

PRECARIOUS PROGRESS

Advocacy for the Human Rights of LGBT People in China



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Written by Darius Longarino

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A brief disclaimer: the views expressed in the report are my own and do not necessarily reflect those of the institutions and individuals who supported its creation.

Author Bio

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Introduction

This report outlines the relationship between law and the lives of LGBT people in China, and the Chinese LGBT movement’s efforts to make law a force for greater equality rather than one that entrenches stigma.

Over the past several decades, LGBT people have gone from being nearly invisible in Chinese society to forming a vibrant social movement. Once focused on grassroots community building and service, China’s LGBT movement is increasingly reaching up and out to make society more inclusive through advocacy. It is a multisector endeavor, involving civil society activists, legal, educational, health, business, and media professionals, as well as scholars and some officials. LGBT advocates have a long-term aim of effecting legal change, not only to attain crucial equal rights, but also to accelerate positive trends in social attitudes.

Progress has been promising, but remains precarious. Discrimination and state repression are still pervasive, and advocates must navigate treacherous and ever-changing political waters. Strings of happy news are punctuated by setbacks – the police detaining activists and shutting down events, censors removing online content, and policymakers snubbing calls for equality. Developments have been rapid, and full of twists and turns.

Yet, on balance, China’s LGBT movement continues forward, building visibility and support. Surveys show increasing acceptance among younger generations,¹ views of pro-LGBT social media hashtags have reached into the hundreds of millions several times

1 “Being LGBTI in China—A National Survey on Social Attitudes towards Sexual Orientation, Gender Identity and Gender Expression.” 2016. United Nations Development Program. https://www.asia-pacific.undp.org/content/rbap/en/home/library/democratic_governance/hiv_aids/being-lgbti-in-china--a-national-survey-on-social-attitudes-towa.html.

(though are often censored shortly after), and LGBT plaintiffs have won pioneering rights litigation in court.

The movement's achievements to date, especially at a time when the Chinese Communist Party's hostility toward civil society has intensified, makes it a noteworthy case of bottom-up advocacy. The LGBT movement is currently marginalized but has a lot going for it: size, growth, and connectivity, advocacy savvy and passion, and ample socioeconomic resources. Whether through intention or a lack

thereof, the Chinese Communist Party (CCP) has not attempted an all-out suffocation of the LGBT movement, and advocates have proven adept at capitalizing on the space available.

Whether state decisionmakers in the coming years and decades will pursue policies to protect the equal rights for LGBT people will come down to a mix of ideology, pragmatism, and public pressure. LGBT advocates are striving to turn that calculus in their favor, and, facing the long and rough road ahead, remain hopeful.



Background

In 1996, 25-year-old Mingshui, living in Shanghai, thought she was the only woman in the world who was attracted to other women.² Then one night her American roommate showed her a gay dating website, sparking a life-changing revelation: she was not alone.

Some five years later, Mingshui and her girlfriend (whom she met online) married in a Shanghai restaurant housed in an old church. Their union would not receive legal recognition. But, in about those same five years between Mingshui's revelation and wedding day, China decriminalized and depathologized homosexuality³ – opening up greater space for lesbian, gay, and bisexual people to thrive. Around the same time, Jin Xing became China's first openly transgender celebrity, bringing visibility of trans people to a new height (China's first gender-affirming surgery happened in 1983, but was kept secret).⁴

An attendee at Mingshui's wedding reflected on the joyful celebration in an online post, "Gays in today's China are busy enjoying their recently obtained freedom. They haven't had time yet to systematically consider an overall strategy."⁵ Perhaps largely true, but in the 1990s handfuls of LGBT activists were starting to find each other through the grapevine – meeting, forming communities, and laying the groundwork for the movement's burgeoning.⁶

2 Mingshui's story is told in Chu, Tian, ed. "The Wedding of a Chinese Lesbian Couple." Wangyi, 11 Dec. 2000, http://culture.163.com/edit/001211/001211_44100.html.

3 Section A covers how the People's Republic of China never expressly criminalized homosexuality, and Section C explains how the process of depathologization is still incomplete.

4 Faison, Seth. "Beijing Journal; As China Changes, a Sex Change Can Bring Fame." New York Times, 14 Sept. 1999, www.nytimes.com/1999/09/14/world/beijing-journal-as-china-changes-a-sex-change-can-bring-fame.html.

5 Chu, Tian, ed. "The Wedding of a Chinese Lesbian Couple." Wangyi, 11 Dec. 2000, http://culture.163.com/edit/001211/001211_44100.html.

6 Wei, Tingting. "Beijing Conference through lesbian eyes." Asian Journal of Women's Studies, Volume 21, Issue 3 (2015), 6 Oct. 2015, <https://doi.org/10.1080/12259276.2015.1072944>.

Two decades later, there are now scores of LGBT organizations of various forms and sizes implementing a variety of advocacy strategies throughout China. Parents, Family, and Friends of Lesbians and Gays (PFLAG), a nation-wide network with tens of thousands of members, devotes itself to helping parents embrace their LGBT children. The Rainbow Lawyers offer legal services, and represent LGBT individuals in rights litigation. Common Language produces policy research and engages government officials about legal reform. The Beijing LGBT Center trains therapists to be LGBT-affirming, while the Gay and Lesbian Campus Association of China holds seminars on gender diversity for teachers. For years, ShanghaiPRIDE organized an annual weeks-long festival and LGBT-inclusion events for business professionals, but disbanded in August 2020 due to state intimidation and harassment – a harsh reminder that advocacy is not without risk. The Nanjing Trans Sanctuary⁷ provides shelter and support for transgender people escaping unsafe living situations. These are just a few examples. One can find groups from Shenyang to Urumqi, Xi'an to Guiyang. They include queer choruses, lesbian mother support groups, fellowships of Rainbow Christians, and networks of LGBT corporate professionals.

The development of the movement has been propelled forward by an explosion in connectivity. It is hard to imagine a 25-year-old in today's Shanghai being

completely unaware of other lesbians. Gay and lesbian dating apps now have tens of millions of active monthly users in China, and LGBT social media accounts have hundreds of thousands or even millions of followers. There are numerous LGBT-themed public WeChat and Weibo accounts that represent the wide diversity of the LGBT community, not to mention countless large private chat groups.

The growth of the movement is also partially explained by sheer size. Even if LGBT people comprise only five percent of China's population, they would number around 70 million. LGBT people are in every socio-economic class and geographic region. They are farmers and factory workers, artists and scholars, professionals and business leaders, elementary school teachers and journalists, CCP members and state bureaucrats. Further, every person is deeply connected to issues of gender and sexuality, and many LGBT advocates are framing their work as dismantling gender constraints for all. This creates powerful synergies with China's feminist movement – indeed, many advocates view these movements as overlapping and are active in both. Depending on the audience, advocates also frame their message in terms of family harmony and romantic love, images and values that have widespread recognition and appeal.

State censorship and social taboo have kept visibility of the LGBT community relatively low, but these restraints are not total and visibility is much greater than before. When Weibo announced a cleanup of “homosexual” content in April 2018, the protest hashtag #IAmGay reached over

7 Nader, Aya. “Transgender People in China Fight to Improve Conditions despite Grim Circumstances.” *Globe and Mail*, 28 Nov. 2019, www.theglobeandmail.com/world/article-transgender-people-in-china-fight-to-improve-conditions-despite-grim/.

one billion views and engagements, causing Weibo to back down. When Weibo censored lesbian discussion spaces a year later, an #IAMLes hashtag took off – though it only had mixed success.⁸ During Pride Month, one can find LGBT-related exhibitions in Xiamen, social media posts by multinational corporations, and posters set up in a Changsha middle school.⁹ Visibility is poised to continue increasing as surveys show younger generations as being more supportive.¹⁰

Despite progress, many things have not changed since Mingshui's youth. Discrimination and harassment – in schools, in the workplace, by families, by authorities – remains prevalent, and no laws expressly provide protection. According to a 2016 UNDP survey, less than five percent of LGBT people are fully out at school, work, or in their religious community, while about fifteen percent are out to their families.¹¹ Survey respondents reported high rates of discrimination in each of these daily life environments.¹² Research demonstrates that, due to experiencing greater discrimination and social stigma, LGBT people in China (consistent with the experiences of LGBT people outside China) have substantially higher rates of depression, anxiety, and suicidality than

8 Chen, Laurie. "Small victory for China's online lesbian community as censored forum is restored, but another remains blocked," South China Morning Post, 16 Apr. 2019. <https://www.scmp.com/news/china/society/article/3006334/rainbow-victory-chinas-online-lesbian-community>.

9 Voice of Comrades [同志之声], Weibo, 2 July, 2019, <https://m.weibo.cn/status/4389752818054486>.

10 Being LGBTI in China--A National Survey on Social Attitudes towards Sexual Orientation, Gender Identity and Gender Expression. 2016. United Nations Development Program, https://www.asia-pacific.undp.org/content/rbap/en/home/library/democratic_governance/hiv_aids/being-lgbti-in-china--a-national-survey-on-social-attitudes-towa.html.

11 Ibid.

12 Ibid.

non-LGBT people.¹³ For NGOs and advocates, the threat of getting harassed, shut down, or detained by authorities is always present. China continues to exclude same-sex couples from the freedom to marry, or any legal acknowledgment and protection of their love and their families.

How the LGBT movement will develop and the extent of its success will greatly depend on how authorities react. An oft-quoted maxim holds that the CCP's policy towards the LGBT community is "don't support, don't oppose, and don't promote." But signals from CCP and state entities are more fragmented and contradictory – sometimes more oppositional and sometimes more supportive – than the maxim suggests.

In the past, official attitudes were much more clearly negative. In 1993, the Ministry of Public Security stated "homosexuality twists human nature" and "violates social morality" when ordering a crackdown on a gay men's advocacy group. In 2009, a high-ranking National People's Congress official gave a speech on using law to address anti-social behaviors, such as "drug use, homosexuality, selling sex and visiting prostitutes, and juvenile crime."¹⁴

Official attitudes have been evolving. In recent years, Chinese delegates have made at least six cautiously-circumscribed but supportive statements on LGBT issues at the United Nations. For example, in 2015, an official remarked, "LGBTI people face

13 Report on the Mental Health of LGBT People in China. The Beijing LGBT Center & the Institute of Psychology of the Chinese Academy of Sciences. 2014.

14 Shen, Chunyao. "Several Issues on Strengthening the Legislation in Certain Social Fields." Ninth Special Topic Speech of the Standing Committee of the Eleventh National People's Congress, 24 April 2009, http://www.npc.gov.cn/zgrdw/npc/xinwen/2009-04/24/content_1499768.htm.

some real challenges in terms of social acceptance, employment, education, health, and family life. This is an issue that needs serious attention,” and later in 2020 another delegate stated, “China opposes all forms of discrimination and violence, including discrimination, violence, and intolerance based on sexual orientation and gender identity.”¹⁵ A few NPC delegates have also publicly shown support, and courts have made favorable rulings in LGBT rights cases.

At the same time, one can still easily find ignorant and prejudiced statements made by CCP and state entities. Advocates are constantly vigilant, trying to read the different signs emanating from the authorities. Common Language analyzed thousands of official CCP and state social media account posts to assess their attitude towards LGBT issues, but could not find a meaningful pattern.¹⁶

As indicative as what CCP and state actors do is what they don't do. Authorities put constant pressure on LGBT organizations, but have not tried to completely snuff them out. In 2017, the leader of one LGBT organization said that although the government will not grant the organization legal status, it is allowed to continue its work. The organization leader took it as “a form of silent approval,” and the organization continued working without legal

status.¹⁷ Similarly, the censorship apparatus has the technical power to drastically ramp up deleting and blocking LGBT-related online content, but allows substantial discussion to occur – within bounds.

Still, boundary lines are unclear, and the CCP's intense aversion to civil society organizing means pressure from authorities is inevitable. Security forces keep close tabs on LGBT organizations, frequently press staff for information about their activities and warn them against certain actions. If, for whatever reason, they do not want an activity to happen or an organization to exist, they will shut it down, and might resort to detentions.

There is also the CCP's fear that LGBT groups, because of connections to the global LGBT movement and global civil society, are potential vehicles for foreign subterfuge, as reflected in state media articles such as “China's LGBT Groups Cautioned Against Western Political Agenda.”¹⁸ In 2015, an international relations professor at the Central Party School summed up this wariness about foreign NGOs focused on social issues:

“From women's and children's rights protection to the promotion of gay rights ... [foreign NGOs] may have some friction or conflicts with the host country in terms of values and culture. In certain situations, some political opposition may occur ... [Foreign NGOs] could also use their influence in China to push

15 “UN Live United Nations Web TV - General Assembly - Third Committee, 33rd Meeting - General Assembly, 74th Session.” United Nations, 24 Oct 2019, webtv.un.org/meetings-events/general-assembly/watch/third-committee-33rd-meeting-general-assembly-74th-session/6097418492001/?term=#t=1h30m9s.

16 “What Has Official Media Said about LGBTI Issues? Part I” [“关于 LGBTI 议题，官媒都说了啥？（上）”]. Common Language, 22 Oct. 2019, https://mp.weixin.qq.com/s/6hCMc_YxkSb6Ri-Jg3M7yg; “What Has Official Media Said about LGBTI Issues? Part II” [“关于 LGBTI 议题，官媒都说了啥？（下）”]. 8 Nov. 2019, <https://mp.weixin.qq.com/s/N5wUAPFSlH2p49zrFs0yQ>.

17 “The Global State of LGBTIQ Organizing: The Right to Register.” OutRight Action International. 7 Aug. 2018. <https://outrightinternational.org/righttoregister>.

18 Zhang, Yiqian and Wenting Xie. “China's LGBT groups cautioned against Western political agenda.” Global Times, 16 May 2018, <http://www.globaltimes.cn/content/1102585.shtml>. Also see, Xie, Wenting. “China's LGBT activists break away from Western agenda, bring their own experience to the world.” Global Times, 24 Jan, 2018, <https://www.globaltimes.cn/content/1086373.shtml>.

forward the Western model of NGOs and civil society, causing China's social construction to diverge from China's national conditions or causing it to turn its back on the path of socialism.”¹⁹

To avoid being perceived as a Trojan horse, some LGBT advocates and public figures have strained to be seen as separate from LGBT movements in the West, and as comports with the CCP's priorities. Ah Qiang, the director of PFLAG told the Global Times, “Direct copying of the Western mode isn't suited to China. In the West, they can have protests and direct confrontations [with authorities], but in China most people prefer harmony. If you choose radical Western ways, this will definitely draw mistrust and misunderstanding from the Chinese government and also bring trouble.”²⁰ Geng Le, CEO of Blued,²¹ went as far as to tell the Global Times that the CCP should consider “including LGBT people in the united front work,” referring to how the CCP maintains relationships with – and influences – different interest groups in society.²² Others see a more confrontational approach as necessary. In 2014, advocate Xiang Xiaohan, after being detained more than once, told BuzzFeed, “If we don't do something, then the government will continue to ignore such issues and pretend

they don't exist – I think this is unacceptable.”²³ LGBT advocates face a tricky situation. To achieve their goals, they must push against the social and political status quo, but if they push too hard they trigger a crackdown.

Even so, under these overlapping political and social pressures, the LGBT movement has built power over the past two decades. After establishing a base of community support, the LGBT movement began engaging key stakeholders that hold influence and resources: scholars, health professionals, lawyers, businesspeople, etc. Working with these stakeholders (whether straight cisgender allies, or out and not out LGBT people) the LGBT movement has been able to amplify its voice and influence, and is reaching the ears of policymakers.

19 Zhao, Liqing [赵黎青]. “History, Motivation, and Impact of Foreign NGOs in China.” [“外国非政府组织对华活动的历史、动机与影响”]. *New Strategies Research* [《新战略研究》] 1 (2015).

20 Zhang, Yiqian and Wenting Xie. “China's LGBT groups cautioned against Western political agenda.” *Global Times*, 16 May 2018, <http://www.globaltimes.cn/content/1102585.shtml>.

21 For a deep dive on Blued: Liu, Yi-ling. “How a Dating App Helped a Generation of Chinese Come Out of the Closet.” *New York Times*, 5 Mar. 2020, www.nytimes.com/2020/03/05/magazine/blued-china-gay-dating-app.html.

22 Zhang, Yiqian and Wenting Xie. “China's LGBT groups cautioned against Western political agenda.” *Global Times*, 16 May 2018, <http://www.globaltimes.cn/content/1102585.shtml>.

23 Feder, J. Lester. “Nine LGBT Activists Arrested In China – But Gay Pride March Still Planned.” *BuzzFeed News*, 9 May 2014, <https://www.buzzfeednews.com/article/lesterfeder/nine-lgbt-activists-arrested-in-china-but-the-country-most>.



Law and LGBT Issues

Same-Sex Sexual Activity and Criminal Law

The People's Republic of China's criminal law has never expressly prohibited same-sex sexual activity.²⁴ As early as 1957, the Supreme People's Court held that same-sex sexual activity in a labor camp between two men was not criminal, because there was no express prohibition in the Criminal Law. Despite this ruling, local courts and police in the 1950s–1970s still doled out criminal and administrative punishments for engaging in same-sex sexual activity.²⁵ During the Cultural Revolution, Red Guards subjected gay men to beatings and forced political indoctrination to “correct” what was perceived as decadent bourgeois behavior.²⁶

With the restructuring of the judicial system after the Cultural Revolution, the 1979 Criminal Law added the crime of “hooliganism,” a catchall provision that the public security and legal systems interpreted to include same-sex sexual activity. As market reforms led to a flourishing of meeting spaces for gay men in the 1980s and 1990s, police would raid public parks, bars, and bath houses. Those apprehended could receive punishments ranging from detention overnight in a police station to several years in prison or a labor camp.²⁷ Police were known to inform work units of their workers' illicit behavior, leading to demotions and/or reductions in pay. CCP members could lose their party membership. Punishments for lesbians were not as common, but still occurred. In 1990, two women

24 Kang, Wenqing. “The Decriminalization and Depathologization of Homosexuality in China.” *China in and beyond the Headlines*, eds. Timothy B. Weston and Lionel M. Jensen. 2012. https://www.academia.edu/8790287/The_Decriminalization_and_Depathologization_of_Homosexuality_in_China.

25 Worth, Heather, et al. “Under the Same Quilt: The Paradoxes of Sex Between Men in the Cultural Revolution.” *Journal of Homosexuality*, Vol. 64, No. 1, Jan. 2017, pp. 61–74. EBSCOhost, doi:10.1080/00918369.2016.1172879.

