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Straightjacket : same-sex orientation under Chinese family law - Marriage, Parenthood, Eldercare

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The previous three chapters have focused on the everyday legal encounters of same-sex-oriented people in terms of marriage, parenthood and elder-care. This chapter has a different yet closely related perspective, namely, the interaction between Chinese LGBT¹ activists² and the law, as well as their linkage with global activism. This chapter pivots around the following questions: What is buttressing the emergence of LGBT legal activism in China in the 2010s? What efforts have been made by LGBT activists to utilize Chinese and international laws and simultaneously to change them? And what theoretical and political implications can we draw from these attempts?

To answer these questions, it is necessary to first conceptualize (LGBT) activism as a polymorphous and context-bound practice, which will be elaborated in Sections 6.1 and 6.2. Next, some specific legal strategies will be exemplified and analyzed (Section 6.3), including liaising with LGBT-friendly lawyers, initiating impact litigation, participating in legislative procedures, requesting open government information, and resorting to international human rights mechanisms. The concluding Section (6.4) will link this chapter back to the discussion of the straightjacket, Family Law 1, 2, 3 and 4, as well as legal consciousness.

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- 1 The term 'LGBT' is imperfect, in that it does not represent all the gender and sexual minorities. Also, it is politically less correct not to include the 'I' (intersex), 'A' (asexual) and other letters in this alphabetic soup. However, I still use LGBT in this chapter as a shorthand for gender and sexual minorities, which is also the most frequently used term among activists in and beyond China. Although the (legal) activism by and for 'B' (bisexuals) and 'T' (transgenders) in China is relatively scarce, many gay and/or lesbian-focused organizations do include these groups in their causes.
 - 2 For the purpose of this chapter, I take a narrow definition of 'LGBT activists', meaning those who have an aspiration for LGBT people's wellbeing and some knowledge about LGBT rights, and commit part-time or full-time in promoting the good causes they believe in. For a critique of the binary understanding of activist and non-activist, see Yu Qi, 'Identity Terms and Organizing for Women in Same-Sex Relations in Mainland China' (Degree Thesis of Master of Arts in Gender Studies of Central European University, 2013).

6.1 EMERGING CHINESE LGBT ACTIVISM

Existing literature often describes Chinese LGBT movements as ‘politics not that political’³. It has been argued that, considering the riskiness of confrontational politics like marches and protests, Chinese activists usually devote more efforts to grassroots, community-building and publicity-generating activities,⁴ as well as ‘doing the ideological work (*sixiang gongzuo*)’ to increase social acceptance.⁵ It is also said that the difficulty of doing politics on the terrain of ‘rights’ enables a different kind of political creativity in China, which seeks small opening rather than large revolutions.⁶

Indeed, in the past two decades, LGBT activists have carried out various forms of advocacy without directly engaging the law: setting up *tongzhi* hotlines;⁷ conducting HIV / AIDS prevention outreach in cruising parks or bath houses;⁸ coming out on TV;⁹ coming out to family and friends, especially with the help of Mama Wu¹⁰ and other PFLAG parents;¹¹ providing match-making fairs for lesbians and gay men seeking for a cooperative

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- 3 See for instance, Shuxuan Zhou, ‘Globalization and Localization: LGBT, Queer or Tongzhi? —A Review of Tongzhi Movements in Mainland China (全球化与本土化: LGBT, “酷儿”, 亦或是“同志”? : 基于中国大陆同志运动的研究回顾)’, in *Rights and Diversity: Anthology of the Third International Conference of Chinese Sexualities Studies (权利与多元: 第三届中国“性”研究国际研讨会论文集)* (Renmin University Press 2011) at www.webcitation.org/6odPVyCwX.
 - 4 Thomas Chase, ‘Problems of Publicity: Online Activism and Discussion of Same-Sex Sexuality in South Korea and China’ (2012) 36 *Asian Studies Review* 2, 151-170; Elisabeth Lund Engebretsen, *Queer Women in Urban China: An Ethnography* (Routledge, New York, 2014).
 - 5 Lisa Rofel, ‘Grassroots Activism: Nonnormative Sexual Politics in Postsocialist China’ in Wanning Sun and Yingjie Guo (eds) *Unequal China: The Political Economy and Cultural Politics of Inequality* (Routledge, London, 2013) 154-167, 166.
 - 6 Ibid.
 - 7 The first HIV / AIDS hotline is said to be established in 1992, followed by a *tongzhi* hotline and a *lala* one in 1998. To date, besides several local and national *tongzhi* helplines, there is even a legal hotline volunteered by a group of ‘Rainbow Lawyers’, see below, footnote 56 and accompanying text.
 - 8 See John Balzano and Ping Jia, ‘Coming out of Denial: An Analysis of AIDS Law and Policy in China (1987-2006) Feature Articles’ (2006) 3 *Loyola University Chicago International Law Review* 2, 187-212.
 - 9 For instance, ‘Comrade Lovers: A Same-Sex Couple of 21 Years’, *Lu Yu You Yue*, at www.webcitation.org/6fDbbH30J; A popular online entertainment show *Wierdos’ Talk (Qipa Shuo)* openly discussed the issue of whether a gay person should come out to their parents or not in 2015, which went viral but later was taken down by the government.
 - 10 Mama Wu is the first mother in China who stood out to support her gay son, who then became a public figure providing guidance for *tongzhi* children to come out and for parents to accept them.
 - 11 PFLAG is short for Parents and Friends of Lesbians and Gays (*qinyou hui*). Based in Guangzhou, their members now come from all over China. By organizing local and national meetings called ‘Sincere Talks (*ken tan hui*)’, they help *tongzhi* people to come out to their original families.

marriage;¹² conducting capacity-building workshops such as *lala* camps;¹³ exploring the pink market, such as developing lesbian and gay online dating applications;¹⁴ carrying out LGBT-inclusive sex education in university campuses;¹⁵ using performance art to attract media attention on particular LGBT issues;¹⁶ cooperating with LGBT-friendly mainstream media and granting 'Rainbow Awards' to them annually;¹⁷ empowering LGBTs with film-making skills to record their own life, such as the annual documentary workshop 'Queer University' since 2012,¹⁸ to name but a few. All these activities have shown a hybridity of resources and strategies, which are neither copying the West nor being exceptionally Chinese.¹⁹

However, when we say these non-legal advocacies are mainly non-confrontational, we should avoid the misconception that legal activism is always aggressive, antagonizing the authorities, and therefore dangerous in China. As we will see in this chapter, although some activists do openly oppose certain discriminatory laws and policies, there are many other concurrent activities on the spectrum of legal resistance,²⁰ ranging from

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- 12 For instance, the QQ group 'Magic Karma (*qiyuan yisheng*)' established by two lesbians in northeast China is an online space to seek cooperative marriages. They also organize offline events. Likewise, the 'Moon Loving Flower (*yue lian hua*)', a lesbian bar in south-west China, also organizes regular match-making events.
 - 13 *Lala* camp is an annual training camp held in China for Chinese-speaking lesbian activists from China, Hong Kong, Macau, Taiwan and the overseas since 2007. It has become an important ground for breeding young lesbian activists and empowering grassroots lesbian communities in China. See Yip Lo Lucetta Kam, *Shanghai Lalas: Female Tongzhi Communities and Politics in Urban China* (Hong Kong University Press 2013) 3.
 - 14 Current lesbian dating applications include Lesdo, LesPark and The L, and their gay counterparts include Blued and Zank.
 - 15 *Tongyu* and Beijing LGBT center have cooperated with the social-work, psychology or sociology departments in several universities; similarly, the Gay and Lesbian Campus Association of China has liaised with tens of LGBT-friendly university professors in Guangzhou to develop various curricula on sexual and gender diversity. The popular open course Society, Culture and Diverse Gender/Sexuality at Sun Yat-Sen University has attracted hundreds of students and citizens in Guangzhou.
 - 16 One of the most well-known act was the photoshoot of two women in wedding dress at Qianmen Gate in front of the Tiananmen Square in 2009, see documentary 'New Qianmen Gate' made by Popo Fan; a recent performance art is the marriage proposal made by a college girl to another in Guangzhou in their before their graduation, see Owen Churchill, 'University Labels Lesbian Students' Proposal Obscene', 2016 June 30, at www.webcitation.org/60dPYkAc3.
 - 17 China Rainbow Awards, at www.webcitation.org/60dPQAJZS.
 - 18 See Call for Application for Queer University, at www.webcitation.org/6lWTRSNmj.
 - 19 For a discussion of such hybridity, see Raewyn Connell, 'Meeting at the Edge of Fear: Theory on a World Scale' (2015) 16 *Feminist Theory* 1, 49-66; Fran Martin and others, 'Introduction' in Fran Martin and others (eds) *AsiaPacificQueer: Rethinking Genders and Sexualities* (University of Illinois Press, Urbana and Chicago, 2008) 1-28.
 - 20 Harding theorizes three different kinds of resistance: stabilizing, moderate and fracturing resistance. See Harding Rosie, *Regulating Sexuality: Legal Consciousness in Lesbian and Gay Lives* (Routledge, Oxon and New York, 2011). Wieringa also discusses a sliding scale of subversion, in Saskia E Wieringa, *Heteronormativity, Passionate Aesthetics and Symbolic Subversion in Asia* (Sussex Academic Press, Brighton. Chicago, Toronto, 2014).

friendly engagement with the officials to direct lawsuits against the governments. Moreover, if Family Law is not only the statutes on marriage, parenthood and inheritance, then we may have a refined understanding of legal activism, too, which should include the challenges against FL4, namely, the social prejudices and cultural norms that are disadvantageous to the family life of same-sex-oriented people.²¹

6.2 THE STIMULI FOR CHINESE LGBT LEGAL ACTIVISM

While LGBT activism in China has been fruitful for decades in the cultural arena, LGBT legal engagement has only started popping up in recent years. Why is the latter happening in China in the 2010s? Apparently, the aforesaid activities focusing on de-stigmatization and community-strengthening have tested the water and paved the way for bolder attempts to utilize or resist the law, and even to hold the authorities accountable. Other than that, some important factors are also conditioning the burgeoning of legal activism.

First of all, the economic and cultural changes have made homosexuality and indeed non-normative lifestyles of various kinds more acceptable. The encouragement for pursuing individual desires in post-socialist China since 1979 have made Chinese people put less emphasis on collective interests and more on personal happiness.²² As the censorship over online entertainment programs and self-media is less strict than that of television and films, LGBTs have much more space and louder voices on the Internet, although the criteria are often capricious and content-dependent. The availability and anonymity of the Internet also brews the male-male erotic slash fiction sub-culture (*danmei*)²³, which has produced a group of women who endorse male same-sex love (*tongren nv*).²⁴ Admittedly, not all of these women are enthusiastic in promoting legal rights for real-life gay people, but many have expressed their support for LGBT activism.

21 Family Law (FL1, 2, 3 and 4) has been discussed in Section 1.2. FL1 refers to the positive laws on narrowly-defined family-law issues such as marriage, parenthood and inheritance; FL2 covers laws that contain certain family-law aspects; FL3 include the positive laws that impact indirectly but structurally on family; and FL4 refers to informal norms that shape normative family life.

22 Tingting Liu, 'Neoliberal Ethos, State Censorship and Sexual Culture: A Chinese Dating/hook-up App' (2016) July *Continuum: Journal of Media and Cultural Studies* 1-10; Rofel Lisa, *Desiring China: Experiments in Neoliberalism, Sexuality, and Public Culture* (Duke University Press, Durham, 2007).

23 Slash fiction is a genre of fiction that focuses on interpersonal attraction and sexual relationships between characters of the same sex.

24 For a review of *danmei* literature, see Leng Rachel, 'Chinese Comrade Literature, Queer Political Reality, and the Tongzhi Movement in Mainland China' (Undergraduate Honors Thesis, Sanford School of Public Policy, Duke University, 2012).

