

# A comparison of the gender-specificity of age of consent legislation in Europe and China: Towards a gender-neutral age of consent in China?

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**Abstract** Age of consent—the age at which young people are considered legally competent to consent to sexual activities—is an important weapon invented by law makers to protect young children from being sexually abused and exploited by predatory adults. In this study, a comparison of the age of consent legislation in 2004 and 2016 in Europe reveals that it is a trend for European law makers to adopt a gender-neutral approach in their age of consent legislation, i.e., the gender of the sexual participants does not affect the legal consequence of the sexual activity and both male and female children, either in heterosexual or homosexual relations, enjoy protection to the same extent. Then the age of consent legislation in China is deeply examined to see whether it is gender-neutral as most of the European jurisdictions. Based on the previous introduction and analysis of Europe and China, this paper concludes that the gender-neutral trend identified in Europe could be instructive for China’s future age of consent legislation.

**Keywords** Age of consent · Gender-neutral · Gender-specific · Child sexual abuse · Childhood · Chinese criminal law

## Introduction

According to Article 2 of the Directive 2011/92/EU (Combating the sexual abuse and sexual exploitation of children and child pornography), age of consent means “the age below which, in accordance with national law, it is prohibited to engage in sexual activities with a child”, and the “child” here refers to “any person below the age of 18 years”. The importance of such provision of age limit is that the consent of people under the age limit to engage in sexual

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activity does not count in the legal sense, thus making the adult sexual partner liable to criminal prosecution and punishment. Through the implementation of age of consent legislation, the legislators try to protect young people, both female and male, from sexual abuse and sexual exploitation by predatory adults. The idea is that criminalization works as a deterrent against engaging in sexual activities with children below the statutory age limit.

Nowadays, all jurisdictions on the European continent have their own age of consent provisions (Zhu and Van der Aa 2017) and they are usually embodied in national Criminal Codes or dedicated sexual offenses Acts. A comparison of the age of consent laws in all jurisdictions on the European continent revealed that, although detailed legislation varied significantly from one jurisdiction to another, a large majority of jurisdictions share one common characteristic: They have adopted a *gender-neutral* approach when setting the age limit for young people, without indicting the gender or sexual orientation of the sexual participants, which means that both male and female children, either in heterosexual or homosexual relations, enjoy protection to the same extent. However, an examination of the history and background of age of consent legislation in Europe in different eras brought to light that the gender-neutrality of age of consent laws in current Europe was a new invention of the last century and that the widespread application of this approach in national legislation has only been achieved in recent decades.

In China, the legal system and its development has been deeply impacted by legislation and legal theory stemming from Western countries (Xu 2006). This Western legal influence on Chinese law can be traced back to the eighteenth century and in current China, the Westernization of its law still continues (Ren 1997). A scholar even concluded that “the modernization of law in China is mainly about transplanting Western laws, although it does not mean 100 % of Westernization” (Hao 1993). Although the Chinese criminal law system contains many indigenous characteristics, it is safe to conclude that the Chinese legislator is greatly inspired by Western legal systems and keeps a close eye on new developments pertaining to (criminal) law in Anglo-Saxon and European Continental jurisdictions to see whether these developments deserve following in China. Considering that the gender-neutral approach in age of consent legislation in Europe was a relatively new development, this raises interesting questions on the current situation in China: Was China influenced by the changes in Europe and has it adopted a gender-neutral age of consent law as well? And what about another, related aspect of age of consent, such as neutrality or specificity towards homosexual relations? Is the current age of consent legislation in China in line with that in Europe? A comparison of the age of consent legislation in Europe and China will provide answers to these questions.

To offer a comparison, this article will first provide an overview of the age of consent legislation in Europe before the twenty-first century in Part II. We will explore when the notion that children below a certain age needed statutory protection against (predatory) sexual activities was conceived and describe the wide acceptance of age of consent laws in Europe in the last century, followed by a discussion on why the approach adopted in Europe at the time was gender-specific, rather than gender-neutral. This part will end with a description of the criticism towards the gender-specific approach. Part III is a detailed comparison of age of consent legislation in 2004 and 2016 in Europe, which allows for the identification of certain trends in age of consent laws on the European continent regarding their neutrality/specificity towards gender and homosexuality. The comparison leads to the conclusion that the traditional gender-specific approach, which was still prevalent in certain European jurisdictions in 2004, has been supplemented by a neutral one. Part IV examines the current age of consent legislation in the People’s Republic of China to see whether it is gender-specific and what

its stance is towards homosexuality. Based on the previous introduction and analysis of Europe and China, Part V ultimately suggests what China could learn from Europe and which approach its future age of consent legislation should ideally adopt.

