



Mid-Term Assessment of China's implementation of 2nd UPR recommendations on SOGI rights

Following UPR (2nd Cycle): October 22, 2013

Period of Assessment: 2014-2017

Submitted by: International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA)

Introduction

This report has been made with inputs from Chinese human rights defenders. At the second Universal Periodic Review on China in 2013, two recommendations regarding the human rights of LGBT persons were made. The two recommendations called for the establishment of effective anti-discrimination laws and regulations that articulate protecting the rights of lesbian, gay, bisexual and transgender (LGBT) persons at schools and in the workplaceⁱ and to specifically address the need to prohibit discrimination on the basis of Sexual Orientation and Gender Identity (SOGI), along with other grounds of discrimination such as ethnicity, religion, and infection with HIV, hence highlighting the complexity of the operations of discrimination and violence and the importance of recognizing intersecting discriminations faced by LGBT persons.

China replied to both recommendations by indicating that they have been “accepted and already implemented”.ⁱⁱ China furthermore indicated: “China’s Constitution clearly stipulates that all citizens are equal before the law. China prohibits all possible discriminations via enacting specific laws”;ⁱⁱⁱ and “The Labour 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”.^{iv}

These replies do not contain a truthful reflection of the legal and social situation in China. The Chinese government has not adopted or implemented any effective laws, regulations, or mechanisms to prohibit and prevent implicit or explicit discriminations against LGBT individuals, who are still targets of mistreatment and violence, in a society and culture where misconceptions about one’s sexual orientation and gender identity are pervasive.

Moreover, the Chinese government itself has been complicit in generating these discriminations and unequal treatments, seen at sites such as public schools, or through the (mis)conduct of officials.

Discrimination and Inequality in the Workplace

While China’s Constitution stipulates that all citizens are equal before the law,^v there is no specific law on the protection of rights of individuals with diverse sexual orientation and gender identities. At present, there are five specific laws that provide specific rights protection to vulnerable groups: the Law on Regional National Autonomy,^{vi} the Law on the Protection of Rights and Interests of Women,^{vii} the Law on the Protection of Rights and Interests of Elderly,^{viii} the Law on the Protection of Minors,^{ix} the Law on the Protection of Disabled Persons.^x A law that prohibits discrimination and unequal treatment towards LGBT persons, a vulnerable and marginalized group, is clearly missing. Additionally, the specific laws regulating labour and employment also do not recognize SOGI as grounds for discrimination, but only mention ethnic background, race, sex, and religious beliefs as grounds for discrimination.^{xi}

No substantial progress in law has been made towards the establishment of a specific anti-discrimination law that enshrines a prohibition of discrimination on the grounds of SOGI in the workplace. A proposal for an Employment Anti-Discrimination Law was submitted to the National People's Congress (NPC) in 2016,^{xii} which stipulates that “gender identity and sexual orientation should not be factors considered by employers when recruiting, hiring, training, paying, promoting, and providing benefits”.^{xiii} However, there has been no sign indicating that this proposal will be passed into law, as shown in NPC's Standing Committee's Plan for Legislation in 2016^{xiv} and 2017.^{xv} In addition, planning for the passing of an anti-discrimination law inclusive of SOGI and specifically protecting LGBT persons is also lacking in the National Human Rights Action Plans of China (2012-2015; 2016-2020),^{xvi} China's official guidelines for human rights development. Moreover, China Human Rights Memorabilia,^{xvii} China's official record of its own human rights activities and achievements, is devoid of any agenda on SOGI. The omission/erasure of SOGI/LGBT discourse in China's official narrative indicates that Chinese authorities actively ignore and/or deny the fact that, in today's China, LGBT persons still face constant discrimination and unequal treatment in the workplace.

LGBT persons face the danger of being fired and being denied employment/promotion when their sexual orientation is exposed, and when their gender identity and/or expression do not match mainstream expectations. Widespread societal discrimination against LGBT persons and the state's omission of SOGI as grounds of discrimination in the legislation not only render LGBT individuals unprotected, but also obstruct them when they seek legal redress. Two recent cases that gained wide-scale public attention illustrate the daily discriminatory realities faced by LGBT people in the workplace, and the current obstructions when it comes to seeking legal protection and redress.

