



Bachelor Thesis

Queering Chinese Human Rights Law through the Receptor Approach: Integrating Non-discrimination and Equality Laws into National Legislation

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*https://www.law.ox.ac.uk/sites/files/oxlaw/oscola_4th_edn_hart_2012.pdf

Abstract

This bachelor thesis wishes to further develop a recent theoretical approach to international human rights law by Professor Tom Zwart known as the receptor approach (to human rights), which as a result will contribute to the wider body of knowledge surrounding this approach. The receptor approach aims to take a more culturally sensitive viewpoint on the implementation of human rights where these human rights may be absent in certain states so that non-western states may not perceive the West to be imposing their standards onto them. This is especially true for most African and Asian states and may be the most effective way to implement these rights for states in the two regions.

Here, the thesis will take a normative approach when looking at the main research question that the author will have answered by the end of this thesis – that is – how should the receptor approach to human rights be employed in China as a means to implement the right to equality and non-discrimination so that homosexual men are not discriminated against on the basis of their sexual orientation? Having no prior literature or research published in an academic journal that has attempted to tackle the above research question, this thesis will try to bridge the research gap present.

To do so, the author will take the following structure: first, the ongoing debate between the universalists and relativists and their respective theories on international human rights will be discussed. Then Tom Zwart's approach will be discussed and it will be argued that the receptor approach would transcend the universalist-relativist debate. The next section dives into the historical shifts in attitudes towards homosexuality. Here, ancient and early modern China will be considered as the starting point and then compared with modern China. Finally, the author will build on the fact that there exists a legal obligation not to discriminate against homosexual men through the use of HRC communications and jurisprudence of other regional courts, and that by confirming the existence of state obligation, the use of the receptor approach is also justified. Following this, five receptors will be identified and then the appropriate amendments will be discussed to bring about positive changes with regards to discrimination and equality laws. At the end of the thesis, the author will conclude by summarising the last subsection which will in effect answer the normative research question that has been stated above.

List of Abbreviations Used

AAA – American Anthropological Association

ACHPR – African Charter on Human and People’s Rights

ACHR – American Convention on Human Rights

CAT – Convention Against Torture

CCP – Chinese Communist Party

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

HIV – Human Immunodeficiency Virus

HRC – Human Rights Committee

IACtHR – Inter-American Court of Human Rights

ICCPR – International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

IVF – In Vitro Fertilisation

LGBTI – Lesbian, gay, bi, transgender and intersex

MSM – Men who have sex with men

NGO - Non-governmental organisation

OAS – Organisation of American States

PRC - People's Republic of China

SCS – Social Credit System

SOGI – Sexual orientation and Gender identity

STI – Sexually Transmitted Infections

UDHR – Universal Declaration of Human Rights

UN – United Nations

UNDP – United Nations Development Project

UNESCO – United Nations Educational, Scientific and Cultural Organisation

UNFPA – United Nations Fund for Population Activities

UNTS – United Nations Treaty Series

VCLT – Vienna Convention on the Law of Treaties

1. Introduction

On 26 June 2015, homosexual men and women, and Americans celebrated the judgment of the United States Supreme Court in *Obergefell v Hodges*.¹ The outcome of this landmark case granted same-sex couples the right to be married, and for states to legally recognise a marriage conducted in other states under the Fourteenth Amendment of the US Constitution.² However, such a privilege is, in contrast to other western states, not present in almost any Asian states with the exception of Taiwan — for example, China, which will be the main focus of this thesis. Although the attitudes of Chinese citizens towards sexual minorities has seen a positive shift among Chinese citizens³, the author ponders upon the existence of rights aimed at the protection of homosexual men from discrimination and equality. This then leads the author to ask the question: how can the receptor approach to human rights be employed in China as a means to implement the principle of equality and non-discrimination as enshrined in article 26⁴ of the International Covenant on Civil and Political Rights so that the state does not discriminate against homosexual men on the basis of their sexual orientation? To elucidate, the purpose of the research question is to identify receptors that can be used as a means to justify the role of equality and non-discrimination in the absence of existing laws that protect homosexual men, or if present, can be improved upon. In China, Confucian ethics and values play a big role in daily life. It will be argued that if culturally sensitive receptors can be identified then implementations can happen organically with little or no backlash at all.

To answer the research question, this thesis will be divided into three sections, but first, a short section will be dedicated to the methodological approach that will be taken in this thesis. The three sections will firstly, deal with the introduction of two clashing approaches to human rights and its applications: universalism and cultural relativism. The author will argue that the age-old theoretical approaches should be replaced with a more recent approach – the receptor approach to human rights (referred to as the ‘receptor approach’ or the ‘approach’ subsequently) – which could arguably be an approach that sits in between universalism and relativism if the two theoretical approaches were to sit on the ends of a spectrum. The second section will delve into the historical background that shows a shift in attitudes towards

¹ *Obergefell v Hodges* 576 U.S. ___ (2015).

² *ibid* 1.

³ 'Being LGBTI In China – A National Survey On Social Attitudes Towards Sexual Orientation, Gender Identity And Gender Expression' (United Nations Development Programme 2016) (UNDP) 22.

⁴ Throughout the thesis, the author will explicitly use ‘article 26 ICCPR’ to mean the same thing as ‘article 26 of the ICCPR’.

homosexuality in ancient and early modern China and the People's Republic of China (PRC)⁵ which the author argues was a result of western influence in Asia. The third section will be the most substantial as it will focus on the issues currently faced by homosexual men as a result of China's current adherence to international human rights standards and how this relates to the right of anti-discrimination and equality laws for homosexual individuals. This will include the receptor approach to human rights and how the approach can be used to suggest future changes in national legislation. Finally, the thesis will provide an answer to the research, limitations of the current thesis and recommendations for future research in this area by way of conclusion.

2. Methodology

For the purpose of this thesis, a normative approach will be taken which will result in a thesis that lays out recommendations for how anti-discrimination and equality laws can be implemented in China by way of the receptor approach. This will include the use of primary sources such as the Vienna Convention on the Law of Treaties (VCLT), Charter of the United Nations, International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and communications by the United Nations Human Rights Committee (HRC). Since international legal instruments are the most authoritative source of international law with its careful drafting and defining of certain provisions, it makes sense to refer to treaties in a legal thesis. Regional case-law of the European Court of Human Rights ('ECtHR' or 'the Court') and Inter-American Court of Human Rights (IACtHR) will be used to confirm the existence of legal obligations put on states when referring to certain provisions, in this case, the provision on the right to equality and non-discrimination. Furthermore, national laws such as the Chinese Criminal Code and the Chinese Constitution will be looked into to understand what is happening on a local level.

Secondary sources in this thesis will include the use of UN publications including reports and General Comments, journal articles, books, blogs and news articles, and to a lesser extent – the Yogyakarta Principles to expand on certain topics, or to get clarity on the definitions from experts in the field, especially with the HRC's General Comments. The use of soft law instruments is quite clear as mentioned above, but journal articles and books contain works of the most qualified scholars. In this case, the books used mostly relates to the topic of this bachelor thesis – in either international law or gender and sexuality studies which provides

⁵ The author will use the terms China and PRC interchangeably to mean the same thing – i.e. China today.

a minimum level of knowledge needed to understand how to proceed with the writing of this thesis. Journal articles provide information on the use of the receptor approach, criticisms on the approach and also the historical information required to understand homosexuality in ancient China and the PRC, while blogs and news articles provide information on current events in the PRC as there is a lack of access to information in China relating to homosexuality.

This purpose of this thesis is to contribute to the wider body of knowledge on this area of law and further the approach developed by Professor Tom Zwart in a specific area of human rights law, as it is a relatively new approach and there has been no prior literature or research that deals with the specific right discussed in this thesis using the receptor approach. Therefore, with a large country like China implementing laws that protect the right to equality and non-discrimination using the receptor approach, it could set an example for other Asian and African states to do the same and assess their own situation using the receptor approach.

