

The Protection of Transgender Workers in China: Between Law and Society

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Abstract Transgender individuals in China are marginalized for existing beyond the binary. While repression has lessened, considerable challenges remain, particularly with legal recognition, such as mandatory gender-affirming surgery. Despite the lack of *ad hoc* legal protections for sexual and gender minorities, landmark cases like *Mr. C and Gao v. Dang Dang* have provided some protection to transgender workers. This article uses Queer Legal Theory to examine the legal challenges transgender workers face in China, analysing legislative developments and social perceptions that shape their experiences.

Keywords Gender equality. Transgender rights. Labour law. Discrimination. Chinese law.

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1 Introduction: Queering Gender Equality in China

China faces a significant contradiction regarding gender equality. The country has historically been considered advanced for its abortion and divorce rights for women, but it is also very strict and traditional in other respects. Enforcing gender equality has also been a stronghold of the Maoist doctrine since the earliest days of the People's Republic of China (PRC). However, Chinese gender equality relied solely on a binary understanding of 'sex equals gender' (i.e., sex = gender, or gender binarism) rather than embracing the broad spectrum of gender identities. While conversations on this matter have reached beyond China, the country's sustained reliance on a binary framework continues, whereas other countries and regions have achieved some progress in improving protection. Gender binarism is particularly evident in the PRC Constitution, which prescribes equality between men and women rather than broader equality provisions, and does not grant any protection against discrimination on the basis of gender identity or sexual orientation. The protection of transgender individuals currently relies on gender-based anti-discrimination provisions that are either universal, too general, or have been established with gender binarism in mind. These provisions, to protect transgender individuals from employment discrimination, necessitate a 'queer interpretation' to extend protection against sexual orientation and gender identity discrimination. This passage proposes an interpretative analysis of extending gender-based anti-discrimination clauses in Chinese law beyond the binary, addressing the lack of explicit protections for sexual and gender minorities through a concept known as queering gender equality. It is also a practical solution that does not require further legislative efforts given the historical resistance to gender and sexual minorities in China. However, queering gender equality is a theoretical concept that becomes more significant when applied to the practice of courts.

Queering gender equality means extending traditionally applicable provisions on women's protection and gender/sex-based discrimination to the full spectrum of gender identities. This extension aims to provide an understanding that gender equality clauses can be used to foster anti-discriminatory measures beyond the binary 'sex = gender' (Engel 2021, 139-40; Banović 2023, 82-4). To advance beyond the binary understanding of gender, it is essential to define gender as more than a mere function of sex. Butler's conceptualisation of gender as performative offers the most effective framework for this definition.

Gender is the repeated stylisation of the body, a set of repeated acts within a highly rigid regulatory frame that congeal over time to produce the appearance of substance, of a natural sort of being. (Butler 1990, 33)

Following Butler's definition, gender identity is not an expression of gender binarism but is manifested through enacted practises. Therefore, social and cultural dimensions contribute to the construction of gender, as manifested in repeated actions (33).

Beyond definitions, queering gender equality to analyse anti-discriminatory clauses in Chinese law fits with a Queer Legal Theory (QLT) framework of analysis. While scholars agree that QLT goes beyond the mere study of 'queer cases' (Romero 2010, 192), the intrinsic drive of this stream of research to question norms and values and clash with what is "normal, dominant, hegemonic, powerful" (88) fits with the scope of this research. The first reason for this match is that transgender identities in China are still considered pathologies rather than natural occurrences. Therefore, the resulting framework mostly invalidates their existence or, in limited instances, pushes them aside in a series of medical regulations that patients and practitioners must follow to allow individuals to have the correct gender markers in their documents. By challenging the Euro-American assumption that equates sex and gender (Valdez 1995, 39), QLT paves the way for rigorous evaluation of gender equality using critical perspectives. Instead of a theoretical framework, QLT functions as a methodology that allows for narratives, integration between law and social studies, and disruption of traditional values (Banović 2023, 88; Valdez 1995, 364-72; Romero 2010, 193-4). It is a relevant approach to analyse workplace equality for transgender individuals in China through the lens of gender equality and gender roles.

This research scrutinises Chinese labour laws' gender equality and anti-discrimination clauses and explores their relevance to safeguarding transgender employees' rights. This study analyses the experiences and legal protections of transgender individuals in workplaces in China by assessing relevant case law and by blending historical accounts and contemporary reports. This research examines how social bias affects the implementation of relevant laws and the extension of relevant provisions. Through the lens of QLT, this study amplifies the voices of China's transgender community and invinces their distinct experiences.

