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## Rights Lawyering in Xi's China: Innovation in the Midst of Marginalization

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RIGHTS LAWYERING IN XI’S CHINA:  
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*I. INTRODUCTION*

In March 2018, Xi Jinping, the President of the People’s Republic of China (“China” or “PRC”) and the General Secretary of the Chinese

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Communist Party (“CCP” or “the Party”), was elevated to highest echelons of political power.<sup>1</sup> Successfully consolidating power to an unprecedented level since Deng Xiaoping and Mao Zedong, Xi is now the “core leader” of a centralized system geared towards implementing his vision for China’s future.<sup>2</sup> “Xi Jinping Thought”<sup>3</sup> is now enshrined in the CCP’s constitution, and was written into the PRC Constitution itself after a March 11, 2018 vote by China’s National People’s Congress.<sup>4</sup> At the same time, the national legislature voted overwhelmingly to amend the PRC Constitution to abolish term limits on the presidency.<sup>5</sup>

Having brought ill-disciplined Party cadres to heel through his ambitious (and ruthless) anti-corruption campaign<sup>6</sup> Xi is now determined to re-establish Party authority over virtually every aspect of Chinese life, including the media, universities, schools, key cultural institutions, corporations, and the military, and even law firms—reiterating at the 19th Party Congress that “the Party is the leader of

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1. Matt Schrader, *In A Fortnight: Xi’s Other Amendments*, JAMESTOWN F. (Mar. 12, 2018, 6:00 AM), <https://jamestown.org/program/xis-other-amendments/> (describing the twenty-one constitutional amendments proposed during the thirteenth National Party Congress in March 2018 as “the largest rewriting of the PRC Constitution since its wholesale revision in 1982” and that the “proposed revisions . . . signal the extent to which Xi Jinping has consolidated power”).

2. Shi Jiangtao, *Congress concludes with President Xi Jinping as undisputed ‘core’ leader*, SOUTH CHINA MORNING POST (Oct. 25, 2017, 5:47 PM), <http://www.scmp.com/news/china/policies-politics/article/2116830/congress-concludes-xi-undisputed-core-leader> [<https://perma.cc/UT9E-NUGB>].

3. The full name of Xi Jinping’s ideological and policy agenda is “Xi Jinping Thought on Socialism with Chinese characteristics for a New Era.” The elevation of Xi Jinping’s theoretical contributions to the CCP’s constitution elevates him to the level of Deng Xiaoping and Mao Zedong. See Peter Wood, *CCP Revises Constitution For a “New Era”* (Nov. 10, 2017, 3:02 PM), JAMESTOWN F., <https://jamestown.org/program/ccp-revises-constitution-new-era/> [<https://perma.cc/NF46-26MX>] (analyzing Xi Jinping’s agenda).

4. Lu Hui, *China Focus: China’s national legislature adopts landmark constitutional amendment*, XINHUA (Mar. 11, 2018, 11:19 PM), [http://www.xinhuanet.com/english/2018-03/11/c\\_137032165.htm](http://www.xinhuanet.com/english/2018-03/11/c_137032165.htm) [<https://perma.cc/6C38-6DGU>].

5. Chris Buckley & Steven Lee Myers, *China’s Legislature Blesses Xi’s Indefinite Rule. It was 2,958 to 2*, N.Y. TIMES (Mar. 11, 2018), <https://www.nytimes.com/2018/03/11/world/asia/china-xi-constitution-term-limits.html>.

6. See *China anti-graft drive sees 100 top officials tried in five years*, HONG KONG FREE PRESS (Mar. 10, 2018, 7:28 AM), <https://www.hongkongfp.com/2018/03/10/china-anti-graft-drive-sees-100-top-officials-tried-five-years/> [<https://perma.cc/46D3-B93W>]; Choi Chi-yuk, *Xi Jinping’s anti-graft drive has caught so many officials that Beijing’s elite prison is running out of cells*, SOUTH CHINA MORNING POST (Feb. 21, 2018, 11:56 AM), <http://www.scmp.com/news/china/policies-politics/article/2133251/xi-jinpings-anti-graft-drive-has-caught-so-many> [<https://perma.cc/DQW3-EQWD>].

everything.”<sup>7</sup> In March 2018, the National Party Congress announced plans for a “revolutionary” restructuring of Chinese government structures,<sup>8</sup> one which is intended to reassert the Party’s leadership over all government agencies.<sup>9</sup> Most pertinently, the Supreme People’s Court and Procuratorate will be subject to the newly created, powerful National Supervision Commission,<sup>10</sup> expanding the Party’s powers over China’s judiciary.<sup>11</sup>

This centralization of power is driven by the desire for ideological control and the belief that such discipline is necessary for the legitimacy of the CCP’s continued rule in China.<sup>12</sup> There is an intense crackdown—both within the government<sup>13</sup> and across Chinese civil society—on those who challenge (or are perceived to challenge) Xi Jinping’s vision of a rejuvenated Chinese nation with the Party at its

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7. Nectar Gan, *Xi Jinping Thought – the Communist Party’s tighter grip on China in 16 characters*, SOUTH CHINA MORNING POST (Oct. 25, 2017) <http://www.scmp.com/news/china/policies-politics/article/2116836/xi-jinping-thought-communist-partys-tighter-grip-china> [https://perma.cc/KWV3-WUGW] (quoting Xi Jinping’s speech at the 19th National Party Congress, in which he said, “Government, military, society and schools, north, south, east and west – the party leads them all.”).

8. *China’s reform of Party, state institutions revolutionary: senior official*, XINHUA (Mar. 13, 2018, 4:23 PM), [http://www.xinhuanet.com/english/2018-03/13/c\\_137036286.htm](http://www.xinhuanet.com/english/2018-03/13/c_137036286.htm) [https://perma.cc/M5QS-NWYG].

9. *Id.* (paraphrasing Liu He, a top official, who noted that “[a] primary task of deepening reform of the Party and state institutions is to strengthen the CPC’s leadership in every sector”).

10. Josephine Ma, *Revealed: the far-reaching powers of China’s new super anticorruption agency*, SOUTH CHINA MORNING POST (Mar. 13, 2018, 11:46 AM), <http://www.scmp.com/news/china/policies-politics/article/2136949/far-reaching-powers-chinas-new-super-anti-corruption> [https://perma.cc/Y3K7-36V3].

11. See Mercy A. Kuo, *China’s Detention Law: CCP Curbs Courts*, THE DIPLOMAT (Feb. 21, 2018), <https://thediplomat.com/2018/02/chinas-detention-law-ccp-curbs-courts/> [https://perma.cc/5UHD-Y6PU] (analyzing in detail the possible impacts of the National Supervision Law, especially regarding the extension of extralegal detentions and the limits of criminal procedure protections for suspects).

12. See Jun Mai, *Xi Jinping is changing the constitution, but what’s his endgame?* SOUTH CHINA MORNING POST (Mar. 11, 2018), <http://www.scmp.com/news/china/policies-politics/article/2136676/xi-jinping-changing-constitution-whats-his-endgame?> [https://perma.cc/67X4-B5MM].

13. Aside from the wide-ranging anti-corruption investigations that have cowed other officials, experts also point to the marginalization of rival political factions within the Party structure, the demotions of those who “do not see eye to eye with Xi” and heightened scrutiny of business interests of those deemed insufficiently loyal. See Willy Wo-Lap Lam, *Xi Jinping Steers China back to the Days of Mao Zedong*, JAMESTOWN FOUNDATION (Mar. 5, 2018, 1:58 PM), <https://jamestown.org/program/xi-jinping-steers-china-back-days-mao-zedong/> [https://perma.cc/T5WW-M759] (arguing that personnel changes demonstrate “[t]hat Xi is determined to run China in his own mold—and to banish all voices of opposition”).

core and himself at its helm.<sup>14</sup> In practice, this aggressive assertion of power over Chinese society is being pushed not only through the use of laws and regulations to govern behavior,<sup>15</sup> but also at the level of values promotion and the intentional shaping of historical and cultural narratives – that is, winning hearts and minds.