26 Ibid.

27 Wu, Jin. “From ‘Long Yang’ and ‘Dui Shi’ to Tongzhi: Homosexuality in China.” *Journal of Gay & Lesbian Psychotherapy*, Vol. 7, No. 1/2, 2003, pp. 117–143.

were rumored to have been arrested when they went to the local Marriage Bureau to apply for a marriage certificate.²⁸

In 1993, the Ministry of Public Security issued a national notice banning Men's World, one of earliest gay men's advocacy organizations. The Ministry of Public Security stated "homosexuality twists human nature" and "violates social morality," and that police have the power to halt meetings like those organized by Men's World in accordance with the Law of the People's Republic of China on Assemblies, Processions, and Demonstrations.²⁹

Public security organs were not always consistent. In a well-known 1991 case, a father in Anhui province submitted a complaint to local police about his daughter being in a lesbian relationship. Initially, the local police thought of handling the situation as a case of hooliganism, but, unsure of themselves, they reported the case up the chain for guidance.³⁰ Ultimately, the provincial-level Department of Public Security advised, "Currently, in our country, there are no express regulations on the definition of and responsibilities regarding homosexuality ... In principle, you may decline to handle this case, and it is not suitable to give an administrative punishment for hooliganism."³¹

As the 1990s progressed, police pressure diminished, allowing more room for community spaces to develop. In 1997, lawmakers removed "hooliganism" in a major revision of the Criminal Law (for this reason, 1997 is often referred to as the year that China "decriminalized homosexuality" – though this was not the expressed intention of the removal of hooliganism). Today, gay and lesbian bars and clubs can be found in cities throughout China. Beijing is home to Destination, a four-story gay club, which also has a community center that provides HIV testing and counseling services.³² Police still exert pressure on, or even raid, gay and lesbian gathering spaces, but it is much more infrequent and with different justifications.

Protection Against Violence

Domestic Violence

LGBT individuals experience relatively high rates of domestic violence (this section discusses intimate partner violence and natal family violence).³³ For transgender and gender-non-conforming people, it is nearly ubiquitous. Of 1,640 respondents surveyed by the Beijing LGBT Center in its 2017 Chinese Transgender Population General Survey Report, only six respondents said they had never experienced

28 Ruan, Fangfu and Molleen Matsumura. *Sex in China: Studies in Sexology in Chinese Culture*. New York: Springer US, 1991.

29 Notification of Banning Gay Cultural Salon "Men's World" (No Longer in Effect) No. 62 (1993). Ministry of Public Security, 5 July, 1993. [公安部关于取缔同性恋文化沙龙“男人的世界”的情况通报(失效). 公通字(1993)62号, 公安部, 1993]. <http://www.chinaacc.com/new/63/71/2006/3/xu6735315913360023029-0.htm>.

30 Zhang, Xianjue. "Notes on Handling Mainland China's First Lesbian Case. Society 1992(11). [张先觉. 中国大陆首例女同性恋办案手记. 社会, 1992(11)].

31 Ibid.

32 "For a Conservative City, Beijing Has a Remarkable Gay Nightlife." *Economist*, 24 Oct. 2019. www.economist.com/china/2019/10/24/for-a-conservative-city-beijing-has-a-remarkable-gay-nightlife.

33 Wang, Xiying, et al. "Report on Violence and Abuse in Intimate Relationships." *Advocates for Legislation Against Domestic Violence*, Dec. 2015. <http://www.tongyulala.org/uploadfile/2019/0409/20190409092818783.pdf>.

domestic violence by natal family members, such as parents and siblings.³⁴

The 2016 Anti-Domestic Violence Law (ADVL) aims to protect all who suffer violence at the hands of their natal families, but the law does little in practice, especially for LGBT people. In 2019, parents in Shanghai put their 23-year-old daughter under “house arrest” upon learning she was in a lesbian relationship. When her girlfriend, backed up by LGBT advocates and a lawyer, went to the police, the police said the matter was a family affair and refused to intervene. Similarly, in a 2016 case, an adult gay man locked at home and beaten by his parents called the police. The police phone line operator responded, “Your father and mother are your guardians. Them limiting your freedom is out of concern for you.”³⁵

Victims of domestic violence have also hit roadblocks when seeking assistance from the All-China Women’s Federation (ACWF),³⁶ a CCP-controlled organization tasked with frontline implementation of the ADVL. When a lesbian woman consulted the ACWF about her girlfriend who was being physically abused and having her freedom restrained by her family, an ACWF representative erroneously claimed the case was not covered by the ADVL

because it only covers violence between husbands and wives.³⁷

A handful of legal experts and officials believe the ADVL can be interpreted to protect cohabiting same-sex couples against intimate partner violence. Article 37 of the ADVL states that the law covers domestic violence among those who “live together,”³⁸ even if they do not have a legally recognized family relationship. Article 37 does not specify requirements for the gender or the nature of the relationship between the parties living together. When the ADVL passed in 2015, a journalist asked the director of the NPC Standing Committee Legal Affairs Commission’s Social Law Office whether this language covered cohabiting same-sex couples. The director responded, “As for homosexuals in our country, we have not yet discovered this form of violence, so to give you a certain answer, it can be said that people who cohabit does not include homosexuals.”³⁹ It was a demonstrably inaccurate response as there are large numbers of cohabiting same-sex couples in China, and Chinese scholars and LGBT advocates had submitted research to the

34 2017 Chinese Transgender Population General Survey Report. Beijing LGBT Center. 2017. <https://www.weareaptn.org/2019/03/18/2017-chinese-transgender-population-general-survey-report/>.

35 Wang, Xiyang, et al. “Report on Violence and Abuse in Intimate Relationships.” Advocates for Legislation Against Domestic Violence, Dec. 2015. <http://www.tongyulala.org/uploadfile/2019/0409/20190409092818783.pdf>.

36 The ACWF is a CCP-led organization that holds itself out as representing and advancing the interests of women in China, but its main purpose is to implement CCP and state policies.

37 Report on the Law and its Implementation of Anti-Domestic Violence Law After One Year. Common Language. March 2016. <https://cnlgbtdata.com/files/uploads/2020/04/反家庭暴力法一周年实施与法律评估以彩虹暴力终结所干预性与性别少数人群家暴实践为例.pdf>.

38 Anti-Domestic Violence Law of the People’s Republic of China. 27 Dec. 2015. http://www.xinhuanet.com/politics/2015-12/27/c_128571791.htm.

39 Rauhala, Emily. “China’s domestic violence law is a victory for feminists. But they say it doesn’t go far enough.” Washington Post, 30 Dec. 2015. <http://washingtonpost.com/news/worldviews/wp/2015/12/29/chinas-domestic-violence-law-is-a-victory-for-feminists-but-they-say-it-doesnt-go-far-enough/>.

NPC showing that intimate partner violence among same-sex couples exists.⁴⁰

Sun Xiaomei, an NPC delegate who was instrumental in the ADVL's passage also disagreed with the Social Law Office director's interpretation. At a public lecture at Yale Law School in April 2019, she said that she pushed for gender neutral language in the law so that it could cover cohabiting same-sex partners. She, along with other influential scholars, have continued to push for this interpretation of the ADVL.⁴¹

Officials have used terms like “cohabitants” and “those who live together” in a broad way before. In 2009, shortly after a local Changchun regulation that used similar language to the ADVL was issued, an official explained that the regulation, “considers the real future development trends of family relations in Changchun, and includes in the scope of protection victims who are unmarried cohabitants [or are from] single parent families, single person families, same-sex families, and other situations.”⁴²

Further, at China's third Universal Periodic Review at the United Nations in 2018, Sweden recommended that protections against domestic violence should

expressly include people of all sexual orientations and gender identities.⁴³ China responded to Sweden's recommendation, “accepted and already implemented.”⁴⁴ Still, on the ground, the ADVL's protections rarely provide help for LGBT people experiencing domestic violence.

To change this, advocacy groups, like Common Language, have been engaging social workers, police, ACWF representatives, and provincial-level officials to raise awareness about the kinds of domestic violence LGBT people experience and push for the inclusion of LGBT people in implementation of the ADVL at the local level.⁴⁵ Common Language and the Beijing LGBT Center also maintain hotlines for responding to domestic violence cases.⁴⁶ Hotlines not only allow NGOs to provide much needed intervention services but also gather information for engaging policymakers. A major step forward for advocates would be for frontline implementers to start using mechanisms available in the ADVL to respond effectively to domestic violence cases involving LGBT people. Bigger than that would be for the Supreme People's Court to issue a judicial interpretation making the ADVL's gender neutral implication express: that cohabiting same-sex partners are covered under the law.

40 Wang, Xiyang, et al. “Report on Violence and Abuse in Intimate Relationships.” *Advocates for Legislation Against Domestic Violence*, Dec. 2015. <http://www.tongyulala.org/uploadfile/2019/0409/20190409092818783.pdf>.

41 Fu, Shan. “The woman who fought for Anti-Domestic Violence Law for 26 years.” *Beijing News*, 1 Nov. 2017. <http://www.bjnews.com.cn/news/2017/11/01/462441.html>. Zhang, Xiaona. “Marriage and Family Expert Explains the Anti-Domestic Violence Law's Merits and Controversies.” *Democracy and Legal System*, 8 May 2016. http://e.mzyfz.org.cn/paper/paper_10325_3354.html.

42 “Press conference held yesterday for Regulations of Preventing and Stopping Domestic Violence.” *Changchun Municipal Government*. 3 Mar. 2009. http://www.changchun.gov.cn/zw_33994/xwfb/xwfbh/201612/t20161204_1986493.html.

43 “Report of the Working Group on the Universal Periodic Review - China.” *United Nations Human Rights Council*, 26 Dec. 2018. A/HRC/40/6, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/40/6.

44 “Report of the Working Group on the Universal Periodic Review, Addendum: China.” *United Nations Human Rights Council*. 15 Feb. 2019. A/HRC/40/6/Add.1, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/40/6/Add.1.

45 “A Discussion of Rainbow Anti-GBV Center's Working Models.” *Common Language*, 19 Nov. 2019. <http://www.tongyulala.org/uploadfile/2019/1119/20191119031830212.pdf>.

46 For more on Common Language's hotline, see: Zhenzhen's Rainbow. “Violence after breaking up?” *WeChat*, 31 July 2019. <https://mp.weixin.qq.com/s/klsnfkJQvykSqE82HDA42g>.

School Bullying

LGBT-based bullying is widespread in China. In a 2016 study by Common Language, forty percent of LGBTI+ students reported having been bullied at school.⁴⁷

Transgender and gender-non-conforming students are particularly at risk. Seventy percent of gender minority respondents in the Beijing LGBT Center's 2017 study reported being subject to some form of violence at school.⁴⁸

Research shows that experiences with bullying and discrimination at school seriously impair the educational achievement and mental health of LGBT students.⁴⁹

Discussion of school bullying of LGBT students spiked in 2019 when, in two separate instances, gay teenagers posted suicide notes on Weibo detailing how they were bullied because of their sexual orientation.⁵⁰ In the first incident the student, who lived in Qingdao, was rescued, but the second student was tragically not saved in time. Soon after the first incident, the Qingdao city government posted messages on Weibo supporting LGBT students.⁵¹

47 "Investigation Report of the Campus Environment of Sexual Minority Students." Common Language. June 2016. <http://www.tongyulala.org/uploadfile/2019/0404/20190404055620718.pdf>.

48 2017 Chinese Transgender Population General Survey Report. Beijing LGBT Center. 2017. <https://www.wearaptn.org/2019/03/18/2017-chinese-transgender-population-general-survey-report/>.

49 Gender-Based Violence on Campus. Common Language. Dec. 2017. <http://www.tongyulala.org/uploadfile/2019/0508/20190508084213676.pdf>.

50 Zhi Shi, "Qingdao middle schooler left suicide note online claiming having been bullied for being gay." Sohu. 15 May 2019, https://www.sohu.com/a/314016658_120094249; Kuang gong xiao xiong mao. Weibo. 18 June 2019, <https://m.weibo.cn/detail/4384615575726987>.

51 Kan Lian Er. "Let Nobody Be Homophobic in a World of Equality." Sina News Center, 16 May 2019, https://k.sina.com.cn/article_2460201382_p92a3b1a602700ehac.html; Huang, Wendy. "Noteworthy Weibo Moment: Qingdao Government Account Shows Support for LGBT Community." What's on Weibo, 16 May 2019, <https://www.whatsonweibo.com/noteworthy-weibo-moment-qingdao-government-account-shows-support-for-lgbt-community/>.

In recent years, China has issued multiple administrative orders to tackle the issue of school bullying and violence, but they do not contain express protections against bullying based in sexual orientation, gender identity, and gender expression (SOGIE) – a goal of many advocates. They have gained some traction in bringing the issue to the attention to policymakers, but progress has been limited. In 2015, NPC delegate Ran Ran, submitted the first legislative proposal to include LGBT issues in university curricula, but it did not receive much of a response.⁵² Two years later, another formal proposal was submitted to the Ministry of Education (MOE) encouraging it to include sexual orientation and gender identity in its school bullying prevention work. The MOE responded that the proposal was "very good" and that its outreach and education work will include "gender diversity" content in the future.⁵³ Movement has been slow. A 2018 MOE handbook on preventing school bullying stated the need to teach students to respect difference with regard to "height, weight, males who have feminine characteristics ... etc.," but did not clearly refer to sexual orientation or gender identity and expression.⁵⁴

Bullying finds encouragement in the officially-sanctioned LGBT-phobic atmosphere at some schools. A Hunan middle

52 "NPC Delegate Ranran: Including Scientific Knowledge of Homosexuality into Sex Education Classes in Higher Education." Xintong Wang, 12 Mar. 2015, <http://www.1314xt.com/news/guonei/20150312/23695.html>.

53 Ministry of Education Response to Suggestion No. 7727 of Fifth Meeting of 12th NPC. Ministry of Education, 28 Sep. 2017, http://www.moe.gov.cn/jyb_xxgk/xxgk_jyta/jyta_jijiaosi/201801/t20180109_324196.html.

54 Guidebook on the Prevention and Control of Bullying and Violence in Primary and Middle Schools. Ministry of Education. 2017. <http://www.moe.gov.cn/s78/A06/s3254/201803/P020180314335760132299.pdf>.

school in 2018 put up a sign that read, “Reject homosexuality, create a bright and harmonious campus.”⁵⁵ In 2019, a poster in a Guangxi high school described gays as “violating the laws of nature” and as a threat to “normal” people.⁵⁶ Both signs were eventually taken down after they were exposed on social media and had complaints filed against them. A group of PFLAG parents had descended upon the Hunan school to demand a meeting with the administrators. Emerging victorious, they posed with the vice principal outside the school holding banners expressing support for lesbians and gays.⁵⁷

Although many school environments are LGBT-phobic, there are some that are affirming. In 2019, another school in Hunan set up an “anti-discrimination wall” where students could sign their names and leave messages of support for LGBT equality.⁵⁸ One student scribbled, “I want to go to Taiwan to get married!” Such schools are few. In the 2016 UNDP survey, only four percent of respondents said their middle or high school teachers were accepting of LGBT students.⁵⁹ The issue is often avoided altogether with sixty-eight

55 Nuo Wa. “Controversy over school’s rejection of homosexuality? This is what the Anti-Discrimination League did.” PFLAG Changsha. WeChat, 1 June 2018, <https://mp.weixin.qq.com/s/YpJirkndIM5ZsBDpMW6tuQ>.

56 “AIDS-Prevention in a Guangxi’s Middle School.” Toutiao. Weibo, 4 July 2019, <https://m.weibo.cn/detail/4390365837059338>.

57 Nuo Wa. “Controversy over school’s rejection of homosexuality? This is what the Anti-Discrimination League did.” PFLAG Changsha. WeChat, 1 June 2018, <https://mp.weixin.qq.com/s/YpJirkndIM5ZsBDpMW6tuQ>.

58 Voice of Comrades. “Voice is on the Way.” Weibo, 2 July 2019, <https://m.weibo.cn/status/4389752818054486?#&gid=1&pid=1>.

59 Being LGBTI in China--A National Survey on Social Attitudes towards Sexual Orientation, Gender Identity and Gender Expression. 2016. United Nations Development Program, https://www.asia-pacific.undp.org/content/rbap/en/home/library/democratic_governance/hiv_aids/being-lgbti-in-china--a-national-survey-on-social-attitudes-towa.html.

percent of respondents saying that they weren’t sure if their teachers were accepting or not.⁶⁰ It is not surprising that the vast majority of students choose to remain closeted at school.

Advocates continue to build bottom-up support for making school environments more inclusive. The Gay and Lesbian Campus Association of China (GLCAC) runs frequent trainings for middle and high school teachers on gender diversity,⁶¹ and has begun reaching out to school principals.⁶² Zhitong, an LGBT NGO based in Guangzhou, has developed relationships with local and national policymakers to educate them on LGBT-inclusion.⁶³ During the recent revision of the Juvenile Protection Law, Zhitong and other advocates encouraged legislators to make the law more LGBT inclusive.⁶⁴ According to Zhitong, some NPC officials had brought up its suggestions at the committee working on the law’s revisions. Although its suggestions were ultimately not taken up by the committee, Zhitong had successfully used the revision process as an opportunity to engage more decision-makers. Advocates are striving to create more successful examples of LGBT-affirming classrooms, schools, and school districts, which can demonstrate to policymakers the advantages of LGBT-inclusive policies.

60 Ibid.

61 GLCAC03. “What happened after a 72-hr discourse on sex and gender...” WeChat, 24 July 2019, <https://mp.weixin.qq.com/s/fPgov3hvfabNWOez-bLgEw>.

62 GLCAC03. “After my lesbian student’s coming out to me was heard by the principal.” WeChat, 11 Oct. 2018, <https://mp.weixin.qq.com/s/BVvtPIDF7IIN-UoNDLE0mw>.

63 Zhitong. “Brief Annual Report of Zhitong 2018.” Wechat, 31 May 2019, <https://mp.weixin.qq.com/s/Xjp0PocQH3w63aEObqaylg>.

64 LGBT Rights Advocacy China. “Act up in amending of the Law on the Protection of Minors, and keep LGBT students away from school bullying.” WeChat, 26 Nov. 2019, <https://mp.weixin.qq.com/s/-Qt3YtpkHgG9QAU5PjYnig>.

Advocates are also engaging parents. There have been backlashes against schools integrating progressive sex education curricula. After Beijing Normal University Professor Liu Wenli published a series of sex education books that openly discussed sexual and gender diversity, online protests by parents went viral.⁶⁵ To quell the backlash, the Ministry of Education removed the books. Incidents like these show that LGBT advocates are fighting on two fronts, needing to change both official and societal attitudes.