## **An overview of the Gendered Age of Consent Legislation in Europe Before the Twenty-First Century**

### **Age of Consent and the Construction of Childhood**

The history of age of consent legislation in Europe is inseparable from the construction of childhood, the theory of which was first developed by the French historian Philippe Aries (1962) in his book, *Centuries of Childhood*. Aries put forth the claim that childhood, as a concept, was a human construction. He indicated that up until approximately the fifteenth century, children were considered as miniature adults and there was no obvious distinction between children and adults. Children at that time could do everything that adults could, such as wearing the same clothes, playing the same games, drinking alcohol, engaging in sexual relations, etc. With regard to the legislation, there was no obvious distinction between the treatment of adults and that of children (Waites 2005). Research shows that sexual contacts between children and adults (e.g., touching of the genitals, innuendo, sharing a bed, and casual nudity) were socially accepted at that time (Carpenter et al. 2014). It was the emergence of the ‘modern family’ and the introduction of school (in the sixteenth and seventeenth century) that, together, brought about the segregation of children from the adult world (Aries 1962, Mayall 2013). From then on, childhood was perceived as a distinct phase of human life and children were constructed as innocent, dependent, incompetent, powerless, and vulnerable, especially in relation to sexual activities.

As a consequence, this construction brought in the need to protect children from dangers of the adult world (Scott 2000). Age of consent, which refers to the age at which children are considered capable of giving their consent to sexual activities, is one of the most powerful weapons invented by legislators to regulate children’s sexuality and protect children from being sexually abused by predatory adults (Mueller 2008). The examination of the history of age of consent laws demonstrates that the wide acceptance of setting such an age limit for children’s engagement in sexual activities only emerged during the past 200–300 years (Graupner 2004). This supports Aries’ finding that, in earlier centuries, there used to exist no distinction between children and adults in various areas including sexual relations.

### **Age of Consent and the Stereotypical Roles of Males and Females**

Although the widespread adoption of age of consent laws in Europe only occurred during the last 200 to 300 years, the first age of consent statute dates much further back: The Statute of Westminster in England from 1275 stipulates: “The King prohibiteth that none do ravish ... any Maiden within age” and “within age” referred to the age of 12 (Waites 2005). Obviously, this age of consent provision only applied to protect “maiden”, which refers to “chaste” females, usually of a higher class. No comparable protection for males could be discerned during the same period. This type of gender-specific age of consent legislation evolved from the historical perception of women and girls as “special property in need of special protection” (Oberman 1994). At that time, great importance was also attached in (English) society to a

young woman's chastity, because it had significant monetary value. Given that (virgin) women were sold in marriage, depriving them of their virginity could negatively impact the father's chances of collecting a bride price. As a consequence, statutory rape at that time was mainly a property crime (Eidson 1980).

However, there was no similar concern for the male's chastity. The different attitudes towards female's chastity and male's chastity reflected "a set of attitudes known as the sexual double standard" (Eidson 1980), according to which women were judged more harshly than men for engaging in the same behaviors. Under this double standard, a man's sexual engagement with a woman was always normal and even positive and status enhancing (Nelson and Oliver 1998). Conversely, the same premarital sexual activity by a woman was considered as immoral and promiscuous (Nelson and Oliver 1998), which always represents a loss of virtue and degradation.

The high value attached to women's chastity and the underlying rationale for the special protection of females provide a vivid exemplification of female subordination within the traditional patriarchal family and their lack of social status in society, which was deeply rooted in the stereotypical notions people entertained of males and females. According to this traditional gender stereotype, females were considered as passive, submissive, dependent and weak, while males were perceived as active, aggressive, independent and strong. Correspondingly, this stereotype also endowed different characteristics to each gender when it comes to the issue of sexuality. Males were thought to be sexually active and aggressive, occupying a dominant position in the sexual relations with females (Nelson and Oliver 1998). On the contrary, females were constructed as sexually passive and reactive, "totally devoid of sexual feelings, desires or needs" (Edwards 1981) and they were considered to assume a submissive position in heterosexual relations. The fact that female sexuality was not defined in its own right but was instead regarded in response to male sexuality results in the assumption of women being "incapable of perpetrating any form of sexual activity, and by extension incapable of committing any sexual offenses" (Edwards 1981). The aggressiveness of the male sexuality, on the other hand, implied a threat and danger to the sexually passive females. Accordingly, this lead to the conclusion that females, especially underage females, were in need of special protection due to their passivity and disadvantaged position in sexual relations.

To sum up, this dichotomous construction of gendered sexuality gave birth to the assumption that "males will aggressively corrupt and exploit innocent young females unless deterred by criminal penalties" (Eidson 1980), which was one of the important rationales for gender-specific sexual offense legislation, such as gender-specific definitions of rape. As age of consent provisions were a component of the sexual offense legislation, this rationale also applies to the gender-specific age limit for young people's engagement in sexual activities. The traditional gendered age of consent legislation based on the assumption of "*male aggressor/female victim*" in sexual relations, to some extent, perpetuated the sexual double standard and reinforced the construction of females as weak and passive and males as dominant and aggressive.

