

‘RUNAWAY LEGITIMATION’ AND ITS LIMITS*

LGBTQ Rights in China

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Introduction

In 2018, as lawyers prepared to represent a transgender woman who was suing her employer for discrimination, they focused on how to explain why the law should protect her. Chinese law prohibits employment discrimination based on ‘sex’ but says nothing about gender identity discrimination. To put the case more squarely in the law’s ambit, the lawyers planned to argue that gender identity discrimination was a form of sex discrimination. However, when they appeared in court, the judge moved straight to assessing the evidence. The lawyers observed that it appeared as if the judge just assumed the case was in the law’s scope because ‘he had heard of “discrimination”, and he knew that was bad’.

The lawyers’ concern that the judge would hesitate to accept the lawsuit’s premise was reasonable. Official discourse is near-silent on lesbian, gay, bisexual, transgender, and queer (LGBTQ) issues, and when that silence is broken, the message is usually negative. Chinese law not only lacks express protections for LGBTQ people but in several instances also discriminates against them. Security agents closely surveil LGBTQ advocates and use intimidation, interrogations, and detentions to curtail their work. Censors constrain LGBTQ-related speech.

Why then did the court move into this difficult territory, seemingly naturally? An underlying process, identified by Michael Dowdle as ‘runaway legitimation’, laid the groundwork:

[‘Runaway legitimation’] describes a dynamic in which consistent appeal by a political elite to particular principles in legitimating particular political practices and institutions will cause these principles to become increasingly embedded in those political practices even if the elites making these appeals did not originally believe or intend these practices to actually embody these principles.¹

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The lawyers believed that the judge, although not familiar with LGBTQ issues, had internalized a norm against discrimination. Even without clear guidance from legislation, he extended the law's protection to the plaintiff (though he later ruled she lacked sufficient evidence to prove discrimination occurred).

This chapter surveys examples of how 'runaway legitimation' has created opportunities for LGBTQ rights claims. This dynamic has been both conceptual and, in Dowdle's coinage, 'infrastructural'. On the conceptual side, the Party-state's promotion of citizens' constitutional guarantees of equality, dignity, and human rights—especially those of marginalized groups, such as migrant workers, women, and people with disabilities—has generated greater belief in and respect for these rights among scholars, judges, government officials, and the public.² Such buy-in has increased the willingness of some legal actors to develop and/or accept new understandings of these rights. By changing public opinion through advocacy, China's LGBTQ movement has paved the way for these stakeholders to reason that such rights are inclusive of sexual and gender minorities.

On the 'infrastructural' side, decades of official rhetoric regarding—and actual investment in—strengthening the legal system built paths through which LGBTQ rights claims could be made. The professionalization of courts made them more likely to hear difficult cases and apply legal reasoning in them. This helped LGBTQ rights claims get into court and have a shot at succeeding on the merits. The adoption of transparency and public participation mechanisms, such as channels for submitting comments to lawmakers on draft legislation, also created openings.

Yet, the ground gained through these processes has been limited and is precariously held. There is no 'infrastructure' through which citizens can compel protection of their constitutional rights, most of all against state repression. Rather, the Constitution merely provides a legitimate discursive framework for rights claims that may or may not persuade official decision-makers in lawmaking and litigation. The Party, dominant in the constitutional order, can easily adjust the scope of the Constitution and laws to exclude LGBTQ rights—as well as use rawer forms of suppression against rights claims.

The chapter proceeds as follows: the 'The Legal Position of Sexual and Gender Minorities: From PRC Founding to the Turn of the Century' section gives a brief historical overview of the legal position of sexual and gender minorities in the People's Republic. the 'Arguments for Inclusion: Sexual Minorities as "Vulnerable Groups"' section builds on the work of John Balzano to show how discussions about the rights of 'vulnerable groups' in the early 2000s began to extend to gay people who were increasingly seen as an unjustly marginalized minority rather than as deviants deserving of opprobrium. The 'LGBTQ Rights Claims and the Constitution' section provides examples of how in the 2010s LGBTQ people began to forthrightly assert equal rights claims to courts and lawmakers and how these state actors responded. The 'State Backlash and Runaway Legitimation' section looks at how an emerging state backlash has stymied 'runaway legitimation'.

The Legal Position of Sexual and Gender Minorities: From PRC Founding to the Turn of the Century

From the 1950s through 1970s, high-level official discourse was near-silent on sexual and gender minorities.³ Unlike the Soviet Union, which added a prohibition on male-male sex to its Criminal Code in 1934, the PRC never adopted a similar provision. Still, the actions of the police and legal system reflected a widely held view that homosexuality was an immoral affront to the natural gender order.