Access to Health

Discrimination by Healthcare Providers

LGBT people often encounter discrimination when seeking healthcare services. Approximately one-fifth of respondents in the Beijing LGBT Center's 2017 Chinese Transgender Population General Survey Report who pursued gender-affirming surgeries (GAS) in China reported being discriminated against by healthcare service providers.⁶⁶ In a 2017 national survey of men who have sex with men (MSM), twenty percent of respondents said they experienced discrimination in a healthcare setting because of their sexual

orientation⁶⁷ – though the vast majority of MSM choose not to disclose same-sex sexual activity to their healthcare providers.⁶⁸

Healthcare providers self-report having discriminatory attitudes. In a 2017 survey, eighty-seven percent of medical staff respondents at a highly-ranked hospital in Changsha said they were opposed to same-sex sex behaviors.⁶⁹ Healthcare providers also commonly lack understanding of and have negative attitudes toward patients seeking GAS.⁷⁰

Protection of privacy is a major concern. LGBT people have reason to fear that healthcare providers will disclose patients' personal information to third parties, like their employers. Healthcare providers are also known to conduct medical tests without consent. A 2018 study by Chinese health experts found that sixty-five percent of healthcare providers surveyed in Guangzhou had administered HIV antibody tests for patients without consent.⁷¹

65 Ye, Josh. "Honest' primary school sex-education textbook in China slammed for going too far." South China Morning Post. 7 Mar. 2017, <https://www.scmp.com/news/china/society/article/2076506/chinese-parents-give-red-light-honest-sex-ed-textbooks>.

66 Being LGBTI in China--A National Survey on Social Attitudes towards Sexual Orientation, Gender Identity and Gender Expression. 2016. United Nations Development Program, https://www.asia-pacific.undp.org/content/rbap/en/home/library/democratic_governance/hiv_aids/being-lgbti-in-china--a-national-survey-on-social-attitudes-towa.html.

67 Watson, J. et al. "Out of the Closet, Into the Clinic: Opportunities for Expanding Men Who Have Sex with Men-Competent Services in China." *Sex Transm Dis.* 2018 Aug; 45(8):527-533.

68 Tang, Weiming et al. "Disclosure of sexual orientation to health professionals in China: results from an online cross-sectional study." *Journal of the International AIDS Society.* Volume 20, Issue 1 (2017), <https://onlinelibrary.wiley.com/doi/full/10.7448/IAS.20.1.21416#CIT0025>.

69 Chen, Jia et al. [陈嘉, 等.] "Young medical staff's understanding of AIDS transmission route, occupational exposure protection and accident treatment." [青年医务人员对艾滋病传播途径的认识及职业暴露的防护及意外事故处理]. *Journal of Clinical Medicine in Practice [实用临床医药杂志]*. (10) 2017, <http://www.cnki.com.cn/Article/CJFDTotal-XYZL201710051.htm>.

70 Yan, Xiujuan, et al [闫秀娟, 等]. "Investigation on the cognition and attitude of medical staff towards Transsexualism Patients." [医护人员对易性癖认知和态度调查与分析] *Chinese Nursing Management [中国护理管理]* 10(8) (2010): 52-54, http://www.nursingmanagement.com.cn/ch/reader/create_pdf.aspx?file_no=20100819.

71 Dong, X., Yang, J., Peng, L. et al. "HIV-related stigma and discrimination amongst healthcare providers in Guangzhou, China." *BMC Public Health* 18, 738 (2018), <https://bmcpubhealth.biomedcentral.com/articles/10.1186/s12889-018-5654-8>.

Discrimination and stigma have significant negative effects on mental⁷² and physical health. Forty percent of respondents in the 2018 survey of MSM cited above said they refrained from pursuing necessary medical services because they were afraid of being discriminated against.⁷³ Discrimination and other barriers to care have driven many transgender people to conduct dangerous surgical procedures on themselves.⁷⁴

So-Called “Conversion Therapy” and Discrimination in the Mental Health Profession

The Chinese Psychiatric Association stopped classifying homosexuality as a mental disorder in 2001,⁷⁵ but a steady stream of reports and investigations indicate that the harmful and fraudulent practice of so-called “conversion therapy” remains commonplace.⁷⁶ One out of five transgender youth respondents in a 2017

study reported being coerced or forced into “conversion therapy”.⁷⁷

“Conversion therapy” continues to thrive because intense family pressure and the internalization of negative social attitudes drive LGBT people to seek it, practitioners profit from it, and the mental health sector lacks regulations to stop it. Further, pathologizing views of LGBT people are still widespread in the mental health profession. A 2015 Beijing LGBT Center survey found that approximately one-third of mental health professional respondents thought being lesbian or gay was a mental illness and one-third believed “conversion therapy” was effective.⁷⁸ A 2014 investigation by the Gay and Lesbian Campus Association of China into ninety textbooks published after 2001 found that forty percent of them still pathologized same-sex attraction.⁷⁹

These beliefs endure in part because the official Chinese Classification of Mental Disorders Version 3 (CCMD-3) continues to include ego-dystonic homosexuality, a diagnosis practitioners use as a pretext to “treat” people who feel discomfort with their sexual orientation (rather than focusing on coping with the social stigma that causes the discomfort). In 2018, the National Health Commission directed

72 Sun, S., Pachankis, J.E., Li, X. et al. Addressing Minority Stress and Mental Health among Men Who Have Sex with Men (MSM) in China. *Curr HIV/AIDS Rep* 17, 35–62 (2020). 3 June 2020, <https://doi.org/10.1007/s11904-019-00479-w>.

73 Watson, J. et al. “Out of the Closet, Into the Clinic: Opportunities for Expanding Men Who Have Sex with Men – Competent Services in China.” *Sex Transm Dis*. 2018 Aug; 45(8):527–533.

74 Barriers to Gender-Affirming Treatments for Transgender People in China. Amnesty International. May 2019, <https://www.amnestyusa.org/wp-content/uploads/2019/05/Barriers-to-gender-affirming-treatments-for-transgender-people-in-China.pdf>.

75 Gittings, John. “China Drops Homosexuality from List of Psychiatric Disorders.” *Guardian*, 7 Mar. 2001, www.theguardian.com/world/2001/mar/07/china.johngittings1.

76 E.g. Bhandari, Bibek. “Conversion Therapy Still Promoted in China, Investigation Finds.” *Sixth Tone*, 19 Apr. 2019, <http://www.sixthtone.com/news/1003870/conversion-therapy-still-promoted-in-china%2C-investigation-finds>; Zhu, Xueqi. “A non-existent disease is being treated by 69 institutions.” *Yixuejie*. WeChat, 11 Apr. 2019, <https://mp.weixin.qq.com/s/--q5Rcu0YB0j0j0QOSTreQ>; “Have You Considered Your Parents Happiness?” – Conversion Therapy Against LGBT People in China. Human Rights Watch. 15 Nov. 2017, https://www.hrw.org/sites/default/files/report_pdf/china1117_web_0.pdf.

77 Peng K, Zhu X, Gillespie A, et al. “Self-reported Rates of Abuse, Neglect, and Bullying Experienced by Transgender and Gender-Nonbinary Adolescents in China.” *JAMA Netw Open*. 2019. https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2749453?utm_source=For_The_Media&utm_medium=referral&utm_campaign=ftm_links&utm_term=090619.

78 Investigation Report on the Attitudes of Mental Health Professionals towards Sexual Minorities [精神卫生与心理咨询从业人员对性少数群体的态度调查报告]. Beijing LGBT Center. Mar. 2019. <https://cnlgbtdata.com/files/uploads/2019/03/精神卫生与心理咨询从业人员对性少数群体的态度调查报告中文版.pdf>.

79 Zhou, Julia. “Chinese Textbooks Claim Homosexuality Is Disease; Student Sues.” *NBC News*, 27 May 2016, www.nbcnews.com/news/china/chinese-textbooks-claim-homosexuality-disease-student-sues-n468681.

all medical institutions to adhere to the International Classification of Diseases 11th Revision (ICD-11),⁸⁰ which completely removed diagnoses regarding same-sex attraction.⁸¹ ICD-11's application is far from uniform in China, and only medical institutions are officially required to use it. Psychological counselors, many of whom purvey "conversion therapy," are outside the scope of the National Health Commission's directive and are largely unregulated. There is currently no certification process or continued professional supervision for psychological counselors.

The ICD-11 also removed "transsexualism" and "gender identity disorder of children" from its "mental and behavioral disorders" chapter, and instead includes "gender incongruence" under "conditions related to sexual health."⁸² According to the WHO, "This reflects evidence that trans-related and gender diverse identities are not conditions of mental ill health, [and] ... Inclusion of gender incongruence in the ICD should ensure transgender people's access to gender-affirming health care ..."⁸³

However, in China, a diagnosis of "transsexualism" – considered a mental disorder – is still legally required for accessing gender-affirming surgeries (please see next section for more information).

80 National Health Commission's Notice to Issue Chinese Version of International Classification of Diseases - 11. [关于印发国际疾病分类第十一次修订本 (ICD-11) 中文版的通知] National Health Commission of the People's Republic of China. 14 Dec. 2018. <https://new.qq.com/omn/20181222/20181222A12WQA.html>.

81 Fitzsimons, Tim. "'Transsexualism' Removed from World Health Organization's Disease Manual." NBC News, 20 June 2018. www.nbcnews.com/feature/nbc-out/transsexualism-removed-world-health-organization-s-disease-manual-n885141.

82 "WHO/Europe Brief - Transgender Health in the Context of ICD-11." World Health Organization, 30 June 2020. www.euro.who.int/en/health-topics/health-determinants/gender/gender-definitions/whoeurope-brief-transgender-health-in-the-context-of-icd-11.

83 Ibid.

Organizations like the Beijing LGBT Center and the Zhuangni LGBT Mental Health Center have been working to educate mental health professionals on being more LGBT-affirming, and encouraging scholars to create more research relevant to LGBT people's mental health. Their goal is to persuade professional associations to adopt enforceable guidelines that prohibit "conversion therapy" while also integrating LGBT-affirmative practices into training curricula.⁸⁴ They hope this strategy will dovetail with the government's slow push to better regulate an industry that is often portrayed in media as having run amuck.⁸⁵

LGBT advocates have also taken legal action. In 2014, a gay man, with the help of LGBT NGOs and public interest lawyers, sued a "conversion therapy" clinic and won. The court held that homosexuality is not an illness thus a practitioner selling a "treatment" for it is liable for consumer fraud.⁸⁶ The case made a splash in the media, but the damage award was low. According to the plaintiff, the clinic continued operating,⁸⁷ and later raised its prices. Follow-up complaints to the municipal Administration for Industry and Commerce and health authorities did not lead to further penalties.

84 Longarino, Darius. "Converting the Converters." ChinaFile, 18 Oct. 2019. www.chinafile.com/reporting-opinion/viewpoint/converting-converters.

85 Luo, Huanhuan. "Psychology to Stop Cancer, Curing Illness By Performance, Without Concerns for Ethics, Fake Psychology Is Sweeping Through" ["心理抗癌、表演治病、不顾伦理..... '野鸡心理学' 席卷而来"]. Southern Weekend, 8 Feb 2018. <http://www.infzm.com/content/133268>.

86 Beijing Haidian District Court, Civil Judgment, (2014) Haidian Civil First Instance No. 16680, 19 Dec. 2014; Chin, Josh. "Chinese Court Rules Against Clinic in Country's First 'Gay Conversion' Case." Wall Street Journal, 19 Dec. 2014. blogs.wsj.com/chinarealtime/2014/12/19/chinese-court-rules-against-clinic-in-countrys-first-gay-conversion-case/.

87 Parkin, Siodhbhra. "LGBT Rights-Focused Legal Advocacy in China: The Promise, and Limits, of Litigation." Fordham International Law Journal. Article 7, Volume 41, Issue 5 (2018). <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2718&context=ilj>.

In 2015 in Henan, a man's wife and her family forcibly committed him to a mental hospital after she found out he was gay.⁸⁸ He was in the hospital for nineteen days where he was force-fed drugs without being told what they were and was physically abused. After escaping with the help of the director of China's PFLAG, the man won a lawsuit against the hospital. The court ruled that, in accordance with the Mental Health Law, a person can only be committed against their will if they are a danger to themselves or society, which was not the case here.⁸⁹ The plaintiff won a public apology from the hospital and a small sum of money. The size of the damage award again raised questions about whether litigation can effectively deter hospitals from such practices. Advocates later followed up by filing complaints against the hospital with local health regulators. The regulators fined the hospital several thousand RMB and issued a warning to the doctor involved. It is the only known example of local authorities using administrative penalties against perpetrators of "conversion therapy."

A year after the Zhumadian court case against perpetrators of "conversion therapy," the Beijing LGBT Center published an explainer on the Mental Health Law and what to do if one is committed against one's will in a mental hospital.⁹⁰ The author was concerned that since GAS is

very difficult to access, many transgender people attempt self-surgery and hormone self-dosing. Hospitals may interpret these actions as self-harm under the Mental Health Law, and feel justified in committing transgender individuals to hospitals against their will.

In 2015, the Chinese government responded to comments at a hearing of the Committee Against Torture (CAT) that it was not doing enough to fight against "conversion therapy." Chinese LGBT advocates had worked hard to get "conversion therapy" on the CAT committee's radar,⁹¹ as it was a topic that had not been addressed in previous reviews of China. Although the Chinese government delegate said this topic was outside the scope of the treaty, the delegate also stated that "China does not view LGBTI as a mental disease or require compulsory treatment for LGBTI people. They will not be confined in mental hospitals either. Indeed, LGBTI people face some real challenges in terms of social acceptance, employment, education, health, and family life. This is an issue that needs serious attention."⁹² In its concluding observations, the UN CAT committee stated that the Chinese government should issue and implement regulations to ban "conversion therapy." In the five years since, China has not taken any official action on "conversion therapy." Though, in an October 2019 meeting of the UN Human Rights Council, a Chinese

88 Shih, Gerry. "Man wins lawsuit in China over forced gay conversion therapy." Associated Press, 4 July 2017, https://apnews.com/4d9d955cfbfd401b93f28ef4e9ffa5f8/Man-wins-lawsuit-in-China-over-forced-gay-conversion-therapy*.

89 Henan Zhumadian Yicheng District Court, Civil Judgment, (2016) Henan 1702, Civil First Instance No. 4122, 26 June 2017.

90 Beijing LGBT Center. "What to do if considered to have mental problems? Transgender people should know Mental Health Law." WeChat, 21 Nov. 2018. <https://mp.weixin.qq.com/s/1GC5ev6r2HPJUrjMSjY9CA>.

91 Parkin, Siodhbhra. "Domestic Advocacy and International Law: Fighting 'Gay Conversion Therapy' in China." WAGIC, 26 Feb. 2018, www.wagic.org/blank-2/2018/02/26/Domestic-Advocacy-and-International-Law-Fighting-Gay-Conversion-Therapy-in-China.

92 Comments of YANG Jian, Ministry of Justice, Country Review of China Under the Convention against Torture, 18 Nov. 2015, <https://www.youtube.com/watch?v=VNsxeZZa7bQ&feature=youtu.be&t=52m58s>.

government representative asked the UN Independent Expert on the protection against violence and discrimination based on sexual orientation and gender identity, “to sum up and share with countries best practices in the areas of anti-discrimination, depathologization, and decriminalization.”⁹³

LGBT advocates are aware of many dozens of “conversion therapy” practitioners, but have found it difficult to continue legal action. Evidence has become harder to gather because perpetrators of “conversion therapy” have gotten savvier about hiding their business from investigating advocates, and because gathering strong evidence oftentimes requires paying for highly expensive “treatment” sessions.

In subsequent years, advocates have filed complaints about other “conversion therapy” practitioners with regulators, but a 2019 report by the Beijing Impact Law Firm and Beijing Gender indicates that government agencies have taken little heed⁹⁴ (the penalty given to the Zhumadian hospital being the exception).

In addition to pressuring perpetrators of “conversion therapy,” LGBT advocates have called for correcting inaccurate and stigmatizing information about homosexuality in university textbooks. In 2015, Qiu Bai, a Guangzhou university student, with the help of LGBT Rights Advocacy China and the Beijing Impact Law Firm,

sued the Ministry of Education (MOE) for not responding adequately to open government information inquiries about the MOE’s regulation of homophobic textbooks.⁹⁵ The case failed to make the MOE take official action, but it was well-covered in the media,⁹⁶ and got the MOE’s attention by compelling MOE staff to appear in court. After the suit, Qiu Bai continued sending requests to publishers and authors to change their textbooks, and received positive responses from Renmin University Press⁹⁷ and others.⁹⁸ In 2018, another Guangzhou college student, XiXi, working with LGBT Rights Advocacy and the Rainbow Lawyers, directly sued Jinan University Press and Chinese ecommerce giant JD.com for selling a homophobic textbook, arguing it was a faulty product.⁹⁹ The relevant regulation states that a book’s errors cannot exceed one ten-thousandth of a percent of its content.¹⁰⁰ The litigation was repeatedly stymied, in part because no appraisal agency had been willing to

93 “UN Live United Nations Web TV - General Assembly - Third Committee, 33rd Meeting - General Assembly, 74th Session.” United Nations, 24 Oct. 2019, webtv.un.org/meetings-events/general-assembly/watch/third-committee-33rd-meeting-general-assembly-74th-session/6097418492001/?term=#t=1h30m9s.

94 Investigation Report of Conversion Therapy in China Based on Open Government Information [扭转治疗”在中国——基于信息公开申请的调查报告]. Beijing Impact Law Firm. Nov. 2019.

95 Rauhala, Emily. “Chinese Textbooks Are Wildly Homophobic. One Student Is Fighting Back.” Washington Post, 24 Nov. 2015, www.washingtonpost.com/news/worldviews/wp/2015/11/24/chinese-textbooks-are-wildly-homophobic-one-student-is-fighting-back/.

96 The Paper. “Qiubai v. MoE over ‘homophobic’ textbooks to be reviewed by court, a medical school girl will accompany her in the courtroom” [“秋白因‘恐同’教材诉教育部案将开审，一医学院女生陪同”]. Weibo, 9 Sep. 2016, <https://www.weibo.com/ttarticle/p/show?id=2309351002454017848690302123&infeed=1>.

97 Qian, Jinghua. “China’s Homophobic Textbooks Turn Over a New Leaf.” Sixth Tone, 24 Oct. 2017, www.sixthtone.com/news/1000050/chinas-homophobic-textbooks-turn-over-a-new-leaf.

98 LGBT Rights Advocacy China. “Mailing Action. Nankai University Press: No more LGBT-stigmatizing textbooks [“寄信行动 | 南开大学出版社：不再出版污名 LGBT 的教材”]. WeChat, 25 May 2019, <https://mp.weixin.qq.com/s/QdRWpCmMzIbFVzpWFv7Vw>.