Meanwhile, more and more companies have seen the potentials of the global pink economy. In addition to investing in LGBT bars, dating applications and the fashion industry, they have also started to cater for same-sex couples' needs for recognition and family life. Some companies provide package tours to the countries where same-sex marriage registration is available for foreigners, so that Chinese same-sex couples can both travel and get legally married there, even though such marriage will very likely to be unrecognized under the Chinese conflict-of-law rules.²⁵ Some offer services for same-sex couples to purchase real estate abroad, to have a surrogate child, or to invest and migrate.²⁶ These activities have necessarily encountered the relevant laws and regulations (or the lack thereof) in China and abroad. These companies often need to carry out thorough legal research, which also indirectly informs their LGBT clients how the heteronormative laws pervade their everyday life. When cooperating with these companies, LGBT activist groups also get to know more about the law and about the opportunities for future advocacy. For instance, in its annual meeting in 2014, PFLAG has cooperated with US-Sino Infertility Bridge, a company helping Chinese clients to conduct surrogacy in the United States. This company introduced the legal and medical knowledge about surrogacy to PFLAG parents in an easily intelligible way.

The globally travelling LGBT rights discourse is also an important catalyst for LGBT legal activism in China. Not everyone knows well what rights LGBTs do or do not have in a certain country, but people nowadays can hardly avoid the eye-catching headlines about the major legal changes in other places, such as the US Supreme Court's landmark decision on same-sex marriage in 2015, or the same-sex marriage campaign in Taiwan. Moreover, in addition to specific rights, the very word 'right' in its broadest sense has been increasingly used by LGBT activists and accepted by the public in China, owing to decades' of law-dissemination works of the party-state. For instance, a feminist-lesbian group Pink Space has argued that there should be a 'right' to pursue sexual satisfaction and happiness without governmental or moral interference.²⁷ Using the rights language without becoming political dissidents therefore seems a feasible means to do legal advocacy in China.

25 See Law of The People's Republic of China on the Laws Applicable to Foreign-related Civil Relations, adopted 28 October 2010, effective 1 April 2011, Article 21, 'Conditions of marriage are governed by the law of the parties' common habitual residence. Absent common habitual residence, the law of their common nationality shall be applied. Absent common nationality, the law of the place where the marriage is concluded shall be applied, if the marriage is concluded in a party's habitual residence or in the country of a party's nationality.'

26 For instance, a real estate company *Wanguo* has set up its 'rainbow affairs department' in 2014, at www.webcitation.org/6qYwjaoV.

27 Rofel, 'Grassroots Activism' (2013) 160-161.

It has been argued that the Chinese LGBT movement has weak transnational linkage, because foreign resources are often funneled through and impeded by the authorities.²⁸ In recent years, however, global connection has become more noticeable in China. For instance, a Chinese expert on HIV/AIDS and gay rights, who is closely allied with grassroots activists, has participated the drafting of the Yogyakarta Principles.²⁹ The International Gay and Lesbian Human Rights Commission, or IGLHRC (now OutRight Action International), has provided training and guidance for a Chinese lesbian group *Tongyu* to utilize the international human rights mechanism.³⁰ The annual legal report and world map on sexual orientation law issued by ILGA (the International Lesbian, Gay, Bisexual, Transgender and Intersex Association), has also been translated into Chinese and used as an educative tool by many activists.³¹ The United Nations Development Program has been providing funding and experts to promote LGBT rights in China, including issuing a country report on the living conditions of LGBT people.³² The American Bar Association (ABA) also launched a LGBT Rights program under its Rule of Law Initiative in China to support local lawyers and activists to engage in legal advocacy.³³

In addition to the socio-economic conditions and the transnational linkage, the wider legal-ideological environment in China is also noteworthy. Previous studies have often emphasized the Chinese authorities' passive and ambivalent stance on LGBT issues, especially their hidden 'three-Nos policy': no approval, no disapproval and no promotion,³⁴ which is to date still largely true. However, what is less discussed is the Chinese party-state's own aspiration for modernization and for the rule of law, even though its

28 Timothy Hildebrandt, 'Development and Division: The Effect of Transnational Linkages and Local Politics on LGBT Activism in China' (2012) 21 *Journal of Contemporary China* 77, 37-41.

29 Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (2007), at www.webcitation.org/6s4SjtYYt. See also, the blog article of the Chinese expert Yanhai Wan, 'Activists in Beijing Celebrate the Issuing of Yogyakarta Principles', 27 March 2007, at www.webcitation.org/6r3wmzn1R.

30 See 'Equal and Indivisible: Crafting Inclusive Shadow Reports for CEDAW', ILGHRC (2009), at www.webcitation.org/6qYxCmKmG. For the details of advocating during CEDAW review, see below, footnote 154 and accompanying text.

31 See Tongyu, *World Map of Tongzhi Rights* (全球同志权益地图), 2013, at www.webcitation.org/6qYxGeRV7.

32 'Being LGBT in Asia: China Country Report', UNDP, Beijing (2014).

33 See footnote 56 and accompanying text.

34 Chin-Fu Hung, 'The Politics of Electronic Social Capital and Public Sphere in Chinese Lala Community: Implications for Civil Society' (2011) 2 *International Journal of China Studies Electronic Social Capital and Public Sphere* 2, 369-388; Elisabeth Lund Engebretsen, 'Intimate Practices, Conjugal Ideals: Affective Ties and Relationship Strategies among Lala (Lesbian) Women in Contemporary Beijing' (2009) 6 *Sexuality Research and Social Policy* 3, 3-14.

effort has often been questioned as superficial.³⁵ According to Andersen's theorization, two sets of infrastructural factors can amply influence the legal opportunities of gay rights advocacy: legal access on the one hand, and substantive and procedural law on the other.³⁶ Two newly-established legal mechanisms in China can illustrate these factors, which indeed have augmented the legal opportunities for LGBT activism.

First, the Regulations on Open Government Information (OGI) in 2008 stipulates that governments at all levels should have an affirmative obligation to disclose 'information that involves the vital interests of citizens, legal persons or other organizations and that needs to be extensively known by the general public'.³⁷ In addition to information that is actively disclosed by the government, people may, 'based on the needs of such matters as their own production, livelihood and scientific-technological research', request information from relevant government agencies.³⁸ Government information to be disclosed on the administrative organ's own initiative should be disclosed within 20 business days from the date the information is produced or changed.³⁹ When receiving an OGI request, administrative organs should reply on-the-spot if possible, otherwise they should provide a reply within 15 business days from receiving a request, or within 30 days in complicated cases.⁴⁰ If those who request for OGI are not satisfied with the reply, they may report it to the higher-level administrative organ, the supervision organ or the department in charge of OGI; they may also apply for administrative reconsideration or file an administrative lawsuit if the process of OGI has infringed their lawful rights.⁴¹

In a nutshell, the compulsoriness of the government to reply, the short time limit to respond and the range of legal remedies have provided civil society groups a swift, legitimate, and politically less sensitive equipment to monitor the government agencies and hold them responsible. As shown in the next section, Chinese LGBT activists have strategically used the OGI mechanism to make rights claims.⁴²

35 Benjamin L Liebman, 'Legal Reform: China's Law-Stability Paradox' (2014) 143 *Daedalus* 2, 96-109.

36 Ellen Ann Andersen, *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (University of Michigan Press, Ann Arbor, 2006).

37 Article 9, Regulations of the People's Republic of China on Open Government Information (中华人民共和国政府信息公开条例), adopted 17 January 2007, effective 1 May 2008.

38 Ibid, Article 13.

39 Ibid, Article 18.

40 Ibid, Article 24.

41 Ibid, Article 33.

42 See below, Section 6.3.4.

Another attempt of the Chinese authorities to advance their level of rule-of-law is the reform of case filing (or docketing, *li'an*) system in 2015,⁴³ which grants LGBT activists easier legal access to courts. It is stipulated, 'for any lawsuit that meets the requirements of the law, the complaint shall be received and a case shall be registered and filed on the spot.'⁴⁴ Previously, a complaint must first pass through a gate-keeping pre-trial review procedure where the case filing division had wide margin of appreciation in deciding whether or not to admit and file a case. That means many people did not even get the chance to prove the claims to the judges. In practice, a court trying to avoid a nettlesome case can use the case filing stage to reject the case. The reformed system now only requires a brief review of formalities and jurisdiction before a case can be filed and heard.

Chinese activists have tactfully utilized the reformed registration system in the same-sex marriage litigation in early 2016.⁴⁵ Although filing the case was then already mandatory and thus almost effortless, and although it did not mean any endorsement of the authorities on same-sex marriage, the activists used the eye-catching words in the newsletters, such as 'making history!' and 'the first same-sex marriage case got successfully filed by court!'⁴⁶ which attempted to give the public an impression that Chinese authorities are taking same-sex couples' needs seriously.

Before moving on, it is important to mention the inconvenience of doing LGBT legal activism in China. In addition to the overall political sensitivity of (sexual) rights activism, there are other difficulties to mobilize the law in China, especially the ineffectiveness of Constitutional or human-rights protection of minority rights. In China's legal system, although the Constitution contains a broad range of human rights allegedly applicable to all citizens⁴⁷, it is not litigable. In other words, the Constitution cannot be cited as a legal source in courts' decisions.⁴⁸ It is impossible to request judicial

43 Notice of the Supreme People's Court on Issuing the Opinions on Promoting the Reform of the Registration System for Case Filing by the People's Courts (最高人民法院关于印发“关于人民法院推行立案登记制改革的意见”的通知), issued 15 April 2015, effective 1 May 2015. Case filing, or立案, means putting the case in file and thereby schedule a hearing. See also, Nanping Liu and Michelle Liu, 'Justice Without Judges: The Case Filing Division in the People's Republic of China' (2011) 17 *Davis Journal of International Law and Policy* 283-342.

44 Notice on Case Filing, footnote 43, para. III (1).

45 See below, footnote 89 and accompanying text.

46 See e.g., 'Historical Moment! China's First Same-Sex Marriage Case Got Filed Today!', *Tongxinglian Bar, Baidu Tieba*, 5 January 2016, at www.webcitation.org/6jDPJkjmE.

47 Constitution of the People's Republic of China (2004 Amendment), adopted and effective 4 December 1982, amended for the fourth time on 14 March 2004, Article 33 (2) and (3).

48 Recent years have witnessed more and more citation of the Constitution in the applicants or defendants' written or oral submissions, which may implicitly influence the courts' decision. For a detailed introduction of the litigability of the Constitution, see Webster Timothy, 'Ambivalence and Activism: Employment Discrimination in China' (2011) 44 *Vanderbilt Journal of Transnational Law* 3, 643-709; Cai Dingjian, 'An Exploration into the Litigability of the Chinese Constitution (中国宪法司法化路径探索)' (2005) 27 *China Journal of Law (法学研究)* 5, 110-124.

review of the constitutionality of a statute, nor is there a Constitutional court or the equivalent institute to deal with civil rights complaints. There also lacks a national human rights institution or Ombudsman⁴⁹ to implement or monitor the Chinese government's claimed commitment to the Constitution or to international human rights conventions.

In sum, the emergence of LGBT legal activism in China is both stimulated and circumscribed by various economic, cultural, political and legal factors in a globalizing China. The next section will look at the specific strategies LGBT activists have used, and how they maximized the legal tools and minimized the risks.

6.3 LGBT ACTIVISTS' ENGAGEMENT WITH THE LAW

As the following text will show, Chinese LGBT legal activists have tactically engaged with the legislature, the courts, the administrative system, and legal professionals like lawyers and law-school teachers to achieve their goals. In addition to using Chinese laws and policies as formal legal sources, activists have also utilized international law to monitor and lobby the Chinese government. The means Chinese LGBT activists use to conduct legal advocacy include liaising with LGBT-friendly lawyers, initiating impact litigation, participating in legislative procedures, requesting open government information, and resorting to international human rights mechanisms. Each subsection will be illustrated by one or more cases, the themes of which cover conversion therapy, film censorship, same-sex marriage, domestic violence, employment discrimination, etc.

6.3.1 Connecting with Lawyers

LGBT activists in China have been trying to find allies among lawyers. Broadly speaking, 'lawyer' can refer to attorneys, to officials and civil servants in the judicial system, to legal scholars or to other people who have had training and a career in relation to law. Of course, the identities of an LGBT person, an LGBT activist and a lawyer can overlap.

