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The Decriminalization and Depathologization of Homosexuality in China

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Homosexuality in China, like in other countries around the world, can be a very sensitive concern, often taken as a threat to conventional society and, in far too many cases, a cause for violent repression, incarceration, and even death. Although China has had a very long history of same-sex relations and erotica, much of which was widely documented in imperial times, the Communist Revolution brought a moralizing denunciation of homosexuality as perverse that was only ambiguously and contradictorily written into the criminal codes and medical diagnosis manuals. However, with the reforms of the last decades Chinese society has become more open and accepting of this sexual orientation, in keeping with its official decriminalization by the state.

While lesbian and gay life in contemporary China is improving, problems do remain. A visible queer culture has emerged in many cities. Gay bars, gay saunas, and gay parks, for instance, appear in the country's larger, more cosmopolitan urban centers. Websites are on the rise that report lesbian- and gay-related news and provide forums on queer issues as well as Internet dating services. Lesbian and gay film and cultural festivals, gay pageantry, and gay pride month are held in big cosmopolitan cities such as Beijing and Shanghai. Lesbian support groups and gay rights organizations in the name of AIDS prevention have formed in many cities, and the National Chinese Male Tongzhi Alliance was established in 2009.¹

Many young people today come out as gay and lesbian, and some of their parents even become vocal supporters of gay rights. Evidence of acceptance has reached a point where same-sex marriage ceremonies are held symbolically on the streets of central Beijing and in other public and private

locations in other cities. Still, the rise of a visible queer culture in China has been met with regulations and interference. Police intervention in gay social activities such as the interruption of gay pageantry in January 2010 and the recent raid on Mudanyan, a public park where gay people meet in Beijing, in September 2010 continue to appear in the media. Moreover, prostitution seems to have become a very prominent and troublesome issue for Chinese gay culture.

Exactly how should the public understand and react to contemporary queer culture in China? Simple answers such as “there must be more tolerance” or “there must be more repression” cannot describe the complexity of the situation. When the media present a rosy picture of lesbian and gay life in China now, they usually provide two important pieces of background information: homosexuality was decriminalized in 1997, and it was officially taken out of the category of mental illness in 2001. But how do we reconcile these legal facts with continuing police harassment?

To come to terms with this contradiction will require us to understand when and how homosexuality was officially criminalized and when and how it was pathologized in the PRC. These critical matters still remain unclear. Little research on the history of homosexuality in the PRC has been done or published in English.² By examining the history of official portraits of homosexuality in the PRC as either pathological or normal, I hope to shed some light on this shadowed subject. Furthermore, by revealing what still remains in contemporary Chinese law that could be applied to homosexual activities and how the medical profession defines homosexuality today, this essay will account for the difficulty of presenting a straightforward description of contemporary Chinese gay culture.

DECRIMINALIZATION

Hailed as a legal milestone, the decriminalization of homosexuality in the 1997 Criminal Law of the PRC was actually a secondary consequence of two distinct changes in the existing criminal code. First, the provision on hooliganism (*liumang*) was eliminated. Second, the provision that “all crimes must be expressly prescribed by the law” (*zuixing fadeng*) was reinstated so that no one would be criminalized for any conduct that was not officially prohibited in the law. These two changes were important revisions to the first Criminal Law of the PRC, promulgated in 1979, a few years after Mao’s death and the end of the Cultural Revolution. Because sex between men was not clearly proscribed but was criminalized after being interpreted as a type of hooliganism under the old 1979 Law, these two changes in the new law amounted to the decriminalization of homosexuality.

Hooligans and Hooliganism

No stipulations that explicitly address homosexuality are found in the 1979 Criminal Law. Provision 160, on the “Crimes of Hooliganism,” specified gang fights, provoking fights and stirring up trouble, sexual assault on women or other hooligan activities, and the disruption of public order. Provision 79, called the analogy clause by legal experts, says that “crimes not clearly stipulated in the provisions of this law may be sentenced by using the most similar provisions in the law with the approval of the Supreme People’s Court.”³ According to Guo Xiaofei, one of the few scholars specializing in homosexuality-related legal issues in China, it was exactly these two provisions in the 1979 Criminal Law that made the criminalization of homosexuality possible. Anal sex between men could be punished as “other hooligan activities” under Provision 160 in official judiciary interpretations, which was made possible by the analogy clause.⁴

The meaning of “hooligan” (*liumang*) has constantly changed in China in modern times. One late-Qing writer described *liumang* as “those jobless migrants who were likely to create unnecessary conflicts in society.”⁵ According to Zhou Dan, an openly gay attorney and legal scholar writing in contemporary China, “hooliganism” was neither a legal term nor the name of a crime in the imperial and Republican periods. It was not until the 1950s under the Chinese communist regime that “hooligan” began to enter political and legal documents. Zhou traces the authoritative definition of *liumang* to the Chinese translation of Karl Marx’s *Communist Manifesto*, in which the German term *lumpenproletariat* was rendered into *liumang wuchanzhe*, “hooligan proletariat,” in Chinese. In the *Communist Manifesto*, the *lumpenproletariat* was described as “the social scum, that passively rotting mass thrown off by the lowest layers of the old society, [who] may, here and there, be swept into the movement by a proletarian revolution; its conditions of life, however, prepare it far more for the part of a bribed tool of reactionary intrigue.”⁶ This description of *liumang wuchanzhe* gave a new meaning to the term *hooligan* in the context of socialist China.⁷