However, the fact that age of consent laws used to be gendered had another consequence too. The dominant representation of *heterosexuality* embodied in the age of consent legislation, for instance, completely ignored sexual activities that did not match the stereotypical construction of sexuality. Possibly, the heterosexuality embodied in the age of consent legislation made a contribution to deter male adults from sexually abusing young females. However, the gendered "*male aggressor/female victim*" assumption for age of consent legislation does not encompass all situations of

child abuse that can occur in real life. Homosexual relations and the situation in which a female aggressor abuses a male victim were, for instance, overlooked.

### *Male Homosexual Relations*

Although the heteronormative approach embodied in the traditional age of consent legislation excluded homosexual behaviors from being regulated by the age limit, this did not necessarily exempt these behaviors from criminal liability. On the contrary, an overview of the history of homosexuality in Europe demonstrates that same-sex sexual activities, gay sexual acts in particular, used to be criminalized, even in consensual situations (Waites 2005). The diffusion of Christianity across Europe during the Middle Ages, accompanied with the strongly defined, dichotomous gender roles, caused the overt hostility towards homosexuality (Pickett 2009). As Christianity only condoned procreation-oriented sex, sexual activities for any other purposes, gay homosexual acts in particular, were considered sinful and worthy of total annihilation (Rubin 1984). For example, historians have found that the execution of male homosexuals for committing sodomy by both the church and secular authorities were quite common in Medieval Europe, including Switzerland, Spain, France, and Italian cities (Crompton 2004). The persecutions of homosexuals were intense and included various inhumane and cruel punishments, such as burning, beheading, hanging, and starving homosexuals to death. Louis Crompton (2004), an expert researching the history of homosexuality worldwide noted: “To look back on the history of homosexuality in the West is to view a kaleidoscope of horrors”. In a hostile context like this, there was no room for the possibility of setting age of consent for male homosexuals, since the behavior was prohibited for all ages.

This longstanding hostility towards homosexuality has changed in recent times in Europe. With the increasing role of science in European societies (approximately from the seventeenth century onwards), a more naturalistic and secular perspective on sexuality, one that was less directly attached to theology and procreation, gradually replaced the traditional Christian theological interpretation of sex (Pickett 2009, Vicinus 1992). This change, however, did not necessarily mean the total acceptance and equal treatment of homosexuals. In the late nineteenth century, the idea of homosexuality as a disease or sickness emerged and then gradually dominated the twentieth century (Weeks 2000). In the UK, for instance, “medical evidence” demonstrated in the middle of the twentieth century that an individual’s sexual inclination and orientation were not fixed until the age of 16. This, in turn, influenced the UK legislator to select the age of 16 as the minimum conceivable age limit for sexual engagement that could be accepted by the public at that time (Waites 2005). However, since male homosexuals were still considered as irrational and unable to resist deviant sexual desires (Waites 2005), it was firmly believed that extra judicial legal constraint was required. As a result, the homosexual age of consent was finally set at the age of 21 in 1967,<sup>1</sup> which was higher than the age limit of 16 years for other sexual behaviors. This discrepancy between the age of 21 and 16 still reflected the discrimination against homosexual groups in modern times. But instead of not having an age of homosexual consent—because the behavior was prohibited as such—they introduced a higher age of consent.

<sup>1</sup> The Sexual Offences Act 1967 decriminalized homosexual acts in private between two men. However, the age of consent for homosexual was set at 21, whereas the age of consent for heterosexual acts was 16.

## *Lesbianism*

With regard to lesbian sexual behaviors, the European legislators and law enforcement were comparatively lenient or even indifferent. After examining the regulation of homosexuality in Europe, Bailey (1955) found that homosexual acts used to be penalized heavily and savagely when committed by men, while sexual acts between women were practically ignored, both in medieval and modern times.

Although lesbian acts used to be a capital crime in many European countries (Crompton 2004), these laws were only seldom enforced in practice in Europe (Waites 2002). In the Dutch Republic (1581–1795), for instance, lesbianism was a capital crime, but there were no records of execution found during that period (Crompton 2004), whereas laws regulating consensual sexual acts between women was practically lacking in the UK (Waites 2002). This demonstrates the indifference of law makers and law enforcement towards lesbianism, an indifference confirmed by Herzog's (2011) survey of trends in the history of sexuality in twentieth century Europe. She too concluded that lesbianism has always been considered less threatening than gay homosexuality, therefore attracting fewer efforts at regulation and control.

