The Legal Status of LGBTQ+ in China: A Law and Politics Perspective

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I. Introduction

This short article analyzes the rights and status of LGBTQ+ individuals in China from the perspective of law and politics. Previous studies show some exceptionally interesting paradoxes in China’s laws and policies with respect to LGBTQ+ communities. On the one hand, LGBTQ+ individuals are not criminalized in China. On the other hand, unlike other disadvantaged groups, such as women, children, and ethnic minorities, there are no anti-discrimination laws dedicated to protecting them. Chinese society continues to be marked by significant homophobia, and workplace discrimination and domestic violence against LGBTQ+ individuals is concerning. However, whether suppression stems from cultural norms or ideological preferences is debatable.

This article aims to contribute to the discussion of the legal status of LGBTQ+ individuals in China by examining the power dynamics and interplay among the government, society, and business interests that have collectively shaped laws and policies affecting LGBTQ+ communities alongside culture and ideology. The article is structured as follows: Part II offers an overview of the legal status of LGBTQ+ individuals in China and outlines the policy orientation of the Chinese government; Part III scrutinizes two theories regarding China’s law and policy affecting LGBTQ+ communities; Part IV examines the power dynamics in laws and policies regarding LGBTQ+ communities with reference to an illuminating case study; and finally, the article concludes by discussing the implications of this approach for understanding law and policy in China.

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1 The term “LGBTQ+” is an inclusive term representing the diversity of sexuality and gender that people experience. The “plus” in LGBTQ+ is used to signify all of the gender identities and sexual orientations that are not specifically covered by the other initials. When I refer to other sources, I adopt the term or acronym that the original sources used.
II. Overview of LGBTQ+ Legal Status in China

Existing studies on the experiences of LGBTQ+ individuals in China share a similar conclusion: the majority of Chinese LGBTQ+ people face discrimination in many aspects of their lives, but the main harms flow from within the family, rather than directly from legislation. However, this is not because laws protecting people with different sexual and gender orientations are already in place. In fact, the legal status of LGBTQ+ individuals is best viewed as ambiguous or inconsistent. Two United Nations Development Programme (UNDP) Reports — "Being LGBTI in China: A National Survey on Social Attitudes towards Sexual Orientation, Gender Identity, and Gender Expression"\(^2\) and "Legal Gender Recognition in China: A Legal and Policy Review"\(^3\) — are representative of this perspective. The first is based on a nationwide survey of over 5,000 LGBTQ+ individuals in China and a series of in-depth interviews. This report finds that the majority of LGBTQ+ people continue to face discrimination in many aspects of their lives and that, most importantly, the deepest forms of rejection come within the family.\(^4\) The second report provides a comprehensive review of China's laws and policies regulating the recognition of gender identity and inclusion of transgender people. This report also portrays a contradictory legal framework in which gender affirmation surgery is legal but “transgender” is not a legal term, and there is ongoing pathologization of transgender people.\(^5\)

Other research similarly observes a complicated picture of LGBTQ+ rights in China. Thus, Joy Chia notes that: “[s]ilence and invisibility (rather than overt homophobia or anti-LGBTQ violence) define how LGBTQ individuals experience their daily lives in China.”\(^6\)

The inconsistency can be found in other relevant laws and regulations. Four observations here are pertinent. First, same-sex sexuality was decriminalized in 1997\(^7\) and is no longer viewed as a disease\(^8\) years after declassification by the World Health Organization (WHO).\(^9\) However,
marriage in China is legally limited to opposite-sex couples, and same-sex relationships are not recognized as legal unions. While there have been some discussions and advocacy efforts related to LGBTQ+ rights in recent years, the issue of same-sex marriage has not been put on the legislative agenda. Second, gender affirmation surgery is legal, but transgenderism is still viewed as a gender identity disorder and a mental disease. A patient is required to provide a diagnosis of transsexuality from a psychiatrist or psychologist and to demonstrate consistent requests for gender reassignment for at least five years. What’s more, a simple legal dichotomy between male and female is assumed and enforced: after the surgery, one must ask the household registration agency to officially change one’s gender identity to the new, now opposite gender. Third, courts tend to reject legal claims when pro-minority legislation is absent, but there are also influential court decisions that protect LGBTQ+ rights. For example, in 2017, a gay man won a legal battle over forced conversion therapy. In another case, a transgender person emerged victorious in a lawsuit against workplace discrimination. Last, but not least, the inconsistency is also reflected in the discriminatory gender distinctions in both law and practice. For example, there is a restriction on egg freezing for unmarried women but no restriction applies to sperm freezing for unmarried men. Also, gay men are prohibited from blood donation.