99 Tai, Katharin. “Suing the Homophobia out of China’s Textbooks.” SupChina, 23 Jan. 2018, supchina.com/2018/01/23/suing-the-homophobia-out-of-chinas-textbooks/.

100 Regulations of Management of Book Quality [图书质量管理规定]. General Administration of Press and Publication, 24 Dec. 2004, http://www.gov.cn/gongbao/content/2005/content_69258.htm.

undertake this analysis.¹⁰¹ In August 2020, the trial court ruled against Xixi holding that it was not factual error to describe homosexuality as a mental disorder, but rather a matter of differing interpretations. Advocates believe that the CCMD-3's reference to ego-dystonic homosexuality paved the way for the court to come to this conclusion. Xixi is appealing.

In addition to legal mechanisms, advocates have continued to use performance art,¹⁰² public education,¹⁰³ and engagement with mental health practitioners, scholars, and professional associations to bring an end to “conversion therapy” practices.

Access to Gender-Affirming Surgeries and Hormone Replacement Therapy

About half of transgender people report a need to access gender-affirming surgeries (GAS), while sixty-two percent report a need to access hormone replacement therapy (HRT).¹⁰⁴ Being unable to access these healthcare services can cause anxiety, depression, self-harm, and suicide

ideation.¹⁰⁵ GAS is also a legal prerequisite for changing the gender marker on one's national identification card, a government document necessary for myriad life tasks.¹⁰⁶ Once GAS is completed, barriers remain to changing gender markers. In addition to providing proof of GAS, the Ministry of Public Security requires people to submit proof that the human resources office of their work unit, collective, or school consent to the change of their gender marker.¹⁰⁷

The 2017 Sex Reassignment Procedural Management Standards stipulate that individuals can access GAS if they meet stringent requirements, including: 1) proof of family member notification (regardless of age), 2) being diagnosed with “transsexualism” and proving psychological interventions have been ineffective for at least a year, 3) submitting proof of not having a criminal record from the Public Security Bureau of where the applicant's household registration is (sometimes the local Public Security Bureau requires a letter of introduction from an employer or neighborhood office).¹⁰⁸ According to a 2018 report by China Women's University Professor Liu Minghui, “In practice, these

101 Xixi. “Homophobic Textbook Case was heard three years later, but I couldn't attend it.” LGBT Rights Advocacy China. WeChat. 19 Apr. 2020, <https://mp.weixin.qq.com/s/Gv6GNXs42M6oXth--jLkPw>.

102 Feng, Emily. “Artists Use Trucks to Highlight Plight of China's Gay Community.” Financial Times, 25 Jan. 2019, www.ft.com/content/9d1d9216-1e25-11e9-b126-46fc3ad87c65.

103 Hard Candy. “Is ‘being gay’ an illness? Can sexual orientation be converted?” [“同性恋是病吗？同性恋可以矫正吗？”]. Weibo, 3 Sep. 2019, <https://m.weibo.cn/status/4412514009658421?>

104 2017 Chinese Transgender Population General Survey Report. Beijing LGBT Center. 2017. <https://www.weareaptn.org/2019/03/18/2017-chinese-transgender-population-general-survey-report/>. Barriers to Gender-Affirming Treatments for Transgender People in China. Amnesty International. May 2019, <https://www.amnestyusa.org/wp-content/uploads/2019/05/Barriers-to-gender-affirming-treatments-for-transgender-people-in-China.pdf>.

105 2017 Chinese Transgender Population General Survey Report. Beijing LGBT Center. 2017. <https://www.weareaptn.org/2019/03/18/2017-chinese-transgender-population-general-survey-report/>.

106 Legal Gender Recognition in China: A Legal and Policy Review. United Nations Development Program. Aug. 2018, www.cn.undp.org/content/china/en/home/library/democratic_governance/legal-gender-recognition-in-china--a-legal-and-policy-review-.html. The US federal government does not require GAS as a prerequisite to change legal sex, but several US states still do.

107 Legal Gender Recognition in China: A Legal and Policy Review. United Nations Development Program. Aug. 2018, www.cn.undp.org/content/china/en/home/library/democratic_governance/legal-gender-recognition-in-china--a-legal-and-policy-review-.html.

108 Beijing LGBT Center. “Preparations before gender-affirming surgeries?” [“性别重置手术前需要哪些准备？”]. WeChat, 12 July 2019, <https://mp.weixin.qq.com/s/6DLgtZuhujOLxMBdeYK6cQ>.

familial notifications amount to familial consent. Signatures must be solicited from, at minimum, parents or guardians; an unsigned notification prevents the GAS candidate from moving forward with the procedures.”¹⁰⁹ These conditions are prohibitive, not to mention violations of autonomy and privacy. Especially problematic is the fact that transgender people experience high rates of family rejection and domestic violence, making obtaining family signatures on proof of notification documents extremely difficult.

Amnesty International's 2019 report “I Need My Parents' Consent to be Myself’ – Barriers to Gender-Affirming Treatments for Transgender People in China” documents how lack of access to GAS compels transgender individuals to pursue highly dangerous means of transitioning, such as self-surgery and self-dosing hormones.¹¹⁰ One adult transgender woman interviewed said she was only able to obtain family consent after she removed one testicle on her own.¹¹¹

Individuals who assist with self-surgery risk criminal liability. Police pursued criminal charges against a person who helped a transgender friend perform a self-surgery.¹¹² Sellers of hormones, who can be easily found on e-commerce sites such

109 Legal Gender Recognition in China: A Legal and Policy Review. United Nations Development Program. Aug. 2018, www.cn.undp.org/content/china/en/home/library/democratic_governance/legal-gender-recognition-in-china--a-legal-and-policy-review-.html.

110 Barriers to Gender-Affirming Treatments for Transgender People in China. Amnesty International. May 2019, <https://www.amnestyusa.org/wp-content/uploads/2019/05/Barriers-to-gender-affirming-treatments-for-transgender-people-in-China.pdf>.

111 Ibid.

112 Transgender Voice. “Transgender Law Workshop Successfully Held” [“跨性别法律工作坊成功举办”]. WeChat, 27 Aug. 2019, <https://mp.weixin.qq.com/s/ix20M41coqFDcX5TqDeDzA>.

as Taobao, also face potential criminal liability.

The Beijing LGBT Center works with doctors from Peking University Third Hospital to hold talks about how to access GAS, as well as the risks of self-surgery and self-dosing. At roundtables organized by the Center, domestic and international medical experts discuss with members of China's transgender community about the challenges they face and how the health-care system should be improved.¹¹³ It also conducts events with lawyers about how transgender people can protect their rights if they receive subpar medical services.¹¹⁴

Workplace Discrimination

Only about five percent of LGBT people are fully out in the workplace.¹¹⁵ Even though few LGBT people are out at work, about twenty percent of LGBT employees surveyed have experienced workplace bullying, harassment, or discrimination.¹¹⁶ Only eleven percent described their workplaces as “open and accepting.”¹¹⁷

113 Beijing LGBT Center. “Academic conference on transgender health held in Peking University Third Hospital.” WeChat, 15 Sep. 2018, https://mp.weixin.qq.com/s/Fg_a4E9QgLNXY3IEa8MZg.

114 Beijing LGBT Center. “Summary of activities in July by Transgender Department.” WeChat, 31 July 2019, <https://mp.weixin.qq.com/s/z3TG1m6mtH2qW4LGb8-W9Q>.

115 Being LGBTI in China--A National Survey on Social Attitudes towards Sexual Orientation, Gender Identity and Gender Expression. 2016. United Nations Development Program, https://www.asia-pacific.undp.org/content/rbap/en/home/library/democratic_governance/hiv_aids/being-lgbti-in-china--a-national-survey-on-social-attitudes-towa.html.

116 LGBTI People and Employment: Discrimination Based on Sexual Orientation, Gender Identity and Expression, and Sex Characteristics in China, the Philippines and Thailand. United Nations Development Program and International Labor Organization. 26 June 2018, https://www.asia-pacific.undp.org/content/rbap/en/home/library/democratic_governance/hiv_aids/lgbti-people-and-employment--discrimination-based-on-sexual-orie.html.

117 Ibid.

Transgender people run a serious risk of being outed by their identity documents, and employers often reject applicants whose gender markers on their education credentials are inconsistent with those on their national identification cards. Even if a transgender person meets the stringent requirements for changing the gender marker on their national identification card, it is even more difficult to change the gender marker on their education credentials. Transgender graduates cannot change their diploma's gender marker through their school. Instead they must submit a request to the Ministry of Education (MOE), which has been uncooperative on this issue. Only in several instances have lawyers been able to help transgender people get the MOE to change the gender marker on their education credentials.¹¹⁸ In an effort to scale up, the Rainbow Lawyers have created a handbook for transgender people on how to change gender markers on identity documents and diplomas.

Chinese law does not have express prohibitions against LGBT-based discrimination in the workplace. However, the 2008 Employment Promotion Law (EPL) prohibits discrimination based on a non-exhaustive list of classifications, including sex.¹¹⁹ Lawyers representing LGBT clients who have been discriminated against have prepared arguments that SOGIE-based discrimination is a form of sex discrimination and, alternatively, that since the list is not

exhaustive – there is an “etc.” at the end of the enumerated classifications – the EPL can be read to cover SOGIE-based discrimination. In several cases, courts seem sympathetic to this interpretation, which will be elaborated on later in this section.

At the United Nations, the government has made several statements indicating that Chinese law prohibits SOGIE-based discrimination. At the second Universal Periodic Review of the United Nations Human Rights Council in 2013, the government responded to recommendations to pass laws prohibiting LGBT-based discrimination as “accepted and already implemented.” The government’s addendum to the Report of the Working Group on the Universal Periodic Review elaborated, “China’s Constitution clearly stipulates that all citizens are equal before the law. China prohibits all possible discriminations via enacting specific laws.”¹²⁰ In 2014, a government representative at a session of the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) stated, “In China, all persons receive protection of the law, regardless of sexual orientation. They will not be discriminated against because of their sexual orientation.”¹²¹ At a June 2018 session of the UN Human Rights Council, the Chinese government stated, “China opposes all forms of discrimination and violence including discrimination, violence, and

118 E.g., Wei, Tingting. “Transgender Graduate Successfully Updated Gender on Diploma.” WeChat, 28 Apr. 2018, <https://mp.weixin.qq.com/s/mcuE4QaA7xntWiu2tuLEWg>.

119 Employment Promotion Law of the People’s Republic of China [中华人民共和国就业促进法]. 30 May 2007 http://www.gov.cn/flfg/2007-08/31/content_732597.htm. The EPL does not cover the government employers.

120 Report of the Working Group on the Universal Periodic Review, Addendum: China. United Nations Human Rights Council. 27 Feb. 2014, A/HRC/25/5/Add.1, <https://www.refworld.org/docid/533532dd4.html>.

121 Comments of Mu Hong, Deputy Director of the National Working Committee on Children and Women of the State Council, Country Review of China under the Convention to End All Forms of Discrimination Against Women, Oct. 2014, https://mp.weixin.qq.com/s/ng7uswLyXR6v5_g_0581xA.

intolerance based on sexual orientation”¹²² (in 2020, the government made a similar statement including gender identity). In March 2019, the Chinese government declared that eight recommendations made during its third Universal Period Review at the United Nations regarding creating protections against SOGIE-related discrimination were “accepted and already implemented.”¹²³ Coverage of these statements rarely appear in Chinese media, but advocates convey them to domestic audiences to desensitize LGBT issues.¹²⁴

There are also some references to sexual orientation and gender identity discrimination tucked away in other official documents. The 2018 Guidelines on China’s Sustainable Agricultural Overseas Investment issued by the Ministry of Agriculture and a government-backed industry association and think tank states that the investing Chinese enterprise: “shall not engage in or support any discrimination based on ... sexual orientation ...”¹²⁵

Although the 2008 Employment Promotion Law expressly prohibits discrimination, the Supreme People’s Court only created a cause of action for “equal employment rights disputes” in late 2018.

122 Report of the Independent Expert of Sexual Orientation and Gender Identity. United Nations Human Rights Council. May 2018. A/HRC/38/43, <https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/AnnualReports.aspx>.

123 Taylor, Michael. “China urged to take action on LGBT+ rights after backing U.N. changes.” Reuters, 7 Mar. 2019, <https://www.reuters.com/article/us-china-lgbt-un/china-urged-to-take-action-on-lgbt-rights-after-backing-u-n-changes-idUSKCN1QO1MU>.

124 Peng, Yanzi. “Using the UN to Advance LGBT Rights in China.” OpenGlobalRights, 6 Nov. 2018, www.openglobalrights.org/using-the-un-to-advance-lgbt-rights-in-china/.

125 Guidelines on Sustainable Agricultural Overseas Investment [中国农业海外可持续投资指引]. China Association for the Promotion of International Agricultural Cooperation, et al. May 2018. https://www.followingthemoney.org/wp-content/uploads/2019/02/2018_CAPIAC_Guidelines-on-Sustainable-Agricultural-Overseas-Investment_C.pdf.

Previously, plaintiffs brought discrimination cases under different causes of action, such as violations of general personality rights or unlawful termination. China does not have at-will employment, and employees can only be fired for cause or other reasons stipulated in the Labor Contract Law.¹²⁶ Although plaintiffs have failed to prove they suffered SOGIE-based discrimination at court, some were able to show that the employer lacked a sufficient basis to fire them or violated the Labor Contract Law in some other way, and were able to recover some compensation. For example, in a labor arbitration, a gay kindergarten teacher who was fired because of his sexual orientation was able to recover ¥36,000 (approximately \$5,000 USD) because his employer failed to provide him with a written contract.¹²⁷ Still, shoehorning discrimination cases into other causes of action has caused confusion for judges and has proved inadequate for addressing challenges particular to employment discrimination cases. It also undermines a core advocacy goal: having courts call out discrimination directly by its name.

In the cases that have gone forward, almost none of the defendants have argued that LGBT-based discrimination is permissible under the law, but instead argue that there was another reason for firing the employee, and they usually win. In 2014, a gay man sued 58 Town in Beijing for withdrawing a job offer after he came out as

126 Labor Contract Law of the People’s Republic of China. 28 Dec. 2012. http://www.npc.gov.cn/wxzl/gongbao/2013-04/15/content_1811058.htm.

127 Pan, Jiakun. “Accused of firing teacher for being gay, Qingdao kindergarten to pay six months’ salary as compensation after arbitration.” Beijing News, 22 Nov. 2018, <http://www.bjnews.com.cn/news/2018/11/22/523998.html>.

gay on social media.¹²⁸ 58 Town responded that the man's claims lacked evidence and then sued him for defamation since he had accused the company of discrimination on social media. The man and the company later settled the case. In the 2014 "Little Red Hat" case, a plaintiff submitted to the court an audio recording of a conversation in which a representative of his former employer strongly implied that he was fired because he had been outed as gay,¹²⁹ but it did not convince the court. Similarly, the trial and appeals courts in a case where a transman in Guiyang was fired did not consider prejudicial comments about the plaintiff to show discrimination, and a judge in 2020 found that a transwoman plaintiff, Jesse Ma, could be fired because she had been late several times (though her colleagues were late more often without consequence). The court did not focus on whether she had been treated differently from her coworkers, but rather on whether she had violated company policy. These cases show that plaintiffs have a very difficult uphill climb in proving discrimination if they have anything less than smoking-gun evidence.

Although the plaintiffs failed on their discrimination claims, the courts seemed to assume or expressly say that LGBT discrimination was prohibited. The Guiyang intermediate court judgment, in dicta, stated: "One's gender identity and gender expression belong under the protected scope of the general right of personality ...

128 "Accused of LGBT discrimination, 58.com sues job-seeker." Beijing News, 19 Feb. 2014, <http://www.bjnews.com.cn/news/2014/02/19/305531.html>.

129 Wang, Na. "First Chinese case of workplace discrimination over sexual orientation: original decision upheld." Sina News, 26 Nov. 2015, <http://finance.sina.com.cn/sf/news/2015-11-26/093311619.html>.

The gender identity and expression of an individual should be respected. Laborers should not be treated differently in the course of employ because of their gender identity and expression."¹³⁰ In the 2020 Jesse Ma case, the court considered the plaintiff's gender identity discrimination claim to be a form of sex discrimination, which is clearly prohibited by law.

In one well-known case, a transgender employee did have smoking-gun evidence. In 2019, Dang Dang, a large e-commerce company, wrote a letter to a transwoman employee, referring to her as "Mr.," and proceeded to state that colleagues did not want to work with her because of "moral awkwardness" and not wanting to share the bathroom. The appeals court held that Dang Dang lacked a legitimate reason to fire her. Although the employee had technically not brought a discrimination claim, the court went on to state that, "although [the Employment Promotion Law] does not expressly provide that laborers shall not be discriminated against because they have undergone a sex change, it should be within the meaning of the [the Employment Promotion Law] that laborers, who have undergone sex-reassignment surgery, changed their sex, and gotten the approval of the Ministry of Public Security, enjoy rights to equal employment and not to be discriminated against."¹³¹ On the bathroom issue, the appeals court ruled,

130 Common Language. "Chinese transgender employment discrimination case wins groundbreaking court statement." OutRight Action International, 6 Feb. 2018, <https://outrightinternational.org/content/republish-chinese-transgender-employment-discrimination-case-wins-groundbreaking-court>.

131 Longarino, Darius. "Was the Dang Dang Case a Successful Transgender Discrimination Lawsuit?" ChinaLawTranslate, 15 Sep. 2020, <https://www.chinalawtranslate.com/en/was-the-dang-dang-case-a-successful-transgender-discrimination-lawsuit/>.

that in accordance with MPS regulations, the employee had changed her sex from male to female, and “has the right to enter the bathroom in accordance with her female identity. Other colleagues should accept [the employee’s] new sex, and have a tolerant mindset in conducting company business with [the employee].”¹³² News of the judgment went viral on social media and was also sympathetically covered by state television.¹³³

Discrimination based on HIV/AIDS status has also negatively impacted equal employment rights. The Employment Protection Law clearly prohibits discrimination based on HIV/AIDS-status, but, like with other discrimination cases, it has been very hard for plaintiffs to effectuate their rights. Employees are often unable to protect the privacy of their status, because employers require them to take physical examinations (these are illegal with the exception of government employers and certain special jobs), and test for HIV without their knowledge.