It is hypothesized that this lenience towards sexual acts between women—again—reflected the stereotypical denial of female sexuality (Edwards 1981). According to Waites (2002), the reasons for the lack of age of consent for lesbians “include widespread beliefs in essential sex differences and the passivity of female sexuality, which rendered same-sex contact between women invisible or unthreatening”. In such a historical setting of denying and ignoring the female's sexuality, it was understandable that the age for consent for sex between females was absent for a long time.

## *Sexual Relationship Between a Female Adult and a Young Male*

Not only the age of consent for male and female homosexuals was ignored by law makers in history, but also the age limit for the female adult and young male sexual relationship was absent from the laws regulating sexuality. Again, this was the result of the prevailing understandings of stereotypical roles of males and females. As mentioned before, due to the social construction of active and aggressive male sexuality, males were the primary objects of legal control in the history (Edwards 1981). By contrast, the wide-accepted female sexual passivity resulted in the assumption that females were incapable of perpetuating any sexual activities, not to mention committing sexual offenses towards males (Davies 2002). So the perpetrator of a sexual offense could only be male, while females were seen only in the role of victims (Novotny 2002). It was unimaginable that a male could be sexually offended by a female. As a direct result of this assumption, there was no need to protect males from female sexual assault, just like there was no need to protect the wolf against the lamb. By the very exclusion of females from the definition of sexual perpetrators, there was no need to draft an age of consent for sexual relationships between adult females and young males.

The emphasis of the traditional construction of dichotomous gender system and the worship of the passivity of women, especially in sexual matters, had a long-term effect in the sexual offense legislation. According to Edwards (1981) the social construction of female's sexual passivity has influenced the various sexual offenses' statutes during the nineteenth and twentieth centuries. Well until the twentieth century, most crimes of a sexual nature were still considered sex specific in the sense that they could only be committed by a male offender to a

female victim. Consequently, for a long time, the age of consent statutes only aimed to protect young females while young males were being excluded.

### **Criticism on the Gender-Specific Approach in Age of Consent Legislation**

In spite of the long-lasting gendered stereotype in history, modern Europe has witnessed significant changes in the field of sexuality and gender. Since the Industrial Revolution, when women began to join the labor force and making a more visible contribution to both the family and society, lots of campaigns were initiated by feminists to acquire equal treatment and rights of females and males in different fields of social life. Inter alia, there were increasingly loud calls for drafting legislative texts in a gender-neutral language, which aimed at redressing the socio-economic differences and imbalances caused by the long-standing discrimination against women (Williams 2008).

In addition, the industrialization and urbanization that occurred in Western Europe redefined family relations, gender roles, and notions related to sexuality (Rubin 1984). Against this background, the gay liberation movement emerged in the late 1960s and early 1970s. Heavily influenced by the feminist critique of gender inequality, they too sought to transform social attitudes towards same-sex relationships and advance equal treatment of homosexuality to heterosexuality in social life (Waites 2005). Both the total ban on homosexuality and the higher age of consent for homosexual behavior were under attack. Such unequal laws were perceived as a form of discrimination as they stigmatized same-sex relations by their suggestion that “the consequences of same-sex acts are more serious and take a greater degree of maturity” (Pickett 2009). Therefore, there was a call for a gender-neutral language to substitute the traditional gender-specific language in the field of sexual offense legislation.

Gradually, the principle of gender-neutrality, also being referred to as “gender-inclusive” or “non-sexist”, became accepted as a standard for legislation drafting at the end of last century, at least in most of the *English-speaking* jurisdictions (Williams 2008). Whether and to what extent this trend of using gender-neutral language by adopting neutral approach towards both males and females, heterosexuality and homosexuality in drafting age of consent laws has spread across other countries on the European continent will be elaborated on in the next part of this article.

### **Towards a Gender-Neutral Approach in the Twenty-First Century in Europe**

To examine what approach the European legislators have adopted and whether certain trends can be discerned, an overview of the detailed age of consent provisions in Europe is needed. In 1997, Graupner conducted a comparative survey on age of consent laws in Europe, which he updated in 2004. In a follow-up study conducted in 2016 (Zhu and Van der Aa 2017), the age of consent provisions of 57 of the original 59 jurisdictions were re-collected. The juxtaposition and comparison of the corresponding laws of 2004 with those of 2016 will provide more insight into the trends regarding gender-specificity and approach towards homo- or heterosexuality in age of consent laws in twenty-first century Europe.

Already in 2004, most of the 59 jurisdictions studied by Graupner had adopted a neutral approach in their age of consent legislation, making no distinction between heterosexuality and homosexuality and/or between boys and girls. Still there were no less than 15 jurisdictions

that—to some extent—held onto the specific approach (see Table 1). This amounted to one-fifth of all European jurisdictions and they were still setting different ages of consent limits according to the gender and/or sexual orientation of the people involved.