2 From Imperial Constraints to Contemporary Reform: Evolving Rights and Challenges for Transgender Individuals in China

2.1 Imperial Times

Traditional Chinese society had two main characteristics: fixed social roles and widespread chauvinism (Huang 1983, 23). These characters align with Valdes' theory, which argues that European-American society is fundamentally based on gender binarism (i.e., conflation of sex and gender), dividing passive and active roles according to sex (Valdes 1995, 39; 1996, 165). In China, feminine attributes were perceived as less valuable than male attributes, partially because of the difference in power and privilege given by society to males. Ruskola famously pointed out that this aspect led to widespread sexism, which became embedded in traditional Chinese patriarchal society. Males were associated with dominance, and females with subservience, resulting in a strong gender bias that persisted throughout the centuries (Ruskola 1994, 2552). The lack of power equally relegated the 'passive' partner of MLM (male-loving-male) relations (Ruskola 1994, 2553) to transgender women. Similar to the European-American experiences (Valdes 1995, 36), the establishment of gender roles in traditional Chinese society was both culturally deductive and intransitive.¹

Confucianism provided cultural foundations for defining gender roles and reinforced the subservience of women to men² based on their dominance and power. Gender roles were developed from this dominant traditional doctrine (Ruskola 1994, 2544). The immobility of roles was reinforced through moral predicaments and precepts by patriarchs and was eventually consolidated in laws. Notably, in

¹ See Valdes' specifics regarding those attributes as follows: "The Euro-American construction of gender is officially and culturally 'deductive' because it is deduced by society and its agents or institutions of power wholly and exclusively from the sex assignment. This construction furthermore is officially and culturally 'intransitive' because gender's manifest fluidity among the populace-its popularly manifested transitivity - is adamantly denied and consistently repressed by dominant sex/gender" (Valdes 1995, 40).

² The subservience of women to men is linked to the five *Confucian Relations* (*wu lun*, 五伦) which describes the five basic human relations. A translation of the relations presented in the Analects can be found in Hsü as follows: "For father and son there was family feeling; for prince and minister there was propriety; for husband and wife there was distinction of function; for elder and younger there was orderly sequence for friends there was good" (Hsü 1970, 28). "All the presented relations, with the notable exception of friendships, were a matter of power and obedience. The subject had to obey a specific set of rules, the three guidelines which were established by the party retaining the power in the specific of the rules se from the ruler to the subjects, from the husband to the wife, and from the father to the son" (He et al. 2015, 7).

the Great Qing Code, morality was hardened in the provisions of this legal instrument, consolidating what was traditionally left to the enforcement of the family/clan dimension (Zhang, Dong 2017, 163). Nevertheless, the morality embedded in the Code (Ruskola 1994, 2535) further reinforced gender bias and traditional values and excluded those who could not conform. Ruskola also emphasised that male self-expression was far more open than what was allowed for females (2553).

The experiences of transgender women in imperial times were very closely linked to MLM individuals, partially because of the lack of distinctions between crossdressing, effeminacy, and gender identity (Zhang 2023, 1412). In terms of employment possibilities, the roles Male-to-Female (MtF) transgender individuals could play in traditional society were limited. In imperial times, they were primarily known for their roles as eunuchs, male actors portraying feminine characters, and sex workers (Zhang 2023, 1412; Zhang 2014, 181; Hinsch 1990, 12). Because of their inability to marry and procreate, transgender women were never considered at the same level as their cisgender counterparts. The literature has highlighted their ‘stone maidens’ status, indicating that they could not even fulfil the gender roles of traditional wives and procreate.³

2.2 Reforms During the PRC Period

Since its inception, the Chinese communist party has sought to dismantle traditional society, and the demolition of pre-determined gender roles has played a significant role in the social transformation of contemporary China. This drive for reform was equally clear in the propaganda, and a notable mention is Mao’s slogan “Women hold up half the sky” (*funü neng ding banbian tian*, 妇女能顶半边天). The limited legislative production of the early PRC sought to instigate social change. The 1950 marriage law, strongly pushed by Mao, sought to ensure gender equality in the country, primarily by freeing women from traditional marital constraints and granting them the right to divorce (Diamant 1997, 130-1). Article 96 of the 1954 Constitution recognised equality between men and women in political, economic, cultural, social, and domestic life, while Article 86 gave women the right to vote.⁴ The advancement of gender equality contributed to the broader policy of reforming society by “destroying the old and establishing the new” (*da po jiu shijie, chuang li xin shijie*, 打破旧世界,

³ See Sommer 2002; 2013; 2024.

⁴ *Constitution of the People’s Republic of China (1954)* (*Zhonghua Renmin Gongheguo xianfa*, 中华人民共和国宪法).

创立新世界). Still, the Maoists' low trust in law led to weak legislative enforcement.

