Also there are few official human rights protection institutions in China dealing with human rights complaints. There is a long road to reach substantive equality in Chinese human rights judicial practice without an effective mechanism to ensure the implementation of the principles stipulated in existing legislation. What is worse, formal equality of tongzhi rights are not even recognized in the *Chinese Constitution*.

It is interesting to note that some Chinese scholars have suggested that the globalization of gay rights could jeopardize tongzhi rights development in China because Western standards and development patterns might not be appropriate for the tongzhi

¹⁰⁹¹ Donnelly, *supra* note223 at 105-106.

community in China.¹⁰⁹² Anti-globalization in China has increased since the economic reform took place in 1979.¹⁰⁹³ The CPC tends to adopt this opposing voice as a form of nationalism against international criticism, in particular, in the field of human rights. Furthermore, some gay activists also claim Western pattern of gay rights development are unsuitable for the Chinese tongzhi. Chou Wan-shan argues that the specific culture of Chinese tongzhi should have an “indigenous” Chinese same-sex identity that should be different from the Western gay identity.¹⁰⁹⁴ He argues that Chinese culture, built on a set of Confucian values, is quite different from the Western individual-centered culture, and it should be considered in the tongzhi rights development. The Chinese cultural factors and specific political environment are taken into account in the discussion on legal reform and strategic thinking presented in the next chapter.

While there has been a great change as a result of *Opening Policy*, the CPC will not give up its political leadership or control over society, including its influence over the family or private life. Thus, without the support from the CPC, it can be seen that international human rights laws and pressure from the international community will have only a marginal effect on the promotion of human rights development on tongzhi equality in China.

C. Regional International Organization Model

From the discussion on sexual orientation rights development in the European regional human rights system in Chapter Four, it can be seen the European process shared the same progressive pattern seen in the UN system, which is identified by Waaldijk.¹⁰⁹⁵ The journey began with criminal law: decriminalization of same-sex acts, removal of unequal of ages for consent for same-sex acts, and legalizing same-sex group sexual activities in

¹⁰⁹² Ho, *supra* note 234 at 11.

¹⁰⁹³ *Ibid.*

¹⁰⁹⁴ See generally, Chou Wan-Shan, *supra* note 238, at 1-9.

¹⁰⁹⁵ Waaldijk, *supra* note 76.

private. During the process, the ECtHR played an important role by making groundbreaking decisions recognizing sexual orientation rights in various areas of day-to-day life.¹⁰⁹⁶ Since the ECtHR's decisions are binding on member states, the states have to execute these judgments thereby having a direct impact at the domestic level.

Furthermore, the EU also affirms sexual orientation rights by adopting various regional legislative measures to protect these rights. For instance, as a pre-condition to access to the EU, the applicant states have to ratify the ECHR, which, based on ECtHR jurisprudence, recognizes sexual orientation rights and change any domestic law that is inconsistent with the ECHR. This impels legal reform in candidate States. In Asia, the only regional organization is ASEAN, which has an increasing impact in Asia as well as China. ASEAN has been working hard at promoting human rights development in member states. Although China is not the member state of ASEAN, the increasing cooperation between these economic entities necessitates communication regarding civil and political matters.¹⁰⁹⁷ Can ASEAN, a regional organization in Asia, promote the tongzhi rights development in China?

1. Overview of the Only Regional Organization in Asia: ASEAN

ASEAN comprises the ten Southeast Asian nations: Brunei, Myanmar, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand and Vietnam. ASEAN was founded in 1967 by Indonesia, Malaysia, Thailand, Singapore, and the Philippines to protect each state's sovereignty at the height of the Cold War.¹⁰⁹⁸ These non-communist Southeast Asian nations came together to reinforce their security by keeping America involved against the communist countries, North Vietnam, China and the Soviet Union.¹⁰⁹⁹

Under the original intention of the Association, sovereignty protection was a significant notion and therefore non-interference in the domestic affairs of its members was

¹⁰⁹⁶ See *supra* discussion at Chapter Four, at p 175.

¹⁰⁹⁷ *Infra*, ASEAN and Chin, at p 255.

¹⁰⁹⁸ "ASEAN Member States", online: ASEAN <<http://www.asean.org/>>.

¹⁰⁹⁹ Alyssa Greenwald, "The ASEAN-China Free Trade Area (ACFTA): a Legal Response to China's Economic Rise?" (2005) 16 *Duke J Comp & Int'l L* 193 at 204 (QL).

the Association's fundamental principle in states' diplomacy between member states. It should be noted that economic cooperation was not a consideration for the founders of ASEAN; conversely ASEAN was intended to be "just a loosely-organized political association with minimum institutionalization, and without legal personality or constitutional framework."¹¹⁰⁰

By the mid 1990s, this original intention had become obsolete, after the collapse of Soviet Union and the continuing economic globalization, ASEAN incorporated four new nations, Vietnam, Laos, Myanmar and Cambodia respectively during the 1990s.¹¹⁰¹ Meanwhile, ASEAN reformed its institutional structure, formalizing summit meetings, increasing the duties and rank of the Secretary-General of ASEAN, strengthening and improving the levels of interaction between officials among the member states in 1992.¹¹⁰² After that, economic considerations began to play an important role on the ASEAN agenda. The success of the ASEAN Regional Forum (ARF), the implementation of ASEAN Free Trade Area (AFTA), the creation of ASEAN plus Three (APT) (i.e. ASEAN plus China, Japan and South Korea), and the launch of East Asia Summit (EAS) linking ASEAN with China, Japan, Korea, Australia, New Zealand and India demonstrates that ASEAN has been increasing its presences and reputation as the leader of regional cooperation in the Asia-Pacific region.¹¹⁰³

The year 2007 was historical for ASEAN with the passing of its first formal constitution, the *ASEAN Charter*, signed by ten member states. The *ASEAN Charter* provides legal personality to the Association for the first time, and also addresses economic cooperation by aiming towards an economic community among member states by covering trade, investment and skilled workers' movement by 2015.¹¹⁰⁴ Furthermore, the preamble

¹¹⁰⁰ *Ibid.*

¹¹⁰¹ "The history of ASEAN", online: ASEAN <<http://www.asean.org/>>.

¹¹⁰² "ASEAN Structure", online: ASEAN <<http://www.asean.org/>>.

¹¹⁰³ "External Relations", online: ASEAN <<http://www.asean.org/>>.

¹¹⁰⁴ *Charter of the Association of Southeast Asian Nations*, December 2007, (Jakarta: ASEAN Secretariat, 2008), online: ASEAN <<http://www.asean.org/asean/asean-charter/asean-charter>>.

of the *ASEAN Charter* stipulates a number of liberal norms and principles regarding democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedom are to guide the Association.

2. Human Rights and ASEAN

At the 1993 World Conference on Human Rights in Vienna, the ASEAN member states claimed that the seeking of economic development should trump other political rights in response to the appeals from Western nations to adopt universal human rights.¹¹⁰⁵ Thus, along with many other Asian countries, the ASEAN countries supported the *Bangkok Declaration* at Vienna, which was essentially an espousal of Asian Values, relying on economic development and state sovereignty arguments to resist the universal human rights adoption.¹¹⁰⁶

Non-interference, as a foundational principle of ASEAN, essentially means that “regime type, economic structure and ethnic and social class compositions” should not be subjects for debate within ASEAN.¹¹⁰⁷ While this principle might have served ASEAN well during the Cold War, it eventually weakened the organization’s international reputation and credibility at handling human rights issues. The gross human rights abuse in some ASEAN member states drew harsh international condemnation.¹¹⁰⁸ ASEAN had little effect at ameliorating the human rights situations in member states. The principle of non-interference became a shield for these countries to avoid the criticism from ASEAN. In fact, the “ASEAN way”, the term often used to describe diplomacy within ASEAN, was seen as undermining ASEAN’s international image and it contributed to the worsening of

¹¹⁰⁵ Hiro Katsumata, “ASEAN and Human rights: resisting Western Pressure or Emulating the West” (2009) 22:5 the Pacific Review 619 at 622.

¹¹⁰⁶ Ann Elizabeth Mayer, “Universal versus Islamic Human Rights: a Clash of Cultures or a Clash with a Construct” (1994) 15 Mich J Intl L 307 at 327-29.

¹¹⁰⁷ Sheldon Simon, “ASEAN and Multilateralism: the Long, Bumpy Road to Community” (2008) 30:2 Contemporary Southeast Asia 264 at 272.

¹¹⁰⁸ See, e.g. Trafficking in South-East Asia, addressed in Annuska Derks, *Combating Trafficking in South-East Asia: A Review of Policy and Programme Responses*, (Geneva: International Organization for Migration, 2000), at 16.

relations between ASEAN and the United States and Europe.¹¹⁰⁹ In an effort to find an alternative interpretation of the principle of non-interference, ASEAN began to rely on unofficial channels to conduct diplomacy, which was seen as a more flexible way to discuss controversial issues such as human rights protection and democracy.¹¹¹⁰ Unofficial dialogue is an indirect way for ASEAN members to criticize their neighbours, and becomes a concept just as important to interpersonal relations as it is to international relations in Asia.¹¹¹¹

Since 2005, the ASEAN Ministerial Meetings have begun to plan to establish an effective human rights mechanism.¹¹¹² After years of preparation and negotiation among the member states, the ASEAN Charter was signed in 2007, with a preamble that explicitly mentions human rights as one of fundamental principles of ASEAN. Furthermore, article 14 of the Charter provides that ASEAN should establish a human rights mechanism. Such a formal commitment to human rights and democracy was praised as an important component to raise ASEAN to the same level as other prominent international institutions, such as the EU and the UN.¹¹¹³ In an unprecedented event, one that showed the international community that ASEAN was serious about human rights, ASEAN held a meeting of foreign ministers to address the human rights abuse in Myanmar.¹¹¹⁴ In their meeting, the foreign ministers “demanded that the Myanmar government immediately desist from the use of violence against demonstrators.”¹¹¹⁵

Generally speaking, the development of human rights within ASEAN has gone through a shift from strong resistance to gradual acceptance. The ambitious liberal reform plan in ASEAN signals that the previous ground for resisting universal human rights, namely

¹¹⁰⁹ *Ibid* at 269.

¹¹¹⁰ Katsumata *supra* note 1105 at 622.

¹¹¹¹ *Ibid*.

¹¹¹² *Ibid* at 623.

¹¹¹³ Simon *supra* note 1107 at 278.

¹¹¹⁴ ASEAN Chair, George Yeo, “Statement by ASEAN Chair Singapore's Minister for Foreign Affairs George Yeo”, (27 September 2007), online, Center for South East Asian Studies <<http://59.77.27.55/Article/ShowArticle.asp?ArticleID=1043>>.

¹¹¹⁵ *Ibid*.

Asian Values, has been gradually losing its support in ASEAN. However it should be noted that the human rights reform in ASEAN is still in its initial phase. At the 2008 ASEAN Summit, it was reaffirmed that human rights remains subordinate to the principle of non-interference and ASEAN will not interfere in its member's domestic affairs.¹¹¹⁶

Despite the impressive reform plans, the processes have been especially slow in terms of sexual orientation rights development. In 2004, the Ministerial Meetings adopted a Plan of Action that contains a notion of protecting *vulnerable groups*.¹¹¹⁷ The definition of vulnerable groups includes “women, children, people with disabilities, and migrant workers” without mentioning gays or lesbians or other sexual minorities.¹¹¹⁸ Moreover, sexual orientation and gender identity was excluded from *the ASEAN Human Rights Declaration* (AHRD) adopted in November 2012.¹¹¹⁹ The AHRD was criticized highly due to some language adopted in the Declaration apparently upholding the cultural relativism and limiting important rights.¹¹²⁰ For instance, articles 6 and 7 in *General Principles* states:

6. The enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals the community and the society where one lives....

7...[t]he realization of human rights must be considered in the regional and national context bearing in mind different political , economic, legal, social , cultural ,historical and religious background.¹¹²¹

Regardless of the fact that sexual orientation rights are universally recognized by many UN core monitoring bodies and EU human rights bodies, the omission of sexual orientation and a gender identity from the AHRD actually undermines the universal rights and

¹¹¹⁶ Simon, *supra* note 1107 at 278.

¹¹¹⁷ *ASEAN Security Community Plan of Action*, Vientiane, November 9, 2004.

¹¹¹⁸ *Ibid.*

¹¹¹⁹ *ASEAN Human Rights Declaration*, 19 November 2012, online: ASEAN Statement & Communiqués <<http://www.asean.org> >.

¹¹²⁰ Generally see, Paula Gerber, “ASEAN Human Rights Declaration: a Step forward or a slide backwards”(21 November 2012), online: the Conversation < <http://theconversation.com/> >.

¹¹²¹ *Ibid.*

freedoms set forth in the UDHR and other international human rights law. AHRD becomes a cultural shield against an international human rights standard. For example, the government of Malaysia insists that any discussion of discrimination on ground of sex or sexual orientation should be in line with “ASEAN Core Values” rather than the decisions of the UN human rights bodies.¹¹²² Ging Cristobal, project coordinator of International Gay and Lesbian Human Rights Commission commented the AHRD lacks “concern for marginalized communities who often suffer horrendous violence because of their sexual orientation and gender identity and have no avenues.”¹¹²³ The most recent outrageous event occurred in April 2013, when the National Organizing Committee of Brunei Darussalam restricted discussions and limited civil society spaces at the *ASEAN Civil Society Conference/ASEAN People’s Forum 2013* for sexual minorities despite of the strong opposition from the NGOs.¹¹²⁴

3. ASEAN and China

The relation between ASEAN and China during the Cold War was intense.¹¹²⁵ One of the strategic goals of ASEAN in its first phase was to resist the invasion of communist countries including China.¹¹²⁶ From China’s perspective, ASEAN was viewed as a military association with anti-Chinese aims.¹¹²⁷ As the relations between United States and China became warmer, the ASEAN members also gradually set up diplomatic relations with China beginning in the late 1970s.¹¹²⁸

¹¹²² Phil Robertson, “ASEAN’s Road to Nowhere? Subverting Standards within the ASEAN Human Rights Declaration”(2012) 4 Strategic Review, online: Strategic Review<<http://www.sr-indonesia.com/>>.

¹¹²³ International Gay and Lesbian Human Rights Commission (IGLHRC), Press Release, “On the Exclusion of Sexual Orientation Gender Identity (SOGI) Non-discrimination in the ASEAN Human Rights Declaration” (13 September 2012) online: IGLHRC <<http://www.iglhrc.org/>>.

¹¹²⁴ ASEAN SOGI Caucus, “We are ASEAN”, International Gay & Lesbian Human Rights Commission (8 April 2013), online: IGLHRC <<http://www.iglhrc.org/>>.

¹¹²⁵ “Overview of ASEAN-CHINA Relations” (December 2012), online: ASEAN< <http://www.asean.org/>>.

¹¹²⁶ Simon, *supra* note 1107 at 281.

¹¹²⁷ *Ibid.*

¹¹²⁸ Alyssa Greenwald, “The ASEAN-China Free Trade Area (ACFTA): a Legal Response to China's Economic Rise?” (2005) 16 Duke J Comp & Int'l L 193, at 196.

The rapid development between ASEAN and China took place in China's booming economy period.¹¹²⁹ Although China's economic rise was viewed as a threat to the neighbouring countries, it was also viewed as an opportunity for ASEAN to enhance its own economic development.¹¹³⁰ Also China endeavored to strengthen relationships by showing its willingness to cooperate and by trying to create a benign profile among ASEAN nations.¹¹³¹ The greatest outcome of these efforts was the creation of the China-ASEAN Free Trade Agreement (CAFTA). China and ASEAN officially announced their intentions to build a “strategic partnership for peace and prosperity” in 2003.¹¹³² The CAFTA is the world's largest trading bloc with 1.7 billion consumers.¹¹³³

4. Discussion: Can ASEAN Promote Human Rights Development in China?

As analyzed in Chapter Four, the EU has played an important role in the promotion of human rights development among member states and candidate nations (through the prerequisite to membership of having domestic laws that protect human rights). The European Commission on Human Rights and the ECtHR has also contributed to the development of human rights through their observations and binding judgments. The research question here is whether ASEAN, as the only regional international organization in Asia, will provoke the development of human rights in its neighbour, China.

Despite of the passage of the new *ASEAN Charter* in 2007 giving it legal status, ASEAN still faces challenges developing effective approaches promoting human rights in member states. Although economic cooperation among members is increasing, the fundamental principle of ASEAN still remains non-interference in internal affairs. ASEAN is a pluralistic community that promotes cooperation between members based on the

¹¹²⁹ *Supra* note 1125.

¹¹³⁰ Simon, *supra* note 1107 at 282.

¹¹³¹ *Ibid.*

¹¹³² Katsumata, *supra* note 1105 at 631.

¹¹³³ ASEAN-China Expert Group on Economic Cooperation, “Forging Closer ASEAN-China Economic Relations in the Twenty-First Century” 2 (2001), online: <http://www.aseansec.org/newdata/asean_chi.pdf>.

mutual benefits of shared rules, without a strong sense of collective identity.¹¹³⁴ The members are still sensitive to state sovereignty and therefore resistant for imposing sanctions for non-compliance with ASEAN programs, for instance protection of human rights.¹¹³⁵ Thus it is unlikely that ASEAN will take a leading role in domestic human rights reform among member states due to the non-interference fundamental principle.

Moreover, ASEAN's human rights system is still in a nascent phase. The notion of protection of human rights was recognized in the new *Charter* for the first time after a long struggle with Asian Values and economic development as a priority. In fact, besides the efforts from some democratic member states, it should not be forgotten that Western pressure has taken an important role in this liberal reform. As many human rights activists have remarked, the US and the EU have utilized their economic leverage to coerce Southeast Asian countries to change their human rights policies over the years.¹¹³⁶ Despite the ambitious reform plans in the short term, there is still a lot of groundwork for institutional development in ASEAN.

It is also anticipated that the close cooperation with China may jeopardize the human rights practice in ASEAN. China never conditions its trade agreements or economic aid with human rights, which has permitted some of the ASEAN members to continue their notorious human rights abuses, unlike other countries that enter into conditional trade agreements with Western nations.¹¹³⁷ Thus, continued and enhanced trade between China and ASEAN might slow down the human rights development within ASEAN.

Viewed from the opposite perspective, ASEAN's economic relationship with China is unlikely to have an impact on human rights in China. This is primarily due to the fact that while China shows strong willingness to cooperate with ASEAN, China's economic development does not depend on ASEAN markets. As such, ASEAN does not have a strong

¹¹³⁴ Shaun Narine, "Forty years of ASEAN: a Historical Review" (2008) 21:4 *The Pacific Review* 411 at 412.

¹¹³⁵ Frank Frost, *ASEAN and regional cooperation: recent developments and Australia's interests*, (np: Australian Parliamentary Library, 2013), at 19.

¹¹³⁶ Katsumata, *supra* note 1105 at 630.

¹¹³⁷ *Ibid.*

bargaining position with China, especially if ASEAN tried to tie their trade to human rights commitments from China.

Last, but not least, is the question about ASEAN's expanding membership. Unlike how the EU has made human rights legislation a prerequisite for membership, it is doubtful that ASEAN would follow a similar path given the fundamental principle of non-interference for dealing with the member countries relations. Furthermore, ASEAN, as an association of *southeast* Asian nations, is unlikely to expand northwards to include China. China does participate with ASEAN at various international fora, such as ASEAN Plus Three (ASEAN, China, Japan and South Korea), the East Asia Summit, and the ASEAN Regional Forum (ARF). However, none of these supra-regional meetings are likely to become international organizations (with legal personality) and adopt legally binding human rights instruments. The only realistic way that ASEAN's debut into the field of human rights might have an impact on China is if ASEAN were to adopt an impressive and comprehensive body of rights for sexual minorities. This could bring international embarrassment and shame upon China for trailing behind ASEAN, a region that was once the subject of significant criticism for its human rights record.

To sum up, ASEAN is unlikely to generate regional pressure on the human rights practice in China due to its nascent human right mechanism and weak economic influence over China; therefore the European model is not applicable for China. That being said, the success in recognizing LGBT rights within the European human rights system provides a good guideline and reform goal to examine the gays and lesbians legal and social status in China.

D. Canadian Development Model

1. Review of the Main Factors in the Canadian Development of Gay Rights

During the Canadian development of gay rights, one of the most important factors was the Canadian *Charter of Rights and Freedoms*. As a part of Canadian Constitution, the

Charter contains a variety of basic citizen human rights. Section 15 (the equality provision) is the main section invoked to challenge discriminatory legislation. Although the *Charter* does not explicitly mention sexual orientation as a protected ground, the courts have interpreted the equality guarantees in section 15(1) to include sexual orientation as an analogous ground. Another significant factor is the principle of Constitutional supremacy as articulated in section 52 of the *Constitution Act 1982*, which states that any law that is inconsistent with the *Constitution* has no force or effect. What is more, the Supreme Court of Canada has interpreted that Canadian Constitution enshrines the principles of the separation of powers and judicial independence that provides the courts with the authority to test the constitutionality of ordinary legislation, and the ability to strike down the unconstitutional laws, without fear of political interference.¹¹³⁸ Thus, with these powers, the courts have successfully struck down laws that discriminated on the ground of sexual orientation, which has pushed provincial and federal governments to pass new laws to protect equal rights for gays and lesbians. These cases were also supported by a number of interest groups, and have raised a great deal of awareness of gay rights issues in the public, which also helped successfully to generate pressure on governments.

The main opposition of gay rights in Canada is from religious groups. However, the broad acceptance of gay rights issues by civil society plays a vital role for the gay rights movement in confronting strong religious opposition. Furthermore, the increasing support from civil society, along with a variety of decisions in favor of gay rights generated a great deal of pressure on government to legalize same-sex marriage. The Canadian gay rights development pattern also follows the reform pattern concluded by Waaldijk in many Western democratic countries. It began with the decriminalization of homosexuality, and then was followed by rights developments in broader areas of life through equality arguments, including employment, the media and social benefits, before further legislative

¹¹³⁸ Craik & Forcese et al., *supra* note 438, at 110-112,316-324. Canada does not have a strict separation-of-powers doctrine as the United States. "It gives pre-eminence to the legislative branch, to which the executive is made subordinate."(Craik&Forcese, at 110)

reforms.¹¹³⁹

2. Discussion: Can the Canadian Experience Apply to China?

a. Lack of Democracy in China: CPC's Supremacy

Within this Canadian pattern, it should be kept in mind that democracy provides significant safeguards to promoting legal reforms. The public support is significant for both legislative reforms as well as for social reform. However, China is far from democratic. Although the principle of democracy was stipulated in the *Chinese Constitution*, China is not a real democratic country since the CPC is the only ruling party in practice.¹¹⁴⁰ As such, many policies or laws do not necessarily reflect the developments in civil society. Moreover, developments in civil society are unlikely to elicit any changes in official policy. For instance, the recent and rapid development in gay culture in China has not led to any corresponding legislative development. As discussed in Chapter Two, the legislative intent of removing hooliganism in the 1997 Chinese *Criminal Code* had nothing to do with homosexuality. Thus, China is unlikely to follow the Western pattern of gay rights development since the CPC does not listen to civil society. Furthermore, the government's repressive indifference policy against tongzhi developments strictly prohibits the media discussing tongzhi issues. The next chapter will explore whether and how the CPC might change their repressive indifference policy and facilitate the development of tongzhi rights.

b. Lack of the Effective Review Mechanism for Constitutional Supremacy in China

The *Chinese Constitution* recognizes the significance of human rights protection and the equality principle, and the Constitution supremacy is recognized as a principle in the *Law on Legislation*: any legislation inconsistency with the *Constitution* is void.¹¹⁴¹ However, tongzhi rights activists are unlikely to utilize the *Constitution* as a weapon for

¹¹³⁹ Waaldijk, *supra* note 76, at 51-52.

¹¹⁴⁰ *Chinese Constitution*, *supra* note 119, at c1, art 3,

¹¹⁴¹ *Law on Legislation*, *supra* note 337, at c 5, art 78.

legal reform due to the fact that the courts lack the power to act as an effective review mechanism to ensure Constitutional supremacy.

Articles 88, 90 and 91 of the *Law on Legislation* provide the current review mechanism of Constitutionality in China. Put simply, the National People Congress (NPC) and NPC Standing Committee are entitled to review the administrative rules and regional laws. However, this review mechanism is flawed and impracticable.¹¹⁴² First of all, according to the provisions, the review bodies are the NPC and NPC Standing Committee.¹¹⁴³ The NPC and NPC Standing Committee are legislative bodies without judicial functions. Furthermore, there are few professional legal experts within these bodies, which render them unlikely to review many laws in practice.¹¹⁴⁴ In Canada, the courts are responsible for the judicial review that is guaranteed by the Constitutional principles of separation of powers and judicial independence. Second, the Chinese review mechanism does not have any implementation and enforcement regulations to detail the procedure or process to achieve the objective of ensuring Constitutional supremacy. In particular, the scope of review is limited to the administrative rules and regional laws, which is insufficient to affect the required legal reforms.¹¹⁴⁵ In other words, the CPC's policies and the laws passed by the NPC itself are not reviewable. Any discrimination by a government in its administrative decision-making function cannot be challenged in a judicial review process. It is rare in practice that a court would accept an application by a person claiming to be discriminated against based on the infringement of constitutional equality and human rights in China.¹¹⁴⁶

Therefore, it is highly unlikely that tongzhi rights activists will utilize the Canadian

¹¹⁴² Fan Jinxue(范进学), “Zhongguo Weixian Shencha Zhidu zhi Jianguo(中国违宪审查制度之建构)[Construction of Chinese Judicial Review System]”, in Liu Maolin(刘茂林), ed, *Gongfa Pinlun 2(公法评论第二卷)*[Public Law Review II](Beijing: Beijing University Publishing: 2004) online: <http://www.publaw.org/gfpl/gfpl/vol2/200610/t20061020_10969.htm>. [translated by author]

¹¹⁴³ *Ibid.*

¹¹⁴⁴ *Ibid.*

¹¹⁴⁵ *Law on Legislation*, *supra* note 337 at art 78.

¹¹⁴⁶ Fan Jinxue, *supra* note 1142.

strategy of constitution-litigation to challenge legislation containing discriminatory provisions against sexual orientation in China even though the principles of equality and constitutional supremacy are recognized.

c. Lack of Judicial Independence in China

Although judicial independence is a recognized principle in the *Chinese Constitution* and the courts are granted an independent judicial power, the judicial legal system has been highly criticized for its lack of independence in practice.¹¹⁴⁷ The main reason is the *de facto* lack of separation of powers, which has led to the complicated connection between the Chinese courts and various levels of administration.

According to the *Constitution*, the Supreme People's Court, the highest judiciary body in China, is required to report to the NPC, the national legislature body.¹¹⁴⁸ The Chief Justice in the Supreme People's Court is also elected by the NPC.¹¹⁴⁹ The same system is in operation across the country. Under the NPC, there are local people's congresses at the provincial and county level to which the corresponding lower people's courts are responsible. Except for the judges in the Supreme People's Court, all judges in the lower people's court are selected and appointed by the local people's congress, which is heavily influenced by local governments.¹¹⁵⁰ More importantly, the operating expenses, including salaries of the judges, are provided from the local governments' budget. Chinese judges do not receive a life term appointment, and any of them could be replaced or removed at anytime by the local people's congress.¹¹⁵¹ It is, therefore, quite common for local judges to follow instructions and opinions from the local government on particular cases, since

¹¹⁴⁷ *Chinese Constitution*, *supra* note 119, at art 126.

¹¹⁴⁸ *Ibid* at art 67(6).

¹¹⁴⁹ *Ibid* at art 62.

¹¹⁵⁰ Faguan Fa (2001 Xiuzheng)(法官法 2001 修正版)[Judges Law](adopted by the Standing Committee of the Nat'l People's Cong. on June 30, 2001) at c 5, art 11, online: pkulaw <<http://en.pkulaw.cn>>.

¹¹⁵¹ *Ibid* at art 13 and 14.

government and judicial powers are usually intertwined.¹¹⁵²

Also the internal managerial system of the courts is flawed. The president of each court is both the chief judge and the chief executive. The president has the power to influence the promotion and demotion of any judge in the court, and to supervise all judges through a reporting system.¹¹⁵³ The local government also appoints the president of the local people's court. Thus, it is common to see inference from the local government in cases involving official interests.¹¹⁵⁴ As such, the ability of the judge to reach an independent decision is considerably limited.

Another criticism about judicial independence is from the interference of the CPC. At the national level, the NPC is led by the CPC, and therefore the CPC has direct influence on the appointment to the Chief Justice. At the local levels, the CPC is supervising the local governments and has a direct influence on local courts.¹¹⁵⁵ Given this reality, the Canadian litigious model is not appropriate for China, since it is unlikely that the Chinese courts can lead the legal reform with regard to tongzhi rights in China.