Based on Table 1, the manifestations of a gender-specific approach can be divided into three different categories:

- 1) The first category makes an *explicit* distinction between homosexual and heterosexual sex. Sometimes, all sexual behaviors between homosexuals are bound to a higher age of consent (e.g., Albania and the Faroer Islands), whereas other jurisdictions have linked the higher age of consent or a total ban to certain homosexual or heterosexual behaviors only (e.g., Cyprus). Another difference is that while some jurisdictions indiscriminately attach a higher age of consent to both male and female homosexual acts (e.g., Albania or Bulgaria), others focus on male homosexuality only (e.g., Gibraltar, Guernsey). A remarkable finding is that in some jurisdictions, it is heterosexuals who are restricted more by the age of consent legislation, for instance in Gibraltar and Guernsey where heterosexual anal intercourse is prohibited whatever the age of the partners. All of these explicit distinctions between homo- and heterosexual activities are a blatant violation of equal sexual rights for (gay) homosexuals, but sometimes also for heterosexuals. Thus, some authoritative organizations in Europe have outlawed this explicit distinction between homosexuality and heterosexuality since the end of last century. The European Courts of Human Rights, for instance, had ruled at least for three times that a total ban on homosexual behaviors violates the European Convention on Human Rights and in 1997, the European Commission on Human Rights held that a higher age limit for homosexual behaviors constitutes a violation of the Convention as well.<sup>2</sup>
- 2) The second category makes an *implicit distinction between heterosexuality and (male) homosexuality*, by adopting a higher age of consent for certain sexual acts that affect the gay community disproportionately, e.g., a higher age of consent for anal intercourse. Such implicit distinction was, for instance, present in the Isle of Man and Serbia, where anal intercourse carried a higher age of consent.
- 3) The third category makes an *explicit distinction between the two genders*, regardless of whether the sexual contact is homo- or heterosexual. This approach of setting different age limit based on nothing more but the gender of the young participants was only found in Scotland. After the higher age limit of 18 for male homosexual acts was repealed in 2000, the only inequality left was embodied in the fact that the age of consent for man/girl relations was 16, whereas for woman/boy relations, the boys needed to attain sexual maturity (Graupner 2004).

Then how is the situation now in these 15 jurisdictions? Based on a comparison between the laws of 2004 and those in force in 2016 (Table 1, third column) we can clearly identify the changes that have occurred in the past 12 years in those 15 jurisdictions. The overview shows that of those jurisdictions, only Albania has retained a gender-specific element in its age of consent law (albeit that information on the Faroer Islands was inaccessible, see Table 1).

In Albania, according to article 100 of its Criminal Code, it is criminal to have sexual relations with children that are less than 14 years old. At first sight, the age of consent of

<sup>2</sup> See *Dudgeon v. the United Kingdom*, 22 October 1981; *Norris v. Ireland*, 26 October 1988; *Modinos v. Cyprus*, 22 April 1993; *Sutherland v. the United Kingdom* (striking out) [GC], no. 25186/94



**Table 1** The 15 European jurisdictions with different ages of consent limits according to the gender and/or sexual orientation of the people involved

	2004	2016
Albania	14 for heterosexual sex 18 for male and female homosexual sex	14; but if the child is female, she should in addition be sexually mature
Bulgaria	14 for heterosexual sex, 16 for male and female homosexual sex when the older person is under 18, 18 for male and female homosexual sex when the older person is 18 or above	14+ the child should understand the essence and meaning of the act
Belarus	'Sexual maturity' for vaginal, oral, anal intercourse, 18 for male homosexual sex	16
Cyprus	No limit for other sexual contacts, 16 for vaginal intercourse, 13 for heterosexual anal intercourse 18 for homosexual anal intercourse Other sexual acts: individual capacity to give informed consent is decisive	18
Gibraltar	16, Male homosexual relations between persons over 18 are an offense if more than two persons are present Heterosexual anal intercourse is punishable whatever the age of the partner may be	16
Guernsey	16 for vaginal intercourse; Total ban on heterosexual anal intercourse; Male homosexual relations between persons over 18 are an offense if more than two persons are present.	16
Ireland	17 for vaginal intercourse and anal intercourse with girls and boys, 15 for all other kinds of (heterosexual and lesbian) contact	15
Isle of Man	21 for anal intercourse; 16 for other kinds of heterosexual contacts; Male homosexual relations between persons over 21 are an offense if more than two people are present	16
Jersey	Heterosexual anal intercourse is punishable regardless of the age of the partner; 16 for vaginal intercourse; 21 for anal intercourse between males, 16 for other male homosexual contacts;	16
Portugal	14 for heterosexual sex; 14 for male homosexual sex when the older person is under 18; 16 for male homosexual sex when the older person is 18 or above;	14
Serbia	18 for anal intercourse; 14 for all other kinds of sexual contact	14
Bosnia-Herzegovina	Total ban on anal intercourse between men; 14 for other kinds of sexual contact.	14
Kosovo	Total ban on anal intercourse between men; 14 for other kinds of sexual contact.	16
Scotland	16 for man/girl relations; Individual sexual maturity for woman/boy relations	16
Faroer Islands	15 for heterosexual contacts; 18 for homosexual contacts	Unknown

