

The Importance of Being Out

Sexuality and Refugee Status

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The traditional approach to an article on sexuality and refugee status might be as follows: to set out the law; to consider the “facts” of the various claims made for refugee status on the basis of sexuality; and to conclude by explaining why the law, in its traditional mode, has been inadequate, or why successful claims for refugee status on the basis of sexuality have been correctly decided. To conclude that refugee law *can* help oppressed gay men and lesbians everywhere — that movement to the “enlightened” west will solve the problems of oppression in the “east”, in Asia, Africa or South America. But this seems too simplistic; the “truth” is far more complex than this black-letter legal analysis. And this analysis foregrounds the law and background lives and cultures. Thus, this piece is an attempt to think through the issues differently: an attempt to foreground lives and cultures and to background (but not ignore) the law. To consider the law as at once both useful and oppressive; to problematise western legal frameworks whilst not wanting to abandon the field of law entirely; to reflect an underlying ambivalence about the law that I detect in myself and in other feminist and queer writers (for example, Smart, 1989: 164–5; Morgan, 1996: 136).

同性爱	tong-xing-ai	love between people of the same sex
断袖	duan-xiu	cut sleeves
分桃	fen tao	split peaches
金兰姐妹	Jin-lan zi-mei	Golden Orchid Sisters
磨镜	mo-jing	polishing mirrors
磨豆腐	mo-dou-fou	grinding the beancurd
契弟	qi-di	adopted little brother
兔子	tu-zi	little rabbit
旱路英雄	han-lu ying-xiong	stranded heroes
鸡奸	ji-jian	intercourse in the manner of fowls

I will begin with some stories — stories of men’s lives in China and their dealings with the Australian immigration authorities.

“Narrative legal scholarship” or “storytelling” is a technique increasingly used in what might broadly be termed “progressive” legal scholarship (see, for example, Eskridge, 1993 and 1994), although it is not without its critics (see,

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for example, Farber and Sherry, 1993 and 1994). In some forms it involves personal narrative by the author (for example, Williams, 1991) and in other forms it involves using stories of others in such a way as to bring outsider voices from the margins to the centre, thus reversing the usual form of legal scholarship which tends to marginalise, if not silence, outsider voices (for example, Eskridge, 1994; Kaspiew, 1995). In this piece, I use storytelling in the latter sense — I am not telling my own story, but the stories of others. However, my only access to the stories of these men is through the rewritten versions produced by the Australian Refugee Review Tribunal (RRT) — and this is after the stories have been made into statements to lawyers, given in evidence, cross-examined and finally reported in the RRT's reasons for decision. Thus these stories are several-times removed from those about whom I write. I am, to some extent, appropriating these stories for my own ends as an academic — but also for strategic ends aimed at (perhaps naively) achieving some changes in the way western society conceives of and speaks about sexuality and the way lawyers think about and “do” law. In this project, I lay myself open to charges

Terminology

In writing about gay men and lesbians in the west, I have preferred to avoid the term “homosexual” because of its negative, pathologised connotation (Walker, 1994: 57; Heinze, 1995: 47). For similar reasons, and in addition because the term is a western term with particular historical and geographical underpinnings, I will here also seek to avoid the term “homosexuality”. The terms “same-sex love” and “homophilia” are used by a number of the Chinese writers in the area, rather than “homosexuality” (for example, Lau and Ng, 1989; Bullough and Ruan, 1993) and where possible, I too will use these terms. However, when discussing the decisions of the RRT, which uses the term “homosexual”, it will be necessary for me to use that term.

of western appropriation of “Asia” (indeed, perhaps even “orientalism” as conceived of by Said (1995)) — but, like Berry (1994: 98–9), I defend myself on the basis that, although my position is western, my relationship with those of whom I speak is an “other-to-other” relationship because I, too, am positioned as “other” within the west on the basis of my sexual activity (and my sexual identity).

I acknowledge at this point that some parts of my telling of these stories involve direct quotes from the decisions of the RRT, but that quotation marks and footnotes are not used to indicate this. To the extent that the stories “belong” to those who lived them, it seems inappropriate to attribute them to the RRT, notwithstanding that they have been rewritten by the RRT.

Story 1: Zhang Ainan (a pseudonym)(RRT Ref N93/00846)

Ainan found himself attracted to other men from quite an early age and began a sexual relationship with another man, Quyan, while at university. This relationship became a long-term and committed one (whether it was monogamous I don't know, but it seems to have been presented as such to the RRT). Eventually, however, the university authorities in China became aware of the sexual nature of the relationship between Ainan and Quyan and took steps to prevent it. Ainan and Quyan were harassed by other students and castigated by the authorities, but their relationship continued. The authorities refused to do anything about the harassment by other students, taking the view that this was Ainan's own fault.

After they graduated, Ainan and Quyan were sent to different work camps in an attempt to separate them. Their actions were monitored and when they spent time together, they were harassed. On one occasion, they were tied up and violently beaten. Quyan was hospitalised with broken ribs as a result and

Around 500 BC, King Wei-Ling-gong had a fondness for Mi Zi-xia, who shared a delicious peach with the King during a walk in an orchard — hence the term *fen-tao zhi-ai*, Love of the Split Peach, as an expression for homophilia.

(Lau and Ng, 1989: 468)

Ainan was not permitted to visit him in hospital. On another occasion, Ainan was tied up and spat upon. For a time, Ainan was living in an apartment and Ainan and Quyan managed to meet without harassment (although in secret, of course). But eventually the local authorities discovered this and began monitoring Ainan's activities. During this time, Quyan was bashed after leaving Ainan's house one night and the attackers taunted him about his sexuality. Later, the windows of the apartment were smashed and Ainan believed this was because of his sexuality.

In 1987, Quyan was moved even further away from Ainan, although they hoped to be able to continue their relationship somehow. However, Ainan was posted overseas — something he viewed as a punishment, designed to keep him away from Quyan, although such postings are considered prestigious in China. While on this overseas posting Ainan became a Christian. He had some sexual encounters while overseas, although none that resulted in a lasting relationship and so his sexual activity escaped notice. During his holidays, Ainan returned to China and spent time with Quyan. After he returned to his overseas posting, Ainan received a letter from Quyan telling him that Quyan was being investigated because of his relationship with Ainan. He then heard nothing more from Quyan and his mother later told him that Quyan had been arrested and sent to an "education through labour" camp. At this point, Ainan decided to try to leave China. He applied for a student visa to Australia, without his superiors' knowledge.

After he arrived in Australia, Ainan pursued his Christianity through an Anglican church in Sydney which advertised that it welcomed gay parishioners. Ainan told the RRT that he does not visit gay bars and discos in Sydney, but mixes in what might be termed a "gay Christian scene". He also said that if he could resume his relationship with his partner he would, as he wished that relationship to be a lifelong commitment.

The Han Emperor Ai-di had an affection for Tung Xian. The Emperor severed his sleeves, on which Tung Xian was sleeping, rather than wake his lover — thus the term "cut sleeves" became another expression for same-sex love.

(Lau and Ng, 1989: 468)

Ainan claimed refugee status¹ and his application was granted.

¹ Under the *Migration Act 1958* (Cth), a refugee is defined in accordance with the terms of Article 1 of the *Refugee Convention* as amended by the *Refugee Protocol*. Article 1 defines a refugee as any person who:

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality

Same-Sex Love in Modern China

Same-sex love has been documented throughout Chinese history, without particular stigma attached to it (see below). However, in modern China — that is, during the 20th century — attitudes towards same-sex love changed, although the occurrence of same-sex sexual activity did not cease:

The rapid influx of political and moral ideas and concepts from Europe, backed by glittering fire-power and technology, led to a rift between modern China and her traditional past, at least on the surface. Victorian ethics and Christian puritanism as ideals pervaded many of the leadership groups, and as a nebulous alien term, homosexuality was viewed with puzzlement and apprehension and kept at a distance. The official stance was to deny its existence or to play down its prevalence or significance (Lau and Ng, 1989: 478).

The predominant response in modern China to same-sex sexual activity has been denial — Bullough and Ruan (1993: 46) report that, if asked, most Chinese will say they do not know any homosexuals and there must be exceedingly few in Chinese society. Hirsch (1990: 163) reports that Chinese psychiatrists assert a “lower rate” of homosexuality amongst Chinese than amongst westerners. This seems to be the official response to same-sex love as well, manifested in statements by Chinese officials to visiting western human rights observers (RRT Ref BN94/03199, para 28). While Foucault (1978: 34–5, 49) observed an explosion of discourse around sex and sexuality in the “repressive” Victorian era in the west which has continued to the present, in China it seems that this has not occurred. Indeed, it seems that novels, plays and poetry celebrating sexuality in general (including same-sex love) were quite freely available in pre-20th century China (Ng, 1989), but that entry into the 20th century, with the increase of western influences and the impact of a totalitarian state, brought about a silencing of public discussion of same-sex love.

This silence, it is said (Bullough and Ruan, 1989: 46, 50), has led to a society largely free of surface homophobia in the form of insults based on “deviant”

and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

Claims for refugee status on the basis of persecution because of sexual preference are made on the ground of “membership of a particular social group”.

