## Author's Response

***Man Yee Karen Lee***[†]

One of the purposes of *Equality, Dignity, and Same-Sex Marriage*, as David Merry rightly observed at the beginning of his review, is to ask 'how societies should handle the question of same-sex marriage'. What he omitted to note, however, is that such was intended to be a precursory – and secondary – enquiry the full-scale investigation of which deserves continued study, empirical as well as theoretical, straddling the disciplines of law, philosophy, and political science. The primary objective of *Equality, Dignity, and Same-Sex Marriage* is less ambitious, as its very title hints, despite its premise being rested on a vast and sprawling theoretical enterprise: deliberative democracy. That being the case, I believe that the book has largely achieved what it was set out to do, as I will explain.

As the Introduction reveals, my fundamental premise concerning contemporary rights controversies, for which same-sex marriage is one, derives from Jeremy Waldron's on democratic deliberation amid vigorous civic disagreements: 'If the role of a theory of justice is to enable all the members of a society to justify to one another their shared institutions and the basic arrangements for the distribution of benefits and burdens in their society, then maybe we can find the first principles of such a theory in the conditions and presuppositions of the activity of justification itself.'[1] Waldron believes that the real importance of theories of rights lies in the basis and process of 'justification' rather than 'in pious lip-service to slogans about human dignity or autonomy'. Hence, to take rights seriously in the face of intense disagreement on rights, he favours democratic deliberation over the judicial process on the basis that all people are, after all, equal rights-bearers.

While subscribing to Waldron's treatise in principle, I believe that, as far as same-sex marriage is concerned, a close analysis of the right being claimed remains an important first step to putting the justification process into context, particularly because the accompanying discourse is predominantly built on the contentious, yet laudable and universally revered ideas of equality and dignity. Hence, 'knowing what these two concepts are

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† Hong Kong Shue Yan University

1 Man Yee Karen Lee, *Equality, Dignity, and Same-Sex Marriage: A Rights Disagreement in Democratic Societies* (2010) 2-3 [Lee], quoting Jeremy Waldron (ed), *Theories of Rights* (1984) 20.

held out to mean is essential so that we can identify the bone of contention and what exactly are being disagreed upon. Waldron's visionary exercise will be the next step after one has thoroughly explored – and critically assessed – the extent of meanings and applications of equality and dignity, in light of the dynamics they created in rights jurisprudence.'[2] The ensuing chapters seek to do essentially that.

*Equality, Dignity, and Same-Sex Marriage* is therefore an attempt to deconstruct the concepts of equality and dignity in light of discourse on same-sex marriage being heavily reliant on the two concepts – and in most cases taken for granted. As the book argues, drawing from prominent jurisprudential debates, judicial opinions and decisions, not only the meanings and implications of equality and dignity remain contested even among their respective advocates, but also that courts which endorsed them as constitutional grounds for the right to same-sex marriage failed to observe the nuances – and sometimes, inherent tensions – underlying the notions as they triumphed from one rights claim to another, from justifying decriminalization of sodomy, anti-discrimination legislation, to civil union and same-sex marriage.[3] This observation may not strike as anything groundbreaking, but the preceding qualitative process unabashedly represents a thorough and critical study of two influential ideas of our time, their place in one of the most divisive issues in contemporary national politics, and the philosophical conundrums they created in rights jurisprudence.

One may say, as did Merry, that it is not surprising at all that people, not least judges and philosophers, have no consensus on rights. Indeed, ever since its resurgence in the lexicon of social and academic debates alongside the birth of the Universal Declaration of Human Rights in 1948, criticisms have ranged from a total rejection of rights, to various scepticisms based on, for example, their propensity to atomise individuals or denigrate the rights regime as a whole.[4] Nevertheless, for all their cultural and ideological differences, nations have assented to one international rights treaty after another, acknowledging that this is a compromise that they must make in order to make the world a better place for all. At the same time, the corpus of rights continued to expand and pervade virtually every aspect of domestic life in liberal democracies most notably the United States. From the more high-profile issues of abortion, euthanasia, religious freedom, same-sex marriage, to the less – but equally controversial – of gun control,

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2 Ibid Lee, 3.

3 Ibid 8-10.

4 For some of the representative literature on the subject, see Alasdair MacIntyre, *After Virtue* (1981); Michael Sandel, *Liberalism and the Limits of Justice* (1982); and Mary Ann Glendon, *Rights Talk* (1991).

immigration and welfare entitlements, inevitably rights talks and their consequences continue to affect the lives of numerous ordinary people, as they have long been the staple of deliberations of their elected representatives in parliament and non-elected judges in court.

To the interest of common law lawyers, in particular, rights litigations have become institutional in places where citizens are allowed to challenge laws deemed incompatible with their rights by way of judicial review. Arguably, legislation duly passed by people's representatives is prone to be overturned by a privileged class of judicial appointees.[5] Such has largely characterized the political and judicial landscapes of those common law jurisdictions operating under a bill of rights including Canada, South Africa, and the United States. Among a plethora of rights disputes that judges have been asked to adjudicate in recent years, same-sex marriage apparently epitomised this, sometimes, antagonizing state of affairs. While Canadian and South African courts have settled the dust by upholding the right to same-sex marriage on grounds of equality, their respective dignity-based reasoning has drawn rigorous criticisms from constitutional scholars as erratic and muddling the concept of discrimination altogether.[6] The United States present a different but more troubling picture. While the same-sex marriage ban was lifted in a few states either by judicial order or legislation, citizen-initiated referenda or lawsuits aimed at overturning such advances continue to keep the controversies, and antagonism, alive.[7]

As the book observes, such developments cannot be blamed on judges. As jurists, they have not taken on the job of writing philosophical treatises particularly on ideas as profound as equality and dignity.[8] Yet the extent to which the two concepts are relied on in justifying the constitutional right to same-sex marriage demands a certain level of judicial coherence in the fundamental understanding of equality and dignity.[9] On the other hand, the

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5 At the same time, critics of representative democracy, understood as majority rule, doubt whether counting heads in parliament truly represents the spirit of democracy. See J. M. Balkin, 'The Constitution of Status' (1997) 106 *Yale Law Journal* 2313; see also Lee, above n 1, 243-246.

