

# ***Human Right Protection of LGBT in China from the Perspective of International Law***

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**Abstract:** In China, the LGBT is rarely reported by official media and has few rights under the protection of Law. The group lives in the shadow of society, with little legal protection. Based on that, this article mainly talks about the status quo of the LGBT in China and provides solutions to tackle the existing problems. The purpose of this paper will be to concentrate on this group of people, to discuss how to protect the human right belonging to these groups better from International Law and provide a solution to tackle some problems that exist nowadays. There are three main research techniques used in the paper: document analysis, case analysis, and comparison analysis. After researching, this paper stated China lacks a connecting law on the LGBT human rights protection.

**Keywords:** LGBT, human rights protection, International Law, China

## **1. Introduction**

LGBT is the abbreviation of Lesbian, Gay, Bisexuality, and Transgender. Not many people have researched these groups, even to consider how to protect their human rights. The LGBT human rights protection is almost a blank in the China legal system. According to the research, the LGBT population in China is about 70 million [1]. This quantity of people desires to enjoy their own lives and avoid the discrimination enforced on them. This paper mainly get researches the LGBT status quo and existing problems inside the law and regulations system, introducing some connecting regulations and cases at the International law level about human rights protection, depending on the advanced regulations regarding the LGBT human rights protections from other countries to provide a possible solution to ameliorate the legal loophole and tackle the growing problems. What's more, this paper uses document analysis, case analysis, and comparison analysis to explore the status quo and existing laws of the LGBT in China, which contain discrimination against LGBT (especially in employment) and domestic violence among the LGBT families and original families. Based on that, this paper will analyze this problem with the technique of case analyzing the cases, which contain the case of "Little red-cap" [2]. Based on that, this article would provide some solutions, which are: Enacting employment anti-discrimination law, increasing publicity efforts on the LGBT background information to the public and including the subject in Anti-domestic violence law. The significance of this paper is to draw the public's attention on the LGBT, provide some solutions on LGBT serious problems and most importantly protect LGBT human rights just like others, enjoying their lives and sexual orientation.

## 2. International Law Protection of LGBT

There is some powerful legal protection for the LGBT people's rights at the level of International Law.

### 2.1. Universal Declaration of Human Rights

As a remarkable document on global human rights protection, the Universal Declaration of Human Rights provides powerful fundamental legal support for International Law. Article 1 states that "All human beings are born free and equal in dignity and rights." This short sentence laid the foundation for the LGBT human rights protection, giving spiritual guidance on the following UN regulations and all the behaviors the UN did on these groups.

### 2.2. United Nations Resolution A/HRC/17/L.9/Rev.1

In 2011, the resolution A/HRC/17/L.9/Rev.1 is also an unprecedented resolution the UN made. The solution was led by South Africa at the UNHRC requesting that the United Nations High Commissioner for Human Rights (OHCHR) draft a report "*documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity [3]*" to follow up and implementation of the Vienna Declaration and Programme of Action. The resolution passed with 23 votes in favor to 19 against, with 3 abstentions. It was the first time the UN officially confirmed and clarified the fundamental rights of the LGBT and was hailed as "historic".

In the statement of the resolution, UN recalled the article 1 of the Universal Declaration of Human Rights and quoted "Human Rights Council should be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in the fair and equal manner[4]" depending on the previous lists, UN expressed the grave concern about the violence and discrimination on different sexual orientations and gender identities, and took immediate actions to investigate discriminatory laws and practices and acts of violence against individuals based on their sexual orientations and gender identities, in all regions of the world and decide to convene a panel discussion to confer about this.

This resolution is the first time the UN directly deliberated on the issue of the LGBT, and this resolution affirmed that the LGBT is also under the protection of the UN human rights committee and the objection of protection from International Law. This resolution also promotes the LGBT movement all over the world and guides many states to keep a watchful eye on these minority people and to review or amend their domestic laws to safeguard human rights better.

### 2.3. The UN Human Rights Committee in Toonen v. Australia

The case, Toonen v. Australia, is a milestone decision given by the UN Human Right Committee in 1994. The background information is that Nicholas Toonen, a gay activist, challenged two provisions of the Tasmanian Criminal Code: Section 122(a) and (c) and 123, which criminalized all forms of sexual contact and at least some private expressions of sexual intimacy within the two adult gay men. Although the Tasmanian police said that in practice no one has been apprehended under the section 122 since 1984, Toonen argued that because of his identification of gay activism and his well-known long-term relationship with another male, he was still threatened by the existence of the law, it still has the possibility to be arrested. Toonen additionally complained that some Tasmanian officials and celebrities made discriminatory gestures to homosexuals in public.