The highest level example of a state authority addressing same-sex sex as a legal issue occurred in 1957, when the High Court of Heilongjiang Province requested instructions from the Supreme People's Court (SPC) on how to handle a case involving two men who had consensual sex in a labor camp. At the time, work on a draft Criminal Law was ongoing but incomplete. The Heilongjiang High Court, noting that 'central authorities had yet to set regulations regarding this matter', said its members had two diverging views.⁴ One suggested criminal penalties because the men had 'severely violated social morality', and such behavior 'harms social decency' and 'violates the physiology and functions of the human body'. The other, noting that the sex was consensual, suggested only administrative penalties because 'although its effect was bad, it constitutes a moral matter'. The Heilongjiang High Court noted that the Soviet Criminal Code stipulated a three-to-five-year sentence for male-male sex acts. The SPC responded that 'whether or not consensual sodomy between adults constitutes the commission of a crime awaits a legislative resolution. While the law still does not have an express provision, we believe it is suitable not to handle the situation your court raised criminally'.

Despite the 1957 SPC decision, 'sodomy was routinely interpreted by local courts and police as a crime, and homosexual men were sent to detention centers, labor camps, and prisons'.⁵ Punishments for male-male sex acts would also be 'meted out haphazardly—by participants in mass, Party-mobilized campaigns, by the police, or by the relevant work unit'.⁶ During the Cultural Revolution, homosexuality was regarded as something 'bourgeois, decadent and unnatural'.⁷ People who engaged in same-sex sex were considered 'bad elements', and 'Red Guards initiated attacks on homosexuals as part of broader political attacks on class enemies'.⁸

After the Cultural Revolution, the Party began rebuilding the legal system and passed the Criminal Law in 1979. The new law included the crime of 'hooliganism', a catchall term for a broad and ill-defined set of behaviors authorities perceived as anti-social. Criminalizing 'hooliganism' was one tool in larger political campaigns to rein in wayward beliefs and 'unhealthy' lifestyles emerging in a society that authorities feared was changing too fast to control in the wake of Reform and Opening.⁹ Throughout the 1980s and much of the 1990s, police subjected sexual minorities to harassment and criminal and administrative detention, including reeducation through labor.¹⁰

Julian Gewirtz details how the Party's concern with decadence informed its response to AIDS. A 1984 Ministry of Health directive connected AIDS to 'capitalist countries' serious social problems', including 'homosexuality and intravenous drug use'.¹¹ Consequently, the National AIDS Prevention Plan 1988–1991 stressed 'severely prohibiting prostitution, homosexuality and drug use'.¹² Several prominent officials dubbed AIDS as 'Loving Capitalism Disease', a pun on its Chinese name.¹³

When a health official, Dr. Wan Yanhai, began advancing a community-based approach to AIDS prevention, including counseling hotlines and discussion groups for gay men, authorities responded harshly. In 1993, the Ministry of Public Security ordered a crackdown on a gay men's discussion group co-organized by Dr. Wan. The ministry's order justified the condemnation: 'Homosexual activities distort human nature, violate social morality, corrupt social conduct, destroy family harmony, induce criminality, endanger public order, and are a key channel for the transmission of venereal diseases and AIDS'.¹⁴

As the 1990s went on, it became increasingly clear that repression was not a working strategy for fighting AIDS. Growing pressure from health authorities pushed the

government, if only hesitantly, to see homosexuality ‘as more than a simple matter for the police and labour camps’.¹⁵ Police pressure eased. Lawmakers, as part of a renewed push to rationalize the legal system and improve China’s global image on human rights, removed the pocket crime ‘hooliganism’ from the Criminal Law in 1997 (‘hooliganism’ was replaced with six specific crimes, none of which included same-sex sex).¹⁶ The 2001 Third Edition of the Chinese Classification of Mental Disorders partially depathologized homosexuality and bisexuality.¹⁷ The government also began funding sexual minority men’s community groups to provide health education and services. Many discriminatory policies remained, including censorship guidelines that targeted ‘homosexuality’ alongside ‘sexual perversions’.¹⁸ Nonetheless, a thaw was underway.