One way to connect with lawyers is to liaise with the law professors who are actively pushing forward the Anti-Discrimination Bill.⁵⁰ Although the draft bill is only an academic proposal, not part of the formal legislative procedure, it might be taken seriously by the Standing Committee of

49 See Adriaan Bedner, 'An Elementary Approach to the Rule of Law' (2010) 2 *Hague Journal on the Rule of Law* 1, 48-74.

50 The latest draft is not available online, but according to some activists, the term 'sexual orientation, gender identity and gender expression' is very likely to be included. For an earlier draft of employment non-discrimination law that included sexual orientation, see Employment Non-Discrimination Law of People's Republic of China (Experts' Draft), 2009 March 27, *China Anti-Discrimination Network*, at www.webcitation.org/6qYxX9plb.

the Congress once anti-discrimination law is listed in the legislative plan.⁵¹ LGBT activists have been lobbying these law professors to add the term SOGIE (sexual orientation, gender identity and gender expression) into the definitional clause; alternatively they argue, at least there should be a catch-all term (like 'other aspects') or a broader interpretation of 'gender'. The latter two options are pragmatic compromises, considering SOGIE issues might be too controversial to be included in a bill that has already encountered a lot of resistance.

Working with LGBT activists also inspires law professors to incorporate SOGIE issues in their curriculum. For instance, in a 2013 conference linking academics and LGBT activists, professor Li Ao from Wuhan University said that even if sexual orientation law has not been a separate discipline in their university yet, it has been integrated in the teaching in courses like Constitutional Law, Legal Theories, Civil Law, Social Security Law, etc.⁵² In 2014, activists from *Tongyu* and Beijing LGBT Center participated in a summer training program for human rights professors from law schools all over the country, informing them about SOGIE-related legal issues and seeking cooperation.⁵³

Lawyers are also called on to provide LGBT communities with basic information about the laws in daily disputes involving different-sex marriage or same-sex partnership. For instance, a lesbian group in Chengdu called *Cheng Ai* organized by the owner of the lesbian bar Moon Loving Flowers (*yue lian hua*) has been inviting *lala*-identified lawyers to their cooperative-marriage events – while providing the local community with match-making opportunities, the bar also links them with these lawyers who are considered to understand the community's needs and concerns better than straight ones.⁵⁴ These lawyers would give them free advice regarding general legal issues on cooperative marriage, or provide them with paid services to draft a tailored pre-nuptial contract.⁵⁵

Besides, cooperating with the American Bar Association (ABA), Chinese LGBT activists have organized some training sessions for LGBT-friendly lawyers in several cities, introducing them knowledge about SOGIE, and equipping with some legal toolkit they may use. Having establishing liaison with more lawyers, some LGBT activists founded an informal, unregistered online group called 'Rainbow Lawyers' in 2014, and there are around 250 members in 2016, half of which are lawyers, some of whom are LGBTs

51 For more about the legislative plan, see below, Section 6.3.3.

52 Participant observation in the Theories and Practices of Anti-Discrimination Conference, Beijing, 26 October 2013.

53 See the China Program of the Norwegian Center for Human Rights, at www.webcitation.org/6qYxbyHJg. This program was funded by this Norwegian institute, and co-organized with the China University of Political Science and Law.

54 See Section 3.3.1.

55 Interview with Lan, a lawyer volunteering for Cheng Ai, 16 October 2015.

themselves.⁵⁶ The legal experts have been providing legal advice to LGBT people on various issues via the free legal helpline or paid individual consultation. In the few recent cases of impact litigation and open government information application,⁵⁷ these lawyers not only served as the think tank for the LGBT plaintiffs, but also as allies who disseminate the newsletters within the lawyers' circle or among their non-LGBT acquaintances.

Apart from the lawsuits strategically planned by activists, these lawyers have not received too many requests from ordinary LGBTs. One explanation is that LGBTs prefer other non-legal means of dispute settlement, especially when they do not want to disclose their sexual orientation to the lawyers and judges. Or, when they try to circumvent or even breach the heteronormative law, they might as well pretend not knowing it. However, as more and more LGBT people start to come out, establish and develop their long-term intimate relationships, become parents, obtaining social security and pass on property, it is foreseeable that the need for lawyers to decipher legal languages in formalities and to intervene in disputes will become salient.

Moreover, the existence of a group of allied Rainbow Lawyers and legal scholars may play an important precautionary role against potential backlashes. It has been argued that the major difficulties of LGBT activism in China lie in the nebulous laws and policies, not in well-organized religious-based opposition against LGBT rights as in some other Western or Asian countries.⁵⁸ However, if we acknowledge that the growth of legal activism is partly preconditioned on a resilient authoritarian regime⁵⁹ that tolerates certain conflicting values and speeches, then it is unsurprising that anti-LGBT activities based on religious belief or 'traditional culture' will emerge simultaneously with the increasingly visible LGBT groups. Connecting with LGBT-friendly lawyers can better support activists in a multi-cultural society.

6.3.2 Conducting Impact Litigation

For the purpose of this chapter, impact litigation (or strategic litigation) refers to the strategically planned lawsuits brought by LGBT individuals or groups that claim certain rights according to existing legal sources or that challenge the interpretation or enforcement of law; it seeks not only individual justice but also community well-being.⁶⁰ Impact litigation seems

56 See their Weibo account at www.webcitation.org/6qYxlrHZE.

57 See below Sections 6.3.2 and 6.3.4. So far, most of the impact litigation cases were represented or advised, although not yet initiated, by the Rainbow Lawyers.

58 Chase, 'Problem of Publicity' (2012) 154.

59 See e.g., Gary King, Jennifer Pan and Margarete E Roberts, 'How Censorship in China Allows Government Criticism but Silences Collective Expression' (2013) 2 (May) *American Political Science Review* 1-18.

60 For a comprehensive understanding of impact litigation and its intended and unintended consequences, see Andersen, *Out of the Closets and into the Courts* (2006), 15.

a more effective approach to elicit legal and social change in common-law countries where a case can serve as precedent, and in countries whose legislation can be subjected to judicial review.⁶¹ However, it has also proved important in countries with Roman law traditions, as well as in international human rights bodies.⁶² There is no judicial review of legislation in China, so it is impossible to question the constitutionality of a law and to change it through litigation.⁶³ Yet still, civil lawsuits and administrative cases against the government agencies can make a difference in promoting LGBT rights.

On a side note, there have also been non-strategic court cases in China in relation to SOGIE, which may have wider influences on how lawyers and laypeople understand what is and should be lawful. There are already thousands of judgments containing the word ‘*tongxinglian*’ or ‘*jijian*’ in the online legal-case databases that do not even cover all the court cases in China before 2014.⁶⁴ It is impossible to make an exhaustive list of them. Some of the cases have been discussed in the previous chapters, such as the divorce litigation concerning mixed-orientation couples⁶⁵ and the case concerning the registration of a trademark containing the word ‘butch’⁶⁶.

The first victory of LGBT strategic litigation in China is the case against a psychological clinic that conducted sexual-orientation conversion therapy brought by a gay activist Xiao Zhen (hereinafter ‘the Xiao Zhen case’). Unsatisfied with the current version of Chinese Classification of Mental Disorder (CCMD-3), where self-dysfunctional homosexuality and bisexual-

61 For example, LGBT rights litigation has been an important way of legal mobilization in the United States, see Mary Bernstein, Anna-Maria Marshall and Scott Barclay, ‘The Challenge of Law: Sexual Orientation, Gender Identity and Social Movements’ in Scott Barclay, Mary Bernstein and Anna-Maria Marshall (eds) *Queer Mobilizations: LGBT Activists Confront the Law* (New York University Press, New York and London, 2009) 1-20; Carlos A Ball, *From the Closet to the Courtroom: Five LGBT Rights Lawsuits That Have Changed Our Nation* (Beacon Press, Boston, 2010); Andersen, *Out of the Closets and into the Courts* (2006).

62 See e.g. Gesine Fuchs, ‘Strategic Litigation for Gender Equality in the Workplace and Legal Opportunity Structures in Four European Countries’ (2013) 28 *Canadian Journal of Law and Society* Special Issue 2, 189-208; International Commission of Jurists, *Sexual Orientation, Gender Identity and International Human Rights Law* (ICJ, Geneva, 2009).

63 The legality of a piece of legislation can only be examined by the higher legislative organ, see Legislation Law of the People’s Republic of China, adopted 15 March 2000, revised 15 March 2015, Articles 97 and 100.

64 Full judgments of all courts in China (except for those inappropriate to be publicized) are available online since 2014, as a result of the Provisions of the Supreme People’s Court on the Issuance of Judgments on the Internet by the People’s Courts (最高人民法院关于人民法院在互联网公布裁判文书的规定), Interpretation No. 26, issued 21 November 2013, effective 1 January 2014. I use the official database issued by the Chinese Supreme Court named China Judgments Online at wenshu.court.gov.cn, a case law search engine called Itslaw at www.itslaw.com, as well as PKULaw at www.pkulaw.cn/Case/. Some of the content of these databases overlap, and there are more of the earlier cases on the last one.

65 See Sections 3.4.2 and 4.4.1.

66 See Section 2.2.4.

ity are still listed as mental illnesses,⁶⁷ Xiao Zhen and the activists in Beijing LGBT center wanted to build a case to push for thorough depathologization. However, it is difficult to directly challenge the CCMD-3 in court, as it is a medical standard, not a legal one.

A breakthrough appeared when Mama Xiao-Li, a PFLAG mother of a lesbian daughter, reported that a psychological clinic in Chongqing in southwest China alleged that they could 'cure' homosexuality by using conversion therapy. Previously, several LGBT groups had tried but failed to find a non-activist LGBT person who had gone through conversion therapy, and who was motivated and courageous enough to challenge the malpractices by putting him- or herself under the media spotlight. Having consulted with some activists, legal scholars and a public-interest law firm called Beijing *Yirenping* Center, Xiao Zhen decided to make a case by seeking for treatment on himself.

Before heading to Chongqing, Xiao Zhen used Baidu, a Chinese search engine, to search for the website of the clinic and its advertisement. He found that when he typed in the key words 'homosexuality' (*tongxinglian*) and 'cure homosexuality', the first item shown on Baidu was the link to this clinic, according to the algorithm of a commercial project called Baidu Promotion. He saved the screenshots of both the Baidu search results and the clinic's webpages related to conversion therapy. As expected, both the clinic and Baidu deleted these ads after being sued. Therefore, collecting evidence beforehand turned out crucial. Xiao Zhen decided to sue both the clinic and the giant company Baidu, as the latter could bring more media attention to this case. Another consideration to sue both is the opportunity of forum-shopping – Baidu is registered in Beijing, where the judges are believed to be more open-minded in general than those in Chongqing, a less developed inland city.

Next, Xiao Zhen went to the clinic. He expressed his intention to be turned into a straight person because of the marital pressure from his family. He told the therapist that he felt very anxious and depressed, so

67 The Chinese Classification of Mental Disorders (CCMD-3) of 2001 still includes Sexual Orientation Disorders in the section 'Psychosexual Disorders (Sexual Perversions)', which refers to individuals 'who are not willing to be homosexuals or feel unsure and, on account of this, who may experience anxiety, depression, and mental anguish'; 'some may seek treatment to change their orientation'. See Chinese Society of Psychiatry and Chinese Medical Association, *Chinese Classification and Diagnostic Criteria of Mental Diseases*, 3rd edition (CCMD-3) (中国精神疾病分类与诊断标准第3版) (Shandong Science and Technology Press, Jinan, 2001) Section 62.31 and 32. Similar delimitations of egodystonic sexual orientation were part of the existing WHO classification of mental disorder in the International Statistical Classification of Diseases and Related Health Problems 10th Revision (ICD-10), 1992, F66.1. In the United States, The diagnostic category of 'ego-dystonic homosexuality' was removed from the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders in 1987 (with the publication of the DSM-III-R), yet 'persistent and marked distress about one's sexual orientation' as a form of sexual disorder is still included, which can be considered similar ego-dystonic sexual orientation in ICD-10 or CCMD-3.

he was eager to try the most radical treatment. The counselor consoled him and guaranteed that the conversion therapy could work. He applied both hypnosis and electric shock on Xiao Zhen. He also said the conversion would only take effect after a series of treatments. The whole process was secretly audio-recorded.

Afterwards, Xiao Zhen brought a tort case to Beijing Haidian Trial Court in March 2014, claiming that Baidu and the Clinic had infringed upon his right to health⁶⁸ and the right of general personality⁶⁹, and that both of the defendants had breached the law on advertisements by promoting deceptive information⁷⁰ – deceptive in that they claimed homosexuality can be treated without sufficient scientific evidence. In addition to mental damage compensation, he also requested the court to urge the defendants to apologize publicly.