In a 2019 case featured in the Chinese version of GQ, Xie Peng, an employee at an entertainment company, was made to take a physical examination.¹³⁴ The employer had no legal reason for requiring the exam and did not inform Xie Peng that the exam would test for HIV. After Xie Peng tested positive, the hospital directly contacted

the employer. Xie Peng sought assistance from the Rainbow Lawyers who helped him file a lawsuit, get media attention, and reach a settlement with the company. In the first such settlement of its kind, the company agreed to re-hire Xie Peng, but the company’s agreement was only for show. The company stopped contacting Xie Peng, and continued to pay him minimum wage to “work from home.”

LGBT and anti-discrimination advocates hope the Supreme People’s Court new cause of action for equal employment rights disputes will better facilitate discrimination litigation. It could signal to judges that they need to handle evidence and proof structures in employment discrimination cases differently than in other cases.

A major advancement would be if courts could shift the burden of evidence to the employer after the plaintiff makes a prima facie case of discrimination. For example, if the plaintiff provides evidence that the employer made prejudicial remarks about the plaintiff’s sexual orientation or gender identity, the burden would shift to the employer to demonstrate that it fired the plaintiff for a legitimate non-discriminatory reason. If not, the court could find that discrimination had taken place.

Also, courts need to develop a better understanding of discrimination so they are not as easily swayed by erroneous counterarguments (e.g., “I’m afraid of what the company’s clients will think if they know we have a gay employee”; “Colleagues don’t feel comfortable working with a transgender person”). Advocates hope that a judicial interpretation from the Supreme

132 Beijing Dang Dang Information Technology Co., Ltd. v. Gao [北京当当网信息技术有限公司等劳动争议二审民事判决书]. 2019 Beijing 2 No. 11084, <https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXS4/index.html?docId=9c97bf5afa7b4b4c93aeab3f000b7912>.

133 “The Labor Dispute Case Between a Transgender Person and Dang Dang” [“跨性别者与当当网劳动争议案”]. CCTV-12, 19 Sep. 2020, <https://tv.cctv.com/2020/09/19/VIDE2u9kfi447lfxTMKVHXqq200919.shtml>.

134 Kang, Lukai. “Lies and Loneliness: The Path of an HIV-Infected Person to Defending His Rights.” Douban, 25 June 2019, <https://www.douban.com/note/723801870/>.

People's Court would help to clarify these issues to make litigation more practicable for all victims of discrimination.

It would be ideal for the proposed Anti-Employment Discrimination Law (AEDL) to pass with protections against LGBT-based discrimination included. The AEDL is not on the government's legislative agenda, but relevant ministries have discussed with scholars how it could be implemented. LGBT advocates' engagement with scholars resulted in a group of legal experts working on the AEDL submitting a draft AEDL to the government that covers LGBT-based discrimination. The law's near-term passage is unlikely, and it is unclear whether its final version will include LGBT-based discrimination, but discussion of the draft AEDL at high levels is sensitizing policymakers to LGBT issues.

Relatedly, the Supreme People's Court issued a new cause of action for sexual harassment cases, simultaneously with the new cause of action on equal employment rights. Existing law on sexual harassment in the workplace only covers harassment of women, but the anti-sexual harassment provisions in the new Civil Code, which will go into effect in 2021, uses gender neutral language.¹³⁵

Since the judicial system thus far only provides limited protection for LGBT employees' rights, LGBT advocates have also been directly engaging businesses about LGBT-inclusion in the workplace.¹³⁶

135 Civil Code of the People's Republic of China. 28 May 2020. http://www.xinhuanet.com/politics/2020-06/01/c_1126061072.htm.

136 "Recap: 2019 Out & Equal LGBTQ China Forum." ShanghaiPRIDE, 15 June 2019, www.shpride.com/2019/06/15/recap-outandequal/?lang=en.

Many foreign multinational corporations in China, driven both by their headquarters' global policies and demand from China-based employees, have been implementing LGBT-supportive policies for employees. These include same-sex partner benefits such as health insurance and honeymoon vacation, the establishment of employee resource groups, clear anti-discrimination policies, and insurance coverage for GAS and HRT. Foreign multinational companies are also speaking out more on Chinese social media and participating in Pride Month activities.¹³⁷

Although the most visible companies have been multinationals, some Chinese companies have taken supportive steps publicly. In March 2020, ByteDance, the owner of the globally popular video-sharing platform TikTok, possibly became the first Chinese tech company to publicly post a message regarding inclusion of its lesbian, gay, and bisexual employees.¹³⁸ A large insurance company, PingAn, agreed to provide spousal health insurance to the same-sex spouse of an employee at Ford Motor Company.¹³⁹ Companies both domestic and foreign have also tried to

137 "Pride Job Fair." ShanghaiPRIDE, 6 June 2019, <https://mp.weixin.qq.com/s/BE0hLkBKZ9IT2Vxhptn5nQ>.

138 Yang, Li. "First Internet Company in China Announces Clearly that it Accepts Different Sexual Orientations" ["国内首家互联网大厂明确包容不同性取向"]. Danlan. WeChat, 20 Mar. 2020, <https://mp.weixin.qq.com/s/swMUrUnMLMpvFGO8401Wkw>.

139 Longarino, Darius. Twitter. 3 June 2019. <https://twitter.com/DariusLongarino/status/1135394015044444161?s=20>.

engage LGBT consumers and their allies through LGBT-themed marketing.¹⁴⁰

Similar to efforts for improving schools, advocates hope directly engaging businesses will not only create near-term improvement of working conditions for LGBT people, but will also eventually lead to policy change. If enough influential businesses are adopting LGBT-inclusive policies and are making a strong case for the economic benefits of inclusion, it will put them in a better position to move anti-discrimination laws and regulations forward.

Relationship Recognition

Same-sex Marriage

China does not recognize same-sex marriage, but same-sex marriage advocacy has a relatively long history. Dating back to the 1990s, same-sex couples have attempted to register for marriage licenses or have held unofficial marriage ceremonies. From 2003–2013, Professor Li Yinhe, China's most famous sexologist, submitted several proposals on legalizing same-sex marriage to national legislators.¹⁴¹ In 2013, PFLAG

parents also submitted proposals to the National People's Congress (NPC) requesting that their children be allowed to start a family with their partners, arguing that it would lay their anxieties about the stability of their children's future to rest.¹⁴² Officials generally have not responded to these calls, or have reiterated that China's traditional culture and values do not comport with same-sex marriage.

Recent years have seen an increase in the visibility and scope of same-sex marriage advocacy. In 2016, in the first case of its kind, a same-sex couple in Hunan, Sun Wenlin and Hu Mingliang, sued the Changsha Bureau of Civil Affairs for denying them a marriage license. About 300 people came to the local court to show their support for the case.¹⁴³ Sun handed out wedding candies¹⁴⁴ while media scrums took pictures of the plaintiff couple. Shortly after trial, the court ruled that the text of the Marriage Law only considers marriage as possible between a man and a woman. Despite the loss, news of the case received tens of millions of views on social media and galvanized activists. A young college student outside the court told a reporter, "this case definitely gave a lot of people courage to stand up."¹⁴⁵

Sun did not stop there. In 2018, he called on Weibo users to submit proposals to

140 Chiu, Joanna. "China's New Multibillion-Dollar Target Market: LGBT Youth." *Foreign Policy*, 1 Mar. 2017, foreignpolicy.com/2017/02/27/chinas-new-multibillion-dollar-target-market-lgbt-youth/; Hewitt, Duncan. "US Supreme Court Ruling on Gay Marriage Prompts 'Unprecedented' Debate in China, Gives Hope to Gay Activists." *International Business Times*, 29 June 2015, <https://www.ibtimes.com/us-supreme-court-ruling-gay-marriage-prompts-unprecedented-debate-china-gives-hope-1987592>. Guilford, Gwynn. "Alibaba Is Sending 10 Same-Sex Couples on All-Expense-Paid Trips to US to Get Married." *Quartz*, 9 Apr. 2015, <https://qz.com/379195/alibaba-is-sending-10-same-sex-couples-on-all-expense-paid-trips-to-us-to-get-married/>.

141 Jeffreys, Elaine and Pan Wang. "Pathways to Legalizing Same-Sex Marriage in China and Taiwan: Globalization and 'Chinese Values.'" *Global Perspectives on Same-Sex Marriage: A Neo-Institutional Approach*, Winter, Bronwyn et al. (Cham: Palgrave Macmillan, 2018), pp. 197–220, https://www.researchgate.net/publication/320989733_Pathways_to_Legalizing_Same-Sex_Marriage_in_China_and_Taiwan_Globalization_and_Chinese_Values.

142 Li, Amy. "Chinese parents of gays and lesbians demand equal marriage rights." *South China Morning Post*, 27 Feb. 2013, <https://www.scmp.com/news/china/article/1159633/chinese-parents-gays-and-lesbians-demand-equal-marriage-rights>.

143 Shih, Gerry. "Hundreds Gather for China's 1st Same-Sex Marriage Lawsuit." *Associated Press*, 13 Apr. 2016, apnews.com/138aeedd341948c9b306.

144 Shan, Juan. "Couple lose same-sex marriage case." *China Daily*, 14 Apr. 2016, http://www.chinadaily.com.cn/china/2016-04/14/content_24522771.htm.

145 Shih, Gerry. "Despite court ruling, China gay rights movement makes gains." *Associated Press*, 14 Apr. 2016, <https://apnews.com/0baaa68faaba46bcb035d40046e69615>.

drafters of China's Civil Code to legalize same-sex marriage. Before long, the hashtag "Civil Code, Same-Sex Marriage" reached 70 million views.¹⁴⁶

The next year, Taiwan's legalization of same-sex marriage in May 2019 boosted discussion of the issue in mainland China once again. On Weibo, views and engagements of the relevant hashtag reached over 680 million.¹⁴⁷ Although many lesbian, gay, and bisexual citizens of the People's Republic of China would like to get married in Taiwan, they currently cannot.¹⁴⁸ Many same-sex couples from China travel to other jurisdictions to get married, such as in North America and Western Europe, even though their marriages are not recognized at home. The US commonwealth of Saipan is a popular wedding destination since entry for Chinese tourists does not require a visa.¹⁴⁹

In late 2019, several LGBT organizations and advocates, including Sun Wenlin, formed a new network "Ai Cheng Jia" ("Love Makes Family") to coordinate same-sex marriage advocacy among its member groups. "Marriage is a really big topic," said Dong Xiaoying, director of the Advocates for Diverse Family Network, an Ai Cheng

Jia member group, "so you need different organizations to work on it together."¹⁵⁰

Ai Cheng Jia's first foray was to launch a campaign to submit legislative proposals calling for same-sex marriage to drafters of China's Civil Code after they had opened a round of soliciting public comments. Views of the campaign's hashtag shot up to 200 million in four days before being deleted by censors.¹⁵¹ Weeks later, by the close of the public feedback solicitation round, 213,634 people had made submissions on marriage – huge compared to other sections' submission numbers.¹⁵² Then in late December a National People's Congress spokesperson publicly acknowledged¹⁵³ the large volume of proposals calling for same-sex marriage. The neutrally-toned statement contrasted with that of another NPC spokesperson made in August 2019 that same-sex marriage was unsuitable for China's "national conditions" and "historical and cultural traditions."¹⁵⁴ News of the December

146 Lau, Doriane. "As China Prepares to Revise Its Civil Code, Calls Are Renewed for Legal Recognition Of Same-Sex Marriage." *SupChina*, 30 Oct. 2018, <https://supchina.com/2018/10/30/civil-code-revision-renewed-calls-for-legal-recognition-same-sex-marriage/>; Shepherd, Christian. "Chinese activists renew push for same-sex marriage in their thousands." *Reuters*, 12 Sep. 2018, <https://www.reuters.com/article/china-lgbt-lawmaking/chinese-activists-renew-push-for-same-sex-marriage-in-their-thousands-idUSL3N1VY4YB>.

147 Longarino, Darius. Twitter. 27 June 2019, <https://twitter.com/DariusLongarino/status/1144100986073436160?s=20>.

148 Steger, Isabella. "Thinking about a gay destination wedding in Taiwan? Not so fast." *Quartz*, 23 May 2019, <https://qz.com/1626158/thinking-about-a-gay-destination-wedding-in-taiwan-not-so-fast/>.

149 Bautista, Kimberly. "Same-sex union of Chinese tourists thriving." *Saipan Tribune*, 25 Apr. 2017, <https://www.saipantribune.com/index.php/sex-union-chinese-tourists-thriving/>.

150 Author interview with Dong Xiaoying, 16 Mar. 2020.

151 "A Hashtag With 200 Million Views was Blocked, but LGBT Participation in Civil Code Revision Continues." ["2 亿阅读话题被消失, 但同志参与民法典修改仍在继续中"]. *LGBT Rights Advocacy China*. WeChat. 13 Nov. 2019. <https://mp.weixin.qq.com/s/i-1m8Q-PVsf5aCdkxmMYTQ>.

152 "The Third Round of Soliciting Public Comments of Marriage and Family Law in China's Civil Code Draft." ["民法典婚姻家庭编(草案三次审议稿)征求意见"], Soliciting Public Comments of Draft Law, National People's Congress. 29 Nov. 2019. <http://www.npc.gov.cn/flcaw/more.html>.

153 "Legislative Affairs Commission of the Standing Committee of the National People's Congress: The Complete Draft of Civil Code to be Published Soon" ["全国人大常委会法工委: 完整民法典草案即将亮相"]. *Xinhua*, 20 Dec. 2019, http://www.xinhuanet.com/politics/2019-12/20/c_1125370947.htm.

154 Wei, Changhao. "At First Press Conference, NPCSC Legislative Commission Reports on Public Comments, Addresses Same-Sex Marriage & Hong Kong." *NPC Observer*, 21 Aug. 2019, npcobserver.com/2019/08/21/at-first-press-conference-npcsc-legislative-commission-reports-on-public-comments-addresses-same-sex-marriage-hong-kong/.

acknowledgement went viral online, with one hashtag reaching 840 million views.¹⁵⁵

When the Civil Code passed in May 2020, it did not legalize same-sex marriage, and, in an interview leading up to its passage, a lead drafter tried to delegitimize submissions supporting same-sex marriage by describing them as being “organized” and “copied and pasted.” The interview though was quickly deleted.¹⁵⁶

Besides changing the Civil Code, Professor Han Dayuan, the former dean of Renmin University Law School, sees as an alternative. He has posited that a constitutional challenge can be brought to the NPC Constitution & Law Committee claiming that the constitution’s “freedom of marriage” guarantee makes no reference to gender, so laws under the constitution, like the Civil Code, cannot limit marriage rights based on gender.

Ai Cheng Jia advocates anticipate that the government will slowly and inconspicuously grant access to piecemeal rights to same-sex couples in order to pacify the growing same-sex marriage movement. Same-sex couples are already trying to use existing laws to attain some of the rights associated with marriage, which are covered in the next section.

There are some “in-the-system” stakeholders who are cautiously optimistic about the legalization of same-sex marriage. In a 2017 interview with CGTN, NPC delegate Sun Xiaomei said she once told

an audience of PFLAG parents that generational change would make the difference, “when young people are in various social positions over the next decade, the LGBT [sic] maybe allowed to get married then. Hundreds of parents shed tears. They hope to see that.”¹⁵⁷

Partial Proxies for Relationship Recognition

Many same-sex couples have tried using legal mechanisms permitted under existing law to obtain some of the rights and protections associated with marriage, such as an equitable splitting of property in case the relationship ends, using power of attorney to make medical decisions for an incapacitated partner, and providing a surviving partner with inheritance and the right to continue residing in a shared home.

Joy Chia notes though that using civil contract law, “is not yet a widespread practice, and there have to date unfortunately been no legal cases that demonstrate the utility of those civil contracts during disputes.”¹⁵⁸ In an interview with Dr. Jingshu Zhu, a gay man summed up skepticism about using contracts and wills to protect his partner in the event of his passing: “We doubt if these legal papers can help much. Imagine I died and suddenly a ‘stranger’ came and argued against my parents that I had left most of my inheritance to him. How could my parents believe and happily

155 “There were Proposals to Include the Legitimation of Same-Sex Marriage in the Civil Code.” [“有意见建议同性婚姻合法化写入民法典”]. Weibo. <https://s.weibo.com/weibo?q=%23有意见建议同性婚姻合法化写入民法典%23> (last visited 25 Sept. 2020).

156 Longarino, Darius. Twitter. 19 May 2020, <https://twitter.com/DariusLongarino/status/1262756124303912964?s=20>.

157 Fu, Shan and Linxin Yang. “Sun Xiaomei: The woman behind Anti-Domestic Violence Law.” Beijing News, 10 Nov. 2017, <http://www.bjnews.com.cn/feature/2017/11/10/463688.html>.

158 Chia, Joy. “LGBTQ rights in China: movement-building in uncertain times.” Handbook on Human Rights in China, ed. Biddulph, Sarah and Rosenzweig, Joshua (Cheltenham: Edward Elgar, 2019), pp. 657–680. <https://www.elgaronline.com/view/edcoll/9781786433671/9781786433671.00043.xml>.

accept that! ... Similarly, my parents would not let a ‘stranger’ make medical decisions for me if I were in coma, even if he had the power of attorney.”¹⁵⁹

There have been cases where parents of the deceased partner have seized the couple’s assets or have tried to kick them out of their apartment.¹⁶⁰ When same-sex couples who have broken up bring property disputes to court, judges have declined to treat their previous relationships as “quasi-marriages” in which property was shared, disadvantaging the less economically well-off party or the party whose name does not appear in documents proving ownership.¹⁶¹

New mechanisms are emerging for same-sex couples to obtain more protections. Article 33 of the 2017 General Principles of the Civil Code (which has since been integrated into the complete Civil Code passed in May 2020 and will go into effect in 2021) allows for adults to enter into guardianship agreements with each other. If one party loses or partially loses civil capacity, the other party has the responsibility to manage the affairs of the incapacitated party on their behalf, including decisions regarding healthcare and property. This reform was aimed at providing more security to aging adults – not as an express recognition of same-sex

159 Zhu, Jingshu. “Straightjacket: Same-Sex Orientation under Chinese Family Law.” Leiden University, 7 Feb. 2018, <https://www.universiteitleiden.nl/en/news/2018/02/straightjacket-same-sex-orientation-under-chinese-family-law>.

160 Qian, Colin. “China’s Same-Sex Couples Heartened by Property Protection Rights in New Civil Code.” Reuters, 28 May 2020, www.reuters.com/article/us-china-parliament-lgbt-property/chinas-same-sex-couples-heartened-by-property-protection-rights-in-new-civil-code-idUSKBN2341DM.

161 Zhu, Jingshu. “Straightjacket: Same-Sex Orientation under Chinese Family Law.” Leiden University, 7 Feb. 2018, <https://www.universiteitleiden.nl/en/news/2018/02/straightjacket-same-sex-orientation-under-chinese-family-law>.

relationships – but same-sex couples have been able to establish guardianship relationships nonetheless.