Policies that affected transgender people also made progress during this time. In 2002, the Ministry of Public Security provided guidance to local public security bureaus on how to change gender markers on national identification cards for citizens who had completed gender-affirming surgery (GAS).¹⁹ A year later, the Ministry of Civil Affairs, in conjunction with the SPC and National People’s Congress (NPC), advised that citizens could marry in accordance with their new gender marker. Xinhua reported a Ministry of Civil Affairs official as saying that, in their right to marry, ‘transsexuals are the same as other citizens of our country’.²⁰

Arguments for Inclusion: Sexual Minorities as ‘Vulnerable Groups’

The Rights of ‘Vulnerable Groups’

The above policy shifts coincided with deepening market reforms that led to break-neck economic growth, yawning inequality, and social disruption. These transformations, accompanied by the spread of the Internet, stimulated widespread reflections on society and citizenship. In these discussions, the term ‘vulnerable groups (弱势群体)’ gained currency.²¹ According to Balzano, the term originally referred to people who had been disadvantaged by economic reforms, such as workers who were laid off by state enterprises. But over time ‘vulnerable groups’ also began to include people whose disempowerment resulted from long-standing marginalization. ‘At its core’, Balzano wrote, the term was about ‘the law helping certain groups to remedy the extreme economic and social disadvantages that they [could not] resolve on their own through other political, social, or economic means’.²²

In the 1990s and 2000s, the government passed and strengthened a flurry of laws on protecting the rights and interests of youth, elderly people, women, workers, and people with disabilities.²³ New policies also further opened the courthouse door to citizens to effectuate these rights. Commentators framed support for ‘vulnerable groups’ as a key element of implementing political programs of the Party leadership, including Jiang Zemin’s signature ‘Three Represents’, in which the Party represents ‘the fundamental interests of the overwhelming majority of Chinese people’²⁴ and Hu Jintao’s ‘Harmonious Society’ which aimed to reduce social conflict.²⁵ Some officials used the term when trying to rehabilitate the Party’s global image after its bloody crackdown on the 1989 democracy movement. In a 1994 speech, Vice-Chairman of the NPC Standing Committee (NPCSC), Wang Hanbin, recounted state visits to northern European countries whose parliament members asked him about human rights in China. Wang explained that China guarantees citizens’ fundamental rights, exemplified by its laws protecting ‘vulnerable groups’.²⁶

While the term 'vulnerable group' may connote the passive receipt of charity from a paternalist state, several authors used the term to advocate for structuring society on the basis of equal rights and citizenship for all. In 2003, Li Zhanhua, a Suzhou University Law School professor encapsulated this viewpoint in *People's Congress Studying*, 'Under the guidance of the concept of constitutionalism, a harmonious, tolerant, and stable society takes rights as its foundation, because only under a framework of equal rights can members of society not be divided between rich and poor but uniformly all be full members of society'.²⁷

These ideas were not limited to the academy. In 2001, the SPC's *Qi Yuling* decision held for the first time that citizens' constitutional rights were justiciable in court. The decision's author explained the groundbreaking move in *People's Court Daily*, 'Following the development of our nation's social and political life, and the continued strengthening of citizen's rights consciousness, a large volume of disputes have sprung up because the fundamental rights based in the Constitution that citizens enjoy have been infringed'. Since there were often no laws pertinent to the alleged infringements, letting the Constitution 'become the direct legal basis for court judgments is absolutely necessary and urgent'.²⁸ Giving citizens greater agency in demanding protection of their constitutional rights in court raised the specter of 'separation of powers', a threat to the core constitutional principle of democratic centralism.²⁹ The SPC unceremoniously annulled the decision in 2008.

The 2003 Sun Zhigang incident further invigorated discussions about the rights of vulnerable groups and all citizens. In response to public blowback over Sun's tragic death and the police cover-up, the NPC added, 'The State respects and preserves human rights' to Article 33 of the Constitution.³⁰ A burgeoning rights protection movement gained momentum. Networks of lawyers, scholars, and activists used legal strategies, including constitutional arguments,³¹ to advocate for the rights of workers, people with disabilities, people living with HIV/AIDS and Hepatitis B, religious minorities, and people affected by environmental pollution and land dispossession. The rights protection movement's discursive and legal strategies later inspired many LGBTQ activists.

The Rights of Sexual Minorities as 'Vulnerable Groups'

Balzano has shown how media and scholars began portraying sexual minorities as 'vulnerable groups' in the 2000s.³² This section surfaces additional examples from this period, but with a focus on legal professionals who drew this analogy to argue that sexual minorities enjoyed constitutional rights. These examples demonstrate that mainstream figures on official platforms were willing and able to develop the meaning of constitutional values in bold new ways. They are especially impressive since they appeared only a few years after decriminalization and depathologization.

