

USALI Perspectives

Moving Beyond Tolerance to Acceptance

Chinese same-sex couples need the protection of law

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Chinese society is gradually coming to tolerate its queer citizens. Homosexual males are no longer routinely threatened with punishment as “hooligans,” and the Ministry of Health partially removed homosexuality from its list of mental diseases in 2001. LGBTQ Chinese have begun to form their own families in expectation of enjoying equal rights. Many same-sex couples in urban areas have become parents through heterosexual marriage, adoption, and surrogacy. There is no official data about same-sex couples and their family arrangements. However, a nonprofit called Love Makes a Family (IFamily)

surveyed 9,955 gay people over age 18 in 2020, and found that 76% of respondents had lived with a same-sex partner, while 5% were currently raising children with a same-sex partner. These same-sex couples are finding that social tolerance is not enough. Without the protection of law and without even a political discourse on LGBTQ issues, same-sex couples’ family arrangements are incredibly vulnerable. Here are some of the legal challenges that require urgent attention from lawmakers so that queer Chinese can experience not merely tolerance but acceptance.

China does not recognize same-sex marriage or civil partnerships. As a result, courts treat same-sex couples as unrelated individuals rather than a family unit. Such couples cannot be confident that their partner will be allowed to assist them in making medical decisions on their behalf in emergencies. They do not automatically inherit each other's property and are not entitled to receive other forms of financial support that married couples would receive.

A 2020 court case in Shenyang, one of northern China's largest cities, alarmed China's LGBT community. An elderly lesbian couple, A and B, who had been together for more than 50 years, owned several houses and bank accounts. Most of these were registered in A's name but A tried to protect B's rights through a will. However, after the elderly woman became incapacitated, each ended up in the care of their respective birth families. Each family asserted guardianship over its relative and sued the other family for the property. B's family argued that the houses and bank accounts should be treated as marital property, while A's family said they belonged to A. The Shenyang judge [ruled](#) that even though the two women were obviously a couple, the laws governing marital property did not apply to them. A's family was allowed to take most of the property.

Another urgent legal challenge faced by Chinese same-sex couples is parental rights. Traditional Chinese family values emphasize fertility and children are essential to the family. Many LGBTQ individuals are considering or have already begun having children. However, without recognition of gay marriage, the rights of gay parents are vulnerable. Didi, a Chinese lesbian, and her partner wed in 2016 in the United States and underwent in vitro fertilization. Two of her partner's eggs were fertilized during the procedure, and each woman received an embryo. Didi gave birth to a girl, followed by her partner nine months later with a boy. In 2019, her partner asked her to leave their Beijing apartment and kept both children away from Didi. She disregarded Didi's requests to visit the children and [severed all contact with her. Didi filed a lawsuit](#) in Zhejiang Province in eastern China to fight for shared custody of both children. The police and the judge took note of the couple's status as married under US law in both the police report and the court hearing, but Chinese law does not recognize the marriage. Several years later, the case is still pending because Chinese law recognizes only one mother and one father. Similar controversies have cropped up repeatedly in different cities. Like straight couples, same-sex parents and their children should be considered a whole family in China.

Because of the lack of legal support for LGBTQ community, same-sex couples in China have tried using the existing legal framework in inventive ways to obtain minimal protection for themselves. China's 2021 Civil Code for the first time provided for a system of voluntary guardianship; lawmakers were responding to appeals from parents of mentally and developmentally disabled children who fear that no one will care for their children after the parents die. Voluntary guardianship allows the parents to designate anyone of their choice, including non-relatives, to be their children's guardians. The Civil Code does not restrict the gender or relationship of persons who sign a voluntary guardianship agreement — they only need to be adults. As a result, some same-sex couples are using the procedure to designate their partner as their intended guardian to make arrangements for their health, medical care, property, and other matters, as agreed upon beforehand.

The number of same-sex couples in China who have established voluntary guardianship arrangements is not known. LGBTQ organizations in China have organized numerous lectures and toolkits to assist same-sex couples in comprehending and using voluntary guardianship. However, in practice they have met obstacles. Government-regulated notary offices often take a conservative stance towards same-sex

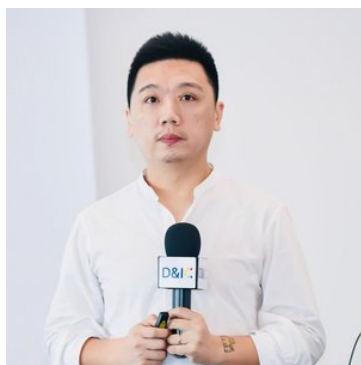
couples and some refuse to notarize guardianship contracts for same-sex couples. A report ([关于进一步加强和规范意定监护类公证业务发展的报告](#)) published by the China Notary Association (中国公证协会) in 2021 said some notary offices and notaries who provided voluntary guardianship services to same-sex couples have been disciplined by authorities, sending a worrisome message to other couples. (The report does not provide any details about the disciplinary action.)

Similarly, the property chapter of the Civil Code [permits homeowners to contractually grant lifetime residence rights in their home to any person of their choice](#), even if the homeowner dies and others inherit the property. This seems to offer same-sex couples a way to ensure that their surviving partner can remain in a shared home. But detailed implementing rules have yet to be released, and using this new mechanism may cause conflict between the partners' families. Such workarounds don't fully solve the key issue that same-sex couples in China cannot enjoy and inherit community property.

Advocacy for legal recognition of same-sex marriages and other legal guarantees for same-sex couples began more than 20 years ago. Li Yinhe, a prominent sociologist, began petitioning the National People's Congress (NPC) in

2000 to legalize same-sex marriage. In 2016, a gay man named Sun Wenlin and his same-sex partner sued the local government in Changsha after the civil affairs bureau refused to register their marriage. On the trial's opening day, hundreds of LGBTQ protesters gathered outside the courthouse to support the couple's claim. [Sun was not surprised that they lost the case.](#) However, as China's first same-sex marriage litigation challenge, the case successfully shifted the debate over protection of same-sex couples from a sociocultural to a legislative level. At the end of 2019, when the NPC released the draft Civil Code for public comment, [more than 200,000 people submitted comments online](#) asking that same-sex marriage be added to the Code. The NPC passed up the opportunity.

Although these advocacy efforts over the years have yielded some positive results, the rights and interests of same-sex couples are still not meaningfully protected. On the contrary, LGBTQ activists and LGBTQ advocacy groups are being suppressed. In a society that puts special emphasis on family values, same-sex couples' families disproportionately face complex and daunting legal obstacles, ranging from abstract human dignity — the social acceptance that gay marriage provides — to the concrete realities of managing property, health, and family life. Lawmakers and the legal system should not disregard the pressing legal needs of same-sex couples.



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