It is not a coincidence that human rights lawyers and NGO activists working on rights issues are the hardest hit in the broad crackdown against Chinese civil society.<sup>16</sup> This Article argues that fundamentally this is a sharp attack to deny the political and civic space needed for the contestation of ideas, and to suppress those that dare to reveal human rights abuses – that is, those that reveal “negative stories” about China that challenge the positive image that the government is seeking to project. Nor is it a coincidence that Xi’s vision of global governance under Chinese leadership involves pushing the concept of “a people-centered development philosophy” as an alternative model to the international human rights legal system underpinned by the Universal Declaration of Human Rights.<sup>17</sup> This Article argues that such moves are a serious attempt to move the battlegrounds for rights lawyering and rights promotion away from the legal system and the policy-making arena, into the sphere of public opinion, which can be

14. See discussion *infra* Part I, III.

15. See discussion of laws and regulations *infra* Part III.

16. More than 300 lawyers and activists were affected by a nationwide crackdown on July 9, 2015; by mid-2018, most of the so-called “709” lawyers and activists who were indicted have been sentenced, with one final lawyer, Wang Quanzhang, awaiting his trial almost three years after being disappeared. China Human Rights Lawyers Concern Group, “709 Crackdown: Latest Data and Development of Cases as of 1800 17 May 2018,” <http://www.chrlawyers.hk/en/content/%E3%80%90%E2%80%9C709-crackdown%E2%80%9D%E3%80%91-latest-data-and-development-cases-1800-17-may-2018> [<https://perma.cc/9GN2-UJRU>]. After almost two years of secret detention, Wu Gan, who did not admit wrongdoing, was sentenced to eight years on charges of subversion; and Xie Yang, who pleaded guilty to subversion charges in May 2017, was retried but escaped a prison sentence despite his “explosive account of being tortured, beaten and threatened by interrogators.” See Benjamin Haas, *Chinese human rights activist jailed eight years for subversion*, THE GUARDIAN (Dec. 25, 2017, 11:37 PM), <https://www.theguardian.com/world/2017/dec/26/chinese-human-rights-lawyer-jailed-for-eight-years-for-subversion> [<https://perma.cc/563D-FFUV>]. See also *China human rights lawyer Xie Yang ‘admits being brainwashed,’* BBC NEWS, (May 8, 2017) <https://www.bbc.com/news/world-asia-china-39843680> [<https://perma.cc/3FNN-VA9T>] (explaining how the “709 crackdown” got its name).

17. See *Full text of Chinese President Xi Jinping’s congratulatory message to South-South Human Rights Forum*, XINHUA (Dec. 7, 2017, 4:40 PM), [http://www.xinhuanet.com/english/2017-12/07/c\\_136808493.htm](http://www.xinhuanet.com/english/2017-12/07/c_136808493.htm) [<https://perma.cc/EQ9W-LK2U>]; see also Charlotte Gao, *China Promotes Human Rights ‘With Chinese Characteristics,’* THE DIPLOMAT (Dec. 12, 2017), <https://thediplomat.com/2017/12/china-promotes-human-rights-with-chinese-characteristics/> [<https://perma.cc/62PR-4VKW>].

more comprehensively managed by a well-oiled media management infrastructure and increasingly strict media censorship laws.

This Article will examine the broader legal, regulatory and social context within which rights lawyering in China occurs, especially as it affects the political and civic space within which values are promoted and narratives are shaped. It begins by contextualizing the emergence of rights lawyering in the early 2000s, looking at several factors that supported the mobilization of lawyers and other activists advocating for different kinds of human rights through the Chinese legal system. It then turns to recent trends in the political and legal frameworks that influence the space for rights lawyering, starting with an analysis of Xi's vision for a new era in China's history, and the shift from winning within the courts to shaping the narrative in the public opinion sphere. Finally, this Article examines the possible impact of these shifts on the rights lawyering and grassroots mobilization in the areas of LGBTQ rights and women's rights.

## II. RIGHTS LAWYERING AND LEGAL MOBILIZATION IN CONTEXT

Scholarship about lawyers as a profession in China, civil society activism and grassroots mobilization has flourished even as the political environment for the subjects of such scholarship is rapidly changing. Experts have studied Chinese lawyers' work methodologies, their daily experiences in courts, scrutinized constitutional litigation cases, and analyzed how Chinese lawyers and law firms are regulated.<sup>18</sup> A body of scholarship around what I would collectively call "rights lawyering" is also developing, with several seminal works in recent years that look closely at the motivations and experiences of different groups of lawyers. Scholars have adopted different taxonomies of the legal profession<sup>19</sup> and examined several institutional and social factors

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18. See Terence C. Halliday & Sida Liu, *Birth of a Liberal Moment? Looking through a OneWay Mirror at Lawyers' Defense of Criminal Defendants in China* in *FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM* 65-107 (Terence C. Halliday et al. eds., 2007) (discussing the use of Article 306 of the 1997 PRC Criminal Law to detain, prosecute or convict lawyers under the crime of "lawyer's perjury" and its retaliatory use in practice against defense lawyers).

19. See, e.g., EVA PILS, *CHINA'S HUMAN RIGHTS LAWYERS: ADVOCACY AND RESISTANCE* (2014) (analyzing the experiences of human rights lawyers in Chinese law and politics); SIDA LIU & TERENCE HALLIDAY, *CRIMINAL DEFENSE IN CHINA: THE POLITICS OF LAWYERS AT WORK* 6-7 (2016) (analyzing criminal defense lawyers in China and their methods of working). Liu and Halliday present a taxonomy of lawyers including: progressive elites,

for the emergence of lawyers and other rights advocates who are “willing[] and ab[le] . . . to stand out, speak out, and act out in addressing public policy issues through litigation.”<sup>20</sup> These taxonomies are not mutually exclusive, because they seek to categorize the evolving motivations, conduct, cases, strategies of lawyers who interact with, influence, and are influenced by, their peers and their external environment. Moreover, while some lawyers may proactively identify themselves with certain groups of lawyers (i.e. human rights lawyers,<sup>21</sup> *weiquan* [维权 rights-protection or rights defense] lawyers,<sup>22</sup> “die-hard” lawyers,<sup>23</sup> or public interest lawyers) as a means of establishing their own networks, others adopt similar approaches or share similar ideals but eschew labels to mitigate risk. While a full analysis of these different categories (both ascribed and self-perceived) is beyond the scope of this Article, I use “rights lawyering” to encompass a wide range of lawyering activities with several shared characteristics. First, it involves legal advocacy focusing on interests that are broader than those of an individual case or the interests of an

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pragmatic brokers, political activists, and routine practitioners. For Chinese criminal defense lawyers, they further differentiate the category of political activists into two types: notable activists (referring to a small group of lawyers that “proactively seek out politically sensitive cases and challenge arbitrary state power”) and grassroots activists (referring to “ordinary lawyers all over China who possess politically liberal values and motivations but do not mobilize collectively due to unfavorable structural constraints . . . [but] use their everyday . . . work to pursue substantive legal-political goals of protecting the basic legal rights of citizens through practices of proceduralism”). *Id.* at 6-7.

20. See Fu Hualing & Richard Cullen, *The Development of Public Interest Litigation in China*, in *PUBLIC INTEREST LITIGATION IN ASIA 1* (Po Jen Yap et al. eds., Routledge 2010) (defining public interest lawyering).