In 2014, a gay man was fired after a video of him quarrelling with a man he met through an LGBT dating website went viral, causing his sexual orientation to be revealed.^{xviii} In a witnessed conversation, the HR manager of the company stated that his homosexuality was indeed one of the reasons for his firing since “not all the colleagues and clients could accept this” and that “the circulation of the video would damage the company's image/reputation”.^{xix} The victim filed a lawsuit against his employer in 2015, which was the first lawsuit on employment discrimination based on sexual orientation in China. He lost the case, as the judge stated in the verdict that “it cannot be proven that the plaintiff was really fired because he is gay”.^{xx}

In 2015 a transgender man in Guizhou province was fired only a few days after he took the job because he looked “abnormal”.^{xxi} Eventually, he brought his case to the court in 2016, after exhausting remedies at a labour arbitration committee which ruled against him. The victim did get legal redress, yet the court only ruled in favour of the victim because the employer violated an article regarding the ending of labour relations in the Law on Employment Contracts.^{xxii} The court did not acknowledge that the victim was discriminated against based on his gender identity and expression. Such a partial redress manipulates the victim's original appeal, and essentially fails to call to account discrimination on the grounds of SOGIE and fails to offer actual protection and redress for LGBT persons.

The lack of applicable laws and regulations prohibiting discrimination on the basis of sexual orientation and gender identity is a paramount factor why court decisions like these are

made, which do nothing to help or protect LGBT persons from future discrimination and violence.

Discrimination and Violence in Schools and Universities

No effective anti-discrimination laws or regulations have been made and/or enacted to ensure the rights of LGBT students at school. Currently, the Law of the People's Republic of China on Protection of Minors (Law on Protection of Minors)^{xxiii} is the only law specifying the protection of minors including minor students. The Law on Protection of Minors lists various kinds of protection duties for minors, including protection by family, protection by school, social protection and judicial protection. The Law furthermore provides that minors enjoy rights to “live, development, protection, civil and political participation, and education”.^{xxiv} It states that “according to law, minors equally enjoy rights regardless of their sex, ethnic background, race, family financial background, religious beliefs, etc.”^{xxv} However, there is no explicit mention of SOGI.

Moreover, there is no legal regulation providing protection for *all* students, including adult (i.e. non-minor) students, thus leaving a legal void regarding the protection of most university students.

The lack of anti-discrimination laws, regulations and mechanisms for LGBT persons at schools leave LGBT students unprotected when they face aggressions and bullying from their peers or teachers.

According to a report published by the Chinese Journal of Clinical Psychology (Liu & Wei, 2015),^{xxvi} self-identified LGBT students experience various kinds of bullying and assault from both their teachers and fellow students because of their sexual orientation or gender identity. This leads to mental health harm such as depression, suicidal thoughts, and a decline in self-recognition and general well-being. Out of the 751 students surveyed (average age 20.68 ± 2.52), 40.9% have been called offensive slurs, 34.6% have been verbally abused, and 6% physically threatened. A recent high-profile case illustrates the daily discriminatory realities faced by LGBT people in schools, and the current obstructions when it comes to seeking protection and redress. In March 2016, a high school student was dosed with aphrodisiacs and threatened to be dosed with white arsenic by her classmates because she is lesbian.^{xxvii} Before the incident, the student had also been bullied and assaulted by the same group of student perpetrators, whose behaviors were seen but left unpunished by teachers of the school.^{xxviii}

Although school bullying has recently become a prominent point on the working agenda of the government, leading to the publishing of a governmental notice and comment on preventing bullying,^{xxix} there has been no mention of the protection against and prevention of discrimination, bullying, and assault based on one's SOGI. Governmental notices and comments offer general directions and comments on the work carried out at all layers of official institutions, and usually heavily influence public opinion. The lack of awareness of LGBT rights and the absence of protection for LGBT minors and/or students among government agendas thus leave LGBT students very vulnerable on paper and in practice. It

leaves the door open for blatant attacks on LGBT students, as illustrated by following excerpt from a recent public speech by a speaker from Fujian Normal University, himself a university lecturer and Secretary of his University's Youth League: "homosexuals...disgust me, and they are the ones that spread HIV. Homosexuals are but a group of purposeless and lost people."^{xxx}