E. Conclusion

This chapter examined whether the successful experiences and lessons learned from the UN human rights model, the European human rights model and the Canadian human rights model could apply or contribute to Chinese legal reform with regard to tongzhi rights.

There are two major approaches to apply international treaty laws in the domestic jurisdiction. There is no clear or prescribed way to determine whether China adopts a

¹¹⁵² Dong Chao (董超), "Sifa Duli zai Zhongguo(司法独立在中国)[Judicial independence in China]" (2005) 1 J Pol Sci & L 6 at 10.[Translated by author]

¹¹⁵³ Renmin Fayuan Zuzhi Fa 2006 Xiuzheng(人民法院组织法 2006 修正版)[Organic Law of the People's Courts (2006 Amendment)](adopted by the Standing Committee of the Nat'l People's Cong on October 31, 2006) at c.1, art 10, online: pkulaw <<http://en.pkulaw.cn> >; See Dong Chao (董超), "Sifa Duli zai Zhongguo(司法独立在中国)[Judicial independence in China]" (2005) 1 J Pol Sci & L 6 at 10-11.[Translated by author]

¹¹⁵⁴ *Ibid*, Dong Chao, at 10.

¹¹⁵⁵ *Ibid*.

monist or dualist approach. In practice, China appears to adopt a mixed approach to apply treaty law to domestic law. Although international law has had an increasing influence on China, there are three major resistances to the universal human rights application: Asian Values, economic development, and state sovereignty. Despite these three major challenges, the achievement of formal equality for woman served as a case study to demonstrate that the international human rights law can have a positive impact in legal reform in China. That being said, the success in developing women's rights in China is not easily replicated with regard to tongzhi human rights, since the CPC accepted the protection of women as a policy. Moreover, with respect to tongzhi rights, the CPC has adopted a repressive indifference policy on tongzhi rights, which implies unwillingness to provide any protection to the tongzhi community. From the analysis, it can be concluded that the international human rights system will help inform and influence legal reform for tongzhi right, but it will be not a decisive factor.

Next, the question of whether a regional international organization could inspire the tongzhi rights development in China was presented, using ASEAN as a case study, since it is the only international organization in Asia at present. The development of human rights for sexual minorities under the European human rights law system provides a good example how the regional human rights treaty, the ECHR, has advanced human rights practice in member states. By providing the overview of ASEAN's history, current human rights laws, the relationship with China, it seems unlikely that a regional human rights model is applicable in China in near future. The human rights laws within ASEAN are in their nascent phase, and will not likely have an influence over China.

Finally, this chapter examined whether the Canadian human rights law model could be utilized in China to promote the tongzhi human rights by reviewing the roles that the Canadian *Charter* and the courts played. Despite the success that this model has had in achieving formal equality for sexual minorities in Canada, the litigation strategy is not applicable in China due to the lack of a democracy system, an effective judicial review

mechanism and an independent judiciary in China. Although the *Chinese Constitution* acknowledges human rights protections and the equality principle, there are no effective review mechanisms to ensure that the constitutional supremacy is upheld in legal practice. The courts have no ability to strike down the legislation that is inconsistent with the *Constitution*. Moreover, there is still a long road ahead before China achieves true judicial independence. Thus, unlike Canada, it seems unlikely that Chinese courts and judges will be able to initiate such legal reform with regard to tongzhi rights.

Chapter Seven

The Future of Tongzhi Human Rights Developments in China

A. Introduction

As seen in Chapter Three, the Yogyakarta Principles provide a comprehensive international human rights protection standard for sexual minorities that states should adhere to. The first section of this chapter compares the current tongzhi legal status in China against the requirements contained in the Yogyakarta Principles. This will enable us to focus on which areas require legal reform and how such reform should take place.

Drawing upon the discussions contained in the previous chapters, the second section of this chapter explores the future tongzhi human rights development in China. As discussed in Chapter Six, the three human rights models cannot be replicated in China at this time. It is anticipated that the road to reform in China will be a *top-down* reform, specifically the initial reform will take place at the official policy level with regards to tongzhi issues, and then such change will lead to the passage of legislation in favour of tongzhi to promote their acceptance in society, which will finally result in equality for tongzhi. The State authority, the CPC, will be the key player in this reform. Therefore, this section will continue to examine strategies to push the CPC to change its current policy of repressive indifference towards tongzhi. The shift of official policy in HIV prevention from prohibiting high-risk behaviours to working with MSM (men who have sex with men) is presented as a case study which endeavours to identify the reason behind the official policy change. It is argued that important social crises, such as the HIV/AIDS epidemic which was the motivation for revising the HIV prevention policy, are able to change official policies and attitude of the CPC. As such, other tongzhi crises are examined in an effort to identify policies areas where the tongzhi rights advocates could focus their strategic resources in order to bring about a change in CPC's repressive indifference policy towards tongzhi.

The third section presents some reflections on strategic thinking for legalizing tongzhi rights. Since same-sex marriage proposals have already been made within the political arena, continuing and augmenting the claims for same-sex marriage would be an appropriate strategy for legal reforms. In order to develop this argument, this section reviews the marriage laws in China, followed by the discussion made by the main representatives in support of same-sex marriage and against it. Without any anti-discrimination legislation and with weak privacy laws, same-sex marriage legal reforms will not likely come about through the principles of non-discrimination or privacy protection. Rather, the formal equality approach will be the strongest argument for the same-sex marriage claim in China.

Finally, this chapter examines the *domestic coming out* strategy advanced by other tongzhi scholars, and concludes that both the same-sex marriage claim and the domestic coming out strategy are consistent and interdependent. However, the same-sex marriage claim could be more direct and practical to the legalization of tongzhi rights in the near future.

B. The Tongzhi Situation in China Compared with the Yogyakarta Principles

As previously stated, the Yogyakarta Principles provide a comprehensive international human rights protection standard for sexual minorities.¹¹⁵⁶ In Chapter Two, the legal status of tongzhi group in China was described as being in a grey area due to the Chinese official policy of repressive indifference. The following summary table provides a comparison between the legal status of tongzhi in China identified in Chapter Two, with the requirements set out in the Yogyakarta Principles. It highlights the large gap between the current tongzhi human rights situation in China with this international standard.

¹¹⁵⁶ Yogyakarta Principles *supra* note 23.

Yogyakarta Principles		Tongzhi Situation in China	
		Legislation	Practice
1-3	The universality of human rights and their application to all persons without discrimination, as well as the right of all people to recognition before the law	Yes. The 2004 Constitution amendment acknowledges the significance of the protection of human rights, and provides the equality principle before the law for all persons. ¹¹⁵⁷	
4-11	The fundamental rights to life, freedom from violence and torture, privacy, access to justice and freedom from arbitrary detention	The 1997 Criminal Code decriminalized homosexual acts. ¹¹⁵⁸	There are a number of arbitrary detentions of tongzhi persons in their assemblies and events. ¹¹⁵⁹
12-18	The importance of non-discrimination in the enjoyment of economic, social and cultural rights, including employment, accommodation, social security, education and health	There is little anti-discrimination legislation for the tongzhi group.	Combined with the discrimination on ground of marital status, tongzhi suffer a number of passive discrimination in employment. ¹¹⁶⁰ Blackmail and extortion are reported, i.e. threats to reveal an individual's sexuality to their employer or colleagues. ¹¹⁶¹

¹¹⁵⁷ Amendments to the Constitution (2004), *supra* note 1080.

¹¹⁵⁸ Xing Fa (97 Revision) (刑法 (97 修订) [Criminal Law of the People's Republic of China (97 Revision)] (Promulgated by the Nat'l People's Cong. 14 March 1997, effective 1 October 1997), online: pkulaw <<http://en.pkulaw.cn/>>.

¹¹⁵⁹ See e.g., Balzano, *supra* note 287 at 31 (a man in Beijing charged for organizing gay sex parties for young men); and Gao Yanhai, *supra* note 391 (police detained more than 50 tongzhi in Dongdan Park during the Beijing Olympics (2008)).

¹¹⁶⁰ Mountford, *supra* note 264 at para 82 (e.g., reports of tongzhi being fired solely based on their sexuality).

¹¹⁶¹ See e.g., Mountford, *supra* note 264 at para 82 (employees fear that their employers or colleagues would reveal their sexuality); and Aibai Cultural & Education Center, *supra* note 389, over half (53.63%) of those surveyed have experienced discrimination or harassment, including vocal and physical violence, at the workplace.

			The lack of any reference of sexual orientation in sexual education renders the young tongzhi very vulnerable. ¹¹⁶²
19-21	The importance of freedom to express oneself, one's identity and one's sexuality, without State's interference based on sexual orientation or gender identity, including the rights to participate peaceably in public assemblies and events and otherwise associate in community with others	There are several harsh and strict pieces of administrative legislation prohibiting the content of homosexuality in the media. ¹¹⁶³ The State's strict and harsh censorship policy on homosexuality has the implication that tongzhi should not come out to the public.	Serious official interference has been reported in many important tongzhi public assemblies with a large number of tongzhi detained arbitrarily. ¹¹⁶⁴
22-23	The right to seek asylum from persecution based on sexual orientation or gender identity	Asylum is not available for sexual minority refugee claimants	There have not been any documented cases of a sexual minority seeking refugee protection in China.
24-26	The right to participate in family life, public affairs and the cultural life of their community, without discrimination based on sexual orientation or gender identity	There is no relevant legislation for tongzhi group in this area.	Without any legal recognition on same-sex relationships, tongzhi are forced into heterosexual marriages under massive social pressure. The tongzhi group suffers discrimination

¹¹⁶² Mountford, *supra* note 264 at para 39.

¹¹⁶³ See e.g., SARFT (2004) *supra* note 353 (scenes and plots about homosexuality should be cut from media).

¹¹⁶⁴ See e.g., Wan Yanhai, *supra* note 391 (police detained more than 50 tongzhi in Dongdan Park during the 2008 Beijing Olympics).

		in applications for divorce from a heterosexual marriage, for child custody, and for adoption. ¹¹⁶⁵
27	The right to defend and promote human rights without discrimination based on sexual orientation and gender identity, and the obligation of States to ensure the protection of human rights' defenders working in these areas	There is not any legislation protection for tongzhi human rights defenders specially.
28-29	The importance of holding rights' violators accountable, and ensuring appropriate redress for those who face rights' violations	There is not relevant legislation addressing tongzhi human rights violations or the violators.
		Academic discussion on depathologizing homosexuality and same-sex marriage is permitted. However the official policy of repressive indifference makes the security of tongzhi activists uncertain to some degree.
		The police appear to be a major tongzhi rights violator. There have not been any documented hate crime cases against tongzhi.

From this table, it can be seen that decriminalizing male same-sex acts in the *Criminal Code* is the only major legislation in favour of tongzhi rights. In terms of official repression of rights, the government has draconian censorship laws. In other areas, the Chinese government does not provide any positive obligations to protect tongzhi in many fields, including employment, education and family law as required by the Yogyakarta Principles. Future legal reform could take place in any of these areas of the law.

C. Predicting the Tongzhi Legislation Development: A *Top-Down* Reform

This section proposes a legislative reform pattern for tongzhi rights. This discussion is dependent on several key components, namely a reform leader, forcing factors, current

¹¹⁶⁵ See generally Chapter Two section D.3.e. "Passive discrimination in family law".

political environment and the role of international human rights law. For the purposes of this thesis, a *top-down* reform is characterized by a policy change at the level of the official authority, and then it will lead to specific legislation in favour of tongzhi rights, followed by the acceptance of tongzhi within civil society and ultimately achieve the final goal, substantive equality for tongzhi.

The predicted pathway for legal reforms in China is opposite to that of the Western legislation development pattern. Reviewing the common development pattern in many Western countries addressed in chapters 3-5, the journey of sexual orientation rights protection always started with the decriminalization of homosexual acts through relying on the protection of privacy, and then expanded legal protection into areas such as employment law, largely through the use of the principle of non-discrimination. This gradually led to the realization of a variety of other civil rights, with same-sex marriage as the symbol of victory, which was won with the principle of equality.¹¹⁶⁶ Apart from having a good strategy, the effective human rights systems in Canada, Europe and the UN relied on the support from civil society to promote sexual orientation legislation in Western democratic societies. Normally once the decriminalization of homosexuality occurred, there was a rapid development of broader civil rights in society, including in the media and the arts, which helped make Western societies become more familiar and tolerant of sexual minorities. Such development within civil society created a strong social support for subsequent legal reforms, expanding legal recognition and protection of sexual minorities.¹¹⁶⁷ Successful legal reforms have then had a positive impact on civil society in terms of a general acceptance of LGBTs. Such a reform pattern initiated and supported by civil society can be characterized as a *bottom-up* reform pattern.

This bottom-up reform pattern is not feasible in China due to the official authority's harsh restriction of tongzhi in the mass media, which has controlled civil society to a large

¹¹⁶⁶ See e.g., Waaldijk, *supra* note 76, at 51-52.

¹¹⁶⁷ Mountford, *supra* note 264, at 9.

extent. Since civil society has a limited access to the information about tongzhi group in China, the general public has little knowledge about the tongzhi community. Although some recent tongzhi activities have successfully raised public awareness about this group, particularly in the cyber world, it is still a long road for tongzhi to gain a sufficient level of support from civil society which would be required to launch a bottom-up legal reform. Moreover, such a pattern of legal reform is nearly impossible since the authority is reluctant to give up its strict control over the media.

Instead, tongzhi legal reform in China could proceed from the *top-down*, namely, from the political authority down to civil society and the general public. This reform will be initiated from the top, (i.e., the authority), where the current policy of repressive indifference will change, most likely due to a social crisis such as HIV/AIDS among the tongzhi group, rather than being launched from civil society. This will result in a series of legislative reforms in favour of tongzhi rights. Such change from the authority will increase the civil acceptance on tongzhi group, and finally lead to the goal of equality.

Legal changes play an important role in promoting social acceptances of gay men and lesbians.¹¹⁶⁸ Legal change can serve as a foundation for greater acceptance of gay men and lesbians in society, or be evidence of social acceptance.¹¹⁶⁹ Alternatively, legal recognition is believed to lead the social acceptance of gay men and lesbian ultimately, although even if the law cannot change the attitude of people, it does have ability to protect sexual minorities from discrimination and enjoy equal rights.¹¹⁷⁰

So the top-down model could work, particularly in the Chinese context where the Communist regime controls the country, it is often the case that the political authority imposes new legislation without their support from civil society or social acceptance. A good example of this is the implementation of one-child policy in 1979. After the

¹¹⁶⁸ Rosie Harding, *Regulating Sexuality: Legal consciousness in lesbian and gay lives*, (New York, Abingdon: Routledge, 2011), at 66.

¹¹⁶⁹ *Ibid.*

¹¹⁷⁰ *Ibid.*, at 67.

enforcement of the one-child policy, the government started to educate the public that controlling the birth rate was the key for the economic development and forced the people to accept it.¹¹⁷¹ Despite the great social resistance to this policy, the one-child policy has been enforced across the country.¹¹⁷² Many families have only one child in China and therefore the one-child policy has had a significant impact on the social fabric. It should be pointed out that citing the one-child policy as an example to demonstrate the feasibility of top-down approach does not imply that one-child policy is correct or supported by the author. On the contrary, one-child policy is controversial, due to the fact it breaches the basic human right to give a birth to a child.

The political landscape in China has changed in recent years due to the development of Chinese democracy and the influence of the international community. The authority is more cautious about making arbitrary decisions and therefore now the opinions of civil society are normally taken into account. However, the demand and/or support of civil society are not necessarily a concern for the State's policy consideration.

It should also be noted that the major opposition against gay rights in Western countries, namely religion, does not exist in China, which makes the top-down reform more feasible without strong religious resistance. Confucianism culture, which still has an influence in Chinese society today, tolerates homosexuality. Furthermore, organized religion was banned during the Cultural Revolution, and thus, Christian and Islamic anti-homosexual discourse did not have a chance to spread across China. Consequently, today there is little religious resistance in Chinese civil society against tongzhi rights. A recent survey conducted by Li Yinhe also showed that the 43% of respondents could accept

¹¹⁷¹ The Information Office of the State Council of China (国务院新闻办公室), "Zhongguo de Jiahua Shengyu" (中国的计划生育) [One Child Policy in China](23 August, 1995), online: Chinese Government Web < http://www.gov.cn/zwgk/2005-06/02/content_3845.htm > [translated by author].

¹¹⁷² RENKOU JIHUA SHENGYU FA (人口与计划生育法) [Law of the People's Republic of China on Population and Family Planning] (adopted at the 25th session of the Standing Committee of the Ninth National People's Congress of the People's Republic of China on December 29, 2001 and is hereby promulgated, and come into force on September 1, 2002.), online: pkulaw.com, at art 5&6.

homosexuality completely, which was considered as a high percentage.¹¹⁷³

1. Authority: Communist Party of China

In a narrow sense, the authority in China is the CPC. According to the existing *Chinese Legislation Law*, the NPC is the supreme legislature in China and its members are deemed to pass the legislation to reflect the wills of Chinese people.¹¹⁷⁴ However its members are not elected directly; rather, they are determined by the CPC, which essentially means that these NPC members are in fact the members controlled by the CPC. The NPC is like a political democratic symbol to rebut the Western criticism of CPC's dictatorship. Therefore, a common criticism of the NPC is that it is unable to represent the wills of the people. The Western media described the NPC as a rubber-stamp for CPC's decisions.¹¹⁷⁵

As shown in the analysis in the previous chapters, the major resistance to tongzhi rights in China is not from religions, but rather from the CPC's policy of repressive indifference. The key issue raised for legal reform considerations is how to break such repressive indifference policy and who will be the leading actor. The historic tolerance of homosexuality has made the public not very hostile towards tongzhi. However, the tolerance in civil society will not necessarily lead to passing any laws in favour of tongzhi in China since China is not really a democratic country. As discussed in Chapter Six, unlike the successful legal battles fought in Western countries like Canada, it is unlikely that Chinese courts could lead the tongzhi rights development due to the lack of an effective judicial review mechanism or a guarantee of judicial independence.

In reality, the CPC is the real ruling party behind this democratic political camouflage. The CPC has supremacy and its powers stretch well beyond the relative power of China's most dominant organs, such as the NPC, other levels of government and the courts. All

¹¹⁷³ Li Yinhe (李银河), "Gongzhong dui Tongxinglian de Taidu" (公众对同性恋的态度) [the Public opinion on Homosexuality] (17 June 2008), online: sina blog <<http://blog.sina.com.cn/liyinhe>> [translated by author].

¹¹⁷⁴ Law on Legislation, *supra* note 337 at art. 5.

¹¹⁷⁵ "National People Congress (of China)", online: BBC News <<http://news.bbc.co.uk>>.

legislative decisions must be consistent with the will of the CPC's leadership in every matter. At the national-level, for instance, the CPC could affect the amendment of the *Constitution*, the appointment of Ministers, and setting-up of governmental institutions.¹¹⁷⁶ The CPC's reach also extends down to the local level, for instance, the local CPC branch can overturn any by-law in cities provided that they are inconsistent with the CPC's policies.¹¹⁷⁷ In essence, China is a state under the CPC's dictatorship and the CPC does not want to lose its control. Therefore, ensuring proposals are consistent with the CPC's policies is the key to launching any social and legal reforms in the current environment. As such, only the authority, the CPC, can be the key actor to commence the legal recognition journey for tongzhi rights.

According to Maoism, the CPC's main ruling ideology, law is the tool of the ruling class rather than a method of protecting individual rights.¹¹⁷⁸ Any individual rights, including civil, political, economic, and social rights should be granted according to the needs of the ruling party. A description in the *Red Flag*, the official CPC journal provides a good explanation: "In a class society, only after obtaining political power can be ruling class, by means of the form of law, transform its will into the will of the state, and rely on the state's coercive force to safeguard its own class interests."¹¹⁷⁹ So it is argued that there would be "no constant or unchanging tenet for human liberties and rights" because the needs of the CPC changed from time to time in China.¹¹⁸⁰

2. What Triggers the Authority to Change its Policy Position? Case Study of MSM in the HIV Prevention Policy Development

In order to understand how to push the authorities to start a significant policy reform, or

¹¹⁷⁶ Qin Qianhong (秦前红), *Xin Xianfa Xue* (新宪法学) [New Study on Constitutional Law], (Wuhan: Wuhan University Publishing, 2005) at 289 [translated by author].

¹¹⁷⁷ Wang Jiangyu, *supra* note 316 at 2-3.

¹¹⁷⁸ Cooper, *supra* note 1050, at 12, reprinted in Chang, *supra* note 984, at 129.

¹¹⁷⁹ Xiang Chunyi et al., "Strive to Establish a Socialist Legal System with Chinese Characteristics" (1984 Feb) 3 *Red Flag*, reprinted in Chang, *supra* note 984, at 129.

¹¹⁸⁰ *Supra* 1178.

what will trigger this legal reform, the following section will detail the official shift in the HIV prevention policy towards men who have sex with men (MSM).

HIV prevention has a close connection with tongzhi group in China. Tongzhi have been associated with HIV and AIDS in the eyes of the central government since 1980s.¹¹⁸¹ Therefore it is said that the HIV/AIDS issue opened a policy window for tongzhi to communicate with the authorities. In the course of the HIV prevention policy development, a dramatic change on official attitude towards the tongzhi community has occurred over the past two decades, from fear and illegality of homosexuality to concern and recognition of the existence of the group.¹¹⁸² During this process, the massive pressure from the worsening HIV/AIDS crisis was a significant contributing factor to the shift of the government's attitudes towards the high-risk groups, including tongzhi group. John Balzano, a law professor at Boston University School of Law, commented on this process as:

AIDS forced the central government to look at and deal with the gay community in some way, however small. On the positive side, the AIDS crisis allowed homosexuals to obtain political and legal visibility from the Chinese government and has paved the way for future action at least in the area of public health.¹¹⁸³

The rapid spread of HIV in late 1980s forced the authorities to adopt the first National Plan for the Prevention of AIDS 1988-1991(the 1988 Plan).¹¹⁸⁴ This plan aimed to shut HIV/AIDS out of China by a strict prohibition of high-risk activities, such as prostitution, drug use as well as homosexuality.¹¹⁸⁵ Put simply, the early policy characterized HIV as a “foreign disease” and should be cracked down on. In 1990, the central government passed

¹¹⁸¹ Balzano, *supra* note 287 at 33.

¹¹⁸² *Ibid.*

¹¹⁸³ *Ibid.*

¹¹⁸⁴ Quanguo Yufang Aizibing Guihua(1988-1991) (全国预防艾滋病规划 (1988年-1991年))[National Plan for the Prevention of AIDS 1988-1991] (Promulgated by the Ministry of Health, effective on 17 August, 1987), online: pkulawChinese <<http://www.pkulaw.cn>>.[translated by author]

¹¹⁸⁵ *Ibid.*

the 1990-1992 AIDS Mid-term Prevention Plan (the 1990 Plan), which contained details concerning homosexuality. In this plan, homosexuality was described as illegal. The authorities acknowledged knowing little about the tongzhi community, but that same-sex acts should be prohibited due to their high risk.¹¹⁸⁶ Different from the official prevention policy, some gay-affiliated non-governmental health organizations started HIV prevention in the mid-1990s by reaching out to the tongzhi community with the help of transnational activists from Hong Kong, Taiwan and overseas.¹¹⁸⁷ The work of these grass-root HIV prevention organizations has been highly praised because it has opened a window for public or semi-public discussions about homosexuality, on such issues as coming out, social discrimination, public recognition and mental health.¹¹⁸⁸

However, the official cracking down method in the HIV prevention plans made the situation worse.¹¹⁸⁹ The failure to control the disease forced the government to reconsider their previous HIV prevention policies in the new century. The government began to soften its efforts to crack down on high-risk behaviour and turned to a policy of recognition of reconsidering more constructive education and outreach techniques.¹¹⁹⁰ *The 2005 Guidelines for Intervention with High-Risk Behaviours* issued by the Ministry of Health contained a specific section on homosexuality, which stated that the methods for HIV prevention among tongzhi group should focus on training gay men and women to become educators within their own communities.¹¹⁹¹ Such detailed strategy for reaching out the tongzhi community implied legalizing homosexual behaviour.¹¹⁹² Furthermore, the two AIDS Prevention and Treatment Action Plans (2006-2010) and (2011-2015) issued by the

¹¹⁸⁶ Aizibing Yufang he Kongzhi Zhongqi Guihua (艾滋病预防和控制中期规划 (1990-1992)) [National AIDS Prevention and Control Mid-Term Plan (1990-1992)], (Promulgated by the Ministry of Health, August 1990), online: China HIV/AIDS Information Network <<http://www.chain.net.cn/laws&policies/domesticpolicy&planning/263.htm>> [AIDS Mid-Term Plan (1990-1992)][translated by author]

¹¹⁸⁷ GaoYanning, *et al*, *supra* note 307 at 193-196.

¹¹⁸⁸ *Ibid* at 427-428.

¹¹⁸⁹ *Infra* note 1196.

¹¹⁹⁰ AIDS Mid-Term Plan (1990-1992), *supra* note 1186.

¹¹⁹¹ *Ibid* at art 3.2.

¹¹⁹² *Ibid*.

central government stipulated that MSM is a high risk group and encouraged the outreach activities among gay communities to prevent the spread of HIV.¹¹⁹³

As such, the HIV prevention policy has provided tongzhi with political and legal visibility from the government. Faced with a social crisis, the government took action on the legal recognition on the MSM. The shift of the government attitude on HIV prevention policy demonstrates that serious social issues or potential instability caused by discrimination on the basis of one's sexual orientation could raise the authorities' awareness, and can result in legal recognition so long as it is not inconsistent with the CPC's policy. It is predicted that the authorities are likely to take actions to break the indifference attitude if there are serious social issues resulting from the continued discrimination or human rights violation against tongzhi.

But there is a danger in depending solely on HIV/AIDS prevention policies for tongzhi rights. HIV/AIDS have become associated in the public mind with tongzhi, which stigmatizes tongzhi to a large extent. As such many Chinese people now see the infection as a "tongzhi problem", which is not so different from the early 1980s with AIDS was first known as "GRID" (gay related immune deficiency). Furthermore, the inclusion of tongzhi with sex trade workers and intravenous drug users casts a criminal shadow on same-sex behaviour in the public's eye.

Thus, if the CPC is faced with a situation where discrimination against the tongzhi group threatens their control, they will likely have to adjust the relevant policies to ameliorate the lives of tongzhi group. The next part will explore the crucial social issues that are on the rise due to the current official repressive indifference policy towards tongzhi group, and further discuss whether these issues are serious enough to force the CPC to change the relevant policy.

¹¹⁹³ The General Office of the St. Council, Zhongguo Ezhi yu Fangzhi Aizibing Xingdong Jihua (2006-2010) and (2011-2015) (中国遏制与防治艾滋病行动计划 (2006-2010 年)) and (2011-2015 年) [China's AIDS Prevention and Treatment Action Plan (2006-2010) & (2011-2015)], 2006 Plan was promulgated in 2006; 2011 Plan was promulgated in 2011. online: pkulaw Chinese <<http://www.pkulaw.cn/>>[translated by author].

3. Crucial Social issues in the Tongzhi Group

Serious discrimination against tongzhi and enormous societal and family pressure makes most tongzhi people prefer to stay in the closet in China. However, this hiding strategy not only makes this invisible group (with a huge population) more disadvantaged, but it also generates a number of serious social issues that can be harmful to the whole society. The social issues caused by the official policy of repressive indifference of the tongzhi group addressed here include the continuous HIV crisis in the gay community and marriages of convenience (where tongzhi hide their sexuality and enter into an opposite sex marriage).

a. Continuous HIV Crisis in the Gay Community

Recognition of MSM as a high-risk group in the current HIV prevention regulation is positive step towards stopping the spread of HIV in the gay community. However, it will not solve the fundamental issue without giving legal protection to tongzhi. The government has acknowledged in its *2012 Plan Notice* that the MSMs with HIV virus has been on the rise in recent years and the prevention has become more challenging.¹¹⁹⁴ The Ministry of Health's *2012 AIDS Response Progress Report* showed that sexual transmission has already become the primary transmission mode in China, and infections amongst MSMs are increasing dramatically.¹¹⁹⁵ Among the reported cases, homosexual transmission increased from 2.5% in 2006 to 13.7% in 2011.¹¹⁹⁶

Without legal recognition and protection from massive social pressure and

¹¹⁹⁴ Guanyu Yinfa Zhongguo ezhi yu Fangzhi Aizibing “Shierwu” Xingdong Jihua de Tongzhi (关于印发中国遏制与防治艾滋病“十二五”行动计划的通知) [The Notice regarding Issuing the China's AIDs Prevention and Treatment “Twelve Fives” Action Plan] (promulgated by the General Office of the St. Council on 13 January 2012), online: pkulaw Chinese <www.pkulaw.cn>[translated by author].

¹¹⁹⁵ Ministry of Health of China, *2012 China AIDS Response Progress Report* (31 March 2012), at 12, online: UNAIDS <<http://www.unaids.org>>.