After discussing with other LGBT activists and lawyers, Xiao Zhen and his lawyer Li, an experienced public interest lawyer, decided to take a pragmatic strategy in court. Instead of emphasizing that homosexuals (and bisexuals) should not be pathologized and treated only because of their sexual orientation, which does not have clear legal basis, they focused on the disqualification of the therapist and the fraudulence of the advertisement. According to China's Mental Health Law, a psychologist shall only conduct counseling, but not provide any medical or physical treatment.⁷¹ Then the key question became whether hypnosis and electric shock can be methods of counseling. However, it turned out this question was not the center of the debate in court, because at a later stage the defendant was found out to be not a senior psychological counselor – he forfeited his senior counselor certificate whereas in fact he was only a level-two counselor, so he might have already breached the law by false advertising.

Although they could have focused on this point to win the case, in the written and oral statements, Xiao Zhen and his lawyer still seized the opportunity to educate the judges on SOGIE issues. They used the existing CCMD-3 to argue that homosexuality has already been deleted as a separate type of sexual disorder in 2001, yet without mentioning the fact that such

68 General Principles of Civil Law, Article 98.

69 China does not have a civil code. In the General Principles of Civil Law of 1986, there are only several specific personal rights, such as the rights of life and health, the rights of name, portraits, reputation and honor (Articles 98-102). However, in judicial practice, the courts have been using the concept of 'the right of general personality' to refer to other unspecified rights in relation to one's dignity and integrity. The above-mentioned specific rights are also stipulated in Tort Law of the People's Republic of China, adopted 26 December 2009, effective 1 July 2010, Article 2.

70 Tort Law, Article 36 (2); The People's Republic of China on Protection of Consumer Rights and Interests, adopted 31 October 1991, revised 27 August 2009, Articles 20, 45 (2), 55; Advertising Law of the People's Republic of China, adopted 27 October 1994, revised 24 April 2015, effective 1 September 2015, Article 38.

71 Mental Health Law of the People's Republic of China, adopted 26 October 2012, effective 1 May 2013, Article 23.

depathologization was incomplete.⁷² The court took seriously this information, as shown in its judgment.⁷³

On the day of the trial, outside the courtroom activists from Beijing LGBT center carried out performance art about electric shock to attract public attention. Meanwhile, several LGBT NGOs also have prepared newsletters throughout the lawsuit and actively invited local and foreign media to interview them, making the case of greater national and international influence. When Xiao Zhen and his lawyer talked to media, they shifted their focus: instead of emphasizing the disqualification of the counselor as they did in the court, they called for broader attention to the mental health of Chinese LGBTs and for full depathologization of homosexuality and bisexuality.

Criticism does exist on impact litigation as such. Xiao Zhen told me that a sexologist who had been dedicated in the revision of CCMD-3 in late 1990s, expressed his concerns: neither the law nor the professional codes of conducts have explicitly prohibited the 'treatment' of homosexuality, so the odd was high that Xiao Zhen might lose the case and set a bad precedent, making the clinics more rampant. He believed the most urgent thing LGBT communities should do is to volunteer to participate in more psychological researches, so as to change law and society with concrete scientific evidence.⁷⁴

Xiao Zhen, like many younger LGBT and feminist activists⁷⁵ who are more proactive and more alert to the disciplinary power of scientific discourses, was not content with simply being 'a little laboratory rat'⁷⁶, passively waiting for the scientists' authoritative diagnosis. He preferred raising public awareness of homosexuality by engaging the court and the new media. Perhaps such divergence is less about the different personalities or the generational gap, but is conditioned on the changing social-legal landscapes concerning homosexuality in China in recent two decades as discussed before.

The decision of the case came in the end of 2014.⁷⁷ In its merits, the court made clear that 'homosexuality is not a mental illness, so the advertisement of conversion therapy is misleading'.⁷⁸ The clinic was required to compensate Xiao Zhen for 3500 RMB, and to apologize on its official website for

72 See above, footnote 67.

73 See below, footnote 77.

74 Interview with Xiao Zhen, 20 June 2014.

75 For the 'youngness' of the contemporary Chinese feminist activism and its rapture and continuation with the feminist legacy, see Liu Wen, Huang Ana and Ma Jingchao, 'Young Activists, New Movements: Contemporary Chinese Queer Feminism and Transnational Genealogies.' (2015) 25 *Feminism and Psychology* 1, 11-17.

76 See above, footnote 74.

77 *Xiao Zhen case*, Trial Court of Haidian District, Beijing, Judgment (2014), No. 16680 (北京市海淀区人民法院民事判决书 (2014) 海民初字第16680号).

78 *Ibid*, 12.

48 hours.⁷⁹ Regarding the responsibility of Baidu, the court decided that as homosexuality is not a well-known topic, it is unreasonable to expect a search engine to sufficiently know the latest classification of mental diseases. The court found that it has already conducted due diligence in examining the license of the clinic, so it should not be responsible for the clinic's unlawful treatment and Xiao Zhen's own decision to undertake electric shock.⁸⁰ The most groundbreaking aspect of the judgment is where the court articulately affirms that 'homosexuality is not a mental illness', although such pronouncement made by a judicial body is actually partly incongruent with the current guideline of the medical authorities.⁸¹

In fact, this case won narrowly, considering the legal ambivalence on what Xiao Zhen called 'defendant fishing'. Eliciting a lawbreaker by intentionally becoming the victim for the sake of lawsuit has been a controversial strategy in public interest litigation in China.⁸² Fortunately, the court accepted the legitimacy of Xiao Zhen's acts. It reasoned, 'despite the purposefulness of the plaintiff to undergo the therapy and sue... the clinic should still be responsible for the damages it caused'.⁸³

Overall, the Xiao Zhen case is strategic in many aspects: the case was 'plotted' by an activist together with those at the Beijing LGBT Center, rather than simply about a gay person seeking for justice after suffering conversion therapy; since the act was well planned, the audio evidence and screenshots were carefully collected during the treatment; the choice of Baidu as a second defendant and the forum shopping for a friendlier court was thought through; and the winning of this case could not be separated from seeking the support of other LGBT activists in this country and of the LGBT-friendly lawyers.

It is a pity that, despite the victory, this litigation did not make an end to the pathologization of homosexual orientation. After the court decision, this clinic still rampantly claims that it is able to 'cure' homosexuality, and charges an even higher price than before for consultation (500 RMB once) and conversion therapy (9000 RMB per 'phase', i.e., 6 sessions, and 40000 RMB for the whole 5 phases).⁸⁴ Although in the judgment the court recommended the Industry and Commerce Bureau further deal with the therapist's certificate-forfeiting behavior, there was no follow-up action. Moreover, there are still help-seeking letters online posted by LGBT children

79 Ibid, 15.

80 Ibid, 14.

81 See above, footnote 67.

82 In the 1990s, the Wang Hai phenomenon, or the act of 'knowing it's fake good and still buying it and later suing' (*zhi jia mai jia*), has been heatedly debated among Chinese legal professionals, and courts' opinions diverged on the legality of 'defendant fishing'. See Song Zheng and Hu Ming, 'Do Knowing Buyers of Fake Goods Count as "Consumers" in Law? (从王海打假案看知假买假者是否消费者)' (2003) 1 *Contemporary Jurisprudence* 82-85.

83 See above, footnote 77.

84 See the pricing list on its website, at www.webcitation.org/6g69pWyPj.

whose parents wanted them to get converted.⁸⁵ The winning of one case in court is therefore only a small step to a larger goal of full depathologization, destigmatization and legal protection.

Apart from the Xiao Zhen case, another victory in strategic litigation is queer filmmaker Fan Popo's lawsuit against the State Administration of Radio, Film and Television (SARFT).⁸⁶ In 2015, SARFT ordered several video websites to take down his documentary *Mama Rainbow* from the Internet, which is about the mothers who support their lesbian and gay children. Some LGBT-friendly lawyers were involved in collecting the evidence. In the end, the court did not examine the substantial legality of banning his film because of homosexual content, but only ruled that the SARFT had violated administrative procedural law by not using the correct stamp. Although Fan's other claims were dismissed, media still hailed it as the SARFT's first lost case, which was also endorsed by many Chinese netizens who had long held grudges against this chameleon-like censorship authority.⁸⁷ This narrow victory is significant, because it tested the water of holding the Chinese government accountable in a judicial way. Moreover, it has some cultural influence as well, because Fan's picture in a T-shirt with the slogan 'We want to watch *tongxinglian* films' was widely disseminated,⁸⁸ and upon repetition, this claim is expected to gain more legitimacy among the public.

There are judgments disadvantageous to LGBT rights as well. The claim made by same-sex couple, Sun Wenlin and Hu Mingliang, against the civil-affair department in Furong district of Changsha city for its refusal to register a marriage for them was dismissed. The court maintained that the Chinese Marriage Law requires marriage to be between one man and one woman, so the civil affairs bureau did not infringe the applicants' rights.⁸⁹

85 For instance, in an online forum *Zhihu*, a gay teenager was asking for help. After he came out to his parents, they wanted him to go through conversion therapy, because they were convinced by a Chinese journal article published in 1999, where a psychologist alleged that he had successfully converted three homosexuals by using hypnosis and electric shock therapy. See 'What Should I Do If My Parents Want Me to Get Converted and Married?', *Zhihu*, at www.webcitation.org/6jGQdjr4V.

86 The rules on film censorship have been discussed in Section 2.2.3. See e.g., a report of this case, Chen Yuan, 'Making a History! The First Case Winning the SARFT! (创历史了!有人告赢了广电总局)', *Sohu News*, 25 December 2015, at www.webcitation.org/6qbMkueQf.

87 *Ibid.*

88 See e.g., 'China: Progress on LGBTI rights. But More to Do', *Peter Tachtell Foundation*, 26 July 2016, at www.webcitation.org/6qbMvQsnG.

89 *Sun Wenlin and Hu Mingliang v. Civil Affairs Department of Furong District of Changsha City*, Trial Judgment, 13 April 2016, (孙文麟、胡明亮诉长沙市芙蓉区民政局不履行婚姻登记法定职责纠纷, 湖南省长沙市芙蓉区人民法院 (2016) 湘0102行初3号).

The court of appeal sustained the decision.⁹⁰ Another lost case concerns the employment discrimination against a gay man whose quarrel with another gay man in the street was filmed and put online, where the Court found the evidence insufficient to prove that the company fired him mainly because of his sexual orientation.⁹¹

Some attempts to strategic litigation did not end up with a judgment at all. For instance, in 2013, before the 2015 reform of the case-filing system,⁹² the court refused to accept and file the case against Changsha civil affairs department that rejected an LGBT NGO's application for registration.⁹³ It first told the plaintiff Xiao Han, the organizer of this NGO, that his written materials were incomplete and had some typos; after the plaintiff made corrections accordingly, the court simply decided that this complaint did not fall within the scope of cases that are supposed to be accepted, without giving clear reasons.⁹⁴

Another case that was not (yet) decided concerns the homophobic content in psychology textbooks. The plaintiff Qiu Bai, a then 20-year-old lesbian university student, brought a lawsuit against the Department of Education in 2015 for its failure to fulfill due diligence in examining textbooks that still pathologize and stigmatize homosexuals as 'sexual perverts', 'abnormal' or 'disordered'. Although the case was filed, Qiu Bai and the Department reconciled before the hearing, because the latter promised to establish a monitor and report mechanism. After the plaintiff withdrew the lawsuit, however, the Department refused to reply her written reports, and claimed that it was not within the scope of their responsibility. Qiu Bai has filed a lawsuit again, and the case was heard on 12 September 2016.⁹⁵

Winning in court does not translate simplistically into real world reforms, just as losing in court does not translate automatically into real world harms, as Andersen points out.⁹⁶ What equally matters, if not more, are the arguments used in and outside the court before, during and after the litigation; and so are the discussions among the general public in social media.⁹⁷ In Chinese context, apart from the versatile rhetoric such as the homoeroticism-friendly cultural tradition, tolerance, understanding, equal-

90 *Sun Wenlin and Hu Mingliang v. Civil Affairs Department of Furong District of Changsha City*, Appeal Judgment, Changsha Intermediate Court of Hunan Province, 27 June 2016, No. 452 (孙文麟、胡明亮诉长沙市芙蓉区民政局不履行婚姻登记法定职责纠纷, 湖南省长沙市中级人民法院 (2016) 湘01行终452号).