There exists a soft law instrument that carries some weight that deals with sexual orientation and gender identity (SOGI) issues known as the Yogyakarta Principles.⁶ Although the Principles are non-binding on states, the ‘authoritative’ nature that it has comes from the drafters of the instrument itself as they are experts on the topic of SOGI and is therefore seen as a well-respected soft law instrument by both states and scholars.⁷ Principle 2 of the Principles outlines the same right to equality and non-discrimination which is similar to article 26 ICCPR although it stresses the importance of equal treatment on the grounds of SOGI; but it also carries with it obligations that the authors of the Principles recommend in order for individuals to enjoy the fundamental rights protected by international human rights law.⁸ These recommendations could prove to be useful in the process of writing this thesis as then the Principles could be translated into practice through the receptor approach that would concretise the position of the Yogyakarta Principles in the international arena.

This thesis wishes to emphasise the case of Asia as a centre for the flourishing of the receptor approach. The case of Asia should gain more attention because of the lack of a regional convention or charter that protects the rights of Asians as opposed to Asia’s counterparts with the European Convention on Human Rights (ECHR) or the African Charter on Human and People’s Rights (ACHPR), and by broadening the scope of research into other fundamental

⁶ Michael O’Flaherty, ‘Sexual Orientation And Gender Identity’, *International Human Rights Law* (2nd edn, Oxford University Press 2014) 313.

⁷ *ibid* 313.

⁸ Yogyakarta Principles – Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (adopted 27 October 2007) (YP) preamble, principle 2.

rights, the receptor approach to human rights could prove to be an effective way for international human rights law to gain momentum in Asia.

3. Theoretical Approaches in International Human Rights Law: Universalism, Relativism and the Receptor Approach

This section will be made up of two subsections. The first will be dedicated to the discussion of the existing debate in relation to the framework in international human rights law: universalism and relativism. Then in the second, the author will introduce a fairly new approach in international human rights law developed by Tom Zwart known as the receptor approach which could be argued, would transcend above the universalism and relativism debate due to its openness and sensitivity to culture. To this end, the author will justify the use of this approach.

3.1 A Clash in Frameworks: Universalism and Relativism

The universality of human rights has always been a hotly debated issue among legal scholars and HRC since the drafting of the Universal Declaration of Human Rights (UDHR) in 1947.⁹ This was an issue brought up by the American Anthropological Association (AAA) the same year when they questioned the true universality of the rights enshrined in the UDHR asking the HRC if notions such as ‘legal personality (Article 6) [or] nationality (Article 15)’ were universal.¹⁰ The answer was not in the affirmative. Non-western states have reiterated that human rights have the tendency to be too west-centric, putting an emphasis on ‘individualistic norms and values’ which clashes with norms and values of non-western states that put emphasis on the community and the relationships within that community.¹¹ Keeping that in mind, the universalists might argue that setting a standard might pave the way for the enjoyment of universal human rights on a global scale, but, valued judgments are still made regarding the actions of non-western states¹² and as a result of this, a sense of post-imperialism imperialism

⁹ Marie-Bénédicte Dembour, 'Critiques', *International Human Rights Law* (2nd edn, Oxford University Press 2014) 62; Neil Walker, 'Universalism And Particularism In Human Rights', *Human Rights: the Hard Questions* (Cambridge University Press 2013) 39; Tom Zwart, 'Using Local Culture To Further The Implementation Of International Human Rights: The Receptor Approach' (2012) 34 *Human Rights Quarterly* 547; Yvonne Donders and Vincent Vleugel, 'The Receptor Approach: A New Human Rights Kid On The Block Or Old Wine In New Bags? A Commentary On Professor Zwart'S Article In HRQ' (2014) 36 *Human Rights Quarterly* 654-55.

¹⁰ Dembour (n 9) 62.

¹¹ Titia Loenen, 'Universality Of Human Rights And Gender Bias In The Right To Work', *To Baerh in Our Minds: Essays on Human Rights From the Heart of the Netherlands* (SIM 1998) 441-42.

¹² Dembour (n 9) 64.

could be reinforced where the western states feel the need to intervene as a vanguard for the universalist agenda.

Relativism can then be seen as the counterpart of universalism as it advocates for the respect for different norms and values as a product of differing cultures and it successfully shows the difficulty in judging the (in)action of others.¹³ The best exemplification of relativism is then the doctrine of the margin of appreciation employed by the European Court of Human Rights. Here, states have a certain degree of freedom to assess national laws in accordance with international human rights standards as they are in the best position to do so¹⁴, which could arguably be a hypocritical doctrine as proponents of the universalist framework are mostly from western states and they tend to be critical of the actions of non-western states when that doctrine is so ingrained in the legal culture of the Council of Europe.

3.2 An Alternative Approach: The Receptor Approach to Human Rights

Having established both the universalist and relativist approach, this subsection now moves on to defining and justifying the use of a more contemporary theory in human rights. The approach developed by Tom Zwart takes on a more sensitive approach to culture, and he posits that human rights can be successfully and effectively implemented if states highlight the use of domestic ‘socio-cultural arrangements.’¹⁵ He further explains that the process of doing so is done in two steps. First, ‘social arrangements’ on a local level and human rights protection that are implemented and already existing needs to be identified. Second, if these plans do not meet international human rights standards, then the plan needs to be amplified – meaning that additional features need to be incorporated into the already present ‘institutions’ instead of entirely replacing them with more western mechanisms.¹⁶ This approach works with two related assertions. First, states must comply with human rights obligations stemming from treaties that they have ratified in accordance with the principle of *pacta sunt servanda* and second, states should place emphasis on ‘culture and social institutions’ when implementing these rights so as to ensure that they are fulfilling state obligations.¹⁷

However, Zwart and Zou see some constraints when trying to apply the approach to China. One would be that formulating human rights so that they may be embraced by the

¹³ *ibid* 63.

¹⁴ *ibid* 65.

¹⁵ Zwart (n 9) 547.

¹⁶ Zwart (n 9) 547.

¹⁷ *ibid* 547.

Chinese could ‘limit the potential for meaningful change when such discourses legitimise and reinforce local power structures.’¹⁸ The problem is that because power is in the hands of a select few, what ‘local culture’ means could be moulded by these people. However, by working closely with the locals and their experts the local norms and traditions may be kept in check.¹⁹ Another roadblock that they predict is that by implementing human rights through the receptor approach, this could potentially ‘limit local people’s awareness of and access to other ways of conceptualising certain rights from outside their society’.²⁰ This is due to the fact that the receptor approach focuses on rights that already have existing ‘receptors’ which does not necessarily have to be a human rights instrument – it could also be ‘norms, values, concepts, customs and practices.’²¹ Furthermore, Zwart and Zou propose that culture should not be seen as static, and therefore, by determining the receptors that already protect these rights in synergy, culture would continue to be dynamic.²²

Furthermore, scholars have also been critical of this approach claiming that the receptor approach is ‘old wine in new bags.’²³ Donders and Vleugel’s main criticisms of the receptor approach is that (1) the receptor approach does not provide any additional value to the current body of international human rights law as what the receptor approach does is reiterating what other scholars have already mentioned in previous literature, and (2) that Tom Zwart disregards the cultural diversity of the ‘West, non-West, East, North, and South’ by grouping each of the respective regions as if they are analogous and sets the ‘West against the rest’.²⁴

However, the receptor approach is not built on repetition of the works of previous literature, and the argument is threefold. Firstly, the receptor approach is not purely meant for theoretical purposes because it also has a practical aspect that can be used in policy making in the establishment of protection in human rights.²⁵ Secondly, the receptor approach does not see culture as an obstacle in the safeguarding of human rights, but perceives ‘culture and social institutions’ as vanguards of human rights and could be seen as significant in the protection of human rights as the aim of the receptor approach is to use these institutions in fulfilling state

¹⁸ *ibid* 547.

¹⁹ Mimi Zou and Tom Zwart, 'Rethinking Human Rights In China: Towards A Receptor Framework', *Human Rights in the Asia-Pacific Region : Towards Institution Building* (Routledge 2011) 258.

²⁰ *ibid* 258.