Membership of a Particular Social Group

The leading case on the meaning of the phrase “membership of a particular social group” is *Morato v Minister for Immigration, Local Government and Ethnic Affairs*. In that case, Lockhart J held that for a person to be a member of a particular social group it is necessary that the person “belongs to or is identified with a recognisable or cognisable group within a society that shares some interest or experience in common” (ibid, 416). This has been interpreted by the RRT as permitting the conclusion that “homosexuals” are a “particular social group” within the meaning of the Convention (RRT Refs N93/00846 and N93/02240). Some members of the RRT have also drawn on decisions of West German and Canadian courts which have reached the same conclusion (ibid), although those courts have emphasised the “immutability” of sexual orientation. While not binding on the RRT, they were considered of persuasive value. Hathaway, too, expressly acknowledges that “homosexual and bisexual men and women” constitute a social group under the Convention, again because they are defined by an immutable characteristic (1991: 163).

sexualities, such as “faggot” or “lezzo” in Australian and other western societies — the only derogatory term used in China seems to be *ji jian* (buggery), which describes an act, not an identity. But this absence of overt homophobia is a silence resulting from repression and enforced ignorance, rather than from tolerance or approval (Bullough and Ruan, 1993: 47). Homosexual activity is perceived to disrupt social order, lead to criminal behaviour and damage the physical and mental health of adolescents (Bullough and Ruan, 1993: 47). It is seen as a mental illness and may be “treated” by aversion “therapy” — administering electric shocks or herbal medicines which induce vomiting whilst showing the “patient” erotic pictures of same-sex love (Bullough and Ruan, 1993: 48; RRT Ref BN94/03199, para 30). In this, China does not differ from the west of 30 years ago, when electric shocks to the genitals, nausea-inducing drugs and even lobotomies were used to “cure” homosexuality (Dynes and Donaldson, 1992: xi; Morin, 1977: 633).

Australia, 1991

A few years ago, I visited a friend in hospital; she'd taken an overdose of the anti-depressants her psychiatrist had put her on. She told me that when she'd raised the question of her sexuality with the psychiatrist, the response had been, “Oh, I don't think you're a lesbian”. That was it. No discussion, just drugs.

In the People's Republic of China, homosexual activity, whether public or private, is not specifically a crime, but Article 106 of the Criminal Law Code, which prohibits “hooliganism” (sometimes translated as “revolting behaviour”: Ruan and Tsai, 1988: 198) has been used against men engaging in same sex sexual activity and the term *ji jian* was sometimes used in the notices concerning offenders which are publicly displayed on street-side bulletin boards (Lau and Ng, 1989: 479). In some cases there have been reports of men being forced to walk in public with a board around their neck identifying them as homosexual/criminal (RRT Ref N93/00846, para 12).

The interpretation of sexual preference as immutable is controversial, both within and without the gay and lesbian community. There is considerable debate about the aetiology of sexual preference (and here I am speaking of sexual desire for a person of a particular sex, rather than other possible ways of categorising sexual preference), and the “nature/nurture” debate will probably never be resolved (see, eg, Stein, 1990). Some lesbians and gay men conceive of their sexuality as something they were born with, others see it as a choice, not something imposed upon them which they cannot change. However, even if a social constructionist approach to sexuality is taken, such an approach does not imply that sexual preference can be easily altered (Vance, 1982: 16). The potential problem for asylum seekers is that they may have had sexual relationships with persons of the opposite sex before or as well as engaging in sexual relations with persons of the same sex and this could be interpreted by a decision maker as taking such persons outside the “social group” of “homosexuals” if an immutability approach is adopted.

However, immutability does not seem to be a requirement under the current definition of social group, either in Australia (see *Morato's* case, above) or elsewhere. Hathaway has interpreted “particular social group” so as to include membership in a group defined by a common characteristic which the members of the group either cannot change, or should not be required to change because

There have been some indications of a change in official attitudes in the early 1990s — for example, officials in Shanghai admitted that there were around 10 000 homosexuals in the city (and that's probably a conservative estimate) (Bullough and Ruan, 1993: 48). Concern over sexually transmitted diseases, including AIDS, has resulted in greater public discussions of sexuality, including homosexuality. However, these changes have been relatively few and are confined to the large cities such as Beijing and Shanghai.

Notably, because of the absence of a visible "gay" community and the inability to live openly in a same-sex relationship or simply as openly non-heterosexual, it has been reported that around 80 per cent of male-to-male sex occurs in public toilets between strangers (Bullough and Ruan, 1993: 48). Researchers have documented a real sense of isolation even in cities such as Shanghai — resulting from and feeding into the requirement to remain hidden or face the consequences. The combination of official and unofficial attitudes to same-sex love has meant that there is no opportunity for gay men to lead any semblance of a "normal" life, free from fear (Ruan and Tsai, 1988: 194–6; Bullough and Ruan, 1993: 52).

In one of the only studies of same-sex love in modern China, conducted by Fang Fu Ruan (under a pseudonym Jin Ma Hua), the subjects reported that the greatest issue in their lives was the fear of exposure and the corresponding need to keep their sexual preference secret. This was not only a problem in itself, it also made it very difficult for men to find sexual partners, let alone engage in any form of ongoing sexual relationship. In reporting on this study, Ruan and Tsai (1988: 194) concluded that:

To gays in contemporary China, the source of their pain derives from the fear of societal punishment, including arrest, sentence, labour reform camp, and prison terms. The mental pressure and anguish for fear of their true identity being found out is often unbearable. ...

The social pressure and pain exerted on homosexuals have led to numerous attempted suicides and constant inner conflicts among gay people.

it is fundamental to their individual identities or conscience (Hathaway, 1991: 160, quoting *Matter of Acosta*). This definition would encompass lesbians and gay men on either an immutability approach or a choice approach, since sexual orientation can be seen as something so fundamental that a person should not be required to change it (S Goldberg, 1993: 613; Heinze, 1995: 21), particularly in a milieu where sexuality is so invested with social meaning. Hathaway's approach is an appropriate one to apply to questions of sexuality — sexual preference may or may not be unalterable, but it is something that a person should not be required to change in order to avoid persecution. In this respect, sexuality can be analogised to religion — some people are born into a particular religion and are characterised as being of that religious group regardless of any belief in god or religious practices (that is, in some senses religion is inherited and cannot be changed); whereas others may choose to practise a particular religion and could cease to do so, yet international human rights law recognises that people should not be required to forego their religious observances. Some writers have suggested that the primary way of justifying the identification of "homosexuals" as a social group should be by focusing on the identification and persecution of "homosexuals" by their society of origin (see, eg, Grider, 1995: 221, 224).

Story 2: Jiang Liandi (a pseudonym) (RRT Ref BV93/00242)

Liandi is married and has a child. While in China, he had a number of sexual relationships with other men, although these were not, it seems, long-term. He came to Australia as a student and since his arrival here, he has had an ongoing sexual relationship with John. If Liandi were required to return to China, John would seek to accompany him — but this would cause problems for them because of current Chinese attitudes towards sexual activity between men. Liandi could not demonstrate any acts of persecution against himself while he was in China based on his sexual activity with other men — but he feared persecution² on the basis of Chinese treatment of men who had sex with other men.

Liandi was refused refugee status.

Same-Sex Love Between Men in Ancient China

[H]omophilia occurred in all age groups and in all social classes in the Chinese culture, with changes in modes and standards over time. However, although socially located, homosexuality does not emerge as a distinctive (“gay”) subculture. Homophilia and homosexual activities seem to have been part of the lifestyle of distinct subgroups of Chinese society, and culturally shaped and interpreted in cultural idioms appropriate to those groups.

(Lau and Ng, 1989: 483)

Writings about China suggest that same-sex love between men (there is little historical information concerning women) was an accepted aspect of Chinese society until the 20th century, when westernisation brought about a change in social attitudes to sexuality generally. That is not to suggest that there was never any moral opprobrium directed towards same-sex sexual activity; it is clear that, in some eras of Chinese history, same-sex sexual activity was condemned morally and, in the 1700s, legally. There was some conflict between homophilia and Confucian ethics (which place a strong emphasis on family and propagation

The question of the basis of the “social group” categorisation has been considered in detail by two members of the RRT (RRT Ref N93/00846 (*Ainan’s* case) and N93/02240) and all subsequent decisions have followed these two cases. In each case, the Tribunal seems to have accepted the immutability approach to the social group issue. In *Ainan’s* case, the Tribunal concluded that:

this social group is a “recognisable or cognisable group within a society that shares some interest or experience in common” when certain societies, including the Australian and the Chinese choose to identify the group by the immutable characteristic “homosexual” or “tongxinglian” in Chinese which the Tribunal is told translates as same sex love (para 76).

While embracing an immutability test, this approach also accords weight to the way in which the group is perceived within a particular society, which is some way towards the approach suggested by Grider.