91 See 'Court throws out China's first gay workplace discrimination suit', 12 May 2015, *Gay Star News*, at www.webcitation.org/6ggjBMtXw.

92 See above, footnotes 43 and accompanying text.

93 Derek Yiu, Chinese Province: Homosexuality 'Against Spiritual Civilization', 2013 December 8, *Gay Star News*, at www.webcitation.org/6r2SSyY4G.

94 See Dong Le, 'China's Xiang Xiaohan: First Gay Man to Sue the Government', *BBC Chinese Service*, 27 March 2014, at www.webcitation.org/6r2SdZjyW.

95 Sarah Lin, 'Young Gay Activist Takes Government to Court Again Over Homophobic Textbooks', *Shanghaiist*, 17 June 2016, at www.webcitation.org/6r2Sm4Led.

96 Andersen, *Out of the Closets and into the Courts* (2006), 238.

97 *Ibid.*

ity, diversity and love, activists and lawyers in LGBT litigations have also frequently invoked the Constitution that cannot be cited as a legal resource in courts' decisions,⁹⁸ international human rights conventions that China has not ratified,⁹⁹ together with legal developments in other jurisdictions that do not have binding effects.

For instance, the statement of attorney Simin Huang in the appeal of Sun and Hu's same-sex marriage registration case has referred to the marriage-right clauses in the Universal Declaration of Human Rights and in the ICCPR, as well as the equality and non-discrimination clause in the Chinese Constitution.¹⁰⁰ The lawyer also cited *Loving v. Virginia*¹⁰¹ and *Obergefell v. Hodges*¹⁰² in the United States to illustrate the historically changing meanings of marriage. The opening up of marriage to same-sex couples in 21 other countries¹⁰³ was also mentioned, so was the newly established civil partnership registration system in Kaohsiung city¹⁰⁴ in Taiwan. The statement ends with a quote from legal scholar Rudolf von Jhering, 'the path law goes through is not paved by flowers but blood. Notwithstanding thorns on the road, we will finally win the crown of rights.'¹⁰⁵ The eloquent words in the statement has received appreciation from many legal professionals and aspired numerous LGBT individuals. The reference to non-binding legal sources shows that lawsuits can have further-reaching meanings than requesting a judge to apply the positivist law to a specific dispute. As the issue of same-sex marriage arouses more debates in public, the non-formal legalities implied in the arguments of different sides may gradually become more competitive against the existing marriage law.

Scholars in the United States have criticized that litigation in their country has garnered much more media coverage than other tactics have, and the LGBT movement organizations that used impact litigation have a greater likelihood of survival than organizations that do legal or non-legal

98 See above, footnote 48.

99 Such as the International Convention on Civil and Political Rights (ICCPR).

100 See Simin Huang, 'Thorns on the Road, We Will Finally Win the Crown of Rights: Statement of the Appellants' Attorney of the First Same-Sex Marriage Case in China (虽路遇荆棘, 终将摘权利王冠: 中国同性婚姻第一案第二审代理词)', *Rainbow Lawyers*, 29 June 2016, at www.webcitation.org/6rG8qgAJw.

101 *Loving v. Virginia*, 388 Supreme Court, United States 1 (1967).

102 *Obergefell et al. v. Hodges*, Director, Ohio Department of Health, et al. 576, Supreme Court, United States 1 (2015).

103 Huang, 'Thorns on the Road' (2016). The lawyer used this number in her statement. By April 2017, the number of countries that opened up marriage to same-sex couples is 22. See Aengus Carroll and Lucas Ramón Mendos, *State Sponsored Homophobia 2017: A World Survey of Sexual Orientation Laws: Criminalization, Protection and Recognition*, (ILGA, Geneva, 2017) 68-69.

104 See Wei-han Chen, 'Kaohsiung Set to Allow Same-Sex Couples to Register', *Taipei Times*, 16 May 2015, at www.webcitation.org/6qe3LCKQW.

105 Huang, 'Thorns on the Road' (2016). The text in the English translation of Jhering's work is 'not infrequently streams of blood, and everywhere rights trampled underfoot, mark the way which law has traveled'. See Rudolf von Jhering, *The Struggle for Law* (Trans. John J. Lalor) (The Lawbook Exchange, New Jersey, 1997) 12.

advocacy by other means.¹⁰⁶ In comparison, Chinese LGBT legal activism has not yet seen the over-prioritization of litigation. This may partly be attributable to the lack of judicial review of constitutionality and the nonbinding effect of precedents, which make lawsuits but one legal-political tool among others. As shown next, LGBT activists have various other ways of engaging and/or changing the law in China.

6.3.3 Lobbying the Legislators

Apart from strategic litigation, Chinese LGBT activists and their supporters have also actively engaged in legislative advocacy. One of the most salient attempts is the call for same-sex marriage. For several times since 2001, renowned sexologist Li Yinhe¹⁰⁷ has attempted to find representatives of the National People's Congress (NPC) and the Chinese People's Political Consultative Committee (CPPCC) to support her proposal to open up marriage to same-sex couples.¹⁰⁸ According to the Chinese Legislation Law, as Li is not a representative of the NPC, she has to lobby at least 30 representatives, who should then collectively introduce the bill to the NPC.¹⁰⁹ Unfortunately, to date no incumbent representative has openly supported her.

Moreover, it is an unwritten practice that the Standing Committee of the NPC would adopt five-year legislative plans and annual legislation agendas.¹¹⁰ That means if a law is not listed in the five-year plan, it is almost impossible to have a bill substantially considered during the annual assembly of the NPC. Assuming that 30 representatives follow all the legal procedures to bring forward a same-sex-marriage bill, the presidium may decide not to put such bill onto the agenda of the current session. Li may have well known these rules, but she still uses her status as a distinguished yet controversial sexuality researcher to stir up public debates on same-sex marriage. Therefore, the bill serves more as an awareness-raising tool than a formal proposal for law reform.

106 See e.g., Gwendolyn M Leachman, 'From Protest to Perry: How Litigation Shaped the LGBT Movement's Agenda' (2014) 47 *University of California Davis Law Review* 1667-1751; Jame D'Entremont s, 'How the Gay Establishment Ignored a Sex Panic Fueled by Homophobia' in Ryan Conrad (ed) *Against Equality: Queer Revolution Not Mere Inclusion* (AK Press, Edinburgh, Oakland, Baltimore, 2014) 158-167.

107 Li is a sociologist, a sexologist, and an activist for LGBT rights in China. She used to work for the Institute of Sociology at Chinese Academy of Social Sciences and retired in 2012.

108 Yinhe Li, The Same-Sex Marriage Proposal (关于同性婚姻的提案), 12 March 2015, *Sina Blog*, at www.webcitation.org/6g34pAMwf. For a translation of a previous version of her proposal with minor differences, see Balzano John, 'Towards a Gay-Friendly China? Legal Implications of Transition for Gays and Lesbians' (2007) 16 *Law and Sexuality: A Review of Lesbian, Gay, Bisexual, and Transgender Legal Issues* 1-44.

109 Legislation Law, see above footnote 63, Article 13, 'A delegation, or delegates of at least 30 people acting jointly, may introduce a bill to the National People's Congress'.

110 Legislation Law, Article 52.

The wording of Li's proposal is worth close examination. She explains why same-sex marriage "has hundreds of benefits and not one harm for China", which includes the following arguments:

Firstly, homosexuality¹¹¹ is not against the law in contemporary China. Homosexuals are Chinese citizens with full rights, and their demand for marriage is not in conflict with their rights as citizens.

Secondly, homosexuals are minorities who are protected in anti-discrimination legislation in many countries. ... If China can open up marriage to same-sex couples, it will rank among the top countries with regard to human rights protection, which also proves that our Party and government represent the progressive culture.

Thirdly, although monogamy and non-monogamy are equally valuable relationship forms, the former is healthier than the latter. ... Same-sex marriage can effectively prevent gay promiscuity and thereby preventing HIV/AIDS and other sexually transmitted infections (STIs).

Fourthly, if homosexuals are not allowed to get married with their same-sex partners, most of them will get married and have children in a different-sex marriage. If they can live with their same-sex partners, there will be a large group of childless people, which is beneficial for population control.

Fifthly, Chinese traditional culture pushes homosexual people into different-sex marriage, which created the dilemma of "straight wives of gay men" and "straight husbands of lesbian wives". Same-sex marriage can significantly reduce such tragedies.

Sixthly, protecting homosexuals as a minority group can guarantee social stability. It also effectively prevents homosexuals' constant demonstrations and fierce conflicts with the mainstream society as we often see in Western societies. In contrast, tolerance to homosexuals is consistent with Chinese values for peace and harmony.

...

Hereby I propose two approaches of law reform: one is to draft a separate same-sex marriage bill; the other is to amend the current Marriage Law, changing "husband and wife" into "spouses". At the first mention of the word "spouse" the phrase "regardless of sex" should be added.¹¹²

Many of Li's arguments sound similar to the conservative case *for* same-sex marriage in the United States. For instance, Andrew Sullivan has argued that same-sex marriage resonates with conservative values, including marital and sexual exclusivity, public health and decency, as well as harmonious core families.¹¹³ In Sullivan's words, 'since persecution is not an option in a civilized society, why not coax gays into traditional values rather than rail incoherently against them?'¹¹⁴ Li's arguments, likewise, are prone to perpetuate many stigmas gay people have long been enduring and resisting, such as the accusation that gay men are all promiscuous, irresponsible, unable to commit, highly susceptible to STIs, and are 'frauds' who cheat innocent women in a different-sex marriage.

111 Li uses the word '*tongxinglian*', which can mean both homosexual behaviors and same-sex love.

112 See above, footnote 108.

113 See Andrew Sullivan, 'Here Comes the Groom: A (Conservative) Case for Gay Marriage' (1989) 28 *The New Republic* 20-22.

114 Andrew, 'Here Comes the Groom: A (Conservative) Case for Gay Marriage' (1989)

However, it would be unfair to call Li a sexual conservative, because she is one of the few scholars who openly criticize the criminalization of consensual group sex in private. She has proposed another bill in 2010 and 2015 respectively, calling for repealing 'the crime of group licentiousness'.¹¹⁵ Reading these two initiatives together, we may reasonably speculate that Li was arguing strategically in the same-sex marriage proposal to cater for the discourse of the authorities. The proposal accurately touches upon some major concerns of the party-state: familial and social stability, population control and international reputation. These words may become a crucial bridge that connects the needs of same-sex couples with those of the government. Suppose Li used an antagonizing tone to condemn the government or legislature for its failure to provide legal protection for sexual minorities. Then she might have become a dissident whose same-sex marriage bill could never have been widely disseminated as it is now. Moreover, making pragmatic arguments for legislative purposes does not mean that gay people will really give up their wish and freedom to assembly and association, or their rights to have children. Li's pragmatic quilting of moral, legal and political discourses is an apt example of talking about homosexuality tactically in China's sensitive environment. One may even conjecture that Li was mocking the party-state by parodying its zeal for 'harmony' and 'progress', which leaves space for some queer reading of this 'conservative' marriage bill.

Many LGBT groups, gay-friendly individuals and mass media have endorsed Li's call. They have actively reposted her draft bills online. Citing Li's proposal, in 2013 a young gay activist Wenhui Liang sent a letter that called for attention to same-sex marriage to one hundred Congress representatives. Although none of them replied to Liang, the act as a form of performance art has caught some media attention.¹¹⁶ Some PFLAG parents have also tried to draft a same-sex marriage bill. One of their arguments is that if same-sex marriage were available, gay people could more easily come out to their parents, which would lead to familial and societal harmony.¹¹⁷ Due to a lack of support from Congress representatives, this proposal did not reach the legislature, either. Unsurprisingly, some netizens also scolded Li for her immoral, impractical or 'un-Chinese' proposal, which may stir up more homophobic reactions. In general, however, the meaning-making effects of the constant debates about same-sex marriage over the last fifteen years in China should not be underestimated.