As the major site for public education and citizenship pedagogy, schools need to be encouraged in their human rights education, and need positive guidance on LGBT and other issues in order to engender a more informed and accepting citizenry. Moreover, they need effective structures preventing discrimination and protecting victims of discrimination. Yet the Chinese government fails to adopt and implement comprehensive anti-discrimination laws, policies and mechanisms protecting LGBT students from discrimination and violence, and can be seen as complicit in violating the various rights of LGBT students. Its subsidiary institutions, in particular public universities, set obstacles to the registration of LGBT student associations on campus and restrict them from conducting activities that aim to promote the awareness of gender and sexual diversity, often punishing individuals for publicly expressing their SOGI. A prominent example occurred in 2016, when a lesbian student at the Guangdong Foreign Languages & Trade University was denied her university diploma by the school officials after she proposed to her girlfriend on the campus, and this for reasons of violating the code of conduct on campus and behaving *inappropriately*.^{xxxi}

In addition, the right to education and access to adequate information regarding SOGI knowledge are undermined in China, because biased and misleading educational materials are used in higher education which promote and aggravate discrimination against LGBT students. In 2016, a student sued the Ministry of Education for its inaction to recall discriminatory university textbooks, published from 2013 onwards, which labeled homosexuality as a mental illness, and/or a sexual perversion in need of corrective therapies.^{xxxii} She decided to sue after her information request in 2015 to the Ministry of Education on the standards of university textbooks, and her report on offending publishers to various state institutions, received no replies.^{xxxiii} The judge ruled in favour of the defendant, claiming in the verdict that the Ministry of Education doesn't have any obligation to protect a specific individual student's rights and interests. The judge indirectly admitted however that the rights of LGBT students should be respected and fulfilled. In 2017, the case was appealed to a higher court, and again the verdict ruled against the plaintiff.

Recommendations

To the Government of the People's Republic of China

1. The Chinese government should expedite the adoption of the proposed SOGI-inclusive Employment Anti-Discrimination Law, and ensure that LGBT persons fully enjoy equal and non-discriminatory treatment in the workplace.
2. To implement in a successful way the 2 accepted SOGI recommendations made by Ireland and the Netherlands in 2013.

3. To include in the National Report that will be presented in 2018 (UPR Cycle III) the advances and challenges with regards LGBT issues.
4. The Chinese government should demonstrate a firm commitment to its treaty obligations to review and audit its national laws, especially the provisions on discrimination contained in its Labour Law, Law on the Promotion of Employment, and Law on Protection of Minors. The Chinese government should ensure that these provisions fully comply with human rights standards under international covenants, and reflect enhanced equal rights protection for persons with diverse SOGI.
5. Chinese authorities should publicly and unambiguously condemn discrimination and violence against LGBT minors and students based on SOGI, emphasizing the illegality of such discrimination and violence. The Chinese government should also enact comprehensive measures to tackle widespread school violence targeting LGBT students, and, where appropriate, investigate and hold accountable public institution officials who are seen to be responsible for such acts.
6. The Ministry of Education should ensure each individual student's rights to be protected regardless of one's SOGI. In order to do so, it should establish an investigatory taskforce to investigate biased educational materials used in higher education that aggravate and propagate discrimination against LGBT people. Moreover, it should make textbook publishers accountable for producing and publishing discriminatory and harmful contents, and should provide appropriate legal deterrents preventing such publications.

To other states and international organizations

1. Express strong concern to Chinese authorities about the human rights abuses of LGBT individuals, in particular discrimination based on SOGI in the workplace and at schools, emphasizing that such abuses violate both Chinese and international human rights law, that victims should be able to access justice, and that the perpetrators should be investigated and held accountable for unlawful acts.
2. Raise the issue of discrimination against LGBT individuals with Chinese officials in legal reform and judicial training programs to spur further reforms in advancing human rights in line with the principles of equality and non-discrimination that are stipulated in international human rights instruments.

