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## LGBT Rights-Focused Legal Advocacy in China: The Promise, and Limits, of Litigation

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ARTICLE

LGBT RIGHTS-FOCUSED LEGAL ADVOCACY IN  
CHINA:

THE PROMISE, AND LIMITS, OF LITIGATION

*Siodhbhra Parkin\**

*ABSTRACT*

*Twenty years after the purported decriminalization of homosexuality in China, the law remains largely silent on the interaction between the LGBT community and the State. This may be about to change. In recent years a number of LGBT civil society organizations in China have embarked on a series of bold legal advocacy campaigns to promote equal rights for LGBT people. As courts have started to publish decisions in cases involving LGBT issues, these campaigns have begun to bear fruit. While the results of these interactions between LGBT communities and the State in courthouses and other legal forums have not always resulted in direct victory for equal rights, many LGBT people and allies are encouraged by both what they have (and have not) seen in these decisions. This paper will review the nature of this mixed progress for equal rights for Chinese LGBT people through a close analysis of three legal cases: 1) The first case brought against private clinics performing conversion therapy on homosexual people; 2) the first labor discrimination case brought by a transgender man; and 3) the first “open government information” and related lawsuits filed in response to homophobic*

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*content in university textbooks. This paper will assess both the underlying domestic cultural shifts and international support partially responsible for the measure of success these cases experienced, and what these outcomes may mean for the LGBT rights movement in the years to come given recent troubling political developments. By analyzing cases from different sectors, this paper will further illustrate the various strains and methods of LGBT rights activism in China today, and the limits they face within the unique constraints of the Chinese political system.*

ABSTRACT.....	1243
I. INTRODUCTION: THE RISE OF LGBT-FOCUSED LEGAL ADVOCACY IN CHINA .....	1245
II. TREATMENT, TOLERANCE, AND TEXTBOOKS: CASE ANALYSES.....	1247
A. The “Treatment” Case: Peng Yanhui v. Xinyu Piaoxiang Psychotherapy Center.....	1248
1. Issue Background .....	1248
2. Case Background .....	1249
3. Case Judgment .....	1250
4. Case Impact.....	1251
B. The “Tolerance” Case: “Mr. C” v. Ciming Health Checkup Center Co., Ltd.....	1253
1. Issue Background .....	1253
2. Case Background .....	1253
3. Case Judgment .....	1254
4. Case Impact.....	1256
C. The “Textbooks” Case: Qiu Bai v. Ministry of Education of the PRC.....	1257
1. Issue Background .....	1257
2. Case Background .....	1258
3. Case Judgment .....	1258
4. Case Impact.....	1260
III. CONCLUSION: ASSESSING THE IMPACT OF LGBT IMPACT LITIGATION .....	1261

*I. INTRODUCTION: THE RISE OF LGBT-FOCUSED LEGAL  
ADVOCACY IN CHINA*

Until very recently, homosexuality has been a largely invisible issue within the legal system of the People's Republic of China ("PRC" or "China"). Indeed, as of this writing, there exists no single law<sup>1</sup> that explicitly mentions by name China's large and largely overlooked Lesbian, Gay, Bisexual, Transgender ("LGBT")<sup>2</sup> community, either as a whole or by subgroup.<sup>3</sup> This remains true in spite of a sharp increase in the social visibility of the LGBT community and related issues over the past few decades, a trend that is the direct result of the sustained advocacy efforts of local LGBT-focused civil society organizations ("CSOs").<sup>4</sup> For many of these LGBT advocates, after years spent "mainstreaming" (*zhuliu hua*) LGBT issues for the Chinese public,<sup>5</sup> the next stop on the road to advance the rights of LGBT people in China was obvious: The courtroom.

The obstacles to this destination have been considerable. Although homosexuality has never been explicitly criminalized in the PRC, from the promulgation of the Criminal Code in 1979 until its revision in 1997, gay men were frequently threatened with persecution

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1. A few government departments do have internal memoranda or administrative policies regulating items such as the delivery of gender-affirming health services for transgender people and censoring media content containing references to homosexual activity. These arbitrarily enforced administrative policies are not formal pieces of legislation, however and have never been considered and/or ratified by a Chinese lawmaking body.

2. In Chinese, the English acronym "LGBT" is rarely used. The far more common Mandarin Chinese terms used to refer to LGBT people include "homosexuals" (*tongxinglian* 同性恋), "bisexuals" (双性恋), "transgender people" (*kuaxingbiezhe* 跨性别者), and the roughly catchall term "comrades" (*tongzhi* 同志) – a tongue-in-cheek play on the common form of address used during the Maoist period, which is now the ubiquitous translation of choice for the English acronym "LGBT." Within the Chinese LGBT community, considerable debate exists about how inclusive or desirable the use of the term "tongzhi" actually is; thus, in this Article, the English acronym "LGBT" will be used.

3. See Stakeholder Submission on Lesbian, Gay, Bisexual and Transgender (LGBT) Rights in China for the 17th Session of the Universal Periodic Review, SEXUAL RTS. INITIATIVE (Oct. 2013), <http://www.sexualrightsinitiative.com/universal-periodic-review/upr-submissions-2/#17> [<https://perma.cc/U9PD-C8BZ>]; Timothy Hildebrandt, *Development and Division: the effect of transnational linkages and local politics on LGBT activism in China*, 21 J. CONTEMP. CHINA, 845, 851 (2012).