In a 2004 article in *Legal Daily* (a publication under the management of the Party's Central Commission for Political and Legal Affairs), Lei Yongquan, President and Party Secretary of a Primary People's Court in a rural county in Hubei, argued that the Constitution required the legalization of same-sex marriage.³³ Instead of depicting homosexuality as a form of moral degeneration or a foreign import, Lei asserted that gays had 'existed universally in human society—whether in the ancient past or today, in China or abroad, unceasingly'. But gays had been 'regularly ostracized by mainstream culture' and were 'a social minority, a weak [group] in society'. Because "'protection of the weak" is a key part of what it means to be a modern civilized society', the law should recognize gay rights.

Lei based his argument on Article 33 of the 1982 Constitution, which provides that ‘All citizens of the People’s Republic of China are equal before the law’. To appreciate his assertions’ place in the ‘runaway legitimation’ process, it is important to recall that when drafters of the 1982 Constitution adopted Article 33, they had the Cultural Revolution top of mind. A near-identical provision to Article 33 first appeared in the 1954 Constitution, but the radical revolutionary Constitution of 1975 eliminated it and the 1978 Constitution did not bring it back. When the 1982 Constitution was being drafted, Peng Zhen, the Vice-Chairman of the Committee on Constitutional Amendment, urged NPC members that ‘It is imperative to reinstate this provision, for it represents a basic principle that ensures the application of socialist democracy and legality’.³⁴ Referring to the Cultural Revolution’s excesses, Peng stressed that ‘no citizen is allowed to enjoy the privilege of being above the Constitution and the law’.³⁵

But whereas Peng upheld Article 33 as a guardrail against an individual’s abuse of official power, many commentators when discussing ‘vulnerable groups’ saw Article 33 as a kind of ‘equal protection’ clause. Lei took the idea that Article 33 was a safeguard against discriminatory laws and applied it to sexual minorities’ rights. He held that Article 33 ‘requires that homosexuals and heterosexuals are the same [in that they] should receive equal protection of the law and enjoy all the benefits brought through law’. He posited that denying same-sex couples’ access to marriage based on the ‘man and woman’ requirement in the Marriage Law was also a form of gender discrimination that violated Article 33. Writing at a time when only a handful of jurisdictions in the world had legalized same-sex marriage, Lei concluded with a striking aura of confidence and inevitability: ‘when conditions are ripe, legislation should be passed to clearly provide for a system of same-sex marriage’.

In a 2005 article in *Procuratorate Daily* (a publication managed by the Supreme People’s Procuratorate), legal scholar Bo Dalin reflected on a parade of nearly 100 gays and lesbians that had recently proceeded along the Shenzhen waterfront.³⁶ The parade—or a ‘walk’ as it was called to make it less politically sensitive—featured sing-alongs and a gigantic 9-by-11-meter rainbow flag. Bo observed, ‘Looking back on the history of humankind’s rights development, each instance of citizens gaining new rights is accompanied by a struggle or movement’. Now, through public demonstrations, gays in China were ‘proving their existence to society’ and ‘calling for society’s understanding and concern’.

Echoing Lei Yongquan, Bo wrote that ‘the modern rule of law’s respect and guarantee of human rights—especially respect and guarantee of the rights of vulnerable social groups—is the root of solving how to eliminate discrimination against minorities’. Referring to Article 33, he asserted that, ‘national legislators, from the high-level perspective of the Constitution’s respect and safeguarding of human rights and the entrustment of equal rights to citizens, should pay attention to gays’ demands for the right to pursue a happy life, and eliminate society’s discrimination and prejudice toward them ...’. Analogous to Lei’s interpretation of Article 33, Bo was redefining the constitutional guarantee of human rights adopted after the Sun Zhigang incident to include gay rights.

A *Legal Daily* article covering the same parade in Shenzhen asked, ‘Does the Law Need to Have Something to Say about Homosexual Behavior?’ The lead contended, ‘No matter what people think, they are a group that objectively exists’. Zhang Beichuan, a pioneering researcher on HIV/AIDS and sexual minority men, was a key interviewee. Zhang shared survey findings showing that a fifth of gay respondents had been beaten, insulted, blackmailed, or fined after their identities had been revealed to heterosexuals.