14 years is applicable to both boys and girls. However, the stipulation that it is also a crime to have sexual relations “with a female child, who is not sexually matured” indicates that if a girl reaches the age of 14, this does not necessarily result in the legality of sexual relations with her, as sexual maturity is also a prerequisite. How the female child’s sexual maturity needs to be determined is not further elaborated in the Albanian Criminal Code. In contrast, there is no supplementary requirement to sexual relations with boys, which means that once a boy reaches the age of 14, he is sexually accessible in the legal sense. In this regard, the legal standard for young people’s engagement in sexual activities is different for boys and girls in Albania, indicating a gender-specific standard for young people’s engagement in sexual acts.

Apart from Albania, the other 13 jurisdictions (information on the Faroer Islands was inaccessible) have adopted a single age of consent, making no distinction either between boys and girls, or between heterosexuality and homosexuality. As to the 44 other European jurisdictions that had already adopted a gender-neutral approach in 2004—and that were therefore not represented in the Table above—not a single jurisdiction has changed its approach since then (i.e., they have remained gender-neutral). We can safely conclude that the gender-neutral approach is overwhelmingly adopted by European law makers in their age of consent legislation. This picture provides a basis with which to contrast the Chinese approach to age of consent, which will be examined in more detail in the following part.

### Age of Consent in the People’s Republic of China

The age of consent legislation in People’s Republic of China (hereinafter PRC) is embodied in article 236 of the Criminal Code of the PRC promulgated in 1997. Contrary to most Western jurisdictions—where age of consent is usually regulated in a separate legal provision—the Chinese age of consent is codified in the crime of rape, which consists of three elements:

*Whoever, by violence, coercion or other means, rapes a woman is to be sentenced to no less than three years and no more than 10 years of imprisonment.*

*Whoever has sexual relations with a girl under the age of 14 is considered to have committed rape and is to be given a heavier punishment.*

*Whoever rapes a woman or has sexual relations with a girl involving one of the following circumstances is to be sentenced to no less than 10 years of imprisonment, life imprisonment, or death:*

- (1) *rape a woman or have sexual relations with a girl under aggravating circumstances;*
- (2) *rape several women or have sexual relations with several girls;*
- (3) *rape a woman in a public place and in public;*
- (4) *rape a woman with another or more persons;*
- (5) *cause the victim serious injury, death, or other serious consequences.*

From the second element of this article – “Whoever has sexual relations with a girl under the age of 14 is considered to have committed rape (...)” – it can be deduced that the age of consent in PRC is 14 years. This is the only statute for age of consent in the Criminal Code of PRC, at least according to Chinese academia. As we will see later on, China has a second age of consent. A literal reading of the article 236 shows that the age limit of 14 years old is only applicable to girls, with boys being excluded from the scope of this provision.

In addition, as the age of consent is embodied in the crime of rape, the gender-specific interpretation of the crime of rape in China inevitably renders the age of consent gender-specific as well. Furthermore, although the word ‘whoever’ in article 236 does not demonstrate the gender of the perpetrator, it is generally accepted in China that the direct perpetrator of rape can only be male, with the roles of females being restricted to those of aiders or abettors if the rape is a joint crime (Zhang 2011).

The judicial interpretations by the Supreme People’s Court (hereinafter SPC) and the Supreme People’s Prosecutor (hereinafter SPP) substantiate the finding that China has a gender-specific approach towards rape and—consequently—age of consent. These interpretations are an important source of law for judges and prosecutors and are often cited during criminal trials. A close reading of some of these judicial interpretations related to the crime of rape, reveals that they were clearly drafted in terms of a male perpetrator and female victim. For example, in 1988, the SPC, SPP, and the Ministry of Public Security jointly issued a judicial interpretation called “Reply to Issues of Concrete Application of Law on Dealing with Cases of Rape”. At the very beginning of this judicial interpretation, the crime of rape is defined as “the act of having forcible sexual intercourse with a female by violence, coercion and other means, which is against the female victim’s will”. In line with article 236 of the Criminal Code, this definition neglects males as possible victims of rape. The judicial interpretation, furthermore, focused exclusively on a heterosexual context. For instance, in explaining how to deal with sexual abuse within authoritative relations, the drafters provided examples of fathers sexually abusing their biological or adoptive daughters, without mentioning homosexual abuse or sexual offenses committed by mothers to their sons. This heterosexual mindset can furthermore be witnessed in the instructions to the judiciary staff on how to distinguish between crimes and non-crimes. In these instructions there were many detailed explanations on how to tell rape apart from consensual sexual behaviors of unmarried heterosexual lovers, how to differentiate between rape and heterosexual adultery, how to distinguish gang rape of a female by males from heterosexual promiscuity, etc. All of these stipulations were based on the presumption of males being the perpetrators and females being the victims, which is a direct demonstration of the gender-specific perception of sexual offenses in PRC.