4. See John Balzano, *Toward a Gay-Friendly China?: Legal Implications of Transition for Gays and Lesbians*, 16 J. L. & SEXUALITY 1, 3 (2007).

5. Interview with Ah Qiang, Dir., Parents and Friends of Lesbians and Gays ("PFLAG") China, in Beijing, China (2014).

under a general law against “hooliganism” (*liumangzui*).<sup>6</sup> Further, while Chinese law itself may have been silent, widespread social and cultural prejudice against LGBT people made many advocates uncertain about how lawyers and judges would treat these issues in court – if the courts would accept such cases at all.<sup>7</sup> There was also the practical issue of locating would-be plaintiffs and lawyers with the time and resources to commit to very public, drawn-out, and often frustrating legal actions. Some advocates also justifiably feared LGBT-branded lawsuits would draw unwelcome attention from groups within the Chinese government that were as likely to arrest and imprison LGBT activists and their lawyers as to allow them access to formal legal channels.<sup>8</sup>

Ultimately, LGBT rights activists persisted in the face of these doubts. As more and more of China’s approximately forty to seventy million LGBT people<sup>9</sup> “came out of the closet” (*chugui*) and began facing more overt discrimination, their legal needs would grow. In spite of the obvious challenges inherent in pursuing LGBT impact litigation (*yingxiangxing susong*), LGBT rights activists increasingly concluded that these people deserved their day in court.

So, in 2013, Chinese LGBT CSOs began seeking out lawyers and legal professionals who would be willing to represent clients in China’s

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6. See GUO XIAOFEI, *HOMOSEXUALITY IN THE EYES OF CHINESE LAW* 49-103 (2007); Harold Tanner, *The Offense of Hooliganism and The Moral Dimension of China’s Pursuit of Modernity, 1979-1996*, 26 *TWENTIETH-CENTURY CHINA*, 1, 13-17 (2000).

7. In China, before a case is opened, the complaint must first be approved by a special case filing department (*li’an ting*) attached to the court and overseen by selected judges. This department will determine whether or not the court will accept and docket the case or reject it. Judges in this department make their decision based on the perceived merits of the complaint and evidence presented. If the case is not accepted, a new complaint must be submitted; options for appeal of a rejection are limited. See generally Nanping Liu & Michelle Liu, *Justice Without Judges: The Case Filing Division in the People’s Republic of China*, 17 *U.C. DAVIS J. INT’L L. & POL’Y* 283 (2011).

8. To an extent, this fears proved justified. One of the lawyers in *Yanzhui Peng v. Xinyu Piaoxiang Center* was detained and questioned for two days in the lead-up to the case decision. Maizi Li, a feminist and LGBT activist and a leader of the “Rainbow Lawyers Network” was detained for 37 days in March 2015. See Jinyan Zeng, *China’s feminist five: ‘This is the worst crackdown on lawyers, activists and scholars in decades,’* *GUARDIAN* (Apr. 17, 2015, 11:18 AM), <https://www.theguardian.com/lifeandstyle/2015/apr/17/chinas-feminist-five-this-is-the-worst-crackdown-on-lawyers-activists-and-scholars-in-decades> [<https://perma.cc/9FTJ-JK8X>].

9. *A Review of Policies and Social Practices on the Human Rights of LGBT People in the PRC*, AIBAI CULTURE AND EDUC. CTR., <http://www.aibai.com/archivesview.php?id=19567> [<https://perma.cc/765Y-7CTT>] (last visited Mar. 15, 2018).

first series of LGBT rights litigation.<sup>10</sup> Through discussions and workshops, often with both financial and technical support from international groups, LGBT CSO advocates sought to encourage legal professionals to take on LGBT clients.<sup>11</sup> For many taking part in these activities, this was the first time they had ever heard the term “LGBT,” let alone had direct contact with the LGBT community.<sup>12</sup> Nevertheless, these interactions had the desired effect. Following these events, dozens of lawyers began offering legal advice to LGBT people over social media and referring or taking on LGBT clients.<sup>13</sup> Loose networks of LGBT-friendly lawyers and legal professionals began springing up on social media and across the country.<sup>14</sup> Now that there were lawyers willing to consider handling cases, LGBT advocacy groups began the process of identifying potential clients and cases that would have the desired impact and, hopefully, set favorable precedents. Three of these “typical cases” (*dianxing anjian*) are analyzed below.

## *II. TREATMENT, TOLERANCE, AND TEXTBOOKS: CASE ANALYSES*

This section will provide an analysis of three landmark cases that typified the recent wave of LGBT impact litigation.<sup>15</sup> The cases considered are the following:

1. The “Treatment” Case: Yanhui Peng v. Xinyu Piaoxiang Psychotherapy Center<sup>16</sup>

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10. Interview with Xiao Tie, Beijing LGBT Ctr., in Beijing, China (2014); Interview with Ah Qiang, Dir., PFLAG China, in Beijing, China (2014); Interview, Xian, Dir., Common Language, in Beijing, China (2014).

