

# Possible Legislation of Same-sex Marriage in the Chinese Mainland: Taking the United States Legislations as a Reference

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**Abstract.** In the Chinese Mainland, as same sex marriage legalization has not been fulfilled, homosexual people face inequality in the exercise of property rights and personal rights. Meanwhile, due to the absence of SSML, the legitimate rights of heterosexual people can also be violated. However, it is difficult for the Chinese Mainland to start the legislation process because of traditional prejudice, the political party system, the types of law systems and the lack of internal drive for homosexual groups to strive for legislation. The United States is one of the typical countries who have fulfilled the legalization of same-sex marriage, and its legislative process and methods have reference significance. The method of comparative study is used in this paper to compare the social and legal context of the legalization of same-sex marriage in the US with the current situation of the Chinese Mainland's society and law, analyze the challenges faced by the Chinese Mainland in the legalization of same-sex marriage, and puts forward the anticipation of possible methods of legislating. In order to analyze the problems more pertinently, the scope of discussion on sexual minorities in this paper is limited to homosexual groups.

**Keywords:** Same-sex Marriage; Legislation; Same-sex Marriage Legalization; China; Chinese Mainland; Comparative Study.

## 1. Introduction

On June 26, 2015, in the case of *Obergefell v. Hodges*, the United States Supreme Court justices, with a narrow majority of 5:4, announced the legality of same-sex marriage. Up till March 2024, more than 30 countries and regions have legalized same-sex marriage. Chinese Mainland is one of the exceptions. On June 23, 2015, a gay couple was rejected when applying for marriage registration. They then filed an administrative lawsuit against the local Department of Civil Affairs. The court determined that regulations in the Chinese Mainland have specified the genders of marriage partners to be male and female, thus rejecting the gay couple's plea. The official website of the Chinese Mainland legal field, "People's Court Online", later published an article claiming that "It took the US nearly a century to legalize same-sex marriage, and the procedure is not yet over. In China, expecting a single lawsuit to resolve this complex issue is too perfunctory [1]". Interestingly, the key to the US's legalization of same-sex marriage was exactly one of the so-called "perfunctory" lawsuits; moreover, the assertion implies that "China may take more time to legalize same-sex marriage", yet in terms of ways to advocate for same-sex marriage legalization, the Chinese Mainland has very limited space, both from the legislative level and the societal level. Very different from the US's access to a system of constitutional review and prevailing social activities like protests, China's legislative body and constitutional review body is the same one, and the censorship system of the Chinese Mainland makes it difficult for social activities related to same-sex marriage to enter the limelight. These facts contradict the claim in the article on "People's Court online".

It appears that the above the Chinese Mainland's legal authority's claim against same-sex marriage legalization is evading the issue by selectively blurring the logic.

With Chinese Mainland's ambiguous stance and numerous obstacles to advocacy, aside from learning from relevant foreign systems, innovative ways should be explored in the Chinese Mainland to further guarantee equal rights for same-sex couples, eliminate legislative neglect and better address the problems faced by the people, or even, achieve the legalization of same-sex marriage. This article

will take relevant legislative backgrounds and laws in the US as a reference to discuss the legal difficulties and possibilities that the Chinese Mainland is faced with on its way of same-sex marriage legalization. In order to analyze the problems more pertinently, the scope of discussion on sexual minorities in this paper is limited to homosexual groups.

## **2. Literature Review**

### **2.1. Present Situation of the Studies on Same-sex Marriage Legislation in Chinese Mainland**

Chinese scholars' research on SSML can be mainly divided into two aspects: legislation and legal practice. In terms of legislation, the decriminalization and depathologization of same-sex marriage, along with the developing public views on marriage, provide both theoretical and practical bases for SSML [2]. Moreover, international laws for human rights and constitutional provisions also offer legitimacy for the SSML [3]. However, the legislative recognition of same-sex marriage still faces challenges due to the Chinese Mainland's lack of equality protection mechanisms and unclear international legislative forms; in response, the Chinese Mainland could adopt a step-by-step legislative approach to achieve legalization while implementing supporting measures like ensuring administrative registration of same-sex marriage and regulations on the adoption by same-sex couples [4]. Nevertheless, some scholars view same sex marriage (SSM) from the perspective of traditional Confucian ideology. They argue against the SSML and consider it unnecessary and inappropriate. The core argument revolves around a belief that same-sex marriage deconstructs the traditional "yinyang" gender binary and its legalization would lead to ethical chaos and negative impacts on reproduction [5]. In terms of legal practice, since same-sex marriage is not yet legalized in the Chinese Mainland, judicial authorities tend to presume a same-sex couple as "strangers" in cases related to property disputes, leading to risks on the couple's property rights and negative effects on their daily lives [6]. Furthermore, due to the lack of SSML in the Chinese mainland, great amounts of homosexual people form heterosexual marriages under pressure. These marriages often relate to domestic violence, difficulties for victims to seek divorce, and challenges in applying relevant laws [7].