² *Well-Founded Fear of Persecution*

A well-founded fear of persecution, it is accepted in the Australian legal context, has two elements: first, a subjective element — the applicant must actually feel such a fear; and second, an objective element — the fear felt must be “well-founded”. The first element is not usually in doubt. What is often in issue is whether there is any objective basis for the fear. The High Court gave its imprimatur to this subjective/objective test in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs*,

of lineage), but this was countered by emphasising references in Taoism to the importance of following the natural instincts (Lau and Ng, 1989: 470). In addition, disapproval was directed not simply at same-sex sexual activity but more generally at extra-marital sexual activity; same-sex love was not singled out as a particular perversion or identity, it was frowned upon when it interfered with family life and the duty to procreate.

This emphasis on family life and propagation of the family line meant that there are few records of men who were exclusively involved in same-sex relationships; most men who engaged in same-sex sexual activity also married and had children. Men were able to maintain a heterosexual marriage and a homosexual relationship without contradiction or societal disapproval for much of Chinese history. Chinese social organisation prevented the emergence of a self-identified homosexual life-style independent of marriage. Thus, in modern terms, what was observed was not so much "homosexuality" as "bisexuality"; however, these terms are of little use in describing sexuality in ancient China. In ancient China there was no term equivalent to "homosexual" (or "bisexual") — the term *tongxinglian* is the modern equivalent of "homosexuality", but it, like the English term, is a late 19th century invention. "Chinese terminology ... did not emphasise an innate sexual essence, but concentrated rather on actions, tendencies, and preferences" (Hinsch, 1990: 7).

The earliest records of same-sex sexual activity relate almost solely to the activities of the Emperors and their courts, as it was this social group that was the primary subject of written history. Documentation begins with the Zhou dynasty (1122?–221 BC), where sexual favourites of the Emperors were recorded as achieving considerable power and wealth, indicating a high level of acceptance of same-sex relationships (Hinsch, 1990: 27, 33). The practice of having male sexual favourites (in addition to a wife and harem) continued during the Han dynasty (206 BC–AD 220), where same-sex sexual relationships was a "central feature" of court life (Hinsch, 1990: 36) until the Tang dynasty (618–907), when records of the Emperors' favourites declined. This decline was more

and offered some further guidance on what the notion of "well-founded" means. The accepted approach was that a fear will be well-founded if there is "a real chance" that the person will suffer persecution (*Chan*, 1989: 389 (Mason CJ), 398 (Dawson J), 407 (Toohey J), 429 (McHugh J)). The notion of a "real chance" conveys that the chance of persecution must not be remote or insubstantial (*ibid*, 407 (Toohey J)).

The requirement of both subjective and objective requirements is also accepted by courts in other common law countries, but it is argued by Hathaway (1991: 65) that the two-pronged approach to the concept of a well-founded fear is "neither historically defensible nor practically meaningful". Rather, he views the notion of "well-founded fear" as inherently objective and always intended to "restrict the scope of protection to persons who can demonstrate a present or prospective risk of persecution, irrespective of the extent or nature of the mistreatment, if any, that they have suffered in the past".

As to the elaboration on "well-founded", it seems that the Australian test is in accordance with accepted international approaches to the question. The drafting history of the Convention refers to a fear which is "justifiable" and to "reasonable grounds" for concern (Hathaway, 1991: 68). The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* ("the UNHCR Handbook") (1979: 12) refers to a fear which is "supported by an objective situation". In the United States, the Supreme Court has rejected a "balance of probabilities" test and moved instead

marked in the Song dynasty (960–1279), possibly because of the rise of a bureaucracy dedicated to rational decision making which disapproved of Emperors' personal peccadilloes as the basis of official appointments and decisions. However, Hinsch (1990: 90) observed that although "the increasing rationality of this system left less room for emperors suddenly to promote illiterate and untrained minions to high office, nevertheless, Song rulers still kept favourites". Interestingly, during the Zhenghe reign (1111–1118) male prostitution was outlawed, but the law does not appear to have been enforced (Hinsch, 1990: 94). This change in the law, however, seems to have coincided with a rising intolerance of men who adopted a passive role in same-sex sexual activity and a Neo-Confucian morality which opposed extra-marital sexual activity.

The Ming dynasty (1368–1644) seems to have been a high point for *duan xiu* (the passion of the cut sleeve) in ancient China, although this could be a result of the emergence of prose fiction, refinements in printing technology and an increase in literacy in China, which left a large number of sources of information not confined to the activities of the royal courts. Plays, poems, literature and popular humour of the time reveal a high degree of acceptance of same-sex sexual activity (Hinsch, 1990: 98–117, 119–38). Notably, too, records of same-sex marriages are found at this time in the province of Fujian. There, men would pay a "bride price" in order to marry a *qi di* (adopted little brother). The relationship would not continue indefinitely, as eventually the men would marry women and have children, in order to fulfil their familial duty. In some cases, widowers would marry a younger man and later purchase a female bride for him (Hinsch, 1990: 127–34).

During the Qing dynasty (1644–1912), the first law against same-sex sexual activity is recorded in China. In 1740, the law was altered to prohibit male-to-male rape (including what we term "statutory rape"), so as to correspond with the law in relation to male rape of women (Hinsch, 1990: 142–4; Meijer, 1985: 109–10, although Meijer records the date as 1679). At the same time a law against consensual sodomy (*ji jian*) was introduced, however it seems that this

to a more generous "reasonable possibility" test, under which "it need not be shown that the situation will probably result in persecution" (*INS v Cardoza-Fonseca*, 1987: 453). A similar approach has been adopted in Canada, where the terminology used is "reasonable chance" (*Joseph Adjei v Minister of Employment and Immigration*, 1989: 172). This can be contrasted with the United Kingdom, where the House of Lords has required a "reasonable degree of likelihood" or a "real and substantial danger" of persecution — *R v Secretary of State for the Home Department; Ex parte Sivakumaran*, 1988: 197–8). The High Court's "real chance" approach is consistent with the more liberal US-Canadian approach, rather than the House of Lords' more restrictive test.

The objective test requires consideration of the conditions inside the asylum-seeker's country of origin. Evidence of past persecution of the applicant can also be used to demonstrate the objective element, but as Hathaway (1991: 87) emphasises, past persecution is not a prerequisite for recognition as a refugee — there is no requirement that an individual has already been victimised because of a convention ground, all that is required is a "real chance" of such persecution if the applicant were to be returned to the country in question. Ultimately, the best indicator of the existence of a real chance of persecution is evidence of harm to persons similarly situated. This evidence can come from the country's general human rights record, from human rights organisations, the applicant's testimony or any other available sources. The objective element of the well-founded fear requirement is one potential

was introduced to bring the law relating to male-to-male fornication (sex outside marriage) into line with male-to-female fornication (Meijer, 1985: 129). The punishment for consensual fornication (with either sex) was the lightest possible in Qing law (caning and the wearing of the cangue, a heavy wooden collar which marked the person as a criminal, for one month). These changes, it seems, were part of a reaction against the liberal attitudes to sexual activity and morality generally that prevailed during the Ming period and were directed towards preventing extra-marital sexual activity, rather than at singling out same-sex sexual activities. Hinsch (1990: 140, 147) suggests that, notwithstanding the change in the law, Qing society retained a high degree of tolerance of same-sex sexual activity and a high degree of awareness of the Chinese homophobic tradition of earlier centuries. However, by the end of the Qing dynasty early this century, tolerance had been replaced with intolerance and the modern era, of denial and repression, was ushered in.

To use Hinsch's words,

From a position of prominence and openness, men involved in homosexual activities would fall to a place of terrified obscurity within their society (1990: 161).

Story 3: Li Shuaige (a pseudonym) (RRT Ref BN94/03199)

Shuaige began a relationship in China with Peter, an Australian man, and they moved to Beijing together. Shuaige had some involvement in the 1989 pro-democracy movement, and was questioned about this and about his association with foreigners by police, though it seems they were not aware that his relationship with Peter was sexual. Shuaige and Peter then left China for Australia for a holiday. While in China Shuaige had always been careful about his sexual activity in order to avoid problems with the authorities. But in Australia he "came out", living publicly in a gay relationship with Peter and then later with Jason, with whom he had a relationship for over three years. Shuaige became actively involved in gay community events and activities, including exhibitions organised for Mardi Gras, the first Asian Gay and Lesbian Pride Event and the production of an AIDS brochure for ACON. Shuaige's experiences in Australia and his commitment to gay pride prevented him from returning to the secretive life he used to live before coming to Australia and he feared persecution³ if he was returned to China.

Shuaige was granted refugee status.

stumbling block for gay and lesbian refugees, because of the Tribunal's view on what does and does not constitute persecution. Very often the harms suffered by lesbians and gay men — particularly the requirement of remaining closeted, but also general discrimination and stigmatisation — are not seen as persecution.