11. The Author’s work experience as a Program Officer at the ABA Rule of Law Initiative in Beijing, China (2012-15).

12. The Author’s work experience at LGBT rights workshops (Oct. 2014).

13. The Author’s work experience as a Program Officer at the ABA Rule of Law Initiative in Beijing, China (2014-15).

14. See *Common Language Resource Map*, TONGYULALA, <http://tongyulala.org/referral.php> [<https://perma.cc/537W-3P38>] (last visited June 28, 2018) (containing a summarized list of such organizations).

15. These cases have been selected based on their significance to the contemporary LGBT rights advocacy movement, the variety of the considered causes of action, the different types of outcomes, and the author’s access to individuals directly involved in the cases.

16. Yanhui Peng v. Xinyu Piaoxiang Psychotherapy Center, Beijing Municipality Haidian District People’s Ct. Civ. Judgment, at 12 (Haidian District Civ. Ct. Case No. 16680, 2014) (China).

2. The “Tolerance” Case: Mr. C v. Ciming Health Checkup Center Co., Ltd.<sup>17</sup>

3. The “Textbooks” Case: Qiu Bai v. Ministry of Education of the PRC<sup>18</sup>

*A. The “Treatment” Case: Peng Yanhui v. Xinyu Piaoxiang Psychotherapy Center*

1. Issue Background

In 2001, the Chinese Psychiatric Association issued the third edition of the manual used by Chinese mental health professionals to diagnose and classify diseases, the *Chinese Classification and Diagnostic Criteria of Mental Disorders* (“CCMD”).<sup>19</sup> Years of lobbying efforts by LGBT advocates proved successful in ensuring the CCMD-3 had dropped “homosexuality” as an official medical diagnosis.<sup>20</sup> They were mostly successful; the CCMD-3 does not categorize same-sex sexual attraction as an illness.<sup>21</sup>

However, implementation of this change in diagnostic best practices proved difficult. Even today, large percentages of Chinese mental health professionals still consider homosexuality an illness, and often treat it as such.<sup>22</sup> One form of treatment offered by these practitioners is “conversion therapy” (*niuzhuan zhiliao*), which is purported to change an individual’s sexual orientation and/or gender identity.<sup>23</sup> This type of therapy has been uniformly denounced as

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17. Ciming Health Checkup Company, Ltd. v. “Mr. C,” at 3, Guizhou Province Guiyang City Yunyan District People’s Ct. Civ. Judgment (Dec. 18, 2016) (China).

18. Qiu Bai v. Ministry of Education of the PRC, Beijing Municipality First Intermediate People’s Ct. Admin. Judgment (Beijing 01 Xing Chu, No. 536, Sept. 27, 2016) (China).

19. CHINESE SOC. OF PSYCHIATRY, *ZHONGGUO JINGSHEN ZHANG’AI FENLEI FANG’AN YU ZHENDUAN BIAOZHUN* [CHINESE CLASSIFICATION AND DIAGNOSTIC CRITERIA OF MENTAL DISORDERS], VOL. 3 (2001).

20. See *THE MENTAL HEALTH PROFESSIONS AND HOMOSEXUALITY: INTERNATIONAL PERSPECTIVES* 132-35 (Vittorio Lingiardi & Jack Drescher eds., 2003).

21. The CCMD-3 retained one homosexuality-related mental illness diagnosis: so-called “ego-dystonic homosexuality,” that is, a diagnosis of mental illness for individuals who find themselves severely anxious or troubled by their same-sex sexual orientation or attraction. (This diagnosis is also recognized in a number of other jurisdictions.)

22. See *THE MENTAL HEALTH PROFESSIONS AND HOMOSEXUALITY*, *supra* note 20, at 133.

23. Interview with Peng Yanhui, the Plaintiff (May 19, 2017).

harmful by professional mental health associations across the world.<sup>24</sup> However, many Chinese LGBT people are still subjected to this harmful practice, often in response to intense pressure from family members.<sup>25</sup>

## 2. Case Background

It was exactly this type of pressure that caused Peng Yanhui, a thirty-year-old gay man from Guangzhou, to seek out conversion therapy services.<sup>26</sup> Using China's most popular search engine, Baidu, Peng identified a mental health clinic that offered conversion therapy, the Xinyu Piaoxiang Psychotherapy Center ("Xinyu Center"). Peng made an appointment and traveled to the clinic for an initial consultation with the Center's director and lead therapist in February 2014. After being told by the therapist that homosexuality could indeed be cured, Peng was subjected to hypnosis and aversion therapy, which involved being subjected to painful electric shocks. Hurt and insulted by what he had experienced, and thoroughly convinced the purported "treatment" could hope to have any effect, Peng returned home to contemplate a response.<sup>27</sup>

After meeting with some lawyers contacted through his local LGBT advocacy network, Peng decided to pursue litigation. In the interest of increasing prospective media attention to the case, Peng and his lawyers decided to sue both the Xinyu Center and Baidu. After several failed attempts to file the case as either a civil or administrative suit, a judge within the filing division of the Beijing Municipality Haidian District People's Court contacted Peng's lawyers and recommended that they list the civil cause of action as a "contract services dispute" (*hetong fuwu jiu fen*) and drop all references to LGBT issues. Peng's legal team complied, and the court formally accepted the case on May 15, 2014.<sup>28</sup>

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24. See AM. PSYCHOLOGICAL ASSOC., REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION (2009).

