

Policy issues concerning sexual orientation in China, Canada, and the United States¹

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A state's laws can restrict or expand a citizen's liberty to engage with one another. The laws spell out what is prohibited and what is permitted. It can deny, limit, or extend privileges and benefits. Further, the law can establish categories of citizens offering a privilege or a benefit to one group while denying it to another. Finally, it can utilize the coercive power of the courts, police, and military to enforce its restrictions.

For sexual minorities, this characterization of state policy is all too familiar. In many countries, homosexual relationships have been deemed a criminal offence and/or a mental illness at one time, but through changes in the law at a later date, these relationships become permitted. Finally, while gay and lesbian relationships might at some point be permitted—that is, not illegal, those involved might not be granted a range of privileges and benefits that are extended to heterosexuals.

Recent events in Putin's Russia provide a very recent example of how the state can move quickly to restrict the freedom of some of its citizens.

It is illuminating to compare evolving policy developments around sexual orientation and same-sex sexual activity in China, Canada, and the United States.

Some historical background on China

From ancient times through many dynasties, Chinese society tolerated and, at times, even encouraged same-sex eroticism. In texts that have survived millennia, most recorded encounters involve members of the male ruling classes. While accounts of “amours among commoners” are understandably rare, Crompton notes that the sexual attitudes in many stories “tacitly assume bisexuality as the human norm.” All of this changed dramatically in 1911 with the fall of the Qing Dynasty. China experienced its first “opening to the West” and welcomed Western science, Christianity, sex education, and psychology—including their/our negative views about same-sex relations. When the People's Republic of China (PRC) was established in 1949, the Communist Party banished Christian agencies but retained their abhorrence of homosexuality, declaring it a sign of bourgeois decadence. In good Marxist fashion, it substituted economic and cultural factors for biological determinism and predicted that homosexuality would evaporate as the new proletarian society emerged.²

¹ A panel presentation made at the Social Issues and Policy Challenges in Western China: Lessons Learned and Lessons Borrowed Conference sponsored by the Department of Sociology, University of Saskatchewan, August 29-30, 2013.

² Quoted from Donald Cochrane and Jinjie Wang, “Chinese University Students' Commitment to Social Justice and Their Willingness to Confront Sexual Orientation Prejudice” in *OutSpoken: Perspectives on Queer Identities* (Regina: University of Regina Press, 2013) edited by Wes D. Pearce and Jean Hillabold.

Same-sex relations were never explicitly criminalized in post-1949 China. However, the charge of “hooliganism” has been applied to many forms of deviation and thus undesirable behaviour, and has been used as a convenient tool to assist authorities in their attempts to hasten the process of “evaporation.” Treatment of suspected homosexuals during the Cultural Revolution (1966–76) was particularly harsh.

Struggling Against Repression

Well into the 1990s, homosexuality was considered both a crime and a mental illness in the People’s Republic. Gays were prosecuted under the “hooligan” law while the Chinese Psychiatric Association labeled homosexuality a mental disease. In Hong Kong, sodomy was illegal until 1991 under a law that had been instituted during British colonial rule. Curiously, sodomy was never explicitly criminalized in China.

Canada, too, was once a British colony, and so we were saddled with British law that regarded sodomy a crime. In 1859, Canada repatriated its buggery law in the Consolidated Statutes of Canada as an offence punishable by death. Buggery remained punishable by death until 1869. A broader law targeting all homosexual male sexual activity ("gross indecency") was passed in 1892.

In changes to the criminal code in 1948 and 1961, Canada combined criminal and psychological categories in which gay men were deemed “criminal sexual psychopaths” and “dangerous sexual offenders.” The classic (and tragic) case involves Everett Klippert who in 1965 acknowledged to police that he was gay, had had sex with men over a 24-year period, and was unlikely to change. In 1967, he was sent to prison indefinitely as a “dangerous sex offender”. Canada’s sodomy laws were repealed two years later in 1969. Klippert was not released until 1972.

Sodomy laws in the United States were not overturned until the 2003 U.S. Supreme Court decision in *Lawrence v. Texas* (and then only after 36 states had repealed their own sodomy laws).

In 1997, the Chinese government abolished the hooligan law, an act considered by most to be a decriminalization of homosexuality (which is six years before the United States overturned its sodomy laws).

The American Psychiatric Association declassified homosexuality as a mental disorder in 1973. Canada’s mental health establishments followed suit. The Chinese Society of Psychiatry undertook a similar reform twenty-eight years later in 2001.

It would seem that the three societies are moving in the same direction but from different starting points and at different speeds.