³ *What Constitutes Persecution?*

The final question that arises in considering the concept of a "well-founded fear of persecution" is: what amounts to persecution? This is generally the most difficult part of the test to satisfy in the case of lesbian and gay asylum-seekers, as the RRT has not been inclined to recognise much of the oppression suffered by lesbians and gay men as sufficiently serious to amount to persecution. As the High Court pointed out in *Chan*, "persecution" is not defined in the Convention or the Protocol. Hathaway (1991: 104-5) suggests that persecution is "the sustained or systemic violation of basic

What the RRT Said

the factual conclusions about a "real chance of persecution"

or

the importance of being out

In Ainan's case, the Tribunal had little difficulty in discerning a "real chance" of persecution if Ainan was returned to China, on the basis of the Chinese authorities' past treatment of both him and Quyan. In support of this conclusion, the Tribunal also drew on evidence concerning the treatment of "homosexuals" in China generally. The Tribunal noted that Ainan would be "vulnerable to attacks ... and powerless to seek the protection of the state which ... is frequently the agent of persecution" (RRT Ref N93/00846, para 96). In addition, it concluded that the evidence had clearly demonstrated that "homosexuals in the PRC are at risk of arrest" (*ibid*, para 92).

As discussed below, the Tribunal was not prepared to accept that the mere existence of relevant offences under the criminal law was sufficient to give rise to a "well-founded fear of persecution", but it did accept that the fear of persecution was well-founded in the applicant's case. The reason for this turned substantially on the fact that as a person involved in a committed, long-term relationship, it would be difficult for Ainan to avoid detection and then persecution by the authorities. This could be contrasted with the "homosexual in China who was content to find sexual expression in casual liaisons in public parks", who could thereby escape notice and avoid arrest. The Tribunal found that:

Discretion ... may enable a homosexual to avoid discovery and the consequences of punishment or persecution (*ibid*, para 73).

Being out, therefore, was significant in Ainan's claim for refugee status.

This approach to persecution was adopted by the Tribunal in Liandi's case and in another case involving a Chinese man, but with the opposite result. In those two cases (which involve identical analysis by the RRT), the Tribunal

human rights demonstrative of a failure of state protection". He highlights the need to show an on-going risk of violation, rather than just an isolated incident of harm, although in *Chan* (1989: 430) McHugh J observed that "a single act of oppression may suffice". Hathaway's definition also contemplates harm inflicted by persons other than agents of the state in circumstances where the state fails in its duty to prevent such harm (this is discussed further in n6).

McHugh J also observed that the harm threatened may be less than loss of liberty or life and will include measures "in disregard of human dignity" (*Chan* 1989: 429-30). In this regard, it is generally, though not universally, accepted that the "sustained or systemic denial of core human rights is the appropriate standard" — actions which "deny human dignity in any key way" amount to persecution (Hathaway, 1991: 108). The question then becomes: what rights are core rights? What actions amount to a denial of human dignity? Hathaway (*ibid*, 109-11) postulates a four-level classification, which has been relied upon by the RRT in some of the cases concerning sexuality and refugee status:

* ONE: rights enunciated in the *Universal Declaration of Human Rights (UDHR)* and the *International Covenant on Civil and Political Rights (ICCPR)* from which no derogation is permitted, even in times of national emergency, including: freedom from arbitrary deprivation of life; protection against torture or cruel, inhuman or degrading punishment; freedom from slavery; the right to recognition as a person in law; and freedom of thought, conscience and

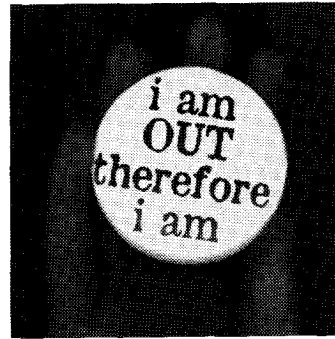
again emphasised the protection that discretion could afford:

The view I take of the evidence ... is that homosexuals in China today face many difficulties and discrimination and even, in certain situations, some risk of violence, depending on their location *and their own behaviour*. ... Nevertheless, it appears likely that in Shanghai *a homosexual who is discreet in his behaviour can avoid the risk of harm* (RRT Ref BV93/00242, para 68; V94/02607, para 72 (emphasis added)).

The Tribunal went on to consider whether this requirement of discretion was not in itself persecutory, but concluded it was not:

Given the conservative nature of Chinese society, I find that it is not unreasonable for the applicant to exercise discretion in giving expression to his homosexuality and that this restriction on his activities would not constitute persecution (V94/02607, para 73; BV93/00242, para 69).

The Tribunal itself acknowledged that, in cases involving persecution for political opinion, it is not appropriate to dismiss a fear of persecution on the basis that the asylum-seeker could return to her country and remain silent on political issues, thus avoiding persecution. Similarly, in the area of religion, returning a person to their country on the basis that they can simply not observe their religious practices is not acceptable in international refugee law. This reasoning ought, I suggest, to apply equally to persecution on the basis of sexual activity, but the Tribunal concluded otherwise. Because the United Nations Human Rights Committee had concluded in *Hertzberg v Finland* that it was no violation of the right to freedom of expression to limit speech in the area of sexuality, on the basis that morals differ widely and a margin of appreciation is to be accorded to states, the Tribunal took the view that it was reasonable to require homosexuals



religion. Any failure to recognise or protect these rights amounts to persecution.

* TWO: rights enunciated in the UDHR and the ICCPR from which a state may derogate in times of national emergency, including: freedom from arbitrary arrest or detention; the right to equal protection for all; the right to a fair criminal process; the protection of personal and family privacy and integrity; the right to international movement; liberty of opinion, expression, assembly and association; the ability to participate in government and vote in free and periodic elections. The failure to ensure any of these rights will generally amount to persecution unless it is demonstrated that the derogation from the rights in question was strictly required by a real emergency situation and was not applied in a discriminatory way.

* THREE: rights enunciated in the UDHR and the International Covenant on Economic, Social and Cultural Rights (ICESCR), (the latter not imposing absolute and immediate legal obligations but rather requiring states to take steps to ensure the enumerated rights in a non-discriminatory way). These rights include: the right to work; entitlement to food, clothing, housing, medical care, social security and education; and the freedom to engage in cultural, scientific, literary and artistic expression. The discriminatory deprivation of these rights may constitute persecution, and the deprivation of certain key rights such as the right to food, clothing and housing may amount to cruel and inhuman treatment under some circumstances and so constitute persecution.

to be discreet (V94/02607, para 73; BV93/00242, para 69). The reasoning is somewhat odd, as it is not speech that is in question in the refugee cases but expression of sexuality (in the simple sense of living openly in a same-sex relationship), and the potential consequences of a lack of "discretion" are severe.

These cases can be contrasted with the approach of the Tribunal in Shuaige's case where the Tribunal concluded that:

it is clear that homosexuals in China face problems ranging from harassment by local police and work unit officials to arrest and imprisonment in gaols or re-education camps (BN94/03199, para 31).

In relation to Shuaige's own circumstances, being out was again important:

The applicant avoided problems with authorities prior to his departure from China by keeping his sexuality a secret from all but his closest associates. Since arriving in Australia he has lived openly in gay relationships with two men and been publicly involved in a range of activities in the gay community. I consider it likely that his sexual preference and activities are known within the Chinese community in Sydney and that it is also possible that local authorities who hold his personal file are also aware of these matters. More importantly, *after his experiences and his openly gay lifestyle in Australia, I accept that he would be more outspoken and honest about his sexual preference on return to China than he had been prior to departure.*

Australia, 1994

"I don't mind homosexuals, so long as they don't flaunt themselves."

"Yeah, we don't flaunt ourselves like that, so why do they have to? Why can't they just keep it private?"

[Overheard conversation]

In these circumstances, I find that the applicant faces a real chance of imprisonment or other treatment amounting to persecution on return to China and thus find him to be a refugee under the Convention. (emphasis added)

(BN94/03199, paras 32-3).

* FOUR: those rights enumerated in the UDHR but not codified in either the ICCPR or the ICESCR, including the right to be free from arbitrary deprivation of property and the right to be protected against unemployment. Violation of these rights will not ordinarily constitute persecution.

In the context of gay and lesbian refugee claims, the second category of rights is the most commonly denied. The rights violated vary from deprivation of liberty (in prison or "re-education camps") to cruel and inhuman punishment or treatment (beatings, electroshock "therapy") to violation of the right to privacy (through criminalisation of same-sex sexual activity directly or indirectly, and through monitoring of suspected "homosexuals"). Electroshock and other aversion "therapies" could be placed in Hathaway's first tier of rights, as "cruel, inhuman or degrading punishment", thus without doubt constituting persecution. Incarceration and violations of privacy clearly fall within the second tier and so amount to persecution unless they can be justified on the basis of national emergency. The denial of rights to sexual minorities is rarely, if ever, justified on the basis of national emergency. Rather, the justification is generally that same-sex sexual activity is criminal, unnatural, anti-social behaviour — so that acts of oppression are described as prosecution under the criminal law or medical "treatment", not persecution.