¹¹⁹⁶ *Ibid*, at 5.

discrimination, many gay men in China feel oppressed and depressed, and prefer staying in the closet.¹¹⁹⁷ If two gay men in love cannot see the hope that they will live together legally in the future, they may take a random, secretive, and careless attitude towards their sexual lives. This can cause sexual health problems among the gay community, such as having a greater risk of HIV infection.

The invisibility of the huge gay community, in particular, in the rural areas makes HIV prevention outreach extremely difficult. Many current HIV/AIDS outreach prevention events targeting tongzhi only take place in urban cities, and even there, they are sometimes limited to the tongzhi in gay bars and bathhouses.¹¹⁹⁸ However, such outreach efforts fail to reach other high-risk tongzhi group, such as gay husbands in heterosexual marriages. These men are unlikely to go to gay bars due to the fear of disclosure, and prefer looking for sexual partners on the Internet. If they are concerned that they may have come in contact with HIV, they likely do not have the information on where to get tested. It also places a number of straight spouses at risk of contracting HIV since condom use between spouses is uncommon, and asking one's spouse to use a condom could raise questions of infidelity.¹¹⁹⁹ Moreover, *revenge mentality* exists in some circles of gay people infected with the HIV virus in China; the media reported that a gay person infected by HIV began to take revenge on society by purposefully infecting others.¹²⁰⁰ According to the HIV positive person, the government is reluctant to face tongzhi issues in China, and it is the

¹¹⁹⁷ Generally see the discussion in Li Yinhe & Qin Shide(李银河,秦世德), “Tongxinglian Shifou Yinggai Jiehun (同性恋是否应该结婚) [Should homosexuals get married?]", in Gao Yanning, *et al.*, *supra* note 307 at 322-323.[translated by author]

¹¹⁹⁸ Generally see Du Cong (杜聪), “Tongxianlian Fangai Jiankang Ganyu (同性恋防艾健康干预)[HIVs and AIDs Prevention Among LGBT],” , in Gao Yanning, *et al.*, *supra* note 307 at 149, the prevention work has always taken place in big cities; Yuan Zineng (袁子能), “Zhiyuan Bangzhu Shou Tongxinglian yu Aizibing Shuangchong Qishi de Renmen(志愿帮助受同性恋与艾滋病双重歧视的人们)[Voluntarily Help the People discriminated on ground of sexual orientation and AIDs]”, in Gao Yanning, *et al.*, *supra* note 307 at 253.[translated by author]

¹¹⁹⁹ Cary Alan Johnson, “Diverse sexualities/Disparate laws: Sexual minorities, the State and International Law” (April 3, 2010), Keynote address at the Harvard Law School.

¹²⁰⁰ “Shehui Nengjiandu:Airen Tongzhi (社会能见度：爱人同志) [Social Visibility: Lover,Tongzhi]”, *Phoenix Television Broadcast*, (14 April 2005) online: ifeng <<http://v.ifeng.com/>>[translated by author].

only way to get attention from society to push the government to grant equal rights for them.¹²⁰¹ Again, due to the large number of tongzhi group in China, the continuing official repressive indifference policy towards tongzhi will cause instability in the society.

b. Homowives/homohusbands and Marriage of Convenience

The second serious social issue that the official repressive indifference policy towards tongzhi poses to society is the emergency of a large number of homowives/husbands and marriages of convenience. It would be beneficial to better understand the Chinese cultural context prior to the analysis of this issue. Chinese tradition considers marriage and reproduction as the most important things in a society. An old Chinese saying states, “there are three ways of being an unfilial son, the most serious one is to have no heir” reflects the significance of marriage, family and descendants in China.¹²⁰² The young Chinese always experience strong traditional pressure to get married and to have a child. Furthermore, a *good* person in many stereotyped Chinese mind should get married with someone of the opposite sex in his/her twenties, have a child, have stable well remunerated work, and have a good source network. To stay single after one’s thirties would incur a variety of societal pressures and discrimination against the single individual as well as for the whole family.¹²⁰³ Furthermore, the situation is worse in rural areas where relatives and neighbours have closer relationships.

Without the legalization of same-sex marriage in China, most young tongzhi facing such massive societal pressure have no options but to enter a heterosexual marriage. According to a Chinese sexologist Liu Dalin, an estimated 90% of gay men in China marry heterosexual women, while the number in America only is 15-20%.¹²⁰⁴ Since China has

¹²⁰¹ *Ibid.*

¹²⁰² Liu Xuedong, “On the present situation of the China’s homosexuals and legislation suggestions through the International Human Rights Law and part state legislation”(2011) September Vol. 20 No.9, *The Chinese Journal of Human Sexuality* 45, at 47.

¹²⁰³ Li Yinhe (李银河), “Tongxinglian Yawenhua (同性恋亚文化) [Sub-culture of homosexuality]” in GaoYanning, *et al*, *supra* note 307 at 1-24.

¹²⁰⁴ “Homosexuality in China: Collateral damage, neither comrades nor spouses”, *The Economist* (18 March

approximately 20 million gay men, according to the estimate by Li Yinhe, there are 18 million gay men married to heterosexual women.¹²⁰⁵ Li Yinhe calls these heterosexual spouses “homowives /homohusbands”, and she argues that this issue is “unique to China” and “the biggest tragedy and causes huge pain”:

The ‘homowife’ phenomenon is a phenomenon unique to China, seldom witnessed in other countries. In other countries, homosexuals would remain single or live together or marry other homosexuals. Very few would enter into a heterosexual marriage. This difference comes about because Chinese culture places such a great emphasis on marriage and reproduction, as to make them compulsory.

The condition for ‘homowives’ is extremely tragic. At the seminar, there were ‘homowives’ who burst into tears as they spoke, leading all of them to hug each other for a good cry. Most days, they wash their faces with tears. I heard what I considered the most shocking testimony that from a woman who told of how she even doubted her ability to attract men — why wouldn’t her husband even want to look at her or touch her? Am I really that unworthy as a woman? She assumed that all men would treat her like that, not knowing that this is far from the truth. She did not dream that her husband would be gay. Under the circumstances, even the most beautiful and accomplished woman would not arouse him.¹²⁰⁶

In a recent tragedy reported by a number of media in China, a doctoral female student in Sichuan province committed suicide because she found out her husband was gay.¹²⁰⁷ This tragedy, nonetheless, did help raise greater public awareness on the homowives/homohusband issue again.

Another solution for tongzhi in urban cities who refuse to enter a heterosexual marriage is a *marriage of convenience*.¹²⁰⁸ In the marriage of convenience, a gay man and

2010), online: The Economist <<http://www.economist.com/node/15731324>>.

¹²⁰⁵ “Li Yinhe on Homowives”(24 June 2009), online: Shanghaiist <<http://shanghaiist.com/>>.

¹²⁰⁶ *Ibid.*

¹²⁰⁷ “Chengdu Nvboshisheng Faxian Zhangfu shi Tongxinglianhou Tiaolou Shenwang (成都女博士生发现丈夫是同性恋后跳楼身亡) [A Female PhD Student from Chengdu Killed Herself after Discovering Her Husband is Gay] (July 18, 2012), online: China.com <<http://news.china.com/>>.[translated by author]

¹²⁰⁸ Some media call it a “fake marriage” or a “sham marriage”. See e.g., “Fake-marriage market gives China’s gays an out” (9 February 2011) MSN News Online, online: MSN News

a lesbian (or sometimes a heterosexual woman) marry one another to escape the overwhelming pressure from their parents and relatives, and colleagues. The difference between a marriage of convenience and the issue of homowives/homohusbands is that the both sides in a marriage of convenience know full well it is not a real marriage. In fact, they do not necessarily live together and many still maintain their own same-sex partner. In Shanghai, a big gay website, Lemon Net,¹²⁰⁹ started organizing a fake-marriage market once a month to facilitate lesbians and gay men to meet and find a potential husband or wife. Another famous national-wide website, Wuxing Hunyin Wang (No-sex -marriage Web),¹²¹⁰ has over a thousand members who looking for marriages of convenience, of which gay men and lesbian make up of the majority.

However, many activists opposing the marriage of convenience solution claim that it is a compromise, a retreat, and it delays the development of tongzhi rights in China.¹²¹¹ Aqiang, a well-known gay rights activist based in Guangzhou states, “If each gay doesn’t even have the courage to communicate with their parent, their close family, and tell the truth, how we can expect the society to change their attitude?”¹²¹² These phenomena are by no means limited to China; however, due to the sizeable tongzhi population, the overwhelming societal pressure to marry, and China’s one-child policy, continuing to deny the tongzhi group the right to marry is only worsening the situation and it will do harm to the stability of the whole society. The official indifference policy simply maintains the status quo, and supports (though unintentionally) homowives/homohusbands and marriages of convenience. Thus such marriages should gain more public awareness due to their significant impact on society, and further, force the government to face these issues.

Furthermore, the globalization trend and the increasing international trend towards

<<http://www.msnbc.msn.com>>.

¹²⁰⁹ Lemon Net, online: <<http://www.inlemon.org/>>.

¹²¹⁰ Wuxing Hunyin Wang (无性婚姻网) [No-sex-marriage Web], online:<<http://www.wx920.com>>.

¹²¹¹ Zhang Yajun, “Amid family pressures, gays in China turn to marriages of convenience” (13 April 2010), online: the Christian Science Monitor <<http://www.csmonitor.com>>.

¹²¹² *Ibid.*

same-sex relationship recognition will bring about a number of new legal issues for China. The most challenging issue advanced by some authors is whether or how to recognize the foreign same-sex marriage in China.¹²¹³ With a large population of Chinese citizens living overseas, some tongzhi have married or entered into the registered partnership in countries where such relationships are legally recognized. Will such marriages or registered partnership be recognized in China when these Chinese citizens return to China? While same-sex marriages and registered partnerships already exist in a number of countries around the world, the issue of bi-national same-sex relationship may become a real issue for China in the near future. Furthermore, since both Hong Kong and Taiwan are more advanced in terms of their respective tongzhi rights developments, it is likely, due to geographic proximity, shared cultural values and having a common language, many mainland Chinese tongzhi may find a Hong Kongese or Taiwanese same-sex partner. These unsolved new legal issues may also generate massive pressure on the authorities to face tongzhi human rights issues. Some scholars also propose some alternatives to address this issue.¹²¹⁴

4. Analysis of the Current Relevant Official Human Rights Protection Policies

Since the official repressive indifference policy against tongzhi could cause such social problems that harm not only the tongzhi group themselves, but also society as a whole, it is likely that the authority would take some actions once these issues have gained a sufficient amount of public attention. The following in-depth examination of the three current key official human rights policies, *Protecting the Vulnerable Groups*, *Building Up a Harmonious Society* and *People-oriented principle*, will highlight the authority's willingness to provide the human rights protection and an optimistic the future relating to

¹²¹³ Zhou Dan, *supra* note 371 at 307.

¹²¹⁴ He Qun (何群), "Shewai Tongxing Hunyin Falv Shiyong Wenti Yanjiu (涉外同性婚姻法律适用问题研究)[Study on the Application Law of Foreign-related Homosexual Marriage]"(2012) Vo. 30 No.10, Hebei Law Science 131.[translated by author]

tongzhi rights development.

a. *Protecting Vulnerable Groups*

The gradual legal recognition of human rights protection and a harmonious political environment within China provides an optimistic sign for the tongzhi rights movement. 2004 saw a notable human rights development in China with the addition of a new broad human rights protection principle to the *Chinese Constitution*. The topic of human rights protection had been gaining a considerable amount of public awareness, and the discussion of the theory of *Protecting the Vulnerable Groups*, to some extent, represents a new phase of equality protection in China.

As discussed above, although the *Chinese Constitution* contains a broad clause to grant equality to citizens, it seems more like a symbolic statement of policy than an implementable law due to the lack of an effective judicial review mechanism. Inequality and imbalance are still very serious and common in Chinese society in many perspectives. In particular, the notion of “equality” captured the public attention with the treatment of a large number of migrant workers from the rural areas working in the big cities in China.¹²¹⁵ They are discriminated against in multiple ways, for instance, salary, children’s education and social benefits. Such inequality and imbalance could cause social instability and become a threat for the central government.¹²¹⁶

Faced with this imbalance, Chinese former Premier Zhu Rongji first adopted the term *vulnerable groups* (ruoshi qunti) in the context of the labour market and called on special support and subsidies for these groups in his Government Work Report to the Fifth Session

¹²¹⁵ See generally: “Chinese Scholars and Activists Demand Equality for Migrant Workers in China”, online: Human Rights in China < <http://www.hrichina.org/content/63>>; Chen Xin, “Equality urged for migrant workers” (13 September 2012), online: China Daily < <http://www.chinadaily.com.cn/bizchina> >; Wei Hua, Junjian Yi and Junsen Zhang, “Internal Migration and Income Inequality in China: Evidence from Village Panel Data”, Human Development Research Paper (2009/27), online: Human Development Reports < http://78.136.31.142/fr/rapports/mondial/rdh2009/documents/HDRP_2009_27.pdf>.

¹²¹⁶ Constance Thomas et al, *Equality and non-discrimination at work in China: training manual*, (Beijing: International Labour Organization, 2010), at 26-35.

of the Ninth National People's Congress in 2002.¹²¹⁷ Based on the official interpretation, the “vulnerable groups” in the report generally refer to those which are economically disadvantaged, mainly include three main categories: first, the urban laid-off workers from the state-owned work units without any professional skills; second, the poor people as the outsider of the state systems who have no work experience in state-own work units, particular older people without family support or disabled; and third, the migrants workers from rural areas.¹²¹⁸

Since then, the concept of protecting the vulnerable groups appeared and has become popular in the media. Essentially, this notion uses the disadvantage approach from substantive equality theory that acknowledges that formal equality is not sufficient and so special assistance should be given to some disadvantaged groups to reach substantive equality. Since the increasing awareness of protecting vulnerable groups, there are debates focusing on the scope of definition of vulnerable group, which also involve the discussion on whether the tongzhi group is a vulnerable group. Some insisted that the scope of the vulnerable group should stick to the economically disadvantaged groups because the term of vulnerable group originally only applied to groups that were economically disadvantaged by the State's reforms.¹²¹⁹ Those in favour of expanding the scope of the concept argue that the term should also apply to those groups who are not necessarily economically disadvantaged but lack sufficient social resources to fight for themselves, such as ethnic minorities, women, children, the elderly, and the disabled.¹²²⁰ Due to such

¹²¹⁷ Zhengfu Gongzuo Baogao (2002) (政府工作报告(2002年)) [Report on Government Work (2002)] (delivered by the Premier of State Council, Zhu Rongji on 5 March 2002), online: China NPC <<http://www.npc.gov.cn>>. [translated by author]

¹²¹⁸ He Ping, the president of the Social Research Institution under the Labor and Social Benefit Ministry, provided the official interpretation on vulnerable group. See “Zhu Zongli Baogao zhong Xin Mingci: Ruoshiquanti Baokuo naxie Ren (朱总理报告中新名词: 弱势群体包括哪些) [New Term in Premier Zhu's Report: Who Included in Vulnerable Group]” (8 March 2002), online: China People <<http://www.people.com.cn>>. [translated by author]

¹²¹⁹ Li Zhiyong (李志勇), “Guanzhu Shehui Ruoshi Qunti (关注社会弱势群体) [Examining Vulnerable Groups]” (2001) 7, *Journal for Party and Administrative Cadres* 14. [translated by author]

¹²²⁰ Wang Lei (王蕾), “Lun Ruoshi Qunti jiqi Falv Goujian (论弱势群体及其法律构建) [Vulnerable Group and its Legislation]” (2005) 15.4, *Luoyang Journal Of Luoyang Technology College* 33 at 83. [translated by

incapacities, they can require the state to provide a remedy or other form of support for them. The state's willingness to promote equality for these groups has been demonstrated through the passage of a series of relevant legislation, such as *Law of the People's Republic of China on the Protection of Minors*,¹²²¹ *Law of the People's Republic of China on the Protection of Disabled Persons*,¹²²² and *Law of the People's Republic of China on the Protection of Women's Rights and Interests*.¹²²³ Also in the *National Human Rights Action Plan of China (2012-2015)* issued by the Information Office of the State Council, the groups of ethnic minorities, women, children, the elderly people, and the disabled are addressed specifically in terms of human rights protective measures.¹²²⁴ It is argued that the tongzhi group is experiencing similar incapacities as those other vulnerable groups to reach equality and therefore they should also be qualified as a vulnerable group.¹²²⁵ Following this logic, it would be analogous for the state to promote tongzhi as a requirement of their policy of protecting the vulnerable groups.

There was little official response to this academic discussion. Nevertheless the notion of protecting vulnerable groups and the academic discussion on the scope of vulnerable group did raise public awareness on the existence of tongzhi group. However it should be noted that just like linking the tongzhi with HIV/AIDS too, there is a danger of stigmatizing the tongzhi again by labeling them as a disadvantaged vulnerable group in the substantive equality protection. In particular, for tongzhi, it seems more difficult to win the social acceptance with such a disadvantaged stigma.

author]

¹²²¹ Weichengnian Ren Baohu Fa (未成年人保护法) [Law on the Protection of Minors] (adopted firstly by the Nat'l People's Cong. on 4 September 1991; revised by the Standing Committee of Nat'l People's Cong. on 29 December 2006, effective 1 June 2007), online: pkulaw < <http://en.pkulaw.cn/>>.

¹²²² Canjiren Baozhang Fa (残疾人保障法) [Law on the Protection of Disabled Persons] (adopted firstly by the Nat'l People's Cong. on 28 December 1990; revised by the Nat'l People's Cong. on 24 April 2008, effective 1 July 2008), online: pkulaw<<http://en.pkulaw.cn/>>.

¹²²³ LPWRI, *supra* note 1061.

¹²²⁴ Information Office of the State Council, *National Human Rights Action Plan of China (2012-2015)*, June 2012, Chinese and English versions available online: Research Center for Human Rights and Humanitarian Law, Peking University Law School < <http://www.hrol.org> > , at ch III.[2012 Action Plan]

¹²²⁵ Balzano, *supra* note 287 at 14-15.

b. *Building Up a Harmonious Society*

Another notable development is the government's new political objective of *Building Up a Harmonious Society*. The 30-year process of modernization in China has led to the rapid economic development, along with other social issues, such as a great gap between the rich and the poor, imbalance between the urban and the rural areas, serious corruption, and so on.¹²²⁶ The government also acknowledges that it would be dangerous if these conflictual social issues could not be solved in the future, therefore, the 2005 Sixth Plenary Session of the 16th Central Committee of the CPC passed a significant resolution on a new administrative guiding policy proposal entitled *Building Up a Harmonious Society*.¹²²⁷ The resolution highlights the importance and goals of building a socialist harmonious society, and then puts forward the principles and guidelines to be followed. The main objectives and tasks for building such a society by 2020 include further improving the socialist democratic and legal systems and narrowing the imbalance between urban and rural development and between different regions.¹²²⁸ It aims to soften various conflicting social interests, which implies that the country's focus has shifted from economic growth to overall social balance and harmony.¹²²⁹

As it stands currently, the *Building Up a Harmonious Society* does not explicitly address the tongzhi rights. However, given the precarious situation faced by the tongzhi group and the relevant social issues caused by the current repressive indifference policy, the tongzhi group ought to be included as one of the official concerns for this *Building Up a Harmonious Society* political objective. Continuingly ignoring this group and worsening these social crises will jeopardize this pursued *Building Up a Harmonious Society* objective.

¹²²⁶ "Goujian Shehuizhuyi Hexie Shehui (构建社会主义和谐社会) [Building up a Harmonious Society]", online: Xinhua News Net <<http://news.xinhuanet.com>>.[translated by author]

¹²²⁷ *Ibid.*

¹²²⁸ *Ibid.*

¹²²⁹ *Ibid.*

c. *The People-oriented Principle*

Since Xi Jianping was elected as the new President of China and the General Secretary of the CPC in 2012, he strongly promotes further economic and social reform to strengthen development in China.¹²³⁰ He has stated publicly many times that further reform is the key to achieving “China’s Dream”, and that a “people-oriented” approach is one of the important principles to conduct the reform.¹²³¹ Luo Haocai, the President of the China Society for Human Rights Studies, provided a description to explain this people-oriented reform principle from a human rights protection perspective:

The profound Chinese thought of people-orientation and the Chinese tradition of care for people’s livelihood, both of which have a long history, determine that the human rights protection in China must give priority to people’s livelihood, lay an emphasis on people’s livelihood, and be oriented in people’s livelihood. The priority to people’s livelihood means to care for the most basic requirement and guarantee of people’s subsistence and livelihood, and give priority to the rights to subsistence and development; the emphasis on people’s livelihood means to take the guarantee and improvement of people’s livelihood and the improvement of the people’s material and cultural standards of living as the very purposes of all the work of the government; and the orientation to people’s livelihood means to view the guarantee of people’s livelihood as the very foundation of human rights protection.¹²³²

On the meeting of the Third Plenary Session of the 18th Central Committee of the CPC held in 2013, the CPC for the first time, advanced “perfection of human rights protection judicial system” as an important political reform objective in the important document *CPC’s Central Committee’s Decision on Major Issues Concerning Comprehensively Deepening Reforms* that providing a roadmap for further reform in China.¹²³³ The media

¹²³⁰ Liu Kai-fa(刘开法), “Xi Jinping Zhongguo Tese Shehui Zhuyi Sixiang Yanjiu (习近平中国特色社会主义思想研究)[Research On Xi Jin ping’s Thought About Socialism With Chinese Characteristics]” (2013) No. 16, Serial No. 198, Economic Research Guide 193, at 193.[translated by author]

¹²³¹ Ibid.

¹²³² Luo Haocai, “Optimize Environment for Human Rights Development, and Boost Sustainable Human Rights Development- Speech at the Opening Ceremony of the Sixth Beijing Forum on Human Rights” (12 September 2013), online:China.org< <http://www.china.org.cn/index.htm>>.

¹²³³ Zhongguo Zhongyang Guanyu Quanmian Shenhua Gaige Ruogan Wenti d Jueding(*CPC’s Central Committee’s decision on major issues concerning comprehensively deepening reforms*)[中共中央关于全面深化改革若干重大问题的决定] (adopted by the Third Plenary Session of the 18th Central Committee of the CPC on 12 November 2013), at para 34, online: CPC news<www.cpcnews.cn> [translated by author]

commented that the judicial system will play a critical role for human rights protection in future reform process, and anticipated that some significant reforms in the judicial system will take place to reach the “human rights protection”.¹²³⁴ It is a reflection of the official people-oriented policy.

Like the policy of *Building Up a Harmonious Society*, the *People-Oriented* principle does not refer to the protection for the tongzhi specifically. But from a broader political environment, the official calling for further social and economical reform seems to provide a good opportunity to fight for the legalization of tongzhi rights. The objective of building a better judicial system for human rights will be beneficial for the tongzhi rights development.

The *Protecting Vulnerable Groups* notion, the *Building Up Harmonious Society* policy and the *People-Oriented* reform principle are good signals for tongzhi rights development. In such a context, it is believed that the intensive social pressures resulting from the discrimination of the tongzhi group, the optimistic political environment, along with continuing stimulus from activists and scholars and the positive exposure of tongzhi communities, will win the support of the central government, and finally achieve legal reforms for tongzhi human rights in China. The main concern of the authorities is whether the legalization of tongzhi rights will cause new instability from the opposition. It is hard to predict how strong the opposition will be if same-sex marriage is passed in China, due to the lack of official statistics. The tolerant culture and past surveys show that the public seems to not be very hostile towards the tongzhi community, and the opposing power should not be very strong. However, the real test is whether or not the CPC is willing take the risk to legalize tongzhi rights thereby helping eliminate the social pressures endured by the tongzhi group. The CPC’s attitude seems unclear and unpredictable at this point.

5. The Role of International Human Rights Law in Shifting the Official Attitude to

¹²³⁴ “Zhonggong Shouti Renquan Sifa Baozhang, Xianggan Gaige Anpai Xieru Jueding (中共首提人权司法保障 相关改革安排写入决定)[CPC advanced Judicial Safeguard for Human Rights, Reform Arrangement Written in the Decision]” (15 November 2013), online: Sina News<www.sina.com.cn> .[translated by author]

Tongzhi

It is likely that the trend of acknowledging sexual orientation rights in the international human rights law could prompt Chinese authorities to change their policies. As noted in Chapter Six, the Chinese government has shown its willingness to promote human rights on the international stage by increasingly taking part in human rights related events. In addition to hosting its own event related to human rights in 2006,¹²³⁵ China actively addresses human rights issues in its reports to the UN treaty monitoring bodies. Also in the *National Human Rights Action Plan of China* (2012-2015), it states “China continues to earnestly fulfill its obligations to the international human rights conventions to which it has acceded, and actively conducts exchanges and cooperation in the field of international human rights.”¹²³⁶ The amendment of the *Constitution*, which added some human rights protection, is also considered an important step at the national level. As Chapter Six illustrated, the legal status of women in China has improved due to the influence of international human rights law.

In the future political debate, the increasing international recognition of sexual orientation rights in many countries could be utilized as significant statistical support. Furthermore, the increasing trend in the international arena could have an impact in shifting the official attitude towards the tongzhi group. Li Yinhe argues that legalizing tongzhi rights in China could put the country in an advanced position in term of human rights protection.¹²³⁷ The rapid development in the neighbouring Asian countries is also encouraging. Although same-sex marriage proposal did not pass in Taiwan in 2003, the first case asking for recognizing same-sex marriage has reached the courts in 2012.¹²³⁸ The recent news that the Vietnamese government is considering passing same-sex marriage

¹²³⁵ “Human Rights in China exhibition to open in Beijing” (15 November 2006), *People's Daily*, online: People's Daily < <http://english.people.com.cn/>>. From November 17 to 26, 2006, China held a “Human Rights Exhibition” in Beijing, showcasing China's achievements in human rights.

¹²³⁶ 2012 Action Plan, *supra* note 1224 at ch. V.

¹²³⁷ Li Yinhe, “My Five Reasons to Propose Legalization of Same-Sex Marriage”, *supra* note 1082.

¹²³⁸ Christopher Brocklebank, “Gay Taiwanese couple make bid to be registered as same-sex household in landmark hearing” (26 March 2012), online: Pink News <<http://www.pinknews.co.uk/>>.

legislation, which would make Vietnam the first Asian country to legalize same-sex marriage, has attracted a considerable amount of the public attention.¹²³⁹ Li Yinhe has called on the Chinese government to accelerate its pace in order to catch up with the international community.¹²⁴⁰

However, the opposition to tongzhi human rights would likely argue that sexual orientation rights are not recognized universally in many Asian countries, and Asian Values could be used to justify the refusal of human rights protection for tongzhi. The past position of the authorities by the adoption of Asian Values and social development against universal human rights protection in 1990s makes it uncertain whether the CPC will abandon their policy of repressive indifference toward the tongzhi group when faced with the strong cultural difference argument on this issue.

D. Strategy Considerations: Same-Sex Marriage Claim

This section explores what strategy would be the best fit for the tongzhi right movement in future. Some key considerations include how to raise awareness of tongzhi issues among the official authorities as well as amongst the public, how to help the tongzhi community get more public exposure, and what is a feasible and persuasive legal claim for tongzhi rights.

Apart from the main obstacle for the tongzhi rights movement, the official repressive indifference policy, the invisibility of tongzhi community in civil society also slows down development. Given such situation, an effective strategy must find a way to make the official authorities face the crisis caused by their current repressive indifference policy and to expose the tongzhi community to civil society. The strategy must also be the most feasible legal claim that will advance tongzhi rights in the near future. Tongzhi activists need a powerful claim to unify the tongzhi community and break this grey legal area of the

¹²³⁹ “Vietnam considers same-sex marriage” (29 July 2012), online: USA today < <http://www.usatoday.com/> >.

¹²⁴⁰ Li Yinhe, *supra* note 1082.

invisibility of tongzhi group. The claim for same-sex marriage is a suitable strategy for advancing tongzhi rights in China.

The successes of same-sex marriage in Western countries and the increasing trend of legalization of same-sex partnerships in international human rights law provides strong support for the same-sex marriage claim in China. At the national level, although same-sex marriage proposals have successfully reached the political field, which is addressed below, the proposals did not receive sufficient support to reach the NPC. Nevertheless, it did successfully raise public awareness on tongzhi issues, and it continues to attract the public attention and more mainstream media have begun to report on tongzhi issues. For instance, many popular Chinese websites, such as, Sina, 163.com have launched public surveys on same-sex marriage.¹²⁴¹ Also in academia, the main discussion in terms of tongzhi rights focuses on the topic of feasibility of same-sex marriages in China.¹²⁴² Thus, the battle for tongzhi rights in China has already narrowed and is largely characterized as the battle for same-sex marriage. Moreover, it would certainly result in legal reform in other civil rights if same-sex marriage were passed. However, if they were to lose the same-sex marriage battle, it seems difficult to start another challenge again in the Chinese political environment. The following will provide overview of the same-sex marriage legal proposals.