### **2.2. Present Situation of the Studies on Same-sex Marriage Legalization in the United States**

For SSML has already been fulfilled in the US, research on SSML in the US mainly focuses on the impact of SSML implement. The legalization of same-sex marriage has brought significant changes to American society. On SSML's influence on people's ideologies, the legalization of SSM and its legislation are likely to be in a mutually reinforcing relationship with the decrease of citizens' antigay bias; however, citizens' attitudes toward SSML vary according to whether the legislation is a local one or a federal-level one [8]. On the promotion of same sex couple's equal interests, SSML cuts down the rate of LGBT people's victimization from hate crimes and employment discrimination and creates a safer environment for sexual minorities [9].

Moreover, on population, SSML increases the interstate migration flow towards states that have SSM, which mainly derives from the contribution of gay men; however, cultural differences may lower same sex couple's willingness of migrating [10]. Furthermore, SSML also has influences on male sexual minority groups' health: after the SSML in Massachusetts, the expense in both physical and mental health care declined greatly in the state, which might imply a positive effect that SSML has on male sexual minority groups' health [11]. On the effect on production, SSML contributes to better performances in firms and higher enthusiasm of employees, especially in workplace where traditional masculinity used to prevail [12].

## **2.3. Characteristics of the Existing Research**

### **2.3.1. Not Egalitarian: More Emphasis on Gay Men Instead of Lesbians in both the United States and the Chinese Mainland**

In both Mainland China and the US, gay men tend to have higher "visibility" in research.

Firstly, there are more research and studies concerning gay men than lesbians. This trend is particularly evident in studies from Mainland China. Additionally, research and case reports in Chinese Mainland sometimes directly assume the term "homosexual people" to be gay men rather than lesbians.

Several reasons might account to this phenomenon.

Firstly, gay men may make up a bigger population than lesbians. Secondly, societal biases and discrimination against women manifest in research of gay and lesbian communities.

Secondly, societal biases result in suppression and disregard of lesbians. Lesbians suffer from greater pressure when coming out of the closet. Many of them have to form heterosexual marriages, thus remaining unknown to the society.

Thirdly, the image of gay men may more significantly deviate from traditional male stereotype of masculinity, while the disparity between the image of lesbians and traditional female stereotypes of femininity is smaller.

### **2.3.2. Divergence in the Research of Different Generations in the US and the Chinese Mainland**

The most SSML studies in the US, whether conducted by young or elderly scholars, hold the view that legalizing same-sex marriage is legitimate and strive to argue for it. Even when pointing out the problems of SSML, most US research approach the topic for the intention of improving SSML or the equal rights for homosexual persons instead of overruling them.

In contrast, studies in the Chinese Mainland shows a conflict in viewpoints between young and elderly scholars. Research of young scholars tends to be more objective. They mainly focus on discussing the potential issues and solutions when implementing same-sex marriage domestically. Most research of elderly scholars adopts a perspective influenced by traditional cultural biases. They mainly concentrate on arguing the problems that SSML may bring about and consequently argue against its legitimacy.

There are two possible reasons for this phenomenon.

Firstly, the more entrenched ideological biases in the Chinese Mainland may lead many elderly scholars to persist in their biases against SSML. However, with social development, these biased ideological tendencies are gradually diminishing. That explains younger scholars' objectiveness.

Secondly, the US has fulfilled SSML for a long period. The existence of the law itself, along with its visible positive impacts on society, enables scholars in the US to more keenly perceive the legitimacy and progressiveness of SSML. In contrast, the Chinese Mainland is still in the stage of pre-SSML, debates over SSML's applicability are indeed inevitable at this stage.

## **3. Comparative Study of Same-sex Marriage Legislation Background in the US and Chinese Mainland**

### **3.1. Social and Legal Context of Same-sex Marriage**

#### **3.1.1. The U.S. Legislative Recognition: Social Context**

Before the Stonewall Riots, homosexual groups went through plights and managed to organize social activities. After the World War II, homosexual groups was considered to be susceptible to extortion by the US State Department [13]. Great amounts of people were dislodged from their positions in

state organs or the army on suspicion of homosexuality. Homosexuality was deemed a disease near the middle part of the twentieth century, thus, homosexual people was stigmatized and suffered through a persecution conducted by self-proclaimed “sexologists” in the US [14]. The FBI tracked and kept the private information of suspected homosexual people, committing a gross violation of human rights [15]. Homophile groups were established to improve the unification of the community and education against the prevailing anti-gay sentiment, such as the Mattachine Society [13]. The oppression of the homosexual community from the US government triggered the occurrence of the Stonewall Riots in 1969, which became a tipping point of the revolt against anti-gay policies and ideologies and had provided momentum for further LGBTQ+ rights movements, like the Pride Month parades. The tendency of codifying equal rights for homosexual people, including marital rights, had been constantly rising since then. In 2015, Obergefell overturned Baker, and with the decision made by the US Supreme Court, SSML is fulfilled by the US [16].