Appendix

December 2013

Report of the Working Group on the Universal Periodic Review: China (including Hong Kong, China and Macao, China)

A/HRC/25/5

Recommendation 186.86 Establish anti-discrimination laws and regulations to ensure that lesbian, gay, bisexual and transgender persons enjoy equal treatment, including at schools and in the workplace (Ireland).

Recommendation 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 labour and employment law in line with international standards (Netherlands).

China's replies: 2 recommendations accepted and already implemented.

NGO assessment: China has not implemented any of these two recommendations

Notes

ⁱ 2013, *Report of the Working Group on the Universal Periodic Review China (including Hong Kong, China and Macao, China)*, A/HRC/25/5, p18

ⁱⁱ 2014, *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, p7

ⁱⁱⁱ Ibid

^{iv} Ibid

^v *Constitution of the People's Republic of China*, art. 33, http://www.npc.gov.cn/englishnpc/Constitution/node_2824.htm. Accessed on 2017-05-12

^{vi} *Law of the People's Republic of China on Regional National Autonomy* http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1383908.htm. Accessed on 2017-05-12

^{vii} *Law of the People's Republic of China on the Protection of Rights and Interests of Women* http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383859.htm. Accessed on 2017-05-12

^{viii} *Law of the People's Republic of China on the Protection of Rights and Interests of Elderly* http://www.china.org.cn/government/laws/2007-04/17/content_1207404.htm. Accessed on 2017-05-12

^{ix} *Law of the People's Republic of China on the Protection of Minors* http://www.npc.gov.cn/wxzl/gongbao/2013-02/25/content_1790872.htm. Accessed on 2017-05-12

^x *Law of the People's Republic of China on the Protection of Disabled Persons* <http://www.ilo.org/dyn/natlex/docs/WEBTEXT/31906/64869/E90CHN01.htm>. Accessed on 2017-05-12

^{xi} See Article 3 “The workers enjoy the right to employment on an equal footing and to choice of jobs on their own initiative in accordance with law. In seeking employment, the workers shall not be subject to discrimination because of their ethnic backgrounds, races, gender, religious beliefs, etc”

Law of the People's Republic of China on Promotion of Employment http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471590.htm. Accessed on 2017-05-12

See Article 12 “Labourers, regardless of their ethnic group, race, sex, or religious belief, shall not be discriminated against in employment.”

Labour Law of the People's Republic of China http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383754.htm. Accessed on 2017-05-12

^{xii} Zhu Ningning, *Too many employment discriminations, too fragmented legislations: Time for an Employment Anti-Discrimination Law* (), January 26, 2016, Legal Daily [Official]

http://www.npc.gov.cn/npc/xinwen/lfgz/lfdt/2016-01/26/content_1961366.htm

^{xiii} *Employment Anti-Discrimination Law (Experts' Opinions) At NPC and CPPCC, and Beyond* (两会《反就业歧视法(专家意见稿)》外的反歧视实践), March 09, 2016, NGO CN

<http://www.ngocn.net/news/2016-03-09-5d899ff1fc848588.html>

^{xiv} *NPC's Standing Committee's 2016 Plan for Legislation* 2016 http://www.npc.gov.cn/npc/xinwen/lfgz/lfdt/2016-04/22/content_1987519.htm. Accessed on 2017-05-12

^{xv} *NPC's Standing Committee's 2017 Plan for Legislation* 2017 http://www.npc.gov.cn/npc/xinwen/2017-05/02/content_2021068.htm. Accessed on 2017-05-12

^{xvi} *The National Human Rights Action Plan of China 2012-2015* 2012-2015 http://www.chinahumanrights.org/html/2014/NHRAPC_0730/112.html. Accessed on 2017-05-12

The National Human Rights Action Plan of China 2016-2020 2016-2012 http://www.humanrights.cn/html/2016/3_0929/22451.html. Accessed on 2017-05-12

