

How should Hong Kong courts rule on the constitutionality of gay sex?

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Introduction

As the Hong Kong (HK) court held that certain Crimes Ordinance provisions which provided for a different age of consent were unconstitutional in August 2005, a large part of the presented paper no longer seemed very relevant. However, the court did not discuss if cultural relativism and Confucianism were relevant in the judicial analysis. The following seeks to answer this question.

This paper casts doubt on a general cultural relativist argument, as, for example, advocated by Dr. Joseph Chan. If this is wrong, homosexuality may still be compatible with Confucianism, the influential school of thought in HK, because I) the latter can be “re-interpreted” to protect homosexuals, interests and II) other Confucian places take homosexual rights more seriously than HK.

Ch 1 Cultural relativism; Confucianism

Chan’s cultural relativist argument

Chan (2000a) argues there are universal basic principles of human rights (61), but they are only vaguely defined in international law. Elaborating on Michael Walzer’s thick and thin account of morality, he argues there are such thin values as the right against torture and the right of dissidents not to be suppressed (62), which are universal, in the

sense that “*everyone* would immediately recognize as immoral or worthy of condemnation” (*Id*; the author’s emphasis).

On the other hand, thick values concern, among others, how exactly human rights values are to be realized in each country and how much weight exactly is to be given to different rights claims and their competing considerations. He argues there are general differences between western and Asian cultures. These Asian values are one factor to consider in the overall balancing exercise. In this regard, he also strengthens his contention by referring to the European Court of Human Rights (ECHR) doctrine of margin of appreciation, arguing that even the state parties to Council of Europe have different cultural values. He then makes the statement that the law on homosexuality in some Asian states *may* not be real violations of human rights (2001a 71; the author’s emphasis).

He argues in another article that Confucianism, as represented by Confucius and Mencius, is compatible with human rights (1999). He contends that, unlike what some others argue to the contrary, Confucianism is not purely relation-based, and “human persons are first and foremost moral agents capable of realizing *ren*, which means, among other things, a certain ability of disposition to care for and sympathize others” (217). These “others” can be strangers to the person concerned. Thus, s/he can have rights with regard to unknown others --- vis-à-vis mere family members, friends, etc. --- in the society.

Second, while Confucianism emphasizes on virtuous relationships between family members, rights talk, he maintains, can still be a fallback apparatus. He specifically gives

the example that a wife should have legal rights if her husband no longer loves her and harms her interests.

Thirdly, he distinguishes later developments of Confucianism from the original and argues that Confucius and Mencius do not argue for an absolute obedience on behalf of the son/wife/younger brother. As such, their beliefs are less hierarchical --- and thus more egalitarian in general --- than some believe. Quoting the much quoted maxim of Confucius “we should not impose on others which we do not desire” (XII 2), Chan interprets an implied reciprocity out of Confucianism, and argues the emphasis of the son’s filial piety goes hand in hand with the parents’ love of their children. This reciprocity is again based on *ren*, which also means, “to love people” (223; see also Ma (1995)).

General Critique

Svensson (2002) neatly summarizes the several relationships between human rights (HRs) and Confucianism (C):

- i) They are incompatible.
- ii) Some HRs are more compatible with C than others.
- iii) C implicitly entails HRs.
- iv) C is congenial and can nurture HRs
- v) C can contribute to and enrich HRs discourse
- vi) C is superior to HRs and so should displace it (52)

In HK’s judicial context, the interplay between human rights and Confucianism is unfair: while International Covenant on Civil and Political Rights (ICCPR) and other Basic Law (BL) rights provisions enjoy constitutional status (BL art. 11; 39), BL does not

mention Confucianism at all. It may be included as customary law, but art. 8 of BL provides that if it is inconsistent with BL provisions, then the latter prevail. As such, in case i) and vi), the court has to disregard Confucianism. Similarly, for ii), where C is incompatible with some human rights, the latter prevail. iii) is irrelevant in the present discussion. iv) and v) imply compatibility, and Chan's argument that filial piety, a Confucian virtue, can enhance elderly rights, may be an example.