Subscribing to Marxism, the communist state held that hooligans represented remnants of the old society and thus were to be subjected to socialist education and reform in the new China. Those who refused to change and continued to disrupt the social order would be punished by the state. It was in this context that gang fights, provoking fights and stirring up trouble, sexual assaults on women, and the disruption of the public order were listed as hooligan activities. Sex between men was also considered as a kind of hooligan activity but was not an openly discussed issue. Efforts to promulgate a new criminal code under the communist regime were made after the founding of the PRC, but the new laws were not formalized until 1979, in the wake of the Cultural Revolution, in an effort to enhance the socialist legal system.⁸

***Jijian* (Sodomy or Anal Sex between Males)**

In twentieth-century China homosexuality could be narrowly understood as *jijian* (anal sex between men). In the sixteenth century, according to Matthew Sommer, the Ming-dynasty legal code punished anal sex between men through an analogy clause, stipulating that “whoever inserts his penis into another man’s anus for lascivious play shall receive 100 blows of the heavy bamboo, in application by analogy of the statute ‘pouring foul material into the mouth of another person.’” As Sommer points out, “the statute quoted above never mentions *jijian* at all.” *Jijian* as a legal term later appeared in the Qing law.⁹

Jijian can be translated as “sodomy,” or “buggery.” In Chinese, *ji* can refer to the penis, and *jian* may also refer to illicit sex between a man and woman. The word also carries the connotation that when a man has sexual intercourse with a married woman who is not his wife, he could potentially derail the patriline of the woman’s husband’s family by begetting an illegitimate son who could inherit the property of the woman’s husband.¹⁰ Since sex between men could not achieve this effect, the term *jijian* has departed from the original meaning of *jian*. When *ji* and *jian* are put together to mean anal sex between men, the term *jijian* becomes an oxymoron. Nevertheless, under a 1734 Qing law, anal sex between men—whether forced or consensual—was criminalized in the name of *jijian* through an analogy clause. The category of sexual offenses between men was modeled after the preexisting classification of illicit sex between men and women, and the act was punished accordingly.¹¹

In one of its last efforts to modernize China, the Qing-dynasty government rewrote its legal code before its fall in 1911. One of the important features in the 1907 Qing legal code was the abolition of the aforementioned analogy clause. As a result, the statute on anal sex between men disappeared. Under the Republican government (1912–1949) following the fall of the Qing, no effort was made to criminalize sex between men, and the legal rule of “all crimes must be expressly prescribed by the law” also became a norm.

After the founding of the PRC in 1949, several drafts of the criminal code were written as policies and guidelines for tackling criminal activities, but no formal laws were promulgated until 1979. Except for a 1950 draft law that included forced sodomy (*jijian*) between male adults under the category of rape, the issue of sex between men did not appear in the legal documents of the central government.¹² Yet the issue of sex between men was constantly raised by local law enforcement personnel anxious for clarification and direction from the central state apparatus. The Heilongjiang Provincial High People’s Court, for instance, in a letter dated March 19, 1957, asked the National Supreme People’s Court for instructions in a case of consensual anal sex between two men who were held in a local labor

reform camp. This correspondence between the two levels of government offices is a rare historical document that addressed the issue of homosexuality during the Mao era and is worth quoting at length. The Heilongjiang letter reads as follows:

Serial Number 139

Supreme People's Court,

In Huling County, two labor reform convicts, Li and Li, had consensual sexual intercourse [sodomy, *jijian*]. The Middle Level People's Court of Mudanjiang District in our province, which is in charge of the county, asked whether their behavior constitutes a crime that should be held accountable as a criminal offense.

One argument is that consensual sodomy [*ziyuan jijian*] is a behavior that severely violates the social moral norm. In addition, this behavior occurred during their labor reform period, which exerted a very bad influence over other labor reform convicts. Therefore, both of them should be held accountable for a criminal offense.

Another argument is that this type of consensual sex between men, although having a bad influence, is an issue of social norms. [They] should be disciplined administratively, but not be held accountable for a criminal offense.

After discussion, we think that this is a kind of moral corruption detrimental to the social norm, and a behavior that violates the human body's physiology and function. Therefore, those who sodomize others by force should be sentenced to punishment. But as for whether the mutual behavior between two consenting persons constitutes a criminal offense, the central government has not had a regulation. According to Provision 154 of the Soviet Union Criminal Code, a man who has sexual intercourse with another man should be sentenced to three to five years of loss of freedom. What is the correct way to understand this provision? How do we understand whether the punishment also applies to consensual behavior? We don't have any basis or confidence to deal with this case and therefore specially ask the instruction of the Supreme People's Court.