Zhang explained that stigmatization caused high rates of suicide ideation and suicide attempts among gays. He then made the 'vulnerable group' analogy, pointing out that the government had passed numerous laws and regulations specifically to protect the rights of women and children, and said that gays, as a similarly large group that contributes to society, should likewise enjoy rights 'to develop jointly with others'.³⁷

In 2006, scholar Zhou Wei also argued for gay rights by analogy in his book *Constitutional Fundamental Rights, Theory, Legislation and Its Application*. But his starting point was not the similarly disadvantaged social positions of sexual minorities and other vulnerable groups. Instead, he saw the 'immutability' of sexual orientation as analogous to the 'immutability' of the characteristics of other vulnerable groups. 'Since the law respects and recognizes certain immutable characteristics, for example, disability, gender, changing of sex, etc.', Zhou wrote, 'then it should also respect and recognize the sexual orientation of gays, which cannot be changed ...'. Zhou asserted that since allowing same-sex couples to marry would not 'infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens' in contravention of Article 51, they should be afforded equal protection as required by the Constitution.³⁸

Like Lei Yongquan, some scholars believed that realizing legal protection for sexual minorities' rights was only a matter of time. After all was this not the logical conclusion of the Constitution's guarantees of equality, dignity, and human rights? Once social acceptance of sexual minorities improved further, the law would follow. In a 2009 article in *Legal System and Society*, a publication that is distributed to several state organs, including the NPC, legal scholar Yang Bingquan predicted, 'following the government's and society's continuing understanding and concern for gays, a vulnerable group in society, and the continuing efforts of the gay community, we believe that fundamental rights of gays will finally receive confirmation and protection of the Constitution and the law'.³⁹

LGBTQ Rights Claims and the Constitution

In the 2000s, dozens of LGBTQ community groups and advocacy organizations formed throughout China. Like the organizers of the Shenzhen pride parade, these groups raised visibility and support through public events, activism, and media outreach. They also built networks of allied academics, journalists, educators, and parents. Starting in 2014, LGBTQ advocates began bringing rights claims to the legal system, often working with rights protection lawyers from other social movements who had become skilled in using the legal 'infrastructure' that had built up in the preceding decades. As lawyers and advocates focused on directly asserting LGBTQ people's rights to equality and dignity, appeals to the 'vulnerable group' frame became less common. This section illustrates the next step in the 'runaway legitimation' process by examining rights claims as they moved from the academy and media into the legal system.

'Conversion Therapy' as a Harm to Dignity

LGBTQ advocate Peng Yanhui had been inspired by how other marginalized groups, like Hepatitis B carriers, had used litigation in their social movements.⁴⁰ In 2014, he launched the first-ever LGBTQ impact litigation case in China, suing a 'conversion therapist' who had tried to 'treat' his homosexuality with electroshock. To lessen the case's

political sensitivity, Peng's lawyer framed the lawsuit as a 'service contract dispute', making it look like a run-of-the-mill commercial case. However, after Peng's powerful testimony at trial, the judge suggested recategorizing the case as an alleged infringement of Peng's bodily rights, health rights, and general personality rights. Peng recalled that this relabeling made it clear that 'the case was about discrimination and dignity, and not about an upset customer'.⁴¹ The court later ruled that since homosexuality was not a mental illness, the therapist's claim that his treatment could 'cure' homosexuality was 'false advertising'.⁴² However, the court also held that the clinic's advertisement that homosexuality could be 'corrected' did not specifically harm Peng's dignity because it was not aimed at him individually.

Commenting on the case, civil law scholars Yang Lixin and Wu Ye contended the court should have recognized the harm to Peng's dignity. They observed that general personality rights ultimately derive from Article 38 of the Constitution, which states, 'The personal dignity of citizens of the People's Republic of China is inviolable'.⁴³ (For context, an official NPC interpretation explains that Article 38's adoption was a response to the 'historical lesson' of the Cultural Revolution in which 'vast numbers of cadres and members of the masses were cruelly persecuted'.)⁴⁴ Although the Constitution is not justiciable, mediating laws 'continually concretize' this fundamental right and need to be implemented to give it meaning.⁴⁵ Since conversion therapy is 'seriously discriminatory toward the personhood of gays', Yang and Wu argued, 'it harms gays' personality rights'.⁴⁶ By not recognizing this harm, the court 'did not exert the effort it should have to change the social position of gays', who were a 'vulnerable group'.⁴⁷

Prohibition of Same-Sex Marriage as a Violation of the 'Freedom of Marriage'

Scholars and advocates have pushed for the legalization of same-sex marriage through petitioning lawmakers, and, in one high-profile instance, litigation. Beginning in 2001, one of China's most famous scholars, Li Yinhe, repeatedly raised proposals for the legalization of same-sex marriage and cited the Constitution's equality and human rights clauses in support.⁴⁸ In 2015, Lin Xianzhi, a retired father of a gay son, sent 1000 NPC delegates letters calling for the legalization of same-sex marriage, quoting the same clauses plus the dignity clause.⁴⁹ Both Li and Lin called on the government to extend legal protections to gays out concern for helping a 'vulnerable group' and improving social harmony.⁵⁰ No lawmakers took up their proposals.

