

Same-sex marriage in China law

Luong Khien Pham^{1 2 3}

Abstracts: In recent years, with the promotion of human rights and the progress of China's society, many homosexuals choose to enter the social activities bravely and propose their requests for civil legal rights. In China, the basic rights of homosexuals, especially legal rights including marriage right which is the most important for them. The legislation on same-sex marriage is still blank and the rights of homosexuals can't be guaranteed. The author believes that China, as the other countries, should face up to the issue of same-sex marriage, respecting and protecting the rights and interests of homosexuals. The paper will focus on introducing The debate over legalizing same-sex marriage in Chinese, including agree with the legalization of same-sex marriage and opposition to the legalization of same-sex marriage. The paper also expounds The need to legalize same-sex marriage in China: social problems caused by the lack of same-sex marriage legislation and legal problems caused by the lack of same-sex marriage legislation. Finally, some idea about Feasibility of same-sex marriage legislation in China. including issues such as Homosexuality is not the disease, The legalization of same-sex marriage in China is not restricted by religion, The tolerant attitude of the general public, Legalization of same-sex marriage is a need to protect human rights, Same-sex marriage has a precedent in China and current Law, especially civil law in Chinese makes same-sex marriage feasible

Key words: homosexuals; same-sex marriage, same-sex marriage in China, China law

¹ School of Law, Vietnam National University, Hanoi, Vietnam

² PhD student, School of Law, Central South University, Hunan, China

³ Email address: khienvnu@gmail.com

1. The debate over legalizing same-sex marriage in Chinese

With the development of the times and the progress of society, vigorous and vigorous movements for the legalization of same-sex marriage have been launched all over the world. The homosexual community's desire for marriage, the desire for the recognition of their same-sex relationship in the law, countries around the world have discussed whether same-sex marriage can be legalized and whether same-sex relationships can be protected and adjusted by law. Different sectors of society have different attitudes towards the legalization of same-sex marriage, whether homosexual marriages can be married; whether same-sex marriages are feasible; how to protect the legal rights of homosexual groups, etc. A series of issues have become hot issues in many fields in recent years. The legality of same-sex marriage is not only related to the vital interests of the gay community, but also related to the development and progress of China's legal system. Regarding this issue, the Chinese legal academia has the following views:

1.1. Agree with the legalization of same-sex marriage

Professor Li Yinhe submitted a draft of legislation on same-sex marriage to the National People's Congress on more than one occasion, suggesting the legalization of same-sex marriage in China, but due to the small number of signature representatives, his draft proposal was ultimately not qualified for deliberation⁴. Professor Li Yinhe's point of view is very representative: First, homosexual marriage demands do not conflict with legal norms. Homosexuals also have Chinese nationality and are protected by Chinese law. They should have the right to enter into marriage. Second, homosexuality is a minority group and a disadvantaged group in China. Many countries in the world have legislation to protect this group, respecting and protecting the human rights of homosexual groups. If China can legalize same-sex marriage, it is bound to show the world that China values and protect human rights and enhance China's international image. Third, the number of people living with AIDS among homosexual groups, especially gay men, is increasing because there is no legal regulation of their same-sex relationships. The establishment and dissolution of same-sex partnerships are more arbitrary, increasing the risk of AIDS transmission. Fourth, the legal protection of the homosexual group, a disadvantaged minority group, will help maintain social stability, reduce the public's discrimination and prejudice against the homosexual group, help the harmony and stability of the Chinese society, and increase the society of this group. A sense of identity and belonging. Fifth, the early legalization of same-sex marriage in China can avoid a large number of gay demonstrations like Western countries.

Lawyer Lu Jing believes that freedom of marriage has different meanings in different periods. In slave society, freedom of marriage is hierarchical freedom of marriage. Nobles and common people are not allowed to marry. At present, freedom of marriage is the subject of heterosexual marriage freely choosing partners. The freedom of marriage in the future is the freedom of marriage between people. The conclusion of marriage is not only between opposite sexes, but same-sex subjects can also enter into marriage freedom.