The National Supreme People's Court responded on April 29, 1957, as follows:

[We] have received the inquiry from your court numbered 139 of March 19. Regarding the question whether sodomy between two consenting adults constitutes a crime, a legislative solution is needed in the future. Before a clear provision is made in the law, we think it appropriate not to treat the case your court mentioned as a criminal offense.¹³

In this internal government correspondence, the writer of the Heilongjiang letter used the term *sodomy (jijian)* for both consensual and forced sex between men. While the Heilongjiang authorities seemed to know that forced sodomy constituted a crime, they found it difficult to deal with consensual

sodomy. The letter from the National Supreme People's Court was clear that the current law carried no exact stipulation on consensual *jijian* and suggested that the local government should not criminalize this kind of act. It remained silent on the issue of forced sodomy.

The problem of lack of exact stipulations from the central government on sex between men, consensual or forced, persisted into the period after the promulgation of the 1979 Criminal Law. The problem was partially solved with the pronouncement of *The Answer to the Questions on How to Deal with Current Hooligan Cases* by the National Supreme People's Court and the National Supreme People's Procurator on November 2, 1984. It was in this document that *jijian* was clearly listed under "other hooligan activities" of Provision 160 of the 1979 Criminal Law. Among the six kinds of "other hooligan activities that are severe and constitute the crime of hooliganism" were "sodomizing young children, sodomizing adolescents by force, or severe cases of using violence and coercion to commit sodomy repeatedly."¹⁴ In this important government document, although forced sex between men is clearly criminalized, the question of whether anal sex between consenting male adults should be considered hooliganism still remained unanswered.

Beyond the Realm of Formal Law

By law, anal sex between consenting male adults did not constitute a crime, or at least the 1979 Criminal Law and the 1984 interpretation of the crime of "other hooligan activities" did not mention consensual sodomy. In everyday life, however, men could be punished outside the formal legal system for engaging in anal sex during the Maoist and post-Mao reform period. Members of the Communist Party who engaged in consensual male-male sex could be disciplined with a warning within the party or have their party membership revoked. Nonparty members could lose their jobs, be detained without trial for a short period of time, or be sent to labor reform for longer durations.¹⁵

Moreover, although the 1984 interpretation only made clear that sodomy with minors and forced sodomy were severe cases of the hooligan crime, the police could still argue that anal sex between men both in public and in private was a type of general hooligan activity and thus they would make arrests accordingly. In those arrests, whether or not anal sex was involved was an important basis for disciplinary detention. One victim remembered that he was caught in bed naked with a male friend in his work unit dormitory by the police in 1994. During the interrogation, they were beaten into confessing that they had anal sex and were sentenced to fifteen days of detention. Afterward, a sympathetic police officer told them that they would not be detained had they not admitted to having anal sex. This piece of advice was backed up by what he had heard from other homosexual friends.¹⁶

THE 1997 CRIMINAL LAW

A new Criminal Law of the PRC was promulgated in 1997 (still in effect today), and the Criminal Law of 1979 was invalidated at the same time. In the new 1997 Criminal Law, the provision on hooliganism was deleted. Some of the crimes listed under the provision on hooliganism were rephrased and stipulated more specifically under different provisions, including acting indecently toward or assaulting a woman sexually by force, threats and any other similar means, and indecent conduct with a minor (Provision 237); gang fighting (Provision 292); provoking a fight and stirring up trouble (Provision 293); and engaging in licentious group activities (Provision 301).¹⁷ No provision on sodomy was written into the new Criminal Law. In addition, Provision 3 of the new law clearly stipulates that "an act which is expressly defined by law as a criminal act shall be grounds for conviction and sentencing in accordance with law; if it is not expressly defined by law as a criminal act, it may not be considered grounds for conviction and sentencing." Theoretically, as a result of these changes, the 1984 interpretation of "other hooligan activities" was now invalidated. The story, however, does not end here.

THE PUBLIC ORDER ADMINISTRATIVE PENALTY REGULATION OF THE PRC

In the PRC, the People's Republic of China Public Order Administrative Penalty Regulation (*Zhonghua remin gongheguo zhi'an guanli chufa tiaoli*) has been in place since 1957, and a new version was issued in 1987 only to be revised again in 1994. The 1994 regulation's stated function is as follows:

Criminal acts as defined by the Criminal Law of the PRC, such as disrupting the social order, impairing the public security, infringing on the rights of other citizens, and exploiting or destroying public and private property are to be held accountable by law. Perpetrators who commit similar acts but less severe than those defined in the Criminal Law should be punished for the disruption of the social order according to this Regulation.

In Article 19 of the 1994 Regulation, "other hooligan activities," which could include consensual sex between men as understood through free interpretation by the police, were stipulated as behaviors disrupting public order, and men arrested under this article were subject to detention, fines, or warning.¹⁸ In fact, most men found by the police engaging in consensual sex with other men were arrested exactly in the name of disrupting the social order, presumably based on this regulation. The regulation was in place

until March 1, 2006, when it was replaced by the Public Order Administrative Penalty Law of the PRC, in which the term "hooligan" does not appear.

WAS THERE A DECRIMINALIZATION OF HOMOSEXUALITY IN 1997?