²¹ *ibid* 257-58.

²² *ibid* 257-58.

²³ Donders and Vleugel (n 9) 662.

²⁴ *ibid* 654, 658; Tom Zwart, 'Safeguarding The Universal Acceptance Of Human Rights Through The Receptor Approach' (2014) 36 *Human Rights Quarterly* 902.

²⁵ Zwart (n 24) 901.

obligations.²⁶ Thirdly, the receptor approach also maintains that states do not have to ‘rely [heavily] on [the] law to implement their human rights obligations’, but they could also allow ‘social institutions and cultural values’ to implement these obligations too.²⁷ In rebutting Donders and Vluegel’s second argument, Tom Zwart admits to making contrasts ‘between the “North” and the “South”’.²⁸ But the justification for this is that research proves that cultures and norms are still very much diverse throughout the globe. As a result, these variations have different outcomes in the way states would safeguard human rights.²⁹

The author finds it curious to also ponder upon the thought that employing the receptor approach in Asia might provide a breeding ground for a revival of dead customs in society which would consequently strengthen the position of the receptor approach in international human rights law as this would disprove the claims made by universalists that culture has no place in international human rights law.

4. China’s Attitude Towards Homosexuality

Having established three different theoretical approaches in the above section, China’s attitudes towards homosexuality will be examined in the past and present to get a better understanding of shifts that have occurred in the past. The purpose for doing so is to provide a contextual background so that it can be understood why shifts occur when they did. In dealing with this section, the author will divide the section into two parts. The first subsection will look into Chinese society and their attitude towards homosexuality in ancient and early modern China. The second subsection will look at the attitudes of Chinese people in modern China. The author will argue in this section that a stark difference will be seen in ancient China and modern China due to the effects of twentieth-century western and Japanese influence in China, however, Confucian ethics is also a factor for change as it was and still is a guiding principle for the Chinese.

4.1 Attitudes Towards Homosexuality in Ancient and Early Modern China

China has a history that dates back before the common era, and unsurprisingly, accounts of homoeroticism have been recorded on a number of times in historical records and works of philosophers. Kang writes that from there emerged phrases relating to homosexuality such as

²⁶ *ibid* 901

²⁷ *ibid* 901-02.

²⁸ *ibid* 902.

²⁹ *ibid* 902.

“*fentao* (分桃), *longyang* (龍陽), and *duanxiu* (斷袖)” especially when it comes to relationships of Chinese rulers and their “male favourites”. What may be surprising too is that no negative stigma was attached to this type of same-sex relations.³⁰ Laurent explains that in a sense, these types of relations could have been perceived as normal with “male prostitutes [and] brothels flourishing” and even form a union that resembled a marriage. He continues by saying that within same-sex relationships, a form of top-down power relation was established – with the Chinese elites at the top of the hierarchy and commoners at the bottom.³¹ Although attitudes towards homosexuality then was positive, a form of hierarchy was still established, and historians have confirmed that this was due to this idea that male lovers³² would cause serious harm to the political landscape of China, scholars think³³, and it can only be speculated that perhaps, some of these male lovers would see the relationship with the ruler only as instrumental for their own benefit such as climbing up the ranks in the government.

Even though the social hierarchy was consolidated, the classical expressions mentioned above related to stories of a genuine affection for each other that was written down in historical records which also showed the acceptance of same-sex relations during this time, and this section will use one of these short stories as an example. The story relates to the expression *duanxiu* or cut sleeve where Kang writes that during 6-1 BCE, the emperor of the Han dynasty had an affair with a male lover – Dong Xian with whom he would lie in bed with, and one day, when the emperor had awoken before Dong Xian who was still sleeping partly on the emperor’s sleeve. He wanted to get up, but he did not want to wake Dong Xian up. To get up, he cut off his own sleeve so that his male lover could continue sleeping because his love for Dong Xian was so intense. The story goes on and eventually, Dong Xian and his whole family moved in with the emperor who gave him and his family respectable positions within his palace and even pondered upon the idea of passing the throne to him.³⁴ Just as above, the author had correctly speculated that some male lovers might have had motives while in the relationship to achieve an end.

³⁰ Wenqing Kang, *Obsession: Male Same-Sex Relations In China, 1900-1950 (Queer Asia)* (Hong Kong University Press 2009) 22.

³¹ Erick Laurent, 'Sexuality And Human Rights' (2005) 48 *Journal of Homosexuality* 179.

³² Throughout this section, I will use the terms “male favourites” and “male lovers” interchangeably to mean the same thing.

³³ Kang (n 30) 22; Travis S.K. Kong, 'The Sexual In Chinese Sociology: Homosexuality Studies In Contemporary China' (2016) 64 *The Sociological Review* 497.

³⁴ Kang (n 30) 25-26.

Although same-sex relations were perceived as normal, the tenth century and the end of the seventeenth century saw the increase in popularity of Confucianism. During the former century, male sex-workers would receive a hundred strokes from ‘a bamboo rod and pay a fine’, while in the latter century³⁵, ‘Neo-Confucian[ism] was popularised which resulted in a set of laws that were meant to strengthen the idea of a heteronormative family.’³⁶ Adamczyk and Cheng note that Confucianism plays an important role in Chinese culture which promotes a society that still reinforces the patriarchy and takes orders from those that are more authoritative, and oriented around others that one has close ties with.³⁷ Furthermore, Confucians put an emphasis on behaving decently and appreciate the conventional. Thus, something like homosexuality could be perceived as being abnormal and would be judged negatively which is a result of a lack of tolerance towards homosexuality.³⁸ Confucian ethics did not only linger in the past and is still widespread to this day due to a Chinese diaspora and could arguably still be applied in the case of modern China.

4.2 Attitudes Towards Homosexuality in Modern China

The twentieth century saw a lot of influence from the West particularly due to New Imperialism, and Laurent writes that the West had imported technological and scientific advancements including the notion of homosexuality being a disease into China.³⁹ The importation of this thought eventually shifted the arguably positive attitudes of ancient and early modern towards homosexuality to a negative attitude.⁴⁰ As a result of this, gays and lesbians were put into ‘labour camps’ where they were punished through unethical, inhumane and degrading treatment during the Chinese Cultural Revolution in the second half of the twentieth century.⁴¹ This continued up until the 1980s where ‘[homosexual men] faced up to [ten] years, and sometimes life, imprisonment’ but eventually homosexuality was decriminalised at the start of the twenty-first century.⁴² However, Laurent explains that homosexual men may still be punished under the “‘hooliganism” law’ mostly as a consequence

³⁵ In conducting legal research for the purpose of this essay, there were no sources I was able to find regarding legal repercussion or provisions with regards to homosexual acts between men in ancient and early modern China.

³⁶ Laurent (n 31) 179-80.

³⁷ Amy Adamczyk and Yen-hsin Alice Cheng, 'Explaining Attitudes About Homosexuality In Confucian And Non-Confucian Nations: Is There A 'Cultural' Influence?' (2015) 51 *Social Science Research* 277.

³⁸ *ibid* 277-78, 287.

³⁹ Laurent (n 31) 179.

⁴⁰ *ibid* 179.

⁴¹ *ibid* 179; Heather Worth and others, "'Under The Same Quilt": The Paradoxes Of Sex Between Men In The Cultural Revolution' (2016) 64 *Journal of Homosexuality* 62.