Also, in Chinese doctrinal literature it is well accepted that the age of consent refers to the heterosexual age limit of 14 years old in article 236, the crime of rape (Su 2003), and even the Chinese legal scholars’ discussion about children’s ability to consent to sexual activities are confined to young girl’s consent to heterosexual sex (Su 2003; Luo 2012; Lao 2011). As China used to be (arguably, still is) a typical patriarchal society with (hetero)sexuality being male-dominated (Becker 1999), it left little room for the possibility of males being sexually offended by females, which could explain the absence of an explicit age of consent for boys’ sexual engagement with females. However, as we will demonstrate later on, we believe there is a second provision in the Chinese Criminal Code in which an age of consent is stipulated.

As to the regulation of homosexual behavior, there has never been a law explicitly prohibiting homosexual contacts. This can be explained by the fact that—different from Europe—the Chinese have always been more tolerant towards homosexuality (Crompton 2004). In fact, male homosexuality was even acceptable in ancient China, at least among elites from the upper-class (Ruskola 1994; Ruan and Tsai 1987; Kong 2016). Scholars have found abundant records of male homosexuality in traditional Chinese literature (Ruan and Tsai 1987), some of which even seem to glorify the behavior. For example, in the famous story of *duanxiu* (“the cut sleeve”), which presented an Emperor’s devotion to his male lover: One

morning the emperor woke up and wanted to get up, only to find that one of the long sleeves of his gown was trapped under his sleeping lover. Out of affection for his lover, the emperor cut off his sleeve so as not to disturb him (Ruan and Tsai 1987).

In contrast to Christian teachings, Confucianism, which was the most influential social and ethical philosophy in Chinese history, had little concern with same-sex behaviors between men. In fact, “its insistence on the seclusion of women and their inferiority, the high value it placed on male friendship, and the closeness of the master-disciple bond it fostered may have subtly facilitated homosexuality” (Crompton 2004). Scholars assume that there was a similar level of tolerance for lesbianism, at least in large households that consisted of multiple wives and female concubines, slaves or servants (Ruan and Bullough 1992), where the male head of the large household was unable to pay frequent or equal attention to the sexual needs of all female members of the household (Crompton 2004).

Still, China’s first Criminal Code—enacted in 1979 and abolished in 1997—contained a ‘catch-all’ provision in article 160, the crime of hooliganism (*‘liumangzui’* in Chinese), which was generally targeting on behaviors of disrupting social orders and often applied by law enforcers in practice to arrest men engaging in same-sex behaviors as they were perceived as immoral (Crompton 2004, Ruskola 1994, Li 2006). With the coming into force of the new Criminal Code in 1997, this catch-all crime was abolished. The fact that Chinese laws remain silent on the issue of homosexuality has lead one scholar to comment that “the current laws in China neither prohibit homosexuality nor protect its legal status” (Ho 2011). In fact, sexual offenses against men above the age of 14 was not a crime until the recent Amendment IX to the Criminal Law of PRC came into force on August 29th 2015. The absence of homosexuality in legislation also resulted in the absence of an *explicit* age of consent for homosexual activities with children.

However, this does not necessarily lead to the legality of homosexual engagement with children. According to article 237 of the Criminal Code, whoever acts indecently against a child under the age of 14 can be prosecuted for the crime of “acting indecently against a child”, which could be translated as child (sexual) molestation. It is important to note that this article also covers consensual sex with children (Zhang 2011). As the gender of the perpetrator and victim is not indicated in this article, it could be perceived that all sexual activities with children under 14 will be charged with child molestation, except for a male’s (penis-vagina) intercourse with a girl, which would fall under the crime of rape.

Although article 237 of the Criminal Code can be constructed as a second, gender-neutral expression of age of consent, this does not mean that boys and girls receive equal protection. The difference is that a male’s sexual intercourse with a girl under the age of 14 will be charged with rape, while all other homosexual and heterosexual activities with either boys or girls under the age of 14 will be charged with child molestation.