21. Note that the terms used by scholars to label Chinese lawyers can be different from how they perceived or organized themselves. For example, Eva Pils uses “human rights lawyer” and “rights lawyer” interchangeably, although her work primarily focused on *weiquan* lawyers. See Bochen Han, *China’s Human Rights Lawyers: Political Resistance and the Law*, *THE DIPLOMAT* (Feb. 11, 2016), <https://thediplomat.com/2016/02/chinas-human-rights-lawyers-political-resistance-and-the-law/> [<https://perma.cc/L3M3-B5J2>].

22. See generally Hualing Fu & Richard Cullen, *Weiquan (Rights Protection) Lawyering in an Authoritarian State: Building a Culture of Public-Interest Lawyering*, 59 *THE CHINA J.* 111, 111-127, (2008) (offering a basic taxonomy classifying *weiquan* lawyering as moderate, critical and radical based on tactics and perceptions of the use of law); Teng Biao, *Rights Defence (weiquan), Microblogs (weibo), and the Surrounding Gaze (weiguan)*, 2012/3 *CHINA PERSP.* 29, 29-41 (2012) (discussing the rights defense movement [维权运动 *weiquan yundong*]).

23. Lawyers who identify as being part of the “diehard faction” (死磕派 *sikepai*) take their name from a northern slang term roughly translated “to fight to the bitter end.” See Alexa Olesen, *Meet China’s Swaggering, ‘Diehard’ Criminal Lawyers*, *FOREIGN POL’Y* (May 16, 2014, 6:30 PM), <http://foreignpolicy.com/2014/05/16/meet-chinas-swaggering-diehard-criminal-lawyers/> [<https://perma.cc/6TBN-G5RP>].

immediate client.<sup>24</sup> Second, it involves the use of legal tools—and sometimes non-legal tools—to push for reforms of the existing Chinese legal and policy framework to improve the protection and promotion of individuals' rights, especially those from marginalized communities.<sup>25</sup>

Several important factors contributed to the emergence of rights lawyering and the ability of lawyers of different stripes to mobilize. One important structural factor is the rapid proliferation of laws and regulations in the rebuilding of China's legal system from 1978 onwards and the accompanying professionalization of lawyers.<sup>26</sup> The 1996 PRC Lawyers Law<sup>27</sup> officially marked the privatization of the legal profession, moving away from lawyers being state legal workers to lawyers with professional identity and ethics.<sup>28</sup> One consequence of the building of the Chinese socialist legal system<sup>29</sup> is that “law has become an important aspect of state ideology and of popular consciousness.”<sup>30</sup> The enshrinement of “rule of law” and “human rights” in the 2004 amendment of the PRC Constitution further entrenched these concepts in popular discourse,<sup>31</sup> and provided space for rights defense activists.<sup>32</sup> Rule of law discourse also offered opportunities for cross-cultural exchange of ideas about the role of law within a society, including the role of China's constitution and ideas related to individual civil rights.<sup>33</sup>

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24. See Fu & Cullen, *supra* note 22, at 111-12.

25. See Rachel E. Stern, *Activist Lawyers in Post-Tiananmen China*, 42 *Law & Soc. Inq.* 234-51 (2017), 237-40 (discussing the traditions that what she calls activist lawyers point to as motivational factors for their push for reforms).

26. Jerome Cohen, *Keynote: An Introduction to Law in China*, 8 *VT. J. ENVTL. L.* 393, 399 (2007) (“I don't know of another national elite in history that has done more to produce legislation, regulations, guidance and other norms in so short a time.”)

27. Law of the People's Republic of China on Lawyers (adopted by the Standing Comm. Nat'l People's Cong., May 15, 1996, effective Jan. 1, 1997).

28. See Fu & Cullen, *supra* note 22, at 124.

29. See generally *Establishment of the Socialist System of Laws with Chinese Characteristics*, CHINA INTERNET INFORMATION CENTER. [http://www.china.org.cn/government/whitepaper/2011-10/27/content\\_23738846.htm](http://www.china.org.cn/government/whitepaper/2011-10/27/content_23738846.htm) [<https://perma.cc/RT5Y-EV2G>] (providing an authoritative explanation of the government's position on the historical context of the development of the contemporary Chinese legal system).

30. Benjamin L. Liebman, *Assessing China's Legal Reforms*, 23 *COLUM. J. ASIAN L.* 17, 19 (2009).

31. See Fu & Cullen, *supra* note 22, at 123.

32. See Teng, *supra* note 22, at 30 (“Rule of law discourse coupled with laws and regulations provided space for rights defence activists.”)

33. *Id.*



Similarly, this process opened up political space for entrepreneurship in governance and legal reforms, allowing lawyers to play a role in demonstrating gaps in the legal framework and suggest possibility of reform. Liu and Halliday note that “lawyers who strive for basic legal freedoms often insist that this is only possible if state power itself is fractured, most importantly through some independence or autonomy of the judiciary, from control by the monarchy, the military, one-party leaders, or an executive branch of government, including the police—the domestic coercive arm of government itself.”<sup>34</sup> Moreover, the proliferation of new laws also generated more instances where the differences in the law in text and the law in practice created opportunities for lawyers and their clients to hold government officials accountable to legal rhetoric.<sup>35</sup> Experimentation was seen as facilitative of state interests in legal reform, not just in the promulgation of new laws at the local levels, but also in the “willingness of courts and local governments to take actions that at times contradict national rules or laws.”<sup>36</sup> Therein lies opportunities for lawyers to bring new ideas to courts or legislators in order to expand or concretize certain rights.

The Reform Era also saw vibrant civil society growth, with “[s]pace for civil activity enlarged by development of the market economy.”<sup>37</sup> Civil society activism helped to increase the “rights awareness of aggrieved individuals and their readiness to assert their rights,”<sup>38</sup> broadening the pool of plaintiffs for lawyers, while lawyers’ engagement with NGOs working with marginalized communities also supported mutually beneficial relationships and increased innovation in how to engage with the state.<sup>39</sup> Another aspect of this was the space within the legal academy for law professors and lawyers to shape public discourse about law; as Fu and Cullen note: “Academic lawyers have

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34. LIU & HALLIDAY, *supra* note 19, at 4.

35. Fu and Cullen note that “inconsistency between legal rights and their routine violation in practice creates opportunities in the political and legal system for *weiquan* to develop.” Fu & Cullen, *supra* note 22, at 123 (citing KEVIN J. O’BRIEN & LIANJIANG LI, *RIGHTFUL RESISTANCE IN RURAL CHINA* (2006)).

36. Liebman, *supra* note 30, at 21.

37. Teng, *supra* note 22, at 30.

38. Fu & Cullen, *supra* note 22, at 125.

39. *Id.* at 124.

been crucial in promoting the concept of the constitutional and legal protections of rights.”<sup>40</sup>

A relatively open media landscape, including through internet news platforms, was also a contributing factor. With journalists and editors who are willing and able to write and publish on social justice issues, and legal news increasing in popularity,<sup>41</sup> lawyers were able to use media attention as a way to influence public opinion on a particular case or a particular topic—and perhaps even encourage government intervention in favor of their clients or their clients’ communities.<sup>42</sup>

Technological advancements, especially on social media platforms, allow for greater ease of communications across China and, with it, the spread of legal knowledge.<sup>43</sup> The exponential growth in Internet users and the use of mobile technology in China also increased the ability of lawyers to organize themselves—to build connections with other like-minded lawyers outside the bounds of geography, to discuss cases and legal strategies, and to broadcast their opinions<sup>44</sup>—both in furtherance of cases and for community mobilization should an activist/lawyer face threats. Social media is particularly important for activist lawyers, as it offers a platform for lawyers to take their opinions and legal arguments to the general public, therefore bypassing traditional media outlets (newspapers or television reporting) that is heavily regulated.<sup>45</sup>

Scholars often use political positioning to describe lawyers’ motivations, decision-making and conduct—that is, differentiating

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40. Fu & Cullen, *supra* note 22, at 113-14 (noting that law schools were particularly supportive practice sites for *weiquan* lawyering and noting leading *weiquan* lawyers that were professors whose “university position allows them the freedom, financial and otherwise, to play an active role in *weiquan* lawyering,” including He Weifang, Xu Zhiyong, Teng Biao and Fan Yafeng from the Law Institute, China Academy of Social Sciences, Zhou Wei from Sichuan University).