⁴² *ibid* 180; Worth and others (n 41) 62.

of the act of sodomy,⁴³ which would disrupt ‘public order’⁴⁴ but this appears to have ended with the legalisation of consensual homosexual acts in 1997.⁴⁵ Article 160 of the Chinese Criminal Law states that:

Whoever assembles a crowd to beat people, stir up fights and cause trouble, humiliate women or engage in other hooligan activities, undermining public order, when the circumstances are flagrant, shall be sentenced to not more than seven years of fixed-term imprisonment, criminal detention, or control.⁴⁶

However, even with the decriminalisation of consensual sex between homosexual men and the cessation of punishing gay men under the hooliganism law, China still does not see gay men as normal according to Chinese academic sources. According to Piao, a female student had sued the Ministry of Education for continuing to frame ‘sexual orientation disorder’ as a mental illness along the lines of, *inter alia*, zoophilia and necrophilia in psychology textbooks in 2015.⁴⁷ Worth and others also note that in conducting their study, even when the Chinese Supreme Court found that consensual sexual activities between men should not be punished, accounts of individuals being arrested or sent to prison by the domestic judiciary and law enforcement officers for participating in consensual sexual activities between men.⁴⁸ What can be seen as illustrated by the lawsuit and personal accounts is that although China has made some progress in the treatment of homosexual men and the LGBTI community, is that their situations can be improved even more to ensure that the legal protection of homosexual men are safeguarded and that they are not seen as sick or diseased by the traditional, heteronormative society.

Although there is a hurdle that China has to face regarding the absence of legal protection for homosexuals, the United Nations Development Programme (UNDP) has offered empirical results which showed that the public, consisting of the younger population, is of the opinion that there should be amendments made to the law to ensure that push for a stronger

⁴³ *ibid* 180.

⁴⁴ Worth and others (n 41) 62.

⁴⁵ James Palmer, 'LGBT Activism Produced A Rare Victory For Online Speech In China' (*Foreign Policy*, 2018) <<https://foreignpolicy.com/2018/04/17/its-still-just-about-ok-to-be-gay-in-china/>> accessed 19 April 2019.

⁴⁶ The Criminal Law of the People's Republic of China (adopted 1 July 1979, entered into force 1 January 1980) art 160.

⁴⁷ Vanessa Piao, '高校教材称同性恋为疾病, 女大学生起诉教育部' (*纽约时报中文网*, 2019) <<https://cn.nytimes.com/china/20150821/c21sino-texts/dual/>> accessed 19 April 2019.

⁴⁸ Worth and others (n 41) 62.

acceptance of the Chinese queer community as a whole.⁴⁹ However, within the private and family life of gay Chinese men, they still face difficulty when it comes to disclosing their sexual orientation to their family. As a result of this, these men could end up in heterosexual marriages when so much pressure is put on the man to bear children. Furthermore, discrimination still plays a large role in the lives of homosexual men that have made their sexual orientation clear and family members may try to resort to Confucian ethics such as filial piety due to their parents as a result of their inexperience in handling information such as this.⁵⁰ What should then be done is to increase the visibility and awareness of queer people as a whole by way of education⁵¹, especially when there is a lack of access to information outside China as a result of strong censorship.

In 2016, a case surfaced in Changsha in Hunan where the two applicants, Su Wenlin and Hu Mingliang sued the Civil Affairs Bureau for refusing to recognise their marriage⁵² – which also happened to be the first case relating to issues of sexual orientation to be heard in China.⁵³ Despite it being the first case relating to marriage between two men, this made news for the wrong reasons. The Changsha Court dismissed the case even though the reasoning of the court proved to be insufficient, but it was based on the argument of the Bureau that marriage should be seen in its traditional sense according to China's Marriage Law⁵⁴ – that is a union between a man and a woman. What this unfortunately shows is that even with the support from the majority of younger Chinese citizens, Chinese courts and politicians are still hesitant to provide legal protection for homosexual men.

5. Applying the Receptor Approach to China

Having understood the complex interplay between Confucianism and Chinese society in the past and present, this final chapter will take Tom Zwart's receptor approach and apply it to China to examine ways in which China would be able to implement anti-discrimination and

⁴⁹ 'Being LGBTI In China – A National Survey On Social Attitudes Towards Sexual Orientation, Gender Identity And Gender Expression' (United Nations Development Programme 2016) (UNDP) 35.

⁵⁰ *ibid* 34.

⁵¹ *ibid* 38.

⁵² The author relied heavily on two secondary sources in getting the required information on this particular case due to the language barrier posed by the Chinese language and the difficulty in locating the primary case itself. However, since this has been reported by sources such as *The Guardian* and *New York Times* on numerous occasions, the author has decided to use the facts of the case as reported by these two news sites.

⁵³ Tom Phillips, 'China Court Refuses To Allow Gay Marriage In Landmark Case' (*The Guardian*, 2016) <<https://www.theguardian.com/world/2016/apr/13/china-court-refuse-gay-marriage-landmark-case>> accessed 2 April 2019.

⁵⁴ Edward Wong and Vanessa Piao, 'Judge In China Rules Gay Couple Cannot Marry' (*The New York Times*, 2016) <<https://www.nytimes.com/2016/04/14/world/asia/china-same-sex-marriage-ruling.html>> accessed 2 April 2019.

equality laws through already existing ‘receptors’ and social institutions in its national laws. To do so, this section will be further divided into two subsections. Firstly, the following subsection will outline the right to equality and non-discrimination and the legal state obligations that follow. In the same section, the author will justify the use of the receptor approach. Additionally, it will also emphasise the existence of a legal obligation to refrain from discriminating against individuals by bringing in case-law of the ECtHR and IACtHR and Communications of the HRC. Therefore, the next subsection will then begin with the application of the receptor approach in China by first identifying receptors or socio-cultural arrangements, and if these are absent then new mechanisms should be created so that they will protect these rights through putting theory into practice thereby producing positive results in the field of international human rights law and overcoming the obstacle posed by the non-ratification of the ICCPR. In total, five receptors will be looked into for the purpose of this thesis.

5.1 Right to Equality and Non-discrimination and State Obligations

The ICCPR was adopted at the same time as the International Covenant on Economic Social and Cultural Rights (ICESCR) in 1966 which made up the International Bill of Rights⁵⁵, and enshrined in the ICCPR were human rights that were considered universal and absolute.⁵⁶ One of the rights enumerated in the ICCPR is the right to equality and freedom from discrimination found in article 26 which reads as follows:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁵⁷

Article 26 ICCPR also imposes an additional tripartite obligation on the state to ‘respect, protect, and fulfil human rights.’⁵⁸ These can be divided into negative (respect) and positive

⁵⁵ Jane Connors and Markus Schmidt, 'United Nations', *International Human Rights Law* (2nd edn, Oxford University Press 2014) 375; Ed Bates, 'History', *International Human Rights Law* (2nd edn, Oxford University Press 2014) 31.

⁵⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) preamble.

⁵⁷ ICCPR art 26.

⁵⁸ Frédéric Mégret, 'Nature Of Obligations', *International Human Rights Law* (2nd edn, Oxford University Press 2014) 101.

(protect and fulfil) obligations.⁵⁹ With regards to the former, this means that states should refrain from doing anything that would result in the violation of an individual's rights. The latter then includes the obligation to protect which demands that the state actively ensures that non-state actors do not violate an individual's right to enjoy the rights and freedom of the treaties that the state has ratified, and in this case - the ICCPR.⁶⁰ The 'fulfil' obligation then aims to ensure that states do what they can so that laws are actually implemented that results in rights to be protected.⁶¹

With that in mind, article 26 ICCPR also has obligations that are put on the state. In giving consent to be bound by the ICCPR, states are to ensure that they abstain from activities that are intrinsically discriminating in nature and that their laws also do not discriminate (respect) while states are also obliged to make sure that third-party actors do not commit discriminatory acts (protect), and that also means that states must also take positive measures to eradicate circumstances in which discriminatory behaviour is maintained and embargoed by the ICCPR.⁶²

Furthermore, the UN Charter also recalls the importance of the need to '[promote] and [encourage] respect for human rights and for fundamental freedoms for all without distinction...'.⁶³ At the present moment, China has not fully become a state party to the ICCPR but has signed and become a member state to the Covenant.⁶⁴ This entails a promise to eventually ratify the Covenant to allow it to have full effect in China.⁶⁵ In doing so, China has expressly given the 'consent to be bound by a treaty', including the VCLT, by way of accession and furthermore, taking the initiative to ratify the ICCPR in the future.⁶⁶ The VCLT also states that in signing the ICCPR, China is bound by customary international law and treaty law and must ensure that their actions do not render the ICCPR useless by going against the 'object and

⁵⁹ *ibid* 102-03.