¹²⁴¹ Ni Zenme Kan Tongxinglian yu Tongxinghunyin? (你怎么看同性恋与同性婚姻?) [What do you think homosexuality and same-sex marriages] (March 2011), online: 163.com, Lady Channel <<http://vote.lady.163.com/vote2/showGroup.do?vglD=380>>[163.com survey]; Tongxinglian, Xingliang Diaocha (同性恋,新浪调查)[Homosexuality, Sina Survey], online: Sina <<http://survey.news.sina.com.cn/voterresult.php?pid=15351>>.[translated by author]

¹²⁴² See e.g., Li Yanlin(李彦林), “Lun Tongxing Hunyin Hefahua zhi Biduan(论同性婚姻合法化之弊端)[Analysis of the disadvantages of legalization of same-sex marriages]” (2010) 2 Cumulatively No. 25, *Social Sciences Review* 112; Liu Tao (刘韬), “Cong Renquanfa Kan Zhongguo de Tongxing Hunyin Hefahua (从人权法看中国的同性婚姻合法化)[Assess The Legalization of Same-Sex Marriages In China From The Perspective Of Human Rights Law]”(2009) 7, *Legal System and Society* 87; Chen Li (陈丽), “Tongxing Hunyin zai Zhongguo de Lifa Biyaoxing”(同性婚姻在中国的立法必要性)[The Necessity of The Legalization of Same-Sex Marriages in China](2009) 7 Cumulatively No. 130, the *South of China Today* 141; Liu Xudong (刘旭东), “Tongguo Guoji Renquanfa he Bufen Guojia Lifa Shenshi Zhongguo Tongxinglian Xianzhuang yiji Jianyi”(透过国际人权法和部分国家立法审视中国同性恋现状及建议)[On the Present Situation of the China’s Homosexuals and Legislation Suggestions through the International Human Rights Law and Part State Legislation](2011) Vol 20. 9, the *Chinese Journal of Human Sexuality* 45.

1. Overview of the Chinese Same-sex Marriage Proposals

In 2001, Li Yinhe, a professor at the Institute of Sociology at Chinese Academy of Social Sciences, advanced the first same-sex marriage proposal in the political arena. Li Yinhe is one of the early Chinese sociologists focusing on gay rights research in China since the 1990s and has conducted numerous studies on sexual minorities in China. She is a very active scholar, and her academic endeavours have greatly contributed to the Chinese gay rights movement. Specifically, she has supported publically gay rights and same-sex marriage in China since the late 1990s. Over the years, Li Yinhe has brought and translated many important Western theories guiding gay rights into China, such as *Kuer LiLun (Queer Theory)*.¹²⁴³ She also utilized her political position as a representative of the CPPCC to advance a same-sex marriage proposal. Since 2001, Li Yinhe has been continually trying to advance the same-sex marriage proposal so that it can get to the Lianghui. It was an optimistic signal that the central government did not ban any news reporting about these proposals. An editorial response by Li Tie, opposing same-sex marriage, has turned this issue into a heated discussion in the media.¹²⁴⁴ In response to this discussion in the media, 163.com, a popular Chinese website, conducted an on-line survey on same-sex marriages in 2011.¹²⁴⁵ 31055 people participated in this survey. Over 70% participants could accept homosexuality. But more than 2/3 participants think China will not legalize same-sex marriages within 3 years.¹²⁴⁶

In order to situate the same-sex marriage proposal within the socio-political arena, this section will review the marriage laws in China, followed by an overview of the main representatives in support and opposition to the same-sex marriage proposals in China. This overview will also demonstrate the gradual acceptance of tongzhi in Chinese civil society.

¹²⁴³ Li Yinhe (李银河) ed, *Kuer Lilun (酷儿理论)* [Queer Theory] (Beijing: Wenhua Yishu Publishing, 2003).[Translated by author]

¹²⁴⁴ *Ibid.*

¹²⁴⁵ 163.com Survey, *supra* note 1241.

¹²⁴⁶ *Ibid.*

a. Chinese Marriage Law Context

It is necessary to address the context of the marriage laws in China because of its relevance to the tongzhi rights development. After the baby boom during the Maoist period, birth control seemed very urgent and, thus the one-child policy was passed in 1979, restricting married couples to having a single child.¹²⁴⁷ While the policy's aim was to control the birth rate, it led to the unintended consequence of disrupting the heterosexual marital reproductive model.¹²⁴⁸ It cut off the direct connection between sex and reproduction within the marriage.¹²⁴⁹ As such, the reason for married people to maintain their sex life after the birth a single child was no longer about reproduction but rather their mutual affection and pleasure.¹²⁵⁰ This has had a strong impact on the sexual freedom revolution in China, which further accelerated the social acceptance of tongzhi in 1990s.

Among a series of new laws in the 1980s regulating the legal chaos that resulted from the *Cultural Revolution*, the 1980 *Marriage Law* had positive influences on the tongzhi community through the unintentional acceleration of social acceptance of sexual freedom. The 1980 Marriage Law confirmed that mutual affection is the foundation of the modern marriage and cut off the connection between procreation and marriage.¹²⁵¹ It further denied that procreation was the main purpose of a modern marriage, and clarified that the overriding criteria for granting a divorce was when “the mutual affection no longer exists”.¹²⁵² Society

¹²⁴⁷ *Supra* note 1171& 1172.

¹²⁴⁸ Zhang Beichuan(张北川), “Tongxingai Xiangguan Lilun yu Zhongguo Xianshi (同性爱相关理论与中国现实)[the Theories of Same-sex love and Realities in China]” in Gao Yanning, *et al, supra* note 307 at 46.[translated by author]

¹²⁴⁹ *Ibid.*

¹²⁵⁰ Pan Suiming (潘绥铭), “Tongxinglian yu Women—Ruhe Kandai Chuyu Shaoshu Diwei de “xing”(同性恋与我们——如何看待处于少数地位的“性” [Homosexuality and us-How to see “Sexuality” as minority])” in Gao Yanning, *et al, supra* note 307 at 277; Zhang Beichuan(张北川), “Tongxingai Xiangguan Lilun yu Zhongguo Xianshi (同性爱相关理论与中国现实)[the Theories of Same-sex love and Realities in China]” in Gao Yanning, *et al, supra* note 307 at 46.[translated by author]

¹²⁵¹ *Ibid* at 278.

¹²⁵² Hunyinfaxi (婚姻法释义) [Explanation of Marriage Law](11 July 2002), online: NPC Official Website <<http://www.npc.gov.cn/>>. [translated by author]

began to accept the thought of “love is the foundation of the modern marriage” and abandon the idea that marriage is for procreation gradually. Public discussion on sexuality and sexual freedom emerged gradually, and the public became more tolerant to outside sexual behaviours, which provided an open atmosphere for social further acceptance of same-sex behaviours, which is deemed as outside sexual behaviours different from the one within legitimate marriages.

Some legal traditions can still be seen in Chinese marriage or family law, which tend to regulate familial relationships by providing legal obligations to maintain or promote some specific traditional values. For instance, it is clearly stated in the current Chinese Marriage Law that the husband and wife shall have equal status in the family; parents shall have the duty to bring up and educate their children; and children shall have the duty to support their parents.¹²⁵³ Furthermore, the new *Law on Protection of the Rights and Interests of the Elderly* (2012 Revision) provides for a mandatory duty for adult children to look after and visit their elderly parents regularly.¹²⁵⁴ Many Chinese media made negative comments on the enforcement of such mandatory duties imposed on these adult children, since the legislation fails to provide for the detailed frequency with which children should visit their older parents.¹²⁵⁵ However there are many supporters in favour of this new law for providing more support to elder people. The implementation issue can be clarified by the courts or interpreted further by the Standing Committee of National Congress. This new law not only has deep implications for civil society by sending an educational message to the public, but also provides an additional legal avenue for elder protection.¹²⁵⁶ Also within the first week since the law became effective in July 2013, it is reported that there

¹²⁵³ *Ibid.*

¹²⁵⁴ Laonianren Quanyi Baozhang Fa (老年人权益保障法) [Law on Protection of the Rights and Interests of the Elderly] (promulgated by the Standing Committee of the Nat'l People's Cong., on 28 December 2012, effective 1 July 2013), art 18, online: pkulaw <<http://en.pkulaw.cn/>>.

¹²⁵⁵ Special issue of China Economic Net, CE Depth: “Chang Huijia Kankan Rufa de Gangai (“常回家看看入法”的尴尬) [the Embarrassment of Legalization of Go Home More for Visiting]”, China Economic Net, online: <www.ce.cn>. [translated by author]

¹²⁵⁶ Celia Hatton, “New China law says children 'must visit parents'” (1 July 2013), *BBC News China*, online BBC <www.bbc.co.uk>.

has been 25% increase in visits to senior residences in Guangzhou.¹²⁵⁷ Furthermore, it is an affirmation of the “protecting vulnerable groups” policy because the elder group has been officially recognized as one of vulnerable groups. All these legislative developments in regulating family relationships reflect this Chinese legal tradition, and thus the civil society’s opinions on many issues have been shaped through many legal reforms in marriage law and family law.

b. Same-sex marriage Proposals in China

After the decriminalization of homosexual acts in 1997, and the increasing human rights recognition of sexual orientation internationally, a few scholars in the area of tongzhi studies began to write about issue of same-sex marriage.¹²⁵⁸ Meanwhile, due to major social changes the central government decided to amend the 1980 *Marriage Law* in 2000. The government launched and organized a series of consultations and Li Yinhe, for the first time, took advantage of this opportunity to propose the concept of same-sex marriage in China in one of consultation meetings in 2001.¹²⁵⁹ It represented the beginning of the same-sex marriage journey in China.

Although no reference to same-sex marriage was in the revised 2000 Marriage Law, Li Yinhe, as a delegate of the CPPCC, constantly tried to bring the issue to the NPC via the Lianghui in 2003, 2005, 2006, 2008 and 2011.¹²⁶⁰ In 2013, she still called on the support for her proposal for same-sex marriage in order to reach the Lianghui.¹²⁶¹ None of these proposals has succeeded in gathering enough support to become a legal proposal for

¹²⁵⁷ Zhang Lin & Yang Guixuan (张林, 杨贵轩), “Xinfa Shishi, Guangzhou qu Yanglaoyuan Tanwang de Ernv Duo le 1/4 (新法实施 广州去养老院探望老人的儿女多了 1/4)” [New Law Implemented, Guangzhou Senior Residences Visiting Increases 1/4], (8 July 2013) Yangcheng Evening News, online: Yangcheng Wanbao <<http://news.ycwb.com>>. [translated by author]

¹²⁵⁸ Guo Xiaofei, *supra* note 166; Liu Dalin & Lu Longguang (刘达临, 鲁龙光) *Zhongguo Tongxinglian Yanjiu* (中国同性恋研究) [*Chinese Homosexuality Research*], (Beijing: Chinese Social Publishing, 2005). [translated by author]

¹²⁵⁹ Li Yinhe, “My Five Reasons to Propose Legalization of Same-Sex Marriage”, *supra* note 1082.

¹²⁶⁰ *Ibid.*

¹²⁶¹ Li Yinhe, *supra* note 11.

discussion in the NPC to date, however it is notable that these proposals have successfully raised public and political awareness on tongzhi issues. In 2006, for the first time, Wu Jianmin, an official from the Ministry of Civil Affairs, replied to Li's proposal that China was not ready for gay marriage.¹²⁶² It was a historical breakthrough because it was the first time that the central government had ever responded specifically to a tongzhi issue.

Li Yinhe outlines five main reasons to support same-sex marriage in China in her proposal.¹²⁶³ Firstly, homosexuality is not illegal and homosexuals should enjoy the same rights as all citizens of China. Therefore, the right to marry, which is a basic right of a citizen, should be granted homosexuals who have a desire to marry. Secondly, although the recognition of same-sex partnership is a controversial human rights issue, a growing number of Western nations have already recognized gay marriage and domestic partnerships for gays and lesbians. The passage of same-sex marriage in China to protect the rights and interests of gay and lesbians as a minority and to eliminate the discrimination would put China in an advanced position in terms of human rights in the world (especially in Asia). Thirdly, same-sex marriage will help gays and lesbians to establish and maintain long-term relationships, thereby decreasing the transmission of sexually transmitted diseases. Fourthly, permitting same-sex marriage will have positive influence on population control. Since China does not permit gay marriage, currently homosexuals are socially and culturally forced to marry opposite sex partners and reproduce (i.e., the homowives issue discussed above). If they could live their lives with same-sex partners, this large group would not reproduce and this would be advantageous for China in terms of population control. Last but not least, granting protection to homosexuals, a vulnerable minority group will make China more open and progressive, and create a more tolerant and harmonious atmosphere amongst groups in

¹²⁶² “Tongxing Hunyin Lifa Tian zai Shoucuo, Zhengxie Fayanren ChengTai Caoqian (同性婚姻立法提案再受挫 政协发言人称太超前) [Same-sex marriage Proposal Rejected again, the Spokseperson of the Chinese People's Political Consultative Conference (CPPCC) claimed too early for China” (5 March 2006), Tencent News, online: <<http://news.qq.com>>. [translated by author]

¹²⁶³ Li Yinhe & Qin Shide *supra* note 1197 at 315-349; and Li Yinhe, “My Five Reasons to Propose Legalization of Same-Sex Marriage”, *supra* note 1082.

society, which has advantages for stability and harmony of the state and society. Furthermore, the historic tolerance towards homosexuality provides the cultural foundation for same-sex marriage.¹²⁶⁴

These supportive reasons are quite broad and convincing in the Chinese context. Li Yinhe framed the same-sex marriage proposal in a way that appears advantageous to the central government's objectives, such as the AIDS prevention control, the new legal objective of human rights protection in 2004 Constitutional Amendment, the political objective of building up harmonious state and population control.

c. Opposition to Same-Sex Marriage in China

With the increasing public awareness on this same-sex marriage proposal, some opponents expressed their views publically. Li Tie, a main opponent of same-sex marriage and an editor of the famous Chinese magazine, *The Times Weekly*, wrote an article entitled *the legalization of same-sex marriage is a complex problem* in 2010.¹²⁶⁵ Li Tie himself is a devout Christian, a graduate from the Hong Kong Baptist University, majoring in religion and philosophy. So his main viewpoints seem familiar to the views expressed by Western religious opposition.

Li Tie has six main arguments opposing same-sex marriage in China.¹²⁶⁶ First, as a social institution, marriage needs ethical and legal support, rather than be seen as a personal and liberal right. Marriage, as a system itself, is not a "private matter" but associated with a lot of public functions and protected by public powers. Marriage is the cornerstone of human relationship and it would easily collapse if any kind of consensual relationship can become

¹²⁶⁴ See the translation by Balzano, *supra* note 287 at 42.

¹²⁶⁵ Li Tie (李铁), "Tongxing Hunyin, Juefei Li Yinhe Shuode Nayang Jiandan (同性婚姻, 绝非李银河说的那样简单) Not that Simple as What Li Yinhe Says" (January 24, 2010) Tencent News, online: <<http://view.news.qq.com>>. [Translated by author] The similar opposing viewpoints are found in Yanlin, "Analysis of the disadvantages of legalization of same-sex marriages", *supra* note 1242.

¹²⁶⁶ Li Tie, *Ibid.*

“marriage”.¹²⁶⁷

Second, the impact of same-sex marriage will have a “domino effect” on the marriage system.¹²⁶⁸ Once the same-sex marriage is legalized, it may lead to debates on legalizing polygamous marriages and bestiality; therefore it will jeopardize the stability of the marriage system as well as society as a whole.¹²⁶⁹

Third, the issue of homosexuality is not a human rights issue, and same-sex marriage is not the “trend of human rights development” either.¹²⁷⁰ As clearly demonstrated in Chapter Three, and elsewhere, sexual minority rights are very much a human rights issue and there is a clear trend towards recognizing that sexual minorities are entitled to treaty rights. Though Li Tie is correct in stating that there is not a single international human rights covenant recognizing the same-sex marriage explicitly, in fact, they clearly state that a marriage is between male and female adults. Furthermore, it is too early to say same-sex marriage is the *trend* of human rights development as only a few countries in the world legalized same-sex marriage. More than 90% of states do not recognize same-sex marriage.

Fourth, the legalization of gay human rights will have a negative impact on those who are against gay rights.¹²⁷¹ For example, forcing churches to perform same-sex weddings in some Western countries was used to warn that the passage of same-sex marriage would harm certain people’s human rights.¹²⁷² While this is a legitimate concern, many countries have found a balance between the right to same-sex marriage and the religious freedom not to perform such marriages by establishing permitting civil (non-religious) marriages, such as in Canada.¹²⁷³ Same-sex marriage is going to lead to an increase in sexual abuse of children by citing some reports in Western countries.¹²⁷⁴ It is a stereotypical and ignorant belief that

¹²⁶⁷ *Ibid.*

¹²⁶⁸ *Ibid.*

¹²⁶⁹ *Ibid.*

¹²⁷⁰ *Ibid.*

¹²⁷¹ *Ibid.*

¹²⁷² *Ibid.*

¹²⁷³ See the discussion in Chapter Five, in Refusal of Marriage Commissioners to Perform Same-sex Marriage.

¹²⁷⁴ *Ibid.*

homosexuals are pedophiles.

Fifth, research shows that same-sex families are more unstable than family units comprised of a father and a mother.¹²⁷⁵ However, these isolated research data is unlikely to answer the question which marriage model, heterosexual or same-sex marriage is more stable. The issue of which model is more stable is irrelevant to the central research question whether same-sex marriage should be legalized. It is not convincing that a group of people should be prevented from marrying merely because they may have a higher divorce rate. Last but not least, the historic tolerance of homosexuality in ancient China is not persuasive due to the loss of tradition in contemporary Chinese society.¹²⁷⁶

In addition, Li Yanlin also summarized some disadvantages of the legalization of same-sex marriages in China.¹²⁷⁷ Similar as Li Tie, Li Yanlin argued that same-sex marriage could jepodize the marriage system, a traditional institution between males and females.¹²⁷⁸ He further addressed the negative influence of same-sex marriage in the Chinese context.¹²⁷⁹ He argued that sex is still a banned topic in China so the majority people feel ashamed to discuss sex publically, even homosexuality.¹²⁸⁰ Many scholars do not think it is worthy to address the topic of homosexuality. Same-sex marriage could not ensure the procreation that is the core function of the marriage.¹²⁸¹ Further, in a homosexual family, it would definitely cause the chaos of social or familial relationships because homosexuals have to adopt or use medical assistance to have children.¹²⁸² Moreover, homosexuals tend to hide in the dark because they are concerned about the social conservative attitudes.¹²⁸³ Unlike Western countries, it is unlikely to see radical or

¹²⁷⁵ *Ibid.*

¹²⁷⁶ *Ibid.*

¹²⁷⁷ Li Yanlin, *supra* note 1265, at 112.

¹²⁷⁸ *Ibid.*, at 113.

¹²⁷⁹ *Ibid.*, at 113-114.

¹²⁸⁰ *Ibid.*

¹²⁸¹ *Ibid.*, at 114.

¹²⁸² *Ibid.*, at 113.

¹²⁸³ *Ibid.*, at 114.

active gay liberal movements occurred in China.¹²⁸⁴ Last but not least, China is different from the developed countries that recognize LGBT rights legally. As China is still in the early development period of the Socialism, we should focus on economical development rather than democracy, freedom and equality.¹²⁸⁵

Among these viewpoints, many of which are patently unreasonable and groundless. Immorality of homosexuality and cultural unacceptability stand out as the main reasons for opposing tongzhi rights in China. It is complex to assess the standard of morality. The argument of immorality of homosexuality seems to originate from the Christian standard. It is a different case in China, as noted above; the traditional Chinese culture has been more tolerant to the tongzhi because same-sex acts do not violate the Confucianism core values. In practice, there is not a strong opposing religious power in China. Conversely, the surveys conducted by 39 Health Web in 2009 *Research Report on the Living Conditions of Homosexual in China* showed among 55,000 responses from straight people (they differentiated the participants on purpose), 83.7% felt the existence of tongzhi has no influence on their lives; in terms of the attitude to tongzhi, 37.8% said that they can understand homosexuals and respect for such personal choice and 29.2% said that they do not care and tongzhi do not bother their lives.¹²⁸⁶

It should be noted that cultural unacceptability could come from the lack of capacity of bearing children in same-sex marriage. The significance of having descendants in Confucianism values could become a strong cultural opposition to same-sex marriage. Although reproduction is no longer a core function of a modern marriage, it still is considered as a significant component in traditional Chinese families, as discussed above, an old Chinese saying indicates, there are three forms of unfilial conducts, of which the worst is

¹²⁸⁴ *Ibid.*

¹²⁸⁵ *Ibid.*

¹²⁸⁶ 39 Health Web(39 健康网), *Research Report on the Living Conditions of Homosexual in China*, (Guangzhou:39 Health Web,2009), at 46-47.[Living Conditions of Homosexual in China][Translated by author]

to not bear heirs to continue the family line.¹²⁸⁷ Some parents could accept their children are gays as long as their sons or daughter could enter a heterosexual marriage and have a descendant.¹²⁸⁸ Therefore, the cultural argument is not persuasive, since many heterosexual families do not have children nowadays. Moreover, the legalization of same-sex marriage could help with population control, which is an official national policy.

2. Theoretical Support: Formal Equality for the Same-Sex Marriage Claim

From a theoretical perspective, the claim for same-sex marriage is a derivation from of formal equality theory. Formal equality emphasizes *strict identical treatment*. It has played a vital role in the political and legal frameworks during the democratization process in many Western countries. The formal equality approach is a powerful tool to eliminate direct discrimination, as such, it is always considered as the first step on the path to substantive equality. Robert Wintemute explains that formal equality is achieved by elimination of any pervasive direct discrimination in legislation and public sector rules and policies, and legal protection against such discrimination in the private sectors, although specific decisions to discriminate by individual public and private sector actors may continue.¹²⁸⁹ Simply, the objective of formal equality is to recognize that “we are the same” in all relevant aspects. It should be kept in mind that the limits of the formal equality model are subject to criticism and therefore mere formal equality is definitely inadequate to prohibit discrimination and provide full human rights protection to every individual.¹²⁹⁰

Reviewing the case law within the international human rights law, many cases of discrimination on the grounds of sexual orientation were challenged based on the formal equality approach by asking for the identical treatment in a variety of civil areas with heterosexual group as a comparator, such as *Young v Australia*,¹²⁹¹ *X v Colombia*¹²⁹² and

¹²⁸⁷ *Ibid.*

¹²⁸⁸ Living Conditions of Homosexual in China, *supra* note 1286, at 54.

¹²⁸⁹ Wintemute, *supra* note 784 at 1173.

¹²⁹⁰ *Supra* p38- 40.

¹²⁹¹ *Young v Australia*, *supra* note 192.

*Fedotova v Russia.*¹²⁹³

The claim for same-sex marriage is essentially asking for the marriage rights to which heterosexual people are universally entitled, to be equally respected for sexual minorities. Recognition of same-sex marriage is a significant and symbolic victory for sexual minorities under formal equality. It can be seen from the human rights protection pattern for sexual minorities in Canada, after the formal equality's victory of same-sex marriage, the rights movement has shifted to substantive equality, for instance, focusing on school bullying for sexual minorities youth who needs extra attention. Within the process, the victory of the same-sex marriage is significant for the current substantive equality pursuit because it acknowledges that sexual minorities are the same as heterosexual people who are entitled to be free from any discrimination based on their sexual orientation. It empowers sexual minorities to demand substantive equality by focusing the LGBTs' distinct issues/needs. The critiques from the feminists, queer scholars and other left viewpoints that claiming it would intense the marganization of sexual minorities who do not take it up are significant for exploring further reform in the Chinese context.

From the journey of women's rights development in China, by passing a series of legislation that addressed the women's equality, the concept of gender equality is acknowledged by the public despite the lack of an effective judicial enforcement system. The public awareness of the inequality of women helped force the central government to continuously pass further legislation to eliminate the gender discrimination and ameliorate their situation in the future. Formal equality recognition has provided women with a strong political voice to fight for the further human rights.

With regard to the tongzhi human rights issue, the formal equality approach is feasible and appropriate for China to achieve acceptance of society. As mentioned above, the public still has little knowledge about tongzhi group due to the harsh control that the authorities

¹²⁹² *X v Colombia*, *supra* note 507.

¹²⁹³ *Fedotova v Russia*, *supra* note 515.

have over the media and due to the fact that there is no strong opposing political or religious power against tongzhi group. Thus, the public hears little in favour or against tongzhi human rights in China. Within this context, the legalization of same-sex marriage could send the message directly to the public that the tongzhi are the same people as the heterosexuals and therefore deserve the right to marry. With the achievement of formal equality in the area of marriage, it will be easier to move further on achieving substantive equality to eliminate all discrimination, which is the final objective. Recalling that Robert Wintemute has asserted that the substantive equality recognizes the premise that “we are different” in some relevant aspects and requires accommodation or more protection for the groups facing discrimination.¹²⁹⁴ It should be acknowledged that the tongzhi group are different in many perspectives from the heterosexual groups, and substantive equality protection is necessary for this group ultimately.

Many cases challenging the opposite-sex concept of marriage to include sexual minorities in international human rights laws have failed because marriage is a traditional concept that contains significant cultural undertones and meaning. On the issue of same-sex marriage, international human rights bodies tend to leave the ultimate decision up to each national jurisdiction. The claim that the human right to marriage is a “universal right” in international law has been insufficient to push national governments to recognize same-sex marriage. Therefore, the formal equality approach would be more strategic on the issues of same-sex marriage rather than substantive equality, thereby giving a strong voice for the tongzhi group to break the current official *aggressive indifference* policy at this stage in China. Furthermore, for the further consideration on how to win the acceptance of the whole of society, formal equality is a fit strategy to fight for greater social acceptance by claiming “we are the same and deserve the same rights” from this perspective. It does not mean that substantive equality approach cannot support the claim for same sex marriage. Conversely, substantive equality theory can argue the equal treatment of same-sex marriage

¹²⁹⁴ *Ibid.*

to secure equal outcomes for sexual minorities. Substantive equality should be the final goal as indicated above although the formal equality is politically persuasive.

3. Discussion: Anti-Discrimination Law and Privacy Protection Law for Tongzhi

Some Chinese scholars argue that the next legislative development should focus on privacy rights or anti-discrimination law to eliminate discrimination on the grounds of sexual orientation in employment and in social benefits based on the Western pattern of gay rights development following the decriminalization of homosexuality.¹²⁹⁵ China, however, appears to be following a different path, largely on account of the fact that the authorities limit the ability to develop a bottom-up pattern of rights reforms. Furthermore, China does not have a codified human rights statute ensuring the implementation of a non-discrimination principle. Equality is only recognized as a general principle in the *Chinese Constitution* without an effective enforcement mechanism. In practice the *Chinese Constitution* has not been invoked in any legal claim in Chinese judicial practice, in other words a person is not allowed to file an application based on the infringement of constitutional rights. Moreover, the Chinese public is currently not very familiar with the concept of non-discrimination. Ultimately, it is unlikely that the NPC will pass an exhaustive *Human Rights Code* including non-discrimination protection for tongzhi in the near future in China.¹²⁹⁶ Conversely, having a same-sex marriage proposal reach the political stage is more likely to succeed, given the amount of public awareness that has accrued on this issue already.

Privacy protection is another important legal principle to support sexual orientation rights. In international human rights law, the courts have relied on privacy protection in decriminalizing homosexuality in the early years of the gay rights movement. However,

¹²⁹⁵ Zhou Dan, *supra* note 371 at 310.

¹²⁹⁶ Li Yinhe also expressed her opinion in comparison with same-sex marriage and anti-discrimination legislation reform in china: "I think that it will be much more difficult to set up an anti-discrimination legislation (including prohibition discrimination on ground of sexual orientation), than passing a same-sex marriage in China". See Li Yinhe & Qin Shide *supra* note 1197 at 321.

privacy protection was not involved in the decriminalization of homosexuality in China. As discussed thoroughly in Chapter Two, the legislative intent of the removal of hooliganism in the 1997 Chinese *Criminal Code* had nothing to do with homosexuality. In the opinion of the revisers, repealing the hooliganism laws was merely a clarification process, not a process of decriminalizing homosexuality *per se*.

Privacy protection seems to not be a strong tool for the tongzhi rights movement in practice. Although privacy is claimed to be a significant interest, China does not have a codified privacy protection statute neither. There is not even a specific provision regarding privacy protection in the *Chinese Constitution*. Only some legislation contains broad provisions in terms of privacy and data protection, and privacy litigation is rare in legal practice.¹²⁹⁷ Thus privacy protection is more like a general legal principle without an effective legislative or judicial mechanism to ensure its implementation.