Another issue is about the proof of a particular cultural value. This is indeed very difficult. First, Confucianism has existed for more than 2000 years. Later developments may deviate much from the original Confucius thought. Chan's rejecting latter developments of Confucianism concerning absolute obedience of sons, which is also well known in modern Chinese society, illustrates this point. Secondly, Chan's argument also illustrates a peculiar situation: modern people, if at all, will normally be more influenced by more recent cultural values than by older ones. As such, there needs more discussion as to why Confucianism, instead of neo-Confucianism, is chosen to represent the virtue of filial piety.

Third, even concerning the same doctrine, there can be more than one interpretation, and modern people tend to enrich the old doctrine with present values. However, modern interpretation may contravene the old doctrine. Chan's example of the wife's right to divorce a bad husband serves as an illustration. Like many other traditional thoughts, Confucianism is sexist (see, e.g. Svensson (2000)). It is doubted that Confucius would agree with the provision of such a right, or other general women's rights. A misinterpretation may merely hijack the heading of some cultural "values" for a reasonable-sounding cultural relativist argument.

A more fundamental critique of the thick and thin account is how one classifies something as thick or thin (c.f. Freeman 1998; Angle 2002). Replying Chan's classification, chat with some HK and Mainland Chinese postgraduate students show that not *every* person readily condemns the suppression of dissidents as immoral. This, they contend, may be suitable sacrifice for better focus on economic development in the Chinese context. If Rawls' kind of thought experiment is to be operated on these students, then why is not it operated on those who insist on cultural preference without considering their genuine moral values? It is not to argue all traditional values are worthless, but cultural values should not, without any moral evaluation, count as a factor to balance away rights claims (c.f. Freeman (1995; 1998); Ghai (1995)). To the extent that cultural concerns are reflected in the democratic process, the judicial deference to the legislature already considers the rights-limiting desire of the majority. Culture and deference should not double count in a judicial review. An analogy is the role of religion in a secular state (Ghai, 1996: 54).

Chan also sought support from the margin of appreciation doctrine. However, after *Dudgeon v UK* (1981, ECHR), the doctrine only defeats homosexuality claims once (*Frette v France*, 2002) in ECHR. The case was not concerned with culture, but with scientific evidence. Homophobic law and policies, albeit supported by the majority's conventional cultural values, still lost to homosexuals' interests. As such, even if the thick and thin account applies, gays' sexual privacy and right to non-discrimination lean more toward the "thin" side.

Ch 2 Confucianism and homosexuality

If the author is wrong on the above critique of the cultural relativist argument, then it is important to explore how Confucianism may affect homosexuality claims.

Homosexuality and Chinese history in brief

Homosexual acts have existed in China for several thousand years. Not few (male) emperors had male lovers (see, e.g. Xiaomingxiong (1997)). It served as a “show-off” for the rich men to have young sexual partners of both sexes, although the young males had low social status (Xiaomingxiong (1997); Chou (2000); Sang (2003)).

As to whether it is moral, there are two similar views: after a quite comprehensive historical study, Xiaomingxiong concludes there is “implicit homophobia” --- vis-à-vis the “explicit” one under Christian values --- in Chinese history (1997: 6-8). The other thought, which may also be derived from Xiaomingxiong’s study, is that gay acts were accepted in some contexts (above), as long as the participants still got married and fulfilled the procreative duty. No Confucian doctrine is specifically against homosexual act (Chou (2000)).

Since the 13th Century, however, neo-Confucianism promoted general sexual conservatism --- “removed human desire” (c.f. Chou (2000)). Under the influence of this school and others, a criminal code prohibited sex outside marriage in Qing Dynasty, under which homosexual acts were first sanctioned (Ruskola (1994)). Nevertheless, the enforcement of this law was selective, and some local communities were willing to approve homosexual marriages (*Ibid*).

Rights-limiting claim 1: Filial Piety

Filial piety is very important in Confucian thoughts (see, e.g. Mencius: IV A 19). Moreover, many HK Chinese have heard of this: “There are three ways of being a bad

son, the most serious is to have no heir.” (Mencius: IV A 26). As such, if a causal relationship can be established between homosexuality and having no heir, then a cultural relativist court may find an additional justification for supporting the existing criminal law.

