

Research on Legislation of Homosexuality in China

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Abstract—Homosexual culture has existed for a long time in human history, which can be traced back to the ancient Babylonians and the ancient Greeks, and was respected by people at that time. Since the 4th century, homosexuality was considered a sin with the establishment of Christianity. It wasn't until the 18th century that people really began to study homosexuality. The large-scale homosexual liberation movement in the 1960s has led some governments to carry out relevant legislation for the homosexuality. In China, however, the homosexuality law is almost a blank. This paper will analyze the history of the development of homosexual law worldwide, and discuss the possibility of legalization on homosexuality in China in the future by combining and borrowing the existing laws on homosexuality.

Keywords: *homosexuality, legalization, homosexual partnership*

I. INTRODUCTION

Homosexuality is a unique cultural behavior and now it is a subculture phenomenon outside the mainstream culture [1]. Widely because of its long history, however, involved in population, deserves enough attention: the earliest homosexuality can be traced back to ancient Babylon and ancient Greece. The ancient Greeks also believed that homosexuality was associated with some good qualities such as military morality, reason, aesthetics and morality, and so on, so they especially respected [2]. In ancient China, there was also an open homosexual phenomenon. The first recorded one in the official history was Lord Longyang, the male favorite of King Anxi of Wei during the warring states period. And there are some debates about who is the first using the word "homosexuality". Some says it is created by Hungarian newspaper writer Karl-Maria Kertbeny in 1869 [3], others agree that It was created in 1869 by a German doctor Benkert [4]. Currently, the term is defined as "the sexual orientation and behavior of same-sex couples." by the international academic community.

In United States, homosexuality did not enter the public view until the Stonewall Riots in New York City on May 27, 1969, a milestone in the history of Gay rights. The Gay Liberation Front was born less than a month after the rebellion [5]. The first case of same sex marriage rights protection in the United States was the Baker v. Nelson's case in 1971. Although the they were rejected, it aroused strong social attention to the homosexual groups. Finally, in 2004, Massachusetts became the first state to legalize the same-sex marriage. By contrast, the first case in China protecting homosexuality's rights is Sun Wenlin and Hu Mingliang's

case, which was rejected. In China's legal system, there is no law specifically for homosexuals. In addition to the basic right of marriage, how to protect the gay community from discrimination, how to deal with the case of organizing or sheltering homosexuality sex crimes by using their needs and so on should be the points that the legislators should consider carefully. At present, the gay rights protection and legislative activities in China are in the embryonic stage. in this article, we will discuss the possible future development trend of Chinese homosexuality by combining the current situation of Chinese society and the development process of western homosexual activities.

II. LITERATURE REVIEW

A. Research on the Number of Homosexuals in China

Dr Li Yinhe has estimated that there are between 39m and 52m gay people in China, based on authoritative surveys at home and abroad [6]. In December 2004, a survey conducted by China's health authorities showed that sexually active gay men in China accounted for about 2 to 4 percent of the male population, so it is estimated that there are about 5 to 10 million gay men in China. In the same year, professor Zhang Beichuan estimated the number of lesbians at around 10 million. In 2014, according to the Chinese academy of sciences, the average number of homosexuals in China was around 70 million [7]. These data show that there is indeed a certain proportion of homosexuals in Chinese society. As the time goes on, this proportion has shown an upward trend [2]. They also did not include homosexuality who concealed their true orientation.

B. Research on Homosexuality in China

From 1986 to 2006, a total of 178 papers on the study of homosexuality were published in various academic journals in China, covering a wide range of disciplines. The problems studied in these papers mainly focus on: (1) Causes of homosexuality. (2) Research on the attitude of the general public towards homosexuality. (3) Research on the treatment of homosexuality (4) The rate of HIV/AIDS in homosexual groups. Only nine of these papers are related to gay rights, accounting for about 5% of the total literature [8].