Professor Wu Changzhen, an expert on marriage law, also put forward his own point of view. The purpose of marriage is not only for the reproduction of the next generation, but also for the happiness of each other. Based on this, China should revise the "Marriage Law" to make the "Marriage Law" more humane. Rather than exclude homosexuality from the scope of the marriage law. The conditions for prohibiting marriage in the Marriage Law are all formulated for the sake of

⁴ 李银河, '2015 李银河再提同性婚姻提案 (附提案全文)' <<https://site.douban.com/bjlgbtcenter/widget/notes/18221245/note/486796605>> 2021 年 11 月 30 日 (Li Yinhe, 2015 Li Yinhe again proposes same-sex marriage proposal (with full text of the proposal) <<https://site.douban.com/bjlgbtcenter/widget/notes/18221245/note/486796605>> accessed November 30, 2021.

eugenics. The inability of both parties in a same-sex marriage to have children will not violate the purpose of prohibiting marriage by the Marriage Law. The marriage of same-sex couples will not cause excessive impact and harm to the society, and will not affect the reproduction of offspring.

In addition, Professor Xu Guodong also adopted an agreeable attitude towards same-sex marriage in the draft "Green Civil Code" compiled by him. In the Civil Code, Professor Xu Guodong no longer defines marriage as a union of the opposite sex but as a union of the opposite sex. Combine with the same sex, and believe that in today's era of rapid increase in social population pressure, such legislation is conducive to alleviating population pressure.

Through the analysis of the above viewpoints, the author believes that scholars who agree to the legalization of same-sex marriage mainly discuss from the following points:

First, it discusses the legality of same-sex marriage from the perspective of protecting the interests of minorities. At present, in order to protect minorities and special groups, Chinese laws have promulgated a series of laws such as the Law on the Protection of the Rights and Interests of the Disabled and the Law on the Protection of the Rights and Interests of Women and Children. In China, although homosexuals are not common, there are definitely many. Homosexuals should also be classified as a minority group. Since the state can promulgate the "Law on the Protection of the Rights and Interests of the Disabled" in order to protect the minority group of persons with disabilities, "Why can't gay marriage be legalized?"

Secondly, the protection of homosexual health discusses the legalization of same-sex marriage. Scholars who support the legalization of marriage believe that the higher risk of AIDS and other diseases among homosexual groups is mainly due to the fact that the relationship between same-sex couples is not bound by marriage, which leads to a large proportion of casual friends, which greatly increases the risk of disease transmission. If same-sex marriage is legalized, same-sex couples will be bound by the law, which can obviously control the spread of AIDS and other diseases.

Third, it demonstrates the legalization of same-sex marriage by discussing the autonomy of marriage. The so-called marriage autonomy is not specific personality rights such as the right to life, health, reputation, but a kind of personality interest, which is based on the willingness of both parties to the marriage to live together, and the personality interest of the marriage relationship is not subject to marriage autonomy. No one interferes, no one can force others to enter into marriage with oneself. The content of personality interests includes equality of personality, so the marriage autonomy of Chinese citizens should also be equal. The personality interests of homosexuals are not diminished because they are homosexuals. Therefore, homosexuals as Chinese citizens also enjoy the autonomy of marriage. The specific discussion is that homosexuals have the autonomy to enter into marriage and also have the autonomy to dissolve marriages. Homosexuality will not affect the survival of marriage autonomy in this group. Based on the above-mentioned lawyer Lu Jing's point of view, we can see that the freedom of homosexual marriage will not harm the national and social interests. The state should guarantee homosexual marriage autonomy by recognizing same-sex marriage.

Finally, it discusses the feasibility of legalizing same-sex marriage by reducing population pressure. The author believes that the legalization of same-sex marriage can reduce a large number of same-husband or same-wife⁵ families. Most homosexuals in China face the dual pressure from society and family, and they have to enter into heterosexual marriages and have offspring. This will

⁵ Same-wife, the wife of gay men. Around gay men, there is a more vulnerable and secretive group, that is, the same wives. They live on the fringe, suppressed by traditional culture, bear the burden of humiliation for their children, and dare not complain loudly. They are large in number and of different ages. The same wife not only cannot get sexual satisfaction, but also suffers from indifference, indifference and domestic violence, as well as the threat of sexually transmitted diseases and AIDS. The definition of the same-husband is the same as above.

not only affect the threat of illness and psychological distress from the other side of the marriage to the other party, but also The burden on the population is increased in the house. There are 16 million same-wife or same-husband families in China, and most of these families have children. Scholars believe that the legalization of same-sex marriage can greatly reduce the existence of such abnormal families and reduce the pressure on the Chinese population.