At the intersection of privacy and morality, Chinese courts tend to protect morality. The recent debate on morality and privacy protection arose in a case of wife swapping reflects the social thinking on privacy legal protection. Ma Yaohai, a university professor, was accused of the offence of “assembly for immoral sexual purpose” for his involvement in “wife exchange” activities.¹²⁹⁸ Within two years, Ma held 18 swinger parties with friends where they swapped spouses as sex partners in private spaces. Ma was finally sentenced to three and half years in prison.¹²⁹⁹ Li Yinhe commented that it should not be a crime because the swinger parties were consensual, their behaviour did not harm anyone, and it occurred in private spaces in order to protect their privacy.¹³⁰⁰ However, the decision

¹²⁹⁷ Qinquan Zeren Fa (侵权责任法) [Tort Law] (promulgated by the Standing Committee of the Nat'l People's Cong., 29 December 2009, effective on 1 July 2010), c 1, art 2. online: pkulaw <<http://en.pku.cn>>.

¹²⁹⁸ “Nanjing Huanqian Fujiaoshou Bei Chongzhong Chufa Yishen Huoxing 3nianban (南京换妻案副教授被从重处罚 一审获刑3年半) [Nanjing Exchanging Wives Case: Associate Professor Received Severe Punishment, Sentenced to Prison 3 and Half Years at the First Trial]” (20 May 2010), online: 163.com <www.news.163.com>.[translated by author]

¹²⁹⁹ *Ibid.*

¹³⁰⁰ “Li Yinhe: Huanqi Bushi Zui, Shuilai Baohu Ma Jiaoshou de Xing Quanli? (李银河:换妻不是罪, 谁来保护马教授的性权利?) [Li Yinhe: Exchanging Wives Is Not Crime, Who can Protect Professor Ma's Sex Right?], (2 April 2010), *Nanfang Daily* (南方报网) online: NFDaily <www.nfdaily.com>.

gained a lot of support from the public and scholars.¹³⁰¹ These supportive views claim that it is generally accepted that spouse swapping is immoral in Chinese tradition, and people believe the legal system should be responsible for legislating common morals. Thus based on this decision in *Ma*, merely relying on privacy protection in challenging the traditional concept of marriage might fail on the grounds of public morals.

Also it should be noted that privacy protection is insufficient to reach full human rights protection for tongzhi because it overemphasizes the private sphere. While privacy protection could prohibit the disclosure of one's marital status or from questioning one's sexual orientation, it does not solve the fundamental problem of discrimination. In fact, it could worsen the situation by keeping more tongzhi in the closet.

4. Strategy Argument: Domestic Coming Out Strategy

With respect to same-sex marriage, both of the ECtHR and the HRC took a compromising view when faced with powerful resistance from cultural differences. International judicial bodies unlikely force governments to pass same-sex marriages as long as same-sex couples could enjoy the “equal rights” as heterosexual couples, except under a different name (such as a domestic partnership). Furthermore, in China, most tongzhi and scholars including Li Yinhe, are not optimistic for the legalization of same-sex marriage in the near future.¹³⁰² It is unpredictable how tongzhi human rights could be achieved in China due to complex factors, including the CPC ruling, a poorly informed civil society (with respect to sexual orientation issues) and the huge population.

Thus some scholars argued that the claim for the same-sex marriage in China seems

<http://www.nfdaily.cn/>>.[translated by author]

¹³⁰¹ “Shekeyuan Zhuanjia: Jiaoshou Huanqian Bu Sheji Qin Hai Geren Yinsi (社科院专家：教授换妻案不涉及侵害个人隐私)” [Expert of Chinese Academy of Social Sciences: Professor’s Wife Exchange Case Not Involved the Violation of Privacy] (8 April 2010), online: sina news <www.news.sina.com.cn>.[translated by author]

¹³⁰² Li Yinhe (李银河)’s Weibo,online: <<http://t.163.com/yinheli>> [translate by author];In the *Living Conditions of Homosexual in China*, the survey showed 20.4% of tongzhi think same-sex marriage will never be legal in China (based on 5000 responses among tongzhi), *supra* note 1286, at 34.

too radical and unrealistic for China due to the lack of the social acceptance of the tongzhi community.¹³⁰³ Even though tongzhi would have been granted the right to access to marriage, they would be unable to survive it if the social pressure from family and society are still there.¹³⁰⁴ Although the achievement of same-sex marriage is considered as a symbolic victory in many Western gay movements, the legalization of same-sex marriage in China would become meaningless and dangerous without taking consideration of the Chinese cultural context.¹³⁰⁵ Chou Wan-shan argues that the unique Chinese culture built on a set of Confucian values should be taken into account in the tongzhi rights movement strategy. It is different from the Western individualism-centered culture.¹³⁰⁶ For instance, coming out is a significant part of modern Western gay movement, but could be dangerous for the tongzhi movement in the Chinese context.¹³⁰⁷

Coming out was important in early gay movements in Western countries. It simply urged sexual minorities to publicly reveal their sexuality to their family, friends and colleagues as a form of activism to fight discrimination. It gradually, yet successfully, made the gay community visible and empowered sexual minorities in the Western countries. However, in China, a large number of the tongzhi group still live in the closet refusing to disclose their sexuality to their family in particular.¹³⁰⁸ Many tongzhi say that they feel no problems to tell their friends about their sexual preference, but it will be painful to tell their family.¹³⁰⁹ Most tongzhi decide *never* to tell their family about their sexual orientation because it may destabilize the harmonic familial relationship, which is the most important unit within the web of human relationships in Confucianism.¹³¹⁰ This is different from the

¹³⁰³ Zhou Dan, *supra* note 371 at 310.

¹³⁰⁴ *Ibid.*

¹³⁰⁵ Chou Wan-Shan, *supra* note 238 at 7-8.

¹³⁰⁶ *Ibid.*

¹³⁰⁷ *Ibid.*

¹³⁰⁸ *Supra* at p 5.

¹³⁰⁹ The coming out experiences of some tongzhi can be seen in Chiu Man-Chung, "Contextualising the Same-Sex Erotic Relationship: Post-Colonial Tongzhi and Political Discourse on Marriage Law in Hong Kong and Mainland China" in Wintemute & Andenes, *supra* note 789, at 366-367.

¹³¹⁰ *Ibid* 366.

Western gay rights movement. This is because in Confucian culture, the core values are “stability, collectivity and patriarchal authority.”¹³¹¹ In this context, an individual is not an isolated subject but is defined by her/his position within a public order, and the main objective is to keep the harmonic web of personal relationships, and the familial relationship is the fundamental relationship within this web.¹³¹² For Chinese tongzhi, it seems easy to come out to their friends and colleagues, whereas it relatively difficult to come out to their family members. Thus, engaging in a discourse of gay rights within a Confucian culture, the seemingly simple act of *coming out* will definitely raise public awareness and the visibility of gay men and lesbian groups, however, it seems dangerous because *coming out* is derived from a personal identity perspective, without careful consideration of familial relationships.¹³¹³

Instead, the strategy of *domestic coming out* is argued to be crucial for the tongzhi movement in China.¹³¹⁴ This strategy emphasizes the “coming out to one’s family and asking for the acceptance from family members” rather than to the whole society, which is quite different from the Western *coming out*.¹³¹⁵ In such a context, the domestic coming out strategy encourages tongzhi to come out to their families as the foremost step, and after having the understanding and acceptance from the families then they can reach for further human rights.¹³¹⁶ It is argued that the thematic concern of “domestic coming out” is to maintain a harmonic relationship, and patience and communication are the keywords.¹³¹⁷ Having acceptance from the basic unit in the relational web, i.e., the family, the tongzhi would gradually have the acceptance from the whole social web.¹³¹⁸ In this sense, the domestic coming out strategy focuses on the significance of maintaining familiar

¹³¹¹ *Ibid* at 368.

¹³¹² *Ibid* at 368-371.

¹³¹³ *Ibid* at 364-369.

¹³¹⁴ *Ibid*.

¹³¹⁵ *Ibid*.

¹³¹⁶ *Ibid*.

¹³¹⁷ *Ibid*.

¹³¹⁸ *Ibid*.

relationships, which differ the Western's coming out strategy. The concern for the same-sex marriage strategy is that claim for same-sex marriage is too radical and dangerous without first having the understanding and acceptance from family members. Even if same-sex marriage were legal, tongzhi may still fear to come out and enter into a same-sex marriage. Thus in this sense, the strategy of claiming same-sex marriage may fail without taking into consideration that familial relationship plays critical role in tongzhi right context.¹³¹⁹

However, it does not contradict the same-sex marriage strategy. Domestic coming out would provide the social foundation and acceptance of tongzhi, which would benefit the same-sex marriage claim. The creation of same-sex marriage could be claimed as a means of creating/maintaining harmony of the familial relationship, since the social issues resulting from the ignorance of tongzhi group have the potential to greatly harm the familial relationship.

All in all, the same-sex marriage strategy seems suitable for the tongzhi rights movement. It is important to recall that the final aim of this same-sex marriage strategy is to achieve substantive equality for tongzhi. Thus, the legalization of same-sex marriage in China is not the end of the reform but the outset. Same-sex marriage simply plays an icebreaker role to force the government to abandon its repressive indifference policy, and accelerate civil society's acceptance of tongzhi. The broader legal reforms in other fields, such as employment, adoption, and family law should follow next. Substantive equality requires consideration of the disadvantages of tongzhi group for those reforms to come to fruition. The full equality for the tongzhi group will be only achieved when all these legal reforms are made in every field of daily life through the catalyst of legalizing same-sex marriage.

E. Conclusion

Since the Yogyakarta Principles provided a comprehensive international human rights

¹³¹⁹ *Ibid.*

protection standard for sexual minorities, the comparison with the Chinese practice at the beginning of this chapter demonstrated the gap between the current tongzhi human rights situation in China with this international standard.

The main resistance to tongzhi rights development in China is the official repressive indifference policy. Thus, the core of this thesis is examining strategies to break this policy. Since the authority's harsh restriction of tongzhi in the mass media has controlled civil society's access to information and understanding about tongzhi issues, civil society is not a decisive factor in terms of advancing tongzhi rights reforms in China. The CPC is arguably the *key* factor for legal reform. The top-down legal reform legalizing tongzhi right is a good approach for tongzhi rights development in China.

The case study on the CPC's recognition of MSM in HIV prevention legislation illustrated how a serious issue can lead to a top-down policy reform. From the cracking down on homosexuality in early prevention policy, the authorities changed its policy gradually to encourage effective approaches to gay community due to the increasing HIV/AIDS crisis. Thus it can be seen that the CPC would adjust relevant policies to the tongzhi group once the crisis generated a serious social pressure to impact its ruling, thereby creating a policy window.

Without the official support, due to the repressive indifference policy, massive discrimination including human rights violations took place among the tongzhi group, which has led to the majority of tongzhi remaining in the closet. In fact, the tongzhi culture of remaining in the closet made HIV prevention much harder, since it is difficult to reach these at-risk target groups (i.e., MSM), particularly in remote areas. Also massive pressure from Confucian tradition, family and society made a number of tongzhi enter heterosexual marriages (either as homowives/homohusbands or in marriages of convenience), which has led to social instability and continues to do so. These crucial situations would further push the government to face the tongzhi human rights issues.

According to the Western pattern of gay rights development, after the

decriminalization of homosexuality, the next step should be anti-discrimination legislation to eliminate the discrimination on grounds of sexual orientation in employment and social benefits including adoption. However, this is not the case in China. China does not have a general anti-discrimination legislation to date and it appears difficult to pass anti-discrimination legislation to include tongzhi protection in the near future. Interestingly, however, same-sex marriage proposals have already reached the political stage and have gained public awareness.

The detailed study on the same-sex marriage proposals and the opposing viewpoints suggest that same-sex marriage would be the breakthrough for tongzhi rights. The battle for tongzhi rights in China has already been narrowed and characterized as the battle for same-sex marriage. Chinese civil society's opinion on many issues have been shaped through the numerous legal reforms in family law and marriage law, and the same can be expected from an official policy shift in tongzhi rights with the adoption of same-sex marriage. The legal reform would take place in family law and the first law legalizing tongzhi rights would be same-sex marriage. This viewpoint might seem radical but it is feasible in practice and is supported by the culture of tolerance tradition, academic support and the current political environment of increasing human rights protection (as seen in the *Protecting the Vulnerable Groups, Building Up a Harmonious Society* and *People-oriented* policies).

CONCLUSION

This thesis analyses whether Waaldijk's gay rights temporal developmental pattern, i.e, from decriminalization of same-sex acts, to the equalization of ages of consent for sexual acts, and then to equal rights in employment and social rights, and finally to recognition of legal partnership and adoption rights, can be reproduced in the Chinese context, when there is an increasing trend of recognizing LGBT rights in the international human rights law systems.

The historical research on the relevant ruling theories and corresponding tongzhi social and legal status over different Chinese periods provided a better understanding on tongzhi issues today. The tolerant culture in ancient times helped us to understand the current phenomena regarding tongzhi in China, such as why homowives/homohusbands refuse to divorce when they find out their spouses are tongzhi, as well as why parents allow their gay sons/daughters to maintain same-sex partners as long as they enter a heterosexual marriage. Homosexuality began to be marginalized in Maoist era, as opposed to the first criminalization of homosexual acts in the late Qing Dynasty. During the reform era, tongzhi communities emerged in big cities after the Opening Policy dramatically changed peoples' thinking and resulted in a number of reforms in state structure. Although the central government in China does not officially condemn homosexual acts, practical human rights violations against sexual orientation rights are common. Some legislation contain explicitly provisions against homosexuality/tongzhi. Despite the symbolic victories of decriminalizing hooliganism and removing homosexuality from the list of mental illness, the role of the official authorities during these events can nevertheless characterized as *repressive indifference*. Such a policy is one of the main barriers to the future tongzhi rights development in China. It implies an official reluctance to address issues, which has doubtless worsened the tongzhi situation and has slowed down their acceptance by civil society, ultimately it will prohibit further rights claims from the tongzhi group without

having the support from the public.

There have been major developments with respect to sexual orientation rights in many international human rights law systems. Equality and non-discrimination, and privacy protection are important legal principles universally recognized in international human rights laws during development processes. During different gay rights developmental phases in Waaldijk's pattern, some principles play different roles and may be more effective than others from a strategic perspective.

Privacy protection played a significant role in decriminalization of homosexuality at the early stage of sexual orientation rights development. It has been well evidenced at the UN, European and Canadian human rights law systems. It was effective in persuading courts to recognize that the scope of privacy over sexual acts between two male adults and therefore criminalizing such acts was problematic. Such an argument seems not easily adopted by the Chinese courts. In the recent case of wife swapping, although the consented sexual acts occurred in the private space, the court still held that these acts were immoral and should be condemned despite occurring in the private. In terms of tongzhi, due to the official regressive indifference, the whole civil society still knows little about tongzhi and often thinks that sexual acts between tongzhi are immoral. Furthermore, the limited nature of privacy protection for sexual orientation rights development is evident, because privacy protection focusing only on the private sphere and it permits the continued stigmatization and discrimination against sexual minorities.

Equality and non-discrimination are always addressed together and are considered two sides of the same coin. Equality and non-discrimination are the positive and negative statements of the same-principle. The absence of discrimination will produce true equality. The thesis discussed the case law with respect to sexual orientation rights in the UN, European and Canadian human rights law systems, and concluded that the application of equality and non-discrimination principle has helped sexual minorities to achieve equal rights in employment, social benefits, partnership rights, children adoptions and same-sex

marriage (in Canada). The key is to have sexual orientation recognized as a protected ground from discrimination. Every jurisdiction has a different recognition process.

In the UN human rights law system, in spite of the relatively slow period prior to the 1990s, sexual orientation human rights law began to develop rapidly with better understanding and acceptance from civil society and among the UN member states. Since the HRC's landmark decision in *Toonen v Australia* in 1994, which ruled that sexual orientation, was one of prohibited ground against discrimination under the ICCPR, nearly all the UN treaty bodies have addressed equality protection for sexual minorities gradually in their respective treaties. The HRC decisions further expanded equal rights to sexual minorities in the public context, such as employment, social benefits and family rights by relying on the non-discrimination principle. A variety of Special Rapporteurs have also raised awareness of the serious human rights violation on the grounds of sexual orientation occurring around the world. During this process, massive opposition to the universality claim of human rights for sexual minorities was seen at the UN. One of the greatest obstacles was cultural relativism argument, which considers the issue of sexual orientation as a social and cultural issue rather than universal human rights issues, and therefore the UN should not intervene in this matter. Although the champions of such opposition are mainly from Islamic countries, the political opinion of sexual minorities from Asia has not been supportive. In some recent important UN resolutions regarding sexual orientation rights, China abstained rather than voting in opposition. It is a good sign that Chinese did not take a strong opposing view, but it is difficult to say Chinese authorities are willing to support sexual orientation rights in UN system.

China signed the five main international human rights treaties, but still has not ratified the ICCPR, which means the decisions of HRC are not legally binding on China. In terms of the implementation of international laws in domestic jurisdiction, there is no clear or prescribed way to determine whether China adopts a monist or dualist approach to apply international treaty laws. China seems to adopt a mixed approach to apply treaty law to

domestic law. The achievement of formal equality for woman served as a case study to demonstrate that the international human rights law can have a positive impact on legal reform in China. However, the success in developing women's rights in China is not easily replicated with regard to tongzhi human rights since the CPC accepted the protection of women as a policy. With respect to tongzhi rights, the CPC still has adopted a repressive indifference policy which implies unwillingness to provide any protection to the tongzhi community. Furthermore, the opposing camp is still strong in the international arena. The lack of a special treaty addressing sexual orientation human rights also slows down the further development at the international level. Moreover, international law is a soft law, which always relies on domestic enforcement. As a result, the international human rights system will help inform and influence legal reform for tongzhi right in China, but it will not be a decisive factor.

By examining the European regional human rights system, this thesis has shown that the development with respect to sexual orientation rights in the European system shared the same progressive pattern seen in the UN human rights law system. With the ECtHR's increasing recognition on sexual orientation rights, the COE and the EU have adopted a variety of important legislation to promote the human rights protection for sexual minorities. One of the key differences between the UN human rights law system and Europe, is that the European developments are relatively more advanced and progressed more rapidly. This is due in large part to the binding power of the ECtHR's decisions and the supportive political climate within the COE and the EU. Based on this experience, the thesis used ASEAN as a case study to examine the question of whether a regional international organization could inspire tongzhi rights in China. ASEAN, as the only regional international organization in Asia, was established for the protection of each state's sovereignty at the height of the Cold War, and has altered the focus towards the economic cooperation since 1990s. ASEAN's human rights system is still in the nascent phase and the concept of human rights protection has not gained too much attention until recent years.

Particularly, sexual orientation and gender identity was excluded from the list of prohibited discriminatory grounds in *the ASEAN Human Rights Declaration* adopted in November 2012. Also, China is not a member state of ASEAN and the ASEAN human rights law does not have direct impact on China. In addition, ASEAN's economic relationship with China is unlikely to push human rights law development in China. This is primarily due to the fact that while China shows strong willingness to cooperate with ASEAN, China's economic development does not depend on ASEAN markets. As such, ASEAN does not have a strong bargaining position with China, especially if ASEAN tried to tie their trade to human rights commitments from China.

The sexual orientation development road in Canada can be characterized as a success of Western democracy. As Canada is a democratic country, the public support to LGBT rights is a fundamental factor for the development. During the case law development, many vital players or factors have been involved in the process. Equality is stipulated as one of important human rights principles explicitly in the Canadian Charter. The system of judicial review is an effective mechanism of protecting an individual's Charter rights from violation. The courts have successfully struck down many discriminatory laws on ground of sexual orientation by reasoning the section 15(1) of the Charter. During the process, the interest groups played important roles by initiating or supporting many Charter litigations. It was found in the thesis that this litigation strategy was not applicable in China due to the lack of a democracy system, an effective judicial review mechanism and independent judiciary in China. Although the *Chinese Constitution* acknowledges human rights protections and the equality principle, there are no effective review mechanisms to ensure that the constitutional supremacy is upheld in legal practice. The courts have no ability to strike down legislation that is inconsistent with the *Chinese Constitution*, and there is still a long road ahead before China achieves true judicial independence. Thus it seemed unlikely that Chinese courts and judges will be able to initiate such legal reform with regard to tongzhi rights without the guarantee of judicial independence and an effective judicial

review mechanism.

Finally, the thesis has provided a strategy recommendation for the central research question, where the sexual orientation rights movement will go in China. The development of sexual orientation rights in the international human rights system addressed in the thesis have followed Waaldijk's pattern basically, but this pattern is not easy to be duplicated in China. Mainly it is due to the fact that Waaldijk's pattern is developed on national law in European countries, or broadly, within Western liberal democracies where civil society plays a significant role in the reform. Different political and social dynamics in China have limited the direct adoption of Waaldijk's pattern, decriminalisation, anti-discrimination, and partnership legislation, into the Chinese context. To some extent, it is demonstrated that a legal reform is intertwined with the political system and the role of civil society in a specific country. Beyond Waaldijk's model, the thesis continues to seek for a more suitable legal reform path for human rights protection of tongzhi by focusing on the circumstances in China.

The main resistance to tongzhi rights development in China is the official repressive indifference policy. The core strategy is to consider how to break this policy. Since the authority's harsh restriction of tongzhi in mass media has controlled civil society's access to information and understanding about tongzhi issues, civil society is unlikely to become a supportive and decisive factor in terms of advancing tongzhi rights reforms in China. The down-top reform route would face massive barriers. The CPC is arguably the key factor in legal reform in tongzhi rights in China and the top-down legal reform is a good approach for tongzhi rights development in China. The case study on the CPC's recognition of MSM in HIV prevention legislation has illustrated how a serious issue can lead to a top-down policy reform. From the cracking down on homosexuality in early prevention policy, the authorities changed its policy gradually to encourage effective approaches to gay community due to the increasing HIV/AIDS crisis. Thus it can be argued that the CPC would adjust relevant policies to the tongzhi group once the crisis generated enough serious

social pressure to impact its ruling, thereby creating a policy window.

Until recently, HIV prevention for tongzhi in China still face challenges because the majority of tongzhi remaining in the closet makes the prevention hard to reach these at-risk target groups, particularly in remote areas. The massive pressure from the Confusion tradition, family and society makes a number of tongzhi enter a heterosexual marriage (either as homowives/homohusbands or in marriages of convenience), which has led to social instability and continues to do so. These crucial situations would further push the government to face the tongzhi human rights issues.

The detailed study on same-sex marriage proposals has suggested that same-sex marriage would be the breakthrough for tongzhi rights in China. Same-sex marriage proposals have already reached the political stage and have gained public awareness. Once the authorities realize the crucial situations, the same-sex marriage law is anticipated to become the first tongzhi law in China. Given that Chinese civil society's opinions on many issues have been shaped through numerous top-down legal reforms in family law and marriage law, the same can be expected from an official policy shift in tongzhi rights with the adoption of same-sex marriage. It comes to conclude that the same sex marriage strategy is feasible in practice and is supported by a culture of tolerance tradition, academics and the current political environment of increasing human rights protection in China.

Selected Bibliography

JURISPRUDENCE

United Nations System

Judgments of Human Rights Committee

- Hertzberg et al v Finland*, Communication No 61/1979, U.N. Doc. CCPR/C/OP/1 at 124 (1985).
- Joslin v New Zealand*, Communication No 902/1999, UN Doc CCPR/C/75/D/902/1999 (1999).
- Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).
- Van Oord v The Netherlands*, Communication No 658/1995, UN Doc CCPR/C/60/D/658/1995 (1997).
- X v Columbia*, Communication No 1361/2005, UN Doc CCPR/C/89/D/1361/2005(2007).
- Young v Australia*, Communication No 941/2000, UN Doc CCPR/C/78/D/941/2000 (2003).
- Fedotova v Russian Federations*, Communication No. 1932/2010, UN Doc CCPR/C/106/D/1932/2010(2012).

Other Documents

- Charter of the United Nations*, 26 June 1945, Can T S 1945 No 7, at art 1(3).
- Committee Against Torture (CAT Committee), *Concluding Observations: Argentina*, UN Doc CAT/C/CR/33/1 (2004).
- . *Concluding Observations: Costa Rica*, UN Doc CAT/C/CRI/CO/2 (2008)
- . *Concluding Observations: Ecuador*, UN Doc CAT/C/ECU/CO/3 (2006)
- . *Concluding Observations: Egypt*, UN Doc CAT/C/CR/29/4 (2002).
- . *Concluding Observations: Latvia*, UN Doc CAT/C/LAT/CO/2 (2008)
- . *Concluding Observations: Lithuania*, UN Doc CAT/C/LTU/CO/2 (2009).
- . *Concluding Observations: Poland*, UN Doc CAT/C/POL/CO/4 (2007).
- . *Concluding Observations: Portugal*, UN Doc CAT/C/PRT/CO/4 (2008).
- . *Concluding Observations: Sweden*, UN Doc CAT/C/SWE/CO/2 (2008).
- . *Concluding Observations: Venezuela*, UN Doc CAT/C/CR/29/2 (2002)
- . *General Comment No 2: Implementation of article 2 by States parties*, UN Doc CAT/C/GC/2 (2008).
- Committee on Economic, Social and Cultural Rights [CESCR], *Concluding Observation: Brazil*, UN Doc E/C. 12/CO/BRA/2 (2009).
- . *Concluding Observation: Sweden*, UN Doc E/C.12/SWE/CO/5 (2008).
- . *General Comment No 18: The right to work*, 6 February 2006, UN Doc E/C.12/GC/18.
- . *General Comment No 20: Non-discrimination in Economic, Social and Cultural Rights (art.2 ,para. 2)*, UN Doc E/C.12/GC/20 (2009).
- . *General Comment No. 15: the right to water*, 26 November 2002, UN Doc E/C.12/2002/11.

- . *General Comment No. 18: the right to work*, 24 November 2005, UN Doc E/C.12/GC/18.
- . *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, 10 June 2009, UN Doc E/C.12/2GC/20.
- . *Concluding Observation: Kyrgyzstan*, UN Doc E/C.12/1/Add.49 (2000).
- . *Concluding Observations: Cyprus*, UN Doc E/C.12/1/Add.28 (1998).
- . *Concluding Observations: Cyprus*, UN Doc E/C.12/1/Add.28 (1998).
- . *General Comment No 14: the right to the highest attainable standard of health*, 11 August 2000, UN Doc E/C.12/2000/4.
- . *General Comment No 14: The right to the highest attainable standard of health*, 11 August 2000, UN Doc E/C.12/2000/4.
- . *General Comment No 15: The right to water*, 20 January 2003, UN Doc E/C.12/2002/11.
- . *General Comment No 20: The right to work*, 2 July 2009, UN Doc E/C.12/GC/20.
- Committee on Elimination of Discrimination Against Women, *Concluding Observation: Brazil*, UN Doc CEDAW/C/BRA/CO/7(2012).
- . *Concluding Observation: Canada*, UN Doc A/52/38/Rev.1 (1997).
- . *Concluding Observation: Chile*, UN Doc CEDAW/C/CHL/CO/5-6 (2012).
- . *Concluding Observation: Germany*, UN Doc CEDAW/DEU/CO/6 (2009).
- . *Concluding Observation: Ireland*, UN Doc A/54/38 (1999).
- . *Concluding Observation: Kyrgyzstan*, UN Doc A/54/38/Rev.1 (1999).
- . *Concluding Observation: New Zealand*, UN Doc A/49/38 (1994).
- . *Concluding Observation: Panama*, UN Doc CEDAW/C/PAN/CO/7 (2010).
- . *Concluding Observation: Republic of Korea*, UN Doc CEDAW/C/KOR/Co/7 (2011) .
- . *Concluding Observation: Sweden*, UN Doc A/56/38 (2001).
- . *Concluding Observation: Ukraine*, UN Doc CEDAW/C/UKR/CO/7 (2010).
- . *Concluding Observation: Uzbekistan*, UN Doc CEDAW/C/UZB/CO/4 (2010).
- . *Concluding Observations: Kyrgyzstan*, UN Doc E/C.12/1/Add.49(2000).
- . *General Recommendation 19: Violence against Women*, UN Doc A/47/38 (1992).
- . *General Recommendation 24: Women and Health*, UN Doc A/54/38/Rev. 1 (1999).
- . *General Recommendation 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc CEDAW/C/GC/28 (2010).
- . *General Recommendation 29 on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, Economic consequence of marriage, family relations and their dissolution*, UN Doc CEDAW/C/GC/29 (2013).
- Committee on the Rights of the Child, *Concluding Observation: Slovakia*, UN Doc CRC/C/SVK/CO/2 (2007).
- . *Concluding Observations: Chile*, UN Doc CRC/C/CHL/CO/3 (2007).
- . *Concluding Observations: China*, UN Doc CRC/C/CHN/CO/2 (2005).
- . *Concluding Observations: Isle of Man, United Kingdom of Great Britain and Northern Ireland*, UN Doc CRC/C/15/Add.134 (2000).
- . *Concluding Observations: Malaysia*: UN Doc CRC/C/MYS/CO/1(2007).
- . *Concluding Observations: Overseas Territories, United Kingdom of Great Britain and Northern Ireland*, UN Doc CRC/C/15/Add.135 (2000)

- . *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, UN Doc CRC/C/15/Add.188 (2002).
- . *General Comment No 3 (2002): HIV/AIDS and the Rights of the Child*, 17 March 2003, UN Doc CRC/GC/2003/3.
- . *General Comment No. 4 (2003): Adolescent health and development in the context of the Convention on the Rights of the Child*, 1 July 2004, UN Doc CRC/GC/2003/4.
- Commission on Human Rights/Human Rights Council, *Joint report of the Special Rapporteur on the question of torture and the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc E/CN.4/1995/111 (1995)
- . *Joint report of the Special Rapporteur on the question of torture and the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc E/CN.4/1995/111 (1995)
- . *Question of the death penalty – Report of the Secretary-General*, UN Doc A/HRC/24/18(2013).
- . *Report of commissioner for human right on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, UNHRC, Doc A/HRC/19/41 (2011).
- . *Report of High Commissioner for Human Rights on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, UN HRCOR, 19th Sess, UN Doc A/HRC/19/41 (2011).
- . *Report of the High Commissioner for Human Rights on the situation of human rights in Colombia*, UN Doc E/CN.4/2005/10 (2005) .
- . *Report of the high commissioner for human rights, human rights, sexual orientation and gender identity*, UNHRC, 2011, UN Doc A/HRC/17/L.9/Rev.1.
- . *Report of the independent expert on minority issues*, UN Doc A/HRC/13/23 (2010).
- . *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*. UN Doc A/HRC/20/22/Add.2, 15(2012) .
- . *Report of the Special Rapporteur on extrajudicial, summary or arbitrary, Addendum: Follow-up country recommendations: Colombia*, UN Doc A/HRC/20/22/Add.2, (2012).
- . *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*,
- . *Report of the Special Rapporteur on the independence of judges and lawyers*, UN Doc E/CN.4/2002/72 (2002).
- . *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN Doc E/CN.4/2002/75/Add.1 (2002)
- . *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN Doc E/CN.4/2002/75/Add.1 (2002).
- . *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc E/CN.4/2004/56/Add.1 (2004)
- . *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UN Doc E/CN.4/2005/51/Add.1 (2005).
- . *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Addendum: Mission to Viet Nam*, UN Doc A/HRC/20/15/Add.(2012) .

- Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, UN Doc A/HRC/14/20 (2010).*
- Report of the Special Rapporteur on the sale of children, child prostitution and child Pornography, UN Doc A/65/221, 4(2010).*
- Report of the Special Rapporteur on the situation of human rights defenders, UN Doc A/HRC/22/47 (2013).*
- Report of the Special Rapporteur on the situation of human rights defenders. UN Doc A/HRC/22/47/Add.1,(2012).*
- Report of the Special Rapporteur on the situation of human rights defenders. Addendum: Summary of cases transmitted to Governments and replies received, UN Doc A/HRC/16/44/Add.1(2011).*
- Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc E/CN.4/2003/68/Add.2 (2003)*
- Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc E/CN.4/2002/76 (2001)*
- Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/HRC/22/53,(2013) .Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment., UN Doc A/HRC/16/52/add.1, (2011) .*
- Report of the Special Rapporteur on violence against women, its causes and consequences, UN Doc E/CN.4/2002/83 (2002)*
- Report of the Special Rapporteur on violence against women, its causes and consequences, UN Doc E/CN.4/2005/72 (2005)*
- Report of the Special Rapporteur on violence against women, its causes and consequences, UN Doc E/CN.4/1997/47 (1997)*
- Report of the Special Rapporteur on violence against women, its causes and consequences, UN Doc E/CN.4/2003/75/Add.1 (2003).*
- Report of the Special Rapporteur on violence against women, its causes and consequences. UN Doc A/HRC/20/16/Add.2(2012).*
- Report of the Special Rapporteur on violence against women, its causes and consequences. UN Doc A/HRC/17/26/Add.1(2011).*
- Report of the Special Rapporteur on violence against women, its causes and consequences, UN Doc A/HRC/4/34/Add.1 (2007).*
- Report of the Special Rapporteur on violence against women, its causes and consequences, UN Doc A/HRC/4/34/Add.1 (2007).*
- Report of the Special Representative of the Secretary-General on human rights defenders, 22 March 2006, E/CN.4/2006/95/Add.1 .(2006).*
- Report of the Special Representative of the Secretary-General on human rights defenders, UN Doc E/CN.4/2002/106/Add.2 (2002).*
- Report of the Special Representative of the Secretary-General on human rights defenders, UN Doc E/CN.4/2002/106/Add.2 (2002).*
- Report of the Special Representative of the Secretary-General on the situation of human rights defenders: Mission to Kyrgyzstan, UN DOC E/CN.4/2002/106/Add.1*

- (2002).
- . *Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc E/CN.4/2003/3 (2003);
 - . *Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc E/CN.4/2003/3/Add.2 (2002)
 - . *Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc E/CN.4/1998/68/Add.1 (1997)
 - . *Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc E/CN.4/2002/74 (2002)
 - . *Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc E/CN.4/2002/74 (2002)
 - . *Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc E/CN.4/2001/9 (2001).
 - . *Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc E/CN.4/2000/3 (2000)
 - . *Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc E/CN.4/1999/39 (1999)
 - . *Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc E/CN.4/2003/3 (2003).
 - . *Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc E/CN.4/2005/7/Add.1 (2005).
 - . *Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc E/CN.4/2005/7 (2004).
 - . *Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc E/CN.4/1998/68/Add.1 (1997).
 - . *Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc E/CN.4/2003/3/Add.2 (2002).
 - . *Reports of the Special Rapporteur on sale of children, child prostitution and child pornography*, UN Doc E/CN.4/2004/9 (2004).
 - . *Reports of the Special Rapporteur on sale of children, child prostitution and child pornography*, UN Doc E/CN.4/2000/73 (2000).
 - . *Reports of the Special Rapporteur on the right to education*, UN Doc E/CN.4/2001/52 (2001)
 - . *Reports of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran*, UN Doc E/CN.4/1996/59 (1996).
 - . *Reports of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran*, UN Doc E/CN.4/1999/32 (1998).
 - . *Resolution 2000/31 Extrajudicial, Summary or Arbitrary Executions*, UN Doc E/CN.4/RES/2000/31 (2000).
 - . *Resolution 2002/36 Extrajudicial, Summary or Arbitrary Executions*, UN Doc E/CN.4/RES/2002/36 (2002).
 - . *Resolutions 2002/87: Question of the Death Penalty*, UN Doc E/CN.4/RES/2002/77 (2002).
 - . *Resolutions 2003/67: Question of the Death Penalty*, UN E/CN.4/RES/2003/67 (2003).
 - . *Resolutions 2004/67: Question of the Death Penalty*, UN Doc E/CN.4/RES/2004/67 (2004).

- Resolutions 2005/59: Question of the Death Penalty*, UN Doc E/CN.4/RES/2005/59 (2005).
 - Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, UN Doc E/CN.4/1999/15/Add.1 (1999).
 - Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc A/HRC/4/20/Add.2 (2007).
 - Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN Doc E/CN.4/2001/64 (2001)
 - Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health*, UN Doc E/CN.4/2004/49 (2004)
 - Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health*, UN Doc A/HRC/14/20 (2010).
 - Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc E/CN.4/2000/9 (2000)
 - Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc E/CN.4/2000/9 (2000).
 - Special Representative of the Secretary-General on the situation of human rights defenders*, UN Doc A/HRC/4/37/Add.2 (2006).
 - The Secretary-General transmitting the interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UN Doc A/66/254 (2011).
- Economic and Social Council. *Communications concerning human rights*, Resolution 1235 (XLII) of the Economic and Social Council, UN Doc E/4393 (1967).
- Draft Resolution: Human Rights and Sexual Orientation*, UN Doc E/CN.4/2003/L.92 (2003).
- Human Rights Committee (HRC), *Concluding Observation: Algeria*, UN Doc CCPR/C/DZA/CO/3(2007).
- Concluding Observation: Austria*, UN Doc CCPR/C/79/Add.103 (1998).
 - Concluding Observation: Austria*, UN Doc CCPR/C/AUT/CO/4 (2007).
 - Concluding Observation: Peru*, UN Doc CCPR/C/PER/CO/5(2013).
 - Concluding Observation: Barbados*, UN Doc CCPR/C/BRB/CO/3(2007).
 - Concluding Observation: Belize*, UN Doc CCPR/C/BLZ/CO/1 (2013).
 - Concluding Observation: Botswana*, UN Doc CCPR/C/BWA/CO/1(2008).
 - Concluding Observation: Cameron*, UN Doc CCPR/C/CMR/CO/4 (2010) .
 - Concluding Observation: Chile*, UN Doc CCPR/C/79/Add.104 (1999)
 - Concluding Observation: Chile*, UN Doc CCPR/C/79/Add.104 (1999).
 - Concluding Observation: Chile*, UN Doc CCPR/C/CHL/CO/5 (2007).
 - Concluding Observation: Colombia*, UN Doc CCPR/C/79Add.76 (1997).
 - Concluding Observation: Cyprus*, UN Doc CCPR/C/79/Add.88 (1998).
 - Concluding Observation: Egypt*, UN Doc CCPR/Co/76/EGY (2002).
 - Concluding Observation: El Salvador*, UN Doc CCPR/C/78/SLV (2003).
 - Concluding Observation: El Salvador*, UN Doc CCPR/CO/78/SLV (2003) .
 - Concluding Observation: Ethiopia*, UN Doc CCPR/C/ETH/CO/1 (2011) .
 - Concluding Observation: Grenada*, UN Doc CCPR/C/GRD/CO/1 (2009) .
 - Concluding Observation: Hong Kong, China*, UN Doc CCPR/C/CHN/HKG/CO/3

(2013).

- . *Concluding Observation: Islamic Republic of Iran*, UN Doc CCPR/C/IRN/CO/3(2011).
 - . *Concluding Observation: Jamaica*, UN Doc CCPR/C/JAM/CO/3 (2011).
 - . *Concluding Observation: Japan*, UN Doc CCPR/C/JPN/CO/5(2008).
 - . *Concluding Observation: Kenya*, UN Doc CCPR/CO/83/KEN (2005).
 - . *Concluding Observation: Kuwait*, UN Doc CCPR/C/KWT/CO/2 (2011) .
 - . *Concluding Observation: Lesotho*, UN Doc CCPR/C/79/Add.106 (1999)
 - . *Concluding Observation: Malawi*, UN Doc CCPR/C/MWI/CO/1 (2012) .
 - . *Concluding Observation: Maldives*, UN Doc CCPR/ C/MDV/CO/1 (2012) .
 - . *Concluding Observation: Namibia*, UN Doc CCPR/CO/81/NAM (2004) .
 - . *Concluding Observation: Philippines*, UN Doc CCPR/C/PHL/CO/4 (2012).
 - . *Concluding Observation: Philippines*, UN Doc CCPR/CO/79/PHL (2003).
 - . *Concluding Observation: Philippines*, UN Doc CCPR/CO/79/PHL (2003).
 - . *Concluding Observation: Poland*, UN Doc CCPR /C/POL/CO/6 (2010).
 - . *Concluding Observation: Poland*, UN Doc CCPR/CO/82/POL (2004).
 - . *Concluding Observation: Romania*, UN Doc CCPR/C/79/Add.111 (1999).
 - . *Concluding Observation: Russian Federation*, UN Doc CCPR/C/RUS/CO/6(2009).
 - . *Concluding Observation: St. Vincent and The Grenadines*, UN Doc CCPR/C/VCT/CO/2(2008).
 - . *Concluding Observation: Sudan*, UN Doc CCPR/C/79/Add.85 (1997).
 - . *Concluding Observation: Sudan*, UN Doc CCPR/C/79Add.85 (1997).
 - . *Concluding Observation: Sudan*, UN Doc CCPR/C/SDN/CO/3 (2007).
 - . *Concluding Observation: Tanzania*, UN Doc CCPR/C/TZA/CO/4(2009).
 - . *Concluding Observation: Togo*, UN Doc CCPR/C/TGO/CO/4 (2011) .
 - . *Concluding Observation: Trinidad and Tobago*, UN Doc CCPR/CO/70/TTO (2000).
 - . *Concluding Observation: Turkey*, UN Doc CCPR/C/TUR/CO/1(2012).
 - . *Concluding Observation: Turkmenistan*, UN Doc CCPR/C/TKM/CO/1 (2012).
 - . *Concluding Observation: United States of America*, UN Doc CCPR/C/79 Add.50 (1995).
 - . *Concluding Observation: United States*, UN Doc A/50/40 (1995).
 - . *Concluding Observation: United States*, UN Doc CCPR/C/USA/CO/3/Rev.1 (2006).
 - . *Concluding Observation: Uzbekistan*, UN Doc CCPR/C/UZB/CO/3 (2010).
 - . *Concluding Observation: Yemen*, UN Doc CCPR/C/YEM/CO/5 (2012) .
 - . *Concluding Observation: Zambia*, UN Doc CCPR/C/ZMB/CO/3(2007).
 - . *Concluding Observation: Zimbabwe*, UN Doc CCPR/C/79/Add.89 (1998).
 - . *Concluding Observations: Ecuador*, UN Doc CCPR/C/79/Add.92 (1998).
 - . *Concluding Observations: Ecuador*, UN Doc CCPR/C/84/Add.8 (1999).
 - . *General Comment 18, Non-discrimination (Thirty-seventh session, 1989)*, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.9 (Vol I) (2008) 195.
 - . *Human rights, sexual orientation and gender identity*, HRC Res 17/19, UN HRCOR, 17th Sess, UN Doc A/HRC/RES/17/19 (2011).
- Rapporteur, L.M. Singhvi, *Report of the Regional Meeting for Asia of the World Conference on Human Rights, Bangkok*, UN. Doc GeneralA/Confl

57/Asrm/8,A/Conf.157/ Pc/59, 7 April 1993[Bangkok Declaration]
Universal Declaration of Human Rights, GA Res 217(III), UNGAOR, 3d Sess, Supp No 13,
UN Doc A/810,(1948).

European System

Judgments of European Court of Human Rights

ADT v the United Kingdom, No 35765/97, [2000] IX ECHR 295.
Belgian Linguistics v Belgium (1968), 6 ECHR, 1 EHRR 252.
Dudgeon v the United Kingdom (1981), 45 ECHR (Ser A) 1.
Dudgeon v the United Kingdom (1981), ECHR, 4 Eur HR Rep 149.
EB v France [GC], No 43536/02 (22 January 2008).
Fretté v France, No 36515/97, [2002] I ECHR 303.
Karner v Austria, No 40016/982003,[2003] IX ECHR, 199.
L and V v Austria, No 39392/98, [2003], I ECHR 29.
Laskey, Jaggard and Brown v the United Kingdom (1997), 1997-I EHCR.
Lustig-Prean and Beckett v the United Kingdom, No31417/96 (27 September 1999).
Modinos v Cyprus (1993), 259 ECHR(Ser A) 1.
Norris v Ireland (1988), 142 ECHR (Ser A) 1.
Perkins and R v the United Kingdom, No 43208/98, (22 October 2002).
Rasmussen v Denmark (1984), 87 ECHR (Ser A) 1.
Salgueiro da Silva Mouta v Portugal, No 33290/96,[1999] IX ECHR 309.
Schalk and Kopf v Austria, No 30141/04, [2010] ECHR.
SL v Austria, No 45330/99, [2003] I ECHR 71.
Smith and Grady v the United Kingdom,No33985/961999,[1999] VI ECHR 45.
Sutherland v the United Kingdom (1997), 7 Eur Comm'n HR 1.
Sutherland v the United Kingdom [GC] (striking out), No 25186/94 (27 March 2001).

Other Documents

Council of Europe, Committee of Ministers, the 1081st meeting of the Ministers' Deputies,
*Recommendation CM/Rec(2010)5 of Committee of Ministers to member states on
measures to combat discrimination on grounds of sexual orientation or gender identity*,
Documents, CM-Rec(2010)5E,(2010).

Council of Europe, Committee of Ministers, the 744th meeting of the Minister's Deputies,
*Final Reply to Situation of gays and lesbians and their partners in respect of asylum
and immigration in the member states of the Council of Europe - Parliamentary
Assembly Recommendation 1470 (2000)*, CM/AS(2001) Rec1470finalE.

Council of Europe, Committee of Ministers, the 765th meeting of the Minister's Deputies,
*Final Reply to Situation of lesbians and gays in Council of Europe member states -
Parliamentary Assembly Recommendation 1474 (2000)*, CM/AS(2001)Rec1474finalE.

Council of Europe, Committee of Ministers, the 792nd meeting of the Ministers'

- Deputies, *Resolution concerning the judgments of the European Court of Human Rights of 27 September 1999 (final on 27 December 1999) and of 25 July 2000 (final on 25 October 2000) (Article 41) in the case of Lustig-Prean and Beckett against the United Kingdom*, ResDH(2002)34.
- Council of Europe, Committee of Ministers, the 997th meeting of the Ministers' Deputies, *Execution of the judgment of the European Court of Human Rights Salgueiro da Silva Mouta against Portugal*, Resolution CM/ResDH(2007)89.
- Council of Europe, *Explanatory Report of Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, CETS No.: 177, (Rome:EC, 2000).
- Council of Europe, PA, 24th Sitting, *Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of Council of Europe*, Texts Adopted, Rec 1470 (2000).
- Council of Europe, PA, 33rd Ordinary Sess, *Discrimination Against Homosexuals*, Texts Adopted, Rec 924 (1981).
- Council of Europe, PA, 33rd Ordinary Sess, Texts Adopted, Rec 924 (1981) and Res 756 (1981).
- Council of Europe, PA, *Situation of gays and lesbians in Council of Europe member states*, Texts Adopted, Rec 1474 (2000).
- Council of Europe, Standing Committee of PA, 2004 session, *Recommendation 1686 (2004) Human mobility and the right to family reunion*, Texts Adopted, CM/Del/Dec(2004)908/3.1.
- EC, *Annual Report on Human Rights in the World 2007 and the European Union's Policy on the Matter*, [2009] OJ, C 271 E/7.
- EC, *Charter of Fundamental Rights of Europe Union*, [2000] OJ, C 364/1, 2000/C 364/01.
- EC, Committee on Civil Liberties and Internal Affairs, *Report on respect for human rights in the European Union*, (1996), EU Doc A4.0223/96.
- EC, *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*, [2000] OJ, L303/16.
- EC, *Directive 2004/38/EC of The European Parliament and of the Council of 29 April 2004*, [2004], OJ, L229/35.
- EC, *Resolution on equal rights for homosexuals and lesbians in the European Community*, [1994] OJ C 61/40.

Canada

- AA v BB*, 2007 ONCA 2.
- Alliance for Marriage and Family v AA*, 2007 SCC 40.
- Andrews v Law Society of British Columbia*, [1989] 1 SCR 143.
- Barbeau v British Columbia (Attorney General)*, 2003 BCCA 251.
- Canada v Ward*, [1993] 2 SCR 689.
- Chamberlain v Surrey District School Board No 36*, [2002] 4 SCR 710, 2002 SCC 86.
- Douglas v Canada (T.D)*, [1993] 1 FC 264.
- Dunbar & Edge v Yukon (Government of) & Canada (AG)*, 2004 YKSC 54.
- EGALE Canada Inc v Canada (AG)*, 2001 BCSC 1365.

Egan v Canada [1995] 2 SCR 513, 124 DLR(4th) 609.
Haig v Canada [1993] 2 SCR..
Halpern v Canada (Attorney General),2002 CanLII 42749 (ON SCDC).
Halpern v. Canada 2003 CanLII 26403 (ON CA).
Hendricks c Quebec (PG), 2002 CanLII 23808 (QC CS).
Law v Canada, [1999] 1 SCR 497, 170 DLR (4th) 1.
Little Sisters Book and Art Emporium v Canada (Minister of Justice), [2000] 2 SCR 1120.
Marriage Commissioners Appointed Under the Marriage Act (Re), 2011 SKCA 3.
Miron v Turdel, [1995] 2 SCR 418.
Pottle et al v Attorney General of Canada et al, 2004 OIT 3964.
R v C.M. [1995] OJ No 1432.
R v Kapp [2008] 2S CR 483, 294 DLR (4th)1.
R v Oakes, [1986] 1 SCR 103.
Re K Adoption, 1995 CanLII 10080 (ON CJ).
Reference re Same-Sex Marriage, 2004 SCC 79, [2004] 3 SCR 698.
Reference re Secession of Quebec, [1998] 2 SCR 217.
Schachter v Canada, [1992] 2 SCR 679.
Thibaudeau v Canada, [1995] 2 SCR 513.
Vriend v Alberta, [1998] 1 SCR 493.
W(N) v Canada (Attorney General), 2004 SKQB 434, [2004] SJ No 669 (Sask QB).

Others

Naz Foundation v Government of NCT of Delhi (2009), High Court Of Delhi At New Delh,
 WP(C) No.7455/2001.
Charter of the Association of Southeast Asian Nations, December 2007, (Jakarta: ASEAN
 Secretariat, 2008).

TREATIES

*Consolidated version of the Treaty of European Union and the Treaty on the Functioning of
 the European Union*, 30 March 2010, OJ C 83/1.
Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November
 1950, 213 UNTS 221, Eur TS 5.
Convention on the Elimination of All Forms of Discrimination against Women, 18
 December 1979, 1249 UNTS 13 at art 1, GA Res 180, UN GAOR, 34th Sess, UN Doc
 A/RES/34/18.
Convention on the Nationality of Married Women, 11 August 1958, 309 UNTS 65.
Convention on the Political Rights of Women, 7 July 1954,193 UNTS 135.
International Convention on the Elimination of All Forms of Racial Discrimination, 21
 December 1965, 660 UNTS 195.
International Covenant on Civil and Political Rights (19 December 1966), 999 UNTS
 171,arts 9-14, Can TS 1976 No 47, 6 ILM 368[entered into force 23 March 1976].
International Covenant on Economic, Social and Cultural Rights (16 December 1966),999

UNTS 3, arts 5-6, ILM 360 (entered into force on 3 January 1976).
Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 11 April 2000, Rome, 4.XI.2000, ETS 177.
Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, 2 October 1997, 1997 OJ (C 340), 37 ILM 56.
Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007, 2007 OJ (C306), ILM 50, (entered into force 1 December 2009).

LEGISLATION

Canada

Accepting Schools Act, SO, 2012, c 5.
Assisted Human Reproduction Act, S.C.2004.
Canada Act 1982 (UK) 1982 c 7.
Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK) 1982 c. 11*.
Charte des droits et libertés de la personne, L.R.Q. c. C-12.
Civil Marriage Act, S.C. 2005, c.33.
Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, s 91 and 92, reprinted in RSC 1985, App II, No 5.
Criminal Code, R.S.C. 1985, c. C-46.
Education Act, R.S.O 1990.
Immigration and Refugee Protection Act, S.C.2001.
Immigration and Refugee Protection Regulations, SOR/2002-227.
Modernization of Benefits and Obligations Act, S.C.2000.

Bill 5, *An Act to amend certain statutes because of the Supreme Court of Canada decision in M. v. H.*, 1st Sess, 37th Leg, Ontario, 1999 (assented to 28 October 1999).
Bill C-23, *An Act to Modernize the Statutes of Canada in Relation to Benefits and Obligations*, 2nd Session, 36th Parliament, 1999-2000.
Bill C-250, *An Act to amend the Criminal Code (hate propaganda)*, 2nd Sess, 37th Parl, 2004 (assented to 29 April 2004).
Bill C-41, *An Act to amend the Criminal Code (Sentencing) and other Acts in consequence*, 1st Sess, 35th Parl, 1995 (assented to 13 June 1995).

Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 1st Sess, 32d Parl, Issue No 48 at 48:20-21, and 48:31-34.

China

- Aizibing Yufang he Kongzhi Zhongqi Guihua (艾滋病预防和控制中期规划(1990-1992)) [National AIDS Prevention and Control Mid-Term Plan (1990-1992)], (Promulgated by the Ministry of Health , August 1990), online: China HIV/AIDS Information Network <<http://www.chain.net.cn/>>.[translated by author]
- Canjiren Baozhang Fa (残疾人保障法) [Law on the Protection of Disabled Persons] (adopted firstly by the Nat'l People's Cong. on 28 December 1990; revised by the Nat'l People's Cong. on 24 April 2008, effective 1 July 2008), online: pkulaw<<http://en.pkulaw.cn/>>.
- Faguan Fa (2001 Xiuzheng)(法官法 2001 修正版)[Judges Law](adopted by the Standing Committee of the Nat'l People's Cong. on June 30, 2001), online: pkulaw <<http://en.pkulaw.cn/>>.
- Funv Quanyi Baozhang Fa (2005 Xiuzheng) (妇女权益保障法(2005 修正) [Law on the Protection of Women's Rights and Interests (2005 Amendment)] (Amended by Standing Committee of the Nat'l People's Cong. on August 28, 2005), online:<<http://en.pkulaw.cn/>>.
- Funv Quanyi Baozhang Fa (妇女权益保障法) [Law on the Protection of Rights and Interests of Women] (adopted by the Nat'l People's Cong. on April 3, 1992, effective on October 1,1992) ,online: pkulaw <<http://en.pkulaw.cn/>>.
- Funv Quanyi Baozhang Fa (妇女权益保障法) [Law on the Protection of Women's Rights and Interests], (adopted firstly by the Nat'l People's Cong. on 3 April 1992; revised by the Standing Committee of Nat'l People's Cong. on 8 August 2005), online: pkulaw <<http://en.pkulaw.cn/>>.
- Guanyu Dangqian Banli Liumang Aajianzhong Juti Yingyong Falv de Ruogan Wenti de Jieda (关于当前办理流氓案件中具体应用法律的若干问题的解答) [Answers Regarding the Legal issues in Processing the Hooliganism Crime Cases] (Adopted by Sup. People's Ct. on 2 November 1984, abolished in 2010), online: pkulaw <<http://en.pkulaw.cn/>>.
- Guanyu Jiaqiag Falv Jieshi Gongzuo de Jueyi (关于加强法律解释工作的决议) [Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law] (promulgated by Standing Comm. Nat'l People's Cong. on 10 June 1981, effective on 10 June 1981), online: pkulaw<<http://en.pkulaw.cn/>> .
- Guanyu Yancheng Guaimai, Bangjiang Funv, Ertong de Fanzuifenzi de Jueding (关于严惩拐卖、绑架妇女、儿童的犯罪分子的决定) [Decision Regarding the Severe Punishment of Criminals Who Abduct and Traffic in or Kidnap Women or Children] (Adopted by the Standing Committee of the Seventh Nat'l People's Cong. on September 4, 1991), online: pkulaw<www.pku.cn>.
- Guanyu Yinfa Zhongguo ezhi yu Fangzhi Aizibing “Shierwu” Xingdong Jihua de Tongzhi (关于印发中国遏制与防治艾滋病 “十二五” 行动计划的通知) [The Notification regarding Issuing the China's AIDs Prevention and Treatment “Twelve Five ” Action Plans] (promulgated by the General Office of the St. Council on 13 January 2012), online:pkulaw <www.pkulaw.cn>.

- Guobo Yingshi Jiaqiang he Gaijin Weichengnianren Sixiang Daode Jianshe de Shishi Fangan (广播影视加强和改进未成年人思想道德建设的实施方案) [Official Notice on Ensuring that Broadcasting Strengthens and Corrects the Moral Character of Adolescents], (Delivered by State Administration of Radio, Film and Television (SARFT) on 13 May 2004, online: China.com <<http://www.china.com.cn/>[translated by author]).
- Guobo Yingshi Jiaqiang he Gaijin Weichengnianren Sixiang Daode Jianshe de Shishi Fangan (广播影视加强和改进未成年人思想道德建设的实施方案) [Official Notice on Ensuring that Broadcasting Strengthens and Corrects the Moral Character of Adolescents], (delivered by SARFT on 27 February 2007), online: SARFT <<http://www.sarft.gov.cn/>>.[translated by author]
- Guojia Xinwen Chubanshu guanyu RendingYinhui ji Seqing Chubanwu de Guiding (新闻出版署关于认定淫秽及色情出版物的规定) [Regulation Regarding the Standard of Obscene And Pornographic Publications Issued by General Administration of Press and Publication] (promulgated on 8 January 2006), online: General administration of press and publication official Web <<http://www.gapp.gov.cn/>>.[translated by author]
- Hongshizi Biaozhi Shiyong Banfa (红十字标志使用办法) [Measures on the Use of the Sign of the Red Cross] (Promulgated by Decree No.194 of the State Council and Central Military Commission and effective on January 29, 1996), online: <<http://en.pkulaw.cn/>>.
- Huiyin Fa 2001 (婚姻法 2001 修正) [Marriage Law (2001 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong. on 21 April, 2001), online: pkulaw <<http://en.pkulaw.cn/>>.
- Laonianren Quanyi Baozhang Fa (老年人权益保障法) [Law on Protection of the Rights and Interests of the Elderly] (promulgated by the Standing Committee of the Nat'l People's Cong., on 28 December 2012, effective 1 July 2013), online: pkulaw <<http://en.pkulaw.cn/>>.
- Lifa Fa (立法法) [Law on Legislation] (promulgated by National People's Congress on 15 March 2000, effective on 1 July 2000), at art 8, online: pkulaw <<http://en.pkulaw.cn/>>.
- Minshi Susong Fa (2012 Xiuzheng) (民事诉讼法(2012 修正) [Civil Procedure Law (2012 Amendment)] (Adopted by the Nat'l People's Cong. on April 9, 1991; amended for the first time by the Standing Comm. Nat'l People's Cong. on October 28, 2007; and amended for the second time by the Standing Committee of the Nat'l People's Cong. on August 31, 2012), online: pkulaw <<http://en.pkulaw.cn/>>.
- Muying Baojian Fa(母婴保健法)[Law on Maternal and Infant Health Care] (adopted at by the Standing Committee of the Nat'l People's Cong. on October 27, 1994, effective as of June 1, 1995).
- Nv Zhigong Laodong Baohu Tebie Guiding(女职工劳动保护特别规定) [Special Rules on the Labor Protection of Female Employees] (adopted by the State Council and effective on April 18, 2012), online: pkulaw<www.pku.cn/>.
- Nvzhigong Laodong Baohu Guiding (女职工劳动保护规定) [Regulations Concerning the Labor Protection of Female Staff and Workers] (Adopted on 28 June 1988 by the State Council, promulgated on 21 July 1988 and effective from 1 September 1988),online: pkulaw<www.pku.cn/>.