Since the 1990s, Chinese legal researchers have been paying more and more attention to the issue of homosexuality. By the end of 2015, there were 395 legal papers on "homosexuality" or "same-sex marriage" in the full-text

database of Chinese journals Net.30 papers discussing homosexuality and same-sex marriage from the perspective of constitutional law. In the judicial case database of Peking University Law, the search scope is based on the full text. By the end of 2015, there were 279 cases of homosexuality and judgment documents. Among them, there are 131 criminal lawsuits, 143 civil lawsuits, 3 administrative lawsuits and 2 intellectual property lawsuits. Related cases include: threats to reveal homosexual identity, extortion victim financial, intentional injury cases, the victims to gay sex as bait, premeditated crime for the victim, use of gays, organization, shelter or introduce a gay sex crimes, due to be called a gay's reputation infringement liability disputes, gay people against over the ownership of property confirmed cases, couples filed by one party is gay divorce fault compensation cases, and discrimination against gays and lesbians trademark administrative disputes, etc [3].

C. Research on Public Attitudes toward Homosexuality

As far as the published literature is concerned, the measurement and research objects of the public's attitude towards homosexuals are mainly gathered in specific heterosexual groups, such as middle school students and college students. In 2013, Li Yinhe and Zheng Hongxia conducted a survey on public attitudes towards homosexuality in mainland China, using telephone survey method and random selection of phone Numbers in cities across the country according to the principle of random sampling. The sample size was 400 people. The conclusion is: on the attitude toward homosexuality, acceptance is not too high. The number of people who fully accept and strongly disagree is relatively small, with most in the middle. The general rights of homosexuals are generally accepted by most people. However, the proportion of people who agree with the further requirements on guaranteeing the basic rights of homosexuals is relatively low. For example, the support for same-sex marriage legislation is less than 30%. An analysis of the social factors that influence public attitudes shows that the most influential factors are age, occupation and marital status [9].

As for the reasons why same-sex marriage is opposed, according to the survey results of professor Wang Liping, the main reasons why same-sex marriage is opposed are as follows: marriage is an establishment system between men and women; The purpose of marriage is to procreate; Families with same-sex couples are unfit to raise children; Gay marriage is immoral; Marriage is to ensure the survival of the human race; Same-sex marriage threatens the institution of marriage; Marriage is a traditional heterosexual institution; Same-sex marriage has not been tested. Some scholars point out that the real reason people oppose same-sex marriage is that homosexuality is disgusting. Same-sex marriage is against almost all religious doctrine; Having sex with another man is a betrayal of male dignity [10].

III. MATERIAL AND METHOD

The legislative situations in the world on gay people are different. Canada is one of the most gay-friendly countries in the world, and the first to allow gay couples to marry without either citizenship or residency requirements. By the end of May 2005, eight of Canada's ten provinces and one of three zones

had legalized same-sex marriage through local court rulings. The culmination of 30 years of legal challenges was Bill C-38, introduced and passed in a fractious minority Parliament in 2005 [11]. This Preamble gives way to the central provision, section 2, the new definition of civil marriage: the lawful union of two persons to the exclusion of all others. In 1995, the Supreme Court of Canada ruled that sexual orientation should be protected under the charter; In 1996, the federal government passed the C33 act, which explicitly included sexual orientation in the protection scope of Canadian human rights law. In 1999, the Supreme Court of Canada ruled that under the charter, the law must relax the definition of a spouse, arguing that the term spouse should not be limited to an opposite-sex counterpart in a marriage or cohabiting relationship, but should also include a "same-sex partner" who should enjoy the same rights as an opposite-sex partner. In 2000, the federal liberal government led the passage of the C23 act, which gave equal rights to same-sex and heterosexual cohabitants. Although the act still maintained the traditional definition of marriage, it included "same-sex partnership" in "cohabiting relationships". In 2003, the court of appeal of Ontario, Canada, ruled that the definition of marriage that recognizes only heterosexual unions violates the charter provisions of the federal constitution. The same month, Canada's justice department sent the same-sex marriage bill to Canada's Supreme Court for legislative advice. In 2004, the Supreme Court ruled that same-sex marriage was constitutional and that the definition of marriage must be changed. The ruling is a big step forward in Canada's legalization of same-sex marriage and brings the same-sex marriage bill to the final stage of the legislative process: a vote by parliament that would establish same-sex marriage legislation in Canadian federal law. Congress formally voted the bill through in 2005 [12].