Religions and politics were a key social factor affecting the SSML in the US. Religious credibility is already powerful enough to shape the congregation’s mindset. When considering the interconnection between religion and politics, religions’ power of shifting opinions can be extended to all people. Before the SSML in the US, conservative religious denominations opposed both cultural and legal recognition of sexual minorities, while liberal religious denominations support them both [17]. The denominations recruited adherents from different political parties that agreed with their beliefs, thus making the opinions upon SSML polarize in the political arena. With the political parties holding opposite opinions on SSML campaigning and ruling in rotation, the process of SSML is proceeded.

### **3.1.2. The U.S. Legislative Recognition: Legal Context**

Before Obergefell, the US legal regime was unfavorable to the recognition of SSM. This can be seen from the obstacles in the expansion of rights. In 1967, *Loving v. Virginia*, an equal protection case, established the due process right to marry [18]. However, the equal right to get married without the limitation of categories was not expanded to same sex couples. In *Baker v. McConnell*, the same sex couple litigated against Minnesota’s refusal of their marriage. Their claims, including that Minnesota’s action violated their marital right which was recognized by the due process right to marry in *Loving*, was rejected by the Minnesota supreme court, and later, the couple’s appeal was dismissed by the U.S. Supreme Court [19]. Another case happened after the Equal Rights Amendment (ERA) was filed. In *Singer v. Hara*, a same sex couple claimed in the appeal that the trail court had violated the ERA and the fourteenth amendment to the US constitution for not supporting their marriage. The couple’s claim was later denied by the authority for state law did not allow SSM [20]. Clearly, the rights in the ERA did not expand to same sex couples, which forms an unfavorable legal condition for SSM. Back then there existed multiple arguments that were able to reason the propriety of expanding the rights, but the legal authorities seemed to be intentionally keeping them at bay.

### **3.1.3. The PRC Legislative Recognition: Social Needs**

First, the realization of citizens’ individual equal rights needs SSML. The law should not only consider the will of the majority and ignore the interests of minorities. Since the Chinese Mainland has decriminalized homosexuality, homosexual people should theoretically enjoy the same legal rights as heterosexual people. Meanwhile, the fulfilment of SSML is also needed to protect the rights and interests of heterosexual people.

**Marital Right:** same-sex partners cannot marry, so there is no legal protection for the partner's right to identity and property. A typical example is the judge’s presumptions that same-sex partnerships are relationships between strangers in cases of property dispute [21].

**Personality Rights:** both homosexuals and heterosexuals need SSML to better protect personality rights.

**For homosexual people:** first of all, homosexuals' rights to life and health are threatened without SSML. Because of the prejudiced hostile environment, homosexual groups face violence in families, schools and the society. Secondly, the right of reputation of homosexual people is also in urgent need

of protection from SSML. The legalization of same-sex marriage can reduce the stigmatization of homosexual groups. Homosexual people need a safe environment where they can be treated with equal respect after coming out.

For heterosexual people: for the absence of SSML and relevant laws and regulations, the personality rights of heterosexuals can also be violated. Under the pressure of social prejudice, many homosexual people choose to form heterosexual marriages and hide the fact from their heterosexual partners. This kind of marriages is where domestic violence is of great occurrence, which poses huge threats to the victims' right to life and health [7]. Victims applying for divorces and property divisions face huge difficulty getting the support from the court because of the obstacles in evidence collection and gaps in legislation; moreover, the punishment for a marriage partner cheating on their heterosexual partner for a same-sex person is also not legislated, which makes it difficult for the cheated partner to sue for compensation [22].

Second, SSML is needed to meet the needs of the Chinese Mainland society.

First of all, the implementation of SSML can improve the function of the unit structure of society, which is the family. In the US, the probability of same-sex partners raising and adopting children is more than 4 times higher than that of heterosexual partners [23]. It can be seen that the SSML and the improvement of the same-sex partner adoption system can improve the function of the family, fill the gap in the social unit structure, and provide a more favorable environment for the development of the population. The need of improving the social unit structure exists in every society. It surely exists in the Chinese Mainland, too.