⁶⁰ *ibid* 102.

⁶¹ *ibid* 103.

⁶² Daniel Moeckli, 'Equality And Non-Discrimination', *International Human Rights Law* (2nd edn, Oxford University Press 2014) 170; UNHRC 'CCPR General Comment No. 18' (10 November 1989) UN DOC HRI/GEN/1/REV.9 (VOL.I) paras 10, 12.

⁶³ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119 (UN Charter) art 1(3).

⁶⁴ 'International Covenant On Civil And Political Rights' (*United Nations Treaty Collection*, 2019) <https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND> accessed 11 April 2019.

⁶⁵ Jan Klabbers, *International Law* (Cambridge University Press 2013) 46-47.

⁶⁶ Vienna Convention on the Law of Treaties (adopted 23 May 1969) (VCLT) arts 2(1)(b) , 15.

purpose' of the ICCPR⁶⁷, and therefore, China should respect the rights enshrined in the ICCPR. In short, this thesis will maintain the assumption that there is a legal obligation put upon China (through the accession of the VCLT and consequently the consent to be bound by the ICCPR) to ensure that the object and purpose of the ICCPR is upheld as the consent requests that states act in accordance with the treaty as enumerated by the principle of *pacta sunt servanda*.⁶⁸ It is imperative to note that China has acceded the Vienna Convention on the Law of Treaties (VCLT). As a result of this, not only has China signed the ICCPR but China has also agreed to be bound by articles 12 and 18 of the VCLT and customary international law which results in a legal obligation to respect the aim of the ICCPR and to be bound by it as well.

With China having given consent to be bound by the ICCPR through signature by way of accession of the VCLT, the next question to ask is then: does article 26 ICCPR provide a right to equality and non-discrimination on the grounds of sexual orientation? This can be answered in the affirmative by reading both articles 3 and 26 of the ICCPR together. Article 3 states that '[t]he States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.'⁶⁹ The reading of both articles would then imply that equality of both men and women are emphasised on the grounds as enumerated in article 26 – including sexual orientation. Therefore, the next part to investigate is the existence of the aforementioned right in both the Communications of the HRC and case-law of the regional courts.

In trying to do so, the argument that will follow is that if the Covenant is equally applicable to all people, without differential treatment on the basis of 'sex'⁷⁰, then same-sex individuals are offered the right to equality and non-discrimination since sexual orientation is included in the listed grounds on non-discrimination.⁷¹ According to the jurisprudence of the HRC in the landmark *Toonen* case which concerned the author, Mr Toonen, who complained that the federal state of Tasmania criminalised consensual sexual relations between men by

⁶⁷ VCLT arts 12, 18; Anthony Aust, 'Vienna Convention On The Law Of Treaties (1969)' (*Oxford Public International Law*, 2006) <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1498>> accessed 15 April 2019 para 16.

⁶⁸ VCLT art 26.

⁶⁹ ICCPR art 3.

⁷⁰ ICCPR art 26.

⁷¹ *Nicholas Toonen v Australia* [1994] Human Rights Committee, CCPR/C/46/D/488/1992 (Human Rights Committee) para 8.7; *C v Australia* [2012] Human Rights Committee, CCPR/C/119/D/2216/2012 (Human Rights Committee) para 8.4.

way of the Tasmanian sodomy laws when a majority of Australian states have repealed the law.⁷² As a result of the existence of this law, there was a continuing threat to the private life and liberty of homosexual men even though the law is not enforced in practice.⁷³

The decision of the HRC relating to sexual orientation as a ground for discrimination in the *Toonen* case is also echoed in the jurisprudence of the ECtHR. Article 14 of the ECHR reads:

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.⁷⁴

In their case-law, the Court has established that sexual orientation is safeguarded by the above article⁷⁵, and that discrimination on this basis will require the state to bring forward very weighty reasons to justify this difference in treatment.⁷⁶ The jurisprudence of the Inter-American Court of Human Rights (IACtHR) also confirms the existence and prohibition of discrimination on the grounds of sexual orientation stemming from article 24 of the American Convention on Human Rights which states that '[all] persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law'.⁷⁷ This was decided in the *Atala Riffo* case which concerned a Chilean mother and her daughters that her previous partner wanted to care for after the applicant announced that she was lesbian which the Supreme Court granted to her ex-husband where they explained that Miss Riffo's lesbian relationship would impact her daughters' growth negatively.⁷⁸ By using the case-laws of both the ECtHR and IACtHR and the Communications of the HRC, the author confirms the existence of a legal obligation put on the state to ensure that individuals are not discriminated against on the grounds of sexual orientation.

⁷² *ibid* para 8.7.

⁷³ *ibid* see facts of the case.

⁷⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953) (ECHR) art 14.

⁷⁵ *Alekseyev v Russia* (2010) App no 4916/07, 25924/08 and 14599/09 (ECtHR, 21 October 2010) para 108; *SL v Austria* (2003) ECHR 2003-I para 37; *Salgueiro da Silva Mouta v Portugal* (1999) ECHR 1999-IX para 28.

⁷⁶ *Alekseyev v Russia* (n 73) para 108.

⁷⁷ American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1969) OAS Treaty Series No. 36 (ACHR) art 24.

⁷⁸ *Atala Riffo and Daughters v Chile*, Judgment, Inter-American Court of Human Rights, Series C No. 239 (21 November 2012) para 72; 'Atala Riffo And Daughters V. Chile | IACHR' (*Iachr.ils.edu*, 2012) <<https://iachr.ils.edu/cases/atala-riffo-and-daughters-v-chile>> accessed 22 April 2019.

Thus, the usage of the receptor approach, in this case, is justified, and the approach can then build upon state obligations found in article 26 ICCPR to recommend ways in which China would be able to implement legislation that ensures the right to equality and non-discrimination for homosexual men.

5.2 Putting Theory into Practice

In Section 1, Tom Zwart describes the first step in the application of the receptor approach as identifying and/or creating receptors that can attach easily to local culture. This would mean that social institutions and laws can be sought after to identify these receptors. In this subsection, the author has identified five receptors and possible solutions that would allow for receptors to attach with Chinese culture which would, in the end, allow for the protection of equality and non-discrimination for homosexual men.

5.2.1 Sexual Education in China

In conducting research for this thesis, the author notes that sexual education is taught in China although the curriculum could be improved as it misses certain topics that are considered important in sexual health including, *inter alia*, 'sexual orientation, condom[s], [and] contraception'.⁷⁹ Although sexual education is not as progressive as of yet, this could prove to be a very useful first receptor as it has positive implications for China when looking at it through an intergenerational perspective. Additionally, in discussing this as a receptor, the author will work with the assumption that there is a positive direct correlation between education and the open-mindedness of people in general. One of the many problems that homosexual men face in relation to discrimination is the fact that there is a stigma attached to being gay – that is that men who have sexual relations with other men are more susceptible to sexual diseases such as HIV or STIs. Choi, Hudes and Steward have found that among other factors, there was a correlation between stigma relating to the act of having sex in Chinese society and the risk of being infected with HIV, including homosexual men.⁸⁰ Generally, people resort to stigmas surrounding gay men when their own knowledge on this issue is lacking and this could be perceived as having a detrimental effect on the everyday lives of homosexual men as well.

⁷⁹ 'Implementation Of Sexuality Education In Middle Schools In China' (UNESCO, UNESCO Beijing Office, UNFPA Beijing Office 2018) 55.

⁸⁰ Kyung-Hee Choi, Esther Sid Hudes and Wayne T. Steward, 'Social Discrimination, Concurrent Sexual Partnerships, And HIV Risk Among Men Who Have Sex With Men In Shanghai, China' (2008) 12 AIDS and Behavior 75-6.