Based on previous facts, The committee ruled that the relevant article in Tasmanian Criminal Code revealed a violation of articles 17, paragraph 1, of the International Covenant on Civil and Political Rights, which stated: "No one shall be subjected to arbitrary or unlawful interference with his privacy,

family, home or correspondence [5]”. Although the Tasmania police tried to defend that they had not charged anyone, it could not be the demur in the case. According to Article 17, lawful interference must have to meet the purpose of the law and obey the regulations of this covenant, or the interference is unlawful. In this case, The law provisions have no any necessities of maintaining the public minority and deviated from the purpose of public healthy security, even this regulation would intensify the discrimination against homosexuals, causing other problems in later years. What’s more, all the states within Australia had abolished the “sodomy law” except Tasmania. All in all, the committee brought the opinion that an effective remedy would be the repeal of Sections 122(a), (c), and 123 of the Tasmanian Criminal Code, and requested a response from the Federal government in 90 days.

After the case, *Toonen v. Australia*, Human rights treaty bodies of the UN have urged states all around the world to decriminalize the homosexual act and to be welcome for the behaviors which abolish and amend such regulations. Most importantly, the case creates the precedent for bringing the LGBT into the scope of the protection of the UN human rights treaty.

### 3. The Status Quo of LGBT People in China

Generally speaking, the status quo of the LGBT people in China reaches an intermediate level. Discrimination from society and the public mind still exists. It has not much protection for the LGBT rights in the law. However, luckily China has no forbidden or punishment regulations about LGBT, homosexual behaviors, and transsexual operations.

Until 2019, China has about 7 million homosexuals [1], and about 4 million transsexuals. Most of them have faced discrimination in all areas of their lives. According to the research, about 63.4% of people think the LGBT is sick, and 44% of LGBT people have been the subjects of violence [6]. From the result, the majority of the people in China do not accept the LGBT and even think that are sick, and need to take treatment immediately. What’s more, In a Chinese family, LGBT is an absolutely sensitive topic. Only 5% of gay have “come out” to their parents and 11.1% of lesbians “came out” to their mothers [7]. The reason for the low proportion of “come out” is that: (1) Chinese traditional culture influence. In Chinese traditional culture, people would avoid talking about anything about sex, even sexual orientation, so that most people would have no idea about other sexual orientations, except heterosexuality and people would afraid of talking about their true sexual orientation to others and all of the topics of sex. In addition, fertility is one of the most critical things for a traditional Chinese family, the LGBT cannot give birth would be considered an extreme violate the criteria and be treated as not virtuous. (2) Cause a lot of trouble. According to the previous data, over half of the people think LGBT is sick, and the majority of LGBT parents have no idea about what LGBT is and cannot understand that. So their parents would try to change their sexual orientation or enforce them to get married with heterosexuality, causing uncountable conflict and trouble among the sexual minority and their parents. (3) Low social acceptance. A lot of LGBT people in China are suffering from mental problems. About 30%-35% of homosexuals have a strong inclination toward suicide, 9-13% have actual actions, and 67% feel so lonely all the time [8]. These mental problems have put catastrophic pressure distribute the daily lives of LGBT.

For transsexuals, China does allow citizen to change their gender on ID after receiving the gender change operation. In 2002, the China Ministry of Public Security proclaims the reply issue of citizens’ gender change on household registration after receiving gender change operation, which officially confirm the legality of gender change and give them the right to select which gender they want to be.

The protection of the law is much weaker for homosexuality and bisexuality, compared to transsexuals. Since then, China have no laws and regulations to clearly protect the right of homosexuality and bisexuality, except for an interesting regulation: Voluntary Guardianship.

According to article 33, of the civil law code, Voluntary Guardianship is that *“An adult with full capacity for civil conduct may, by consulting in advance with his or her close relatives or other individuals or organizations willing to act as a guardian, determine his or her guardian in writing. When the adult loses all or part of capacity for civil conduct, the guardian shall perform the duty of guardianship of the adult.”* [9] The article seems like gave a gray zone to the LGBT. One side of LGBT couples can serve as the guardian in performing juridical acts and protecting the personal rights, property rights, and other lawful rights and interests of the ward through Voluntary Guardianship.