The court may consider the different age of consent as two possibilities: first, for a 17-year-old boy, if he has sex with another male, has hetero/bi- sexual relationship and procreates in the later part of his life, then he should not be regarded as unfilial in the above sense. In the second case, if the same boy remains homosexual after his first gay sex and does not procreate, then he seems unfilial.

However, if this argument is to be employed, the government has to establish there are much more case 2 than case 1. It is because people under case 1 are wrongly punished. If there is substantial number of case 1, then the unequal age is over-inclusive. It can also be argued that even if there are only a few case 1 cases, they should anyway not be punished, not to mention the life sentence for anal sex. Second, there does not seem any authoritative interpretation of “having no heir” as requiring that offspring be born biologically. Quite the contrary, “kim-tiu” adoption was accepted in Chinese tradition (Leonard, 1994: 278-280). As such, case 2 males may also adopt in order to fulfill their filial duty. Natural relationship may be preferred to adoption, but the government has to justify the use of criminal sanction to enforce the preference.

Third, in case 2, the government also has to show that gay sex for a male aged 16-21 will *lead* him not to procreate in later part of his life. Gay act may not be his first sexual experience. It is possible that he has sexual experience with females before the gay act, but he happens to remain exclusively homosexual after that. This leads to the further

argument that there is an external factor for the coincidence, namely that his gay orientation is fixed earlier than 16-21, which causes to him to prefer gay sex during his whole life. *S.L. v Austria* (ECHR, 2003) rules this is what the majority of scientific evidence points to. Counter scientific evidence has to show a racial difference between Caucasians and Chinese (and there is non-Chinese population in HK). Anyway, no lawmaker has noticeably run this specific argument in the 1990 partial decriminalization debate (LC 1990/1). If the court is to run this argument, it should not claim deference to the legislature.

Considering the larger picture, many HK heterosexual couples choose not to procreate, but there is no criminal sanction on them. Last but not least, there is no criminal sanction for being unfilial per se. While one may cite the tax benefits for children who support their old parents as a legal enforcement of filial piety (Inland Revenue Ordinance ss 26D, 30A), the use of criminal law to enforce filial piety, which is even not done by the legislature, is far from a generous interpretation of rights provisions.

Rights limiting claim 2: Sexual conservatism

As mentioned above, neo-Confucianism deviated from Confucianism by promoting general sexual conservatism. Chan's very brief argument on culture and homosexuality (Ch 1) may be based on this. On the other hand, he seems to buy Confucianism more than neo-Confucianism on the issue of absolute obedience to parents (Ch 1). The question of whether the former or the latter is adopted as representing HK cultural tradition is significant. If one adopts the neo- school, should s/he also adopt the unreasonable absolute obedience on behalf of the son of that school? Lastly, to the extent

that heterosexual group sex is unregulated in modern HK, the selective sexual conservatism against gays is unconvincing.

Confucianism and Rights claims 1--- privacy

While some contemporary scholars explore the possibility of deducing rights-compatible interpretations from Confucianism by reconstructing the latter for modern needs, this part also makes such an attempt in the homosexuality context.

There does not seem any noticeable Confucian maxim on the protection of privacy. Two quotes are however noted:

i) “Do not look unless it is in accordance with the rites; do not listen unless it is in accordance with the rites...” (Confucius XII 1)

ii) “... whoever is devoid of the heart of shame is not human...” (Mencius II A 6)

Confucius does not define what exactly are impolite to see and listen. Similarly, Mencius does not state under what circumstances will one feel shameful. However, it should be very possible to include seeing others' sexual activities as impolite and shameful. The focal point is not the actor's rights, but others who may disturb the actor's private act. As such, while Confucianism does not derive human rights, the two can be compatible concerning privacy. Chan (1999) gives two examples --- the compulsory test of urine for drugs in Singapore and on the compulsory check of identity cards in HK --- and argues privacy is given lesser value in these places. This human rights situation in Singapore, like such many others as death penalty and corporal punishment for prisoners, should not be applicable to HK and other places. Moreover, they are not about sexual privacy and so can be distinguished from the present discussion.