41. LIU & HALLIDAY, *supra* note 19 at 71 (describing a “notable trend of commercialization in the Chinese media . . . legal news, as well as other social news, has become a popular section for many newspapers and TV programs.”)

42. *Id.* at 72.

43. See Liebman, *supra* note 30, at 21 (“The actions of procurators, lawyers, and ordinary citizens are also influenced by knowledge of legal developments elsewhere in China.”)

44. See, e.g., LIU & HALLIDAY, *supra* note 19, at 74 (“For highly sensitive cases . . . on which no official Chinese media would report, some notable activists in Beijing sometimes use Internet blogs and microblogs or go directly to the international media . . . WeChat groups, which are more private than blogs and microblogs, have also become a popular tool for activist lawyers to provide support for like-minded colleagues in recent years.”)

45. See *id.* at 75, 87 (“Whenever there is an influential legal case, they speak collectively through the Internet using social media to voice their opinions to the public sphere.”)

between those who adopt “moderate” political stances (i.e. not openly critical of the Chinese government), and those more “radical” lawyers willing to challenge the government and take on cases that other lawyers may consider to be “off limits because they are . . . political questions that are too important and sensitive for the law to decide.”<sup>46</sup> These political calculations—and the ability to mitigate risks—are extremely important to lawyers’ ability to win their cases, continue their rights advocacy, and mobilize support without facing government reprisal, especially because the personal costs of being attacked by the government are extremely high.<sup>47</sup>

Yet what happens when the lines of what is, and what is not, political shifts?

### III. THE RESHAPING OF RIGHTS AND LAW IN XI’S CHINA

Under the Xi administration, previous calculations of political acceptability and risks shifted dramatically, while methods of government repression are changing. While repression of civil society activism and rights lawyering was always part of the landscape under the Hu Jintao administration, Xi’s rise has “ushered in a campaign of repression against civil society characterized by national security rhetoric, the criminalization of threatening activism, and proactive repression.”<sup>48</sup> Xi continues to preside over the most wide-ranging and sustained attack on civil society that China has seen since the Tiananmen Square crackdown in June 1989 as the state “aggressively police[s] boundary pushers.”<sup>49</sup> Rights-based NGOs suffered intense harassment, some forced to close their doors altogether, others to tamper down their activities or to continue to work underground.<sup>50</sup>

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46. Fu & Cullen, *supra* note 20, at 2 (“Radical lawyers are willing to take on politically sensitive cases, which the government regards as off limits, ready to mobilize media and NGOs, and prepared to work with foreign entities.”)

47. See Liu & Halliday *supra* note 19, at 90 (“Since the zealous advocacy of activist lawyers can readily be construed as acts of political subversion, the defenders of the Party-state deploy an array of weapons in their armories to silence, quash, domesticate, marginalize, isolate, or exile these stubborn defenders of the weak. The personal costs of rights advocacy and defense have been widely reported in the media and analyzed by scholars . . . namely, professional sanctions, state security repression, and violence of the black mafia.”)

48. Diana Fu & Greg Distelhorst, *Grassroots Participation and Repression under Hu Jintao and Xi Jinping*, 79 *THE CHINA J.* 100, 104 (2018).

49. *Id.* at 100.

50. See generally Chinese Human Rights Defenders, *Repression & Resilience: Annual Report on the Situation of Human Rights Defenders in China* (Feb. 2018) (presenting a full accounting of government actions against human rights activists in 2017).

Activists have been detained in record numbers: a large-scale, coordinated attack on human rights lawyers and activists starting on July 9, 2015 (now known as the “709” crackdown) targeted more than 300 rights lawyers and activists across the country.<sup>51</sup>

A. *Xi's China: Personalization of Power and Impact on Civil Society*

The personalization of power under Xi Jinping has not only changed the structure of the Chinese government, it has also significantly curtailed the space for diverse ideas and discourse. Xi Jinping “has made himself the chairman of everything”<sup>52</sup> and injected party control into areas that were relatively independent for the last two decades. For example, the reintroduction of party cells into many different sectors – including private companies, schools at all levels<sup>53</sup> and even law firms—is intended to ensure that discipline and monitoring is done from the inside. Moreover, the merger of party and state institutions<sup>54</sup> seeks to close structural gaps between central and local governments so that central Party prerogatives and state governance are more aligned.<sup>55</sup> This will likely reduce the space for rights lawyers to exploit opportunities that derive from the “*de facto* pluralistic nature of today’s OPS [one party state].”<sup>56</sup>

There is also increased control of different actors who offer alternative poles of influence, in part to institute ideological control and to ensure that the Party leads reform efforts and shapes narratives about contemporary and historical events. It is well-documented that universities are under tight political control, and that professors—once seen to be relatively insulated from political reprisal because of social

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51. Alex W. Palmer, ‘*Flee at Once*’: *China’s Besieged Human Rights Lawyers*, THE N.Y. TIMES MAG. (July 25, 2017), <https://www.nytimes.com/2017/07/25/magazine/the-lonely-crusade-of-chinas-human-rights-lawyers.html>.

52. *Xi Jinping decides to abolish presidential term limits*, THE ECONOMIST (Mar. 1, 2018), <https://www.economist.com/news/china/21737543-unhappiness-china-palpable-xi-jinping-decides-abolish-presidential-term-limits> [<https://perma.cc/92ZX-RPLQ>].

53. See Gan, *supra* note 7.

54. *Xi Jinping decides to abolish presidential term limits*, *supra* note 52 (discussing constitutional revisions that highlight the leading role of the Chinese Communist Party in the government, noting that “[p]arty and state could hardly become more amalgamated”).

55. Tian Feliong, *Beyond term limits: China’s new constitution is written for a nation on the rise*, SOUTH CHINA MORNING POST (Mar. 23, 2018, 3:58 PM), <http://www.scmp.com/comment/insight-opinion/article/2138542/beyond-term-limits-chinas-new-constitution-written-nation> [<https://perma.cc/JA5V-R9WS>].

56. Fu & Cullen, *supra* note 22, at 126.

prestige and vestiges of academic freedom—are subject to restrictions on expressing their views and what they can teach in class.<sup>57</sup> Media outlets, once a source of influence in public affairs, have been drastically curtailed and the ranks of journalists diminished as well.<sup>58</sup> As for the non-governmental and charities sector, the Charity Law and the Foreign NGO Management Law have, in effect, combined to channel resources towards sectors that are officially sanctioned and away from rights-based advocacy.<sup>59</sup>

### B. *Role of Law and Lawyers in Xi's China*

Although rights lawyers often emphasize law as a tool of reform, law can also be a tool of oppression and repression. In recent years, the high-octane push for law-making to improve the socialist legal system with Chinese characteristics<sup>60</sup> also included a dragnet of laws aimed at preventing social disruption, regulating behavior and punishing those who challenge government prerogative.<sup>61</sup> The March 2018 constitutional amendments have added a new phrase “socialist rule by law” to the CCP’s governing philosophy—moving away from “rule of law” language to “rule by law” also dispenses with the veneer of judicial independence, and marking a return to the Marxist/Leninist view that “courts should be a tool of party control.”<sup>62</sup> This is also

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57. Anthony Kuhn, *In China, Scholars Are Being Punished Amid Growing Squeeze On Public Expression*, NAT’L PUB. RADIO (Oct. 10, 2017, 11:24 AM), <https://www.npr.org/sections/parallels/2017/10/10/553484924/in-china-scholars-are-being-punished-amid-growing-squeeze-on-public-expression> [<https://perma.cc/CB2U-W5NL>].