#### 4. The Current Problems in the System

Although China has a few connected regulations and systems to protect the human rights of LGBT, the problems of discrimination are much more and intense. Especially in labor and domestic violence. For employment discrimination against LGBT, many LGBT were dismissed after showing their identity as LGBT, even the majority of the court concurring with using sexual orientation and gender identity as excuses to terminate employment is not violent the law that “forbidden employment discrimination by genders”. Helen(alias) joined “Ciyuan” company to be the actor assistant in 2015. In 2018, Helen received a gender change operation, and back to her place later. Since she received the operation, the manager has used uncountable excuses to persuade her to quit the job, she refused them all. Then the company terminated her employment with her. Based on these facts, the court overruled the claim given by Helen in the name of that there is not enough evidence to prove the company terminate the employment only depending on gender discrimination, even her appeal was also rejected [10]. On balance, China still expels the LGBT to be qualified under the protection of labor law. In article 3, Employment Promotion Law *“Workers seeking employment shall not be subject to discrimination based on factors such as ethnicity, race, gender, religious belief etc.”* Such a huge quantity population of the LGBT in China is ignored by law is one of the obvious loopholes in the system.

Another loophole in the system is domestic violence. According to the survey, about 42.64% of people experienced violence from their homosexual mates [11]. domestic violence for the LGBT has three typical types. (1) the domestic violence from the original family, (2) the domestic violence from the homosexual mates, (3) the domestic violence from the isomerism mates. For the first type, LGBT people always face misunderstanding and pressure from their original families, their families would use violence against them on account of their unusual sexual orientation, and even their families would perpetrate violence on them or enforce them to take psychological treatment, get injured both physically and psychologically. For the second type, there are must have one side is the dominant role, and the other is the genuflect-or among an LGBT couple under normal conditions, the dominant role and the genuflect or are placed in unfair status by mental identity so that the genuflect or would more possibly facing the abuse and violence from the dominant role. The third type is domestic violence from isomerism, many LGBT were forced to get married to heterosexuals, and they cannot avoid the danger of facing domestic violence, which is similar to typical domestic violence.

Such quantity of the LGBT facing domestic violence is an urgent problem, However, only a few vague articles on the law maybe can protect them. According to the *Article 32. Anti-domestic Violence Law “Acts of violence committed between persons living together other than family members shall be carried out with reference to the provisions of this Law. [12]”* This article seems to give the chance for LGBT people to acquire some remedy. In practice, This vague statement article has a barrier to actually applying it to specific cases. How to definite the “persons living together other than family members” are still confusing and distributing the judges, even the Supreme Court of China has not given any explanations about that Based on the controversial circumstance, it has the remote possibility to give a verdict using an article in question and it is hard now for LGBT people to acquire remedy depending on anti-domestic violence law.

## 5. Solution of Problems

Based on the previous status quo and problems, here are three main resolutions for that.

### 5.1. Enhancement of Publicity Efforts on LGBT Background Information to the Public

The primary cause of all the problems is the misunderstanding of the LGBT. The public is afraid of the LGBT, thinking that it is sick and need to take treated immediately. only about 40% of people support homosexual marriage and 38.2% accept homosexual marriage [13]. Such low social acceptance can attribute to the lack of publicity efforts for the LGBT and the blank of sexual education in school. Therefore, this paper may try to analyze how to increase publicity from 2 points.

#### 5.1.1. Influence of Government on the Publicity of LGBT

Government has some effects on the mainstream ideas of society and many influential media, so the government has an impact on the dominant main voice to be heard. Whether the government can lead the publicity of the LGBT, other media have the impetus to follow the step of the government, so that more and more public can have a basic understanding and background knowledge about LGBT, helping to defuse the misconception for these people. There are three concrete ways for government to make the idea practicably: (1) Government should publish public service advertisements about this topic. (2) The main media under the lead of the government should take the main responsibility for propaganda. (3) Government should introduce the regulation to prohibit any discrimination against the LGBT.