As the preceding discussion shows (through the 1984 legal interpretation of the "other hooligan activities" that was stipulated in the 1979 Criminal Law), men who had anal sex with minors in any case or with male adults by force could be held in criminal offense for anal sex. Men who engaged in consensual sex were subject to arrest by the police, and penalties could be applied to those who had anal sex, presumably according to the 1984 interpretation and the 1994 regulation. Therefore, it is safe to say that it is "anal sex between men" (*jijian*), not homosexuality in general, that was criminalized under the Criminal Law, at least from 1979 to 1997. With the changes in the 1997 law, no legal stipulations support the criminalization of anal sex between men anymore. This circumstance of law and practice has been interpreted as the "decriminalization of homosexuality."

The term *tongxinglian* (same-sex love), however, never appeared in any official Chinese legal document, and moreover, sex between women has not been a legal issue in the PRC. The much-reported 1991 "homosexuality" case in Wuwei County, Anhui Province, made these facts widely known. A father accused his daughter and her girlfriend of "committing homosexuality" and asked the local police to "strictly punish the ugly phenomenon" between "the two hooligans." The county public security division reported the case to the Chao Hu district, which again reported to the provincial level for advice. The case in turn reached the National Ministry of Public Security. Chao Hu district received this response from the Anhui Provincial Public Security Department:

Regarding the Wuwei County homosexuality case that you reported, we have consulted with the Ministry of Public Security, and the answer is as follows: Currently, the law of our country does not have a clear stipulation on what homosexuality is and its legal status. In light of this situation, in principle, the case you reported should not be accepted. It is also inappropriate to treat the case as a kind of hooligan behavior and penalize [the people involved] for disrupting the social order. As for how to handle this particular case, you should consult related departments such as the procurators' offices and the judicial court.¹⁹

This 1991 document demonstrates a clear position by the National Ministry of Public Security on the issue of homosexuality. The ministry did not make any connection between *tongxinglian* and anal sex between men,

jijian. While anal sex between men was understood as a type of hooligan activity and could be penalized under the Criminal Law and the 1994 regulation, homosexuality was neither a crime nor could it be explained as a type of hooligan activity appropriate for penalization. In other words, love between people of the same sex was not made illegal, but anal sex between consenting adult males potentially remained a criminal behavior.

In *Homosexuality in the Purview of Chinese Law*, Guo Xiaofei argues that no “decriminalization of homosexuality” has ever really occurred: “In the 1997 revision of the 1979 Criminal Law, the changes on the question [of hooliganism] had nothing to do with [the issue of] of homosexuality in terms of the motivation on the part of the lawmakers, and the connection made [between the new law and the result of] decriminalization of anal sex between men is also an ‘interpretation after the event.’”²⁰ Guo’s central argument is that the issue of homosexuality has not really been within the purview of Chinese legal thought, especially since the founding of the PRC. The legal code is dominated by heterosexist assumptions.²¹ Specifically, the reinstatement of the principle of “all crimes must be expressly prescribed by the law” made the ambiguous “other hooligan activities” impossible to include in the new 1997 law, and that is why the crime of hooliganism had to be dissolved into different specific crimes, along with the annulment of the 1984 interpretation.

As an unintended consequence of the reinstatement of these legal principles, sex between consenting male adults was decriminalized. Although forced sex between a man and a male minor can be punished under the provision of indecent conduct with a minor, sex between and among adult men by force cannot be found anywhere in the new law.²² That the issue of coercion has not been adequately addressed has led many legal specialists to complain about the failure of “the decriminalization of sodomy.” For Guo, this situation exactly proves that the issue of homosexuality has been persistently outside the purview of Chinese lawmakers, and the so-called “decriminalization of homosexuality” has come about not intentionally but as an “unintended result.”²³

SEX BETWEEN MEN UNDER THE 1997 CRIMINAL LAW

The crime of forcing *women* into prostitution (*maiying*) in the 1979 Criminal Law was changed to the crime of organizing or forcing *others* into prostitution (Provision 358) in the new 1997 Criminal Law.²⁴ Provision 359 also includes the crime of seducing or introducing others into prostitution, or providing others with places for prostitution. Under these provisions in the new law, sex between men could be criminalized as a form of male prostitution.

The famous 2004 Nanjing “homosexual prostitution case” (*tongxinglian maiyin an*) set the precedent. According to the procurator’s indictment, brought in January 2003, Li Ning, who colluded with a certain Liu and a certain Leng, placed newspaper advertisements in the name of recruiting “male public relations personnel,” as a front for hiring and organizing many young men to engage in prostitution with male consumers at his three different bars. From the seven confirmed cases of organized prostitution, Li profited 124,700 yuan.

At first, the procurator’s office declined the police request for an arrest warrant, based on the legal interpretation that Provision 358 on “organizing others for prostitution” does not have a clear stipulation on organizing same-sex prostitution and the rule that “all crimes must be expressly prescribed by the law.” Upon receiving this response, the police in Nanjing asked the procurator’s office to reconsider this case. Meanwhile they released Li, since he already had been detained for thirty days, which is the maximum legal detention period. The procurator’s office, however, sustained their earlier decision after their first reconsideration.