25. Interview with Peng Yanhui, *supra* note 23.

26. *Id.*

27. *Id.*

28. *Id.*



### 3. Case Judgment

The subsequent judgment was nothing short of momentous in terms of its significance to the LGBT rights movement in China. The three judges writing the decision explicitly acknowledged the fact that homosexuality was not an illness,<sup>29</sup> and further ruled that the Xinyu Center had performed therapy services beyond the remit of its (invalid) license. Peng was awarded compensation for incurred expenses, and while he did not receive additional compensation for pain and suffering (which the court found to be minimal), the court did order the Xinyu Center to issue a formal apology to Peng on its website.<sup>30</sup>

The decision went well beyond what Peng's legal team had expected in another important way: While absolved of any wrongdoing, the court recommended that Baidu stop promoting advertisements for conversion therapy services in the results section for searches using the keywords "gay conversion therapy." To the welcome surprise of many LGBT people, Baidu complied.<sup>31</sup>

A summary of the judgment is provided below<sup>32</sup>:

<b>Cause of Action (<i>anyou</i>)</b>
"Personal dignity right dispute" ( <i>rengē quan jiūfen</i> ). <sup>33</sup>
<b>Key Evidence</b>
<ul style="list-style-type: none"> <li>• Surreptitiously made audio recording of the therapy session (which was accepted by the court, though the judges did note this indicated Peng had had "ulterior motives").</li> <li>• Receipts issued by the Xinyu Center for providing "gay conversion therapy" services.</li> <li>• Excerpts from the CCMD-3 demonstrating homosexuality had not been pathologized, further supported by statements from the World Health Association and the United Nations.</li> </ul>

29. See *Yanhui Peng*, Haidian District Civ. Ct. Case No. 16680, at 12.

30. See *id.* at 16.

31. Interview with Peng Yanhui, *supra* note 23

32. See *Yanhui Peng*, Haidian District Civ. Ct. Case No. 16680, at 1-16.

33. See *id.* This was changed from the initial cause of action at the time the case was filed ("contract service dispute"). According to the final judgment, Peng sued not because of a dispute over provision of medical treatment services, but on the basis that his rights to bodily integrity, health, and dignity had been infringed upon.

<ul style="list-style-type: none"> <li>• Third-party verification of the search results for “gay conversion therapy” made using the Baidu search engine in August 2013.</li> </ul>	
<b>Point at Issue</b>	<b>Court Ruling</b>
Xinyu Center Director Kaicheng Jian did not have a valid license to perform either hypnosis or electroshock therapy.	Affirmed. The court further recommended that administrative agencies responsible for regulating mental health services investigate Kaicheng Jian’s credentials and service record for evidence of wrongdoing.
Homosexuality is not a mental illness and medical treatments purporting to “cure” the condition are unnecessary and illegal.	Affirmed in part. The court did rule that homosexuality is not an illness, but no further conclusions were made about the legality of conversion therapy.
Baidu should bear joint liability for promoting a “sponsored advertisement” for the Xinyu Center, which was practicing harmful and illegal types of mental health therapy.	Denied. Baidu performed due diligence of the Xinyu Center as required under current Chinese law before advertising its services; while it is recommended they stop sponsoring advertisements for “gay conversion therapy” keyword searches, Baidu did not commit any illegal action.
The Xinyu Center and Baidu insulted Peng’s personal dignity as a gay man by offering advertising services that purport to “cure” homosexuality.	Denied. These actions did not constitute an infringement of Peng’s personal dignity rights.

#### 4. Case Impact

This case has become an important advocacy tool for the LGBT community. LGBT advocates even went so far as to submit the judgment to the UN Committee Against Torture during its fifth periodic report on China as evidence that Chinese LGBT people were

being subject to conversion therapy in violation of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>34</sup> The Committee against Torture accepted the judgment and directly asked the Chinese delegation about the issue during its oral review process.<sup>35</sup> Chinese authorities went on record saying that LGBT people deserved protection, one of the first times the Chinese government has gone on record in an international legal setting to affirm the rights of Chinese LGBT citizens.<sup>36</sup>

Unfortunately, later investigations by advocates indicated that the Xinyu Center is still practicing conversion therapy.<sup>37</sup> Peng and other LGBT advocates remain committed to trying to bring the practice to an end, and are currently at work developing a crowd-sourced online map that will “name and shame” the Xinyu Center and other of the many facilities practicing conversion therapy.<sup>38</sup> Efforts are also being made to try and identify other plaintiffs who may be willing to take other conversion therapy practitioners to court. One such case in July 2017 also resulted in victory for a man who sued a psychiatric hospital for subjecting him to involuntary conversion therapy efforts.<sup>39</sup> Groups providing support and advice in the July 2017 suit were also part of the networks that came to Peng Yanhui’s aid in 2014, demonstrating the value of continued community advocacy efforts in combating conversion therapy in China.<sup>40</sup>

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34. Interview with Peng Yanhui, *supra* note 23. See also Siodhbhra Parkin, *Domestic Advocacy and International Law: Fighting ‘Gay Conversion Therapy’ in China*, WOMEN AND GENDER IN CHINA (Feb. 26, 2018), <https://www.wagic.org/blank-2/2018/02/26/Domestic-Advocacy-and-International-Law-Fighting-%E2%80%9CGay-Conversion-Therapy%E2%80%9D-in-China> [<https://perma.cc/PD59-YJ6X>].