1.2. Opposition to the legalization of same-sex marriage

Homosexuality was not uncommon in ancient China. In some Chinese song dynasties, there were even gay emperors, such as the Hanai Emperor of the Han Dynasty and Ming Wuzong of the Ming Dynasty. These emperors did not shy away from being gay, and even regarded homosexual behavior as themselves. Unlike other emperor symbols. Therefore, it can be seen that the attitudes towards homosexuality in boosting morale between China and Western countries are completely different⁶. However, some scholars of China have put forward their views against same-sex marriage.

Professor Yang Dawen believes: "For thousands of years, the marriage system has been set up for the union of a man and a woman. If the same sex can also be married, marriage is not the current marriage." "I agree to tolerate homosexuality in the law. But why do you want same-sex marriage?"⁷

Professor Long Yifei believes that "The Marriage Law will not set separate new rules for same-sex marriages, because the protection of the property rights or personal rights of members of the society is regulated in different laws. For example, two people of the same sex help each other together. Support, the inheritance law stipulates that people other than the statutory heir have performed more duty to care for the decedent and can appropriately divide a part of the property, which solves the problem of inheritance. It involves some personal rights and property that are accepted by the public. The protection of rights is stipulated in other laws."⁸

Scholars who oppose the legalization of same-sex marriage mainly based on the following two reasons. First, deny same-sex marriage from the traditional way of marriage. They believe that the marriage system that has been inherited for thousands of years is a monogamous heterosexual marriage, and this way of forming a couple is deeply ingrained. The author believes that the traditional composition of marriage is not a reason for the law to ignore the demands of homosexual groups. The number of homosexual groups is large, and their demands for marriage rights should not be ignored by the law. In addition to some laws specifically designed to protect special groups, other laws formulated by the state should protect the legal rights and interests of all citizens. It is not disputed that homosexual groups are Chinese citizens. Their demands for marriage rights are reasonable and more legal, not pathological. It's against humanity. Based on this, Chinese legal norms should adjust the marriage relationship between homosexuals, truly realize the purpose of the law, and give full play to the legal mechanism. Secondly, some scholars believe that the legality of same-sex marriage does not necessarily require amendments to the "Marriage Law". The current laws and regulations can directly adjust the legal issues that arise in the lives of same-sex couples. The author believes that this view is completely contrary to the theory of legal interpretation. Legal

⁶ 段涛:《同性婚姻立法》,西南大学2011年硕士学位论文,第29页(Tao Duan, *Legislation on Same-Sex Marriage*, Southwest University 2011 Master's Thesis, p. 29)

⁷ 费曦:《同性恋者的婚姻权保护之研究 重点》,2011年08月09日。<https://wenku.baidu.com/view/3bf3db6548d7c1c708a1459f.html>, 2021年11月30日(FeiXi, *Key Points of Research on the Protection of the Marriage Rights of Homosexuals*, <<https://wenku.baidu.com/view/3bf3db6548d7c1c708a1459f.html>> accessed November 30, 2021)

⁸ 费曦:《同性恋者的婚姻权保护之研究 重点》,2011年08月09日。<https://wenku.baidu.com/view/3bf3db6548d7c1c708a1459f.html>, 2021年11月30日(FeiXi, *Key Points of Research on the Protection of the Marriage Rights of Homosexuals*, <<https://wenku.baidu.com/view/3bf3db6548d7c1c708a1459f.html>> accessed November 30, 2021)

hermeneutics researchers believe that the expression of legal text should be clear, and the meaning of the text should not exceed the scope of the public's understanding of the meaning contained in the revised text, and the marriage law directly adjusts the homosexual relationship to the marriage law's definition of marriage. Different, the marriage law defines marriage as both men and women. Men and women cannot be interpreted as two parties of the same sex because men and women are originally two contradictory concepts. If they are directly adjusted by the Marriage Law, they will inevitably cause confusion in legal concepts.

The process of legalization of same-sex marriage will inevitably be a process of academic discussion. Any kind of legislation will experience the emergence of social issues, academic discussions, and the formation of mainstream views. The mainstream views after formation will be used by legislators as a reference and basis for legislation. This is the reason why many experts and scholars in related fields are invited to discuss the legislation of many laws. The opinions of experts and scholars play a crucial role in the success of the legislation. If a certain legal hot issue discussed in the current society forms a mainstream view, then it becomes the possibility of legalization. Unfortunately, the legalization of same-sex marriage in China is disapproved by most scholars, and only a few scholars agree with the legalization of same-sex marriage.