In 2016, Sun Wenlin and his same-sex partner, Hu Mingliang, sued the Changsha Bureau of Civil Affairs for refusing to grant them a marriage license. At the first and second instance, their lawyers claimed that the bureau misapplied the Marriage Law. The lawyers could not ask the court to rule on the constitutionality of the Marriage Law, so they argued that the Marriage Law—which has no explicit prohibition on same-sex marriage—should be interpreted *in light of* the Constitution.⁵¹ They likely knew this was a stretch given the Marriage Law's numerous references to 'man and woman' but it gave them an opportunity to elaborate on why constitutional provisions on the freedom of marriage, human rights, and equality before the law required recognition of same-sex marriage, similarly to how Lei Yongquan and Bo Dalin argued a decade earlier.

The lawyers expounded on the meaning of marriage and why same-sex couples should be given access to the institution. 'Freedom of marriage is the freedom to choose or not choose what kind of person with whom one will live one's life', lawyer Shi Fulong told the

first instance court. 'It is one of the most fundamental freedoms in the Constitution ...'.⁵² Lawyer Huang Simin built on this theme in the second instance, 'Through marriage, an individual participates in social life and carries out self-actualization'.⁵³ Huang put a provocative flourish on the 'objectively exists' argument, stating that, 'Gays have existed since ancient times ... [they] do not emerge or disappear because of changes in regime or law'.⁵⁴

Sun and Hu lost in both instances, but their cases received substantial media attention and sparked extensive discussion in the academy. Influential constitutional law scholar and the dean of Renmin University Law School, Han Dayuan, wrote an article while the case was ongoing, 'Human Dignity, Tolerance, and the Constitution's Safeguarding of Gays Rights'.⁵⁵ He argued that the freedom of marriage is a fundamental right that cannot be limited based on the majority's 'favored morality'. Instead, 'under the guidance of the principles of respecting and safeguarding human rights, we should openly, rationally, and tolerantly rethink the meaning and value in a modern society of the "freedom of marriage" clause in Article 49 of the Constitution'.

Later, in 2019, Han posited a moonshot idea that requests be brought to the NPCSC challenging the 'man and woman' requirement of the Marriage Law as an unconstitutional infringement of 'the freedom of marriage'. Notably, it was only in 1978 that the NPC added 'Men and women shall marry of their own free will', a provision that was present in the 1950 Marriage Law but had not been in the earlier Constitutions.⁵⁶ The 1982 Constitution changed this provision to 'Violation of the freedom of marriage is prohibited' in Article 49. This clause does not refer to 'man and woman' though Article 49's second clause refers to 'husband and wife'. So far, there is no publicly available example of anyone making Han's suggested appeal to the NPCSC.

Advocates have tried to directly appeal to lawmakers to change the law itself. In 2019, when the NPC was soliciting public comments on the draft Civil Code, a network of LGBTQ advocates called Ai Cheng Jia, which included Peng Yanhui and Sun Wenlin, launched a campaign that flooded the NPC with proposals calling for same-sex marriage. The NPC received 213,634 individual submissions on marriage (five times more than any other category). Ai Cheng Jia provided a model letter to send to the drafters that read, 'According to the protection provided to marriage and families by Article 49 of our country's Constitution and its safeguarding of the "freedom of marriage", the legal relationship of same-sex couples needs to be included and protected in the [Civil Code's] Book on Marriage and Family'.⁵⁷ After the Civil Code passed, a lead drafter dismissed the submissions as having been 'copied and pasted'. Ai Cheng Jia responded by emphasizing the breadth of its movement rather than its vulnerability, 'We are in manufacturing, agriculture, the military, schools, and business—every sector and every industry. Our marriages and families need equal protection of the law'.⁵⁸

Employment Discrimination as an Infringement of Equality and Dignity

Recognition of the constitutional rights of LGBTQ people has had the most success in the employment discrimination context. Chinese law prohibits discrimination based on a non-exclusive list of characteristics, including 'sex', and some workplace discrimination lawsuits based on sex and geographic origin have succeeded in court. The development of this area of law has facilitated the 'runaway legitimation' process by providing a solid basis from which to extend protections to LGBTQ people.