35. Interview with Peng Yanhui, *supra* note 23; Parkin, *supra* note 34.

36. See generally U.N. Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Concluding Observations on the Fifth Periodic Report of China, U.N. Doc. CAT/C/CHN/CO/5 (Feb. 3, 2016).

37. Interview with Peng Yanhui, *supra* note 23.

38. *Id.*

39. Associated Press, *Chinese man wins forced gay conversion therapy lawsuit*, THE GUARDIAN (July 4, 2017, 1:19 PM) <https://www.theguardian.com/world/2017/jul/04/chinese-man-wins-forced-gay-conversion-therapy-lawsuit> [<https://perma.cc/28C4-CDNK>].

40. Interview with Peng Yanhui, *supra* note 23.

*B. The “Tolerance” Case: Mr. C v. Ciming Health Checkup Center Co., Ltd.*

1. Issue Background

In China, discriminatory practices against LGBT people in the workplace are common. Survey responses from thousands of Chinese LGBT people reveal that over half of respondents have been subjected to some form of discrimination in the workplace because of their sexual orientation and/or gender identity.<sup>41</sup> This issue is at its root the direct result of a lack of robust protections in law for victims of workplace discrimination.

In spite of many years of spirited advocacy and related impact litigation, China has yet to pass detailed legislation or policies that define “gender discrimination” (*xingbie qishi*). Employees who believe they have been discriminated against on the basis of protected categories such as ethnic origin, race, sex, or religious belief must instead rely on vague protections against such discrimination that are scattered across a few different laws and lack concrete mechanisms for enforcement.<sup>42</sup>

2. Case Background

On April 29, 2015, the Ciming Health Checkup Center Co., Ltd (“Ciming Center”) of Guiyang City terminated “Mr. C,” a transgender man, after only eight days on the job.<sup>43</sup> According to Mr. C, he was fired because his gender marker on his identification documents, which reflected the sex assigned at birth,<sup>44</sup> did not conform to his affirmed gender identity and expression at the time he entered the workforce.

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41. See generally U.N. Development Programme, *Being LGBTI in China: A National Survey on Social Attitudes towards Sexual Orientation, Gender Identity and Expression*, 8 (2016); see also AIBAI CULTURE AND EDUCATION CENTER, *ONLINE SURVEY REPORT ON THE WORK ENVIRONMENT FOR CHINA’S LGBT COMMUNITY 3* (2013).

42. See generally Labour Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., July 5, 1994, effective Jan. 1, 1995); Employment Promotion Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 30, 2007, effective Jan. 1, 2008); Law of the People’s Republic of China on the Protection of Rights and Interests of Women (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 1, 1992, amended August 28, 2005, effective December 1, 2005).

43. Interview with Minghui Liu, the Plaintiff’s Head Lawyer, in Beijing, China (Apr. 19, 2017).

44. It is impossible to change one’s gender marker on official identity documents in China without first undergoing genital gender affirming surgery and submitting the accompanying official medical certification documents.

According to Mr. C, after being pressed by company representatives on the issue, he flatly refused to wear conventionally “feminine” attire or behave in a stereotypically “feminine” way. The employer countered that he had been fired because of substandard performance.<sup>45</sup>

In the year between the firing and filing any legal case, Mr. C voiced many concerns to the LGBT advocacy groups he consulted regarding the costs of pursuing litigation, from the time and money that would be involved to the public scrutiny he was sure to face.<sup>46</sup> Ultimately, he decided that the treatment he had endured had to be called to account.<sup>47</sup> His lawyers subsequently filed a complaint with the labor arbitration committee of Guiyang City on March 7, 2016.<sup>48</sup> In the suit, Mr. C requested relatively little: compensation for services rendered and an apology.<sup>49</sup> When he was granted the former and not the latter, and no finding of wrongful dismissal, he appealed to the Guiyang City Yunyan District People’s Court on April 12, 2016.<sup>50</sup>

### 3. Case Judgment

Neither the initial judgment from the labor arbitration committee nor the appellate decision from the Guiyang City Yunyan District People’s court found in favor of Mr. C’s claim that he was dismissed as a result of gender discrimination.<sup>51</sup> This decision was made even though he had presented fairly damning evidence: A surreptitious recording of his coworker explicitly stating that he was being fired because of his gender identity.<sup>52</sup> During the trial, the judges also heard the testimony of an expert witness who explained the dynamics of covert and overt discrimination against LGBT people to the appellate judge.<sup>53</sup> These judgments instead held that in the absence of more direct evidence that the management had based their decision on Mr.

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45. Interview with Minghui Liu, *supra* note 43.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. Independent of this case, and involving different causes of action, Mr. C and his lawyers filed another lawsuit protesting the violation of his “right to dignity” (*rengē quan*) in April 2017. This case resulted in another partial victory; while the judge did find that Mr. C had been subject to improper treatment by an employer, the court did not find that he had suffered from gender-based discrimination specifically.