Secondly, the implementation of SSML can help fulfil social moral needs. Morality is not immutable. Only with the development of society can morality become morality. The concept held by the public in Contemporary Chinese Mainland has been developing with time. The old concept that same-sex marriage is a sin and a violation of human rights should be abolished. The concept of equality among sexual orientations is gradually accepted by the youngest generations. Law should correspond to people's thoughts and wills.

Third, the SSML can promote the development of social equity and justice. There are discrimination against homosexual people in the society, such as bullying on campus and personal insults. Without the protection of legislation, under the social traditional prejudice in the Chinese Mainland, homosexuals cannot resort to their relatives, let alone the public and the law, forming "isolated islands" whose suffering is difficult for the public to know. This is an injury to the feelings of the people. This phenomenon has caused great harm to the social fairness and justice in the Chinese Mainland. The legalization of same-sex marriage can improve people's awareness of concern and care for gay groups, reduce prejudice and discrimination, and further improve the construction of social equity and justice.

Third, a global protection of human rights calls for SSML in the Chinese Mainland. At present, more than 30 countries and regions in the world have fulfilled SSML. Before the arrival of the International Day Against Homophobia, Biphobia and Transphobia in 2023, the UN Secretary General Guterres called on all people to work together to improve the equal rights and dignity of sexual minorities. It will be likely to become a world consensus to legalize SSM and protect legitimate rights and interests of homosexual groups through legislation.

#### **3.1.4. The PRC Legal Practice: Current Practice Exploration**

First, in terms of judiciary, as SSM is not yet legalized and there is no case law in the Chinese Mainland, judicial cases related to same-sex couples in the Chinese Mainland can only serve as potential references for legislation. Lawsuits related to same-sex couples in the Chinese Mainland, which have been successfully filed and are currently visible to the public, can mainly be classified into two categories: first, same-sex couples suing government administrative agencies for refusing their applications for marriage registration; second, property disputes and custody disputes among same-sex couples [1]. The first type of cases is rare, and currently there are no successful ones. In the

second type of cases, regarding property disputes, courts usually presume same-sex couples to be strangers; regarding custody disputes, courts generally recognize the birth giver as the mother who has custody of the child in question [6,24].

Second, in terms of legislation, legislation regarding the rights of same-sex partners in the Chinese Mainland remains blank. Same-sex partners can only use other laws and systems to defend their rights. However, when these laws and systems are applied to same-sex partners, they create loopholes in their equal rights.

Concerning guardianship legislation, according to Article 33 of the Civil Code of the PRC, “An adult with full capacity for performing civil juristic acts may, in anticipation of incapacity in the future, consult his close relatives, or other individuals or organizations willing to be his guardian, and appoint in writing a guardian for himself, who shall perform the duties of guardian when the adult loses all or part of the capacity for performing civil juristic acts.” This system of guardianship by conduct extends the application subject from the elderly to all adults with full capacity for civil conduct. It can be used to safeguard the personal and property rights of same-sex partners. However, since the legal provisions do not explicitly specify the supervision system after guardianships of conduct are established, there are still risks of adverse effects on personal interests [25].

Concerning custody legislation, there are three main ways for same-sex partners to obtain custody of children: one is that one of the female same-sex partners give birth to babies, the second is surrogacy, the third is adoption. If one of the female same-sex partners chooses to have a child to obtain custody, the partner who did not give birth is not legally recognized as having a kinship with the child. The did-not-give-birth mother’s identity rights will be violated, and, if there are disputes over custody of the children, the partner who did not give birth will also find it difficult to get the support from the court. Surrogacy treats women's bodies as tools or commodities, which violates women's rights for their bodies, and jeopardizes social ethics and order. Although the prohibition of surrogacy is not reflected in legislation in the Chinese Mainland, according to the provisions of departmental regulations and normative documents, any form of surrogacy is not officially supported in the Chinese Mainland [26]. Same-sex partners also face additional restrictions in the adoption system. For example, Article 1101 of the Civil Code of the People's Republic of China stipulates: “Where a person with a spouse intends to adopt a child, the person and his spouse shall jointly adopt the child. [27]” Article 1102 stipulates: “Where a person without a spouse intends to adopt a child of a different gender, the prospective adopter shall be at least forty years older than the adoptee. [27]” Since same-sex partners cannot be recognized as “spouses” in legislation and judiciary, according to the above statutes, the obligation of same-sex partners to jointly raise children is not legally regulated and guaranteed, and same-sex partners cannot adopt children of the opposite sex before the older partner reaches the age of forty. The three ways for same-sex partners to obtain custody of children are all full of obstacles.