LGBT advocates have played a crucial role in training hundreds of public notaries about how they can help same-sex couples establish legal guardianship agreements.¹⁶² When a notary approved Beijing’s first guardianship agreement between a same-sex couple in 2019, the related Weibo hashtag reached 97 million views. However, couples usually avoid directly stating their same-sex relationship in the guardianship agreements out of fear that such a statement would invalidate the agreement because it violates “public order and good morals.”¹⁶³ Public notaries have also helped same-sex couples draft agreements regarding property.¹⁶⁴

Another new potential mechanism is the right to reside in Chapter 14 of the new Civil Code, which allows a property owner to grant another the right to live on the property for life. LGBT advocates are concerned that although the provision’s language is gender-neutral, implementing authorities may choose to stop same-sex couples from using it.¹⁶⁵

162 “Voluntarily Confirm Your Love: The Third Voluntary Guardianship Training Session Successfully Concluded.” [“ 意定你的爱：第三期意定监护研修班圆满落幕 ”]. Yiding Zhi Ai. WeChat. 10 Aug. 2019, <https://mp.weixin.qq.com/s/atX0bW1Hu5z8GNLrCaGkfa>.

163 Zai Zi. “How Legal Guardianship Made My Same-Sex Relationship ‘Official.’” Sixth Tone, 13 Aug. 2019, <http://www.sixthtone.com/news/1004427/how-legal-guardianship-made-my-same-sex-relationship-official>.

164 Tang, Chang and Kunkun Zhang. “A Policy Enables Same-sex Couples to Sign ‘Life and Death’ Agreement” [“ 一项制度 “ 歪打正着 ”， 同性伴侣有了 “ 生死协议 ”]. Southern Weekend, 8 Aug. 2019, <https://new.qq.com/omn/20190809/20190809A0IVX100.html>.

165 Qian, Colin. “China’s Same-Sex Couples Heartened by Property Protection Rights in New Civil Code.” Reuters, 28 May 2020, www.reuters.com/article/us-china-parliament-lgbt-property/chinas-same-sex-couples-heartened-by-property-protection-rights-in-new-civil-code-idUSKBN2341DM.

These legal mechanisms can provide some protections for people in same-sex relationships, but advocates emphasize that they do not come close to securing all the rights and benefits granted by marriage, and thus are no substitute for full marriage equality.

Cooperative Marriages Between Gays and Lesbians

In response to family and social pressure, many gays and lesbians choose to enter into cooperative marriages, in which they present themselves as a straight couple to family, colleagues, the government and/or society at large.¹⁶⁶ They are otherwise not in an intimate relationship, though there are cases of close friends entering into cooperative marriages who do support each other as life partners. In contrast to same-sex couples trying to secure legal protections piecemeal, the problem for parties in a cooperative marriage is to avoid the rights and obligations of marriage.

Individuals entering into cooperative marriages have drafted contracts that delineate the terms of the marriage, including keeping property ownership separate, waiving inheritance rights, and keeping the marriage asexual.¹⁶⁷ Some agreements stipulate the abdication of parenting rights and caretaking obligations regarding the spouse and their family, as well as stipulating non-interference in extra-marital relationships, but courts would consider

such provisions to be against public policy and thus ineffective.¹⁶⁸

Non-Cooperative Marriages

Given the immense social pressure to marry, many gay and lesbian people have married a different-sex person under the pretense that they were sexually and romantically attracted to them. When one spouse discovers that the other is gay or lesbian, conflicts arise. In one extreme case, a woman committed suicide after finding out her husband was gay. Her family sued the husband as being liable for her death, but the court ruled against them.¹⁶⁹

If these marriages enter divorce proceedings, the straight spouse often argues that the gay or lesbian spouse should be found to be at fault for having concealed their sexual orientation, and thus should provide compensation. Under Article 46 of the Marriage Law, the no-fault party may request compensation if the divorce was caused by bigamy, cohabiting with a third party, domestic violence, or maltreatment and desertion.¹⁷⁰ Since the law is silent on matters of sexual orientation, courts usually decline to rule that compensation is owed because the spouse had concealed their sexual orientation. However, several scholars and advocates believe that judges often favor wives of gay men in rulings on the division of marital property. The new Civil Code adds a catchall category for finding fault in addition to the four cat-

166 Although rarer, there are cooperative marriages where one party is straight and the other party is not.

167 Zhu, Jingshu. "Straightjacket: Same-Sex Orientation under Chinese Family Law." Leiden University, 7 Feb. 2018, <https://www.universiteitleiden.nl/en/news/2018/02/straightjacket-same-sex-orientation-under-chinese-family-law>.

168 Ibid.

169 Levesque, Brody. "China court rules gay man who married a woman not liable for her suicide." LGBTQ Nation, 8 Jan. 2013, <https://www.lgbtqnation.com/2013/01/china-court-rules-gay-man-who-married-a-woman-not-liable-for-her-suicide/>.

170 Marriage Law of the People's Republic of China [中华人民共和国婚姻法]. 1 Jan. 1981 (amended 28 April 2001), http://www.gov.cn/banshi/2005-05/25/content_847.htm.

egories under Article 46 of the Marriage Law.¹⁷¹ This might give judges more room to find fault with the gay or lesbian party in divorce proceedings and require them to pay compensation.¹⁷²

Parenting

Custody Cases

Many gay and lesbian people have reared biological children in different-sex marriages. In divorce proceedings, if a gay or lesbian parent's sexual orientation comes to the attention of the court, it can negatively affect their chances of obtaining custody rights.

Article 36 of the Marriage Law stipulates that when the divorcing parties do not agree on custody, the court shall decide custody rights “in accordance with the rights and interests of the child.”¹⁷³ On the same issue, Article 1084 of the Civil Code, which will go into effect in 2021, superseding the Marriage Law, states, that a court will “make a judgment in accordance with the principle of the best interest of the child.”¹⁷⁴ Judges have wide discretion in making custody determinations.

According to Dr. Jingshu Zhu, for LGB parties in a divorce proceeding, “In China,

most choose to secure custody by denying the accusation of homosexuality, rather than proudly coming out and making non-discrimination arguments. The courts tend to ignore this factor, too, at least not making it explicit in their judgments.”¹⁷⁵

There are some examples of courts addressing the issue of sexual orientation head on. In one 2013 case, the court ruled the parent's “homosexual behavior goes against current normal mainstream views and traditional ethics. This behavior creates an unfavorable influence on the healthy development of the juvenile.”¹⁷⁶ Another ruled one parent's “sexual orientation is different from normal people, potentially creating an unfavorable influence on [the child's] perspectives on life and family.”¹⁷⁷ However, there is at least one instance of a court finding the claim that a gay parent's sexual orientation would have a negative effect on a child's development to “lack factual basis.”¹⁷⁸

Researchers have been unable to find cases on the custody of rights of spouses who underwent a gender transition prior to divorce. UNDP researchers found one example of legal commentary on the subject, in which the author concluded, “in terms of social values and psychological factors, allowing transgender people to [raise children] is likely to leave a definite

171 Article 1091 of the Civil Code of the People's Republic of China [中华人民共和国民法典]. 28 May 2020, <http://www.npc.gov.cn/npc/c30834/202006/75ba6483b8344591abd07917e1d25cc8.shtml>.

172 “Reform[Our Voice] – Reflections on Participating the Civil Code's 2nd Round of Soliciting Public Comments” [“改变 | 我们的发声”——民法典二审稿参与回顾]. Common Language. 18 Oct. 2019, <http://www.tongyulala.org/index.php?m=content&c=index&a=show&catid=14&id=204>.

173 Marriage Law of the People's Republic of China [中华人民共和国婚姻法]. 1 Jan. 1981 (amended 28 April 2001), http://www.gov.cn/banshi/2005-05/25/content_847.htm.

174 Article 1091 of the Civil Code of the People's Republic of China [中华人民共和国民法典]. 28 May 2020, <http://www.npc.gov.cn/npc/c30834/202006/75ba6483b8344591abd07917e1d25cc8.shtml>.

175 Zhu, Jingshu. “Straightjacket: Same-Sex Orientation under Chinese Family Law.” Leiden University, 7 Feb. 2018, <https://www.universiteitleiden.nl/en/news/2018/02/straightjacket-same-sex-orientation-under-chinese-family-law>.

176 Judgment of Zhao X v. Pang X Divorce Dispute [赵某与庞某甲离婚纠纷一案一审民事判决书]. Shijiazhuang No.00280 (2013), <https://wenshu.court.gov.cn/website/wenshu/181107ANFZOBXSK4/index.html?docId=51409e230b9d454baba49c03dc5747e1>.

177 “Woman Asks for Custody of Son After Discovering Ex-husband is Gay.” Southeast Morning Post, 9 Aug. 2013, http://qz.fjnews.com/2013-08/09/content_12157003.htm.

178 Wang X v. Zhou X Civil Trial Court Judgment [“王某甲与周某一案一审民事判决书”]. Hangzhou, Jianggan District Trial Court Civil Judgment No. 511 (2014).

impression upon the child. Because of this, the author feels that the partner who has not undergone a gender transition should raise the child, except in cases where that would be inappropriate.”¹⁷⁹

Historically, US advocates fought against prejudiced court decisions by working with social scientists. They conducted empirical research showing that children raised by gay and lesbian parents developed just as healthily as children raised by straight parents. After evidence reached a critical mass, numerous professional associations began issuing official statements supporting the rights of gay and lesbian parents. The mounting social science evidence – along with changing social attitudes – led to a subsequent sea change in court rulings.¹⁸⁰

In a similar vein, advocates in China have been exploring how China’s developing expert witness system can play a positive role in LGBT rights cases. Expert witnesses helped secure a favorable judgment in the Guiyang transgender employment discrimination case. They have also led to ameliorated sentences for women convicted of murdering their husbands after suffering through years of domestic violence. In custody cases, expert witnesses could present social science research on LGBT parents to judges. However, because relevant domestic research is extremely limited, any such testimony would rely on

179 Gao, Ran. “Research on marriage and family law questions concerning sex changes within an existing marriage in China” *Legal System and Society* Vol. 32 (2015): p. 87.

180 George, Marie-Amélie. “The Custody Crucible: The Development of Scientific Authority About Gay and Lesbian Parents.” *Law and History Review*, vol. 34, no. 2, 2016, pp. 487–529, <https://www.cambridge.org/core/journals/law-and-history-review/article/custody-crucible-the-development-of-scientific-authority-about-gay-and-lesbian-parents/705578E1F8B369D7AF3D8C5D54643D3D>.

overseas research, which would be less persuasive. Much more cross-sector collaboration between advocates, social scientists, and lawyers is needed before this strategy could be fully implemented. Until then, the safest strategy for LGBT parents in divorce cases might still be to conceal.

One positive trend is that with the rise of openly LGBT parents, there will be more public discussion of their families. Entertainment media have positively covered the family life of Jin Xing and her three adopted children, and many gay and lesbian parents are sharing their stories on social media.

Adoption

Policy and practice around adoption exhibits prejudice against LGBT people. Neither the Adoption Law nor the new Civil Code that will come into force in 2021 expressly prohibit openly-LGBT people from adopting children, but it states that adoption “shall be in the interest of the upbringing and growth of adopted minors ... and not in contravention of social morality.”¹⁸¹ In an announcement on overseas adoption, the China Centre for Children’s Welfare and Adoption, which sits under the Ministry of Civil Affairs, stated that the Adoption Law’s “social morality” requirement excludes gays and lesbians from adopting.¹⁸² It goes on to state that the Marriage Law “does not recognize homosexual families” and that the Chinese Classification of Mental Disorders

181 Adoption Law of the People’s Republic of China. 12 Dec. 2007, http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383868.htm.

182 “Can Gays Adopt Children in China?” China Centre for Children’s Welfare and Adoption. 24 Mar. 2011, <http://www.cccwa.cn/article/sysw/zxjd/201103/20110300141465.shtml>.

considers homosexuality to be a “psychosexual disorder.” Another provision from the China Centre for Children’s Welfare and Adoption on overseas adoption organizations operating in China requires that applicants of the same sex who cohabit and are not family must make a declaration that neither of them are gay or lesbian.¹⁸³

More recently, provincial- and municipal-level government regulations clearly list homosexuality as a negative or disqualifying factor for applicants.¹⁸⁴ A policy from the Changzhou city government in Jiangsu lists homosexuality along with drug abuse, committing domestic violence, and being in a cult as factors making an applicant ineligible.¹⁸⁵ In a less extreme example, the assessment forms for applicants seeking to adopt in Qidong, Jiangsu ask if they have had “homosexual” or “other bad and abnormal behaviors.”¹⁸⁶ Applicants receive a point if they have not (a perfect score is 125 points).

There have also been reports of the China Centre for Children’s Welfare and

183 Temporary Regulations and Requirements for Foreign Adoption Organizations Conducting Transnational Adoptions in China. China Centre for Children’s Welfare and Adoption. [“中国儿童福利和收养中心，对外国收养组织在华开展跨国收养的暂行规定和要求”] (2011). A 2016 Washington Post op-ed about a lesbian couple prevented from adopting a 4-year-old Chinese orphan made rounds on social media after being translated into Chinese, with many commentators expressing support for the couple: Wyatt, Melissa. “I bumped into my fate and against China’s adoption rules.” Washington Post, 7 Mar. 2016, <https://www.washingtonpost.com/news/parenting/wp/2016/03/07/i-bumped-into-my-fate-and-against-chinas-adoption-rules/>.

184 Pilot Implementing Regulations for Evaluating Families Adopting Children. Shaanxi Department of Civil Affairs, Oct. 2018, Doc. 2018 No. 38, <http://mzt.shaanxi.gov.cn/html/zw/zcwj/shsw/201910/8914.html>.

185 Policy Explainer for Changzhou Pilot Implementing Regulations for Evaluating Families Adopting Children. Jiangsu Province People’s Government, 10 July 2014, http://www.jiangsu.gov.cn/art/2014/7/10/art_32648_6133799.html.

186 Public Announcement for Public Tender for Qidong City’s Families Adopting Children Evaluation Project. Qidong City Bureau of Civil Affairs, 20 July 2018, <http://zfcg.nantong.gov.cn/jyxx/003009/003009007/003009007001/20180720/6fdb1228-2454-4363-a5e3-7ec9d7ba1c0a.html>.

Adoption prohibiting transgender individuals who have already changed the gender marker on their identification cards from adopting children.¹⁸⁷ However, Jin Xing, as an unmarried transgender woman, was able to adopt three children from orphanages in China.¹⁸⁸

Some LGBT legal advocates believe that since the Adoption Law is silent on sexual orientation and gender identity, they can challenge the lower level provisions or, at least, pursue adoptions in areas where local provisions lack express LGBT-related prohibitions. There have been no known successful examples of this to date. As with advocacy against domestic violence and “conversion therapy,” pursuing this strategy will involve engaging frontline service providers.

Second-Parent Adoption

There are single lesbian and gay parents in China whose parental rights are recognized by the state. For example, a person who had a child in a different-sex marriage and managed to obtain custody rights or someone who had a child through IVF or surrogacy abroad. A major difficulty for same-sex couples is that even if one of them has secured parental rights with regard to a child, there are no legally tested cases of the second party in the relationship also establishing parental rights vis-à-vis that child. A common situation is that for same-sex couple parents,

187 Mountford, Tom. “The Legal Status and Position of Lesbian, Gay, Bisexual and Transgender People in the People’s Republic of China.” OutRight Action International (2009), <https://outrightinternational.org/sites/default/files/395-1.pdf>.

188 Rahman, Abid. “Meet the Oprah of China, Who Happens to Be Transgender.” Hollywood Reporter. 1 Nov. 2016, <https://www.hollywoodreporter.com/features/meet-oprah-china-who-happens-be-transgender-942750>.

only one person will have legally-recognized parental rights while the other, as far as the government is concerned, has no relationship with the child.

This puts families led by same-sex couples in a precarious position. A well-known WeChat account, “Three Men in One House” documents the challenges that a gay couple face in raising their son. When their son gets into graduate school abroad, the non-legally-recognized parent is unable to act as a guarantor for his son’s loans. Other obstacles include the non-legally-recognized parent not being able to make medical decisions for their child or sign official documents. If the legal parent were to die, the government would consider the child orphaned. The remaining non-legally-recognized parent would not have means of asserting their rights, and the government or other family members could take over guardianship of the child. The remaining parent could attempt to adopt the child, but this process is long and has no guarantee of success.

Gay and lesbian parents and advocate lawyers are looking into how the guardianship system could be used to ameliorate the above problems. Although different in name, a legal guardian would have many of the same rights and obligations toward the child.

Assisted Reproductive Technology (ART)

To obtain ART services, Chinese law requires women to present a marriage certificate and a permit from the local government. The government will only

grant permits if it deems the services to be medically necessary. Legal ART is unavailable to single women in China, though there is a pending court case by a woman against a hospital for refusing to freeze her eggs.¹⁸⁹

Lesbian women seeking in vitro fertilization (IVF) services may choose to obtain them abroad or by finding providers in China who are willing to look the other way for a price. A lesbian couple shared their experience in an interview with Dr. Jingshu Zhu:

The doctor knew that we were lesbians and was willing to help. Of course, our gifts and “red envelopes” (gift money) are also crucial in maintaining good doctor-patient relationship ... other relevant people were also “taken good care of” (dadian haole). We didn’t come out [to them], and they simply treated me as an “infertile patient” and my partner as an altruistic friend for gestational surrogacy. My “husband” did not show up because we said, “he happened to be busy with his work that day.”¹⁹⁰

According to Dong Xiaoying, from the Advocates for Diverse Families Network, there is no way to guarantee the safety of these underground procedures. The hospitals will not leave written records, and the clients do not have legal recourse in case anything goes wrong.

Entering into a cooperative marriage with a man is a way to meet the marriage certificate requirement, but the state would

189 Wee, Sui-lee, and Elsie Chen. “China Blocked Her From Freezing Her Eggs. So She Sued.” *New York Times*, 23 Dec. 2019, www.nytimes.com/2019/12/23/business/china-egg-freezing-lawsuit.html.

190 Zhu, Jingshu. “Straightjacket: Same-Sex Orientation under Chinese Family Law.” *Leiden University*, 7 Feb. 2018, <https://www.universiteitleiden.nl/en/news/2018/02/straightjacket-same-sex-orientation-under-chinese-family-law>.

recognize the man as the legal father of the child. Parental rights and obligations cannot be given up contractually, so the man in the cooperative marriage would have to be willing to take on the legal role of being a parent and the mother would have to trust that he would not use these rights against her (e.g., by filing for divorce and demanding custody of the child).