51. Interview with Minghui Liu, *supra* note 43.

52. *Id.*

53. See *Ciming Health Checkup Company*, Guizhou Province Guiyang City Yunyan District People’s Ct. Civ. Judgment, at 3.

C’s status as a transgender man, the argument simply could not be supported.<sup>54</sup> Mr. C was awarded back pay and compensation for the illegal termination of a labor relationship, as the company had failed to provide him with a labor contract as mandated by law, but no finding of gender-based discrimination was made.<sup>55</sup>

A summary of the civil judgment appealing the labor arbitration committee’s ruling is provided below<sup>56</sup>:

<b>Cause of Action (<i>anyou</i>)</b>	
“Labor dispute” ( <i>laodong zhengyi jiu fen</i> ).	
<b>Key Evidence</b>	
<ul style="list-style-type: none"> <li>• Mr. C presented to the court three secretly made recordings of conversations between Mr. C and a coworker in which the coworker directly stated he was being fired because he was transgender.</li> <li>• The Ciming Center presented two documents Mr. C claimed were fabricated and the court ultimately could not completely verify:             <ol style="list-style-type: none"> <li>1. “Evaluation of Probation Period Employee Work Performance” alleging the plaintiff’s performance had been substandard; and</li> <li>2. “Ciming Health Checkup Center Labor Union Small Group Decision” showing the labor union representative agreed to termination of Mr. C’s employment.</li> </ol> </li> </ul>	
<b>Point at Issue</b>	<b>Court Ruling</b>
Mr. C’s employment status at the time he was terminated was that of a regular employee, not that of an employee in an initial probationary period.	Affirmed. The court found that because the Ciming Center failed to issue a written labor contract stating otherwise, by law, Mr. C had to be considered a full employee at the time he was terminated.
Mr. C’s employment relationship with the Ciming Center was terminated illegally.	Affirmed. Once again, because the Ciming Center had failed to issue a written labor

54. *Id.*

55. *Id.* at 4.

56. *Id.*

	contract, Mr. C was denied protections guaranteed to him by the Labor Contract Law (2008).
Mr. C's termination constituted discrimination on the grounds that he was transgender.	Denied. The court ultimately did not support Mr. C's claim that he was the victim of discrimination against transgender people. In response to the recording Mr. C presented as evidence, the court stated that because the coworker in the recording was firstly not present in court to be cross-examined, and secondly was not in a management role, her opinions could not be taken as the Ciming Center's official stance towards transgender people.

#### 4. Case Impact

As of this writing, the Mr. C legal saga is ongoing. Early on, in consultation with their client, Mr. C's legal team decided to divide Mr. C's claims into two separate cases<sup>57</sup>: first, a labor dispute case based on the claims of gender discrimination; and second, in this judgment considered here, a civil case based on claims that the Ciming Center had damaged Mr. C's reputation and caused psychological suffering.<sup>58</sup> This strategy ensured the full issue would be reviewed by several different panels of judges, permit the legal team to experiment with different legal strategies, and attract as much media coverage as possible.<sup>59</sup>

Many in the LGBT rights movement community felt this case was a particularly good vehicle for advocacy given the compelling nature

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57. Claim splitting is permissible in certain situations according to Chinese laws governing civil procedure. *See also* Interview with Minghui Liu, *supra* note 43.

58. This second case was filed as part of a "personal dignity right dispute" filed in a civil court on April 17, 2017, which resulted in another unsatisfactory resolution as the court again failed to find that "gender-based discrimination" had taken place. Interview with Minghui Liu, the Plaintiff's Head Lawyer, in Beijing, China (Feb. 2017).

59. Interview with Minghui Liu, *supra* note 43.

of the evidence.<sup>60</sup> Thus, Mr. C was unusually well-represented at trial by a number of lawyers and two expert witnesses. This state of affairs was also reflected in the complex legal strategy deployed in this case, namely, separating different causes of action to ensure Mr. C's case would be assessed by a labor arbitration panel as well as civil law courts.<sup>61</sup> Thanks in part to this strategy, Mr. C's case drew a great deal of domestic and international media coverage, which has helped raise public awareness of discrimination against transgender people, a group that is often overlooked in contemporary media channels.<sup>62</sup>

*C. The "Textbooks" Case: Qiu Bai v. Ministry of Education of the PRC*

1. Issue Background

On August 27, 2014, the Guangzhou-based Gay and Lesbian Campus Association of China ("GLCAC") released an "Investigation and Report on Misinformation and Defamatory Information Regarding Homosexuals in College Textbooks."<sup>63</sup> The report demonstrated that of 90 college textbooks assessed in the study, 40% erroneously identified homosexuality as a type of illness, and over 50% claimed that homosexuality could be cured by conversion therapy.<sup>64</sup> In combination, this report concluded, it is quite difficult for a lay person—such as a young person questioning his or her sexual orientation, like the woman in this case—to access scientifically accurate and neutrally presented information.<sup>65</sup>

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60. *Id.*

61. *Id.*

62. See, e.g., Vanessa Piao, *Transgender Man Was Unfairly Fired, but Bias Not Proved, Chinese Court Says*, N. Y. TIMES (Jan. 2, 2017); *Kuaxingbiezhe C xiansheng: yi yi linghun fangcuo le shenti de "ye er"* [*Transgender man Mr. C: A gentleman's soul put in the wrong body*], SINA NEWS (Aug. 19, 2017, 11:20, AM), <http://news.sina.com.cn/c/2017-08-19/docifykqaw0052487.shtml> [<https://perma.cc/AJP6-MLBW>].

63. *Investigation and Report on Misinformation and Defamatory Information Regarding Homosexuals in College Textbooks*, GAY AND LESBIAN CAMPUS ASS'N OF CHINA (Aug. 27, 2014), <https://pan.baidu.com/s/1kT632Nt> [<https://perma.cc/W9US-JTUK>] (last visited June 28, 2018).