6 Ibid Lee, ch 4.

7 The latest example is New York. After the state legislature voted to approve same-sex marriages on 24 June 2011, opponents immediately sued against the law and asked for deliberation over the matter. See 'Gay marriage opponents sue to overturn New York law', *The Globe and Mail*, 25 July 2011. Available at <http://www.theglobeandmail.com/news/world/americas/gay-marriage-opponents-sue-to-overturn-new-york-law/article2108768/> (visited on 11 Aug 2011).

8 See above n 1, 211.

9 Ibid 71.

dearth of moral reasoning in most judicial opinions continues to fuel the perennial debate over the tenability of judicial review especially on issues that command moral as well as legal significance. As Waldron, a staunch opponent of judicial review, argues, as constitutional gatekeeper the court is obliged to maintain the legitimacy of its decisions; hence its strict adherence to its role as interpreter of constitutional texts, legislation and precedents.[10] At the same time, judicial independence underlying most democratic systems rightly discourages judges from accounting for any moral or political disagreements surrounding their decisions.[11]

That is why Ronald Dworkin, while praising judicial review for its role in stimulating public debates of principle, once conceded that it is not always right. And it can even be embarrassing to see an appointed court decide some issues of political morality in a democracy like America's – another complex matter.[12] Hence, Dworkin does not rally behind the judicial process as the sole agent of social change. Instead, he thinks that unless Americans were willing to come to terms with their entirely 'unargumentative' politics, legal reasoning however sound would continue to be outdone by the acrimonious 'culture war' plaguing their polarised society today.[13] Hence his proposal for a partnership view of democracy on the basis that each person is 'a full partner in a collective political enterprise' and should be counted.[14] In tune with Waldron's, this view holds that society must seek common ground amid a seemingly unbridgeable gulf of disagreements in order to make 'genuine argument among people of mutual respect possible'.[15]

How deep is the gulf between the opposing camps on same-sex marriage? Readers of *Equality, Dignity, and Same-Sex Marriage* can judge it for themselves by referring to Chapter One, which details the major arguments for and against legalization of same-sex unions following a world survey of its history and legal developments. It is beyond the scope and intention of the book, however, to evaluate those arguments including the different interpretations of marriage. Such would entail a thorough inter-disciplinary study comprising law, philosophy, sociology, and anthropology, just to name a few. More significantly, the apparent

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10 Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346, 1383-1384.

11 Amy Gutmann & Dennis Thompson, *Democracy and Disagreement* (1996) 46-47.

12 Ronald Dworkin, *A Matter of Principle* (1985) 70.

13 Ronald Dworkin, *Is Democracy Possible in Here? Principles for A New Political Debate* (2006) 5-6.

14 Ibid 131-138; see also Lee, above n 1, 228-232.

15 Ibid Dworkin, 5.

inconclusiveness actually helps make the case that rights disagreements rarely yield absolute answers. As Waldron emphatically put it:

> We *do* disagree about rights, and it is understandable that we do. We should neither fear nor be ashamed of such disagreement, nor hush and hustle it away from the forums in which important decisions of principle are made in our society. We should welcome it. Such disagreement is a sign – the best possible sign in modern circumstances – that people *take rights seriously*.[16]

It means seeing disagreement as a contest of visions between people of good faith instead of a battle between sheer enemies. It means acknowledging that people may rightly feel indignant in defence of the views they take to be correct – no matter which side they are on. As Waldron argues, the issues that rights implicate are too complex to warrant someone or some group to profess that they have the truth of rights.[17] Yet it is not asking people to keep coy in disagreement. Rather, it is the time that we keep faith with our convictions and respond to the others with respect and reciprocity, on the fundamental ground that everyone is an equal rights-bearer.

That is the basis of deliberative democracy – an important theme that demands further extrapolations. Can it make any difference on the same-sex marriage dispute? The answer will probably follow after society found the basis and process of justification of rights, a point highlighted in the Introduction and raised throughout the book. *Equality, Dignity, and Same-Sex Marriage* helps lay the groundwork by critiquing the rights discourse at the centre of people's disagreement. Next is for society to explore the right forum for deliberating over their competing visions of rights.

Yet deliberative democracy is not a panacea. Just as Waldron believes that even after public deliberation, 'people will continue to disagree in good faith about the common good, and about the issues of policy, principle, justice, and right which we expect a legislature to deliberate upon.'[18] But giving people – apart from the powers that be – a voice, may still be a good thing for democracy.

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16 Jeremy Waldron, *Law and Disagreement* (1999) 311; see also Lee, above n 1, 247.

17 Ibid Waldron 12; ibid Lee 2.

18 Ibid Waldron 93; ibid Lee 246.

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