2. The need to legalize same-sex marriage in China

2.1. Social problems caused by the lack of same-sex marriage legislation

In China, the proportion of homosexuals may not be high, but the number of homosexuals is very large. "Based on the total population of 1.4 billion in China, the total population of homosexuals in China is about 40-60 million (the ratio of homosexuals to the total population is a lot controversial in academic circles, but most scientists agree that the ratio should be 3%-5%)⁹." This data is consistent with Dr. Li Yinhe's speculation that "there are about 39-50 million homosexuals in mainland China"¹⁰. The number of homosexuals is equivalent to the total population of China's Liaoning Province. There is no law to regulate such a large number of homosexual groups in China. They always live on the other side of society, facing the lack of legislation, social discrimination, and family misunderstandings alone. This is bound to produce a series of social problems.

a) Physical health problems caused by lack of homosexual legislation

When people think of homosexuality, people will not realize it, a disease that makes people hear of it-AIDS. Homosexuality is one of the main transmission media of AIDS, and the number of patients suffering from same-sex sexual behaviors is increasing every year. There are many ways to spread AIDS, but most of them are spread through sex, unsafe blood transfusions, etc. When male homosexuals have sex, they often use anal sex, which leads to secondary contact between blood and sexual behavior, which greatly increases the risk of AIDS among gay men. As a result, the HIV infection rate of gay men greatly exceeds The lesbian community. China's "Marriage Law" clearly stipulates the duty of loyalty between heterosexual couples. We rarely see that in heterosexual marriages one spouse has a sexual partner other than the other spouse. As there is no adjustment of legal norms, homosexuals are not bound by law and can be combined and separated arbitrarily. Changing partners will not be sanctioned by law, which will greatly increase the risk of AIDS transmission. In addition to the large number of homosexual couples, the same wives or husbands in marriage are also one of the ways for the spread of AIDS. The so-called homo-wives and homo-husbands are words that have only emerged in recent years, referring to homosexual

⁹ 靳惠杰:《同性婚姻立法思考》,中国海洋大学2014年硕士学位论文,第13页。(Jin Huijie, *Reflections on Same-Sex Marriage Legislation*, 2014 Master Thesis, Ocean University of China, p. 13)

¹⁰ 李银河:《同性恋亚文化》,中国友谊出版公司2002年版,第6页(Li Yinhe, *Homosexuality Subculture*, China Friendship Publishing Company 2002 edition, p. 6)

wives or husbands. In today's Chinese society, getting married and having children is a sign of their children's independent life. Many homosexuals are forced to accept heterosexual marriages. If the homosexual party is infected with HIV, it will inevitably increase the chance of the other party being infected. "Most of the new AIDS patients are infected after experiencing same-sex sexual behavior. After these people are infected, most of them will enter traditional marriages due to social pressure, which will inevitably increase the risk of the other spouse suffering from AIDS¹¹.

b) The lack of same-sex marriage legislation has not only led to physical health problems such as AIDS, but also a series of mental health problems for same-sex groups

The reasons are as follows: The lack of legislation on same-sex marriages in contemporary Chinese society has resulted in a lower proportion of legal resources enjoyed by same-sex couples than those of opposite-sex couples. There is no legal regulation for the various problems that same-sex couples have during their lives. They can only solve their problems through peer rights protection organizations and psychological counseling activities, which are often on the level of public welfare. However, heterosexual couples can enjoy more legal resources, which are more helpful to solve their marriage problems. The protection of heterosexual marriages by law is clearer and clearer than that of same sex. Legislation for same-sex marriage is very necessary. The lack of same-sex marriage legislation not only caused mental health problems for homosexuals, but also caused mental health problems for those who did not know the same-sex marriage. The psychological impact of this phenomenon on the other side of the marriage will inevitably cause psychological problems for the other side. The lack of same-sex marriage legislation has forced many homosexuals to accept heterosexual marriages, making many heterosexuals unable to enjoy the happy couple life they deserve. If same-sex marriages are legalized, then homosexual groups will not have to bear the pressure of having to marry the opposite sex, which can not only meet the requirements of the marriage groups of homosexual groups, but also ensure the normalization of the married life of a large part of heterosexual groups.