This emphasis on being "out" is somewhat ironic given the emphasis by some sectors of Australian society on "discretion" by gay men and lesbians.

the presence of the criminal law as persecution

As mentioned, there is no law in China specifically directed to same-sex sexual activity (unlike, for example, Iran or Tasmania). However, the criminal law is used against lesbians and gay men and the question whether "laws merely prohibiting homosexual acts between consenting adults" are of themselves persecutory,⁴ although not strictly relevant, was considered by the RRT in Ainan's case (as well as in cases concerning Iran and Fiji, where specific "anti-sodomy" laws exist, discussed in n5).

In Ainan's case, the Tribunal recognised that the right to privacy, protected under Article 17 of the ICCPR, had been denied to Ainan by virtue of the harassment and monitoring he and Quyan had been subjected to and their separation by the authorities. The Tribunal noted that "if the couple were a heterosexual de facto couple harassed and constantly separated for that reason, the treatment would be deemed persecutory" (N93/00846, para 79). However, the Tribunal considered that the prohibition of same-sex sexual activity itself did not amount to persecution. In support of this conclusion, the Tribunal commented that:

[m]any countries and states still have legislation which prohibits homosexual acts between consenting adults. Many religions, including some branches of the Christian, Islamic and Jewish faiths support such legislation and find homosexuality to be a perversion and unnatural. There is no existing case law which would support a finding of persecution based on the existence of a law prohibiting homosexuality of itself (N93/00846, para 80).

Jenni Millbank (1995: 263) has pointed out that this reliance on religion and the legal regimes of Tasmania and other countries displays both cultural imperialism and cultural relativism: imperialism in the implicit reasoning that "if we do it it must be OK" because in Australia we don't abuse human rights;

⁴ Prosecution vs Persecution

In international law, legitimate prosecution for a criminal offence under the ordinary criminal law (a non-political offence) is not a sufficient basis for claiming refugee status. (Hathaway, 1991: 169; UNHCR Handbook, 1979: 15). Such a claim is insufficient because the ordinary criminal laws are aimed at every citizen of the state and are not directed at a particular social group (at least in theory, although where gay men and lesbians are concerned, the criminal law is in many cases aimed directly at the group). However, prosecution and persecution are not mutually exclusive — it is possible for a government to use the criminal law as a tool of persecution. This is particularly so in relation to political opponents of the government — as Hathaway (1991: 170-1) notes, it makes little sense to treat those at risk of politically inspired abuse of the criminal law as fugitives from prosecution. In such circumstances, prosecution is recognised as illegitimate, as a tool of persecution. The Refugee Convention itself excludes only those persons who have committed a "serious non-political crime" from the definition of refugee (Art 1 (F) (b)), thus recognising that in some cases breach of the criminal law and the associated risk of prosecution will amount to persecution, where the offence is political in nature.

What, then, to make of laws which criminalise same-sex sexual activity? Such laws are not (usually) directed specifically at the political opponents of the government; nor are prosecutions pursued for overtly political reasons (in the traditional sense of that term, although the use of the criminal law to enforce a

and cultural relativism in the implicit reasoning that a number of religions condemn homosexuality, therefore criminalising it is acceptable in other cultures and we must respect those cultures/moralities. Yet laws which restrict freedom of speech on the basis of religious doctrine are not accepted in this way.

The Tribunal concluded that, in the case of China, what was occurring in the use of hooliganism laws against homosexuals was the "differential application of the laws relating to public disturbance ... between heterosexual persons and homosexuals. This removes the application of the law from prosecution and renders it persecution as it targets this particular social group" (N93/00846, para 85). As Millbank (1995: 264) has noted, this means that the selective application of a general criminal law *can* amount to persecution, but enacting a discriminatory law specifically aimed at same-sex sexual activity will not *per se* amount to persecution.⁵

"1st time. Lonely mid-fifties, well established, looking for Asian lover or similar. I am sincere and looking for same to form long term 1-1 r/ship"
Brother/Sister, 22 Feb 1996

"Gentle, caring, easy-going 33 yo guy, av/looks. Seeks cute, slim, boyish looking Asian up to 30yo who loves hugging, kissing & genuine love & affection." MSO 21 June 1996

"Blonde guy, 40yo, would like to meet a happy, easy going Asian from 18-30yo for fun and more." MSO 21 June 1996

particular sexuality could easily be designated "political" in a broader sense). Rather, they are laws directly aimed at a particular social group so as to preserve a particular vision of society, the family and gender roles — they constitute the use of the criminal law to protect and promote a "normative-heterosexual paradigm of social organisation" (Heinze 1995: 33). Indeed, such laws help to construct the social group they are aimed at. Because these laws in effect single out a particular group, it is wrong to describe them as part of the "ordinary criminal law". Yet the RRT has tended to view them in just this way.

In addition, in some countries, the People's Republic of China being one, the law in question is not aimed directly at the social group "homosexuals". A general law, against "hooliganism" in the PRC context, is used against same-sex sexual activity, but that same law may be (and is) used against a variety of other "anti-social" conduct as well. However, the use of the hooliganism law against homosexual conduct is discriminatory — it discriminates against a particular social group. In the context of persecution on the basis of political views, the discriminatory use of a general law so as to silence political opposition renders prosecution persecution (Hathaway, 1991: 179). If one extends Hathaway's analysis from the political ground to other Convention grounds, including the social group ground, then the targeting of a social group by an apparently general law should also be considered to be persecution.

⁵ *Criminalisation of Same-Sex Sexual Activity as Persecution*

The UN Human Rights Committee has stated that it considers the criminalisation of gay male sex, at least in the Australian context, to amount to a violation of the right to privacy, thus demonstrating that such laws are inherently illegitimate and in clear violation of international law (Toonen, 1994). Reliance on the criminal law to justify the oppression of lesbians and gay men cannot, therefore, succeed as a legal argument. Hathaway's four-tiered analysis of human rights law (discussed in n4) places the right to privacy in the second tier — a right which cannot be derogated from except in cases of national emergency. A breach of these rights in the absence of such an emergency constitutes, according to Hathaway, persecution, particularly if the breach is

the committed relationship model: a heterosexual paradigm?

It is worth noting that, in the two cases where the claims for refugee status were successful, the men in question (Ainan and Shuaige) were involved in long-term, committed relationships. This was also the case in Liandi's claim, but in the other failed claim, there was no apparent relationship involved. While no express mention was made of this absence in the RRT's decision, it is possible, I suggest, to discern a distinct note of approval of the committed relationship in Ainan's case (and disapproval of promiscuous homos engaging in casual sex). The Tribunal observed that Ainan did not express his homosexuality "through numerous fleeting sexual encounters" (N93/00846, para 73) and distinguished Ainan from the homosexual who "finds sexual expression in casual liaisons in public parks" — rather, he was in a relationship that was:

serious, monogamous and ... longstanding ... [T]he consequences and potential suffering must be looked at in terms of the meaning of the relationship as well as the denial of his right to sexual expression (*ibid*, para 74).

The irony is that, in a case where an individual is returned to China on the basis that he can avoid harassment and discrimination by being discreet, it is difficult for him to continue or enter into a long-term committed relationship as these are generally harder to conceal from the authorities than casual sex. Thus despite apparently promoting a monogamous ideal, the decision undermines the potential for gay men to achieve that ideal if they have not already done so.

"Muscular Asian guy, attractive looks 30s. Seeks big, masculine, st/act. guys for uncomplicated, safe sex. Discretion given and expected. Body builders, rugby players a plus." MSO 21 June 1996

"Asian Master needed by 32yo Australian. I'm med build and will do anything safe that gives you pleasure. Toys an extra turn on. Your place preferred for discreet, hot fun. I won't disappoint." MSO 21 June 1996

systemic and on-going. Thus on this approach, criminalisation of same-sex sexual activity would amount to persecution, as it involves an ongoing violation of a second-tier right. Notably, the decision of the Human Rights Committee made it clear that *enforcement of the law was not necessary to demonstrate a breach of the right to privacy* — the mere existence of such laws was a breach. Thus it would be unnecessary for an asylum-seeker to demonstrate that he had been charged or convicted of an offence of homosexual conduct, or even to demonstrate that there is a "real chance" of a prosecution; the mere existence of the laws ought to be sufficient.

In the Iranian case (RRT Ref N93/02240), the Tribunal took essentially the same approach to the criminalisation of homosexual activity as it had taken in Ainan's case, considering that it would be "very surprising" if such laws were held to be persecutory (*ibid*, para 32). Again, reliance was placed on the "major religions" of Christianity and Islam (no doubt Salman Rushdie would feel relieved that major religious support for oppression removes the persecutory nature of such oppression and makes it legitimate). And reliance was placed on the frequency of such criminal laws throughout the world, including our own Tasmania. The Tribunal noted the Toonen complaint then before the UN Human Rights Committee, but puzzlingly discounted it because it was based on only two grounds, privacy and non-discrimination (*ibid*). In conclusion, the Tribunal noted that consensual heterosexual activity between adults in the area of incest is also regulated in many countries.