^{xvii} *Memorabilia* <http://www.chinahumanrights.org/html/PR/MEMORABILIA/>. Accessed on 2017-05-12

^{xviii} *Chinese court hears first lawsuit on gay workplace discrimination*, January 26, 2015, The Guardian, <https://www.theguardian.com/world/2015/jan/26/chinese-court-first-lawsuit-gay-workplace-discrimination>

^{xix} “.....” *Conversation on file.*

²³ http://www.guancha.cn/society/2015_11_26_342719.shtml “中国性倾向职场歧视第一案”终审宣判 小红帽主角之一败诉, Nov26 2015, 观察者

^{xxi} In China, only those who undergo sex/gender reassignment surgery are permitted to change one's gender on ID and Household Registration. The mismatch between one's own gender expression and official records required for employment and work thus often leads to discrimination and harassment towards trans persons as experienced in this case. Even for those who have successfully changed their gender on IDs, further obstacles regarding change of gender on university diplomas and other documents remain, which are all essential for employment and promotion.

Chen Leizhu, *Transgender Employment Discrimination case in Guiyang Pronounced: Defendant Accused of Unlawful Sack but not Discrimination* (), December 31, 2016, The Paper

http://www.thepaper.cn/newsDetail_forward_1590861

Foreign Media draws attention to China's first Transgender Employment Discrimination Case (), May12 2016,

<http://mt.sohu.com/20160512/n449042796.shtml>

^{xxii} *Law of the People's Republic of China on Employment Contracts*

http://www.chinalawedu.com/new/23223_23228/2010_2_9_ji3308115724192010219890.shtml. Accessed on 2017-05-12

^{xxiii} *Law of the People's Republic of China on the Protection of Minors*
http://www.npc.gov.cn/wxzl/gongbao/2013-02/25/content_1790872.htm. Accessed on 2017-05-12

^{xxiv} See Article 3 “

”

Ibid

^{xxv} Ibid.

^{xxvi} Liu Wenli & Wei Chongzheng, 2015, *Research on the Relationship between School Bullying and Mental Health of Sexual Minority Students* (), Chinese Journal of Clinical Psychology No. 4 Vol. 23

<http://www.cnki.net/kcms/detail/43.1214.R.20150807.1703.030.html#rd>. Accessed on 2017-05-12

<http://www.ngocn.net/news/2016-06-01-e862d20f67a68ab9.html>. Accessed on 2017-05-12

^{xxvii} *Three Male Students Dosed Their Lesbian Classmate Aphrodisiacs and Threatened to Dose White Arsenic* (3

), March 07, 2016, QQ News

<http://news.qq.com/a/20160307/026667.htm>

^{xxviii} Ibid

^{xxix} *Guiding Comments on the Protection and Prevention of Bullying and Violence Against Primary and Secondary School Students*

, November 01, 2016,

http://www.law-lib.com/law/law_view.asp?id=547924

Notice of the Office of National Education Inspection, Ministry of Education on Governing Bullying and Assault at Schools

, May 09, 2016,

http://www.moe.edu.cn/srcsite/A11/moe_1789/201605/t20160509_242576.html

^{xxx} *University Teacher in Fujian Discriminates Against LGBT People: Homosexuals Are Lost* (

), March 26, 2017

<http://groups.tianya.cn/post-164696-1c8f57f122b34427ac0aa8d4c70998d3-1.shtml>

^{xxxi} *Straight Graduation Proposal Received School's Blessing, A Lesbian Graduation Proposal Led to Denial of University Diploma?* (

), June 29, 2016,

http://blog.sina.com.cn/s/blog_67c528700102wlfy.html

^{xxxii} “*Textbooks stigmatises Homosexuality*” : *Qiu-Bai VS Ministry of Education Case's Retrial* (“ ”

), January 10, 2017, Beijing News

<http://www.bjnews.com.cn/news/2017/01/10/430137.html>

University Student Sues Ministry of Education for Textbooks that Stigmatises LGBT (),

September 13, 2016, China Daily

http://cnews.chinadaily.com.cn/2016-09/13/content_26784385.htm

^{xxxiii} Ibid