- Qinquan Zeren Fa (侵权责任法) [Tort Law] (promulgated by the Standing Committee of the Nat'l People's Cong., 29 December 2009, effective on 1 July 2010), online: pkulaw<www.pku.cn>.
- Quanguo Renmin Daibiao Dahui he Difang Geji Renmin Daibiao Dahui Xuanju Fa(全国人民代表大会和地方各级人民代表大会选举法(2010 修正))[Electoral Law for the National People's Congress and Local People's Congresses (2010 Amendment)] (promulgated by Standing Comm. Nat'l People's Cong. on 4 July 1979, effective on 1 January 1980, the 2010 amendment was issued by Nat'l People's Cong on 14 March 2010, effective on 14 March 2010, online: pkulaw <<http://en.pkulaw.cn/>>.
- Quanguo Yufang Aizibing Guihua 全国预防艾滋病规划 (1987 年-1991 年) [National Plan for the Prevention of AIDS 1987-1991] (Promulgated by the Ministry of Health, effective on 17 August, 1987), online: pkulaw<<http://en.pkulaw.cn/>>.
- Renmin Fayuan Zuzhi Fa 2006 Xiuzheng(人民法院组织法 2006 修正版)[Organic Law of the People's Courts (2006 Amendment)](adopted by the Standing Committee of the Nat'l People's Cong on October 31, 2006) online:pkulaw<<http://en.pkulaw.cn/>>.
- Shouyang Fa(xiuzheng) (收养法修正) [Adoption Law (Amended)](promulgated by Standing Comm. Nat'l People's Cong. on 29 December 1991, effective 1 April 1992), online: pkulaw<<http://en.pkulaw.cn/>>.
- Weichengnian Ren Baohu Fa (未成年人保护法) [Law on the Protection of Minors] (adopted firstly by the Nat'l People's Cong. on 4 September 1991; revised by the Standing Committee of Nat'l People's Cong. on 29 December 2006, effective 1 June 2007), online: pkulaw(< <http://en.pkulaw.cn/>>.
- XIANFA (宪法) [Constitution] (promulgated by Nat'l People's Cong. on 4 December 1982, effective on 4 December 1982), online: pkulaw <<http://en.pkulaw.cn/>>.
- XIANFA Xiuzhengan (2004) (宪法修正案(2004)) [Amendments to the Constitution (2004)] (promulgated by the National People's Congress of China on March 14, 2004, effective on March 14, 2004), online: pkulaw <<http://en.pkulaw.cn/>>.
- Xianxue zhe Jiankang Jiancha Yaoqiu (献血者健康检查要求) [Whole blood and component donor selection requirements] (Adopted by the Ministry of Health and Standardization Administration Committee on 30 December 2011, effective on 1 July 2012), online: Chinese government web <<http://www.gov.cn>>.[translated by author]
- Xing Fa (97 Xiuding) (刑法(97 修订)) [Criminal Law(97 Revision)] (Adopted by the Nat'l People's Cong. of China on July 1, 1979 and amended by Nat'l People's Cong. on March 14, 1997), online: pkulaw<<http://en.pkulaw.cn/>>.
- Xue zhan Guanli Banfa (Zanxing) (血站管理办法(暂行))[Blood Station Administration Regulation (provisional)], (promulgated by Ministry of Health on 21 September 1998, effective 1 October 1998, ineffective now), online: pkulaw <<http://en.pkulaw.cn/>>.
- Xue zhan Guanli Banfa (血站管理办法)[Measures for the Administration of Blood Stations], (Issued by the Ministry of Health on 17 November 2005, effective on 1 March 2006), online: pkulaw <<http://en.pkulaw.cn/>>.
- Zhongguo Ezhi yu Fangzhi Aizibing Xingdong Jihua (2006-2010) (中国遏制与防治艾滋病行动计划 (2006-2010 年)) [China's AIDS Prevention and Treatment Action Plan

(2006-2010)] (promulgated by the General Office of the St. Council, effective on 27 June 2006), online: pkulaw <<http://en.pkulaw.cn/>>.

Zuigao Renmin Fayuan guanyu Shiyong <Zhongguo Renmin Gongheguo Hunyinf> Ruogan Wenti de Jieshi Yi (最高人民法院关于适用《中华人民共和国婚姻法》若干问题的解释一) [Interpretation No. I of the Supreme People's Court on Several Issues in the Application of Marriage Law of the People's Republic of China] (Issued by Sup. People's Ct. on 25 December 2001, effective on 27 December 2001),online: pkulaw <http://en.pkulaw.cn>.

SECONDARY MATERIAL: MONOGRAPHS

English Sources

- Aandenaes, Mads & Robert Wintemute. *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Portland: Hart Publishing, 2001).
- Action Canada for Population and Development. *An NGO Guide to Human Rights and Sexual Orientation at the UN Commission on Human Rights* (Ottawa: Action Canada for Population and Development, 2003).
- Aibai Culture & Education Center (ACEC), *Report of the Online Survey on Homophobic and Trans-phobic Bully at Educational Institutions*, (May 2012) online: ACEC <<http://www.aibai.com>>.
- Anderson, James. *Human Rights Protections for Sexual Minorities in Insular Southeast Asia: Issues and Implications for Effective HIV Prevention* (Bangkok: UNESCO Asia and Pacific Regional Bureau for Education, 2011).
- Aristotle, *Ethica Nicomachean*, trans by W Ross, revised by JL Ackrill & JO Urmson, (Oxford University Press, 1980).
- Arnardottir, Oddny Mjoll. *Equality and Non-discrimination under the European Convention on Human Rights* (Hague, London, New York: Martinus Nijhoff Publishers, 2003).
- Baehr, Peter & Cees Flinterman *et al*, eds. *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights* (Amsterdam: Royal Netherlands Academy of Arts and Sciences, 1999).
- Ball, Olivia & Paul Gready. *The No-Nonsense Guide to Human Rights* (Oxford: New Internationalist Publications, 2006).
- Canadian Human Rights Commission, *Annual Report 1995* (Ottawa: Supply and Services Canada, 1996) (Cat. No. HR1-1995).
- Chang, Catherine Kuo-Shu. *Violence Against Women In Post-Mao China: International Human Rights Norms and Local Law* (PhD Thesis, University of Washington, 2003), (np: UMI Dissertations Publishing, 2003).
- Chou, Wah-shan. *Tongzhi: Politics of Same-Sex Eroticism in Chinese Societies* (New York: The Haworth Press, 2000).
- Conor Gearty & Adam Tomkins, eds, *Understanding Human Rights* (London: Mansell Publishing, 1996).
- Cook, Rebecca J ed. *Women and International Law Human Rights of Women: National and*

- International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994).
- Craik, Neil & Craig Forcese. *Public law: Cases, materials and commentary*, 2d ed (Toronto: Edmond Montgomery, 2011).
- Croll, Elisabeth. *Feminism and Socialism in China* (London, Henley and Boston: Routledge & Kegan Paul, 1978).
- Dover, K. *Greek Homosexuality*, 2nd ed (Cambridge: Harvard University Press, 1986).
- European Commission, *Equality and Non-discrimination Annual report* (April 2005), online: European Commission <<http://ec.europa.eu/old-address-ec.htm>>.
- European Union Agency for Fundamental Rights, *Homophobia, Transphobia and Discrimination on Grounds Of Sexual Orientation And Gender Identity: 2010 Update*, online: European Union Agency for Fundamental Rights <<http://fra.europa.eu/en>>.
- Halper, Stefan A. *The Beijing Consensus: How China's Authoritarian Model Will Dominate the Twenty-First Century* (New York: Basic Books, 2010).
- Ho, Loretta Wing Wah. *Gay and Lesbian Subculture in Urban China* (London: Routledge, 2010).
- Holmes, Nancy. *Human Rights legislation and the Charter: A Comparative Guide* (Ottawa: Library of Parliament, 1992, revised on 18 September 1997), online: Government of Canada, Publication <<http://publications.gc.ca/>>.
- Hurley, Mary C. *Sexual Orientation and Legal Rights* (Ottawa: Library of Parliament, 2010) online: Parliament of Canada <<http://www.parl.gc.ca/>>.
- . *Bill C-38: the Civil Marriage Act*, (Ottawa: Parliament of Canada, 2005), online: Parliament of Canada <<http://www.parl.gc.ca/>>.
- Information Office of the State Council, *National Human Rights Action Plan of China (2012-2015)*, June 2012, Chinese and English versions available online: Research Center for Human Rights and Humanitarian Law, Peking University Law School <<http://www.hrol.org>>.
- Ishay, Micheline R. *The History Of Human Rights: From Ancient Times to The Globalization Era* (Berkeley: University of California Press, 2006).
- Itaborahy, Lucas Paoli & Jingshu Zhu, eds. *State-Sponsored Homophobia: A world survey of laws: Criminalisation, protection and recognition of same-sex love*, 8th ed (International Lesbian Gay Bisexual Trans and Intersex Association, 2013).
- Kleeman, Julie & Harry Yu, *The Oxford Chinese Dictionary*, (New York: Oxford University Press, 2010).
- Kong, Travis SK. *Chinese Male Homosexualities: Memba, Tongzhi, and Golden Boy* (London: Routledge, 2011).
- Macklem, Patrick et al. *Canadian Constitutional Law*, 4th ed (Toronto: Edmond Montgomery, 2010).
- McNamara, Luke. *Human rights controversies: the impact of legal form* (Oxon, New York: Routledge-Cavendish, 2007).
- Ministry of Health. *2012 China AIDS Response Progress Report* (31 March 2012), online: UNAIDS <<http://www.unaids.org>>.
- Mountford, Tom. *The Legal Position and Status of Lesbian, Gay, Bisexual and Transgender People in the People's Republic of China* (International Gay & Lesbian Human Rights Commission, 2010) online: IGLHRC <<http://www.iglhrc.org/>>.
- Ng Jason. *Blocked on Weibo: What Gets Suppressed on China's Version of Twitter (and*

- Why), (New York: New Press, 2013).
- Parker, Richard & Rosalind Petchesky, Robert Sember, eds. *Sex Politics: Reports from the Front Line* (np: Sexuality Policy Watch, 2007), online: <<http://www.sxpolitics.org>>.
- Patterson, Dennis. *A Companion to Philosophy of Law and Legal Theory*, (Blackwell Companions to Philosophy, 2010).
- Peters, Julie & Andrea Wolper, eds. *Women's Rights, Human Rights: International Feminist Perspectives* (New York: Routledge, 1995).
- Ringer, Benjamin B. *"We the People" and Others: Duality and America's Treatment of its Racial Minorities* (New York: Tavistock, 1983).
- Sullivan, Gerard & Peter A Jackson, eds. *Gay and Lesbian Asia: Culture, Identity, Community* (New York: Harrington Park Press, 2001).
- Tobler, Christa. *Indirect Discrimination, a Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law* (Oxford: Intersentia, 2005).
- Toronto Police Service – Hate Crime Unit, *2011 Annual Hate/Bias Crime Statistical Report 2011* (Toronto: Toronto Police Service, 2011), online: <<http://www.torontopolice.on.ca/publications/files/reports/2011hatecrime-report.pdf>>.
- Vandenhoe, Wouter. *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Antwerpen: Intersentia, 2005).
- Yael Danieli, Elsa Stamatopoulou & Clarence J Dias, ed, *The Universal Declaration of Human Rights: Fifty Years and Beyond* (New York: Baywood Publishing Company, 1999).

Chinese Sources **[Translated By Author]**

- Aibai Cultural & Education Center (ACEC), *Zhongguo Xingshaoshu Qunt i(LGBT) Zhichang Huangjing Diaocha Baogao* (中国性少数群体 (LGBT) 职场环境在线调查报告) [Report of the online Survey on Chinese Sexual Minorities (LGBT) workforce], 17 May 2013, online: ACEC <<http://www.aibai.com>>.
- Chen Xingliang (陈兴良). *Xingfa Zexue* (刑法哲学) [Philosophy of Criminal Law], (Beijing: China Political and Law University Press, 1997 edition).
- Gao Yanning (高燕宁) et al. *Fudan Dajiangtang Xilie: Tongxinglian Jiangkang Ganyu* (复旦大讲堂系列: 同性恋健康干预) [Fudan University Academic Forum: Homosexuality Health Interference] (Shanghai: Fudan University Press, 2006).
- Guo Xiaofei (郭晓飞). *Zhongguo Fashiyexia de Tongxinglian* (中国法视野下的同性恋) [Homosexuality in the Prospective of Chinese Law] (Beijing: Intellectual Property Press, 2007).
- Li Yinhe (李银河). *Tongxinglian Yawenhua* (同性恋亚文化) [Subculture of Homosexuality], (np: China Today Publishing, 1998).
- . *Kuer Lilun* (酷儿理论) [Queer Theory] (Beijing: Wenhua Yishu Publishing, 2003).
- Liu Dalin & Lu Longguang (刘达临, 鲁龙光). *Zhongguo Tongxinglian Yanjiu* (中国同性恋研究) [*Chinese Homosexuality Research*], (Beijing: Chinese Social Publishing,

- 2005).
- Liu Maolin(刘茂林) .*Gongfa Pinlun 2*(公法评论第二卷)[Public Law Review II](Beijing: Beijing University Publishing: 2004).
- Qin Qianhong (秦前红). *Xin Xianfa Xue*(新宪法学) [New Study on Constitutional Law], (Wuhan: Wuhan University Publishing, 2005).
- Zhang Beichuan (张北川).*Tongxing'ai* (同性爱) [Same-sex Love] (np: Shandong Science Technology Publishing, 1994).
- Zhang Jinpan (张晋藩). *Zhongguo Falv de Chuantong yu Xiandai Zhuanxing* (中国法律的传统与近代转型) [the transition from tradition to modern in Chinese laws] (Beijing: Law Publishing, 1997).

SECONDARY MATERIAL: ARTICLES

English Sources

- Adolphe, Jane. "The Case Against Same-Sex Marriage in Canada: Law and Policy Considerations" (2004) 18, *BYU J of Pub L* 479.
- Balzano, John. "Toward a Gay-Friendly China?: Legal Implications of Transition for Gays and Lesbians" (2007) 16 *Law & Sexuality* 1.
- Bayefsky, Anne F. "The Principle of Equality or Non-Discrimination in International Law" (1990) 11(1-2) *HRLJ* 1.
- Carter, Terrance & Anne-Marie Langan. "Dissension in the Ranks: the Relationship between law, Political and Church Discipline" (15 November 2005), 14 *Church Law Bulletin*, online: Carters & Associates Professional Corporation <<http://www.carters.ca/pub/bulletin/church/2005/chchlb14.pdf>>.
- Chiu Man-Chung. "Contextualising the Same-Sex Erotic Relationship: Post-Colonial Tongzhi and Political Discourse on Marriage Law in Hong Kong and Mainland China" in Mads Aandenaes & Robert Wintemute, *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Portland: Hart Publishing, 2001) 366.
- Coleman, Jules L & Brian Leiter. "Legal Positivism" in Dennis Patterson, ed, *A Companion to Philosophy of Law and Legal Theory*, (Blackwell Companions to Philosophy, 2010).
- Cossmann, Brenda. "Lesbians, Gay Men, and the Canadian Charter of Rights and Freedoms" (2000) 40, *Osgoode Hall LJ* 230.
- Davis, MC. "The Price of Rights: Constitutionalism and East Asian Economic Development" (1998) 20 *HQ* 303.
- Donald G Casswell, "Any Two Persons in Canada's Lotusland, British Columbia", in Robert Wintemute & Mads Andenes, eds, *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Oxford: Hart Publishing, 2001).
- Donnelly, Jack. "Non-Discrimination and Sexual Orientation: Making a Place for Sexual Minorities in the Global Human Rights Regime" in Peter Baehr, Cees Flinterman and Mignon Senders eds, *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights* (Amsterdam: Royal Netherlands Academy of Arts and Sciences, 1999) 23.

- Engle, Karen. "Culture and Human Rights: The Asian Values Debates in Context" (2000) 32 *Intl'l L & Pol*, 291.
- Farnsworth, Clyde. "Homosexuals is Granted Refugee Status in Canada" (14 January 1992) *New York Times*.
- Faulkner, Ellen. "Homophobic Hate Propaganda in Canada" (2006/7) 5 *J Hate Studies* 63.
- Flaherty, Michael O' & John Fisher. "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles" (2008) 8:2 *HRL Rev* 207.
- Girard, Françoise. "Negotiating Sexual Rights and Sexual Orientation at the UN", in Richard Parker, Rosalind Petchesky and Robert Sember, eds, *Sex Politics: Reports from the Front Line* (np: Sexuality Policy Watch, 2007), online: <<http://www.sxpolitics.org>>.
- Greenwald, Alyssa. "The ASEAN-China Free Trade Area (ACFTA): a Legal Response to China's Economic Rise?" (2005) 16 *Duke J Comp & Int'l L* 193.
- Grigolo Michele. "Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject" (2003) 14 *EJIL* 1023.
- International Panel of Experts in International Human Rights Law and on Sexual Orientation and Gender Identity. "The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity", March 2007, online: Yogyakarta Principles <www.yogyakartaprinciples.org/>.
- Katsumata, Hiro. "ASEAN and Human rights: resisting Western Pressure or Emulating the West" (2009) 22:5 *the Pacific Review* 619.
- Kavanagh, Francine. "Chinese Human Rights: towards a Theory of Success" (2005) 1 *European Law Students' Association SPEL* 26.
- Kimber, Cliona JM. "Equality or Self-determination" in Conor Gearty and Adam Tomkins, eds, *Understanding Human Rights* (London: Mansell Publishing, 1996) 218.
- Kollman, Kelly & Matthew Waites, "the Global Politics of Lesbian, Gay, Bisexual and Transgender Human Rights: an introduction" (2009) 15:1 *Contemporary Politics* 1.
- Li Weiwei. "Equality and Non-Discrimination under International Human Rights Law" (2004) *Research Notes, The Norwegian Centre for Human Rights*, at 7 online: <<http://www.mittendrinundaussenvor.de/fileadmin/bilder/0304.pdf>>.
- Liu Xuedong. "On the present situation of the China's homosexuals and legislation suggestions through the International Human Rights Law and part state legislation" (2011) September, Vol. 20 No.9, *The Chinese Journal of Human Sexuality*, 45.
- MacDougall, Bruce. "The Celebration of Same-Sex Marriage" (2000-2001) 32:2 *Ottawa L Rev* 235.
- Mayer, Ann Elizabeth. "Universal versus Islamic Human Rights: a Clash of Cultures or a Clash with a Construct" (1994) 15 *Mich J Intl L* 307.
- Mazur, Paul. "Gay and Lesbian Rights in Canada: a Comparative Study" (2002) 25(1) *Intl'l J Pub Admin* 51.
- Meijknecht, Anna & Byung Sook de Vries, "Is There a Place for Minorities' and Indigenous

- Peoples' Rights within ASEAN?: Asian Values, ASEAN Values and the Protection of Southeast Asian Minorities and Indigenous Peoples”(2010) vol 17 International Journal on Minority and Group Rights 75.
- Napoleon, Val. “The Raven’s Garden: A Discussion about Aboriginal Sexual Orientation and Transgender Issues” (2002) 17:2 CJLS 149.
- Narine, Shaun. “Forty years of ASEAN: a Historical Review” (2008) 21:4 The Pacific Review 411.
- Nirerbisz, Annette & Mark Searl, Charles Theroux. “Human Rights Commissions and Public Policy: the Role of the Canadian Human Rights Commission in Advancing Sexual Orientation Equality Rights in Canada” (2008) 51:2 Can Pub Admin 23.
- Oziewica, Estanislao. “Homosexual Granted Status as Refugee” (11 January 1992) *Globe and Mail*.
- Paul, Brest. “In Defense of the Antidiscrimination Principle” (1976) 90 Harv L Rev 1.
- Pererenboom, Randall. “Human Rights and Asian Values: The Limits of Universalism” (2000) 7:2 China Review International 295.
- Peter Western. “The Empty Idea of Equality” (1982) 95 Harv L Rev 537.
- Robertson, Phil. “ASEAN’s Road to Nowhere? Subverting Standards within the ASEAN Human Rights Declaration”(2012) 4 Strategic Review, online: <http://www.sr-indonesia.com/>.
- Saiz, Ignacio. “Bracketing Sexuality: Human Rights and Sexual Orientation – a Decade of Development and Denial at the UN” (2004) 7:2 Health and Human Rights 48.
- Sanders, Douglas. “Human Rights and Sexual Orientation In International Law” (2002) 25(1) Int’l J of Public Admin 13.
- Simon, Sheldon. “ASEAN and Multilateralism: the Long, Bumpy Road to Community” (2008) 30:2 Contemporary Southeast Asia 264.
- Smith, Miriam. “Recognizing Same-Sex Relationships: the Evolution of Recent Federal and Provincial Policies” (2002) 45(1) Can Pub Admin 1.
- The Joint United Nations Programme on HIV/AIDS (UNAIDS). “UNAIDS Terminology Guidelines” (2011), online: UNAIDS http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2011/JC2118_terminology-guidelines_en.pdf.
- Trotter, Geoffrey. “The Right to Decline Performance of Same-Sex Civil Marriages: The Duty to Accommodate Public Servants- A Response to Professor Bruce MacDougall” (2007) 70 Sask L Rev 386.
- Waldijk, Kees. “Standard Sequences in the Legal Recognition of Homosexuality-Europe’s Past Present and Future” (1994) 4 Austl Gay & Lesbian LJ 50.
- Wintemute, Robert. “Sexual Orientation and the Charter: The Achievement of Formal Legal Equality (1985-2005) and Its Limits” (2004) 49 McGill LJ 1143.
- Wong, Day. “Hybridization and the Emergence of ‘Gay’ Identities in Hong Kong and in China” (2010) 24 (1-2), Visual Anthropology 152.
- Xue Hanqin and Jin Qian. “International Treaties in the Chinese Domestic Legal System” (2009) 8 Chinese Journal of International Law 299.
- Zhu, Yuchao. “China and International ‘Human Rights Diplomacy’” (2011) 9 (2), China: An

Chinese Sources
[Translated By Author]

- Bo Qing (柏青).“Tongxinglian de Shuguang (同性恋的曙光) [the twilight for homosexuals]”, 10:2005 Jiangkang Bidu[Health Must Read Journal] 53.
- Chen Li (陈丽), “Tongxing Hunyin zai Zhongguo de Lifa Biyaoxing”(同性婚姻在中国的立法必要性)[The Necessity of The Legalization of Same-Sex Marriages in China](2009) 7 Cumulatively No. 130, the South of China Today 141.
- Dong Chao (董超).“Sifa Duli zai Zhongguo(司法独立在中国)[Judicial independence in China]” (2005) 1 Zhengfa Luncong[J Pol Sci & L] 6.
- Er Yan (二言).“Zhongguo Tongxinglian Feibinglihua Yiwei zhe Shenme (中国同性恋非病理化意味着什么) [What Chinese Gay non-pathological Means]”,online: (2001) 38 Taohong Mantianxia Journal (桃红满天下) edited by the Chinese Society for Study of Sexual Minorities (CSSSM) <<http://csssm.aibai.com/>>.
- Fan Jinxue(范进学). “Zhongguo Weixian Shencha Zhidu zhi Jiangou(中国违宪审查制度之建构)[Construction of Chinese Judicial Review System]”, in Liu Maolin(刘茂林), ed, *Gongfa Pinlun 2(公法评论第二卷)[Public Law Review II](Beijing: Beijing University Publishing: 2004).*
- Guofang Daxue Zhongguo Tese Shehuizhuyi Lilun Tixi Yanjiu Zhongxin(国防大学中国特色社会主义理论体系研究中心)[the Research Center for the socialism system with Chinese characteristics, National Defense University].“Renqing Xifang ‘Minzhu Renquan Shuchu’ de Shizhi(认清西方“民主人权输出”的实质)[The Understanding of the Substance of Western Democracy and Human Rights Output]” (25 May 2012), , online: People Daily <<http://paper.people.com.cn>>.
- He Qun (何群), “Shewai Tongxing Hunyin Falv Shiyong Wenti Yanjiu(涉外同性婚姻法律适用问题研究)[Study on the Application Law of Foreign-related Homosexual Marriage]”(2012) Vo. 30 No.10, Hebei Law Science 131.
- Liu Kai-fa(刘开法), “Xi Jinping Zhongguo Tese Shehui Zhuyi Sixiang Yanjiu (习近平中国特色社会主义思想研究) [Research On Xi Jin ping’s Thought About Socialism With Chinese Characteristics]” (2013) No. 16, Serial No. 198, Economic Research Guide 193.
- Liu Tao (刘韬), “Cong Renquanfa Kan Zhongguo de Tongxing Hunyin Hefahua (从人权法看中国的同性婚姻合法化)[Assess The Legalization of Same-Sex Marriages In China From The Perspective Of Human Rights Law]”(2009) 7, Legal System and Soceity 87
- Liu Xudong (刘旭东), “Tongguo Guoji Renquanfa he Bufen Guojia Lifa Shenshi Zhongguo Tongxinglian Xianzhuang yiji Jianyi”(透过国际人权法和部分国家立法审视中国同性恋现状及建议)[On the Present Situation of the China’s Homosexuals and Legislation Suggestions through the International Human Rights Law and Part State Legislation](2011) Vol 20. 9, the Chinese Journal of Human Sexuality 45.

- Li Yanlin(李彦林), “Lun Tongxing Hunyin Hefahua zhi Biduan(论同性婚姻合法化之弊端)[Analysis of the disadvantages of legalization of same-sex marriages]” (2010) 2 Cumulatively No. 25, *Social Sciences Review* 112.
- Li Yinhe & Qin Shide (李银河&秦世德). “Tongxinglian Shifou Yinggai Jiehun (同性恋是否应该结婚) [Should homosexuals get married?]”, in Gao Yanning (高燕宁) *et al*, *Fudan Dajiangtang Xilie:Tongxinglian Jiangkang Ganyu* (复旦大讲堂系列: 同性恋健康干预) [Fudan University Academic Forum: Homosexuality Health Interference] (Shanghai: Fudan University Press, 2006) 322.
- Li Yinhe (李银河). “Tongxinglian Yawenhua (同性恋亚文化) [Sub-culture of homosexuality]”, in Gao Yanning (高燕宁) *et al*, *Fudan Dajiangtang Xilie:Tongxinglian Jiangkang Ganyu* (复旦大讲堂系列: 同性恋健康干预) [Fudan University Academic Forum: Homosexuality Health Interference] (Shanghai: Fudan University Press, 2006)1.
- Li Zhiyong (李志勇). “Guanzhu Shehui Ruoshi Qunti (关注社会弱势群体) [Examining Vulnerable Groups]” (2001) 7, *Dangzheng Ganbu Xuebao* [Journal For Party And Administrative Cadres] 14.
- Ma Kechang & Li Xihui (马克昌&李希慧). “Wanshan Xingfadian Liangge Wenti de Sikao (完善刑法典两个问题的思考) [Thoughts regarding improving two issues in Criminal Code]”, 1994 (12) *Fa Xue*[Law Study] 43.
- Qin Yadong & Huang Dawei(秦亚东&黄大威). “Zhongguo Gudai Hunyin Zhidu Tanxi(中国古代婚姻制度探析)[Investigation and Analysis about Chinese Ancient Marriage]”, (2007) *Qiqihar Xuebao*[Journal of Qiqihar University (Phi & Soc Sci)] 57.
- Qu Xinjiu (曲新久). “Zhongguo Xingfa Xiandaihua de Jiben Zouxiang(中国刑法现代化的基本走向)[Basic Trend of the Modernization of Chinese Criminal Law]” (2007), Vol 25(4), *Tribune of Political Science and Law*(政法论坛) 22.
- Wang Jiangyu (王江雨). “Daidai Zhongguo Falv Zhidu de Jiben Tezheng, Jiegou yu Weilai Fazhan Zhangwang (当代中国法律制度的基本特征、结构与未来发展展望) [The Basic Characteristics, Structure and Future Outlook of Chinese Legal System]”, (2010) 86 *East Asian Institute Working Papers* 1, online: <<http://www.eai.nus.edu.sg>>.
- Wang Lei (王蕾). “Lun Ruoshi Qunti jiqi Falv Goujian (论弱势群体及其法律构建) [Vulnerable Group and its Legislation]” (2005) 15.4, *Luoyang Gongye Gaodeng Zhuanke Xuexiao Xuebao* [Journal Of Luoyang Technology College] 33.
- Zhou Dan (周丹). “Tongxinglian yu fa” (同性恋与法) [Homosexuality and Law], in Gao Yanning (高燕宁) *et al*, *Fudan Dajiangtang Xilie:Tongxinglian Jiangkang Ganyu* (复旦大讲堂系列: 同性恋健康干预) [Fudan University Academic Forum: Homosexuality Health Interference] (Shanghai: Fudan University Press, 2006) 310.