Lastly, to reiterate the importance of privacy, the demand of the right is not selfish, but serves as positive empowerment for one's life (Twiss, 1998). The demand of privacy in the gay context is not individualistic either, for the relevant law affect the whole gay population.

Confucianism and rights claim 2 --- Equality

As stated in Ch 1, Confucianism is sexist. It is thus not surprising that modern interpretation of Confucianism can support homophobic assumptions: Gay sex makes men, especially the penetrated, less manly, thus frustrating the patriarchal assumption of Confucianism. However, to the extent sexism is objectionable based on women's interests, which are protected under HK's constitution, Confucianism should not have much application here.

Confucianism and rights claim 3 --- personal development and human dignity

Confucianism is quite expansive on how to become a "moral Gentleman". He should advance himself by self-exploration and fulfillment (see, e.g. Mencius: IV B 14) (c.f. Chan 1999).

De Bary interprets the work of Confucius and Mencius as arguing that for individual's self development, s/he has to be true to her/his "innermost self" (1998: 24). The problem of self-denial and low self-esteem of some gay men under the general homophobic environment is well established. In order to relieve this problem, they, in general, should be allowed to be true to their sexual orientation.

Three maxims may also indicate how one should deal with gays. The first is the reciprocity illustrated by Chan: "Do not impose on others what you yourself do not

desire” (Chan, 1998: 218). When the heterosexual majority does not want their private consensual sex to be interfered, they should respect that of the gay minority.

The second concerns the Mencius maxim on the heart of compassion, which was also quoted by Chan above (1999: 218). This heart entails the natural concern for the suffering of a human person. Chan seems to agree that the application of the doctrine should not be limited to life-and-death situation, but less serious sufferings are also caught. The grave psychological suffering of and real life discrimination against gays are well established by Canadian Supreme Court and South African Constitutional Court. The maxim should be reconstructed to protect gays’ interests.

Lastly, as discussed above, Chan and Ma emphasize filial piety goes alongside with parents’ love/kindness. So why do not they respect their son for exercising his moral agency to be gay? (c.f. Twiss (1998))

The above establishes the possibility of a gay-friendly Confucian interpretation.

Contemporary China, Taiwan, etc. and homosexuality

There should be caution about the examination of mainland China’s law, especially human rights law, but it is examined to show how Confucianism is applied to homosexual acts in the origin of the school of thought. The recent criminal law reform repealed a provision which had been used to prosecute gays (art. 293, Criminal Code of People’s Republic of China 1997). There is arguably also a same age of consent (see art. 236(2) of the Code). Moreover, the Chinese Psychiatric Association removed homosexuality from the list of illness (Zheng 2001). Last but not least, the authority has recently endorsed a transsexual’s marriage (People’s Daily Online, 2004). All these point to a more egalitarian model concerning sexual orientation in China.

Taiwan is also influenced, if not much more than China, by Confucianism. It provides for the same age of consent (art. 227, Criminal Code). It is even legislating on a civil partnership bill (ILGHRC (2003)).

To conclude this part, China and Taiwan, the former being the origin of Confucianism and the latter still much upholding its values, are more gay-friendly than HK. HKG lacks an explanation as to what cultural values make HK particularly homophobic.

Conclusion

Ch 2 argues that Confucianism is not very homophobic when compared with traditional Christian thoughts. There may be tension between filial piety and gay rights, but it is only to a limited extent. The neo-Confucian claim of sexual conservatism deviates with previous thoughts, and the gross indecency provisions concerning consensual group gay sex in private are anyway unconvincingly selective.

On the other hand, a modern re-interpretation of Confucianism may strengthen the western-originated privacy and human dignity rights. To the extent that inequality dominates behind the thoughts and so must be rejected by human rights concern, any Confucian interpretation for discrimination against gay acts should also be discarded. The study of the relevant law of China and Taiwan also confirms that Confucianism is either compatible with a same age of consent, or not strong enough to outweigh the concern for the latter in those places. As such, there does not seem any serious cultural reason to counter rights claims of gays, let alone the doubt in Ch 1 on whether cultural relativism should be recognized by the court at all.

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