In caution, both the procurator’s office and the police decided to refer the case to the provincial level. Following deliberation, the judicial department of Jiangsu Province, to which the city of Nanjing is administratively subject, decided to refer the case to the National Supreme People’s Court for instruction. The Supreme People’s Court in turn remanded the case to the Standing Committee of the National People’s Congress, which eventually offered an oral response: use the provision on the crime of organizing prostitution to punish those who organize young men to sell sex to men. On the basis of this oral response, the court interpreted the “others” in the provision as referring to both male and female. Li Ning was summoned again in October 2003 and in February 2004 was sentenced to eight years in prison plus a 60,000 yuan fine for organizing prostitution.²⁵

Victims of blackmail, along with the perpetrators, can also be punished by the police for engaging in prostitution. Thus the net of deterrent threat is widened. But with the intensification of economic inequality in China, many poor young men resort to homosexual prostitution and become what is known as “money boys.” Some of them simply engage in blackmail by taking advantage of closeted gay men who are looking for anonymous sex. In one case that was reported in two mainstream Tianjin newspapers, Liu, a married man over forty who lives in the city and works for a company, admitted a long history of homosexual tendencies. On August 18, 2002, Liu, via a gay website, became acquainted with Xiaoqiang, and the two decided to meet later that night. After they met, Liu brought Xiaoqiang and his friend, another young man, to the dormitory of his company, and the three of them had sex there. Afterward, the two young men demanded 1,500 yuan from Liu. Following an hour of failed negotiations, Liu sneaked

out and called the police for help, accusing Xiaoqiang and his friend of blackmail. However, once the police determined what had happened, they detained all three, fining them 5,000 yuan each. According to the police, the three had engaged in prostitution as described in the Public Order Administrative Penalty Regulation.²⁶

That the police could charge blackmail victims with homosexual sex on the grounds that they were engaging in prostitution suggests that many men feel insecure, if not threatened, when having casual sex with other men. Although recently the situation has improved for blackmail victims, these men may be punished for engaging in group sex (*juzhong yinluan*) under the current law. This provision against group sex clearly does not aim at homosexuals but could certainly be applied to this group of people. This troubling legal ambiguity is one of the reasons that the famous sociologist, gay rights advocate, and authoritative scholar on homosexuality in China, Li Yinhe, is openly campaigning for the abolition of the 1997 Criminal Law's provision on group sex.

DEPATHOLOGIZATION

Like the criminalization and subsequent decriminalization of homosexuality, its official pathologization and depathologization also occurred after the end of the Mao era. Unlike the decriminalization process, which was only a side effect of the promulgation of the new Criminal Law, depathologization was clearly a result of efforts on the part of medical experts and gay rights advocates.

Pathologization: A Post-Mao Phenomenon

While some people, as shown in the 1957 Heilongjiang letter to the Supreme People's Court, may have believed homosexuality to be a mental illness, it was not until the 1980s that it was officially categorized as such in the PRC. Official classifications of mental disorders and diagnostic criteria were not employed in the first half of the twentieth century, before the communists took power. In 1958 the Ministry of Health drafted a classification of mental disorders for the first national conference on the prevention of mental illness, but in the end this draft was never officially released.²⁷

After the Cultural Revolution, several versions of mental disorder classification were drafted and revised between 1978 and 1984. The 1981 version was the first official one and was named *Chinese Classification of Mental Disorders* (CCMD). Subsequently, the CCMD was recommended to doctors all over the country who were working with mental illness. This preliminary taxonomy was expanded in 1984 with the formulation of specific

diagnostic criteria. Over a four-year period, the criteria for three general types of mental disorders were released separately. According to Yang Desen, who wrote a brief history of the classification and criteria-making process, a very important additional task undertaken by the doctors and experts was the translation of the most up-to-date draft version of the “Mental and Behavioral Disorders” chapter of the *International Statistical Classification of Diseases and Related Health Problems, 10th Revision (ICD-10)*, by the World Health Organization (WHO) and the third edition of the *Diagnostic and Statistical Manual of Mental Disorders (DSM-III)* by the American Psychiatric Association. These two documents served as “necessary reference materials” for the formulation of the comprehensive Chinese diagnostic criteria that were first drafted in 1988.²⁸

In April 1989 the first completed draft including both the classification and diagnostic criteria of mental disorders was finalized at an extended conference of the standing committee of the Chinese Society of Psychiatry held in Xi’an. In order to acknowledge the earlier efforts to formulate explicit criteria, the first combined and complete version of *Chinese Classification and Diagnostic Criteria of Mental Disorders* was named the second edition (CCMD-2).²⁹ In the CCMD-2 that was adopted by the Chinese Society of Psychiatry and issued to the public in 1989, homosexuality was listed as a type of psychosexual disorder (*xingxinli zhang’ai*) and was officially pathologized.

In treating homosexuality as a type of psychosexual disorder, the Chinese Society of Psychiatry seemed to have followed not the DSM-III, which had taken homosexuality off the list of mental illnesses, but the ninth revision of the *International Statistical Classification of Diseases*, in which homosexuality remained among the two pieces of “necessary reference materials” on the list of mental disorders. In 1990, however, the WHO passed the tenth edition of the ICD, which came into use in WHO member states from 1994. Chapter 5 of ICD-10 clearly states that “sexual orientation by itself is not to be regarded as a disorder.”