What is more, the consequence of sexual engagement with children will be different according to the gender of the partners involved. A male who has sexual intercourse with a girl under the age of 14 will be charged with rape and the maximum punishment could be life imprisonment or even a death penalty. As to the other kinds of sexual engagement with children under the age of 14, no matter whether heterosexual or homosexual, the perpetrator will be charged with child molestation, the maximum punishment of which is just 15 years of imprisonment (see Table 2). Another difference is that the age of criminal responsibility varies for the two crimes. According to article 17 of the Criminal Code, the general age of criminal responsibility in China is 16 years old, but children aged between 14 to 16 years old can be prosecuted if they committed severe crimes such as murder, rape, robbery, drug trafficking, etc.

In this sense, sexual offenses against girls by males are considered a severe crime, setting the age of criminal responsibility for this crime at 14 years, while the other kinds of sexual offenses against children are not considered as severe as rape, leading to an age of criminal responsibility of just 16 years. Based on the higher maximum penalty of sexual offenses against girls by males and by the fact that the age of criminal responsibility is lower for this type of crime, we conclude that the Chinese legislator is more concerned about the protection of young girls in heterosexual relations than with other types of consensual sex with children (see Table 2). It is safe to say the age of consent in China is 14 years old and that it is gender-specific in the sense that it provides more protection to girls in heterosexual relations, which is different from the gender-neutral approach being adopted by practically all European jurisdictions.

## Discussion and Recommendations

From the analysis above, we can conclude that the gendered dimension of age of consent laws in Europe have been transformed into gender-neutral provisions. In all but one (Albania) jurisdiction, they have now adopted neutral provisions—both in terms of gender and homosexuality—and this is a big stride towards the goal of (sexual) equality for all. In China, however, although it is forbidden to have sexual relations with children under the age of 14, the gender of the participants directly influences the criminal charge—rape or child molestation—the age of criminal responsibility of the perpetrator and the maximum penalty of the crime. Based on these findings we conclude that the age of consent legislation in China has gender-specific elements and is not fully gender-neutral.

Put into the historical context, the development towards gender-neutral age of consent legislation in Europe was the result of (inter alia) a successful lobby by women and gay's rights movements who strived to end the long-lasting discrimination against homosexuality and women and aimed to achieve the goal of "equality for all" (Ellis and Kitlinger 2002, Williams 2008). China does not have a similar historical background. In contrast to the situation in Europe, where the persecution of homosexuals used to be quite common, the social attitudes

**Table 2** Crimes and penalties in China

Crime	Perpetrator	Victim (under the age of 14)	Sexual behavior	Maximum penalty
Rape	male (above the age of 14)	girl	penis-vagina intercourse	death penalty
Child molestation	male (above the age of 16)	girl	all sexual behaviors except penis-vagina intercourse	15 years of imprisonment
Child molestation	female (above the age of 16)	boy	all sexual behaviors	15 years of imprisonment
Child molestation	male (above the age of 16)	boy	all sexual behaviors	15 years imprisonment
Child molestation	female (above the age of 16)	girl	all sexual behaviors	15 years of imprisonment

towards homosexuality in Chinese history were more tolerant (Crompton 2004). The tradition of tolerance to homosexuality in China could partly explain why there was no public outcry for the equalization of age of consent for homosexuality and heterosexuality as it occurred in Europe.

The current gender-specific provisions on age of consent in China represent the law makers' unequal attitudes towards sexual offenses against homosexual and heterosexual offenses against boys. Under the principle of gender neutrality, sex-specific language in legislation should be avoided and this has been accepted by most of the Western countries (Williams 2008). In this respect, China is lagging behind.

In practice, the gender-neutral approach in Europe is not impeccable, as the traditional gender-specific construction of gender and sexuality still remains omnipresent in society and people's attitudes towards different kinds of sexual offenses (McLean 2013; Nelson and Oliver 1998). Some scholars criticized that the gender-neutral legislation in child sexual offense belies the reality of a gendered social construction of sexuality and its corresponding consequences (Nelson and Oliver 1998). The gender-neutral drafting of legislation, for instance, does not necessarily result in the gender-neutral enforcement of the legislation (Allen 2002). Although legislators try to create equality in drafting sexual offense legislation, in reality it is possible that "the deeply entrenched patriarchal views takes precedence over written laws despite the (gender-neutral) technique used" (McLean 2013).

Still, despite these deficiencies of unbalanced enforcement and persistent social attitudes in practice, the transformation of the age of consent legislation from a gender-specific to a gender-neutral approach in Europe is a positive step, particularly in enhancing equality and changing these social attitudes. Given that the gendered stereotypes and inequality between male and female have been around for centuries, it is understandable that society needs time to completely accept the new gender-neutral approach, but legislation could be of influence in changing public opinion, if only as a first step. In this sense, European jurisdictions' efforts on the equal protection of boys and girls and equal treatment of heterosexuality and homosexuality in the age of consent legislation should be instructive for China's future legislation.

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