64. Interview with Qiu Bai (May 25, 2017).

65. China also restricts the presentation of content about LGBT people and issues in televised media, classifying homosexuality as an example of "abnormal sexual relationships and behaviors." See *General Principles of Manufactured Television Content*, CHINA TELEVISION DRAMA PRODUCTION INDUSTRY ASS'N <http://www.ctpia.com.cn/exchange/zcxx/2015-12-31/451534140473.shtml> [<https://perma.cc/6SK4-YUCP>] (last visited June 28, 2018).



## 2. Case Background

This was precisely the problem encountered by one college student, “Qiu Bai,” in late 2014.<sup>66</sup> As a college junior, she became troubled by what she was reading about LGBT people in her college psychology textbooks.<sup>67</sup> Qiu Bai knew homosexuality had been officially depathologized in 2001, but many textbooks published as late as 2013 were still ignoring this fact, claiming that homosexuals were abnormal and recommending conversion therapy.<sup>68</sup> Even her classmates studying to become mental health professionals reported that their textbooks—and at times, their instructors—were communicating incorrect information about homosexuality.<sup>69</sup> In response, Qiu Bai began drafting and submitting requests to publishing houses to edit their textbook content.<sup>70</sup> She also wrote letters to her instructors and library staff to remove the offensive textbooks.<sup>71</sup> When these reports and letters failed, she decided to take her grievances to court.<sup>72</sup>

At first, local courts in Guangzhou refused to touch the issue. Only after she embarked on an “open government information” (*xinxi gongkai*, “OGI”)<sup>73</sup> campaign against the Ministry of Education did a court in Beijing agree to hear her appeal when she sued them for not responding to her OGI requests. Qiu Bai was represented in this action by a prominent lawyer in the LGBT rights advocacy committee, whom she had met through various LGBT advocacy activities in Guangzhou.<sup>74</sup>

## 3. Case Judgment

As Qiu Bai’s lawyer had warned her from the very beginning, the judgment to her appeal demanding that the Ministry of Education “execute its lawful duty” by excising scientifically inaccurate and

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66. Interview with Qiu Bai, *supra* note 64.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. This is similar to a Freedom of Information Act (FOIA) request in the United States. See Jamie P. Horsley, *China’s FOIA Turns Eight*, FREEDOMINFO.ORG, (Apr. 28, 2016) <http://www.freedominfo.org/2016/04/chinas-foia-turns-eight/> [<https://perma.cc/8ZW4-KKEM>].

74. Interview with Qiu Bai, *supra* note 64.

homophobic content in textbooks was denied.<sup>75</sup> The ruling was as simple as it was discouraging: Under the Administrative Reconsideration Law (1999), Qiu Bai simply lacked the necessary “legal interest” (*lihai guanxi*) in the outcome of the textbook issue to bring any legal action, as her “rights to bodily integrity, health, property, and education” were not directly or uniquely involved— notwithstanding Qiu Bai’s identity as a gay woman, as the court took pains to mention.<sup>76</sup>

A summary of the judgment is provided below<sup>77</sup>:

<b>Cause of Action (<i>anyou</i>)</b>
“Administrative nonfeasance” ( <i>xingzheng bu zuowei</i> ).
<b>Key Evidence</b>
<ul style="list-style-type: none"> <li>• Documentation certifying the previous exchanges between Qiu Bai and the Ministry of Education.</li> <li>• A series of documents drafted by the Ministry of Education affirming its professional responsibilities in reviewing educational materials, including textbooks.</li> <li>• Copies of the letters Qiu Bai had submitted to the Ministry of Education locating and describing the erroneous content.</li> <li>• Evidence of Qiu Bai’s enrollment in classes at Sun Yat-sen University that required she read textbooks containing the offensive and inaccurate material.<sup>78</sup></li> <li>• Qiu Bai presented extensive evidence demonstrating that the objectionable textbook content was scientifically inaccurate. This included:             <ol style="list-style-type: none"> <li>1. The court judgment from Yanzhui Peng’s case in which the court explicitly stated that homosexuality was not an illness; and</li> <li>2. Copies of the CCMD-3 section pertaining to sexual disorders (which notably did not include homosexuality).</li> </ol> </li> </ul>

75. *Id.*

76. *See generally* *Qiu Bai*, Beijing 01 Xing Chu, No. 536.

77. *See generally* *id.*

78. In presenting this evidence, Qiu Bai explicitly stated that her status as a student in university was ample evidence of her legal interest in the outcome of the textbook issue, as being required to read these materials caused an infringement on her right to dignity. *See generally* *id.*

<b>Point at Issue</b>	<b>Court Ruling</b>
The Beijing Municipality First Intermediate People's Court administrative division had legal standing to hear Qiu Bai's appeal.	Affirmed. The court ruled that according to the Administrative Reconsideration Law (1999), it had the appropriate authority to hear the case, and denied the Ministry of Education's request to reject the suit out of hand.
Qiu Bai had a legal interest in the outcome of the textbook issue sufficient to overrule the Ministry of Education's decision not to issue OGI documents.	Denied. Because Qiu Bai could not demonstrate that her rights had been directly or uniquely harmed because of the textbook content, she could not demonstrate standing sufficient to challenge the Ministry of Education.
The Ministry of Education had neglected its official duties by failing to take action and correct erroneous textbook content about homosexuality.	Neither affirmed nor denied. The court did not rule directly on this question, instead finding it sufficient to say that Qiu Bai lacked a legal interest in the matter.