Thus, as all these examples illustrate, public health policy and regulation take a mixed, problematic approach to gender and sexual diversity, and the Chinese government’s approach...
to LGBTQ+ rights is best described as “fickle,” characterized by a “no approval; no disapproval; no promotion” approach. This muddy situation even confused US policymakers: despite the US-China rivalry, the generally China-critical US Congress split over how to address LGBTQ+ rights in China when it was challenged to categorize China’s laws and policies as either simply indifferent or outrightly hostile.

III. Cultural or Ideological: Two Theories for China’s LGBTQ+ Law and Policy

How can one explain this inconsistency across law and policies in China? The issue of anti-discrimination laws protecting LGBTQ+ individuals in China is complex, involving multiple factors, including cultural attitudes, political considerations, and limited advocacy and visibility. Nevertheless, dominant explanations are rooted in both cultural attitudes and ideological considerations.

According to the cultural argument, despite a growing acceptance of LGBTQ+ individuals in some parts of Chinese society, traditional cultural attitudes and societal norms still hold significant sway. These attitudes and norms cast homosexuality as taboo or abnormal and tend to oppose legal protections for the LGBTQ+ community that UNDP reports and other studies advocate. Indeed, the Chinese government identifies such cultural and social conditions as the main reasons for its indeterminate policies. According to the official statement:

China protects the health rights and interests of homosexuals, provides free basic medical services for all citizens, allows voluntary gender affirmation surgery, and respects citizens’ privacy. According to the “Marriage Law,” China only recognizes the marriage relationship between men and women and does not recognize same-sex marriage. This is not because of discrimination, but because of factors such as history, culture and values.

According to the ideological argument, sexual identity and social movements in contemporary China reflect the rise of neoliberalism. More specifically, negotiation and contestation between socialism and neoliberalism constantly play out in regulation and the shaping of both public and intimate spheres. Despite the decriminalization and depathologization of

20 Robbie Gramer & Mary Yang, “Congress Splits Over How to Address LGBTQ Rights in China”, Foreign Policy (1 April 2022), online: <https://foreignpolicy.com/2022/04/01/china-congress-human-rights-lgbtq-repression/> [perma.cc/49SY-NA9S].
23 Hongwei Bao, Queer Comrades: Gay Identity and Tongzhi Activism in Postsocialist China (Copenhagen: NIAS Press, 2018), in particular 196-209. See also Tiantian Zheng, “Chapter One Sexuality, Class, And Neoliberal Ideology Same-Sex Attracted Men And Money Boys In Postsocialist China” in Tiantian Zheng,
same sex relations, the Chinese government falls short in protecting the rights of LGBTQ+ individuals as fully as international human rights law requires. In this regard, the recent crackdown on LGBTQ+ activism and the censorship of online-content related to LGBTQ+ rights represent a political conservatism plus paranoia about foreign infiltration under the Xi Administration. This argument is especially plausible given the fact that the Chinese government is essentially dominated by one party, the Communist Party of China (CPC), and this integrated Party-State regime has the unfettered ability to improve the legal and social status of non-heteronormative individuals if their rights are prioritized.

However, neither cultural nor ideological arguments alone or combined are sufficient to explain the paradoxical reality of LGBTQ+ individuals in China. The cultural argument is debatable, both in terms of tradition and in respect of social reality. First, same-sex relationships were generally accepted and seen as unproblematic in traditional Chinese culture. Taiwan, a society that shares the same cultural heritage, legalized same-sex marriage in 2019. Second, China’s extensive history encompasses a variety of attitudes and beliefs regarding LGBTQ+ individuals. Some even argue that fear of and antagonism towards LGBTQ+ communities should be seen as the outcome of foreign influence. In any case, it is reasonable to observe that societal attitudes towards LGBTQ+ individuals and communities change over time as in other modernized societies; indeed, attitudes towards sexual identity in contemporary China share many of the same patterns as seen in other societies.