Managing to become pregnant is only the first hurdle. After giving birth, a single mother will have to secure the child a residence permit from the government, which will allow the child to access local social services like public education and healthcare. Previously, authorities would deny resident permits to children born to unmarried mothers, but, in 2015, the State Council issued a policy stating that these children can obtain a household registration certificate.¹⁹¹ Still, at least 25 provincial-level jurisdictions have regulations for fining unmarried mothers,¹⁹² which can amount to tens of thousands of RMB.¹⁹³ However, given the CCP's concern with

slowing birth rates, many jurisdictions have stopped levying these fines.¹⁹⁴

Lesbian couples who marry and have children abroad through IVF also encounter difficulties when returning to China. In one case, authorities denied residence permits to twins born in the United States because two women were listed as parents on the birth certificate (the children, US citizens, also had difficulty obtaining visas before a compromise was reached).¹⁹⁵

Lesbian couples who have children through IVF face other risks as well. Chinese law does not recognize same-sex marriage and does not contemplate the possibility of a child having two same-sex parents. If the relationship breaks up, the government will likely only recognize one mother as the legal parent. This issue was at the center of a 2020 court case, in which one woman gave birth to a child using donor sperm and the egg of her same-sex partner, but then later broke up and disputed custody. The court acknowledged that the two women had been in a same-sex relationship, but only awarded custody to the birth mother, writing "According to basic moral values, the maternal relationship is not defined by genetic continuity, but by the emotional

191 State Council Work Office Suggestions on Solving the Problem of Registering Household Registration for People without Household Registration [国务院办公厅关于解决无户口人员登记户口问题的意见]. The State Council of the People's Republic of China. 31 Dec. 2015, http://www.gov.cn/zhengce/content/2016-01/14/content_10595.htm.

192 Jing, Yalong and Lihong Jiang [经亚龙, 江利红]. "On the Definition of the Scope of Social Support Fee Collection for Non-Marital Childbearing" [非婚生育社会抚养费征收范围之界定]. *Public Administration and Law*, 87 (Mar. 2020); Fan, Yiying. "Single Mothers Forced to Pay Fines for Giving Birth." *Sixth Tone*, 14 June 2016, www.sixthtone.com/news/946/single-mothers-forced-pay-fines-giving-birth.

193 Qian, Jinghua. "Gay Mom Asks China's Congress to Allow IVF for Unmarried Women." *Sixth Tone*, 19 Jan. 2017, <https://www.sixthtone.com/news/1843/gay-mom-asks-chinas-congress-to-allow-ivf-for-unmarried-women>.

194 Cai, Xuejiao. "Legislator Proposes Rights Protections for Kids of Unwed Parents." *Sixth Tone*, 5 Mar. 2019, <http://www.sixthtone.com/news/1003639/legislator-proposes-rights-protections-for-kids-of-unwed-parents>; "Baby Shortage Prompts China's Unwed Mothers to Fight for Change." *Bloomberg*, 28 Oct. 2019, www.bloomberg.com/news/articles/2019-10-28/baby-shortage-prompts-china-s-unwed-mothers-to-fight-for-change.

195 Huang, Cecily. "For single mothers and lesbians in China, accessing fertility treatment is a nightmare." *ABC News*, 16 Mar. 2019, <https://www.abc.net.au/news/2019-03-16/ivf-single-women-and-lesbians-in-china/10903864>.

attachment [formed] during months of pregnancy and the ordeal of childbirth.”¹⁹⁶

In a similar ongoing case, a lesbian couple married in the United States and had two children there with donor sperm. Each woman gave birth to one child, but both eggs came from the same mother. After returning to China, the couple split up and one mother took the children to another city to live, against the wishes of the other mother. Their case is now before a court which will determine parental rights if they cannot come to an agreement.¹⁹⁷ LGBT advocates hope the court will take a non-biologically-determinative view of parenthood, especially since the mothers had married – showing their intent to raise their children together – and recognize that both women are mothers to both children. The case has been covered in state media and has received substantial public attention.

Women’s rights and LGBT advocates have been publicly calling on the government to relax policies around the reproductive rights of single women, fueling widespread discussion online. In 2017, a lesbian mother wrote letters to all female NPC delegates asking to make ART services available to unmarried women.¹⁹⁸ In 2019, A Lan, an unmarried woman, posted a viral video on Weibo looking for a man to help her conceive a child, but not get married.

196 Wang Xuandi, “Court Rules on LGBT Couple’s Landmark Child Custody Case.” Sixth Tone, 17 Sep. 2020, <http://www.sixthtone.com/news/1006193/court-rules-on-lgbt-couples-landmark-child-custody-case>.

197 Bochenek, Michael and Kyle Knight. “China’s Lesbian Parenting Case Is a Children’s Rights Issue.” Jurist, 26 May 2020, www.jurist.org/commentary/2020/05/bochenek-knight-china-lesbian-parent-case/.

198 Qian, Jinghua. “Gay Mom Asks China’s Congress to Allow IVF for Unmarried Women.” Sixth Tone, 19 Jan. 2017, <https://www.sixthtone.com/news/1843/gay-mom-asks-chinas-congress-to-allow-ivf-for-unmarried-women>.

Mounting public demand for better access to ART and the declining birth rate has led some officials to decide that the time has come to dismantle barriers for unmarried women to give birth. In 2017, NPC delegate Dai Hairong proposed allowing single women access to ART, but the National Health and Family Planning Commission firmly rejected the idea: “legalizing single women’s reproductive rights does not conform to Chinese traditional values, or public order. Restricting single women’s access to reproductive technology shows protection of children’s rights.”¹⁹⁹ In 2019, another NPC delegate Huang Xihua also proposed eliminating restrictions.²⁰⁰ Feng Yuan, a veteran women’s rights advocate, described why China’s older and male decisionmakers fear changing the policy, “They are worried once single women are entitled to reproductive freedom, it would massively impact the current family structure, the relations with men, and current ethical standards.”²⁰¹

Even in the face of these many obstacles, there are increasing numbers of lesbian women in China who are having children. Though a small fraction of the population, lesbian mothers are sharing their stories on social media and offline gatherings, and are coming out to their children’s teachers and friends’ parents – increasing their visibility.

199 Huang, Cecily. “For single mothers and lesbians in China, accessing fertility treatment is a nightmare.” ABC News, 16 Mar. 2019, <https://www.abc.net.au/news/2019-03-16/ivf-single-women-and-lesbians-in-china/10903864>.

200 Zhou, Viola. “Single women can’t have kids in China. This official wants to change that.” Inkstone News, 5 Mar. 2019, <https://www.inkstonenews.com/society/chinese-parliamentary-delegate-advocates-single-mothers-npc/article/3001046>.

201 Huang, Cecily. “For single mothers and lesbians in China, accessing fertility treatment is a nightmare.” ABC News, 16 Mar. 2019, <https://www.abc.net.au/news/2019-03-16/ivf-single-women-and-lesbians-in-china/10903864>.

A Lan summed up her optimism about how the actions of individuals can create more possibilities for the future, “Today the situation is different from the past. Today we can have more choices, and our next generation will have even more diverse choices. By then, a voice will say proudly: ‘my mother has fought for this.’”²⁰²

China’s Ministry of Health issued regulations banning surrogacy in 2001,²⁰³ and continues to impose heavy penalties on service providers. Despite the ban, many people – including LGBT people – have sought illegal domestic surrogacy services. Chinese law does not recognize contracts relinquishing the surrogate’s parental rights. When disputes arise, however, some courts have upheld the custody rights of the non-surrogate parent arguing it is the best interests of the child (particularly if they have been raising the child for a long period of time).²⁰⁴ To the author’s knowledge, such cases have not involved openly lesbian, gay, or bisexual parents. A number of medical and legal experts, as well as government officials, are advocating for lessening restrictions on surrogacy with the aim of benefiting different-sex couples who cannot have children on their own.²⁰⁵

202 Zhang, Phoebe. “Single woman seeks sperm (for IVF).” Inkstone News, 24 Jan. 2019, <https://www.inkstonenews.com/society/chinese-woman-looks-sperm-donors-online/article/3000579>.

203 Measures for the Administration of Assisted Reproductive Technologies [人类辅助生殖技术管理办法]. Ministry of Health, 20 Feb. 2001, <http://www.nhc.gov.cn/fzs/s3576/201808/99ad3444a14340e79c8361ee23b96251.shtml>.

204 Sheng, Menglu, et al. “Chinese Couples Desperate for Children Turn to Illegal Surrogacy.” Caixin Global, 30 May 2017, <https://www.caixinglobal.com/2017-05-30/chinese-couples-desperate-for-children-turn-to-illegal-surrogacy-101095787.html>.

205 “After 45, Almost 90% of Women Are Unable to Have Children, Doctors Suggest Appropriately Opening Up Surrogacy” [“45 岁以后近 90% 女性无生育能力医生建议适当放开代孕”]. Xinhua, 03 Feb. 2017, http://www.xinhuanet.com/health/2017-02/03/c_1120404996.htm.

Those who can afford it, seek more expensive services abroad. There are no prohibitions against bringing a child born by surrogacy in another jurisdiction back to China. Typically, the government will recognize the parent-child relationship established in the overseas jurisdiction (but if both parents are the same sex, it will not recognize both of them). A host of companies provide surrogacy consulting services, including China’s largest gay men’s social networking app, Blued.²⁰⁶ Some services complete fertilization abroad, but then the surrogate mother travels to China to give birth. The father and surrogate might present themselves as unwed parents to the local authorities, and will have to deal with the potential fines and denial of housing registration certificates described above.

The government provided a grant to East China Normal University Professor Wei Wei to research how same-sex couples in China form families.²⁰⁷ Professor Wei predicts that policies will eventually be relaxed, “The government is worried about the birth rate, yet lots of gay couples are keen to have children. I honestly believe China will open up in this regard, to legitimize gay families.”²⁰⁸

206 Lawrence, Dune and David Ramli. “A Chinese Dating App for Gay Men Is Helping Them Have Kids, Too.” Bloomberg, 21 Mar. 2019, <https://www.bloomberg.com/news/features/2019-03-21/a-chinese-dating-app-for-gay-men-is-helping-them-have-kids-too>.

207 Ministry of Education Humanities and Social Science Grant “Research on Same-sex Couple Families Under the Tension of Family and Self” [教育部人文社科项目“家本位和个人本位张力下的同性伴侣家庭研究”]. Wei, Wei. East China Normal University, https://faculty.ecnu.edu.cn/_s6/ww/main.psp.

208 Smith, Jack. “This man is documenting China’s queer spaces.” TimeOut, 24 Oct. 2017, <https://freewechat.com/a/MjM5MjA0OTc4Mg==/2651966177/2>.

Freedom of Expression and Assembly

Freedom of expression and assembly are tightly restricted in China. Although rights to freedom of expression and assembly are enshrined in the constitution, and citizens have tried to invoke these rights, there is no meaningful way to effectuate them. Due to social taboo and political sensitivity, space for LGBT-related speech and assembly is very constrained by state censors and security forces.

Expression

Media controls dating back to the 1990s expressly include “homosexuality” in long lists of prohibited content alongside other subjects that challenge mainstream sexual mores.²⁰⁹ Despite these longstanding prohibitions, LGBT-related content still appears sometimes in television and film. Though her career has not always been smooth, Jin Xing, one of China’s most popular talk show hosts, is an openly transgender woman.²¹⁰ A 2008 popular film in China, “Feicheng Wurao” featured a gay man who confessed his love for his friend, while in the 2016 “Everybody’s Fine” a Chinese father learns to accept that his daughter is in a same-sex relationship. In contrast, “Bohemian Rhapsody,” which was allowed popular release in China, was censored to the point of being practically unintelligible. In an interview with Quartz, Hiro Hua, founder of a popular

Weibo account devoted to LGBT issues, commented on these inconsistencies, “The decision is largely subject to local authorities’ whims. They never give any reasons.”²¹¹

The boundaries of online censorship have also been hard to determine, which leads to more self-censorship. In 2015, film director Fan Popo discovered that his hit 2012 online documentary “Rainbow Mama” – a collection of stories about mothers embracing their LGBT children – was suddenly removed from a number of video sites. Some of the sites explained that they were just following instructions from the State Administration of Press, Publication, Radio, Film and Television (SAPPRFT), to remove the documentary, while SAPPRFT denied any such involvement.²¹² With the help of lawyers, Fan sent Open Government Information (OGI) requests to SAPPRFT asking it disclose any documents related to the removal of his film. SAPPRFT issued a formal response denying the existence of any such documents. Unconvinced, Fan sued in court to compel disclosure. The court held that it could not compel SAPPRFT to disclose documents that do not exist, but because the incorrect office at SAPPRFT responded to Fan’s request, the judge ordered it pay Fan the court filing fee of 50 RMB. SAPPRFT is unpopular, so celebratory news of a filmmaker “winning” in court against it circulated widely online, but Fan’s

209 Film Examination Regulations. Ministry for Radio, Film and Television, 16 Jan. 1997. Translated by Rogier Creemers, <https://chinacopyrightandmedia.wordpress.com/1997/01/16/film-examination-regulations/>.

210 Rahman, Abid. “Meet the Oprah of China, Who Happens to Be Transgender.” *Hollywood Reporter*, 1 Nov. 2016. <https://www.hollywoodreporter.com/features/meet-oprah-china-who-happens-be-transgender-942750>.

211 Steger, Isabella. “Thinking about a gay destination wedding in Taiwan? Not so fast.” *Quartz*, 23 May 2019, <https://qz.com/935170/for-a-change-chinas-censors-have-no-problem-with-gay-moment-in-disneys-beauty-and-the-beast/>.

212 The documentary *Block and Censor* takes an in-depth look at Fan’s case: *Block and Censor*. Dir. Chen Ah Wei. 2017. Film. <https://filmfreeway.com/BlockandCensor>.

documentaries remain off the video sites to this day.²¹³

Legal advocacy targeting censorship revived in 2017 when the China Netcasting Services Association (CSNA), a state-controlled industry association, issued guidelines for video and live streaming sites which, like past regulations, contained a prohibition on depictions of “homosexuality.”²¹⁴ In response, advocates filed dozens of Open Government Information requests to SAPPRFT seeking documents related to the making of this decision and regarding the relationship between SAPPRFT and CSNA, including CSNA’s annual work report submitted to SAPPRFT.²¹⁵ One OGI applicant sued SAPPRFT in court to disclose these documents, but the court ruled that SAPPRFT did not have to provide the documents requested because they either belonged to CSNA (an ostensibly non-government entity) or did not exist.²¹⁶

Mass online protest has achieved more than OGI filings and court cases. In April 2018, Weibo announced a cleanup of illicit content, including pornography, violence, and “homosexuality,” provoking a huge backlash. Weibo users started posting pictures of themselves with the hashtag #IAmGay, with non-LGBT people joining

213 “Gay documentary director won SARFT.” Toutiao. Weibo, 25 Dec. 2015, <https://m.weibo.cn/detail/4390365837059338>.

214 Li, Cheng and Xinyue Zhang. “Online regulations and LGBT rights: A test for China’s legal system.” Brookings, 1 Sep. 2017, <https://www.brookings.edu/opinions/online-regulations-and-lgbt-rights-a-test-for-chinas-legal-system/>.

215 LGBT Rights Advocacy China. “Internet Programming Censorship Guidelines Discriminate Against Gays. What Can you Do?” [“网络节目审核通则歧视同性恋，你可以做什么？”]. WeChat, 30 June 2017, <https://mp.weixin.qq.com/s/YGKOiGoeFv-xU4OG9JdDIw>.

216 Beijing First Intermediate Court Administrative Judgment. First Administrative Court, No. 120 (2018), <https://m.weibo.cn/status/4298770802192217?>

in.²¹⁷ Views and engagements of the hashtag reached one billion.²¹⁸ Lawyers and advocates openly discussed bringing legal action and calling investors. After two days, Weibo caved and rescinded the order.

Shortly after, the People’s Daily’s WeChat account weighed in with an op-ed stating, “To a certain degree, respect for and protection of different sexual orientations is a manifestation of a society’s degree of civilization.”²¹⁹ Xiaotie, the director of the Beijing LGBT Center, said Weibo “over analyzed” the regulations.²²⁰ Geng Le, CEO of Blued, reached out to the responsible officials who said that they had just copied content regulations for other media without thinking.²²¹

In January 2019, when CSNA released guidelines for short video platforms, like Douyin, it included bans on “abnormal” sexual relations and “non-mainstream” views on marriage, but it did not expressly list “homosexuality.”²²² Geng Le views this as a step forward. However, other advocates think the guidelines’ language is

217 Hernandez, Javier and Zoe Mou. “I Am Gay, Not a Pervert: Furor in China as Sina Weibo Bans Gay Content.” New York Times, 15 Apr. 2018, <https://www.nytimes.com/2018/04/15/world/asia/china-gay-ban-sina-weibo.html?auth=login-email&login=email>.

218 LGBT Expression on Weibo Index Report [LGBT 微博发声指数监测报告]. Voice of Comrades. Relevant portions viewable at: Longarino, Darius. Twitter, 27 June 2019, <https://twitter.com/DariusLongarino/status/1144100986073436160?s=20>.

219 Yi Nuo. “‘Fireworks of a Different Color’ can also Bloom.” People’s Daily Commentary. WeChat, 15 Apr. 2018, https://mp.weixin.qq.com/s/DvQGVmHrgn_yfVCg-2xYAA.

220 Zhang, Yiqian. “Chinese gay apps stop short of fighting homosexual ban on social media.” Global Times, 17 Apr. 2018, <http://www.globaltimes.cn/content/1098382.shtml>.

221 Lawrence, Dune and David Ramli. “A Chinese Dating App for Gay Men Is Helping Them Have Kids, Too.” Bloomberg, 21 Mar. 2019, <https://www.bloomberg.com/news/features/2019-03-21/a-chinese-dating-app-for-gay-men-is-helping-them-have-kids-too>.

222 Detailed Implementation Rules for Online Short Video Content Review Standards. China Netcasting Services Association, 9 Jan. 2019, http://www.cnsa.cn/index.php/infomation/dynamic_details/id/69/type/2.html.

sufficiently broad to cover LGBT-related content. In February 2019, Douyin cited content violations when deleting posts made by a gay couple about their daily life,²²³ and in April 2019 Weibo deleted popular hashtags for lesbian issues catalyzing another wave of online protest. One was restored while the other remains blocked.²²⁴

In November 2018, a young woman received a ten-year prison sentence for publishing “danmei” fiction depicting sex and romance between men. The charges focused on her work’s pornographic content and the fact that it was published illegally, but many commented on the absurdly severe sentence.²²⁵ Despite such instances of cracking down, danmei fiction is still being published.²²⁶

Assembly

Authorities also stringently limit space for offline activities. When Changsha activist, Xiang Xiaohan organized a small Pride march in Changsha without a permit, he was put in administrative detention for fifteen days.