Despite the emphasis on gender equality, the status of gender minorities was excluded from gender equality and gender-based anti-discrimination provisions. Gender equality meant equality between men and women, excluding any additional gender identity, and relegating the experiences of sexual and gender minorities behind closed doors. Because of their closeted existence, accounts of the lives of gender minorities during the Maoist years are limited. Furthermore, transgender individuals were often considered indistinguishable from homosexual individuals because the traditional conflation of sex and gender questioned their existence. Additionally, during Mao's era, femininity was counterrevolutionary, regardless of gender identity, as Maoism promoted a gender-neutral appearance and traditionally masculine gender roles in labour as a means to free society from the oppression of the traditional system. Yet, neutrality was mandated rather than granted (Yang, Yan 2017, 67-8), which meant that femininity equalled rebellion (Yang 1999, 40-3; Roberts 2006, 407-8) and, ultimately, that crossdressing was to be criminalised as it was a purely anti-revolutionary act (Zhang 2023, 1411-12; Zhang 2014, 185). Because of the politicisation of gender roles and the suppression of femininity, mandated equality was not equated with generalised freedom. Transgender individuals were excluded from the general discourse, and their existence was largely secluded. Anything beyond gender binarism was hidden from the general narrative (Zhang 2023, 1412; Zhang 2014, 187), labelled abnormal or deviant, and repressed. During the Maoist era, all perceived deviant behaviours were repressed and criminalised under the broad-scope crime of hooliganism (*liumangzui*, 流氓罪), which encompassed all perceivably immoral behaviours, including homosexuality and crossdressing. The preferred punishment against those who committed these deviances was re-education through labour (*laojiao*, 劳教), meaning that convicted individuals were often subjected to regular abuses. Still, most of these 'judgements' were handled in extra-legal sanctions (Worth et al. 2019, 45) rather than in a court of law, and, ultimately, the punishment depended on a worker's work unit (*danwei*, 单位) (Kang 2018, 21).

However, the institutionalisation of proper tribunals and, eventually, the socialist rule of law (Blasek 2015, 15; Di Matteo 2018, 50-1) did not lead to improved equality. Instead, during the Reform and Opening Up period, oppression increased by formalising the same informal repression mechanisms as in the revolutionary era. In 1979, the informal charge of hooliganism was codified under Article 160 of the Criminal Law. Under a broad provision, the Criminal Law allowed tribunals to lawfully prosecute the same perceivably immoral acts of the Maoist period (Tanner 2000, 10-13). This crime, therefore,

reflected the moral values embedded in Chinese society beyond the Maoist period and into contemporary times. As the broad and vague language of hooliganism provided much discretion to judges, it also provided unprecedented opportunities for enforcing morality in society (Ruskola 1994, 2540-1). This period further distanced gender minorities and gender equality. While the 1982 Constitution re-stated equality between men and women, to also include equal pay (Art. 48), it did not include any reference to gender or sexual minorities, which were left out of the scope of gender equality,⁵ and not protected by any *ad-hoc* provision.

The 1980s marked a period of ‘global pathologisation’ of transgender individuals due to the popularisation of gender-affirming surgeries; China was not exempted from this trend, and the first MtF surgery in the country was performed in 1983 (Zhou 2024, 2). Interestingly, the pathologisation process partially legitimised the struggle of transgender people in society. As transgender people were, now, suffering from a ‘pathology’ that could be ‘fixed’, they were to be granted some degree of acceptance (Zhang 2014, 189). This pathologisation of transgender individuals has continued to occur, as gender dysphoria remains a ‘disease’ in the Chinese Classification and Diagnostic Criteria of Mental Disorders (CCMD). However, some positive advancements occurred during this period: hooliganism was decriminalised in 1997 (Worth et al. 2019, 42), and increased focus on rights in the 1990s and 2000s provided some legal paths to show some degree of openness to sexual and gender minorities. The ‘Homosexual disorder’ was also removed from the CCMD in 2001, thereby de-pathologizing MLM and women-loving-women relations (Zhang 2023, 1413).

In 2002, the Chinese government promulgated the “Ministry of Public Security Reply to Questions Concerning the Alteration of Assigned Sex on Household Registration for Citizens Following Sex Change Surgery”. This regulation marked a milestone for transgender individuals by consolidating a procedure for changing gender markers on official documents. However, the process was not easy, and it required the burden of Gender Affirming Surgery (GAS)⁶ to validate the change (UNDP, China Women’s University 2018, 21-4). Although the regulation was updated in 2008, the requirements for surgical procedures have remained unchanged. The 2009 “Technical Management Specification for Transgender Surgery” regulated access to GAS, which was updated in 2017. This regulation imposes

⁵ *Constitution of the People’s Republic of China* (1982) (*Zhonghua Renmin Gongheguo xianfa*, 中华人民共和国宪法).