Government officials have endorsed this extension in some high-profile instances. For example, at the United Nations Second Universal Periodic Review in 2013, the Chinese

government stated that it had ‘already implemented’ laws prohibiting discrimination based on sexual orientation and gender identity, explaining that ‘China’s Constitution clearly stipulates that all citizens are equal before the law. China prohibits all possible discriminations via enacting specific laws’.⁵⁹ In 2015 and 2016, Sun Xiaomei and other NPC delegates introduced a draft Anti-Employment Discrimination Law into the NPC legislative plan. The draft Sun submitted included prohibitions against discrimination based on sexual orientation, gender identity, and gender expression. In an article, Sun advocated for the passage of the law by stating that equality is a core socialist principle, and that the Constitution provides for equality before the law and respect for human rights.⁶⁰ The draft law is on the backburner, but Sun’s advocacy brought to high-level decision-makers the argument that the Constitution protects sexual and gender minorities.

The Constitution has also exerted influence in court cases. In 2018, the Intermediate People’s Court of Guiyang heard an employment discrimination case brought by a transgender man, ‘Mr. C’. Although the court ruled against Mr. C on evidentiary grounds, it expressed in an unprecedented passage that:

the right to dignity of a natural person is the most fundamental right that should be enjoyed by every citizen. One’s gender identity and gender expression belong under the protected scope of general personality rights. Respect should be given to the gender identity and gender expression of others Laborers should not be treated differently in the course of employ because of their gender identity or expression.⁶¹

The court’s reference to the ‘most fundamental right’ of dignity connected respect for gender identity and expression to Article 38 of the Constitution. The declaration was a breakthrough compared to other LGBTQ employment cases. In another case the same year, a kindergarten teacher at a private school brought a labor dispute against his employer for firing him for being gay. The teacher requested that the arbiter write ‘gay people’s equal employment rights receive the law’s protection’ in the decision. The arbiter reported the request to a provincial-level leader. In the end, the sentence did not appear in the decision.⁶²

Gao Moumou vs. Dang Dang Net went even further than Mr. C’s case and is the best example to date of the Constitution playing a key role in an LGBTQ rights case. It is worth a close-up look: In July 2018, Gao Moumou requested several weeks’ sick leave from her employer, e-commerce giant Dang Dang, to recover from GAS. Gao worked as a high-level director in Dang Dang’s Beijing office for three years where she had presented as male, her sex assigned at birth. Government regulations required Gao to undergo GAS before changing the gender marker on her national identity card. Dang Dang’s human resources department rejected Gao’s request because she had, out of concern for her privacy, blocked out the ‘transsexualism’ diagnosis in the hospital records attached to her leave application (regulations required proof of such a diagnosis to access GAS). Gao later supplemented this information, but Dang Dang still did not approve her application. A few weeks later, Dang Dang fired Gao for excessive absence.

In November 2018, Gao brought Dang Dang to labor arbitration for unlawful dismissal and won. Dang Dang challenged the arbitration decision in civil court and lost. The court ruled that workers have a right to medical leave and employers violate that right by denying leave in an ‘excessively mechanical’ way that ‘does not consider the particularity of a laborer’s illness’.⁶³ On appeal to an intermediate court in Beijing,

Dang Dang argued it could not continue to employ Gao. Dang Dang had detailed its concerns in an offensive letter to Gao, which addressed her as 'Mister'. The letter claimed that colleagues did not wish to share the bathroom with her and that they felt 'unsafe' and 'morally awkward' around her. It also suggested Gao bring her own security guard to work in case as a 'mentally ill person' she had an 'episode' and harmed her colleagues.⁶⁴

The Intermediate People's Court judge handling the case, Dou Jiangtao, shared how he decided the case in an article for *People's Judicature*, a publication managed by the SPC. Judge Dou saw the law lacked express provisions regarding discrimination against transgender people, but 'whether transgender laborers enjoy rights to equal employment and not to experience employment discrimination [was] a premise that had to be clarified in the course of trial'.⁶⁵ Judge Dou's judgment did not cite the Constitution, but he explained how it guided him:

Relevant provisions of the Constitution and the Civil Code all clarify the concept that the personal dignity of citizens of the People's Republic of China (natural persons) is inviolable, and that the personality rights and interests arising from personal dignity receive the equal protection of the law Transgender laborers are independent natural persons and citizens of our country, and should have applied [to them] the provisions of the above-mentioned laws of our country. Their personal dignity should be respected, and the personality rights and interests arising from their personal dignity should receive the equal protection of the law ... employment discrimination toward transgender people implies that the personal dignity of transgender laborers had been infringed in violation of the provisions of the Constitution.