In 1994 the Chinese Society of Psychiatry revised the CCMD-2 and began to implement the CCMD-2-R. With respect to the CCMD-2-R, the committee undertaking revisions “still listed homosexuality as a ‘sexual perversion’ [*xingbian tai*], [deciding] not to adopt the method practiced in foreign countries that removes homosexuality from the disease classification system and considers it as absolutely normal.” According to CCMD-2 and CCMD-2-R, both those who accept their sexual orientation (egosyntonic homosexuals) and those who want to change their sexual orientation (egodystonic homosexuals) were diagnosed as suffering from the mental disorder.

Wan Yanhai, a public health expert and gay rights advocate, actively campaigned for the depathologization of homosexuality during the second half of the 1990s and also wrote an account of the process. According to Wan,

the reason that in 1994 some medical experts insisted on keep homosexuality on the list of mental illnesses was that they believed a “patient” status could sometimes protect homosexuals from police arrests. However, there were others who supported the pathologization because they believed that homosexuality violated social norms and law and that the psychiatric profession had the responsibility to reform and control it. The pathologization of homosexuality at that time could be used as an excuse both to protect and to prosecute homosexuals.³⁰

The Making of the CCMD-3

Chinese medical experts have persistently claimed that they want to create a system for classifying mental disorders that is suitable for Chinese particularities while also meeting international standards. Facing the discrepancy between the newly changed international standard of the ICD-10 and the Chinese criteria of the CCMD-2-R, the Chinese Society of Psychiatry established a committee of medical experts to put together CCMD-3 in September 1996. Immediately afterward, an activist group called Aizhi (“Loving Knowledge”) Action Project, organized by Wan Yanhai, began to campaign for the depathologization of homosexuality.

One thing that the Aizhi Action Project did was to focus Chinese medical experts’ attention on the recent depathologization of homosexuality around the world, especially in the United States. This work triggered a debate among medical experts. Between August 1997 and February 1998, eleven articles appeared in the *Psychiatric Health News (Jingshen weisheng tongxun)*, a professional journal published by the Zhejiang Psychiatric Health Institute. Some proposed that China should adopt the standard of DSM-4 and ICD-10 that eliminates homosexuality from the classification of mental disorders. Others insisted that homosexuality be classified as an abnormal sexual behavior, unacceptable according to Chinese social norms. Still others recommended compromises, such as not classifying homosexuality as a disorder but still calling for a cure, or still considering homosexual attraction as an illness but finding another name for it.³¹

In addition to affecting the discussion, another important achievement of the Aizhi Action Project was bringing the medical experts and the gay community together. In the past, the medical experts could only meet homosexuals who believed their sexual orientation to be problematic and sought their assistance. With the gay community involved, the doctors met many gay people who were entirely comfortable with their sexual orientation. Again, according to Wan, this kind of communication contributed tremendously to the change in how the medical experts viewed homosexuality and the later depathologization of homosexuality.³²

In April 2001 the Chinese Society of Psychiatry published the third edition of the *Chinese Classification and Diagnostic Criteria of Mental Disorders* (CCMD-3). In the CCMD-3, homosexuality is still listed as a sexual orientation disorder (*xingzhixiang zhang'ai*) under the category of psychosexual disorders. It reads as follows:

62.3 Sexual Orientation Disorder

It refers to a disorder caused by various kinds of sexual maturation and the development of sexual orientation, which is not necessarily abnormal from the perspective of sexual love [*xing'ai*] per se. But, along with the sexual maturation and the development of sexual orientation, some people might develop a mental disorder. For instance, the individual does not wish to be or hesitates to act in a certain way, and is anxious about, depressed, or agonized by [his sexual orientation]. Some of them attempt to find treatment in order to change. This is the main reason that CCMD-3 includes homosexuality and bisexuality [on its list].

62.31 Homosexuality

[Diagnosing criteria]

1. Fits the definition of sexual orientation disorder.
2. Under a normal living condition, from adolescence, [an individual] has begun to show persistent sexual love interest toward members of the same sex, including thoughts, feelings, and sexual behaviors.
3. Although able to have normal sex with members of the opposite sex, [the individual] has difficulties in establishing and maintaining a family relationship with a member of the opposite sex due to obviously declining or lack of sexual interest.

What has become evidence for the official depathologization of homosexuality in China is the statement that “[sexual orientation] is not necessarily abnormal from the perspective of sexual love per se.” It is a compromised way of saying that “sexual orientation by itself is not to be regarded as a disorder,” as stated in ICD-10. As later explained by medical experts and journalists, the important message in this statement is that the medical authority simply does not consider homosexuality abnormal, even though “homosexuality” is still listed under the category of “sexual orientation disorder.” According to the CCMD-3, only those who cannot adapt themselves to their homosexual orientation are still defined as suffering from such a disorder, although the criteria for diagnosing homosexuality do not seem to support this interpretation.