Lesbian claims for refugee status

There have been no reported claims for refugee status in Australia by women on the basis of same-sex sexual activity. Millbank (1995: 265) has pointed out that there is less documentation generally about persecution of lesbians than there is of gay men, and suggests that this could be because there is less persecution or simply because there is less attention paid to persecution of women by the media and human rights groups. Given that women generally experience greater poverty around the world than do men, a lack of resources in gathering information about persecution of lesbians could also be a factor. Finally, Millbank notes that the nature of persecution suffered by lesbians could be different than that suffered by men: women often suffer "private" abuse within the

"[R]eferences to lesbianism in traditional [Chinese] sources are rare. Partly this was due to the relative absence of personal freedom accorded to women. Bound to their husbands and often forced into seclusion in the home, many women were denied the opportunity to form close bonds with women outside their household. Moreover, the relationships that did form would usually escape notice by men uninterested in women's affairs. Since men also controlled the literary world, this combination of factors meant that few examples of lesbianism were recorded in print. As a result, lesbianism never inspired the sustained literary tradition such as that associated with male homosexuality."

(Hinsch, 1990: 174)

However, the Tribunal concluded that evidence of torture being used to extract confessions in Iran and evidence of the execution of "hundreds of homosexuals" and the rape and torture of many more in prison provided evidence of a real risk of persecution (*ibid*, paras 62-3). That is, the results of the enforcement of the valid law against homosexual activity — death, torture or rape — were sufficient to amount to persecution. Mere imprisonment, however, would not be persecutory, it would be permissible punishment.

In the case of the Fijian man (RRT Ref BN93/00015), the Tribunal was confronted with the views of the Human Rights Committee in the *Toonen* case which expressly stated that criminalisation of consensual gay male sex amounted to a breach of the right to privacy. In Fiji, homosexual activity is a criminal offence punishable by up to 14 years imprisonment and corporal punishment. Again, the Tribunal relied upon the practice of a number of states in criminalising such activity to demonstrate the acceptability of these laws and as an indication that "such laws do not, of themselves, offend international human rights principles" (*ibid*, para 32) — this was notwithstanding the *Toonen* case. In discussing that case, the Tribunal merely concluded that "mere interference with the right to privacy would [not] necessarily amount to persecution". Rather, the breach was described as "theoretical", with no "direct impact" on the applicant's daily affairs. There was no evidence that the applicant would be detained or beaten or separated from his lover, as had occurred in Ainan's case (*ibid*, para 34).

The fundamental problem with the approach in the Fijian case, apart from the virtual dismissal of the UN HRC's views in *Toonen* (arguably an error of law), is the complete effacing of the experiences of lesbians and gay men who live in places where same-sex sexual activity is criminalised. Information about these experiences, at least in the Australian context, is not hard to come by — it is set out in the *Toonen* case in some detail. Such information demonstrates that the characterisation of the breach of privacy flowing from criminalisation as "theoretical" or without "direct impact" is simply incorrect. Criminalisation generally leads to stigmatisation by the

family, and violence and harassment of lesbians could also take place in this arena, often rendering it invisible and furthermore not "persecution" unless some responsibility can be attributed to the state.⁶ In addition, lesbian sexual activity is not always criminalised in the same way as gay male sexual activity — although it is criminalised in Iran, Fiji and Zimbabwe (Millbank 1995: 265) and lesbians have been charged with "hooliganism" in China (Bullough and Fang, 1993: 51). It seems that lesbian sexuality is often less visible generally, and this seems particularly to be the case in China (Hinsch, 1990: 7).

However, I have read of one claim in the US by a woman for refugee status on the basis of sexual preference (*In re Pitcherskaia*, discussed in Goodman, 1995). She sought asylum from Russia

.....
: For the Courtesan Ch'ing Lin

: On your slender body

: Your jade and coral ornaments chime

: Like those of a celestial companion

: Come from the Green Jade City of Heaven.

: One smile from you when we meet,

: And I become speechless and forget every word.

: For too long you have gathered flowers,

: And leaned against the bamboos,

: Your green sleeves growing cold,

: In your deserted valley:

: I can envisage you all alone,

: A girl harbouring her cryptic thoughts.

: You glow like a perfumed lamp

: In the gathering shadows.

: We play wine games

: And recite each other's poems.

: Then you sing "Remembering South of the River"

: With its heart breaking verses. Then

: We paint each other's beautiful eyebrows.

: I want to possess you completely —

: Your jade body

: And your promised heart.

: It is spring.

: Vast mists cover the Five Lakes.

: My dear, let me buy a red painted boat

: And carry you away.

.....
: Wu Tsao (Mulford, 1990: 226)
:

community and violence, harassment and discrimination both by the state and privately, against which there is often no redress because of the criminal status of homosexuals. While the evidence produced in relation to Tasmania is doubtless not automatically transferable to Fiji, the Tribunal gave no consideration at all to the question whether the criminal law does produce these wider effects on lesbians and gay men.

The Tribunal did concede that the maximum penalty for homosexual conduct in Fiji, which included corporal punishment (caning), violated Art 7 of the ICCPR (which prohibits "cruel, inhuman or degrading punishment") and that infliction of the maximum penalty would amount to persecution (*ibid*, para 38). However, the Tribunal considered that there was little likelihood of the maximum penalty being applied, as there was evidence to suggest that social and legal attitudes towards homosexuality in Fiji had become more liberal and no evidence showing that homosexuals are prosecuted or penalised for their homosexual activity. The Tribunal inferred, from the absence of evidence, that "homosexuals in Fiji do not encounter serious and systemic human rights abuses which amount to persecution" (*ibid*, para 44).

⁶ "Private" Violence as Persecution

The paradigm case of persecution occurs when agents of the state, such as the military or the police, carry out violence or deprivation of fundamental human rights against an individual. However, very often violence and rights abuses occur not at the hands of state agents but at the hands of private individuals. This is particularly the case where women are concerned — and also where gay men and lesbians are concerned, as much homophobic violence is perpetrated by non-state actors.

on the basis that she feared persecution because she was a lesbian. In particular, she feared "medical" interventions — institutionalisation, electroshock treatment and the administration of mind-altering drugs as ways to "cure" her of her "illness". Psychiatric detention and the associated "medical techniques" were well-known methods of silencing political dissidents in the Soviet Union, and this was considered ample basis for a claim to refugee status, particularly in the United States. What is less often mentioned is that psychiatric detention and the abuses associated with it were also commonly used against lesbians and gay men in the Soviet Union, and there

Until 1990, persecution on the basis of sexual preference could never have resulted in a successful refugee claim in the US because lesbians and gay men were excluded from immigration because of their "constitutional psychopathic inferiority" (later altered to "sexual deviation") (Carro, 1989: 209; Foss, 1994: 456). The fact that "homosexuality" had been removed from the American Psychiatric Association's catalogue of psychiatric disorders in 1973 had no impact on this discriminatory immigration policy — although Public Health Service physicians did refuse to issue a medical certificate as conclusive evidence of excludibility (Foss, 1994: 457).

is evidence that such practices continue in the current Russian Republic (Goodman, 1995: 288). After the disintegration of the USSR, many of the social and political dissidents incarcerated in psychiatric institutions and elsewhere were released; however, many gay men and lesbians were not (*ibid.*). The Immigration Court in the US denied Ms Pitcherskaia asylum. The judge considered the possible intervention of the medical profession in Russia as beneficial and as evidence of psychiatrists' concern for the "otherwise fragile mental health of lesbian women" (Goodman, 1995: 298). The US State Department's Human Rights Report, on the other hand, had this to say:

[P]olice frequently place lesbians against their will into psychiatric hospitals after receiving requests from family members or friends to commit the "patient" to an institution for treatment ... In psychiatric hospitals, chemical treatments are prescribed, and lesbians are sometimes beaten if they refuse treatment ... [T]he only way to be discharged is to renounce their sexual orientation (quoted in Goodman, 1995: 288).

Unfortunately, this report came in 1995, too late for Ms Pitcherskaia.

In order to amount to persecution within the meaning of the Refugee Convention and Protocol, state liability for the rights abuses must be established (so as to establish the necessary failure of protection which refugee law is designed to overcome: Hathaway, 1991: 124). Where a government supports or condones such violations, such liability is clear, and the abuses will amount to persecution (Hathaway, 1991: 126-7). However, persecution may also be established in cases where the government has failed to protect fundamental rights, even in the absence of actual support for rights violations. Such a failure may occur where a government is either unable or unwilling to protect its citizens (or some of them) from rights violations linked to a Convention ground (failure to prevent generalised violence is insufficient to constitute persecution: Hathaway, 1991: 136-7). While refugee law has clearly accepted this principle in relation to "public" violence (eg, racist attacks which a state is unable to prevent — see Hathaway, 1990: 128-9), the position is less clear cut in relation to "private" violence inflicted on women in the domestic sphere.

The UNHCR has accepted that "private" violence inflicted upon women at the hands of fathers, husbands or other private actors may amount to persecution if there is no possibility of state protection against such violence (see also UNHCR Guidelines on the Protection of Refugee Women, 1991, cited in P Goldberg, 1993: 589). In cases concerning non-state violence against men, state

Is Homosexuality to Heterosexuality as East is to West?