## **3.2. Analysis of the Comparison**

### **3.2.1. A Contrast in the Pre-SSML Process in the US and the Chinese Mainland**

Compared to the US, the process of advancing towards SSML in the Chinese Mainland presents a gentle and slow trend.

In the US, the trajectory of advancing SSML follows a trend of "oppression"-“outbreak”-“high-profile actions”-“success.” The homosexual community suffered through the oppression from the government and the intentional ignorance of their rights in court. Later, they maintained significant momentum both socially and legally, culminating in successful legalization from a Supreme Court ruling.

However, as for the development of the homosexual community in the Chinese Mainland, the curve of their fight for SSML is much milder compared to the US. Although homosexual people in the modern Chinese Mainland had also faced oppression, being viewed as diseased and convicted, they

have never engaged in large-scale and high-intensity resistance. After the decriminalization and destigmatization of homosexuality, the Chinese Mainland has not enacted any legislation directly related to homosexuals. With the passage of time, many homosexual persons began to hope for legislative recognition of same-sex marriage. In the early 21st century, Chinese scholar Li Yinhe repeatedly commissioned proposals for SSML but had failed due to insufficient co-signers. In 2018, the first plaintiff in the Chinese Mainland to file a lawsuit against the Civil Affairs Bureau for rejecting same-sex marriage registration, Sun Wenlin, initiated a co-signing project for SSML, hoping to persuade National People's Congress delegates, but there was no subsequent response of the consequence. Neither of these events has really entered the limelight, and subsequently, public momentum for SSML became even smaller.

### **3.2.2. Possible Reasons of the Contrast**

Apart from differences in social ideologies, there are two possible reasons for this contrast:

Firstly, on the political aspect, the political party systems of the Chinese Mainland and the US differ. In the US, the process of competition between two parties with different attitudes towards same-sex marriage naturally stimulates societal reflection and debate on the SSML, thereby advancing related research and theory development. Besides, the governing process of party supporting same-sex marriage itself acts as a driving force for legalization. Under the Chinese Mainland's political party systems, only one party is in power, and there are no campaigns. This fact, coupled with the lingering biases against same-sex relationships, makes political viewpoints on same-sex marriage relatively homogeneous. Thus, it's difficult to generate significant clashes of opinions and related discussions. Therefore, the political impetus for SSML in the Chinese Mainland is relatively small.

Secondly, on a legal perspective, the US adopts the Anglo-American legal system, where precedents are a manifestation of law. Thus, the use of judicial means such as litigation provided an important approach for American homosexual people to fight for SSML. In the Chinese Mainland, precedents are not a form of law, and the rulings of higher courts do not restrict the judgments of lower court. Therefore, solely relying on judicial means is far from sufficient to achieve the legalization of same-sex marriage in the Chinese Mainland; it can only be achieved through direct legislation or legal interpretations adopted by the Standing Committee of the National People's Congress (the latter are of the same authority as laws [28]). As a result, on the Chinese Mainland's way of fulfilling SSML, less legal gradients are provided, which add to the difficulty of achieving the goal.

## **4. Main Problems that the Chinese Mainland is Faced with on its Way of Same-sex Marriage Legalization**

### **4.1. Pre-legislation Period: The Dilemma of Multiple Interweaving Factors**

On the Chinese Mainland's way of fulfilling SSML, there are several factors that interweave with each other which makes the process complicated. These factors include, at least, social attitudes, the disunity within the homosexual community, and the loopholes on the existing legal ground.

#### **4.1.1. Social Attitudes Towards Same Sex Marriage**

One of the biggest challenges in legalizing same-sex marriage in mainland China is the negative attitude of the society towards it.

##### **4.1.1.1. Prevailing heterosexual hegemonism**

Confucianism had been in a dominant place in the Chinese ideology in history. Nowadays, even though some of the original viewpoints had been remoulded with the development of the society, they are still inevitably affecting social consciousness, thus influencing public opinions on SSML. According to the traditional Confucianism, heterosexuality enjoys the supremacy, and, as SSM is considered as a deviation from the orthodox pattern of heterosexual marriage, is definitely not

supported. Though the existence of homosexuality is tolerated in Confucianism and Confucianism-affected mindsets, the tolerance is based on a condescending and hierarchical attitude [5].

First, towards homosexual people, the expression of Confucianism's attitude is often "allow/oppose their existence" [5]. This common statement is as illogical as saying "our culture does not allow/object to the sky being blue". Unfortunately, the public views on homosexuality in the Contemporary Chinese Mainland are almost consistent with the above statements. Expressions such as "do not understand or support homosexuality" prevails in the society and on the internet of the Chinese Mainland.