Relating this back to the *Toonen* case, the Tasmanian government had argued that laws that were discriminatory towards homosexuals were justified by reason of ‘public health and moral grounds’; although this was rejected by the HRC because it was found that no link between the action of outlawing same-sex relations and the prevention of the spread of HIV could be established.⁸¹ The author sees that the link between the *Toonen* case and the case of China is that by integrating more topics into a curriculum that is already being taught in Chinese schools throughout the country, it could be beneficial to adolescents, provided that their teachers have a wider knowledge on the subject.⁸²

5.2.2 Medical Policies

Adding on to this, the author also notes that in 2001 Chengdu had adopted laws that were discriminatory in nature towards individuals that are tested positive for HIV or ‘high-risk groups’ – which included gay men and ‘men who have sex with men (MSM)⁸³’ – which blocked access to certain rights like employment in certain sectors or marriage.⁸⁴ However, China also enacted the 2006 ‘National AIDS Prevention and Treatment Regulations’ (2006 Regulations) which countered discriminatory laws like those in Chengdu.⁸⁵ Discrimination on the grounds of sexual orientation can occur in many different circumstances. In this case, discrimination is on the basis of the stigma surrounding HIV which consequently turns into discrimination in different areas of life which makes this an intersectional problem – the 2006 Regulation could perhaps also be a receptor to investigate.

Although another receptor has been identified, what is important is the amplification stage as part of the receptor approach. UNDP China has reviewed the 2006 Regulations and has also outlined its main findings, but for the purpose of this thesis, only the most relevant findings will be mentioned in this thesis: (1) although the 2006 Regulations are praised, there is still a lack of awareness of the law which leads to the non-implementation of the law in the Chinese provinces (2) because the 2006 Regulations has not been integrated into ‘national law’,

⁸¹ *Toonen* (n 71) para 8.4-8.5.

⁸² UNESCO, UNESCO Beijing Office, UNFPA Beijing Office 57.

⁸³ A distinction is made between MSM and gay men because the former could relate to bisexual men or those that are sexually curious, while the latter relates more to sexual orientation where men are sexually attracted to other men.

⁸⁴ John Pomfret, 'Chinese City Is First To Enact Law On AIDS' (*The Washington Post*, 2001) <https://www.washingtonpost.com/archive/politics/2001/01/15/chinese-city-is-first-to-enact-law-on-aids/fb04dc31-b30d-4963-8f70-e84545f0b32d/?noredirect=on&utm_term=.6f59902916f9> accessed 24 April 2019; Laurent (n 31) 180.

⁸⁵ 'The Policy And Legal Environments Related To HIV Services In China: Review And Consultation' (UNDP China 2015) 6.

the provisions in the Regulations may still be vetoed through laws that have a higher legal status (3) contradictions can be found within the 2006 Regulations itself and also between laws implemented in provinces which poses an obstacle for implementation of ‘efficient law[s]’, and reinforces discriminatory treatment of HIV positive individuals (4) relating this back to the previous finding, employers may discriminate because they can find a legislation that is of higher legal status which allows them to disregard the 2006 Regulations⁸⁶; but discrimination may occur not just in the employment sector but could also occur in different aspects of life. Thus, to rectify these four main problems, the author will build upon the recommendations of the report published by UNDP China below.

The report recommends that the status of the 2006 Regulations should be elevated to ‘national law’⁸⁷. To build upon this, the author recommends having this regulation integrated into the Chinese Constitution somehow basing the provision on anti-discrimination laws that prevents differential treatment on the basis of sexual orientation or another status which could encompass the health of an individual. The implication of this would be that, for example, a gay man who is HIV positive might feel that he is being discriminated against, and if there is a legal basis for this claim, then the situation has to be addressed by the courts. Adding on to that, by elevating the legal status of the Regulations, the provinces would become aware of this national law and would need to review whether regional laws are in accordance with national laws. In doing so, this could already alleviate all four problems that were listed above.

5.2.3 Homoeroticism in Ancient China

Another arrangement that could potentially be used as a receptor has already been identified in section 2. This would be the long history of China that has provided records of homosexual activity within the state which continued on until the West started exporting western thought and technological advancements into Asia and Africa in the twentieth century. Using these stories and historical accounts as had been previously identified, as a receptor could also prove to be incredibly effective as these accounts stem from events that had occurred before the modernisation of China. Exploring this as a receptor could be ideal as it would bring awareness to Chinese society of its historical roots where homosexuality was part of Chinese life and was normalised. This was before imperialist states shared ideas and goods from the West, including religion and medicine, with China, which could perhaps be the main reasons why there was a

⁸⁶ UNDP China (n 85) 41-2.

⁸⁷ *ibid* 41.

shift towards homophobia in the twentieth century onwards. However, this shift cannot wholly be attributed to the actions of the West, as Mao's PRC put an emphasis on the homogeneity of Chinese society which resulted in the ill-treatment of gay men during the Cultural Revolution⁸⁸ as has also been described above.

Following this train of thought and also of the previous section, homosexual relations have been recorded in history as real-life events or stories by poets which were about the relation between an emperor and a common man, the stories could be interpreted in such a way that they related to social status in society and dominance. But even so, the existence of same-sex relations in ancient and early modern China signifies acceptance for the kinds of acts the men were involved in. The only obligation that men in ancient China had was that they needed to carry on the family line and bear children by way of marriage⁸⁹ which is a common obligation in many parts of Asia. However, medicine and technology have evolved so much that there are many methods that could be employed to ensure that the family line continues even though an individual might identify as homosexual. If the telos of a Chinese man were to have descendants, then means such as In Vitro Fertilisation (IVF) or surrogacy could also be used to achieve that same end. Therefore, should the argument of the opposition (most likely their own family) surround the failure to ensure that the family line is passed on, then alternative means of conceiving a child is possible. Thus, this would perhaps stop the discriminatory behaviour of the family in trying to pressure or coerce a gay man into a heterosexual relationship.

5.2.4 The Chinese Constitution

The next receptor that has been identified is legal in nature and can be found in the PRC's Constitution. Article 33 emphasises the equality of Chinese citizen before the law.⁹⁰ The Chinese Constitution can then be read together with international law documents such as the ICCPR and UN Charter. Here, the author has identified an already existing legal receptor that could be effective in the implementation of equality and non-discrimination rights as the right itself is protected by the Chinese Constitution. The author observes that article 33 is the first fundamental right enumerated in the Constitution which must translate the importance of equality in the PRC. For example, the study done by the UNDP has uncovered that

⁸⁸ *ibid* 37.

⁸⁹ Kong (n 33) 497.

⁹⁰ The Constitution of the People's Republic of China (adopted 4 December 1982) art 33.

discrimination occurs in four different aspects of Chinese society – ‘in the family, schools, workplaces and religious establishments.’⁹¹ When it comes to the religious aspect of life, a gay man provided an account of his experience with the church he was part of. He was treated differently by churchgoers and had his donations refused on the assumption that his donations were tainted or unclean.⁹² A difference in treatment on the basis of sexual orientation can be seen and as has been mentioned by Adamczyk and Cheng in the previous section that Confucian societies tend to prefer a homogenous society and when faced with the unusual, would judge that characteristic more negatively.⁹³ Using the Chinese Constitution as a legal receptor, the state could apply article 33 in implementing the right to equality and non-discrimination as it is a legitimate provision protected by the Constitution and therefore could be used as a guideline in drafting anti-discrimination laws against homosexuals, as the violation of the right itself is more commonly carried out by non-state actors.

The final receptor that the author has identified is possibly an amalgamation of all the receptors that have already been discussed above. This next receptor can also be located in the Chinese Constitution in article 41 pertaining to the freedom of speech of Chinese citizens.⁹⁴ The UNDP found in their study that their younger citizens born after the 1990s had a more positive outlook on the queer community.⁹⁵ Through this report, the UNDP is showing that indeed, ‘the future is young’⁹⁶ and that the younger generations’ opinions matter the most moving forward into the future, and thus in understanding this, the author identifies two existing vehicles for effective change: (1) mainstream newspapers and the internet, and (2) the role of non-governmental organisations (NGOs) that promotes lesbian, gay, bi, transgender, intersex (LGBTI) rights.