115 See Amada Wu, 'Li Yinhe: China Should Relax Law against "Group Licentiousness"', *Women of China*, 6 January 2015, at www.webcitation.org/6r2SwJawe.

116 Chang Meng, 'Student Calls for Same-Sex Marriage', *Global Times*, 28 February 2013, at www.webcitation.org/6r2T7QTHW.

117 The draft is not published online, but the authors have authorized me to paraphrase the content.

Because of the rules on the legislative plan, timing is crucial for participating in legal changes, which is proven by some LGBT activists who grasped the opportunities. For instance, the Standing Committee of the Congress has listed a law against domestic violence in its legislative plan since 2011. Ever since, LGBT groups, especially *Tongyu*, have endeavored to cooperate with law professors who have connections with the legislature, lobbying them with the qualitative and quantitative data they collected about the oft-ignored violence in same-sex intimate relationships and the violence suffered by LGBTs children from their original family. In 2015, the Committee issued a draft bill and encouraged the public to comment on it, which is yet another attempt the authorities made towards the rule of law.¹¹⁸ The draft only included narrowly defined ‘next of kin’, thus precluding different-sex or same-sex unmarried partners and non-romantic cohabitants.¹¹⁹ This draft was more restrictive than some provincial or municipal temporary regulations against domestic violence, where cohabitants were actually covered.¹²⁰

In this regard, the Changchun City Ordinance on Preventing and Combating Domestic Violence¹²¹ of 2009 used to be the most progressive local legislation in mainland China, because it defines ‘family members’ in an inclusive manner, so that same-sex partners and many other people can be protected. Article 2 of this Ordinance specifies, “‘family members’ in the present Ordinance refers to spouse, parents, children and *other family members* living together’.”¹²² Technically speaking, the definition of ‘family members’ in this provision is circular, but the legislators seem to have intended to define ‘other family members’ much more broadly than blood, conjugal and in-law relatives in a household. As explained by the Deputy Secretary-General of Changchun municipal government, this Ordinance is ‘forward-looking, because it considers the future trends of diverse familial relationships in our city. It covers unmarried cohabiting couples, single-parent families, families composed of a single person and *same-sex*

118 See above, footnotes 35 to 46 and accompanying text.

119 Law against Domestic Violence (Draft), issued by the National People’s Congress in August 2015, at www.webcitation.org/6r2T8z5nF.

120 See e.g., Jiangshu Province Domestic Violence Warning System (Temporary) 江苏省家庭暴力告诫制度实施办法 (试行) effective 25 July 2013; Wenzhou City Domestic Violence Warning System (Temporary) 温州市家庭暴力告诫制度实施办法 (试行), effective 25 November 2013.

121 Changchun City Ordinance of Preventing and Combating Domestic Violence (长春市预防和制止家庭暴力条例), issued 14 January 2009, effective 1 March 2009.

122 The original Chinese text is: “本条例所称家庭成员,是指配偶、父母、子女以及其他共同生活的家庭成员。”

families'.¹²³ Media spoke highly of the Changchun Ordinance, appraising it as a model law that can inspire other cities and the national legislation.¹²⁴

Unsatisfied with the draft of the national law, some feminists initiated a campaign to collect ten thousand signatures to call for a more inclusive law that protects all unmarried people.¹²⁵ Consequently, a leading lesbian group *Tongyu* decided not to carry out the specific advocacy as it planned, namely, putting same-sex relationships in the definition of 'family' in this law. Instead, they chose to stand in line with other feminist groups so as to make a more consonant and louder voice from civil society that calls for expanding the scope of the law. They believed that the collective opposition against the heteronormative provisions in a bill that would privilege different-sex marriage over other relationships will benefit LGBTs as well.

The augmented voice from lesbian, feminist and other social groups has made a positive impact on the final version of the Law Against Domestic Violence. In an added clause, it is stipulated that, 'This Law shall apply, *mutatis mutandis*, to the violence inflicted between those living together who are not family members.'¹²⁶ Therefore, all unmarried couples, whether straight or gay, are theoretically covered by the law.

Nevertheless, when asked at a press conference whether this provision included same-sex couples, Guo Linmao, a member of the Legislative Affairs Commission of the Standing Committee of the Congress, responded, 'Between 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 in this law people who cohabit does not include homosexuals.'¹²⁷ Guo's remarks were blatantly ignorant of the real-life cases and the data LGBT groups have long been exposing, which suggests his lack of information or his reluctance to acknowledge the existence of same-sex cohabitants and their needs.

Despite the denial from the authorities, the provision on 'those living together who are not family members' has at least opened up some space for legislative or judicial interpretation that may clearly include same-sex relationships in the future. Of course, there is also a chance that the Supreme Court or the Congress may, like Guo suggested, make a restrictive interpre-

123 See External Affairs Office of Changchun Municipality, Press Conference on Implementing the Changchun City Ordinance of Preventing and Combating Domestic Violence (《长春市预防和制止家庭暴力条例》实施新闻发布会), 03-02-2009, at www.webcitation.org/6r2TBXgkB. The original text of 'families composed of a single person' is 单身家庭, the meaning of which is unclear in Chinese. It is not a legal term, and there is no explanation of it.

124 See e.g., 'Changchun: Unmarried Cohabitants and Others are Protected by the Legislation Preventing Domestic Violence (长春: 未婚同居者等被纳入防止家庭暴力保护范围)', 3 March 2009, *Xinhua News*, at www.webcitation.org/6rDfGCq1Y.

125 See 'Law Against Domestic Violence Must Include Violence in Cohabitation and Ex-Partnership!', *Tongyu* 2014 December 1, at www.webcitation.org/6odQR63KW.

126 Law against Domestic Violence of the People's Republic of China, adopted 27 December 2015, effective 1 March 2016, Article 37.

127 'China passes first domestic violence law', *the Guardian*, 27 December 2015, at www.webcitation.org/6odQd1tvp.

tation on this provision without giving sufficient reasons, thereby formally blocking the rights of same-sex partners. For now, at least we can say that the legislation with its inclusive text is standing by the side of LGBTs.

Another example of timing is the advocacy for the criminalization of forced molestation and rape of men, which coincided with the officially planned ninth revision of the Criminal Law in 2015. During the public hearing phase, several LGBT groups called for the change of law by collecting signatures from the public, especially in the last couple of hours before the closing date.¹²⁸ Eventually, the Criminal Law was amended to include men as victims of sexual molestation,¹²⁹ although the rape provision remained unchanged and the penalty of forced molestation is much lighter than that of rape.

It is difficult to say whether the online voices of LGBTs and their supporters played the most crucial role in contributing to these legislative changes, but it would be unfair to deny their efforts just because they did not fully persuade the decision-makers to articulately endorse LGBT rights. Moreover, the public attention that was drawn throughout the advocacy is significant, and so is the symbolic meaning that LGBTs are no longer outlaws. They are now legitimate players on the negotiating table, who dare to ask, and manage to obtain, respect, protection and recognition from the state.

6.3.4 Applying for Open Government Information

Chapter 2 has shown the ambiguity and silence of Chinese laws and policies with regard to homosexuality. Accordingly, pushing the government to say something about homosexuality has become an important strategy employed by LGBT activists to increase their legitimacy, visibility and bargaining power. Chances arise especially when the state officials hurriedly make some statements: if such statements are helpful, they can be welcomed and augmented, and if they are fallacious, they can be criticized. In either way, the interaction can create more discursive and material resources for advocacy.

Applying for open government information (OGI) is one way to push the authorities to speak. Before suing the SARFT for blocking his documentary online,¹³⁰ Fan Popo had also made use of the OGI regulation to request the authority to spell out the criteria of film censorship. In 2010, the

128 Lala Camp, '12 Hours Countdown! *Tongzhi* Groups Calling for Criminal Law's Protection for Sexual and Gender Minorities! 倒数十二小时!同志组织呼吁刑法保护性与性别少数人士权益!' *China Development Brief*, 5 August 2015, at www.webcitation.org/6odQnsURh.

129 Amendment (IX) to the Criminal Law of the People's Republic of China, 'para. 13. Article 237 of the Criminal Law is amended to read: Whoever, by violence, coercion or other means, molests any other person or humiliates a woman shall be sentenced to imprisonment of not more than five years or criminal detention', adopted 29 August 2015, effective 1 November 2015.

130 See above, footnote 86 and accompanying text.

SARFT repealed the 2008 regulation that forbade homosexuality as a form of pornographic and obscene content. However, the 2010 'new regulation' that replaced the old one could not be found anywhere, which should have been disclosed on SARFT's own initiative according to law.¹³¹ Therefore, supported by the legal interns at *Tongyu*, Fan decided to file a request for OGI about the content of the 'new regulation'. He combined the legal advocacy with performance art: he chose to deliver the application on May 17th 2013, the international day against homophobia and transphobia. He went directly to the office of the SARFT, wearing the T-shirt with the slogan 'We want to watch *tongxinglian* films'. Unfortunately, he was not able to hand in the files to the officials in person, because 'the reception desk was unclear which department is in charge of the OGI'¹³². In the end, he managed to send the application by post.

There are some small but significant tips to increase the chance of making a successful OGI request, which LGBT activists have learnt via exchanging experience with other grassroots organizations. For instance, a public interest law firm Yipai has compiled a handbook on OGI, where it advises activists to use EMS¹³³ instead of other companies to deliver their files. This is because EMS is the only courier that can access the buildings of the governments, which may increase the chance of receipt.¹³⁴ They also suggest activists keep friendly communication with the government after filing the request, instead of passively waiting for the answers. It is unnecessary and impractical for grassroots organizations to always antagonize the government, says the handbook. Instead, a flexible tactic of combining OGI requests with complaints, recommendations, or thankyou letters may result in an optimal effect.¹³⁵ Administrative reconsideration is recommended as the least costly remedy for the applicant and the most responsive one, compared with the other two (reporting to the higher-level agency or filing an administrative lawsuit).¹³⁶

About a week later, Fan received the reply from an SARFT official by phone, who told him that the requested information had already been disclosed, and referred him to a webpage. However, the 'already-disclosed information' was in fact only a procedural regulation about film censorship promulgated in 2010.¹³⁷ The substantial standards are still unknown, and

131 See above, footnote 39.

132 See e.g., 'History-making! Someone Won the SARFT!' *Sohu News*, 25 December 2015, at www.webcitation.org/6odQxtSoL.

133 EMS is an international postal Express Mail Service, for documents and merchandise, offered by postal operators of the Universal Postal Union.

134 Yipai Law Firm, *Open Government Information Manual*, Center for Transparent Government (Beijing, 2014).

135 Ibid.

136 Ibid.

137 Notices of SARFT on Improving the Censorship and Filing Works on Film Scripts (广电总局关于改进和完善电影剧本(梗概)备案电影片审查工作的通知), issued and effective 12 October 2010.

filmmakers still need to conduct self-censorship, worrying if their content may cross the invisible line.¹³⁸

Another attempt to utilize the OGI system concerns an LGBT NGO's failed registration. Before bringing the complaint to court,¹³⁹ the organizer of Changsha LGBT Center, Xiao Han, had also resorted to the government first. He filed an OGI request, hoping to know the reasons of the rejection. The provincial civil affairs department replied in written that establishing a homosexual organization lacks legal basis, because Chinese law only allows one man and one woman to get married, and that homosexuality violates China's social morality.¹⁴⁰ Although later the administrative lawsuit against this OGI response was lost, the request itself was significant, because it squeezed the word 'homosexuality' out of a government agency, which might otherwise have kept silent. Once catching the flaws in authorities' words, activists can carry out more legal and non-legal challenges targeting these statements.

Admittedly, the strategy of 'making the government speak' can also be risky in that negative responses publicly issued by the governments may worsen the stigma on LGBTs, which needs more efforts to fight against. Another danger is that, under an authoritarian regime, the OGI system may well be used as a bait for dissidents, so that a successful OGI request may arouse stricter surveillance over the individual and collective activities of LGBTs. Activists using international human rights mechanisms may have similar benefits and risks, which will be discussed next.