Second, Confucianism's tolerance of homosexuality is based on an inferior status of homosexual people and the value that homosexual people can create for heterosexual marriages and families. Contrary to the ancient Chinese Confucianism, the Confucianism-influenced public ideology in modern day Chinese Mainland tends to ignore the fundamental human rights of homosexual people and their contributions other than reproduction. Their attitude towards SSM is determined by the profit that homosexuality can make for the heterosexual hegemonic society. Confucianism and Confucianism-influenced thoughts believe that SSML will add to homosexual people's self-dependent initiative on raising children for heterosexual families, thus transforming their "marginal and auxiliary social function" to their personal choices, which will greatly reduce the benefits that homosexual groups can create for heterosexual groups [5]. Therefore, in this sense, SSML should not be supported.

Third, Confucianism requires marriages to conform to the traditional "filial piety" and the traditional heterosexual family pattern. According to Confucianism, it is "unfilial" or immoral for a person to be unable to breed children with blood lineage satisfying their elder family members; in addition, some Confucian scholars claim that the non-traditional gender pattern of same-sex marriage can bring negative effects both psychologically and socially to the children of same-sex marriage families [5]. Although existing research and survey results are contrary to their arguments, they still insist that their arguments are "reasonable and understandable facts [5]". This stereotypical and condescending heterosexual hegemonic attitude widely exists in the society of the contemporary Chinese Mainland.

Heterosexual hegemonism exists extensively in the social consciousness in the Chinese Mainland. The opposition of the public creates great difficulties for striving for SSML and starting relevant legislation.

#### **4.1.1.2. The same sex marriage is unnecessary argument**

A great amount of people, including some homosexual people, hold vacillating or even negative attitudes towards the necessity of fighting for legal marriage of homosexual unions. The common phenomenon in the Chinese Mainland that denies the necessity of SSML exists not only in heterosexual groups, but also in the homosexual community.

First of all, in the homosexual community, there exists a lack of legal awareness and right awareness, which will lead to a lack of internal driving force for SSML within the community. Some same sex couples believe that not getting married makes their lives freer, and there is no need to fight for marital rights.

At the outset, the proponents of this idea did not realize the importance of legal regulation. The property and personality of cohabiting partners are often mixed. Once a dispute arises, without related legal regulation, the dispute will be unsolvable or at least greatly violating the rights of one party of the couple, such as the disputes over property division and child custody when breaking up. Moreover, the idea ignores the equality of human rights. Whether the function of legal marriage is really needed by same-sex partners or not, when heterosexual partners have the right to choose whether to establish a marriage in accordance to their sexual orientation while same-sex couples do not, the equal human right of homosexual people has already been violated.



Second, there are people believing that SSML will reinforce the gender hierarchy in traditional heterosexual marriage, thus make gender inequality deteriorate. Under the gender hierarchy in traditional heterosexual marriage, women tend to be exploited in marriage due to their comparative advantage in housework and the prejudice of social traditions [29]. In the Chinese Mainland, there indeed exists phenomena where same-sex couples imitate the hierarchical pattern of traditional heterosexual marriage to form their way of being, which is manifested as one partner being responsible for working outside while the other mainly responsible for housework or taking care of both work outside and housework. Therefore, there is a public opinion that once the marriage of same-sex couples is legalized, this exploitative marriage patterns will be more deeply rooted in society, thus aggravating gender inequality. Therefore, SSML should not be supported.

However, this point of view is narrow. Firstly, it is difficult to conduct very comprehensive investigations on same-sex couples in the Chinese Mainland, for most of them won't come out of the closet. Thus, so the probability of the above phenomenon in same-sex couples cannot be verified, so its possibility of occasionality cannot be excluded. Secondly, same-sex marriage itself breaks the gender pattern of traditional heterosexual marriage, which makes the equality between the two partners easier to achieve. Thus, theoretically, when gender hierarchy exists in society, it is a more effective way to improve gender equality by advocating and promoting the equality between couples in same-sex marriages, and then use their equality as a template to encourage and regulate the equality in heterosexual marriages. Thirdly, marriage itself does not necessarily have to be the core reason why women are exploited in traditional heterosexual marriage. What deserves more blame is the discriminatory gender concept of the public [14]. In other words, society's stereotypical gender concept and its indoctrination of women are the fundamental reasons for the exploitation. The hierarchical pattern in marriages is only the embodiment of the prevailing gender concepts. Therefore, opposing SSML is just an evasion or procrastination of solving the true problem, which cannot really make women get rid of the exploitation. The focus of the problem is to take positive actions to reduce the gender hierarchical stereotype in society, rather than passively evading the problem at the cost of the violating the equal rights and interests of homosexual people.