In the United States, before the 1990s, almost all state courts guarded traditional heterosexual marriage and did not recognize the right to same-sex marriage. In 1993, the Supreme Court of Hawaii ruled in *Baker v. Nelson's* case that the law limiting marriage to heterosexual couples violated the Equal Protection clause of the Hawaiian constitution. But in 1996, the Federal Congress passed the Marriage Protection Act in the name of protecting traditional marriages. According to the provision, the federal government did not require that legal same-sex marriage in Hawaii be valid in states that prohibit it. From the perspective of traditional marriage, the Marriage Defense Law seems to be no exception. However, as time goes by, the society becomes more and more tolerant of homosexuality, and the rights of homosexuals are paid more and more attention. The Marriage Protection Act deprived individuals of equal freedom protected by the Fifth Amendment of the Constitution, thus violating the Constitution. In addition, in the Windsor case, the majority used the "equal protection clause" to give the Marriage Protection Act a final blow, pointing out that Congress intervened in state power, regulated the same-sex marriage as "second-class marriage", making same-sex marriage in an unequal status. Although the Windsor ruling opened the door to same-sex marriage, two-thirds of states in the United States still do not allow same-sex couples to marry [13].

In Europe, Dr. Michael Munich, a law professor at the university of Munich in Germany, has summarized the European legislation on homosexual relations into four basic models [1,14]: (1) Sporadic regulatory model. This model of law takes into account various social and economic realities, thus partially alleviating the predicament caused by previous laws equating long-term partnerships with strangers. This piecemeal legislative model is indeed the first step across the age-old "marriage or no marriage" dichotomy. But this mode has no independent legal status in law. (2) Legislative model for family partners. The law applies the marriage system to same-sex couples as "Marriage is a contractual relationship between two persons of the opposite sex or of the same sex." (3) Legislative model for registered partners. Compared with other legislative models, this model is a unique legal status specially created for cohabitants, rather than just giving some rights and obligations to cohabitants. And the model also asks the public to recognize their relationship as a highly respected institution, just as it does the institution of marriage. (4) Legislative model of same-sex marriage. The law applies the institution of marriage to same-sex couples. However, there are still existing problems in this model [14].

In China, it is estimated that there are 39 million to 52 million homosexual groups in China, accounting for about 4% of the total population. The law on homosexuality in China's legal system is still blank, and the legitimate rights and interests of homosexuals in all aspects are difficult to be guaranteed. Whether the Chinese legislature should start to improve relevant laws and how to protect the legitimate rights and interests of homosexual groups deserve the attention from all sectors of society.

IV. DISCUSSION

The analysis shows that it is a very long process for any country in the world to include some contents of same-sex marriage into the marriage law. By 2019, same-sex marriage and civil unions have been legalized in five continents around the world, and 31 countries have legalized same-sex marriage globally [15]. In 1989, Denmark became the first country in the world to legalize civil unions between gays and lesbians [7]. In comparison, China has a large gay population and the public is paying more and more attention to homosexuality. Therefore, it is worth doing to improve laws related to homosexuality. As far as the same-sex marriage law is concerned, Chinese academic circles have great conflicts of opinions [16]. Professor Li Yinhe of the Chinese Academy of Sciences believes that homosexuals, as legitimate citizens of China, have the requirements and needs for marriage. The implementation of the same-sex marriage system in China is not only harmless, but also conducive to social stability and the improvement of the legal system. It is not only beneficial to the national interests, but also to the interests of the people and minorities [17]. Professor Fang Qin believes that it is impossible to legalize same-sex marriage if we want to amend the law in a short time. Although the transplantation of law is necessary, we should also pay attention to the "localization" of law. We should not be satisfied with studying China only from the ethical framework, concepts, categories and propositions of foreign countries, because if we fail to do so, we will only

incorporate China's experience into the conceptual system of the West. We should pay attention to summarizing China's experience and earnestly and strictly contributing China's legal knowledge on the basis of studying China's reality [18].

Some Chinese scholars who support the legalization of homosexual marriage in China also put forward some legislative suggestions [19]. In order to coordinate the interests of the mainstream society and homosexuals, the legislative model of registered partners is the most suitable one for the current situation of our country. Using this model, we should first create a new legal identity, i.e. registered partner, for the partnership formed by same-sex partners in legislative technology. The term "partner" refers to the same-sex couples who aim to live together forever. It is not difficult to see that as a partner, we need to have a common sense of living together, and that sense runs through the whole relationship. "Registered Partner" refers to a special civil legal relationship between the same sex couples, who aims at permanent common life and combines the rights and obligations of the partners voluntarily, and takes registration as an effective requirement. Partnership law creates a legal status similar to marriage. Like marriage, the law not only stipulates several legal rights, privileges and responsibilities, but also leaves room for the contractual agreement of the parties.