⁶ Although gender affirming surgeries are of different kinds, the requirement here is for what is commonly referred to as ‘bottom’, i.e., genital, surgeries.

specific conditions on hospitals, surgeons, and patients. Individuals seeking surgery must meet specific criteria: they must be at least 20 years of age, have had a persistent desire to undergo GAS for at least 5 years, have undergone a failed cycle of psychological therapy, be unmarried (and divorce if they are married), have no criminal record, and obtain a psychiatric assessment simultaneously confirming their gender dysphoria without any further disorder. Perspective patients' immediate family members must also be informed, which represents an incommensurable difficulty for many individuals. Surgeons are also required to meet stringent qualifications to perform surgery: they must hold a valid licence, have a minimum of 10 years of experience in plastic surgery with a position of deputy director or higher, have completed at least 10 relevant surgeries, and have a certification from a provincial health administrative department (UNDP, China Women's University 2018, 25-31).

Individuals who wish to change their documents must submit a written request that includes their household registration, residency card, a notarised certificate of gender authentication and, if applicable, approval from their employer's human resources office. If the GAS is performed abroad, a hospital certified by the Public Security Bureau and Health Administrative Department must also submit an additional certificate. In any case, documents can only be changed from *nan* 男 (male) to *nü* 女 (female) or vice versa (UNDP, China Women's University 2018, 21). At the time of writing, the Chinese framework does not provide genderless or gender-neutral gender markers.

2.3 Regulatory Gaps and Contemporary Problems

The lack of gender neutral markers is only one of the many regulatory gaps that contribute to the currently inadequate protection of transgender individuals in unregulated areas, with the most notable case of educational diplomas and documents. Currently, there are no standardised guidelines from the Ministry of Education (MOE), decisions on this matter are left to the discretion of schools and universities. Nevertheless, some local and provincial regulations sometimes provide for internal procedures. In any case, *ex-post* changes are rare and reportedly almost impossible, and the MOE is currently silent on this problem (Asia Catalyst et al. 2015, 55-6). The problem spills over in the workplace when prospective workers must prove their education status in the employment process and sometimes fail to prove that they have obtained a specific degree or certificate in the employment process due to problems with gender markers. Consequently, this problem hinders transgender workers' ability to secure stable employment, meaning they may be relegated to

the informal economy or simply engage in sex work (UNDP, China Women's University 2018, 24).

The phenomenon of sex work is a last resort for transgender individuals who cannot integrate into or access formal employment; however, official data on this last aspect are scarce because sex work is illegal in China. According to the Criminal Law of the People's Republic of China, those who organise such activities or force others to prostitute carry a penalty ranging from five to ten years and a fine, potentially extending to life in prison for severe cases (i.e., prostituting minors) (Art. 358). Individuals luring, accommodating, or introducing others to prostitution can face up to five years in prison (Art. 359). Additionally, individuals engaged in prostitution who knowingly have an active diagnosis of any sexually transmitted disease may face up to five years in prison and a fine (Art. 360).⁷ Prostitution is also punishable under the *Public Security Administration Punishment Law of the PRC*, which provides for penalties such as detention for 10 to 15 days and fines of up to 5,000 yuan. Penalties may be reduced to a five-day detention period of 500 yuan for minor offences like solicitation (Art. 66).⁸ Because they operate outside the formal economy, sex workers lack protection against gender discrimination and equality provisions. Moreover, implicated sex workers face detention in the aforementioned system of 're-education through labour' due to the perceived immorality attributed to their occupation (Biddulph 2003, 3; Yu et al. 2009, 205; Anderson, Gil 1994, 137). Police also frequently target sex workers, resulting in frequent arrests. When transgender people are arrested they are detained with people belonging to the same gender as the one on their documents (UNDP, China Women's University 2019, 40). Police also often explicitly target sex workers to meet arrest quotas and do not shy away from committing abuses (Asia Catalyst et al. 2015, 39).

Overall, the situation offers grim prospects for transgender workers' workplace conditions. The Beijing LGBT Center reports that transgender individuals are not only three times more likely to be unemployed than their cisgender counterparts (2017, 17; 2021, 26) but also significantly more susceptible to workplace discrimination, often choosing to hide their gender identity in the office (2021, 27). This precarious situation is further exacerbated by the Chinese government's increasingly restrictive stance towards LGBTQIA+ communities (Ren, Gui 2022, 102) and broader closures on civil society and NGOs (Deane 2021, 123-5). The aforementioned Beijing's LGBT Center, a significant

⁷ *Criminal Law of the People's Republic of China* (2021) (*Zhonghua Renmin Gongheguo Xingfa*, 中华人民共和国刑法).

⁸ *Public Security Administration Punishment Law of the People's Republic of China* (2012) (*Zhonghua Renmin Gongheguo zhi'an Guanli Chufa Fa*, 中华人民共和国治安管理处罚法).

hub for LGBTQIA+ research and advocacy within China, was forced to close in 2023 (Lemaître 2023), and the LGBT Rights Advocacy China group discontinued its operations in 2021 (Hu 2023). The 2020 Shanghai Pride was also cancelled due to COVID-19 restrictions and was never rescheduled (*Shanghai Pride* 2020).