This kind of ambiguity could be a result of the twin guidelines for the making of the CCMD-3, that is, meeting international standards while also preserving Chinese characteristics. Following the ICD-10, the CCMD-3 writers suggest that homosexual orientation is not a disorder. Maintaining the notion of *Zhongguo tese*, “Chinese characteristics,” they create a concept of sexual love, which seems different from the notion of sexual orientation.

Because the concept of sexual love is never clearly defined in these materials and sexual love is deemed “not necessarily abnormal,” the difference between sexual orientation and sexual love remains unclear. There is still much that must change before the complexities of the human heart can be accounted for even in a more enlightened age.

As this short account shows, both the official criminalization and pathologization occurred in the post-Mao period, as part of an effort to standardize the Chinese legal system and medical profession after the end of the Cultural Revolution. The decriminalization of homosexuality was only a side effect of the promulgation of the new 1997 Criminal Law of the PRC, when the Chinese government further strengthened its legal system in light of the social and economic changes occurring since the promulgation of the 1979 Criminal Law. The revision and final release of the CCMD-3 in 2001, which intentionally depathologized homosexuality, was clearly a gesture on the part of Chinese psychiatric professionals to meet international standards of medical practice, albeit incompletely.

Both Western and Chinese media tend to characterize the Mao era as a dark period of political oppression and the post-Mao period as a moment of liberation when social control loosened up, and they assume, explicitly and implicitly, that it was the Maoist regime that made homosexuality both a crime and a mental illness. This chapter does not argue that the Mao era was not repressive for homosexuals in China, and it is clear that further research needs to be done on the history of homosexuality during this period. What I hope my critical investigation into the history of the medical and political representation of homosexuality may have accomplished is to demonstrate how the focus on one issue “beyond the headlines” can permit us to understand the historical transition from China’s “communist” past to its “reformist” present.

SUGGESTIONS FOR FURTHER READING

Books

Guo Xiaofei. *Zhongguofa shiya xiade tongxinglian* (Homosexuality in the Purview of Chinese Law). Beijing: Zhishi chanquan chubanshe, 2007.

Kong, Travis S. K. *Chinese Male Homosexualities: Memba, Tongzhi and Gold Boy*. New York: Routledge, 2010.

Martin, Fran. *Backward Glances: Contemporary Chinese Cultures and the Female Homosexual Imaginary*. Durham, NC: Duke University Press, 2010.

Muhlhahn, Klaus. *Criminal Justice in China: A History*. Cambridge, MA: Harvard University Press, 2009.

Sang, Tze-lan D. *The Emerging Lesbian: Female Same-Sex Desire in Modern China*. Chicago: University of Chicago Press, 2003.

- Sommer, Matthew. *Sex, Law, and Society in Late Imperial China*. Stanford: Stanford University Press, 2000.
- Wenqing, Kang. *Obsession: Male Same-Sex Relations in China, 1900-1950*. Hong Kong: Hong Kong University Press, 2009.
- Wing Wa Ho, Loretta. *Gay and Lesbian Subculture in Urban China*. New York: Routledge, 2009.
- Yang Yifan, Chen Hanfeng, and Zhang Qun, eds. *Zhonghua renmin gongheguo fazhishi* (The Legal History of the People's Republic of China). Beijing: Shehui kexue wenxian chubanshe, 2010.
- Zhou Dan. *Aiyue yu guixun: Zhongguo xiandaixing zhong tongxing yuwan de falixiangxiang* (Pleasure and Discipline: Jurisprudential Imagination of Same-Sex Desire in Chinese Modernity). Guilin: Guangxi shifan daxue chubanshe, 2009.

Films

- Chunfeng chenzui de yewan* (Spring Fever), 2009. Directed by Lou Ye.
- Zhi Tongzhi* (Queer China), 2008. Directed by Cui Zi'en.

NOTES

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1. *Tongzhi*, "comrade," was the most common term of familiarity for men and women in postrevolutionary China; however, with the eclipse of comrade as a meaningful term in a nation of economic class and wealth, *tongzhi* has become the favored term of address for gay men.

2. But for a 1990s snapshot of actual attitudes and practices, see Dalin Liu, Man Lun Ng, Li Ping Zhou, and Irwin J. Haeberle, *Sexual Behavior in Modern China: Report on the Nationwide Survey of 20,000 Men and Women*, trans. Man Lun Ng and Irwin J. Haeberle (New York: Continuum Books, 1997). See also Susan D. Blum and Lionel M. Jensen, *China Off Center: Mapping the Margins of the Middle Kingdom* (Honolulu: University of Hawai'i Press, 2002), 219–37.

3. Quoted in Guo Xiaofei, *Zhongguofa shiye xiade tongxinglian* (Homosexuality in the Purview of Chinese Law) (Beijing: Zhishi chenquan chubanshe, 2007), 61.

4. Guo Xiaofei, *Zhongguofa shiye xiade tongxinglian*.

5. Quoted in Zhou Dan, *Aiyue yu guixun: Zhongguo xiandaixing zhong tongxing yuwan de falixiangxiang* (Pleasure and Discipline: Jurisprudential Imagination of Same-Sex Desire in Chinese Modernity) (Gulin: Guangxi shifan daxue chubanshe, 2009), 209.