It should be noted that partnership as an unattainable alternative to marriage only applies to same-sex couples, not to heterosexual couples. Because if the opposite sex takes their relationship seriously, they can get married, and there is no need to give them a chance to form a "secondary marriage", because if so, it may put the traditional marriage system at risk. It should also be noted that as a special legal relationship, its content has its own particularity, which is mainly manifested in adoption and parental rights.

As far as adoption is concerned, legislation should be enacted to prohibit homosexuals from adopting children in partnership. There are two reasons: first, the cognitive and discriminative ability of minor children is not strong, if the law allows such adoption, it will make their understanding of the opposite sex more ambiguous, and their own possibility of becoming homosexual will be greater. Secondly, from the spirit and value of law, the law cannot put people who have no ability to think, refuse and choose into the unpredictable future. At present, only a few countries, such as the Netherlands, Denmark, Iceland, the United Kingdom and Belgium, recognize that homosexuals adopt children in a common name, which is explicitly prohibited in most other countries [20]. In addition, registered partners are different from marriage in relation to parental rights. Foreign legislation mainly prohibits the mother of the child or the partner of the father from enjoying parental rights to the child. Considering the reality of our country, the same-sex partner of the mother or father of a minor child does not have the right to raise and guard the child.

However, the conclusion, legal effect and dissolution of partnership can be referred to the relevant provisions of the current marriage law. In this way, the law can leave most of the issues to the parties to the partnership through the free agreement of the contract. In addition, the provision of a legal system for the cohabitation and other specific issues can be

accomplished through sporadic legislation, thus constituting a two-tier regulatory system.

V. SUGGESTIONS AND CONCLUSIONS

From the legislative point of view, in order to improve the legal system of homosexuality in China, Ma Ping put forward three perfecting mechanisms in his Feasibility Study of Homosexuality Legislation [8]. Human beings are born equal. China should implement homosexual human rights legislation as soon as possible, and adopt laws to clarify that homosexuals enjoy human rights without discrimination from others. Homosexuals have the same rights as heterosexuals. No individual, organization or unit may discriminate against homosexuals or insult homosexuals in any way. On privacy issues such as homosexuals' sexual orientation, relevant privacy protection laws should be established to ensure that their information is not disclosed. Physical or psychological attacks and insults against homosexuals are prohibited; if they occur, they cannot be protected because of their homosexual status. Legislation should be enacted to protect the rights of homosexuals in employment, education and residence, eliminate discrimination against homosexuals, and not deprive them of their legitimate rights because they are homosexual.

Homosexuality criminal legislation refers to legislation on some criminal issues related to homosexuality, which should be distinguished from homosexuality criminalization, because homosexuality criminalization mainly refers to homosexuality as a crime. Criminal legislation should first determine the criminal responsibility of homosexuals, because homosexuality does not belong to mental illness, so it should have the same criminal responsibility as other people. In China's criminal law, there are no provisions on homosexual sexual assault, but in judicial practice, there are many homosexual rapes, and the victims of homosexual sexual assault are more physically and mentally harmful than the opposite sex. The crime of rape stipulated in our criminal law is "against women's will, forcibly having sexual relations with women by violence or other means", which means that the victim of rape at present can only be a woman, if a man commits sexual assault on another man by violent means, it cannot constitute the crime of rape. In fact, men may also be the victims of rape. Women cannot be considered as the only victims. Sexual abuse between homosexuals should not be different from sexual abuse between heterosexuals. There is almost no criminal law protection for adult males after being subjected to indecent, rape and other violations in China. It is very necessary to formulate homosexual criminal law norms to stipulate homosexual sexual violations. In China, although homosexuality has been recognized, the public is not ready to recognize homosexual marriage. In order to ensure the happiness and stability of marriage and family, we can learn from the Western system of homosexual partnership, which

gives certain rights and obligations to homosexual partners, which is different from the marriage system.

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