3 Protection of Transgender Workers in the Chinese Constitutional and Labour Laws

Longarino, who has extensively researched the protection of gender and sexual minorities (2022, 221-4), highlighted the importance of Constitutional law as a backbone for any anti-discrimination provisions. Following increased legislative production on individual rights and interests (*quanyi*, 权益), the constitution was notably amended in 2004 to include Article 33. This provision extended the state protection of human rights to all Chinese citizens and simultaneously restated the equality of all people before the law in courts of law.⁹ Along with the provision regarding human rights, other relevant clauses in the Chinese constitution that support transgender workers are personal dignity (Art. 38) and the overarching right to work (Art. 42), which were already present in the 1982 Constitution.¹⁰ However, the applicability of the Chinese Constitution to citizens remains problematic. In the early 2000s, the Supreme People's Court made two major, yet contradictory, rulings concerning the applicability of constitutional rights in a court of law. In *Qi Yuling v. Chen Xiaoqi*, the court stated that Chen and others had violated Qi's constitutional right to education, thus attributing a constitutional right to a Chinese citizen for the first time (Morris 2012, 282-3). However, the judgement was later annulled in 2008 solely because it could not be applied anymore (Sprick 2019, 41-2; Tong 2010, 669).

Concerning specific labour protection, the framework of reference of the labour law still relies on anti-discriminatory practises and anti-gender-based discrimination clauses found in the labour laws. The Labour Law (LL) was promulgated in 1994 and became effective a year later. The LL, which was last amended in 2018, upholds both the right to employment (Art. 3) and the principle of non-discrimination on the grounds of race, sex, and religion (Art. 12). Women and men are both entitled to equal employment rights, except for certain occupations deemed 'unsuitable' for women according to

⁹ *Constitution of the People's Republic of China* (2004) (*Zhonghua Renmin Gongheguo xianfa*, 中华人民共和国宪法).

¹⁰ *Constitution of the People's Republic of China* (1982) (*Zhonghua Renmin Gongheguo xianfa*, 中华人民共和国宪法).

state regulations (Art. 13).¹¹ While the LL grants special degrees of protection, such protection is only applicable to women and minors (Art. 58). However, additional stipulations can include disabled individuals and people from minority ethnic groups (Art. 14).¹² However, it still lacks any anti-discrimination clauses on the basis of one's sexual orientation or gender identity.

Promulgated in 2007, the Labour Contract Law (LCL) entered into force in 2008 to enhance the protections provided for by the LL. The LCL, which was last amended in 2012, further reinforced the principle of equality, which was extended to labour contracts (Art. 3), while simultaneously adding protection to contractless labour relations or relations when an employer fails to provide for a contract. Even when not covered by contracts, labour relations must follow the principle of equal pay for equal work (Art. 11). Similarly to the LL, the LCL included specific provisions on the protection of women's rights and interests (Art. 52),¹³ but it did not provide anti-discrimination provisions grounded on sexual orientation or gender identity.

The 2007 Employment Promotion Law (EPL), last amended in 2015, introduced the right to equal employment and granted citizens the freedom to choose one's career without discrimination based on ethnicity, race, gender, or religious beliefs (Art. 3). The EPL reinforced the principle of equality between men and women, further emphasising that gender cannot be grounds for workplace discrimination, except for unsuitable jobs (Art. 27). Non-discrimination was also extended to ethnic minorities, disabled individuals, rural workers, and pathogen-positive individuals (Arts. 28-31), implicitly referring to HIV-positive and hepatitis-positive individuals.¹⁴

The lack of specific anti-discrimination provisions for sexual and gender minorities limits the protection of transgender workers. The framework presented shows that all claims for specific protection must be constructed from gender-based anti-discrimination provisions or broad-scope provisions. The Constitutional text in China, which promotes gender equality between men and women (Art. 48) and does not include any references to sexual minorities and gender identities,

11 The Labour Law (2018) mentions working in mines, occupations at the fourth level of physical labour intensity (Art. 59), work at high points, in hot temperatures or cold water and any occupation at the third level of physical labour intensity when menstruating (Art. 60) or pregnant (Art. 61).

12 *Labour Law of the People's Republic of China* (2018) (*Zhonghua Renmin Gongheguo Laodong Fa*, 中华人民共和国劳动法).

13 *Labour Contract Law of the People's Republic of China* (2012) (*Zhonghua Renmin Gongheguo Laodong Hetong Fa*, 中华人民共和国劳动合同法).

14 *Employment Promotion Law of the People's Republic of China* (2015) (*Zhonghua Renmin Gongheguo Jiuye Cujin Fa*, 中华人民共和国就业促进法).

clearly reflects a binary understanding of gender.¹⁵ One way to apply provisions relevant to transgender workers without expanding the framework is to reinterpret binary provisions to encompass all gender identities through the aforementioned queering process. In the context of legal disputes, the interpretation of distant provisions requires a high degree of judicial and arbitral goodwill. Notwithstanding obstacles and the lack of explicit legal provisions, two cases have endeavoured to protect the rights of transgender workers.