In the final judgment, Judge Dou ruled 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 being discriminated against'. The equality and dignity provisions—adopted into the 1982 Constitution in response to the abuses of the Cultural Revolution—had guided a judge to advance a novel interpretation of the law to protect transgender people's rights.

State Backlash and Runaway Legitimation

Looking at Judge Dou's ruling, one may be tempted to sign on to Yang Bingquan's 2009 prediction. Perhaps LGBTQ advocates could eventually convince a critical mass of state decision-makers to follow the logic of the Constitution to uphold LGBTQ people's rights. But time and space for this kind of engagement may be disappearing. Like Fu Hualing said of the 'fragile autonomy' of private law in China, 'repressive measures of the exceptional state cannot be effectively sealed off'.⁶⁶ Increased repression threatens to foreclose openings created by runaway legitimation, and citizens have no practicable means of legally challenging it.

Around the same time that Judge Dou published his *People's Judicature* article, troubling signs emerged that the Party-state's attitude toward sexual and gender minorities

was worsening (from an already unfriendly position).⁶⁷ Dozens of social media accounts run by LGBTQ student groups were shuttered for ostensibly violating regulations. LGBTQ advocacy groups were forced to close or cease activities. Police and civil affairs bureaus pressured charitable foundations to stop working with LGBTQ civil society organizations, many of whom were not allowed to participate in 99 Charity Day, a crucial public fundraising event. Courts indefinitely stalled pending LGBTQ rights lawsuits without explanation. The Ministry of Culture and Tourism and the China Association of Performing Arts directed broadcasters to stop airing 'sissy' men and other 'abnormal aesthetics'. The vice president of the China TV Drama Screenwriter Working Committee defended a new ban on adaptations of 'boy love' dramas, saying 'influencing the young ones, whose sexual awareness has yet to be fully developed, with such culture is to some extent a crime'.⁶⁸ At the 2022 Two Sessions, an NPC delegate suggested passing legislation to guard against 'subcultures', including 'LGBT culture', that 'corrode' the ideology of young people and infiltrate schools.⁶⁹ These are only some of the publicly available examples.

The backlash is delivering a one-two punch to runaway legitimization. At the infra-structural level, it is squeezing down space for advocacy and cutting off channels for LGBTQ rights claims. At the conceptual level, it threatens to replace the LGBTQ community's voices with others that aim to recast LGBTQ people as a suspect 'subculture' undeserving of equal citizenship.

Conclusion

In *Queer Comrades*, Hongwei Bao recounted a clash between police and a gathering of gay men in Guangzhou's People's Park in 2009. The police told the men that 'this is People's Park. You *gei-lou* shouldn't be here' and tried to drive them out.⁷⁰ Xiaomu, a volunteer for a local queer NGO who regularly visited the park, shot back, 'Since you know that this is the People's Park, and since *tongzhi* are also law-abiding citizens, why can't we stay here?'⁷¹ A crowd of gay men and presumably non-queer passersby formed in opposition to the police. Once it grew large, the police retreated, and the victorious crowd cheered. Reflecting on the dispute about who belonged in People's Park, Bao observed that 'the debate over whether queer people are part of the "people" is a battle for citizenship'. According to the Constitution, 'the people' 'enjoy full citizenship rights' and 'rhetorically rule the country through a 'democratic dictatorship'. Democracy is exercised toward 'the people'. Dictatorship is exercised toward those who are not.

Bao's comments and the emerging state backlash are reminders that runaway legitimization of the constitutional values of equality, dignity, and human rights is at the mercy of more core constitutional principles on the Party's leadership and dominance. How far the Party can or wishes to go in marginalizing China's LGBTQ community is unclear, but it is primarily a political calculus. One significant deterrent will be its assessment of how popular support for LGBTQ people has become, including how many members of the public and officialdom see LGBTQ people as fellow citizens with equal dignity. This support was built up over preceding decades when the LGBTQ movement and its allies had a freer hand in pushing the runaway legitimization process forward, and it may help sustain spaces for the movement until the prerogative state recedes again.

Notes

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