#### **4.1.1.3. The same sex marriage is unnecessary argument**

First, in terms of the attitude of the legislative body, the ignorance of the public and the judiciary on homosexual groups will lead to a low will of legislation.

At the outset, in terms of public attitude, the lack of knowledge of homosexual groups will lead to low public awareness of the seriousness of the problems faced by homosexual people, let along the importance and urgency of achieving SSML and protecting the equal rights and interests of homosexual people. Moreover, for there are still a large number of misconceptions about homosexual people, many people are reluctant to support the legislation even if they are aware of the problems.

Second, in terms of the attitude of the judicial authorities, basically, the judiciary holds an indifferent attitude towards the situation. According to some of the comments on official judicial media, the legalization of same-sex marriage has not yet become a widespread/very important issue in China. This is the ignorance of human rights. The judiciary should not only solve the problems of the majority of people, but also pay attention to the minorities.

Under China's legislative system, the views and opinions of the legislative subject, to a large extent, reflect the thoughts and needs of the Chinese people. People's lack of knowledge of homosexuality and the negative public attitudes towards SSML, as well as the fact that litigations concerning same sex couples remain relatively obscure, will hinder the legislative process of the SSML to a great extent.

#### **4.1.2. The Disunity between Genders within the Homosexual Community**

Within the Chinese Mainland's homosexual community, there is a gap between lesbians and gay men, which makes the community less united and less motivated to fight for SSML.

First of all, on the issue of surrogacy rights, there are conflicts between gay men and lesbians. Some gay men support the legalization of surrogacy, while most lesbians, as feminists, firmly oppose the legalization of such activities that violate women's human rights.

Secondly, some lesbians believe that the gay men have maintained in its community the patriarchal systems, which, in its essence, still conform to the traditional heterosexual system that oppress women. Thus, a lot of lesbians are not willing to cooperate with gay men.

Thirdly, due to the society's lingering discrimination against women, some gay men discriminate against lesbians, which only intensifies the conflicts in the homosexual community.

The gap between genders has resulted in obstacles in establishing a better supportive mechanism within the homosexual community. This forms an unfavorable environment for arranging activities concerning their own rights (i.e. SSML), which inevitably requires unity.

#### **4.1.3. The Disunity between Genders within the Homosexual Community**

In the Chinese Mainland, there are also other legal methods other than legislation that can provide references for the solution of same-sex couples' issues, provide some help for the protection of equal rights and interests of same-sex couples, and raise the impetus for realizing SSML. However, due to the following problems, there still exists lots of difficulties in the implementation of these methods.

##### **4.1.3.1. The judicial interpretation issued by the Supreme Court of the PRC and the Supreme People's Procuratorate**

The judicial interpretation issued by the Supreme People's Court of the PRC and the Supreme People's Procuratorate can be regarded as a general regulation with universal legal validity, but the problems faced by homosexual people are difficult to be taken into account by the interpretations. Unlike the US, in the Chinese Mainland, the interpretations made by judges in judicial activities only have force over individual cases, and only the judicial interpretation made by issued by the Supreme People's Court of the PRC and the Supreme People's Procuratorate have universal legal validity [30].

First, according to "the second-instance-being-the-final-instance process" in Article 10 and the Hierarchical Jurisdiction provisions in Articles 18-21 in the Civil Procedure Law of the PRC, as the multitude of impact of cases concerning same sex couples are always considered not high enough, it is difficult for those cases to be heard by a court higher than an intermediate people's court [31]. This fact makes it difficult for homosexual issues to attract the attention of the Supreme People's court or the Supreme People's Procuratorate. It is therefore more difficult for the Supreme People's court and the Supreme People's Procuratorate to make legal interpretations for the homosexual group.

Second, due to the relatively small population of homosexual people, the proportion of litigations filed related to homosexuality is also relatively small. This fact makes it difficult for homosexuality related cases to enter the vision of the Supreme People's Court and the Supreme People's Procuratorate, thus making it difficult for legal interpretation related to homosexuality to be issued.

##### **4.1.3.2. Guiding Cases issuing by the Supreme People's Court of the PRC**

The Guiding Cases system also has difficulty providing cases related to homosexuality because of the above reasons. The guiding cases issued by the supreme law can guide and reference the judgments of courts at all levels in similar cases. Guiding cases can be regarded as having similar effect with judicial interpretation [32]. The problem lies in that the subject of issuing guiding cases is the Supreme People's Court, and it is difficult for cases related to homosexuality to get into the vision of the Supreme People's Court. Up till April 10, 2024, none of the 224 guiding cases published on the official website of the Supreme People's Court is related to homosexuality. Therefore, it is difficult to promote SSML through the Guiding Cases system.