The ideological argument is also insufficient. First, Chinese Marxist-Leninist ideology formally advances social equality, including gender equality, and is not in direct opposition to variants of liberalism in this regard. This commitment to at least formal equality accounts for why the Party-State has refrained from enacting laws explicitly against LGBTQ+ individuals. Second, while there is indeed political repression of LGBTQ+ individuals in civil society, it is largely motivated by a desire to maintain social stability and control the

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24 Chia, supra note 6.
26 Guo, supra note 7.
27 The Legislature Yuan of Taiwan enacted the Enforcement Act of the Judicial Yuan Interpretation No 748 of 2017 to legalize same-sex marriage. For more discussions of the context and implications of the enactment, see Erez Aloni, “First Comes Marriage, Then Comes Baby, Then Comes What Exactly?” (2020) 15:1 National Taiwan National Taiwan U L Rev 49.
28 Sarah Prager, “In Han Dynasty, Bisexuality is the Norm” JSTOR Daily (10 June 2020), online: <https://daily.jstor.org/in-han-dynasty-china-bisexuality-is-the-norm/> [perma.cc/K26F-DG4F].
30 One of the first enactments of the People’s Republic of China was the 1950 Marriage Law, which affirms freedom of marriage and gender equality.
31 China formally amended its Constitution in 1993 and adopted a “socialist market economy” as the country’s economic system. The Constitution was amended again in 2004 to provide constitutional protection of private property and human rights.
country’s social discourse, whether it pertains to LGBTQ+ rights or other social and political issues. Thus, many advocacy groups and organizations striving to advance LGBTQ+ interests endure despite having to navigate through ideological campaigns that oppose their basic values.

While both cultural and ideological arguments shape the configuration of LGBTQ+ status in China, tension persists between mainstream and State reinforced conservative social attitudes and ambiguous or even moderately tolerant laws and policies. To illuminate this paradox and inconsistency more effectively, it is essential to consider additional factors, particularly political dynamics in modern China. Specifically, one needs to examine how interplay between government, business interests, and society has shaped LGBTQ+ laws and policies, alongside the effects of culture and ideology.

IV. Legal Status of LGBTQ+ Persons in China from the Perspective of Law and Politics

The law and politics approach this essay takes follows the tradition of investigating interactions between public policymakers and other stakeholders with vested interests, situating formal legal responses in the context of larger social and market forces — especially the role played by interest groups and business in lawmaking, and the norm-setting function of judicial politics. In this regard, suffice it to note that Chinese society has become more fragmented after over forty years of social and economic reforms oriented toward privatization and marketization. Thus, while the Party-State continues to stand as the prevailing political force, individuals and business interests have acquired substantial influence in an evolving social and political framework.

The private sector’s influence primarily stems from its economic power. Individuals in China are no longer as economically dependent on the government. The private sector now

32 One of the controversial documents in this regard is the 2013 *Communiqué on the Current State of the Ideological Sphere: A Notice from the Central Committee of the Communist Party of China’s General Office*, the so-called “Document No 9,” which targets “Western values.” This document is available online here: <http://www.chinafile.com/document-9-chinafile-translation> [perma.cc/X2NL-ZH8K] (see sections 2 and 3 in particular, which challenge “universal values” and “civil society”).


37 Due to the absence of competitive elections, the government relies on non-elected bureaucrats and administrative agencies, along with selected representatives and pundits, for public decision-making. See generally Dragan Pavličević & Zhengxiu Wang, *Social Relations and Political Development in China: Change and Continuity in the “New Era”* (London: Routledge, 2022). In particular, see Chapter 8, Yik-Chan Chin, “Internet Governance in China: Exploration of Power Relationship.” See also Yan, *supra* note 33.
accounts for 70% of the country’s GDP and 80% of employment\(^{38}\) (China has a middle-class population of over 700 million people\(^{39}\)). Due to advancements in information technology since the 1990s, China now boasts some of the most successful and innovative Fortune 500 Tech Giants, including Alibaba and Tencent.\(^{40}\) These companies provide services to over one billion internet users, spanning communication fora, online shopping, financial services, and entertainment provision.\(^{41}\) Government agencies even employ these information portals and platforms for tasks such as information sharing, law enforcement notifications, and court auctions. This reciprocal relationship among growing social interests, business incentives, and the government influences policies surrounding LGBTQ+ issues.