4 Expanding Legal Protection: Case Law and Further Developments

The overarching problem with the presented lack of adequate protections is consistent with the fact that only a few transgender workers openly decided to fight workplace discrimination (Beijing LGBT Center 2021, 27). Therefore, only two notable cases concern protection of transgender individuals in the Chinese workplace: *Mr. C and Gao v. Dang Dang*. Both represent important examples of individuals seeking compensation for having experienced workplace discrimination in different ways. Moreover, both cases were, notably, appeals, an aspect that highlights the added difficulties that transgender individuals face when making legitimate claims.

4.1 The ‘Mr. C’ Case

The first and probably most famous case on the protection of transgender workers is the Mr. C (a pseudonym) Case (2016). Mr. C was dismissed from the Ciming Health Company after working without a contract for about a week. He claimed the real reason for his dismissal was connected to the female gender marker on his document, which did not reflect his male gender identity. Due to this difference, he was forced to wear feminine clothes and behave in a feminine manner. Ciming Health Company countered his claim by saying that the termination was due to subpar performance. Mr. C did not immediately sue the company but instead voiced his situation in different LGBTQIA+ associations and advocacy groups, which convinced him to pursue his case (Parkin 2018, 1253-4). Attorney Liu Minghui, a prominent defender of the LGBTQIA+ community in China, was one of the lawyers representing the transgender man (UNDP, China Women’s University 2018, 5). In the case, which was a labour dispute

¹⁵ Constitution of the People’s Republic of China (2018) (*Zhonghua Renmin Gongheguo xianfa*, 中华人民共和国宪法).

in which he was appealing a previously unsuccessful arbitration, Mr. C asked for compensation and an apology for the gender-based workplace discrimination he had experienced (Parkin 2018, 1254-7).

The court ruled in favour of compensating Mr. C for his unpaid wages, but not on the grounds of discrimination. The court ruled that the termination was wrongful because it had failed to provide to him a written contract and because they misleadingly stated that Mr. C was under probation when he was not (1256-7). One notable reference in the body of the case was a short statement in which the court stated that workers' gender identity could not justify their differential treatment (Longarino 2022, 230). The court specifically argued that:

personality rights of natural people are the most fundamental rights every citizen should enjoy. Personal gender identity and expression are under the same level of perfection as personality rights, and others' gender identity and expressions must be respected. Simultaneously, workers should not be discriminated against their ethnicity, race, gender or religious belief should be eliminated all in urban and rural areas, industries, identities, genders.... All barriers and discriminations affecting equal employment should respect individual gender identity and expression and workers should not be treated differently on the basis of their gender identity or expression. In the case an employer discriminates against a worker on the grounds of sex, it constitutes a violation of general personality rights, and shall be held liable according to the law.¹⁶

Therefore, the court potentially envisaged a broader definition of gender equality than that originally contained in Chinese law. However, the court did not use this definition to respond to the claims in the case, neither did it require the company to issue an apology. Still, the court managed to provide an important statement on the broad interpretation of gender equality.

4.2 *Gao v. Dang Dang*

The second significant case involving the protection of transgender workers involved Gao, a transgender woman who was fired from the online company DangDang.com in connection with her GAS in 2019.

¹⁶ *Ciming Health Checkup Company v. Mr. C*, Guizhou Province Guiyang City Yunyan, District People's Court, Second Instance Civil Judgment (2016) (*Ciming Gongsi Yu "C Xiansheng" Ershen Minshi Panjueshu*, Guizhou Sheng Guiyang Shi Yunyan Qu Renmin Fayuan, 慈铭公司与“C 先生”二审民事判决书, 贵州省贵阳市云岩区人民法院).

Gao applied for medical leave immediately before undergoing (MtF) GAS. She had followed all relevant requirements and obtained a certified diagnosis of gender dysphoria, indicating that she had a legitimate claim to undergo surgery as granted by the relevant Chinese regulatory framework. However, her company never approved her paid medical leave and ultimately fired her because of her extended absences. Gao then brought the company to court in a labour dispute, claiming a wrongful termination of the labour relationship (Longarino 2020; 2022, 230-1). While losing her initial dispute, Gao persisted and appealed to the previous case, and the court ruled in favour of her wrongful termination. First, followed proper protocols when requesting paid medical leave and justifiably held off until the final moment to submit the application for medical leave, a rightful entitlement provided by the GAS regulations. Second, the court ruled that Gao's willingness to proceed with the surgery was legitimate because of her gender dysphoria diagnosis. Third, her discharge documents required Gao to undergo a mandatory two-month recovery period, which legitimised her asking for sick leave. Fourth, although Gao had visited Thailand, the trip was legitimate for her recovery. Therefore, Gao was to be fully compensated for her salary. The court also encouraged the company to operate in a spirit of "equality, collaboration, progress, and sharing".¹⁷