#### 4. Case Impact

Though Qiu Bai's cause made little progress in the court system, the public attention her case attracted did have a strong positive impact.<sup>79</sup> After her case had been extensively reported on by multiple domestic and international media outlets, one of China's largest and most widely respected educational publishing companies, the China Renmin University Press, announced that it would revise its college-level psychology textbooks to remove offensive homophobic content.<sup>80</sup> In a related development, following the judgment, the Beijing Normal

79. Interview with Qiu Bai, *supra* note 64.

80. Interview with Qiu Bai, *supra* note 64. See Qian Jinghua, *China's Homophobic Textbooks Turn Over a New Leaf*, *SIXTH TONE*, (April 24, 2017), <http://www.sixthtone.com/news/1000050/chinas-homophobic-textbooks-turn-over-a-new-leaf> [https://perma.cc/Z346-PS TY].

University press published an unusually explicit sex education textbook for use in 13 different elementary schools in Beijing that introduce homosexuality as a normal part of human sexuality, indicating publishing houses were indeed paying attention to the case and its fallout.<sup>81</sup>

### *III. CONCLUSION: ASSESSING THE IMPACT OF LGBT IMPACT LITIGATION*

As in any other civil law jurisdiction, with a few exceptions, case precedent has no binding effect in China.<sup>82</sup> That is to say, future Chinese judges hearing new cases touching on LGBT issues and parties will not be legally bound by their colleagues' decisions in this early round of LGBT impact litigation. Nevertheless, the fact that the judges in these cases refrained from making negative moral judgments about LGBT people in their decisions is significant in that it has contributed to a body of legal findings that refrain from formally endorsing the widespread social and cultural prejudice and stigma towards Chinese LGBT citizens. This is in and of itself a reason for guarded optimism about the future interactions between the LGBT community and the Chinese legal system.

In addition, these cases have demonstrated that while courts may fail LGBT plaintiffs, the court of public opinion may be leaning in their favor. The largely sympathetic reporting done by the domestic media towards these cases and plaintiffs is strong evidence of this. As seen directly in both the textbooks and conversion therapy cases, for example, institutions voluntarily took strong action to better protect LGBT people in response to a flood of positive media coverage.<sup>83</sup> Public opinion is thus an important force in the Chinese LGBT rights movement in its own right, even where that force may be diminished by state censorship, and LGBT rights advocates can effectively mobilize it through these types of rights claims.

Nevertheless, while impact litigation will always be a part of broader LGBT rights advocacy strategies, most activists in the community see greater promise in the area of legislative and policy

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81. See *New Editions of the Treasure Life Sex Education Textbook Series and Spark Controversy*, XINHUA NEWS, (Apr. 1, 2017, 5:13 PM), [http://news.xinhuanet.com/politics/2017-04/01/c\\_1120741267.htm](http://news.xinhuanet.com/politics/2017-04/01/c_1120741267.htm) [<https://perma.cc/78F6-MCCC>].

82. See Li Wei, *Judicial Interpretation in China*, 5 WILLAMETTE J. INT'L L. & DISP. RESOL. 87, 87-88 (1997).

83. Interview with Peng Yanhui, *supra* note 23.

advocacy. “Cases are hard to file and hard to win. Without clear laws and policies relating to LGBT issues, there is no obvious ‘hook’ for legal strategy . . . Also, with politically sensitive cases, it can be difficult to know what the judges will say or do,” Qiu Bai herself concludes.<sup>84</sup> She also stated, “At the end of the day, what we need is new laws to protect the LGBT community.”<sup>85</sup>

The government’s stance on issues related to LGBT rights has often been characterized as one of “not supporting, not opposing, and not promoting” (*bu zhichi, bu fandui, bu tichang*).<sup>86</sup> Even with such inspiring examples of impact litigation, this characterization appears to largely continue to hold true. At the same time, as these case analyses have demonstrated, litigation remains incredibly useful as a tool to educate legal actors and the general public about LGBT issues and as a way of identifying future directions for legal and legislative advocacy. However, as the Chinese government has recently initiated new measures to further tighten control of independent civil society – and specifically targeting the support of international groups that have provided guidance and support<sup>87</sup> – the future of these endeavors is unfortunately uncertain

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84. Interview with the Qiu Bai, *supra* note 64.

85. Interview with the Qiu Bai, *supra* note 64.

86. See Tom Mountford, *China: The Legal Position and Status of Lesbian, Gay, Bisexual, and Transgender People in the People’s Republic of China*, OUTRIGHT ACTION INT’L, (Mar. 24, 2010), <https://www.outrightinternational.org/content/china-legal-position-and-status-lesbian-gay-bisexual-and-transgender-people-people%E2%80%99s> [https://perma.cc/RF6N-CRB3].

87. See, e.g., The People’s Republic of China Law on the Management of Foreign Non-Government Organizations’ Activities Within Mainland China (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 28, 2016, effective Jan. 1, 2017) (severely restricting the ability of foreign organizations to fund and otherwise provide support to domestic LGBT rights advocacy groups).