A compelling illustration of such interactions stands out: implementation and enforcement of controversial regulation of what are termed “boys’ love” (BL) dramas. These dramas are characterized by subtle or explicit same-sex relationships. To begin with, LGBTQ+ movies and dramas are not legally prohibited in China, but the National Radio and Television Administration (NRTA) and the National Press and Publication Administration have some oversight through their regular content-based review of video-audio productions and provision of ISBN licenses. In 2021, the NRTA issued a regulation that called for the entertainment industry to “resolutely resist the bad ‘fandom’ culture; strictly control the selection of actors and guests, performance style, clothing and makeup, etc; and resolutely put an end to abnormal aesthetics such as ‘sissiness.”\(^{42}\) While there is no explicit mention of sexual and gender identity, this regulation is widely believed to be a reaction to social concerns regarding the fandom culture and rise in popularity of the new BL drama genre.\(^{43}\)

Significant business interests are vested in BL dramas. A single popular BL drama, “The Untamed,” garnered over four billion views within two months,\(^{44}\) prompting the production company Tencent Video and other businesses to swiftly capitalize on the show’s popularity.\(^{45}\)

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39 See “Annual income of middle class families in China from November 2021 to January 2022, by income bracket”, online: [Statista](https://www.statista.com/statistics/1319678/china-income-distribution-of-middle-class-families-2022/) [perma.cc/A4TE-7BSP].
40 See [Fortune Global 500](https://fortune.com/ranking/global500/2023/search/) [perma.cc/PUF7-Q7VF].
43 “Survey: More than half of Phoenix netizens believe that BL dramas and talent shows are sources for chaotic fandom culture”, Phoenix Entertainment (6 January 2020), online: [https://i.ifeng.com/c/8CdT2bKEPzG](https://i.ifeng.com/c/8CdT2bKEPzG) [perma.cc/NCW-MQM0].
44 Liang Ge, “Dual Ambivalence: The Untamed Girls as a Counterpublic” (2022) 44:5 Media, Culture & Society 1021.
45 Tencent charged an additional fee for new episodes and released new trailers for a paid membership. Actors of *The Untamed* became ambassadors for luxury brands such as Chanel and Gucci, as well as fast-moving consumer goods such as Pepsi and KFC.
After the 2021 NRTA Notice, Tencent and other main producers such as iQiyi and Youku suffered revenue and future investment losses in 2022 as a result of compliance with the new regulation. Rather than confronting the Notice, television platforms opted to suspend BL-themed dramas although they also took strategic actions to test the Notice. These actions included retaining featured actors from the BL-themed dramas to appear in other productions, creating mainstream shows with implicit or explicit "bromance" content, and cautiously reintroducing BL dramas to the market in early 2023. As it is not illegal to produce dramas with explicit LGBTQ+ themes, the NRTA has tolerated most of these new shows, until, one might assume, further controversies are generated.

This multifocal response to regulatory control is a recurring motif in the Chinese context. In this storyline, the government responds to certain social and political concerns with regulatory intervention. In turn, business interests maneuver around these regulations in such a manner as to enable continuing market exploitation. Throughout this process, no legal claims for freedom of expression or gender identity rights were raised, with LGBTQ+ rights assuming at best a secondary role in public discourse. However, because these identity interests frequently intersect with business interests, the private sector continues to offer services and products that cater to diverse communities within society.

V. Conclusion and Implications

This brief article provides an overview of China’s laws and policies concerning LGBTQ+ rights and legal status. It also introduces a theory aimed at explaining the ambiguity and inconsistency of how Chinese law and society respond to issues regarding LGBTQ+ rights and status. I contend that the uncertainties and disparities surrounding LGBTQ+ rights reflect prevailing power dynamics and tensions between the public and private sectors in contemporary China. Against this backdrop, the LGBTQ+ community is woven into the societal fabric, yet grapples with limited voice, bargaining power, and tools to advocate for its concerns. This power asymmetry contributes to the absence of recognized entitlements within China’s legal framework. However, the increasing influence of market forces and business interests serves as a moderating factor on discriminatory governmental policies. While this analysis primarily focuses on LGBTQ+ rights and legal status, I would argue that the analytical framework also holds the potential to provide insights into other power dynamics in China.


47 One of the bromance dramas, A League of Nobleman, was released in January 2023 by Tencent. Another more explicit BL drama was suspended after 8 episodes were aired. See Anne J, “Fate of C-Dramas Adapted from BL Uncertain as 'Justice in the Dark' Appears to Have Stopped Releasing New Episodes”, PandaDrama (25 February, 2023), online: <https://dramapanda.com/2023/02/fate-of-c-dramas-adapted-from-bl-uncertain-as-justice-in-the-dark-appears-to-have-stopped-releasing-new-episodes.html> [perma.cc/K73N-C35L].