In order to get around restrictions for large gatherings, LGBT advocates have framed their events as Rainbow Marathons or Rainbow Hikes to get permission

(or at least giving police an excuse to look the other way). Attendees at some of these activities can number in the hundreds, and require extensive prior negotiation with the police to avoid the event getting shut down.

Conferences and workshops are also often shut down. In 2014, state security officers raided a hotel to detain nine LGBT advocates who were going to attend a small seminar the next day on how to legally register their organizations. In detention, one of the officers told them, “Homosexuals need to be reformed. It is like for people who are coprophiles. If we don’t help them to change the habit of eating feces, how can our society progress?”²²⁷

It is hard to determine the reason behind when police choose to exert pressure and when they do not, if there is one. In May 2018, advocates were held in detention for several hours and forced to cancel their event, Speak Out, where LGBT people share their stories. After being released, one of them told Reuters, “They were very clear in telling us we couldn’t organize activities in Xi’an [the capital city of Shaanxi province] again, and that they didn’t welcome gays.”²²⁸ Yet, later that summer a conference for LGBT-Friendly Mental Health Counselors was held in Xi’an.²²⁹

223 Voice of Comrades. “Douyin’s discrimination against LGBT people exposed.” Weibo, 14 Feb. 2019, https://www.weibo.com/1664065962/HgFT7az4I?type=comment#_rnd1586759588822.

224 Chen, Laurie. “Censorship of Chinese Lesbian Site Ends, but Another Forum Remains Blocked.” South China Morning Post, 16 Apr. 2019, www.scmp.com/news/china/society/article/3006334/rainbow-victory-chinas-online-lesbian-community.

225 Shepherd, Christian. “Ten Years’ Jail Term for Chinese Author of Homoerotic Novel Sparks Outcry.” Reuters, 19 Nov. 2018, www.reuters.com/article/us-china-censorship/ten-years-jail-term-for-chinese-author-of-homoerotic-novel-sparks-outcry-idUSKCN1N00RH.

226 Danmei. Web. 11 Apr. 2020. <https://www.danmei.la/>.

227 Feder, J. Lester. “Nine LGBT Activists Arrested in China – But Gay Pride March Still Planned.” BuzzFeed News, 9 May 2014, <https://www.buzzfeednews.com/article/lesterfeder/nine-lgbt-activists-arrested-in-china-but-the-countrys-most>.

228 Blanchard, Ben. “China police detain gay activists after Xian event canceled.” Reuters, 31 Mar. 2017, <https://www.reuters.com/article/us-china-lgbt/china-police-detain-gay-activists-after-xian-event-canceled-idUSKBN18R168>.

229 “First National LGBT-Friendly Consultants Forum Ended.” Zhuang Ni Psychology. WeChat, 12 Jul. 2018, <https://mp.weixin.qq.com/s/CJh5lI7oCBUPfDmpbWp1YQ>.

Before it was shut down, the most high-profile offline event was Shanghai-PRIDE, a weeks-long festival that features art and film exhibitions, dance parties, NGO fairs, and choir performances. In its twelve-year run, ShanghaiPRIDE grew in size and profile, but disbanded in 2020 due to increased pressure from authorities.²³⁰

LGBT advocates also often hold events in secret or semi-secret, with the exact location and time only being announced at the last minute, lowering the chances it will be noticed in time by police. In recent years, the game of cat and mouse has become more difficult as the Chinese Communist Party tightens its grip on civil society.

Legal Status of LGBT NGOs

There are dozens of LGBT organizations in China of varying sizes and structures. Some are registered as businesses, others as non-profit social organizations or not registered at all. Some conduct different components of their programming under different legal statuses.

Registering as a non-profit social organization brings benefits, such as favorable tax treatment and the added safety of an official endorsement. But it has drawbacks as well. One leader of an organization said registration was: “Like a double edge sword, a curse, because you have to follow their requirements ... you have to reduce your work on advocacy for rights of the LGBTIQ populations or else you might have your registration cancelled.” The leader continued, “After registration, there

230 Shen, Bruce. “More info on ShanghaiPRIDE shutdown: Team members asked to ‘have tea.’” SupChina, 17 Aug. 2020, <https://supchina.com/2020/08/17/more-info-on-shanghaipride-shutdown-team-members-asked-to-have-tea/>.

(is) a lot of financial reporting, attend[ing] a lot of meetings. And we will not have as much freedom as when we are not registered ... we might not be able to work on topics that are sensitive.” Social organizations are required to have an internal cell of CCP members and can be punished for failing to comply with rigorous compliance and reporting requirements.²³¹ However, if an advocacy organization is registered as a business or not registered at all, it is easier for authorities to justify shutting down the organization or punishing its staff.

It has been easier for organizations that focus on providing services to register. For example, many grassroots MSM groups who do HIV prevention and education have had an easier time getting registered with the Bureau of Civil Affairs. Although oriented toward service provision, these groups sometimes also act as community centers and use their relationship with Chinese Communist Party and government officials to engage them on policy issues.

In contrast, groups focused on LGBT advocacy have had a notoriously difficult time registering with the Bureau of Civil Affairs. PFLAG’s past attempts at registration repeatedly failed, with one response from the government stating, “There is no law that states that homosexuality is legal, therefore we cannot, for the moment, deal with your application.”²³² Ah Qiang, PFLAG’s director, responded, “On the con-

231 Shieh, Shawn. “Remaking China’s Civil Society in the Xi Jinping Era.” *ChinaFile*, 3 Aug. 2018, chinafile.com/reporting-opinion/viewpoint/remaking-chinas-civil-society-xi-jinping-era.

232 Ma, Hua. “Guangdong’s new registration policy for social organizations: progress and challenges.” China Development Brief, 4 Aug. 2014, <http://www.chinadevelopmentbrief.cn/articles/guangdongs-new-registration-policy-social-organizations-progress-challenges/>.

trary, China has no law that states homosexuality is illegal; and, moreover, no law that states heterosexuality is legal. If you are unable to assist us in the registration process, please provide a clear explanation in writing.”²³³ In another meeting, a local government official suggested to Ah Qiang removing the word “gay” from the organization’s name before trying again.²³⁴ Ah Qiang refused. Other organizations have tried to play the game by packaging themselves differently, “We don’t think we can register as an LGBT organization, so we are attempting with the themes youth, development, gender, etc., to try to register,” said the leader of a another organization.²³⁵

Government agencies in other locations have given similar responses to the one that Ah Qiang received. When the Changsha Civil Affairs Bureau rejected Xiang Xiaohan’s registration application for his LGBT organization in 2014, he filed an administrative complaint with its supervising department to challenge the decision. Responding to the complaint, the Hunan Province Civil Affairs Department affirmed the local bureau’s decision: “Marriage must be between a man and a woman and the Marriage Law does not recognize homosexual relations ... Therefore, there is no legal basis for setting up a social organization for homosexuals.” The response continued, “Social organizations must respect the constitution, the

law, regulations and policies and may not violate social morals and customs, and homosexuality contradicts our country’s traditional culture and spiritual civilization construction so a group cannot be set up.”²³⁶ Xiang Xiaohan attempted suing the department for defamation in response, but the court declined to hear the case.

In 2014, a Chinese government representative at a session of the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) conveyed a diametrically opposite message, stating, “In China, all persons receive protection of the law, regardless of sexual orientation. They will not be discriminated against because of their sexual orientation. Chinese society is becoming more and more tolerant of them, and there are organizations that specifically provide research and services for them. The relevant organs within the government are doing their best to make things easier for these organizations – for example, by providing them with registration.”²³⁷ Encouraging words, but little happened for LGBT organizations as a result of the government’s statement at the United Nations.

Most organizations continue to persevere in the legal grey zone, and maintain a tense relationship with authorities and the security forces tasked with keeping them in check. One organization leader said, “We do our work with very high visibility ... if

233 Ibid.

234 Li, Amy. “China’s gay rights groups asked to pull out of Shenzhen charity fair.” South China Morning Post. 24 Sep. 2013. <https://www.scmp.com/news/china-insider/article/1316638/chinas-gay-rights-groups-asked-pull-out-shenzhen-charity-fair>.

235 “The Global State of LGBTIQ Organizing: The Right to Register.” OutRight Action International. 7 Aug. 2018. <https://outrightinternational.org/righttoregister>.

236 Tatlow, Didi. “Homosexuality ‘Against Spiritual Civilization,’ Hunan Government Says.” New York Times, 6 Dec. 2013, <https://sinosphere.blogs.nytimes.com/2013/12/06/homosexuality-against-spiritual-civilization-chinese-government-says/>.

237 Comments of Mu Hong, Deputy Director of the National Working Committee on Children and Women of the State Council, Country Review of China under the Convention to End All Forms of Discrimination Against Women, Oct. 2014, https://mp.weixin.qq.com/s/ng7uswLyXR6v5_g_0581xA.

they look for trouble ... we tell them that 'we have been trying to register but you did not allow us to ... we have been trying to be a good citizen and a legal entity but you did not allow us to. In return, we have not even asked 'why did you not let us register?' In this way, they don't bother us."²³⁸

A major blow to funding for LGBT civil society came with the passage of the Foreign NGO Management Law in 2017. Previously, the larger domestic LGBT NGOs had received support from international NGOs and foundations. The draconian requirements of the law have, as the government likely intended, decimated foreign NGOs' cooperative relationships in China. In the lead up to the law being passed, LGBT NGOs scrambled to supplement the imminent loss of substantial funding.

Only some have succeeded. In 2018, the China Social Assistance Foundation, a foundation registered with the Ministry of Civil Affairs, established a special project fund through which PFLAG could raise donations.²³⁹ Without obtaining proper status under the Charity Law, organizations are prohibited from public fundraising, seriously constraining their operational resources. English-language state media framed this development as "a sign that the government has begun to recognize such groups, who can depend less on foreign contributions."²⁴⁰ Some other

organizations have had success in establishing special project funds with foundations, but the pace has been slow. In June 2020, the Beijing LGBT Center announced a special project fund with the ZhenRo Foundation focused on empowering transgender and gender diverse people.²⁴¹

PFLAG and the Beijing LGBT Center have had some success, but the vast majority of LGBT organizations continue operating without non-profit status or access to reliable and legal public fundraising mechanisms. There are some opportunities for temporarily cooperating with foundations to conduct public fundraising, such as through Tencent's 99 Charity Day.²⁴² Organizations have also pursued individual donations through private fundraisers and selling merchandise.

LGBT Student Groups

There are dozens of LGBT student groups in universities throughout China. Many operate "underground," while others are officially recognized by their school. A group's status can vacillate with the political winds at the school. The Global Times reported in 2015, "Back in 2006, Sun Yat-Sen University (SYSU) in Guangzhou, South China's Guangdong Province approved the registration of the first LGBT students' union on the Chinese mainland. But the university revoked its status the following year."²⁴³

238 "The Global State of LGBTIQ Organizing: The Right to Register." OutRight Action International. 7 Aug. 2018. <https://outrightinternational.org/righttoregister>.

239 Power, Shannon. "China's government wants to help LGBTI groups raise money to keep running." Gay Star News, 23 May 2018, <https://www.gaystarnews.com/article/chinas-government-wants-to-help-lgbti-groups-raise-money-to-keep-running/#gs.okj9cy>.

240 Zhao, Yusha. "China to Set up 1st Foundation for LGBT Fund-Raising." Global Times, 22 May 2018, www.globaltimes.cn/content/110362.

241 "Living Under the Sun! Pick the Name for a Foundation for Transgender People!" Beitong Wenhua. WeChat, 3 June 2020, <https://mp.weixin.qq.com/s/zjP69XnaVPidvsGwbyfm7w>.

242 Davis, Kenrick. "China's Charities Court Donations by Going Online." Sixth Tone, 8 Sep. 2017, <https://www.sixthtone.com/news/1000829/chinas-charities-court-donations-by-going-online>.

243 Huang, Jingjing. "Student LGBT Groups Struggle for Approval from China's University Authorities." Global Times, 15 July 2015, www.globaltimes.cn/content/932247.

Registration brings benefits such as a small amount of funding, use of school spaces, the ability to advertise and conduct events openly, and a degree of political protection. An LGBT student organization's success with registration is highly dependent on the school's decisionmakers. Some student organizations have been registered for years and conduct large activities. Other organizations' activities get broken up by campus authorities or have threats made against them by the school for participating in LGBT-related events. In Guangzhou, a student group was declared an illegal organization by the local Civil Affairs Bureau.²⁴⁴ As with LGBT NGOs, schools fear LGBT groups are vehicles of subversion. In 2018, students in

244 "Take a Quick Look! Guangzhou Bureau of Civil Affairs Publishes the Sixth Name List of Illegal Social Organizations" ["速看! 广州市民政局公布第六批涉嫌非法社会组织名单"]. Guangzhou Civil Affairs. WeChat, 8 Jan. 2019, <https://mp.weixin.qq.com/s/4Brk7d9b5Xd50VrK6NfGvQ>.

Wuhan were warned against attending an activity, as "the LGBT event is held by an illegal organization that may collude with the Western powers."²⁴⁵

The overall political environment for LGBT student groups may not be improving, but their growth in number and size shows a generational shift in support for LGBT people. One student leader wrote in the online publication Sixth Tone, "Although the school bureaucracy has remained conservative and reluctant whenever we try to host large-scale events or overtly display our views, it is undeniable that the students themselves have demonstrated a great degree of open-mindedness and acceptance."²⁴⁶

245 Chen, Si. "China's Complicated LGBT Movement." The Diplomat, 1 June 2018, <https://thediplomat.com/2018/06/chinas-complicated-lgbt-movement/>.

246 Zhang, Han. "The Challenges of Leading an LGBT Student Society in China." Sixth Tone, 17 Nov. 2017, www.sixthtone.com/news/1000713/the-challenges-of-leading-an-lgbt-student-society-in-china.



The Future of the LGBT Movement in China

China’s LGBT community is a long way from achieving formal legal equality, but many advocates believe that, despite the grim situation facing civil society, time and momentum are on their side. Social attitudes are changing, more LGBT people are coming out and living their lives openly, and younger generations are entering into positions of influence and responsibility.

Progress in other parts of the world adds to the momentum. Media coverage of developments outside mainland China helps fuel discussions within. Same-sex marriage and LGBT-supportive laws in Taiwan and Thailand undermine arguments that dismiss LGBT rights as “Western,” and advances in Cuba and Vietnam show socialist countries can support LGBT equality too. Changing global norms put pressure on China to strike an LGBT-friendly tone at the United Nations, and as Chinese companies invest and operate abroad they are socialized into legal frameworks and markets that demand non-discrimination. China’s growing global presence has created more arenas for advocates to engage and get their message out.

Rich lived experience around the world also makes cultural conservatives’ “Chicken Little” predictions, like that same-sex marriage will “destroy civilization,”²⁴⁷ ring hollow. Indeed, this lived experience shows inclusion benefits not only LGBT people and their families, but whole societies. This could all incentivize the Chinese Communist Party (CCP) to

247 Jiang, Qing. “Leading Confucian Jiang Qing Discusses Same-sex Marriage: Since Time Immemorial, Human Civilization Has Never Faced Such a Existential Challenge” [“儒家领袖蒋庆论同性婚姻：人类文明亘古未有的毁灭性挑战”]. The Paper, 22 July 2015, https://www.thepaper.cn/newsDetail_forward_1355289.

move forward on inclusion and fairness for Chinese LGBT people – for economic, social, and political reasons, as well as because it is the right thing to do for LGBT people and their families.

Of course, circumstances may deteriorate drastically. The CCP, in facing a decelerating economy, rising tensions with the United States, COVID-19, democracy protests in Hong Kong (which it blamed on foreigners), and a host of other domestic and international challenges, has repeatedly doubled-down on social control and nationalism to shore up its monopoly on power. This has already shrunk the already small space for civil society. The limited remaining space for LGBT advocacy could evaporate if the CCP targets the LGBT movement as a threat or scapegoat. It could pull a page from Putin’s playbook, maligning LGBT people as “foreign agents” “destroying” “traditional values” to stoke anti-foreign sentiment (indeed the CCP has increased its rhetoric promoting traditional culture and values). Given the lack of limits on the CCP’s power and alternatives to CCP-approved voices, this could dismantle much of the LGBT movement’s gains.

Barring such a severe downturn, the LGBT movement is poised to continue to make advancements. This is in part because the movement does not currently depend on high-level government action (e.g., passage of a law) to make progress, but only needs sufficient space for its advocacy work (though, of course, state support and action are ultimately required, and would accelerate positive changes in social attitudes). With space, the movement

can continue engaging individuals and institutions to change hearts and minds, and improve the situation for LGBT people, whether in the family, at school, in the workplace, or healthcare settings, and politically. The creation of more LGBT-friendly policies at the organizational-level or sector-level (e.g., anti-discrimination policies, codes of professional ethics) and more successful examples of LGBT-friendly institutions will be important stepping stones to greater social and legal change.

Working with legal actors to use existing laws to effectuate the rights of LGBT people will also help lay a foundation for further progress. This includes getting more public notaries to assist same-sex couples to draft guardianships agreements, and getting police and ACWF representatives to intervene in cases of domestic violence against LGBT people. Lawyers have a crucial role to play in bringing LGBT rights litigation. In the short term, these actions only help individual cases, but, in accumulation, can create the impetus for making laws more inclusive. “At the end of the day,” observes Qiu Bai (the plaintiff in the lawsuit against the MOE for approving homophobic textbooks), “what we need is new laws to protect the LGBT community.”²⁴⁸

LGBT advocates will continue laying the groundwork for legal reform by making contacts in the National People’s Congress, legislative staff at various ministries, and academics who influence the policymaking

248 Parkin, Siodhbhra. “LGBT Rights-Focused Legal Advocacy in China: The Promise, and Limits, of Litigation.” *Fordham International Law Journal*. Article 7, Volume 41, Issue 5 (2018), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2718&context=ilj>.

process, while trying creatively to share with the public the reality and diversity of LGBT lives and why change is needed; ending discrimination in marriage, work, education, and healthcare arenas will help China and its families, while hurting no one. With a critical mass of public and key stakeholder support, LGBT issues could finally end up on the leadership's agenda.

Once this happens, decision-makers will make a political calculus about whether or not to embrace inclusion. They will consider the intensity of public opinion for and against, possible economic dividends, and the impact on China's global image. They will also be moved by their personal understanding about what it means to be LGBT in China. If the LGBT movement has built enough support by then, these decision-makers could move to affirm and enact LGBT equality.



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