With China having enforced strict laws on censorship that almost always erases the existence of gay men in mainstream media, the only time when they are present in the media is when they are portrayed in a negative fashion on mainstream newspapers.⁹⁷ It was interesting to find that after the legalisation of same-sex marriage in Taiwan in 2017, this was not covered

⁹¹ UNDP (n 49) 27.

⁹² *ibid* 32.

⁹³ Adamczyk and Cheng (n 37) 277-78, 287.

⁹⁴ The Constitution of the People’s Republic of China (adopted 4 December 1982) art 41.

⁹⁵ UNDP (n 49) 19.

⁹⁶ *ibid* 8-9.

⁹⁷ Jiang Chang and Hailong Ren, 'Keep Silent, Keep Sinful: Mainstream Newspapers’ Representation Of Gay Men And Lesbians In Contemporary China' (2017) 24 *Indian Journal of Gender Studies* 321.

in mainstream media and television in China.⁹⁸ However, even with the strict censorship in China, discussions on China's social media platform, Weibo, still emerged with many praising the Taiwanese judiciary on their progressive ruling on same-sex marriage.⁹⁹ Of course, the most obvious solution in the case of the first vehicle is the relaxation of censorship laws. Gay men should not be subject to prejudiced views when being represented on media as being inherently 'weak' or scapegoats of 'social instability'¹⁰⁰ but should be portrayed in the media as authentic as possible which is contrary to popular and stereotypical beliefs. In order to do so, a heavy burden is put on journalists, film and television producers to ensure a more accurate portrayal of gay men through effective rhetoric and journalism.

Furthermore, NGOs as advocacies of rights also play a critical role in the normalisation of homosexuality. The author posits that grassroots NGOs are likely to be the most effective type of organisations in effecting change due to its hierarchical bottom-up structure putting these types of organisations closer to the people as they are more dependent on the people instead of the professionalisation of NGOs which employs skilled individuals which may not have the same type of connection grassroots NGOs have with the people on a local level. Though this may be a positive aspect, it does weaken the social ties that one might have with grassroots organisations. Nevertheless, both grassroots and institutionalised NGOs are able to help achieve the normalcy of homosexuality not just through awareness campaigns aimed at the general public, but also calling for professional and academic institutions to introduce reforms where flaws are present. For the latter, an example would be the classification of homosexuality as a mental illness that can be rectified. The UNDP report also echoed this in their recommendations in two ways: first, changes should be made with regards to the current edition of the 'Chinese Classification of Mental Disorders' (CCMD-3) so that entries pertaining to sexual orientation as a disorder is completely removed as a psychological illness which in effect would also cease unethical treatments that aim to convert gay men.¹⁰¹ With China also being a state party to the Convention Against Torture (CAT)¹⁰², China has expressly agreed to be bound by the provisions enshrined in the CAT by way of the VCLT. Article 1 of the CAT

⁹⁸ J. P., 'Chinese Attitudes Towards Gay Rights' (*The Economist*, 2019) <<https://www.economist.com/the-economist-explains/2017/06/05/chinese-attitudes-towards-gay-rights>> accessed 8 May 2019.

⁹⁹ *ibid.*

¹⁰⁰ Chang and Ren (n 97) 321, 331.

¹⁰¹ UNDP (n 49) 37.

¹⁰² 'Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment' (*United Nations Treaty Collection*, 2019) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en> accessed 8 May 2019.

provides a definition of torture.¹⁰³¹⁰⁴ By putting a gay individual through circumstances of gay conversion therapy, the individual is undergoing psychological harm as a result of the government's allowing of such means that may induce trauma on the individual. Article 7 of the ICCPR also prohibits actors from putting individuals through 'torture, inhuman or degrading treatment or punishment' which would ultimately violate the 'inherent dignity' and integrity of that individual.¹⁰⁵ In this sense, China would not only be in direct violation for subjecting gay people through treatments that attempt to make them straight, but also a norm that has been elevated to a '*jus cogens*' status which states cannot derogate from and holds more authority than treaties.¹⁰⁶ Moving on from this, the above section has also noted that academic textbooks still perceive homosexuality as being pathological and it is, therefore, crucial that publishers make corrections in their books while the Ministry of Education should implement necessary changes to ensure that this incorrect view on homosexuality is amended.¹⁰⁷

NGOs should also go to great lengths to organise events where they are able to invite Chinese citizens, especially those born before the 1990s to awareness programmes where the NGOs are able to collaborate with social scientists to educate the people on sexual orientation and gender identity issues. Much like the receptor approach, they would be able to use historical events pre-imperialism to have people understand that it was once a part of Chinese culture before the West's influence in China. To tie this all in together, the author suggests that further changes could be made to the Chinese Constitution – specifically article 51 which reads:

The exercise by citizens of the People's Republic of China of their freedoms and rights may not infringe upon the interests of the state, of society, and of the collective, or upon the lawful freedoms and rights of other citizens.¹⁰⁸

¹⁰³ 'For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'

¹⁰⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) art 1.

¹⁰⁵ ICCPR art 7, preamble.

¹⁰⁶ Nigel S Rodley, 'Integrity Of The Person', *International Human Rights Law* (2nd edn, Oxford University Press 2014) 177.

¹⁰⁷ UNDP (n 49) 37.

¹⁰⁸ The Constitution of the People's Republic of China (adopted 4 December 1982) art 51.

Here, although the fact that China is a communist state is very much conspicuous and kept in check by the CCP, the voice of the people of China should be heard. Especially because the future of China is in the hands of the future generations, it is imperative that the interest of the citizens in this regard triumphs over the interest of the state so long as it has no adverse consequence on the rest of society. Therefore, the effect that an amendment is made on article 51 would be beneficial as this would result in giving the people what they want – a positive environment for gay men and sexual minorities as well as the liberation from discrimination in Chinese society.¹⁰⁹

6. Concluding Remarks

In this final section, the author will be concluding this bachelor thesis by going back to the research question and answering it. Furthermore, this section will also be providing ideas for future research so that the receptor approach can be developed further in the future, and also limitations that the author faced while writing this thesis.

6.1 Summary of findings

As this bachelor thesis benefits from a normative approach that seeks to enforce change and reforms, the conclusion will summarise what has been written in the previous subsection to answer the research question – that is – how can the receptor approach to human rights be employed in China as a means to implement the principle of equality and non-discrimination as enshrined in article 26¹¹⁰ of the International Covenant on Civil and Political Rights so that the state does not discriminate against homosexual men on the basis of their sexual orientation?

Furthermore, this thesis sought to contribute to the scholarly research of human rights law in two ways: first, the thesis showed that the eternal debate between proponents of both universalism and cultural relativism could be transcended by looking to the development of more contemporary theories such as the receptor approach which took a culturally-sensitive approach in the application of human rights; second, the thesis also contributed to the works of scholars that focused on gender and sexuality in China. This would allow not only the state to benefit from this thesis, but also future researchers, and the gay men that live in China. In this case, the former would then be able to perform state obligations in public international law according to the principle of *pacta sunt servanda* and thus, the benefit would then flow from

¹⁰⁹ UNDP (n 49) 23.

¹¹⁰ Throughout the thesis, the author will explicitly use ‘article 26 ICCPR’ to mean the same thing as ‘article 26 of the ICCPR’.

the top-down. Additionally, the conclusion of this thesis also then addresses the research gap between the development of the receptor approach and the application of the aforementioned theory in China. The research gap is that there has not been any study conducted on the application of the receptor approach in the field of sexuality and thus, this opens a gateway for future research to be conducted in specific groups within the queer community.

Moving on, the author will echo the findings of the previous section in an attempt to answer the research question. The jurisprudence of regional courts such as the ECtHR and the IACtHR has confirmed that there exists an obligation not to discriminate on the basis of sexual orientation. Especially relevant for this thesis would be the Communications of the HRC in the landmark case – *Toonen v Australia*. Having established the legal obligation, the author then identified five such receptors that could perhaps be used to answer the research question. The first receptor that has identified is on sexual education in China. Education could be considered one of the most effective receptors that have been discussed in this thesis mainly due to the fact that education has a powerful effect on the future generations, especially after reforms are made that would result in an improved curriculum which would optimistically eradicate the stereotypical notions that heteronormative society has regarding homosexual men. As a result of this, men who have sex with other men are then treated differently due to the fact that Chinese society still has not moved away from the thought of homosexuality as a disease, or that they are more susceptible to contracting HIV or STIs because they are seen as being more sexually active. Therefore, this results in discriminatory treatment towards gay men because of this orthodox view. However, as the *Toonen* case has exemplified – discriminatory behaviour on grounds of health or morals are unjustified and does not aid in the reduction or eradication of HIV cases there are throughout a country.