58. Liz Tung, “*Social media fills vacuum left by China’s ‘hollowed out’ press*,” *Columbia Journalism Review* (May 25, 2017) <https://www.cjr.org/analysis/china-social-media-press-freedom.php> [<https://perma.cc/7ZTV-UET4>].

59. Nuala Gathercole Lam, *NGOs at a Crossroads*, CHINA FILE (Feb. 5, 2018), <http://www.chinafile.com/ngo/latest/ngos-crossroads> [<https://perma.cc/VKL8-UPFC>] (noting “the current administration’s ‘re-centering’ of civil society around public service provision and away from advocacy” and that the Chinese government “is walking a narrow path—maneuvering public services into the hands of civil society organizations, while simultaneously attempting to ensure they are not politicized by the situations their work brings them into contact with”).

60. See *Full Text: New Progress in the Legal Protection of Human Rights in China 2017*, XINHUA (Dec. 15, 2017, 5:18 PM), [http://www.xinhuanet.com/english/2017-12/15/c\\_136828822.htm](http://www.xinhuanet.com/english/2017-12/15/c_136828822.htm) [<https://perma.cc/R7D3-UKXD>].

61. Gan, *supra* note 7 (describing Xi’s governing philosophy as promoting confidence, noting that “[s]uch confidence comes with a lower tolerance for different views. In his first term, he sought to crush dissent, or what he calls ‘erroneous viewpoints,’ with a sweeping crackdown on activists, rights lawyers and civil society as well as stringent censorship of the media and the internet”).

62. *Xi Jinping decides to abolish presidential term limits*, *supra* note 52.

particularly true, given the National Supervision Law, which brings the courts under the Party's supervision. The law's jurisdiction now includes all civil servants, regardless of party membership, therefore extending investigative procedures of the Party and unlimited detention procedures to millions non-Party members.<sup>63</sup>

New regulations intended to manage lawyers<sup>64</sup> and law firms<sup>65</sup> now require lawyers to "support the leadership" of the CCP and to establish party branches in law firms. These regulations also seek to control lawyers' opinions, prohibiting them from speech that challenges China's political system or endangers national security. As noted by Human Rights Watch,

The amended directives also impose vague and overbroad restrictions on all lawyers' right to freedom of expression. Lawyers will now be prohibited from "inciting" or "organizing" their clients and others to participate in sit-ins or demonstrations that "disturb public order" or otherwise put pressure on the authorities, even if those gatherings are peaceful. Lawyers may not make "misleading" or "malicious" comments about any cases, publish or sign joint letters, or gather "virtually" or in person to "attack or slander" the judicial system. Lawyers are barred from "gathering crowds to make a fuss," insulting judicial officers, "denying the nature of cults when the state has already determined them as such," or other behaviors that "disturb court order." They also cannot use the Internet and the media to "provoke discontent against the Party and the state" or "instigate" people to file lawsuits to "destabilize social stability."<sup>66</sup>

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63. *China detention law to roll back legal protections for suspects*, THE FIN. TIMES, [HTTPS://WWW.FT.COM/CONTENT/147EC1CA-0A38-11E8-8EB7-42F857EA9F09](https://www.ft.com/content/147ec1ca-0a38-11e8-8eb7-42f857ea9f09) [<https://perma.cc/W7ZV-ZBSW>] ("The incursion of party authority into the civil state is a reversal of broader reforms undertaken since the 1979s to carve out a sphere for professional civil government in China.")

64. *Lawyers Practice Management Methods* (promulgated by the Ministry of Justice, Sept. 18, 2016, effective Nov. 1, 2016) (China), [http://www.gov.cn/gongbao/content/2016/content\\_5113014.htm](http://www.gov.cn/gongbao/content/2016/content_5113014.htm) [<https://perma.cc/V75A-FXQC>].

65. *Id.*

66. *See China: New Rules Gag Lawyers*, HUM. RTS. WATCH (Oct. 25, 2016, 7:55 PM), <https://www.hrw.org/news/2016/10/25/china-new-rules-gag-lawyers> [<https://perma.cc/B6TX-NKX9>].

### C. *Rights Discourse in Xi's China*

There is also a significant shift in Chinese governmental attitudes towards international engagement, and particularly towards state rhetoric about international ideas and values. Authorities are seeking to combat undesirable ideological trends through limiting the influence of so-called “Western ideas” (including universal values like human rights, civil society and “the West’s view of media”<sup>67</sup>) and increasing control of how Chinese civil society actors engage with international partners. The CCP has increased its rhetoric naming “foreign forces” as major threats to China’s domestic stability, while accusing foreign powers of attempts to undermine China’s rise.<sup>68</sup> It has branded those who dare to question the CCP’s agenda as agents of foreign powers and expanded legal definitions of “hostile groups” to include any group that challenges the power of the CCP, China’s socialist system or the Chinese government.<sup>69</sup> For example, in 2017, the Chinese government broadened the Counter-Espionage Law to include conduct deemed subversive or threatening to national security like the issuing of information that harms China’s national security, or meeting with individuals that harm national security<sup>70</sup>—activities which are not traditionally deemed to be espionage. The Chinese government has also made disrespect to state symbols (like the national flag and anthem) or CCP heroes and leadership punishable offences.<sup>71</sup>

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67. See *Document 9: A ChinaFile Translation*, CHINAFILE (Nov. 8, 2013), <http://www.chinafile.com/document-9-chinafile-translation> [<https://perma.cc/53HE-6A4B>] (Document 9 is an internal CCP communique listing seven taboo subjects that posed political “perils,” declaring that the promotion of civil society was being used as a “political tool” to “dismantle the ruling party’s social foundation.”)

68. See Julia Makinen, *China’s crackdown on dissent is described as the harshest in decades*, THE L.A. TIMES (Aug. 10, 2016, 3:00 AM), <http://www.latimes.com/world/asia/la-fg-china-crackdown-snap-story.html> [<https://perma.cc/8TBT-Z533>]; Zheping Huang, *The complete guide to China’s propaganda videos blaming the West for almost everything*, QUARTZ (Aug. 8, 2016), <https://qz.com/751338/the-complete-guide-to-chinas-propaganda-videos-blaming-the-west-for-almost-everything/> [<https://perma.cc/XK8C-C6ER>].

69. See Nectar Gan, *Beijing extends powers of state security agents under counter-espionage law*, SOUTH CHINA MORNING POST (Dec. 7, 2017, 12:19 AM), <http://www.scmp.com/news/china/policies-politics/article/2123210/beijing-extends-powers-state-security-agents-under>.

70. *Counter-espionage rules stipulate exit, entry restrictions*, XINHUANET.COM, (Dec. 6, 2017), [http://www.xinhuanet.com/english/2017-12/06/c\\_136805751.htm](http://www.xinhuanet.com/english/2017-12/06/c_136805751.htm).