6.3.5 Resorting to International Mechanisms

The international human rights mechanisms and its state-monitoring functionalities have provided another tool for the civil society in general and LGBT rights advocacy in particular. China only signed the International Covenant on Civil and Political Rights (ICCPR), but has yet to ratify it, so it is not subject to the monitor of the Human Rights Committee. However, China has ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC), the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and Convention on the Rights of Persons with Disabilities (CRPD). China is

138 Chase, 'Problems of Publicity' (2012) 158.

139 See above, footnote 94.

140 For more discussion of this reply, see Chapter 2.

also bound by the Universal Periodic Review (UPR) of the United Nations Human Rights Council (UNHRC).¹⁴¹

In 2013, some Chinese LGBT activist groups, through the Sexual Rights Initiative,¹⁴² submitted a shadow report¹⁴³ on LGBT Rights in China to its second cycle of the UPR.¹⁴⁴ The report covered a wide range of issues, including the incomplete depathologization, the classification of homosexual content as pornography, the biased sex education textbooks, employment discrimination based on SOGIE, marriage inequality, the restrictive political environment facing LGBT NGOs, as well as the limited access to hormone use and sex reassignment operations for transgender people. Accordingly, the report made 11 recommendations, including one that calls for same-sex marriage or domestic partnership laws.¹⁴⁵

After submitting the shadow report and before the review session, the activists started to lobby the ambassadors of LGBT-friendly countries in China, including those from Sweden, Germany, Switzerland, Norway, Ireland, the Netherlands, United States, France, Poland, etc. They also invited the ambassadors to a meeting they organized in Beijing, coordinated by the Dutch embassy, hoping the UNHRC representatives of these countries would raise questions and give recommendations to the Chinese government during the country review. An activist drew from his experience,

'lobbying ambassadors half a year beforehand is actually much more effective than persuading a committee member on the spot. It's already too late to start lobbying in Geneva. Plus, the foreign embassies are located in our "home ground", so we can better present ourselves.'¹⁴⁶

141 For an overview of these treaties and China's status of ratification, see the Office of the United Nations High Commissioner for Human Rights, Status of Ratification – Interactive Dashboard, at www.webcitation.org/6qe5SW65R.

142 The SRI is a coalition of NGOs advocating for human rights concerning gender and sexuality at the UN level. It submits shadow reports about authoritarian states, and it does so in its own name, to keep anonymous the local activists it has cooperated with, although it is not difficult for the government to find them out, at www.webcitation.org/6qe68fgid.

143 By submitting a shadow report to a UN body, NGOs can highlight issues not raised by their governments or point out where the government may be misleading the committee from the real situation. For a general introduction on the shadow reports, see International Women's Rights Action Watch, University of Minnesota, *Shadow Reporting to UN Treaty Bodies*, at www.webcitation.org/6odR5gvCP.

144 The information of the first cycle of UPR on China in 2009 can be found at www.webcitation.org/6qe5faJph; the second cycle was in 2013, at www.webcitation.org/6qe5faJph. There have already been submissions about SOGI issues in 2009: '26, There is no law or policy about same-sex sexual harassment and sexual violence, as highlighted by Sexual Rights Initiative (SRI). Homosexual marriage is not supported by law and homosexual people cannot adopt children...' see Summary of Stakeholders' Information, A/HRC/WG.6/4/CHN/3, 5 January 2009, at www.webcitation.org/6qe65Mhvx.

145 The Sexual Rights Initiative (SRI), Stakeholder Submission on Lesbian, Gay, Bisexual and Transgender (LGBT) Rights in China for the 17th Session of the Universal Periodic Review, October 2013, at www.webcitation.org/6qe6Ysq7J.

146 Interview with an anonymous activist, 25 February 2015.

In the report of the UPR working group, Ireland and the Netherlands have respectively recommended China to

'186.89 ...establish anti-discrimination laws and regulations to ensure that LGBT persons enjoy equal treatment, including at schools and in the workplace.

186.90 ... include a prohibition of discrimination of any kind, including discrimination based on sexual orientation and gender identity, ethnicity, religion and infection with HIV, in labor and employment law in line with international standards.'¹⁴⁷

The government responded in writing that China already enforced these recommendations, but it only referred to the term 'other aspects' in the laws alongside the categories of ethnicity, religion, gender, age, and disability. It explains,

'186.85. Accepted and already implemented

China's Constitution clearly stipulates that all citizens are equal before the law. China prohibits all possible discriminations via enacting specific laws. China's Law on Regional National Autonomy, Law on the Protection of Rights and Interests of Women, Law on the Protection of Rights and Interests of Elderly, Law on the Protection of Minors, Law on the Protection of Rights and Interests of Disabled Persons, Law on the Promotion of Employment and other laws clearly prohibit discriminations based on ethnicity, religion, gender, age, disability and other aspects.

186.89. Accepted and already implemented

See 186.85. Prohibition of discriminations against different groups is written in many laws of China.

186.90. Accepted and already implemented

The Labor Law of China stipulates that workers shall not be discriminated on grounds of ethnicity, race, sex and religious beliefs. The Law on the Promotion of Employment of China contains *systematic* stipulations against employment discriminations.'¹⁴⁸

The government seemed to be reluctant to articulate any term in relation to SOGIE, but space for interpretation exists in its ambiguous wording. The first five laws the government listed in response to paragraph 186.85 only protect specific groups such as ethnic minority, women, elderly, minors and the disabled; there is no umbrella term in these laws that can be interpreted as including SOGIE. Although it can be argued that the former groups can also have LGBT subjects, China has seen few statutes or cases where the alleged discrimination is examined intersectionally.¹⁴⁹ However, the Law

147 Report of the Working Group on the Universal Periodic Review, China (including Hong Kong, China and Macao, China), United Nations Human Rights Council, A/HRC/25/5, 4 December 2013, paras. 186.89 and 186.90.

148 See Report of the Working Group on the Universal Periodic Review, China, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A/HRC/25/5/Add.1, 27 February 2014 (emphasis added).

149 For the theory of intersectionality, see Kimberle Crenshaw, 'Intersectionality and Identity Politics: Learning from Violence against Women of Color' in Mary Lyndon Shanley and Uma Narayan (eds), *Reconstructing political theory* (Pennsylvania State University Press 1997).

on the Promotion of Employment mentioned in response to paragraph 186.85 and 186.90 does contain the terms ‘such as’ and ‘etcetera’ in its non-discrimination provision,¹⁵⁰ which does not preclude SOGIE as grounds for protection, textually speaking. Moreover, the government acknowledged that this law contains ‘systematic’ stipulations against employment discriminations, which can also be interpreted as including other unlisted grounds. Therefore, by saying China has ‘accepted and already implemented’ the recommendations, Chinese government was implicitly allowing for a SOGIE-inclusive interpretation for the Law on the Promotion of Employment.

Nonetheless, Chinese activists were unsatisfied with such ambiguity. On the day of the review meeting, they kept pushing the government to further specify the phrase ‘other aspects’ and to commit to combating discrimination on the ground of SOGIE explicitly.¹⁵¹ Such pressure did not receive a more articulate response from the government during the UPR.

Likewise, in 2014, some groups of Chinese lesbian, bisexual and transgender women (LBT women) have made their first attempt to speak up through the review mechanism of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). Compared with the UPR, the CEDAW mechanism might be a more practical tool to push for legal changes. The CEDAW committee has independent experts who are often considered more impartial, whereas the UNHRC consists of governmental representatives. Moreover, although the UPR covers CEDAW and other treaties, the CEDAW review has a narrower scope of subjects and issues concerned, so the recommendations may be more precise and in-depth.

With the help of a handbook issued by the international NGO IGLHRC,¹⁵² Chinese LBT activists equipped themselves with UN-specific writing and lobbying skills. They also got financial and expert support from the United Nations Development Program (UNDP) in China, as well as advice from experienced local feminist activists, which all helped them to produce a comprehensive shadow report.

In its report, the LBT activists identified four major wishes that are both important and feasible to be brought to this particular review session: 1) including SOGIE in the definition of gender discrimination, 2) eliminating SOGIE-based stereotypes, 3) fully depathologizing homosexuality and bisexuality, and 4) tackling violence against LBT women. Furthermore, considering the timing of the bill against domestic violence as described

150 Employment Promotion Law of the People’s Republic of China, issued 30 August 2007, effective 1 January 2008, Article 3 (2): ‘Workers seeking employment shall not be subject to discrimination based on factors *such as* ethnicity, race, gender, religious belief *etcetera*’ (emphasis added).

151 For the details of the advocacy for LGBT rights using UPR mechanism, see Mian Liping, *The Policies on and Advocacy for LGBTI rights in Mainland China (中国大陆LGBTI人群权利的政策回顾和社会实践)*, September 2014, Aibai Culture and Education Center, 13, at www.webcitation.org/6odRAzFEF.

152 See above, footnote 30.

above,¹⁵³ in the 90-second NGO oral presentation, the activist representative strategically focused on one issue, namely, domestic violence facing LBT women.¹⁵⁴

During the review meeting, an official among the Chinese Delegation, Ms. Mu Hong, Deputy Director-General of the Office of the National Working Committee on Women and Children of the State Council, claimed that the rights of all Chinese citizens were protected by Chinese law, regardless of their sexual orientation and gender identity, that social attitudes towards homosexuals and transgenders were becoming more progressive in China, and that there are social organizations that can provide LBT women with a range of support services.¹⁵⁵ She also illustrated the increasing openness of Chinese society with the examples of her own daughter's openly gay friends, and of Jinxing, a well-known transwoman.¹⁵⁶ Her remarks were groundbreaking, as it was the first time Chinese government ever explicitly showed a friendly gesture to LBT women and SOGIE issues at large on the international level, going one step further than the implicit inclusion of SOGI in the previous round of UPR.

Cynics may question the sincerity and effectiveness of this response. Indeed, Chinese government may well have just picked up the politically correct LGBT rights languages from the UN documents and meetings, and then made hollow commitments without really executing them. Nevertheless, it is difficult and unnecessary to find out the 'real' governmental attitudes behind Mu's statement. Chua correctly pointed out in her observation on LGBT activism in authoritarian Singapore, which is also pertinent here, that as long as the officials speak up, activists are then able to leverage on such statements – sincere or otherwise – as the state's 'true' position, and push the government to keep their promises.¹⁵⁷ This strategy is evident in what Chinese LGBT activists did after having Mu's statement: they fed this news to mainstream media, which then made headlines like 'Chinese Government Says Clearly for the First Time that *Tongxinglian* Will Not Be Discriminated'.¹⁵⁸ Afterwards, activists also followed up and tried to invite Mu to an academic-and-activist conference on LGBT and Law in early 2015, although she declined to take part.¹⁵⁹

153 See above, footnote 119 and accompanying text.

154 See Information Submitted by the China LBT Rights Initiative (a Coalition of Chinese LBT Women NGOs) to the Committee on the Elimination of Discrimination Against Women, 20 February 2014, at www.webcitation.org/6nbaG5fKy.

155 Summary Record of the 1251st Meeting, 30 October 2014, CEDAW/C/SR.1251, para. 50.

156 Information obtained from participant observation in the session.

157 Chua Lynette J, 'Pragmatic Resistance, Law, and Social Movements in Authoritarian States: The Case of Gay Collective Action in Singapore' (2012) 46 *Law and Society Review* 4, 713-748 739.

158 See China LBT Rights Initiative, 'Chinese Government Says Clearly for the First Time that *Tongxinglian* Will Not Be Discriminated' (中国政府首度明确表示同性恋不会被歧视), *NetEase Lady Forum*, 27 October 2014, at www.webcitation.org/6odRFsEyp.

159 Information obtained from Ah-Qiang, founder of the PFLAG.

On the other hand, advocating LGBT rights at the UPR and CEDAW country reviews can be a risky move. Rumors have circulated that it was the LGBT activists' unexpected questions during the UPR review in 2014 that embarrassed and irritated the government, thereby making the surveillance over LGBT activists and civil society in general much stricter since then.¹⁶⁰ Of course, such causal link can only be speculative rather than evidential, and the risk awareness should better be taken as a reminder for more meticulous strategizing rather than a deterrent to future actions.