#### **4.2. During the Future Process of Legislation: Hard Balance of the Principle of Equality**

The Chinese Mainland's performance of promoting gender equality is already in the leading position in the world. However, there are still great amounts of inherent biases against gender equality at the social level. If legalized same-sex marriage is feasible in the Chinese Mainland and can be put into legislation, some problems are prone to appear in the legislating process.

Firstly, the loopholes in the early stage of legislation for SSM may amplify the gender discrimination that same sex couples have to suffer. SSM will break the gender composition and gender images of traditional heterosexual marriages. As both parties of the marriage are of the same gender, the prejudice and malice from the society towards a single gender may be multiplied on a same-sex marriage. First, for lesbians, because the gender discrimination and prejudice against women in the Chinese Mainland have not been completely eliminated, lesbian couples may face more social discrimination as well as threats on personality and property after marriage. Second, for gay men, due to the deep-rooted stereotype that men should be masculine in the Chinese Mainland, some gay men's action of breaking free from the stereotypical male image to shape their own image may face more attack from the society. Once the above malice multiplies, the obstacles for homosexual people to form stable marriages and families will multiply. Since the above problems are more likely to occur in relatively deprived areas, the legal regulation will face greater difficulties to solve the problems.

Secondly, SSML will inevitably be accompanied by problems related to children. First, based on the discussion in section 3.1.4 of this article, viewed from the range of the entire society, it is difficult for same sex couples to achieve equality with heterosexual marriage on the birth of their children. Second, viewed from within the homosexual community, it is difficult for lesbian couples and gay couples to achieve equality on the issue of children. Under a system of opposing surrogacy, lesbian couples have the ability to raise children that at least have blood relation to one party of the couples, while gay couples do not. The law is devoted to ensure equal rights for everyone, but the natural contrast between gays' and lesbians' rights in children's custody is inconsistent with the principle of equality. This will inevitably lead to disputes over the legitimacy of surrogacy. Surrogacy is legal in most states of the US, while it is prohibited in the Chinese Mainland. But surrogacy must not be legalized in Chinese Mainland, otherwise it will inevitably lead to direct or indirect violations on women's human rights. However, if the prohibition of surrogacy and SSML happens at the same time, there will inevitably be a paradox concerning the principle of equality.

#### **5. Conclusion**

According to the PRC's constitution's protection of people's equal rights and the depathologization of homosexual people made by the World Health Organization and the Chinese Mainland, homosexual people should, theoretically, enjoy the same equal rights as heterosexual people, such as marital right according to sexual orientations. However, in the Chinese Mainland, due to traditional prejudice, heterosexual hegemonism, the low awareness of the necessity of SSM, the indifference of the public and legal institutions, the lack of unity within the homosexual community and the loopholes in the existing legal grounds, the legislative process of SSML has not been started. This makes the personal and proprietary relations between same-sex couples lack legal protection, which often leads to inevitable violations of homosexual people's equal rights. In addition to homosexual people, heterosexual people's rights and interests can also be infringed due to the absence of SSM legislation, such as the fact that fraudulent marriage conducted of a homosexual person cannot be repealed legally. Due to the differences in traditional prejudice, political party systems and law systems, the momentum for striving for SSML in the Chinese Mainland is lower and less effective than that in the US.

Although the social and legal environment faced by SSML in the Chinese Mainland is not friendly enough, it does not mean that there are no possibilities for fulfilling it. For example, the voluntary guardianship system in the Chinese Mainland is likely to become an important factor in promoting SSML legislation as long as it is further improved. The needs of the people, the requirements of social

development and the call of the international community for human rights all unanimously require the Chinese Mainland to put SSML on its agenda.

Considering the social and legal background of the Chinese Mainland, the process of realizing SSML has to be more gradual than that in the US. The following are some of the anticipations on the possible ways of promoting SSML legislation.

First, the society and laws in the Chinese Mainland can adopt an appropriate amount of deconstructive ideology, break the original binary that does not conform to the rules of nature and the development of societies in the social consciousness and legal system, and then make way for more ideologies and laws that can better protect human rights. Second, a gradual legislative process should be adopted. For example, we can start by prohibiting discrimination based on sexual orientation in departmental regulations, guiding cases and other legal grounds, and then start the legislative process when public awareness of legislative urgency has been improved. Third, more special protection mechanisms for different gender dilemmas should be designed to improve the development of the cause of gender equality in the Chinese Mainland and establish a more egalitarian legislative power and stability guarantee for SSML.

When fighting for equal rights, there are challenges as well as possibilities. The key is to adhere to the hopes and possibilities and deconstruct the obstacles step by step. A brighter future for homosexual couples awaits.

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