Homosexuality has long been used as a geographic marker between east and west, barbarians and civilisation. Early European travellers visiting China considered homosexual behaviour a Chinese disease: "The greatest fault we do find [among the Chinese] is sodomy, a vice very common in the meaner sort, and nothing strange among the best" (Hinsch 1990: 2, quoting 16th century chronicler, Galeote Pereira).

In modern China (and, indeed, in some other Asian states), however, this western "othering" of the east has been reversed, so that homosexuality is positioned as a western phenomenon. Thus, one response of the Chinese authorities and press is to equate homosexuality and lesbianism with western social diseases derived from western ideology and thoughts, infecting China (Hinsch, 1990: 170-1). This use of homosexuality falls neatly into what Xiaomei Chen has termed "occidentalism" (after Edward Said's "orientalism"). Chen (1995: 65) describes occidentalism as "a new discourse marked by a particular combination of the Western construction of China with the Chinese construction of the West", a discourse which shares with orientalism many of its ideological techniques and strategies, but has

"In February 1993, the Taiwanese film *The Wedding Banquet* shared top honours at the Berlin International Film Festival ... [D]uring the festival, international film critics met to discuss their own prize and *The Wedding Banquet* came up for consideration. The only Asian representative, an elderly gentleman from the People's Republic of China, protested that the film could not possibly be considered because it was 'a lie'. Didn't everyone know there was no homosexuality in Chinese culture, he reasoned? If there was any truth at all to this film set in New York, it was that it represented the corruption of Chinese manhood by Western decadence ... *The Wedding Banquet* disappeared from consideration."

(Berry, 1994: 70)

liability has required that the man complained to the police or authorities and received no assistance, although it has been accepted that if it would be "objectively unreasonable" for him to complain, because no protection would be forthcoming, then proof of complaint is unnecessary. As *La Forest J* stated in the Canadian case of *Attorney-General (Canada) v Ward* (1993: 23):

it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness.

This requirement of complaint except where such a complaint would be "objectively unreasonable" will probably be applied also in cases concerning "private" violence against women.

Feminist scholars have been vocal in seeking to have private violence against women recognised as persecution under refugee law. In addition to drawing on cases where "private" violence against men has been attributed to the state, they have pointed to states' international obligations under the Convention on the Elimination of Discrimination Against Women and the recent Declaration on the Elimination of Violence Against Women. These obligations require states to protect women from gendered violence which occurs in private, thus linking the failure to do so with international human rights law and treaty obligations (Macklin, 1995: 228, 236; P Goldberg, 1993: 585).

The absence of cases concerning lesbian claims for refugee status and of general documentation of rights violations directed at lesbians makes it difficult to state accurately the nature of persecution

served a quite different function from orientalism. For while orientalism served as an instrument of western domination of the east, occidentalism is not so much concerned with domination of the west as with effects in domestic Chinese society.

“Homosexual rights are a western issue, and are not relevant to this Conference”.

Foreign Minister of Singapore, Wong Kan Seng at the UN World Human Rights Conference, Vienna 1993, in response to a speech by Rodney Croome, Tasmanian gay activist

(Berry, 1995: 73)

Chinese occidentalism, Chen says (1995: 65), has been evoked for both oppressive and liberatory ends within China — by the Chinese government to support “a nationalism that effects the internal suppression of its own people” and by opponents of the government who assert the superiority of

western political institutions in their battles for greater freedom in China. It is with the former use of occidentalism that I am primarily concerned — the official evocation of the “Western Other ... in order to discipline, and ultimately dominate, the Chinese self at home” (ibid).

The official Chinese attitude to homosexuality, seen in this light, serves a function going beyond the repression of individuals who deviate from the heterosexual norm. Not only does it buttress the heterosexual-normative paradigm (Heinze, 1995: 33), it also serves as a method of distancing Chinese society from the west, by associating the west with decadence, perversity and sickness. This assists in the maintenance of the current Chinese political order in the sense that the alternative, western-style democracy, is portrayed as contaminated and contaminating, corrupted and corrupting.

Continuing this analysis, writers such as Lau and Ng, who suggest that suppression of homosexuality only arrived with western influence, are perhaps themselves engaging in a counter-discourse of occidentalism. Rather than positioning the west as superior so as to counter the official discourse of the corrupting west, they position the west as corrupting China’s previously benign social attitudes to same-sex love. This analysis may or may not be accurate —

suffered by lesbian women. However, given the position of women generally in many countries — that is, their subjection to (private) male authority, often of husbands and fathers — we might expect that women who deviate from the required heterosexual norm would be disciplined privately in most cases. In countries where women are not permitted to venture outside the home without an accompanying male, it is unlikely that their sexuality would come to public attention at all. Thus persecution of lesbian women may often be invisible, and if visible it may be difficult to attribute such persecution to the state in question so as to constitute persecution within the terms of the Convention and Protocol. However, on the analysis adopted by some courts and feminist commentators, “private” persecution of lesbians should constitute persecution sufficient to ground a claim to refugee status in states where there will be no likelihood of protection from the state. This would include all states where same-sex sexual activity is a crime (whether directly or indirectly) and, more generally, states where official attitudes are homophobic so that violence against lesbians or gay men is viewed as a result of their own conduct and not something the authorities need take any action on.

Violence by non-state actors against lesbians and gay men may also take place outside the context of the home, of course, and the same questions of state responsibility arise. When will a state be responsible for gay bashing? The same test should be applied — if the authorities are also perpetrators of homophobic violence, or if they will not take action to protect lesbians and gay men from

indeed, it is likely that it is a partial view of the impact of westernisation on the moral codes and social structures of China; for example, it is difficult to conclude that ancient China was particularly liberal in relation to female sexuality. However, what is important is that this characterisation of the west may provide a way for Chinese men to counter the official discourse on their activities. In addition, it is a form of occidentalism which avoids the risks Chen (1995: 88–9) associates with the valorisation of western cultures — that is, the risk of perpetuating western ideological hegemony in its ever-expanding imperialism.

Refugee status – a violent gift?

Rights are ... not, in the original instance, entitlements of intersubjectively constituted rational agents but violent gifts, the necessary nexi within immanent global force relations which produce the identities of its claimants.

(Cheah, 1996: 19)

Pheng Cheah has written of human rights generally as “violent gifts”. In order to utilise rights, the claimant must position him/her/itself within a particular identity framework cognisable within the international human rights discourse, but by virtue of doing so, the claimant does violence to his/her/its identity. Cheah uses the example of the assertion of indigenous rights by “tribals” in South East Asia, noting that:

[Tribals] are compelled to defend against the encroachment of nation-states and the forces of global capitalism on their lifestyles by staging a collective identity and demanding rights in the name of that identity.

... The irony is that typically, they are not ethnic groups; yet to survive they may have to learn to think and act as such ... Yet, the costs of going ethnic, that is, participating in ethnic majority politics and economics within the nation state, are not to be underestimated ... These [ethnic] identities ... occlude and submerge non-ethnic local identities in the very process of attempting to defend them. Such identities may ... invite conscious oppression rather than malign neglect, but they also open the way to developing a necessary political and economic bargaining power. [“Introduction”, *Southeast Asian Tribal Groups and Ethnic Minorities*, Cultural Survival Report 22, 1987, 1, 11]

The dilemma of “going ethnic” illustrates that rights only accrue when the subject claiming them is a collective subject endowed with institutional or epistemic recognition. Put another way, rights claims are contingent upon the performative positing of a subject of rights within and by a given conjuncture although this performative is then necessarily taken to be a constative declaration about and by a pre-existing subject (Cheah, 1996: 18).

homophobic violence, then the actions of private individuals should be attributed to the state and the violence recognised as persecution within the meaning of the Convention and Protocol. In circumstances where seeking state protection would result in further persecution or in prosecution under the criminal law, a complaint to state authorities should not be required, as such a complaint would be “objectively unreasonable”.

The group seeking rights "must be constituted as an institutionally recognisable collective which they were previously not so that they can have leverage as the subjects/objects of institutional decision-making" (1996: 19). Yet in constituting itself in this way, violence may be done to the group's original ways of life and various sub-identities. Rights then produce the identities of their claimants and yet they are the only way, in the current global context, "for the disenfranchised to mobilise" (1996: 19).

Cheah does not advocate the abandonment of human rights; rather, he suggests we need to rethink the ways in which rights operate. In particular, we need to see rights not as exterior to the structures of global capitalism but as potential points of weakness in an overarching capitalist structure, points of contestation the effect of which cannot be entirely predicted or contained and which therefore open up the possibility of inducing change (1996: 23-4).

My thesis is that refugee status and the rights associated with it (which, it should be noted, are few and relatively weak) can be understood within this framework of the "violent gift". Claims to refugee status based on sexuality illustrate this well. In order to claim refugee status on the basis of sexuality it is necessary to demonstrate that the claimant has been persecuted because of membership of a particular social group — namely, "homosexuals". The individual must position him or herself within this identity category, regardless of whether she or he conceived of her identity in that way previously. In addition, that identity must be constituted in a way known to and understandable by the decision makers in the west — that is, the "homosexual identity", which we might expect to be culturally and historically specific, must in fact be assumed in a westernised way so as to be recognisable to the western decision maker. And the outcome of a successful claim for refugee status is the (probably) permanent uprooting from the claimant's country of origin, a movement of some violence in itself.