2.2. Legal problems caused by the lack of same-sex marriage legislation

The legalization of same-sex marriage can solve the problems of judicial practice. According to reports, the Ministry of Civil Affairs of China receives a large number of same-sex marriage applications and same-sex divorce applications every year. Because there are no relevant laws and regulations for same-sex marriages, most of these applications will be rejected. This is bound to trigger a lawsuit against the Ministry of Civil Affairs by same-sex groups. In January 2016, Mr. Sun, a gay man from Beijing, was rejected by the Ministry of Civil Affairs because he applied for marriage. Mr. Sun appealed to the Ministry of Civil Affairs. This was the first case in which a gay man in China was fighting for the right to marry and the lawsuit was accepted¹². Such cases have already existed in China. As time goes by, as the Chinese gay community strives for the legalization of marriage, such cases are bound to increase further and inevitably occupy a certain share of judicial resources.

In China, the failure to legalize same-sex marriage has also led to a series of legal issues. China's current laws and regulations cannot guarantee property issues during homosexual cohabitation. It should be because there is no legal regulation of same-sex cohabitation relations. This has led to many cases where there is no need for judgment in the same case, or there are cases where there is no judgment or no judgment in the same case.

¹¹ 宋蕊:《同妻群体的艾滋病风险研究》, 哈尔滨工业大学 2010 社会学学位硕士论文, 第 10 页 (Song Rui, *A Study on the Risk of AIDS among Homosexual Groups*, Harbin Institute of Technology 2010 Sociology Master Thesis, p. 10)

¹² 《中国男同性恋争取婚姻权利, 首次起诉被受理》, <http://learning.sohu.com/20160131/n436448648.shtml> (*Chinese gay men fight for marriage rights, first lawsuit accepted*, <<http://learning.sohu.com/20160131/n436448648.shtml>> accessed November 30, 2021)

The legalization of same-sex marriage can solve the legal application of foreign-related same-sex marriages. In recent years, the legalization of same-sex marriage has become a legislative trend in countries around the world. Different countries and regions have adopted different legislative models to confirm the legal effect of same-sex marriage. With China's accession to the World Trade Organization, economic and cultural exchanges with other countries in the world have become more frequent, and natural persons have been studying, working, and visiting relatives. China and other countries in the world are bound to handle their relations well in the field of private international law, and same-sex marriages are bound to bear the brunt

3. Feasibility of same-sex marriage legislation in China

3.1. Homosexuality is not the disease that makes same-sex marriage feasible

Same-sex behaviors were considered criminal behaviors for a long time since the founding of New China, and same-sex marriages could never be legal during this period. By 1997, China's new "Criminal Law" implemented and abolished "hooligan crimes." From the perspective of the legal status of homosexual groups in China in different periods, same-sex behaviors have experienced a process from sin to innocence. Same-sex behavior has been decriminalized, so the legal barriers to the legalization of same-sex marriage no longer exist. Should homosexual couples have the same rights as us? On April 20, 2001, the third edition of the "Chinese Mental Disorder Classification and Diagnosis Criteria" removed homosexuality from the list of mental disorders. Although this does not mean that Chinese laws and society recognize the status of homosexuality, it does show that the legalization of same-sex marriage in China is as feasible as abroad.

3.2. The legalization of same-sex marriage in China is not restricted by religion

Homosexuality is clearly stated in the laws of modern Islamic countries as illegal. In the Christian countries in Europe and America, the resistance to the legalization of homosexuality does not come from the government but from the denial of homosexuality by the Christian doctrine. Although China insists on freedom of religious belief, thanks to the party's firm belief in atheism, the influence of religion on the thinking of the Chinese people is minimal. Chinese society Compared with European and American countries and Islamic countries, the general public has no doctrinal influence and is more receptive to homosexuality. Some people say that the Chinese people believe in Buddhism more, and religious doctrines also have an impact on the Chinese people. However, Buddhist doctrines are different from Christian Islam, and Buddhist creeds are completely different from Christianity and Islam. There are no extreme religious thoughts in the teachings of Buddhism. Buddhism often promotes the equality of all living beings and the peace of mind and other moderate religious doctrines. Based on this, it determines Buddhism's super tolerance attitude towards things, and determines that Buddhism's approach to homosexuality is very different from that of Western countries. In summary, the author believes that without religious restrictions, it is easier to legalize same-sex marriage than in other countries.