71. For detailed discussion of the amendments to the Criminal Code and the establishment of the National Anthem Law, see Wendy Zeldin, *China/Hong Kong/Macau: Penalization of Disrespect for National Anthem Under Tenth Criminal Code Amendment*, Library of Congress Global Legal Monitor, (Nov. 8, 2017), <http://www.loc.gov/law/foreign-news/article/chinahong-kongmacau-penalization-of-disrespect-for-national-anthem-under-tenth-criminal-code->

At the same time, state-sponsored propaganda campaigns aimed at bolstering Chinese government and CCP-authorized narratives have been launched—looking not only at shaping narratives about Chinese culture and history, but also contemporary events. Since 2015, the Chinese authorities have launched an unprecedented campaign to shape public opinion against human rights activists—and consequently, human rights ideas—through the state-run media.<sup>72</sup> National television outlets and state-run newspapers, which used to censor all references of human rights lawyers, have launched a coordinated smear campaign seeking to undermine and discredit the work of human rights lawyers and activists. Human rights lawyers are now painted as radical and working as an “organized criminal gang.”<sup>73</sup> Working with disenfranchised populations (including petitioners, many of whom are citizen activists) is now cast as subversive;<sup>74</sup> while the use of social media to call attention to cases of injustice is used as evidence of sinister intent.<sup>75</sup> In a troubling development, there has been an increase in the use of (coerced) confessions,<sup>76</sup> either televised on CCTV or disseminated via social media, as a way of assigning guilt without trial.<sup>77</sup> Moreover, this propaganda campaign also coopted Chinese media through the use of televised interviews or interviews with the

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amendment/ [https://perma.cc/E9PH-PG49]. For analysis of the newly enacted Heroes and Martyrs Protection Act, see China Digital Times, *New Law Criminalizes slander of Historical Heroes*, (Apr. 28, 2018), <https://chinadigitaltimes.net/2018/04/new-law-criminalizes-slander-of-historical-heroes/>.

72. See generally Safeguard Defenders, *Scripted and Staged: Behind the scenes of China's forced TV confessions* (2018) (containing extensive analysis and detailed descriptions of the experiences of human rights activists and the use of state-run media to promote this narrative).

73. Tom Phillips, *The Case of Wang Yu, emblem of China's human rights crackdown*, THE GUARDIAN (Sept. 2, 2015, 4:08 PM), <https://www.theguardian.com/world/2015/sep/02/the-case-of-wang-yu-emblem-of-chinas-human-rights-crackdown> [https://perma.cc/TEY4-AZ5E].

74. See Chris Buckley, *Chinese Authorities Detain and Denounce Rights Lawyers*, N.Y. TIMES (July 11, 2015) <https://www.nytimes.com/2015/07/12/world/asia/china-arrests-human-rights-lawyers-zhou-shifeng.html>.

75. Sarah Cook, *How China's Crackdown on Lawyers Affects Media Freedom*, THE DIPLOMAT, Aug. 12, 2015, <https://thediplomat.com/2015/08/how-chinas-crackdown-on-lawyers-affects-media-freedom/> (“A central focus of the accusations made against the human rights lawyers has been their use of social media and other online tools to challenge official versions of events, share images of small-scale protests that then garner wider attention, raise funds from the public, or build popular support for their clients in an effort to gain judicial sympathy.”).

76. See Javier C. Hernandez, *China Frees Wang Yu, Human Rights Lawyer, After Videotaped Confession*, N.Y. TIMES (Aug. 1, 2016), <https://www.nytimes.com/2016/08/02/world/asia/human-rights-lawyer-is-released-in-china-after-videotaped-confession.html>.

77. See generally Safeguard Defenders, *supra* note 72.



press<sup>78</sup>—including Hong Kong’s English language paper, the South China Morning Post<sup>79</sup>—as a means of challenging allegations of rights violations.<sup>80</sup>

This demonstrates a concerted effort to move the battleground away from the intricacies of the legal system and move it into the public opinion sphere. Broadcasting confessions of human rights activists, prominent journalists,<sup>81</sup> media influencers, and foreigners<sup>82</sup> serve several purposes. These confessions, filled with the language of self-criticism, demonstrate the government’s power over individuals, and push the message that rights activism threatens national security and state stability.<sup>83</sup> Using a propaganda machine that is able to reach hundreds of millions of people, televised confessions also serve to associate human rights activism with criminality and illegal activities.<sup>84</sup>

Just as rights lawyers and activists successfully used traditional and social media platforms to highlight cases and specific causes, Chinese authorities now use the same platforms to broadcast a different message. Yet this is not a battle on an equal playing field. Resources

78. Verna Yu & Danny Lee, *Published ‘confessions’ stoke fair trial fears for lawyers held in Chinese crackdown*, SOUTH CHINA MORNING POST (last updated Aug. 4, 2016, 10:47 AMJ), <http://www.scmp.com/news/china/policies-politics/article/1841387/published-confessions-stoke-fair-trial-fears-lawyers> [https://perma.cc/YC3A-MW8W].

79. The South China Morning Post faced harsh criticism for breaking the story of Zhao Wei’s confession under suspicious circumstances; journalists and China experts questioned the veracity of the story, noting that there was no by-line and Zhao Wei had not reached out to her family at the time of the interview. See *Young Chinese legal activist ‘regrets’ civil rights activism*, SOUTH CHINA MORNING POST (July 11, 2016, 11:31 PM), <http://www.scmp.com/news/china/policies-politics/article/1988501/young-chinese-legal-activist-regrets-civil-rights> [https://perma.cc/F2FV-WNGR]; cf. David Bandurski, *The Mea Culpa Machine: Is the South China Morning Post pushing Chinese political ‘confessions’?*, H. K. FREE PRESS (July 16, 2016, 6:29 PM), <https://www.hongkongfp.com/2016/07/16/the-mea-culpa-machine-is-the-south-china-morning-post-pushing-chinese-political-confessions/> [https://perma.cc/8Z62-VJWP].

80. See, e.g., Tom Phillips, *Bookseller Gui Minhai surfaces in Chinese custody to deliver staged confession*, THE GUARDIAN (Feb. 9, 2018, 9:26 PM), <https://www.theguardian.com/world/2018/feb/10/bookseller-gui-minhai-surfaces-in-chinese-custody-to-deliver-staged-confession> [https://perma.cc/YPH5-HKM8] (describing Gui Minhai’s interview with the press).

81. See Patrick Boehler, *Beijing detains, parades journalist Gao Yu on state TV for ‘leaking state secrets’*, SOUTH CHINA MORNING POST (May 8, 2014, 4:55 PM), <http://www.scmp.com/news/china-insider/article/1507195/beijing-detains-parades-journalist-gao-yu-state-tv-leaking-state> [https://perma.cc/P8ZX-5KXT].

82. See Edward Wong, *China Uses Foreigners’ Televised Confessions to Serve Its Own Ends*, N.Y. TIMES (Jan. 21, 2016), <https://www.nytimes.com/2016/01/22/world/asia/china-confession-cctv.html>.

83. *Id.*

84. *Id.*

are now poured into soft power tools to promote positive views about China with investments by government media but also other mainstream and digital media outlets, with the goal of presenting an alternative vision of news reporting that is less in the service of the citizen, and more in the service of the state. This coordinated campaign to project positive stories of China includes the creation of a new broadcast agency “Voice of China” which consolidates state run media outlets like China Central Television, China Global Television Network, China National Radio, and China Radio International, and which will report directly to the Party’s publicity department.<sup>85</sup> The recent decision to dissolve the State Administration of Press, Publication, Radio, Film, and Television (“SAPPRFT”) and consolidate regulatory power over news, online content, and film under the Communist Party publicity department<sup>86</sup> also indicates a shift in the propaganda campaign. It “signals tighter media control amid a broad crackdown on news, online content and film that goes against Party values under President Xi Jinping.”<sup>87</sup>

Similarly, reforms in 2017 and 2018 further centralized the regulatory landscape for social media and Internet platforms, including increasing the resources available to strengthen the censorship infrastructure through a central government agency.<sup>88</sup> Changes in regulations and increased censorship strengthened the Great Firewall, especially through significant limitations on the use of virtual private networks (“VPN”) software that allow users to access blocked information.<sup>89</sup> As part of Xi Jinping’s “cyber sovereignty” campaign, government regulators required state-run telecommunications firms to

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85. See Pei Li & Christian Shepherd, *China tightens grip on media with regulator reshuffle*, REUTERS (Mar. 21, 2018, 3:05 AM), <https://www.reuters.com/article/us-china-parliament-media/china-tightens-grip-on-media-with-regulator-reshuffle-idUSKBN1GX0JG> [<https://perma.cc/VU5Y-6R5T>].