In his analysis, Longarino stressed that the court ruled on a worker's-specific right to request medical leave (2020). He also stressed that the company's mechanical process failed to consider the worker's specific illness, as suggested in the judge's opinion on that case, which was presented in an *ex post facto* article (2022, 230-1). Similarly to Mr. C's case, the court seemed to show some sympathy for the worker's gender identity without completely grounding the argument on discrimination. Therefore, both cases show the gradual yet significant recognition by the judiciary of the necessary protection against workplace discrimination that must be attributed to transgender workers. However, they also show how incomplete, long, and complex the journey to protect transgender workers rights' in the workplace is.

17 *Beijing Dangdang Information Technology Co., Ltd. Labour Dispute Second Instance Civil Judgment of the Beijing Second Intermediate People's Court* (2019) (*Beijing Dangdang Wang Xinxi Jishu Youxian Gongsi Deng Laodong Zhengyi Ershen Minshi Panjueshu*, *Beijing Shi Di Er Zhongji Ren Min Fayuan*, 北京当当网信息技术有限公司等劳动争议二审民事判决书, 北京市第二中级人民法院).

5 China's Legal Challenges vis-à-vis Global Trends

Although the Chinese legal system does not provide provide protections for gender and sexual minorities, there is some potential for existing anti-discrimination clauses to be extended to transgender workers. Interpreting existing laws more inclusively (by queering provisions for, instance) allows claimants the opportunity to pursue discrimination claims against employers despite the complete absence of *ad hoc* clauses, as shown in the present cases. Although the judiciary's support is not extensive, it is still noteworthy. However, the future of the protection of transgender workers remains an even bigger question given the regressive position of the Chinese government in its policy against sexual and gender identity minorities. While many regions worldwide are advancing their protection for transgender workers, China appears to be heading in the opposite direction.

This aspect is particularly evident in recent US case law. In the *Bostock* judgement, the Supreme Court of the United States declared that firing a worker for their sexual orientation or transgender identity is in breach of Title VII of the 1964 Civil rights Act, which prohibits "employment discrimination based on race, color, religion, sex and national origin".¹⁸ A few years before, in *Chavez*, the US Court of Appeals reversed a previous judgement declaring an employer had unlawfully fired a transgender employee on the basis of legitimate circumstantial evidence. In contrast to the Chinese cases, the US court determined that the submitted evidence proved discriminatory intent rather than a purely wrongful termination.¹⁹ In a broader sense, the US has developed significant case law on the protection of transgender workers, building on the precedent set by the *Price Waterhouse* case. In *Price Waterhouse*, the court ruled that discrimination based on gender stereotypes constitutes sex-based discrimination.²⁰ This principle has since been applied to protect individuals who face discrimination for not conforming to traditional gender norms, and was extended to cover transgender workers through *Glenn*. In this case the court stated:

Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender.²¹

¹⁸ *Bostock v. Clayton County*, Georgia, 590 U.S. 644, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020) [Bostock].

¹⁹ *Chavez v. Credit Nation Auto Sales, LLC*, 641 Fed.Appx. 883 (11th Cir. 2016) [Chavez].

²⁰ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) [Price Waterhouse].

²¹ *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) §1317 [Glenn].

Showing a very broad understanding of sex discrimination.

European case law also reflects support for protecting transgender individuals from discrimination. In *Goodwin*, the European Court of Human Rights declared that problems with recording one's gender identity interfere with their right to respect for private life.²² The Court of Justice of the European Union ruled in *NH v. Lenford* that when employers publicly state that they would never recruit a person of a specific sexual orientation, whether or not an active recruitment process is in place, they are in violation of EU law. Furthermore, they stated that lawyer associations can bring cases to court even when no specific individual is directly affected.²³

Thus, China's approach runs counter to global trends. One argument that could justify China's distinct approach is the influence of its unique geographical and cultural context, which sets it apart from Western societies. Chinese cultural biases, as previously argued, are partially shaped by specific historical and societal factors, contributing to a different outlook on LGBTQIA+ rights. However, this argument has some limitations. According to Cheng, the more liberal Taiwan is, the more it questions whether historical and cultural developments can be solely blamed for the discriminatory LGBTQIA+ policies of China (2024, 35). Taiwan's regulatory framework challenges the limits of these cultural arguments. It includes specific provisions protecting the rights of sexual and gender minorities under its Gender Equality in Employment Act. The Act was amended in 2008 to extend its protection to sexual and gender minorities. The updated provisions mandate that employers refrain from discrimination on gender identity or sexual orientation grounds (except where the job is exclusively suitable for a particular gender) (Art. 7). It also included specific anti-discrimination provisions in employment for education and training (Art. 8), welfare measures (Art. 9), equal pay for equal work (Art. 10), retirement, discharge, severance, and termination (Art. 11).²⁴ The Taiwanese Employment Services Act was also amended in 2012 to include a provision on equal opportunities and prohibition of discrimination in employment, including gender and gender orientation (Art. 5).²⁵ Despite these legal protections, Taiwanese civil society continues to lament the mostly inadequate protection provided by the current framework. For instance, the

²² *Goodwin v. the United Kingdom* (11 July 2002) App 28957/95, European Court of Human Rights, § 73 [Goodwin].