3.3. The tolerant attitude of the general public makes the legalization of same-sex marriage feasible

The implementation and modification of any law is inseparable from the support of the general public, and the legalization of same-sex marriage is no exception. In 2011, a survey on same-sex marriage in Guangzhou: "53% of Guangzhou people support the legalization of same-sex marriage, 30% say they don't care, and 17% oppose it." In 2011, Danlan.org¹³ talked about Chinese college students' The survey of attitudes towards same-sex marriage shows: "When dealing with the social phenomenon of homosexuality, the interviewees are quite tolerant. 18.8% of the interviewees

¹³ 淡蓝网是中国大陆地区流量最高、最具影响力的同志网站 (Danlan.org is the most influential gay website with the highest traffic in mainland China)

believe that “same-sex marriage should be legalized”; 53.5% of the interviewees said that they are “neutral””; 20.8% of the respondents think “disagree”; 4.2% of the respondents think “this is an alternative fashion.” The survey results show that Chinese college students are more tolerant of homosexuality, and overall Higher than the degree of tolerance for premarital sex and extramarital sex.”¹⁴ This shows that the public's attitude towards same-sex marriage in today's society has changed, and the public's attitude towards same-sex marriage has become more tolerant, and the legalization of same-sex marriage is feasible.

3.4. Legalization of same-sex marriage is a need to protect human rights

The legalization of same-sex marriage is a need for the protection of human rights. Compared with other citizens, homosexual groups are no different except for their different sexual orientations. The Chinese Constitution stipulates: China protects and respects human rights. “The so-called human rights are the various benefits that people should enjoy and be fully protected and realized in the society in which they live, especially in the country. There are three forms of due rights, legal rights and actual rights.”¹⁵ Chinese scholars divide human rights into personal rights, freedom rights, equality rights, democracy rights, labor rights, education rights, and humanitarian rights¹⁶. These rights are reflected in specific legal norms. Article 49 of the Chinese Constitution stipulates: “It is prohibited to destroy the freedom of marriage.” The right to freedom is a concept of human rights, and the right to freedom of marriage is a concept of freedom. The protection of the right to freedom of marriage in the Constitution is the protection of the right to freedom. It is the protection of human rights. And the author believes that the scope of the right to freedom of marriage here is not only the right to freedom of heterosexual marriage, but also the right to freedom of same-sex marriage. Article 2 of China's “Marriage Law” stipulates: “Implement a marriage system with freedom of marriage, monogamy, and equality between men and women.” From this regulation, it is not difficult to see that China's “Marriage Law” restricts the freedom of marriage between men and women and excludes the same sex. The right to freedom of marriage. This provision in the “Marriage Law” is bound to narrow the extension of the constitution's right to freedom of marriage, restrict the freedom of marriage of homosexual couples, and violate the human rights of homosexual groups. Therefore, from the perspective of human rights, the freedom of homosexuality granted by Chinese law has not been truly realized in the field of the “Marriage Law”, and the loss of freedom protected by the law is not true freedom¹⁷. Therefore, the legalization of same-sex marriage is the need to protect the human rights of the gay community.

3.5. Same-sex marriage has a precedent in China

“In fact, gay marriages already exist in China. It is reported that in 1990, a pair of gay men in Fujian Province applied for a marriage license, which was approved by the local newspaper. In 1991, a pair of lesbians in Guangxi Province applied for a marriage license. It was approved by the local newspaper and the central government”¹⁸. It is obvious that there are same-sex marriages in China, although it is only an exception. Since there are legal same-sex marriages in China, other same-sex couples should also have the right to marry, and everyone should be equal before the law.

¹⁴ 调查：你所不知的大学同性恋现状，<https://news.qq.com/a/20120509/000977.htm>，2021年11月30日 (Survey, *Homosexuality in colleges you don't know about*, <<https://news.qq.com/a/20120509/000977.htm>>, November 30, 2021)

¹⁵ 李步云主编：《人权法学》，高等教育出版社，2005年2月第1版，第20-21页 (Editor-in-Chief Li Buyun, “*Human Rights Law*”, Higher Education Press, 1st edition, February 2005, pages 20-21)

¹⁶ 李步云主编：《人权法学》，高等教育出版社，2005年2月第1版，第4-8页 (Editor-in-Chief Li Buyun, “*Human Rights Law*”, Higher Education Press, 1st edition, February 2005, pages 4-8)

¹⁷ 原婷婷：《关于同性婚姻立法模式研究》，中国政法大学2011年硕士论文，第11页 (Yuan Tingting, *Research on the Legislative Model of Same-Sex Marriage*, China University of Political Science and Law 2011 Master Thesis, p. 11)