ONLINE AND OTHER MATERIALS

English Sources

“47 Countries – 800 million citizens – Council of Europe”, online: Council of Europe

- <<http://hub.coe.int/>>.
- “A Victory for Equality Rights in the Saskatchewan Court of Appeal”, online: Canadian Civil Liberties Association (CCLA) <<http://ccla.org/>>.
- “Anti-gay marriage bill passes” (16 March 2000), online: CBC News <<http://www.cbc.ca/>>.
- “Can homosexuals adopt children from China?”, Adoption Direction, the China Center of Adoption Affairs (CCAA), (12 October 2005), online: CCAA <<http://www.china-ccaa.org>> .
- “Consultative Status with ECOSOC and other accreditations”, online: ECOSOC <<http://esango.un.org>>.
- “EGALE Submissions to the House of Commons Standing Committee on Justice and Human Rights: Bill C-23: the Modernization of Benefits and Obligations Act”, online: Egale Canada, at <<http://egale.ca/>> .
- “European Parliament reaffirms LGBT rights are a condition to join the European Union” (2 October 2010), online: European Union Commission on Sexual Orientation Law <<http://www.sexualorientationlaw.eu/>> .
- “Fake-marriage market gives China's gays an out” (9 February 2011), online: MSN News <<http://www.msnbc.msn.com>>.
- “Gay pageant 'cancelled by police' in China” (15 January 2010), online: BBC <<http://news.bbc.co.uk/>>.
- “Guangzhou gays protest police action at local park” *Fridae* (31 August 2009), online: Fridae <<http://fridae.asia>>.
- “Homosexuality in China: Collateral damage, neither comrades nor spouses”(18 March 2010), online: The Economist <<http://www.economist.com/node/15731324>>.
- “HRC 3rd Session. Joint statement on Human Rights violations based on sexual orientation and gender identity” (1 December 2006), online: Norway delegations in Geneva <<http://www.norway-geneva.org>>.
- “Human Rights Council Document”, the Principles In Action, online: <<http://www.ypinaction.org/>> .
- “Human Rights in China exhibition to open in Beijing” (15 November 2006), *People's Daily*, online: People's Daily <<http://english.people.com.cn/>> .
- “Human Rights in China exhibition to open in Beijing” (November 15, 2006), *China People's Daily*, online: People's Daily <<http://english.peopledaily.com.cn/>>.
- “Introduction to ECOSOC Consultative Status”, online: United Nations, NGO Branch <<http://csonet.org>>.
- “Joint Statement on Sexual Orientation, Gender Identity and Human Rights at United Nations”, 2008, online: ILGA-Europe <<http://www.ilga-europe.org/>>.
- “National People Congress (of China)”, online: BBC News <<http://news.bbc.co.uk>>.
- “National People's Congress (of China)”, online: Nat'l People's Cong. <www.npc.gov.cn> .
- “Nazi Persecution of Homosexuals 1933-1945”, online: United States Holocaust Memorial Museum <<http://www.ushmm.org/>>.
- “Notice of changes to Alberta's human rights legislation”(October 2009), online: Alberta Human Rights Commission, <<http://www.albertahumanrights.ab.ca/NoticeOfChangesToAlbertasHumanRightsLegislation>>

- .pdf>
- “Paul Martin's speech on same-sex marriage”, (16 February 2005) online: Yawningbread <<http://www.yawningbread.org/>>.
- “Saskatchewan government to ask courts for ruling on same-sex marriage” (3 July 2009), online: Globe and Mail <<http://www.theglobeandmail.com>>.
- “Trudeau’s Omnibus Bill: Challenging Canadian Taboos” *CBC Archives* (21 December 1967), online: CBC News <<http://www.cbc.ca/>>.
- “UN General Assembly – Third Committee – Social, Humanitarian & Cultural”, online: United Nations <<http://www.un.org/en/ga/third/index.shtml>>.
- “Vietnam considers same-sex marriage” (29 July 2012), *USA Today*, online: USA today <www.usatoday.com>.
- Ah Qiang , “Can gay people get involved in NGO in China?” (4 December 2013), PFLAG China, online: Sina Blog<http://blog.sina.com.cn/s/blog_664772fb0101p0zd.html>.
- ASEAN Human Rights Declaration*, 19 November 2012, online: ASEAN Statement & Communiqués <<http://www.asean.org/news/asean-statement-communiqués>>.
- ASEAN SOGI Caucus. “We are ASEAN”, International Gay & Lesbian Human Rights Commission (8 April 2013), online: IGLHRC <<http://www.iglhrc.org/>>.
- ASEAN-China Expert Group on Economic Cooperation. “Forging Closer ASEAN-China Economic Relations in the Twenty-First Century” 2 (2001), online: <http://www.aseansec.org/newdata/asean_chi.pdf>.
- Ban Ki-Moon, “Secretary-General’s video message to the Oslo Conference on Human Rights, Sexual Orientation and Gender Identity” (15 April, 2013), online: The United Nations <<http://www.un.org/>>.
- . “Secretary-General’s remarks at event on ending violence and criminal sanctions based on sexual orientation and gender identity” (10 December 2010), online: The United Nations <<http://www.un.org/>>.
- Brocklebank, Christopher. “Gay Taiwanese couple make bid to be registered as same-sex household in landmark hearing” (26 March 2012), *Pink News*, online: Pink News <<http://www.pinknews.co.uk>>.
- Canadian Labour Congress, *Policy statement: Sexual orientation*, 20th Constitutional Convention 1994, online: Canadian Labour Congress <<http://www.canadianlabour.ca/>>.
- Celia Hatton, “New China law says children 'must visit parents'” (1 July 2013), online BBC <www.bbc.co.uk>.
- Council of Europe, “Supervision of the execution of judgments and decisions”, online: Council of Europe (COE) <<http://hub.coe.int/web/coe-portal>>.
- . “Who we are”, online: COE <<http://hub.coe.int/>>.
- Didi Kirsten Tatlow, “Homosexuality ‘Against Spiritual Civilization,’ Hunan Government Says” (6 December 2013), online: New York Times, Sinosphere <<http://sinosphere.blogs.nytimes.com/>>.
- EC. “The Institution”, online: European Union <<http://www.european-council.europa.eu/the-institution?lang=en>>.
- . “Europa – Countries”, online: European Union <http://europa.eu/about-eu/countries/index_en.htm>.

Egale Canada .“About EGALE”, online: < <http://egale.ca/about-egale/>>.

Gardner,Dinah. “Police shut down Mr. Gay China Contest”(16 January 2010), online: Fridae News <<http://www.fridae.asia/>>

Gast, Phil. “Obama announces he supports same-sex marriage” *CNN News* (9 May 2012), online: CNN <<http://articles.cnn.com/>>.

“Growth in United Nations membership, 1945-present”, online: United Nations <<http://www.un.org/>>.

Hogg, Chris. “China bans parts of gay festival” (10 June 2009), online: BBC <<http://news.bbc.co.uk/>>.

Huang Zhiling and Zhang Ao.“In a 'first', gay couple tie the knot in China”,(13 January 2010), online: China Daily<<http://www.chinadaily.com.cn/>>.

Human Rights Watch. “World Report 2010”, at 291, online: Human Right Watch <<http://www.hrw.org/sites/default/files/reports/wr2010.pdf>>.

International Gay and Lesbian Human Rights Commission (IGLHRC), Press Release, “United Nations Grants Official Status to U.S.-based International LGBT Rights Group” (19 July 2010), online: IGLHRC <<http://www.iglhrc.org/>>.

---. Press Release, “On the Exclusion of Sexual Orientation Gender Identity (SOGI) Non-discrimination in the ASEAN Human Rights Declaration” (13 September 2012) online: IGLHRC Press Room <<http://www.iglhrc.org/>>.

International Lesbian, Gay, Bisexual, Trans And Intersex Association(ILGA), online<<http://ilga.org/>>.

Jacobs,Andrew. “Gay Festival in China Pushes Official Boundaries” (14 June 2009), online: New York Times<<http://www.nytimes.com>>.

Letter from the permanent Mission of Pakistan to the United Nations and Other International Organizations, No. Pol/SO/2012, at para 8, online: United Nations Watch <<http://www.unwatch.org/>>.

Luo Haocai. “Optimize Environment for Human Rights Development, and Boost Sustainable Human Rights Development- Speech at the Opening Ceremony of the Sixth Beijing Forum on Human Rights” (12 September 2013), online:China.org<<http://www.china.org.cn/index.htm>>.

Moore ,Oliver. “Toronto Zoo decision to separate “gay” penguins sparks international outcry”(10 November 2011), online: the Globe and Mail <<http://www.theglobeandmail.com/>>.

Office of High Commissioner for Human Rights, “International Human Rights Law”, online: United Nations Human Rights <<http://www.ohchr.org>>.

---. “Other United Nations Bodies”, online: UN OHCHR< <http://www.ohchr.org/>>.

---. “Universal Periodic Review”, online: UN OHCHR< <http://www.ohchr.org/>>.

---. “Human Rights Treaty Bodies”, online: UN OHCHR< <http://www.ohchr.org/>>.

---. “What are human rights?”, online: UN OHCHR< <http://www.ohchr.org/>>.

Sanders, Douglas. “At the UN: 66 to 57, with 69 abstentions” (22 December 2008), online: Fridae News <<http://www.fridae.asia>>.

Smith, Dinitia. “Love That Dare Not Squeak Its Name” (7 February 2004), online: the New York Times<<http://www.nytimes.com/>>.

Statistics Canada: Canada 2006 Census of Population, online: Statistics Canada

- <<http://www.statcan.gc.ca/>>.
- .“Police reported hate crime, 2010” (12 April 2012), online: Statistics Canada <<http://www.statcan.gc.ca/>>.
- The Council for Global Equality, “Countries Where Homosexuality Is Criminalized” (June 2011), online: Global Equality <<http://www.globalequality.org/>>.
- “The World’s Women 2010 Trends and Statistics, Executive Summary”(20 October 2010), online: United Nation Statistics Division <<http://unstats.un.org/>>.
- “The Four Global Women's Conferences 1975 – 1995: Historical Perspective” DPI/2035/, May 2000, online: Division for the Advancement of Women Department of Economic and Social Affairs, <<http://www.un.org/womenwatch/>>.
- United Nations, Press Release “Economic and Social Council Takes Action on Texts Concerning Consultative Status of Non-Governmental Organizations”, ECOSOC/6231, 25 July 2006, online: United Nations Information Service <<http://www.unis.unvienna.org/unis/en/pressrels/2006/ecosoc6231.html>>.
- .Press Release, “Sixty-Third General Assembly Plenary, 70th & 71st Meetings: General Assembly Adopts 52 Resolutions,6 Decisions Recommended by Third Committee”, online: United Nations <<http://www.un.org/News/Press/docs>>.
- United Nations, Mission Geneva. “Over 80 Nations Support Statement at Human Rights Council on LGBT”, online: US Mission Geneva <<http://geneva.usmission.gov>>.
- Wenande,Christian. “Gay penguin pair become parents" (19 October 2012), online: the Copenhagen Post< <http://cphpost.dk/news/national/gay-penguin-pair-become-parents>>.
- Wikipedia. “Sexual orientation and gender identity at the United Nations” June 28, 2012, online: <http://en.wikipedia.org/wiki/Sexual_orientation_and_gender_identity_at_the_United_Nations>.
- World Health Organization, “International Classification of Diseases (ICD)”, online: WHO <<http://www.who.int/classifications/icd/en/>>
- Zhang Yajun. “Amid family pressures, gays in China turn to marriages of convenience” (13 April 2010) the Christian Science Monitor, online: <<http://www.csmonitor.com>>

Chinese Sources [Translated By Author]

- “Beida Xingxue Dashi: Zhongguo Ketang Xingjiaoyue Wanquan Shibai (北大“性学大师”：中国课堂性教育完全失败) [Sex Education Expert of Beijing University: The Sex Education at Chinese School Completely Fails]” (7 November 2006),online: Edu.qq.com<<http://edu.qq.com>>
- “Chengdu Nvboshisheng Faxian Zhangfu shi Tongxinglianhou Tiaolou Shenwang (成都女博士生发现丈夫是同性恋后跳楼身亡) [A Female PhD Student from Chengdu Killed Herself after Discovering Her Husband is Gay] (July 18, 2012), online: China News <<http://news.china.com/>>.
- “Fudan Daxue Tongxinglian Kecheng Jiqi Qianceng Lang, Jiaoshi Xicheng “Saomang” (复旦大学同性恋课程激起千层浪 教师戏称“扫盲”) [The Homosexuality Course at Fudan University Arouses Ripples, Teachers Called “eliminate illiteracy”]”(21 September 2005), online: Xinhua Wang <<http://news.xinhuanet.com>>.

- “Goujian Shehuizhuyi Hexie Shehui (构建社会主义和谐社会) [Building up a Harmonious Society]”,online: Xinhua News Net <<http://news.xinhuanet.com>>.
- “Hunyinfaxi Yi (婚姻法释义) [Explanation of Marriage Law]”(11 July 2002), online: NPC Official Website <<http://www.npc.gov.cn/>>.
- “Jiangfangzhou Pengji Xingjiaoyu Henshibai (蒋方舟抨击性教育很失败) [Jiang Fangzhou criticizes Sex Education Fails]” (20 February 2010): *NewsCN*, online: NewsCN <<http://news.xinhuanet.com>>;
- “Jie Renquan Zhiming Xing Baquan Zhishi (借人权之名行霸权之实) [Using the name of human right to operate hegemonism] (8 May 2005), in Renquan Zhuanti:Zhongguo Renquan Fazhan Zhilu (人权专题:中国人权发展之路) [Human Rights Special Issue: Chinese Human Rights Development Road] online: China Central Television<<http://www.cctv.com/> >
- “Li Yinhe: Huanqi Bushi Zui, Shuilai Baohu Ma Jiaoshou de Xing Quanli? (李银河: 换妻不是罪, 谁来保护马教授的性权利?) [Li Yinhe: Exchanging Wives Is Not Crime, Who can Protect Professor Ma’s Sex Right?](2 April 2010) *Nanfang Daily*,online: NFDaily <[www.http://www.nfdaily.cn/](http://www.nfdaily.cn/)>.
- “Nanjing Huanqian Fujiaoshou Bei Chongzhong Chufa Yishen Huoxing 3nianban (南京换妻案副教授被从重处罚 一审获刑 3 年半) [Nanjing Exchanging Wives Case: Associate Professor Received Severe Punishment, Sentenced to Prison 3 and Half Years at the First Trial]”(20 May 2010), online: news.163.com <www.news.163.com>.
- “Qianfu shi Tongxinglian Yaoqiu Biangeng Haizi Fuyangquan (前夫是同性恋 要求变更孩子抚养权)[Ex-husband is gay Ask for change of Adoption of Child] (9 August 2013)”, online: People Web, Henan <<http://henan.people.com.cn/> >.
- “Quanguo Gongan Jiguan “Daguai” Zhuanxiang Yundong Jianyao Qingkuang (全国公安机关“打拐”专项行动简要情况) [Briefing on National Police’s a Special Action Against Trafficking Women and Children]”, 7 May 2009, Ministry of Public Security, online: Ministry of Public Security of China <<http://www.mps.gov.cn/>>.
- “Shehui Nengjiandu:Airen Tongzhi (社会能见度: 爱人同志) [Social Visibility: Lover,Tongzhi]” *Phoenix Television Broadcast*, (14 April 2005) online: ifeng <<http://v.ifeng.com/>>.
- “Shekeyuan Zhuanjia: Jiaoshou Huanqian Bu Sheji Qin Hai Geren Yinsi (社科院专家: 教授换妻案不涉及侵害个人隐私) [Expert of Chinese Academy of Social Sciences: Professor’s Wife Exchange Case Not Involved the Violation of Privacy] (8 April 2010), online: sina <www.news.sina.com.cn>.
- “Shoujie Zhongguo Tongxinglian Dianyingjie Richeng Anpai (首届中国同性恋电影节日程安排) [The First China Gay Movie Festival Agenda]”, Pengyou Buku (12 December 2001), online: Friend Don’t Cry<<http://www.pybk.com>>.
- “Taohong Mantianxia: Zhongguo Tongxinglian Binglihua/Fei Binglihua Bianluan Zuanji (桃红满天下:中国同性恋病理化 / 非病理化辩论专辑) [Chinese gay pathological / non-pathological debate special issue]”, (1998) 12 Taohong Mantianxia Journal, online: CSSSM <<http://csssm.aibai.com>>
- “Tongxian Xingqinfan Zaoyu Falv Nanti(同性性侵犯遭遇法律难题) [Same-sex sexual

- harassment facing legal challenge]”, (6 January 2005) Fazhi Daily.
- “Tongxing Hunyin Lifa Tian zai Shoucuo, Zhengxie Fayaren ChengTai Caoqian (同性婚姻立法提案再受挫 政协发言人称太超前) [Same-sex marriage Proposal Rejected again, the Spokesman of the Chinese People’s Political Consultative Conference (CPPCC) claimed too early for China]” (5 March 2006), online: Tencent News<<http://news.qq.com>>.
- “Yi Shengming de Mingyi (以生命的名义) [The Name of Life]”, *China Central TV(CCTV)* (9 August 2005), online: CCTV<<http://www.cctv.com/news/china>>
- “Zhongguo Fandui Meiguo Liyong “Falungong” Ganshe Zhonguo Neizheng (中国反对美国利用“法轮功”问题干涉中国内政) [China Opposes United States interference with China domestic affairs using the issue of Falun Gong]” (4 November 1999) , online: Sina <<http://news.sina.com.cn/>>.
- “Zhonggong Shouti Renquan Sifa Baozhang, Xianggan GaiGe Anpai Xieru Jueding (中共首提人权司法保障 相关改革安排写入决)[CPC advanced Judicial Safeguard for Human Rights, Reform Arrangement Written in the Decision]” (15 November 2013), online: Sina News<www.sina.com.cn>.
- “Zhongguo XIANFA de Zhiding he Xiugai (中国宪法的制定和修改) [the Enactment and Amendments of Chinese Constitutions]”, online: Xinhua News <<http://news.xinhuanet.com/ziliao>>.
- “Zhonghua Renmin Gongheguo Guojia Jigou Tizhi (中华人民共和国国家机构体制) [State Structure System of People’s Republic of China]”, online: Chinese government web <<http://www.gov.cn>>.
- “Zhu Zongli Baogao zhong Xin Mingci: Ruoshiqunti Baokuo naxie Ren (朱总理报告中新名词: 弱势群体包括哪些) [New Term in Premier Zhu’s Report: Who Included in Vulnerable Group]” (8 March 2002), online: China People <<http://www.people.com.cn>>.
- “Zhuanjia cheng Jin Nantong Xianxue Caozuoxing Di, Jiejin Nvtong wei Jiegui Guoji (专家称禁男同献血操作性低 解禁女同为接轨国际) [Experts say unrealistic to ban Male Homosexuals blood donors; allowing lesbians donating blood meets the international standards]”(14 July 2012), online: China news <<http://www.chinanews.com>>.
- Caosi& Chen Yanling(曹斯/陈燕玲). “Guangzhou Zhiyuanzhe Qixi Yan Xingwei Yishu Huyu Xiaochu Qishi(广州同性恋志愿者七夕演行为艺术呼吁消除歧视)[Guangzhou gay volunteers perform art asking for eliminating discrimination] (23 August 2012), online: the Southern Daily<<http://www.zsnews.cn/>> .
- Chen Yanfang (陈彦方). “CCMD-3group leader, CCMD-3 XU (CCMD-3 序) [CCMD-3 Preface]”, online: Chinese Society of Psychiatry <<http://www.21jk.cn/>>
- Chinese Society of Psychiatry. “Zhongguo Jingshen Zhangai Feilie yu Zhenduan BiaoZhun Disanban(中国精神障碍分类与诊断标准第 3 版) [3rd Edition of the Chinese Classification of Mental Disorders and Diagnostic Criteria (CCMD-3)]”, online: Chinese Society of Psychiatry <<http://www.21jk.com.cn>> .
- Guo Xiaoming(郭晓明). “Nanzi zai Beijing Zuzhi Tongxinglian Jiti Yinluan (男子在北京组织同性恋集体淫乱) [Gay sex party organized in Beijing]” (20 May 2006), online: Sina News <<http://news.sina.com.cn>>.

- Interview of Zhang Beichuan and Cui Zien by China Central TV in “Yi Shengming de Mingyi (以生命的名义) [The Name of Life]”, (9 August 2005) online: CCTV <<http://www.cctv.com/news/china>>.
- Interview of Zhang Beichuan by Zeng Zimo in “Shehui Nengjiandu: Airen Tongzhi (社会能见度: 爱人同志) [Social Visibility: Lover, Tongzhi]”, *Phoenix Television Broadcast*, (14 April 2005) online: ifeng<<http://v.ifeng.com/>>;
- Interview of Zhou Dan and Cui Zien by Chen Luyu in “Luyu Youyue: Airen Tongzhi Cuizien (鲁豫有约: 爱人同志崔子恩) [A Date with Luyu: Lover Tongzhi Cuizien]” *Phoenix Television Broadcast* (27 October 2009) online: sina<<http://video.sina.com.cn>>.
- Jiang Zemin zai Zhongguo Gongchandang Dishiwuci Quanguo Dabiao Dahui de Baogao (江泽民在中国共产党第十五次全国代表大会上的报告) [Jiang Zemin’s report on the Fifteenth National Congress of Chinese Communist Party], adopted on 12 September 1997, online: CPC News<<http://cpc.people.com.cn>>.
- Li Tie (李铁). “Tongxing Hunyin, Juefei Li Yinhe Shuode Nayang Jiandan (同性婚姻, 绝非李银河说的那样简单) Not that Simple as What Li Yinhe Says” (January 24, 2010), online: Tcent News<<http://view.news.qq.com>>.
- Li Yinhe (李银河), “Gongzhong dui Tongxinglian de Taidu” (公众对同性恋的态度) [the Public opinion on Homosexuality] (17 June 2008), online: sina blog <<http://blog.sina.com.cn/liyinhe>>.
- . “Wo Tiyi Tongxing Hunyin Hefahua de Wuge Liyou (我提议“同性婚姻合法化”的五个理由) [My Five Reasons To Propose Legalization of Same-Sex Marriage]”, online: 网易女人 Netease Woman <<http://lady.163.com>>.
- . Weibo, online: <<http://t.163.com/yinheli>>.
- . “Guanyu Tongxing Hunyin de Tian” (关于同性婚姻的提案) [Proposal Regarding Same-sex Marriage]” (15 February 2013), online <http://blog.sina.com.cn/s/blog_473d53360102ev05.html#comment1>.
- Qin Hanjie, Ceng Gang & Wang Xiaofan (韩俊杰、程刚、王晓凡). “Nanzi Zao tongxing Qiangbao, Shibaozhe Wufa Bei Zuijiu Xingshi Zeren [男子遭同性强暴, 施暴者无法被追究刑事责任]” (17 February 2005) *China Youth Daily*.
- Shanghai Pride official website <<http://www.shpride.com/pride2012/>>.
- Singer Yun Qiao (歌手匀乔). Weibo, online: Weibo <<http://www.weibo.com/anankmark>>.
- Special issue of China Economic Net CE Depth. “Chang Huijia Kankan Rufa de Gangai (“常回家看看入法”的尴尬) [the Embarrassment of Legalization of Go Home More for Visiting]”, *China Economic Net*, online: <www.ce.cn>.
- The Beijing No.1 intermediate Court, Lihun Anjian Zhong She Tongxinglian Shuqiu Caichu de Diaoyan (离婚案件中涉同性恋诉求裁处的调研) [*the Research Regarding the Divorces Cases involving Homosexuals*] (11 January 2013), reprinted in PFLAG China press release, online: <<http://www.pflag.org.cn/>>.
- The Information Office of the State Council of China (国务院新闻办公室), “Zhongguo de Jiahua Shengyu” (中国的计划生育) [One Child Policy in China] (23 August, 1995), online: Chinese Government Web <<http://www.gov.cn/>>
- Wan Yanhai (万延海). “Guanyu Sanyue Shiqiri Dongdan Gongyuan Shijian, Wan Yanhai Gei

- Beijing Shigonganju de Xin (关于3月17日东单公园事件, 万延海给北京市公安局长的信) [A letter to the Head of Beijing Police Re: 3/17 Dongdan Park Incident]” (30 March 2008), online: Love Knowledge Action <<http://www.aizhi.co>>.
- Wang Xuejin(王学进).“Bianxie Cidian Mei Biyao Qiangdiao Jiazhi guan(编写词典没必要强调价值观)[Not necessary to emphasize values in editing a dictionary]” (17 July 2012), online: China Youth <<http://zqb.cyol.com/>> .
- Wuxing Hunyin Wang (无性婚姻网) [No-sex-marriage Web], online:<<http://www.wx920.com>>.
- Xie Sufang (谢素芳). “Quanmin Pufa: Shenzhou Dadishang de Guannian Geming (全民普法: 神州大地上的观念革命) [National Legal Education: Ideology Revolution in wonderland (China)]” (16 May 2011), online: the National People’s Congress of China Website, <<http://www.npc.gov.cn/>>.
- Zhang Lin & Yang Guixuan (张林, 杨贵轩). “Xinfa Shishi, Guangzhou qu Yanglaoyuan Tanwang de Ernv Duo le 1/4 (新法实施 广州去养老院探望老人的儿女多了 1/4)” [New Law Implemented, Guangzhou Senior Residences Visiting Increases 1/4] (8 July 2013) Yangcheng Evening News, online: Yangcheng Wanbao <<http://news.ycwb.com>>.
- Zhengfu Gongzuo Baogao (2002) (政府工作报告(2002年) [Report on Government Work (2002)] (delivered by the Premier of State Council, Zhu Rongji on 5 March 2002), online: China NPC <<http://www.npc.gov.cn>>.
- Zhi Gen (志根).“Gongchandang Weishenme Yao Zhenya Falungong (共产党为什么要镇压法轮功) [Why did the Communist party repress Falun Gong?]]” (13 April 2009), online: Epochtimes <<http://www.epochtimes.com>>.
- Zhongguo Gongchandang Dishisanci Quanguo Dabiao Dahui Ziliao (中国共产党第十三次全国代表大会资料) [The documentations re Thirteenth National Congress of Chinese Communist Party], online CPC News <<http://cpc.people.com.cn>>.
- Zhongguo Gongchandang Dishiyijie Zhongyang Weiyuanhui Disanci Quanti Huiyi Gongbao (中国共产党第十一届中央委员会第三次全体会议公报) [The third plenary meeting Gazette of the Eleventh Central Committee of the Chinese Communist Party], Adopted on 22 December 1978, online: CPC News<<http://cpc.people.com.cn>>.
- Zhongguo Renquan Fazhan 50nian (中国人权发展 50年) [Human Rights Development in China: 50 Years] (February 2000), Guowuyuan Gongbao (国务院公报) [St. Council GAZ.], Beijing, online: Chinese Government <<http://www.gov.cn/gongbao/>>.
- Zhongguo Zhongyang Guanyu Quanmian Shenhua Gaige Ruogan Wenti d Jueding(CPC’s Central Committee’s decision on major issues concerning comprehensively deepening reforms)[中共中央关于全面深化改革若干重大问题的决定] (adopted by the Third Plenary Session of the 18th Central Committee of the CPC on 12 November 2013), at para 34, online: CPC news<www.cpcnews.cn> .