In the Chinese context, it seems that there was no "gay" identity separate from marriage and procreation in ancient or pre-modern China. It is difficult to obtain information on the existence of a "gay" identity in modern China, but while people who engage in same-sex sexual activity are certainly subjected to oppression and harassment, the information available seems to suggest that sexuality is not the strong identity category that it is in western societies. In particular, the Confucian emphasis on familial duty and propagation of the family line in both ancient and modern China means that long-term, exclusive homosexual relationships might be the exception, not the rule, in a hypothetical China where persecution was absent. And even if sexuality does provide an important aspect of identity, we might expect it to be quite a different identity from that which we find in western cultures. Berry (1995: 96-7) has observed that in East Asian films which deal with same-sex love, the film-makers have engaged gay identity in relation to the Confucian family tradition in a way that is:

unlike Western discursive constructions of lesbian and gay identity. [Western films] tend to oppose the blood family and gay identity, as signified in the phrase "coming out", so that "out gay" figures in films very frequently have tended to be without blood family or excluded from participation in that family. In the three fake wedding films [*Okoge*, *Twinkle* (Japan) and *The Wedding Banquet* (Taiwan)], however, the possibility of a satisfactory life outside the family is not even considered; instead, the problem is how to reconcile gay identity with a position inside the Confucian family.

Audrey Yue writes of the western tendency to assimilate the other into the dominant, hegemonic "gay and lesbian culture". Speaking of the difficulties in constructing an identity as a Chinese-Singaporean lesbian in Melbourne, she writes:

One thing I realised was the other diverse codes outside of the butch-femme Confucian narrative that I had grown accustomed to. For me, this revelation was political, as if nomenclature was sutured enough, not realising of course that the ethnic and sexual *me* was already stereotyped and named before *I* could be. Suffice it to say, I thought I was a lesbian therefore I thought I existed, notwithstanding the fact that it is not only the invisibility of lesbians everywhere that marks their absence present, but also the invisibility of non-Anglo lesbians within the Anglocentric lesbian margin(s) that marks my presence absent. The Grand Lesbian Revolution has no place for a racialized and ethnicized *Other* like me. Shut up, assimilate or annihilate. I learned to keep my place, on the other side of the other side (1996: 88).

The homogenising tendency of western discourses is closely connected to the notion of rights as a violent gift, as it is a western version of identity that must be adopted in order to receive the gift of rights. That is not to say that the other must necessarily "be like" a westerner (although that is one possible way in which identity may be imposed); rather, what may occur is that the other must adopt an identity that is the idealised western view of the other — the western perception of what it is to be an Asian lesbian or gay man, for example.

The very use of the identity category "homosexual" as a social group itself replicates the construction of "homosexual" as deviant other, which has implications beyond the individual asylum-seeker, extending into the community where asylum is sought. This is especially so where homosexuality is treated as an immutable characteristic, as has been done in Canada, the US and in Australia. This categorisation negates the experiences of many gay men and lesbians and perpetuates a particular version of homosexuality which reinforces the hetero/homo binary (see Spijkerboer, 1996: 24–5) and the notion that we "can't help it". This approach, rather than valuing diversity, pities those of us who deviate from the biologically determined, heterosexual norm.

In Australia, according to a recent Victorian study, 70 per cent of lesbians and 69 per cent of gay men have been verbally abused, threatened or bashed and the more open they are about their sexuality the more likely they are to suffer discrimination and violence.

(report by Gay Men and Lesbians Against Discrimination, reported in *The Australian*, 17 May 1995).

All this does not suggest that we abandon refugee law as a site of intervention on issues of sexuality. What it does suggest, however, is that we recognise the power relations operating within refugee discourse and acknowledge the violence that may be done to individuals in order for them to claim refugee status. It also suggests that we should see refugee law as a potential point of weakness in global power relations — a point at which we can contest particular cultural constructions of sexuality of both east and west. Refugee law at least opens up the possibility, not only for individuals to "escape" from oppression, but also for that oppression to be spoken of and (possibly) changed in the future.

Finally, the very designation of refugee status as a "gift" is problematic, shoring up as it does the already lurking assumption in refugee discourse that western countries are "refugee-acceptors" and the east and other "uncivilised" countries are "refugee-producers" (Macklin, 1995:263-4). This is certainly reflected in the RRT's reliance on Tasmania's anti-gay laws to help demonstrate that criminalisation cannot amount to persecution: Australia is a refugee-acceptor, so nothing we do to our own citizens can amount to persecution. This dichotomy, like all dichotomies, privileges the first part over the second and presents a misleading picture of the lives of lesbians and gay men in the west. In fact a refugee fleeing China (or elsewhere) on the basis of persecution because of sexuality is likely to encounter homophobia, violence, discrimination and racism in the west and, in some places, criminalisation of same-sex sexual activity. Refugees may be better off in their place of refuge, but they will not necessarily avoid persecution.

Conclusion

Homosexuality is a convenient discursive trope; a political conjuring trick made to appear first here, then there according to the needs of the players. However it is manipulated, it is always abjected, always part of the collective other and not part of the collective self it is deployed to construct and defend.

(Berry, 1995: 77)

Homosexuality is used as the archetypal "other" in many societies around the world. In the PRC it has been in the one breath denied and attributed to the corrupting influence of the decadent west. This "occidentalism" operates not to subdue the west but to shore up Chinese identity and to justify repression of Chinese men and women who deviate from the desired (hetero)sexual norm. Repression occurs in a variety of ways — application of the criminal law, "treatment" for mental illness, beatings and discrimination. The effects of this othering are thus felt acutely by individuals in China, some of whom have sought refuge in Australia.

Australia has not been uniformly willing to grant refuge where persecution is based on sexual preference. While the law has developed to a point where it is accepted that "homosexuals" are a social group within the meaning of the Refugee Convention and are thus entitled to claim refugee status, an applicant for refugee status must also satisfy Australian immigration authorities that he or she has a "well-founded fear of persecution". It is in this area that particular norms of homosexuality have been adopted by the RRT. A particular, western image of "the homosexual" has been required before the RRT will accept that there are objective grounds for a fear of persecution. Men who are "out" and who are in long-term monogamous relationships are accepted as refugees, whereas those who are closeted or promiscuous are not. The "discreet" homosexual is sent back to a life of casual sex and the risk of imprisonment on the basis that discretion will provide protection from persecution — a life lived in fear and secrecy is not sufficient to demonstrate persecution. And those whom Australia accepts as refugees do not enter a land of freedom and enlightened social attitudes, but a country where gay men and lesbians are subjected to violence, discrimination (in law and "privately") and, in Tasmania, criminalisation.

Refugee law in the area of sexuality is a violent gift indeed. Asylum-seekers must take on an identity in order to fit within an appropriate legal category and this identity must not simply be that of "homosexual" but must also conform to certain forms of behaviour. Refugees are uprooted from their country of origin, itself a violent effect of refugee law. And the ultimate promise of refugee law — the "safe haven" and freedom from persecution — may not materialise at the end of the process. Refugee law can be seen as a continuation of the western colonising project, where individuals are literally transferred into a different, dominant culture and in the process are required to take on a particular identity which must conform as closely as possible to the heterosexual norm (committed, long-term relationships) while at the same time that identity is constituted as other and faces oppression in the west. We should not abandon refugee law as an avenue available to sexual minorities — some possibility of protection is better than abandoning people to electro-shock therapy or "re-education". But, like human rights generally, refugee law is a flawed vehicle that needs to be re-thought. The notion of refugee law as a violent gift is not confined to the area of sexuality; the same can be said of any of the Convention grounds, all of which require the asylum-seeker to take on an identity that is cognisable within the Convention framework. Mere persecution is not enough to justify the granting of refugee status — but perhaps it should be. As Hathaway (1990: 174–5) comments:

Because International refugee law currently is a means of reconciling the sovereign prerogative of states to control immigration with the reality of forced migrations of people at risk, it does not challenge the right of states to engage in behavior which induces flight, nor conversely the power of states to decide whether to admit victims of displacement. Refugee law today is less closely tied to human rights law than it is to general principles of public international law, which enable states ... to continue to pursue their own interests within a global context.

... The rhetoric of humane concern lingers, but the modern apparatus of international refugee law is more closely tied to the safeguarding of developed states than to the vindication of claims to protection.

More fundamentally, perhaps the focus of refugee law should be redirected towards removing the conditions that produce refugees than on offering exile as a solution. This, of course, would require both ideological and monetary commitment from developed states. Such commitment is unlikely to be realised without considerable struggle.

.....
 : Why should one bother to distinguish between male and female, as long as :
 : the object affords erotic enjoyment? :
 :

Chen Sen, a writer of the late Ming period :
 (quoted in Lau and Ng, 1989) :
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