¹⁸ 李银河：《同性恋亚文化》，内蒙古大学出版社，2009年11月，第403页 (Li Yinhe, *Homosexuality Subculture*, Inner Mongolia University Press, November 2009, page 403)

3.6. current Law, especially civil law in Chinese makes same-sex marriage feasible

"As one of the concepts of civil law, autonomy of will means that civil subjects can freely form rights and obligations relations with other civil subjects in private law according to their own will within the scope of the law, and are not subject to illegal actions by the state, social organizations, and other individuals. Intervention. Within the scope of the law, any civil subject can independently decide to participate or not to participate in a private law rights and obligations relationship, and can independently choose the counterparty in the private law rights and obligations relationship in which it participates."¹⁹ According to this Interpretation, the law does not expressly stipulate that it is allowed. In the field of marriage law, it is embodied in the freedom of marriage. The Chinese Marriage Law stipulates that everyone has the freedom to marry and divorce except for situations where marriage is prohibited by law. Article 7 of the "Chinese Marriage Law" also stipulates: "Marriage is prohibited under any of the following circumstances: (1) direct blood relatives and collateral blood relatives within three generations (2) suffering from diseases that medically consider not to be married." Although the "Marriage Law" does not provide specific provisions for diseases that should not be married, according to Article 9 of the "China Maternal and Child Health Law", it should include designated infectious diseases (AIDS, gonorrhea, syphilis, etc.), mental illness, and serious illnesses. Hereditary diseases. Obviously, homosexuality does not belong to the prohibition of marriage in Chinese law, so homosexual marriage is in line with the principle of autonomy of will. Based on this, the author believes that it is legal for homosexuals to enter into marriages, and the previous article has mentioned that there is a precedent for homosexual marriages in China.

Personality right refers to the inherent right that is exclusively enjoyed by civil subjects, with personality interests as the object, and is necessary to maintain the independent personality of civil subjects.²⁰ The generation of personality rights has a long history. It is impossible to verify who first proposed it. Nowadays, it is generally believed that personality rights first appeared in modern times. Personality rights are human rights enjoyed by natural persons and legal persons from birth (production). In addition to this definition, personality rights also embody the basic spirit and principles of civil law. Among them, the principle of equality is embodied in the rights of personality that all subjects enjoy equal rights. Personality rights. Article 3 of China's "General Principles of Civil Law" stipulates: "The parties have equal status in civil activities," which refers to the principle of equality. As an independent subject, civil entities exercise power and perform obligations equally. Anyone in the field of civil law Without privileges, anyone who exercises power is not subject to interference from others. This principle is manifested in personality rights as that no one shall arbitrarily deprive others of the personality rights enjoyed by civil law. "Personality equality" means that the personality rights of any subject are equally protected by the law. In the application of law, except for special circumstances stipulated by the law, the personality rights of any subject shall not be arbitrarily derogated.²¹ In the 1950s, the "Declaration of Human Rights" was formulated, in which Article 1 clearly stipulates that natural human rights are born equal, and the law protects human rights equally, and no one may discriminate against others because of their race. Based on the above point of view, homosexuality does not belong to any law-

¹⁹ 顾肖荣: 《民法的理念与运作》, 上海人民出版社 2005 年版, 第 105 页 (Gu Xiaorong, *The Concept and Operation of Civil Law*, Shanghai People's Publishing House, 2005 edition, p. 105)

²⁰ 杨立新: 《人格权法专论》, 高等教育出版社 2005 年版, 第 25 页 (Yang Lixin, *On the Law of Personality Rights*, Higher Education Press, 2005 edition, p. 25)

²¹ 顾肖荣: 《民法的理念与运作》, 上海人民出版社 2005 年版, 第 99 页 (Gu Xiaorong, *The Concept and Operation of Civil Law*, Shanghai People's Publishing House, 2005 edition, p. 99)

provided personality derogation situation, and that the basic principle of personality equality should be used.

As a basic principle of the personality right law, personality equality is manifested as: the law does not ask about birth, the subject condition of any person does not negate the premise of equal application of personality, and differences in religion, education, social status, race, nationality, etc. cannot negate personality. equality. Based on the above point of view, homosexuals are the same as heterosexuals in other respects except for their differences in sexual orientation compared to heterosexuals. Personality equality is fully applicable to homosexuals. Homosexuals should enjoy equal legal personality like other civil subjects. This is the most basic requirement for subjects.