86. *Id.*

87. *Id.*

88. According to reports, the State Computer Network and Information Security Management Centre (which runs the Great Firewall) is now under the central commission on internet security headed by Xi Jinping. See Zhou Xin, *It's the mysterious department behind China's growing influence across the globe. And it's getting bigger*, SOUTH CHINA MORNING POST (Mar. 21, 2018, 4:37 PM), <http://www.scmp.com/news/china/policies-politics/article/2138196/its-mysterious-department-behind-chinas-growing> [<https://perma.cc/9KTN-DFNK>].

89. See, e.g., Lucy Hornby, *China's VPN crackdown is about money as much as censorship*, FIN. TIMES (Jan. 21, 2018), <https://www.ft.com/content/35eafc9a-fcf8-11e7-9b32-d7d59aace167> [<https://perma.cc/XXA3-BF8X>].

use technology to block VPNs and other circumvention tools.<sup>90</sup> The stakes for challenging dominant state narratives increased—regulations from the Cyberspace Administration of China released in 2017 now impose real name registration requirements for users seeking to post online content or comments, and legal liability for Internet platform providers who fail to regulate online content.<sup>91</sup>

#### *IV. INNOVATION AND MARGINALIZATION: LGBTQ RIGHTS AND WOMEN'S RIGHTS RE-EXAMINED*

The intentional marginalization of rights-focused advocacy by Chinese authorities and the re-assertion of Party leadership over all aspects of life, including within the courts, mean that previous political calculations about rights lawyering and activism must be re-examined. Although Fu and Cullen noted that “an authoritarian state embraces *weiquan* lawyering when it takes on issues that do not threaten the state’s legitimacy,”<sup>92</sup> it is no longer clear what issues do not pose threats. We are now at an inflection point—how can right lawyers and activists best navigate the shifting political lines that determine the acceptability of (1) what advocacy issues activists can work on; (2) how they can advocate; and even (3) whom is allowed to speak?

This Section considers how issues like LGBTQ rights and women’s rights, which were previously perceived as politically acceptable, are now in an uneasy status vis-à-vis the state. Women’s rights and LGBTQ rights lawyering offer useful sites of inquiry and comparison for several reasons. First, LGBTQ issues are intrinsically connected to issues related to gender and sexuality. Traditional gender stereotypes serve as impediments both to gender equality as well as LGBTQ equality because discrimination against individuals on account of gender roles or for perceived violations of gender norms.<sup>93</sup>

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90. See *China Tells Carriers to Block Access to Personal VPNs by February*, BLOOMBERG NEWS (July 10, 2017, 10:50 PM), <https://www.bloomberg.com/news/articles/2017-07-10/china-is-said-to-order-carriers-to-bar-personal-vpns-by-february> [<https://perma.cc/FQY8-NYTY>].

91. See 国家互联网信息办公室公布《互联网跟帖评论服务管理规定》[*The State Internet Information Office Promulgates the “Administrative Regulations on Internet Comments Comments Service”*], 国家互联网信息办公 [CYBERSPACE ADMINISTRATION OF CHINA] (Aug. 25, 2017, 11:45 AM), [http://www.cac.gov.cn/2017-08/25/c\\_1121541481.htm](http://www.cac.gov.cn/2017-08/25/c_1121541481.htm) [<https://perma.cc/NGE4-KU9W>].

92. Fu & Cullen, *supra* note 22, at 126.

93. See John Balzano, *Toward a Gay-Friendly China?: Legal Implications of Transition for Gays and Lesbians*, 16 L. & SEXUALITY 1, 15 (2007) (explaining the relationship between gender law and LGBTQ issues).

Second, though their treatment under the Chinese legal system and within the Chinese government agencies are markedly different, activism and lawyering in furtherance of both rights issues used similar tools with comparable effect. Third, both women's rights and LGBTQ rights issues were previously defined as "social issues" that are less politically sensitive, albeit for different reasons, but recent experiences demonstrate that the landscape shifted, and therefore is worth re-examining.

#### A. Innovation in Legal Grey Areas

As noted above, the mark of political acceptability is one that allows rights lawyers and activists a modicum of political cover for their actions. In the case of women's rights and LGBTQ rights, it is a double-edged sword. Cast as social issues, they are not typically seen as core rights like civil and political rights (including freedom of speech and freedom of religion) and so have not always been taken up by high-profile rights lawyers. Yet, this also means that issues associated with gender and sexuality were not always readily attacked. For LGBTQ rights activists, invisibility is a major impediment—both in terms of invisibility within government policies and data, and invisibility within Chinese society.<sup>94</sup> Yet, this invisibility may also be protective: activists posited that LGBTQ rights mobilization is not "intimidating" to the government because "the population is perceived to be so small in China."<sup>95</sup>

Women's rights were traditionally perceived as politically safe<sup>96</sup>—legal and policy advocacy on women's rights issues like domestic violence, and even the land rights of rural women, has mostly been allowed to proceed unimpeded by the Chinese authorities. Not only does the government hold up gender equality as a central tenet of

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94. See Joy L. Chia, *LGBTQ Rights in China: Movement-Building in Uncertain Times*, in HANDBOOK ON HUMAN RIGHTS IN CHINA (Biddulph & Rosenzweig eds., 2018) (forthcoming) (on file with author).

95. See Timothy Hildebrandt, *Same Sex Marriage in China? The strategic promulgation of a progressive policy and its impact on LGBT activism*, 37 REV. OF INT'L STUD. 1313, 1322 (2011) (reporting that "a prominent gay leader reported that when gays and lesbians talk about human rights the government does not see it as sensitive because the population is perceived to be so small in China" and "the effect of this group mobilization is not as intimidating to the government.").

96. See Fu & Cullen, *supra* note 22, at 126 (noting that women's rights were not politically problematic at the time of writing).

its political ideology,<sup>97</sup> it has also passed many laws that seek to protect women's rights. Most feminist activists believed that working on issues that reflected the daily lives of many women and which had widespread public support (for example, employment discrimination, sexual harassment on public transportation, discrimination in university admissions), would accord them some semblance of safety and allow them to avoid government attention and backlash.<sup>98</sup>

Chinese courts prove to be relatively welcoming to cases seeking to protect women and LGBTQ people from discrimination, perhaps due to the perception that anti-discrimination cases are not politically sensitive. Since 2013, several cases challenging gender-discriminatory practices have successfully been brought to court, including China's first successful gender discrimination case finding that a Hangzhou city cooking school violated the plaintiffs' right to equal employment by denying her application on account of her gender.<sup>99</sup> A previous case against a Beijing education institute for refusing to consider a female college graduate for an administrative assistant job that was advertised as seeking only male applicants was settled in 2013 for 30,000 yuan.<sup>100</sup> In 2015, similar cases were successfully brought against the Beijing Postal Service (the first such case against a state-owned enterprise) for the denial of an application because the headquarters did not wish to hire women as frontline postal workers,<sup>101</sup> and against the blatantly

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97. See Joy L. Chia, *Legislating Inequalities: Gender, Sexuality and Violence in China*, in *GENDER, VIOLENCE AND THE STATE IN ASIA* (Amy Barrow & Joy L. Chia eds., 2016).

98. Author's Notes (Feb. 2015 Interview with feminist activists). See Rachel E. Stern & Kevin J. O'Brien, "Politics at the Boundary: Mixed Signals and the Chinese State," *Modern China* (Vol. 38), 174-98 (2012) for an important discussion about how people advocating for change calculate which issues are safer than others to work on, including using government interest in their favor.