²³ *NH v. Associazione Avvocatura per i diritti LGBTI - Rete Lenford* (23 April 2020), ECLI:EU:C:2020:289, Court of Justice of the European Union [NH v. Lenford].

²⁴ *Gender Equality in Employment Act of the Republic of China* (Taiwan) (2023) (*Xingbie Pingdeng Gongzuo Fa*, 性別平等工作法).

²⁵ *Employment Service Act of the Republic of China* (Taiwan) (2023) (*Jiuye Fuwu Fa*, 就業服務法).

Labour Standards Act, the main labour law instrument in Taiwan (Lin 2018, 26), does not provide any specific protection for sexual or gender identity minorities. Furthermore, the Taiwanese civil society has stressed that, regardless of the existing provisions, the labour market still lacks adequate programmes and *ad hoc* sensitivity training (Ganado 2024). Nevertheless, Taiwan has seen consistent improvements in the rights and recognition of sexual and gender minorities. Notably, it was the first Asian country to legalise all homosexual marriages in 2021, which was extended to all couples regardless of their nationality in 2023 (Hioe 2023). Therefore, the Taiwanese case demonstrates some degree of improvement regardless of common societal bias. Additionally, case law from Taiwan and Hong Kong²⁶ has also ruled against the requirement for GAS to change gender markers, further demonstrating that the cultural argument could only partially address the problem of inadequate protection and that similar regions have more liberal approaches than China.

Another compelling argument concerns the endemic elements, notably the repression of civil society by the Chinese government and the lack of specific employment-related anti-discrimination laws in the country. The lack of adequate legislative protections was already raised by Yang, noting that an anti-discrimination law encompassing all minorities would complete the picture of inadequate protection (Yang 2019, 185-6). However, the highlighted systemic difficulties demonstrate that a single instrument narrowly focused anti-discrimination measure may be insufficient to provide comprehensive protection for gender minorities. Numerous areas require enhancement to provide sufficient protection for transgender individuals in China. For instance, the complete absence of guidelines for updating educational diplomas and certificates requires action from the Ministry of Education. However, all this seems more complex when one considers the repressive attitudes against LGBTQIA+ civil society. Consequently, queering current regulations continues to be a precarious but essential process, with its restricted potential being the most viable way to ensure the protection of transgender employees.

26 See, e.g., *Judgement of the High Administrative Court of Taipei No. 1469 of the 111th Year (2022)* (*Taipei Gaodeng Xingzheng Fayuan 111 Shang Zi Di 1469 Hao Panjue*, 臺北高等行政法院 高等庭 111 年度訴字第 1469 號判決) and *Judgement of the Supreme Administrative Court No. 558 of the 110th Year (2021)* (*Zuigao Xingzheng Fayuan 110 Shang Zi Di 558 Hao Panjue*, 最高行政法院 110 年度上字第 558 號判) for Taiwan and Joint cases “Q and Commissioner of Registration” and “Tse Henry Edward and Commissioner of Registration”, Final Appeal No. 9 of 2022 (Civil) for Hong Kong.

6 Conclusion: What Hopes Do Queering Provisions Offer?

Despite data showing that public opinion on transgender individuals in China is improving, the legal framework still inadequately protects transgender workers. The landmark Mr. C and Gao cases illustrate both the challenges and progress achieved in safeguarding the rights of this special category of workers. In both cases, the judiciary acknowledged that gender identity could not legitimise workplace discrimination, but in neither case, this element contributed to the main argument of the case, which demonstrates that the current framework still lacks adequate protections. This research has provided a complete and punctual picture of the protection of transgender workers in Chinese law and its lack thereof. From imperial times through the PRC period to this day, this study details the many hurdles and experiences transgender people have endured. It has also highlighted the challenges and hopes for more protection in a more accepting society.

To advance the minimal progress made so far, Chinese legislators should establish specific legal provisions protecting gender and sexual minorities. Court rulings and the improving perceptions of transgender people in China both offer a glimmer of hope, but they have to cope with social bias and repressive governmental actions, which decrease the likelihood of expanding protections. Because the repression on civil society limits the possibility of expanding the current framework, lawyers and advocacy groups still need to rely on interpretative solutions to employ the currently limited framework to defend transgender workers in court. Therefore, queering the current framework can provide some solutions to the problem, but can only partially make up for lack of concrete provisions the judiciary can reference in case law.

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