Apart from the political sensitivity, some activists express other doubts and concerns on employing international human rights discourses to address LGBT issues at the domestic level. A gay activist devoted to online visibility of same-sex love thought it ineffective to talk about LGBT human rights in China:

'Honestly, these efforts are too costly, pretentious and high-end (*gao da shang*) in the eyes of activists like us who work bit by bit to change people's attitudes. The human rights words are more suitable for academics and diplomats. For Chinese government officials and mass population, it makes more sense to speak to them with the language of "sameness", "tolerance" and "empathy".'¹⁶¹

A young lesbian activist who had participated in one of the workshops about international human rights expressed her simultaneous excitement and frustration:

'These workshops are really inspiring, and I felt boosted (*da jixue*) and ambitious after learning the international human rights laws and the mechanisms. But when I went back to my small town, I could hardly do anything with the knowledge I got to make our daily life better. After discussing with our group members, we agreed that we might as well organize more lesbian basketball games and drinking parties, which is merrier, and perhaps more beneficial to our peer lesbians who just want a community to belong to.'¹⁶²

Their skepticism is not uncommon in the discussion of the limits of international human rights law, especially the difficulties in vernacularizing the human rights discourse.¹⁶³ And there is oftentimes some tension between the more 'high-end' approach of LGBT rights advocacy and the more on-the-ground one. However, such difficulties should not lead to a wholesale claim that international human rights law does not work for China. In fact,

160 Interview with an anonymous activist A, 20 January 2015.

161 Online informal chat with B, an anonymous activist, 21 June 2014.

162 Informal conversation with C, an anonymous activist, 18 May 2015. A, B and C's request for anonymity shows the incongruent approaches, resources and influences among LGBT activists in China. For more about the power dynamics in activism, see Ye Shana, 'Post-socialist China and the Promise of *Ku'er*: Politics of Affect and Transnational Queer Praxis' (Doctoral Thesis at the Development Studies and Social Change, University of Minnesota, 2017).

163 See e.g., Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press, Chicago and London, 2006); Hildebrandt, 'Development and Division' (2012).

local community-based activities are not incompatible with the efforts to use international legal-political mechanisms: the former often provide the most solid statistics and vivid stories for the latter, and the latter in return can support the former by establishing coalitions with other groups in and beyond China.

6.4 CONCLUSION

This chapter has mainly focused on the advocacy Chinese LGBT activists have carried out in recent years that calls for law's respect, protection and recognition. LGBT legal activism is proven to be much richer than one confrontational model. There can be different tactics to engage with the law: litigating, lobbying the legislators, educating the lawyers, filing OGI (open government information) requests, and making claims at the UN,¹⁶⁴ not all of which are antagonistic or politically sensitive. Also, the ability to initiate and carry out legal advocacy is not necessarily monopolized by large LGBT groups with sufficient funding and experienced legal experts, as illustrated by the courageous individual activists like Xiao Zhen, Qiu Bai, Fan Popo, Xiao Han, Sun Wenlin and others. Of course, they have also gained enormous support from the community, the rainbow lawyers and LGBT-friendly media, without which the results and their impact would be discounted.

The various tactics of LGBT activism are often deployed in an organic and complementary way, to the extent that it is difficult, and unnecessary, to strictly differentiate legal advocacy from everyday activism. For example, PFLAG, whose mission is mainly to help parents to accept their LGBT children, has also actively responded to Dr. Li's same-sex marriage bill, and even attempted to draft a more detailed one.¹⁶⁵ In another instance, when Qiu Bai, the young lesbian activist who sued the central Department of Education, was outed by her teachers to her parents, she had to deal with the prejudices from her original family on top of the homophobic textbooks and laws. Therefore, the law is always embedded in the social fabric, and is reweaving it, too.

Although only a few of the issues that Chinese LGBT activists brought forward (same-sex marriage and domestic violence) are directly related to Family Law (FL) 1, all the other ones, including conversion therapy, homophobic textbooks, film censorship and refusal of NGO registration, can be deemed as FL3 and 4 that co-construct what a 'normal', legally protected family should look like.¹⁶⁶ The Family Law governing these fields has been

164 See Section 6.3.

165 In the annual PFLAG meeting in 2014, one of the parents, Papa Tao, brought forward a same-sex marriage proposal drafted by he himself. He is a retired civil servant, and did quite thorough comparative legal research on the marriage legislation in many countries. This bill has not been made public yet, but I was shown a copy of it.

166 Family Law 1, 2, 3 and 4 is elaborated in Section 1.2.

treating LGBTs as pathological and immoral sexual deviants who deserve medical cure and symbolic erasure. Challenging the FL 3 and 4 is thus tantamount to questioning the stigma of LGBTs as 'family outlaws' who are unfit for family life and bad for children.¹⁶⁷ Regardless of the formal results of the lawsuits or lobbying, these activities are creating legalities that compete with the official one. Examples include the judgment in the Xiao Zhen case that clearly announced 'homosexuality is not a mental illness',¹⁶⁸ and the official's answer in the CEDAW review session that she personally accepted her daughter's gay friends.¹⁶⁹ These non-binding statements can be both results of and further driving forces for the shifting FL4.

In the process of 'toeing the lines' and 'pushing the boundaries' of the law,¹⁷⁰ LGBT activists have shown the legal consciousness of 'before', 'with' and 'against' the law, oftentimes simultaneously. They can obey and use certain procedural and substantial rules in some laws to push for changes in others, such as the utilization of the OGI and case-docketing systems.¹⁷¹ As long as such usage caters for the Chinese party-state's expressed aspiration for rule-of-law and does not threaten the legitimacy of the regime, the movements would be relatively safe. On the other hand, however, the line between acceptable legal challenges and subversive dissidence is fairly thin, so the legal tools can incidentally turn into political risks, which is why strategizing is always necessary. Such strategizing may look much like bowing to the official ideology, as evident in Dr. Li Yinhe's listed arguments for same-sex partnership recognition.¹⁷² Nonetheless, there is no agency free of constraints. In fact, the coexistence of 'before-the-law' and 'against-the-law' consciousness is prevalent in non-activists' daily life as well, as shown in the previous three chapters. In this sense, it is difficult, if not futile, to find a purely non-compromising way of life or advocacy plan.

This chapter has also shown a wide variety of, even dissonance in, the papers of different governmental agencies, officials' words, and courts' judgments, which suggests that what we call 'the Chinese government' is never a monolith. 'The Chinese government' does not have one coherent policy on SOGIE issues; its attitudes are often indeterminate and are contingent on the particular decision maker or spokesperson in a specific scenario. Such incongruence is for instance evident in the cases of the press conference of the Law Against Domestic Violence¹⁷³ and the CEDAW

167 Cheshire Calhoun, *Feminism, the Family, and the Politics of the Closet: Lesbian and Gay Displacement* (Oxford University Press, New York, 2000). 'Family outlaw' is elaborated in Chapter 2.

168 See Section 6.3.2.

169 See above, footnote 155 and accompanying text.

170 Here I'm borrowing Chua's terms, in Chua, 'Pragmatic Resistance, Law, and Social Movements in Authoritarian States' (2012), 723.

171 See Section 6.2.

172 See Section 6.3.3.

173 See above, footnote 127 and accompanying text.

country review meeting.¹⁷⁴ In this sense, the well-known caricature of legal realism that justice is 'what the judge ate for breakfast'¹⁷⁵ is not that exaggerated. This reminds us of the inherent inconsistency in law, and of the open-endedness of interacting with the ambivalent authorities.

Some comparative-law perspective is relevant here. The recognition of LGBT rights in Europe is said to have shown a general trajectory of decriminalization, non-discrimination, and recognition of same-sex families.¹⁷⁶ In contrast, it seems that Chinese activists are already ambitious for same-sex marriage without the protection of legislation against discrimination, and without fully expelling the haunting effects of the crime of hooliganism,¹⁷⁷ thus looking more similar to the sporicidal marriage campaign in the United States prior to the decriminalization of sodomy.¹⁷⁸ These three themes therefore had better be understood as concurring, mutually stimulating dimensions of LGBT activism, rather than sequential steps. Therefore, the activism on textbooks, depathologization, employment, etc. actually serve multiple purposes all at once: to combat the residual stigma of criminalization, to tackle the pervasive direct and indirect discrimination against LGBTs, and to claim for legitimacy of their various forms of relationships.

While celebrating the achievements, we should also bear in mind the caveats feminists, queer and post-colonial theorists have long been putting forward concerning the efficacy of legal activism: rights language may cover up more serious systematic problems;¹⁷⁹ fighting for the assimilation

174 See above, footnote 155 and accompanying text.

175 See Shai Danziger, Jonathan Levav and Liora Avnaim-Pesso, 'Extraneous Factors in Judicial Decisions.' (2011) 108 *Proceedings of the National Academy of Sciences of the United States of America* 17, 6889-6892; Carel Smith, 'The Vicissitudes of the Hermeneutic Paradigm in the Study of Law: Tradition, Forms of Life and Metaphor' (2011) 4 *Erasmus Law Review* 1, 21-38.

176 Kees Waaldijk, 'Standard Sequences in the Legal Recognition of Homosexuality: Europe's Past, Present and Future' (1994) 4 *Australasian Gay and Lesbian Law Journal* 50-72. Notice that the sequences are more descriptive of the outcomes of law, rather than the intentions of activists and lawmakers in Europe. Moreover, it is not a global pattern, as, for instance, in parts of the Americas, family recognition precedes anti-discrimination, and in some African countries, anti-discrimination precedes decriminalization. See Kees Waaldijk, 'Legal Recognition of Homosexual Orientation in the Countries of the World. A Chronological Overview with Footnotes' presented at the conference *The Global Arc of Justice – Sexual Orientation Law Around the World* (2009, Los Angeles); Lucas Paoli Itaborahy and Jingshu Zhu, *State-Sponsored Homophobia: A World Survey of Laws: Criminalization, Protection and Recognition of Same-Sex Love* (ILGA- International Lesbian Gay Bisexual Trans and Intersex Association, 2014).

177 See Chapter 2.

178 See e.g., legal arguments for same-sex marriage despite anti-sodomy law: William M Hohengarten, 'Same-Sex Marriage and the Right of Privacy' (1994) 103 *The Yale Law Journal* 1495-1531.

179 Renée Römkens, 'Law as a Trojan Horse: Unintended Consequences of Rights-Based Interventions to Support Battered Woman' (2001) 13 *Yale Journal of Law and Feminism* 265-290.

of a high-quality (*gao suzhi*)¹⁸⁰ gay constituency may further exclude the less obedient sexual subalterns;¹⁸¹ the funder-driven elitism in professional activist groups may sacrifice community accountability;¹⁸² LGBT advocacy has not paid as much attention to economic redistribution as cultural recognition;¹⁸³ and above all, the transnational flow of funding, knowledge and LGBT rights rhetoric is playing a crucial part in what Puar calls homonationalism – the privileging of identity politics, ‘coming out’, public visibility, and legislative measures as the dominant barometers of social progress for all cultures and nations, without examining the violence of the very universal discourse of progressiveness on a global scale.¹⁸⁴ As radical queer awareness and the LGBT rights discourse are simultaneously growing in China, we may foresee more tensions outside and within the LGBT communities in the near future, especially when it comes to the diverging attitudes towards ‘dating the state’¹⁸⁵ via legal advocacy.

180 Several scholars have addressed the ‘*suzhi*’ issue. See e.g., Travis Shiu-Ki Kong, ‘Outcast Bodies: Money, Sex and Desire of Money Boys in Mainland China’ in Ching Yau (ed) *As Normal As Possible: Negotiating Sexuality and Gender in Mainland China and Hong Kong* (Hong Kong University Press, Hong Kong, 2010) 17-35; Rofel, *Desiring China* (2007) 104-105.

181 For the exclusionary effects of assimilation, see Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (Glasshouse Press, London, Sydney, Portland Oregon, 2005); Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (Random House, New York, 2006).

182 Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (South End Press, New York, 2011); Matthew Bakko, ‘The Capture of Affect: (Homo)normalizations of Affective Relationality in the Non-Profit Industrial Complex’ (Master Thesis of Department of Gender Studies, Central European University 2013).

183 Nancy Fraser, ‘Rethinking Recognition’ (2000) 3 *New Left Review* 107-120.

184 Jasbir Puar, ‘Queer Times, Queer Assemblage’ (2005) 23 *Social Text* 3-4, 121-13, 138.

185 This term is appropriated from Katherine Franke, ‘Dating the State: The Moral Hazards of Winning Gay Rights’ (2012) 44 *Columbia Human Rights Law Review* 1, 1-46.