Thus, in some parts of the United States in 2002, a gay man was not regarded as mentally ill, but could still be arrested for sexual activity, and could not enter into a same-sex marriage. In 2005 in Canada, a gay would not have been deemed mentally ill, would not have been arrested

for sexual activity, and could enter into a same-sex marriage. And in China in 2002, a gay man would not be judged mentally ill, would not be arrested for sexual activity (under the hooligan law), but could not be married to his same-sex partner.

What were the conditions that pushed reform in the United States to decriminalize sodomy and establish same-sex marriage in Canada? In the States, the Supreme Court upheld the constitutionality of sodomy laws in *Bowers v. Hardwick* in 1986, but in 2003 it reversed the decision with *Lawrence v. Texas*. By that time, 36 states had invalidated its sodomy laws, so the decision affected only the remaining 14 states (Alabama, Florida, Idaho, Kansas, Louisiana, Michigan, Missouri, Mississippi, North Carolina, Oklahoma, South Carolina, Texas, Utah, and Virginia).

In Canada, the government introduced federal legislation to legalize same-sex marriage, but only after a string of Charter court decisions affecting immigration, employment, service in the military, pension rights, bereavement leave, adoption, access to social programs, and tax benefits. As well, Court decisions, starting in 2003, had already legalized same-sex marriage in eight out of ten provinces and one of three territories, whose residents comprised about 90% of Canada's population. Before passage of the Act, more than 3,000 same-sex couples had already married in those areas. The groundwork had already been laid in smaller jurisdictions. Parliament's decision was simply a hard-fought capstone.

In both cases, the tide was coming in quickly and the Court (United States) and Parliament (Canada) have gone with the current.

Sexual Orientation Activism

Enforcing restrictions on a population is often easier than expanding liberty. Politicians are usually reluctant to be very far ahead of widespread social attitudes when considering new policy and this is particularly true when thinking about sexual/moral/ religious issues.

The research that Jinjie Wang and I undertook reveals a sweeping change on sexual orientation issues among a younger generation—this against a very conservative backdrop. This younger generation is pushing the status quo boundaries. Still, the struggle will be long and there will be many set-backs.

Over the last decade, numerous events have been planned by gay and lesbian activists, several of which have been closed by police. For example,

2001 The first Gay and Lesbian Film Festival was staged in Beijing—although it was closed by the police after three days.

2009 The Beijing Queer Film Festival went off without a hitch though it had been closed by authorities 2005.

2009 The Shanghai Gay Pride Festival was successfully launched—China's first gay pride event—consisting of plays, film screenings, discussions and parties scattered

throughout one week. While police did monitor the events and plans for a parade were called off, the fact they were able to hold the event is a testament to the progress China has made.

In 2004, a different group had tried to hold a similar event in Beijing, but was shut down.

In 2010, the Chinese government shut down the Mr. Gay China pageant in Beijing just an hour before it was scheduled to start.

Meanwhile, gay and lesbian support groups have sprung up across the country and some universities now offer course on some sexual minority issues.

Seeking a Benefit: The Marriage Issue in China

The deepest issue in China on the rights, privileges, and benefits for sexual minorities—just as it was in Canada and the United States—is same-sex marriage. The country’s leading and tireless protagonist is Li Yinhe who has just retired as a senior academic in the China Academy of Social Science. She has proposed a Chinese Same-Sex Marriage Bill as an amendment to the marriage law at the Chinese People’s Political Consultative Conferences in 2003, 2005, 2006, and 2008 to legalize same-sex marriage. None has succeeded thus far, as she has been unable to find enough co-sponsors for the motion to be placed on the agenda. She renewed her efforts in 2012 by asking for backing from some 3000 members of the National People’s Congress, the country’s parliament, who were having their annual meetings in Beijing. Again, she was unsuccessful in her efforts to place the amendments on the official agenda. The government’s policy on marriage is subject it to what is known as the “Three No’s Policy”: No approval, no disapproval, no promotion.

Still, the winds of change are blowing in China and the pace of change is not likely to abate. Li Yinhe has said that she may not live long enough to see same-sex marriage established in her country, but no one should be taking any bets.

Appendix: Same sex marriage in the United States

As of August 2013, thirteen states (California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington), the District of Columbia, several counties in New Mexico, and five Native American tribes have legalized the issuing of same-sex marriage licenses.

While several jurisdictions have legalized same-sex civil marriage through court rulings, legislative action, and popular vote, six states prohibit same-sex civil marriage by statute and 29 prohibit it in their constitutions.