With this in mind, it would be imperative to change the structure or content of the already existing sexual education in China towards a more progressive direction, as adolescents are then able to understand the learn about the concept of homosexuality not as a mental illness or an individual choice, but perhaps as a combination of biological and genetic factors that leads to a deviating sexual orientation from the norm. At the same time, this is also an effective way for China to reduce the number of HIV cases that emerge annually since the introduction of safe-sex practices would be beneficial to anyone who has studied this. The benefit that reformed sexual education would bring to China would be one that would be longitudinal since the education curriculum could be reformed and further improved in the future.

The third receptor that was identified could be said to be an extension of the second receptor but in the socio-medical institution. It focused on medical and government policies that could be reformed, specifically pertaining to HIV-related cases. Regarding the latter, the case was that in 2001, laws were enacted in Chengdu that discriminated against individuals that were more prone to contract HIV which restricted their access to certain rights, for example in employment where high-risk groups were not allowed to work certain jobs, including gay men. This meant that homosexual men, as a social group that shares an innate and unchangeable characteristic, could potentially be discriminated against – especially those that do fit the mould of a stereotypical gay man: effeminate, has a limp hand, with an extravagant personality. However, the 2006 Regulations acted as a counterbalance to that law, or at least it attempted to. But it was still an interesting receptor to look into. This coupled with the UNDP report conducted in 2015 provided insight into the flaws of the 2006 Regulations and the types of reforms that would prove to be useful in this case. Here, the author took the recommendations of the UNDP and built on it further to ensure that optimal results are being obtained. The most important reform that could be seen as part of this receptor is the elevation of anti-discriminatory laws that were hardly known on the provincial level into national constitutional or criminal law which would give provinces a level of awareness to this law and an incentive to comply with these anti-discriminatory laws.

The next receptor was located in the historical events that were recorded from ancient China up until the point of western imperialism during the middle of the twentieth century. More specifically, it is the process of increased awareness of homoerotic activities prior to the exportation of the West's idea of homosexuality as being the result of a mental illness, as well as the conversion of religion to Christianity with the coming in of missionaries, which provided China with an incentive to criminalise homosexuals during Mao's Cultural Revolution in an effort to homogenise China. Before this, homoeroticism had been prevalent in Chinese society with records that state that emperors had had sexual relations with male favourites that would turn into a romantic relationship where expressions such as *duanxiu* or *longyang* came about, and it could to a certain extent justify the tolerance that Chinese society had for these types of engagement, even among activities between normal citizens. The only obligation that men had were to have descendants, and marriage was the only option that would result in having children. However, with technological and medical advancements now, gay men are now presented with options like surrogacy or IVF to have children. If this were the case, then

modern medical options can now be presented as a means for homosexual men to be recognised as an equal in the world dominated by heteronormativity.

The final two receptors that the author found were located in the Chinese Constitution, specifically on articles 33 and 51. For the former, it can only be speculated but the positioning of the article as the first fundamental right of Chinese citizens must say something the place of equality in China. With regard to this receptor, the author would recommend that the government emphasise the existence of this right and the consequences of curtailing this right and that combined with case-law and Communications ensure that grounds of discrimination should be explicitly added into the Chinese Constitution or the criminal code to ensure the existence of this clause on paper as black letter law. Regarding the latter, the author suggested reforming article 51 of the Constitution so that the interest of the people could triumph over the interest of the state so long as it does not cause detrimental effects to the safety of China as a state. To do so, the role that the media and NGOs played were underlined. As a consequence of this, the role that rhetoric and journalism plays become inflated as the two are what influences the attitudes that one has regarding homosexual men and the LGBTI community in general. Furthermore, NGOs advocating for queer rights are also a crucial vehicle if a shift in homosexuality were to be positive. Although the author argued that grassroots organisations would be more effective in implementing change due to their bottom-up hierarchical structure, nevertheless, institutionalised NGOs also help in effecting change especially through reforms in the professional and academic sector.

6.2 Limitations of the Present Thesis

In the process of researching and writing this bachelor thesis, the author did recognise two limitations. First, the author was previously in contact with a specialist on religion and ethics to discuss the role of Confucian ethics in China, but the challenge that was then posed was that due to the sensitive nature of a thesis such as this where it concerns topics such as homosexuality, the implementation of policies and human rights law, authorities of the PRC might find this to be problematic when trying to tie this in with Confucian ethics in China. Therefore, the author had decided not to pursue the possibility of Confucian ethics as a receptor for the implications this might have in the future. Second, the author also recognises the difficulty in looking for sources for this bachelor thesis as it is no surprise that other journal articles might exist but is written in Chinese which ultimately led the author to resort to news articles when researching certain aspects of China's attitudes towards homosexuality.

6.3 Recommendations for Future Research

With the progress that has been made in the field of international human rights since the drafting of the UDHR, it is especially important that scholars continue to develop and contribute to a field that deals with the fundamental rights of individuals on an international level, even with the receptor approach. Therefore, the author is of the opinion that with regards to the receptor approach, great strides can be made if there are research organisations in Asian states that specialise in the receptor approach and at the same time research these different institutions that would afford homosexuals the same legal protection that heterosexuals have, since many of these states still believe that homosexuality is a mental illness that can be cured. This way, states would be able to work with these researchers of the receptor approach when implementing reforms or passing legislation that would ensure the compatibility with international law standards, as well as also being accepted in a state where culture still plays a huge role in daily lives. Doing so, this would ensure that Asian states would perform their obligations having ratified international human rights treaties, instead of having the West impose their standards which would at times be unsuitable in certain circumstances. Perhaps an additional idea for the development of the receptor approach could be that the application of the approach in a state where an international conflict is taking place, such as the Palestine-Israel conflict. It is no surprise that Israel has been committing multiple human rights violation when it comes to the killing of Palestinians within its borders. Taking an intersectional approach would be especially interesting since many factors start coming into play, such as their sexual orientation, race or religion that would result in myriad receptors that could be looked into.

Another recommendation could be that the scope of future research could be expanded so that it becomes more inclusive. The author is aware that the target group of this thesis are homosexual men that make up a very small group of people when looking at the LGBTI community as a whole. To make this even more troubling, people who identify as intersex, transgender or transsexual may have trouble fitting into the binary of heterosexual or homosexual. For example, if an intersex individual that have both anatomical characteristics of a male and female but identifies as female and is in a relationship with another man, is she by virtue of having a penis in a homosexual relationship or heterosexual relationship with that man? This could mean that minorities within the LGBTI community could be excluded from studies only for the reason that their situation might be complex or problematic. Perhaps a solution for this might be that qualitative methods should first be used to further understand

the position of both intersex and trans individuals in this position. This could perhaps come in the form of an anthropological ethnography or interviews which would help legal researchers better understand the fluidity of gender and sexuality.

Following the above train of thought, people who have intersex conditions or are trans may already be in complex situations that perhaps need to be analysed through an intersectional lens, but the shared experiences of lesbian women might not even be comparable to that of homosexual men. Although they are both attracted to people of the same gender, the target is usually above the homosexual man's head and it can only be speculated that the targeting of gay men can only be equated with the sodomy laws that used to or still exists in many countries. As a result, the experiences of lesbians might be downplayed, and therefore, it is imperative that their experiences become underscored. The receptor approach exists to serve as a mean for states to improve the quality of human rights in their own states, and if applied correctly, could become a tool for Asian states to implement human rights without employing the argument that human rights is essentially a tool that only works in the West.

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