6. Karl Marx and Frederick Engels, *Communist Manifesto*, ed. Frederick Engels (New York: International Publishers, 1948), 20.

7. Zhou Dan, *Aiyue yu guixun*, 209–10.

8. Yang Yifan, Chen Hanfeng, and Zhang Qun, eds., *Zhonghuo renmin gongheguo fazhishi* (The Legal History of the People's Republic of China) (Shehui kexue wenxian chubanshe, 2010), 123–34. For a history of the Criminal Law and the Chinese legal system of the PRC in English, see Harold M. Tanner, *Strike Hard! Anti-Crime Campaigns and Chinese Criminal Justice, 1979–1985* (Ithaca, NY: Cornell University, East Asian Program, 1999).

9. Matthew Sommer, *Sex, Law, and Society in Late Imperial China* (Stanford: Stanford University Press, 2000), 119–20. Wenqing Kang, *Obsession: Male Same-Sex Relations in China, 1900–1950* (Hong Kong: Hong University Press, 2009), 93–94.

10. Kang, *Obsession*, 93.

11. For details, see Sommer, *Sex, Law, and Society*, 124–25.

12. Guo Xiaofei, *Zhongguofa shiye xiade tongxinglian*, 60.

13. Quoted in Guo Xiaofei, *Zhongguofa shiye xiade tongxinglian*, 63, and in Zhou Dan, *Aiyue yu guixun*, 185–86.

14. Quoted in Guo Xiaofei, *Zhongguofa shiye xiade tongxinglian*, 61–62.

15. Guo Xiaofei, *Zhongguofa shiye xiade tongxinglian*, 95.

16. Guo Xiaofei, *Zhongguofa shiye xiade tongxinglian*, 95–96.

17. Guo Xiaofei, *Zhongguofa shiye xiade tongxinglian*, 85.

18. See Zhou Dan, *Aiyue yu guixun*, 227.

19. Quoted in Zhou Dan, *Aiyue yu guixun*, 201.

20. Guo Xiaofei, *Zhongguofa shiye xiade tongxinglian*, 85–86. Also quoted in Zhou Dan, *Aiyue yu guixun*, 227.

21. See Guo Xiaofei, *Zhongguofa shiye xiade tongxinglian*.

22. According to Zhou Dan, this kind of situation has changed since the promulgation in 2006 of the Public Order Administrative Penalty Law, which lists acting indecently toward others as behaviors of violating personal rights (Provision 44). As Zhou points out, since “others” could be both male and female, sex between men by force could be criminalized according to this provision. Zhou Dan, *Aiyue yu guixun*, 227–28.

23. Guo Xiaofei, *Zhongguofa shiye xiade tongxinglian*, 85–93.

24. Guo Xiaofei, *Zhongguofa shiye xiade tongxinglian*, 110; Zhou Dan, *Aiyue yu guixun*, 229.

25. Guo Xiaofei, *Zhongguofa shiye xiade tongxinglian*, 104–5. A similar case that occurred in Chengdu, Sichuan Province, in 1998 was closed without a lawsuit for lack of a clear legal stipulation. After the intervention of the People's Congress in the Nanjing case, two other similar cases happened in Beijing and Shanghai, and the accused were found guilty and sentenced. Guo Xiaofei, *Zhongguofa shiye xiade tongxinglian*, 117 and Li Qing, “Nanjing Tongxinglian Maiyin An” [Nanjing homosexual prostitution case] in *Fenghuang zhoukan* [Phoenix Weekly]. No. 141, March 2004, 40–2.

26. As reported in *Meiri xinbao*, Tianjin, August 20, 2002, and *Jinwan bao*, Tianjin, August 20, 2002.

27. Yang Deshen, “Zhongguo jingshen jibing fenlei fang'an yu zhenduan biao-zhun zhiding gongzuo de lishi yu xianzhuang” (The History and Current State of

the Formulation of the Chinese Classification and Diagnostic Criteria of Mental Disorders), *Shanghai jingshen yixue* (Shanghai Psychiatry) (1989): 10.

28. Yang Deshen, "Zhongguo jingshen jibing fenlei fang'an yu zhenduan biao-hun zhiding gongzuo de lishi yu xianzhuang," 11.

29. Yang Deshen, "Zhongguo jingshen jibing fenlei fang'an yu zhenduan biao-hun zhiding gongzuo de lishi yu xianzhuang," 11-12.

30. Wan Yanhai, "Zhongguo tongxinlian zuoxiang zhengchang" (Chinese Homosexuals Are Becoming Normal), in *Tongxinglian feibinglihua yiji xiangguang wenjian* (Depathologization of Homosexuality and Related Documents) (Beijing, Beijing Aizhixing yanjiusuo, 2001), 4.

31. Wan Yanhai, "Zhongguo tongxinlian," 8-10. For more details on the debate, see Zhou Dan, *Aiyue yu guixun*, 121-24.

32. Wan Yanhai, "Zhongguo tongxinlian," 6-8 and 10-11.