#### 5.1.2. Supplement of More Sexual Education in the Textbook among Fundamental Education and Higher Education

It has rare things about sexual education inside of the context, even though it is also definitely a sensitive topic in Chinese families. All the status quo can be concluded in 4 aspects. (1) China has no scientific sexual education text, but other states like Finland had a specific sexual education text in the 1970s [14]. (2) China has no sexual education course within all levels and types of schools, only rarely mentioned in the biological text. Contrary to that, U.S. provides the various sexual education from primary school. (3) China has no professional sexual education teacher training and qualification system. (4) Parents' outdated sexual concept. Parents in China always think children would know sexual knowledge when they are adults granted, and consider that sex is not suitable to tell children.

Based on the previous problems of lacking sexual education, this paper also gives four solutions: (1) Start the sexual textbook compilation of sexual education, including LGBT education. (2) Offer sexual education at all levels of schools as the required courses. (3) Train the sexual education teachers and establish the relevant qualification system. (4) Have sexual lectures for the parents at regular intervals.

### 5.2. Enactment of Anti-Employment Discrimination Law

As for now, China has passed *The Labour Law* and other 13 related laws. Unfortunately, *Anti-employment Discrimination Law* is not included. Even though *the Employment Promotion Law* has articles to prohibit some types of employment discrimination, it is far from enough. What ' s more, article 3 of *the Employment Promotion Law* expels LGBT to be qualified under the protection of labor law. The loophole is essentially to be fixed, consequently, the paper gives 2 solutions for that.

#### (1) Enact Anti-employment Discrimination Law

The few articles in the *Employment Promotion Law* construct all the protection for equal employment rights. The current articles are far from enough to protect all the discrimination in present



lives. The authority should take action to enact the special Anti-employment Discrimination Law and add sexual orientation to the reason of prohibit discrimination.

(2) Enhance the judicial remedy for LGBT equal employment rights

Since 2018, The Supreme Court has introduced the concept of “equal employment rights” . It was the first time for the Chinese judiciary to affirm this civil right. However, the affirmation has not reached the LGBT people.

Neither the clearly legal support nor the related judicial explanation, LGBT are like orphans who cannot acquire any judicial remedies. Whether the right cannot be protected, the human rights belonging to these people would absolutely damaged and even would be one of the unstable factors of public security. The perfection of judicial remedies depends on the detailed investment of cases, especially the existence of discrimination and estimate of the violation of the rights [15]

### 5.3. Clarification of the Protected Subjects in the Anti-Domestic Violence Law

In article 37, *Anti-domestic Violence Law*: “Acts of violence committed between persons living together other than family members shall be carried out with reference to the provisions of this Law [11].” This article seems to illustrate the various types of family structures under the protection of this law, but the reality has worked in a completely opposite way. The dilemma is reflected in two aspects:

(1) Legislatures do not accept the LGBT under the protection of the law.

The article only stipulates the protection for persons living together and has not made it clear that it only refers to heterosexual cohabiting couples. However, the responsible person of NPC Legislature Affairs Committee clearly mentioned in the press conference that: “There is no existence of domestic violence between homosexuals [16].” These words mean that the legislature affirmed that homosexual couples can not be included as “persons living together” in article 37. All in all, the legislature refuses to accept the LGBT as the subject under the protection of Anti-domestic Violence Law.

(2) Judicial bench avoids the issue and controversy

Nowadays, The Anti-domestic Violence Law can be only applied in the case of a husband abusing his wife, the range of the law application is not so comprehensive [17]. What’s more, the Supreme Court has given no explanation about Article 37, because of the sensitivity of the issue and the official denial from the legislature. In judicial practice, Judge would impossible to use the article to bring the verdict at all. Simply put, the Judicial bench is trying to avoid the issue.

Based on the reasons for the dilemma, this paper would advise including LGBT people under the protection of the Anti-domestic Violence Law and clarify the applied subjects in Article 37.

## 6. Conclusion

This paper mainly discussed the International law protection of the LGBT, the status quo of the LGBT in China, the current problems of LGBT people in China and the solution to the current problems. Based on that, this paper comes to the conclusion that China has to keep a watchful eye on LGBT human rights issues and take action to fill up the loophole of LGBT human rights protection in the law. This paper could analyze more problems and issues of LGBT human rights, and use more research techniques to demonstrate the possible solutions to tickle the issues for LGBT human rights protection in China. The research on LGBT human rights protection is still scarce, this paper expects the later research can be more concentrated on the campus violence of the LGBT and the legalization of same-sex marriages.

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