99. See 就业性别歧视第一案胜诉! [*The First Case of Employment Discrimination in Sex Won!*], NGOCN (Nov. 11, 2014, 4:39 PM), <http://www.ngocn.net/news/360312.html> [<https://perma.cc/6R8K-ZFW5>]; Fan Yiyang, *China Lacks Anti-Discrimination Law with Teeth*, *SIXTH TONE* (Jan. 6, 2017), <http://www.sixthtone.com/news/1772/china-lacks-anti-discrimination-law-with-teeth> [<https://perma.cc/WTL9-WEGK>] (providing detailed analysis of Chinese anti-discrimination law).

100. See Tania Branigan, *China: woman settles in first gender discrimination lawsuit*, *THE GUARDIAN* (Jan. 28, 2014, 10:26 AM), <https://www.theguardian.com/world/2014/jan/28/china-woman-settles-first-gender-discrimination-lawsuit> [<https://perma.cc/F92H-CY46>].

101. See *Woman successfully sues Beijing postal service in gender discrimination case*, *CHINA LAB. BULL.* (Nov. 3, 2015), <http://www.clb.org.hk/en/content/woman-successfully-sues-beijing-postal-service-gender-discrimination-case> [<https://perma.cc/U7EE-4WAU>].

sexist recruitment policies of restaurant refusing to hire women as chefs.<sup>102</sup>

Rights lawyering on LGBTQ issues also increased since 2014, when Chinese courts accepted the country's first LGBTQ rights-specific case. This high profile lawsuit challenged the widespread use of "treatments" claiming to "cure" homosexuality—in its judgment, the Beijing court stated that homosexuality is not a disease and therefore did not need to be treated.<sup>103</sup> In 2016, China's first same-sex marriage lawsuit was brought in Changsha, Henan Province; although it was ultimately unsuccessful, it was remarkable that the case was brought and then accepted by the court in the first place.<sup>104</sup> In 2017, China's first successful case against involuntary hospitalization to undergo conversion therapy was won, with the Henan court ruling that the gay man was held against his will and subjected to regular physical abuse and forced treatment.<sup>105</sup> In December 2016, Mr. C., a transgender man, won China's first transgender employment discrimination case after a Guizhou court ruled he was illegally fired.<sup>106</sup>

### B. Marginalization in Shifting Landscapes

Yet, winning in the courts did not necessarily indicate that issues were politically safe. In one fell swoop, assumptions about the non-sensitivity of issues as anodyne as sexual harassment were proven wrong on March 6, 2015, when feminist activists were detained two days before International Women's Day. Public security officers in at least three different cities detained more than a dozen young activists

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102. See Jonathan Kaiman, *In China, feminism is growing – and so is the backlash*, THE L.A. TIMES (June 15 2016, 11:21 PM), <http://www.latimes.com/world/asia/la-fg-china-feminist-activists-20160614-snap-story.html> [<https://perma.cc/Q2FU-ARAS>].

103. See Dan Levin, *Chinese Court Sides With Gay Man in 'Conversion' Suit*, N.Y. TIMES, (Dec. 19, 2014), [www.nytimes.com/2014/12/20/world/asia/chinese-court-sides-with-gay-man-against-clinic-that-tried-to-convert-him.html](http://www.nytimes.com/2014/12/20/world/asia/chinese-court-sides-with-gay-man-against-clinic-that-tried-to-convert-him.html).

104. See Tom Phillips, *China court refuses to allow gay marriage in landmark case*, THE GUARDIAN (Apr. 13, 2016, 1:52 AM), [www.theguardian.com/world/2016/apr/13/china-court-refuse-gay-marriage-landmark-case](http://www.theguardian.com/world/2016/apr/13/china-court-refuse-gay-marriage-landmark-case) [<https://perma.cc/2XQY-AKHW>].

105. See Sofia Lotto Persio, *LGBT in China: Man Wins Public Apology In Forced Gay Conversion Therapy Ruling*, NEWSWEEK (July 4, 2017, 5:13 AM), <http://www.newsweek.com/being-lgbt-china-man-wins-public-apology-forced-gay-conversion-therapy-ruling-631504> [<https://perma.cc/7S3G-ECPE>].

106. See Emily Rauhala, *Transgender Chinese man wins first-of-its-kind labor discrimination case*, THE WASH. POST (July 27, 2017), [www.washingtonpost.com/news/worldviews/wp/2017/07/27/transgender-chinese-man-wins-first-of-its-kind-labor-discrimination-case/](http://www.washingtonpost.com/news/worldviews/wp/2017/07/27/transgender-chinese-man-wins-first-of-its-kind-labor-discrimination-case/) [<https://perma.cc/5MUK-GPMW>].

in a coordinated crackdown, apparently motivated by an effort to stop their planned peaceful activities on sexual harassment on public transportation. Although most were released after several hours of questioning, the authorities declined to release five young feminists (now known as the “Feminist Five”) and subjected them to tough interrogation and harsh treatment.<sup>107</sup> Though they were released after 37 days, in great part due to high-profile domestic and international campaigns,<sup>108</sup> the chilling effect of the arrests on the feminist movement was undeniable. Authorities have drawn a clear line between working with women as a population and working on the human rights of women.

For LGBTQ activism, the threats have been less overt, but the consequences of government scrutiny are similar.<sup>109</sup> For example, domestic NGO regulations do not allow organizations working explicitly on LGBTQ rights to register with the Ministry of Civil Affairs, thereby “restrict[ing] the operational capacity of these groups to raise funds, attract human resources, and provide critical legal, psychological, and other services.”<sup>110</sup> The passage of the Foreign NGO Management Law has also impacted LGBTQ groups disproportionately—for many LGBTQ activists, international funding is “the lifeblood of their organizations”<sup>111</sup> and foreign funding restrictions (based on source of funding and intended beneficiaries) have diverted resources away from LGBTQ rights.<sup>112</sup>

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107. See Leta Hong Fincher, *China’s Feminist Five*, *DISSENT MAG.* (Fall 2016), <https://www.dissentmagazine.org/article/china-feminist-five> [<https://perma.cc/Z42G-7CWN>].

108. See *China releases five women’s rights activists after international outcry* *DEUTSCHE WELLE* (Apr. 13, 2015), <http://www.dw.com/en/china-releases-five-womens-rights-activists-after-international-outcry/a-18379105> [<https://perma.cc/GQT6-QJ5B>].

109. This is not to say that LGBTQ activists do not face the threat of government arrest. In May 2017, 2014, nine people were arrested in relation to a planned seminar on the registration of LGBTQ NGOs, but all were released within 24 hours. See J. Lester Feder, *Nine LGBT Activists Arrested in China—But Gay Pride March Still Planned*, *BUZZFEED NEWS* (May 9, 2014, 5:59 PM), [https://www.buzzfeed.com/lesterfeder/nine-lgbt-activists-arrested-in-china-but-the-countrys-most?utm\\_term=.umpKPaEb6d#.ombX7AoxwW](https://www.buzzfeed.com/lesterfeder/nine-lgbt-activists-arrested-in-china-but-the-countrys-most?utm_term=.umpKPaEb6d#.ombX7AoxwW) [<https://perma.cc/M84A-GKZD>].

110. See CHINA LBT RIGHTS INITIATIVE, *SHADOW REPORT: IMPLEMENTATION OF THE CONVENTION TO ELIMINATE ALL FORMS OF DISCRIMINATION AGAINST WOMEN IN THE PRC 4* (Sept. 2014).

111. See Timothy Hildebrandt, *Development and Division: the effect of transnational linkages and local politics on LGBT activism*, 21 *CHINA J. OF CONTEMP. CHINA* 845, 845 (2013).

112. See Zheping Huang, *NGOs are under threat in China’s latest crackdown against “foreign forces,”* *QUARTZ* (Jan. 4, 2017), <https://qz.com/873489/ngos-are-trying-to-stay-alive-in-chinas-latest-crackdown-against-foreign-forces/> [<https://perma.cc/47HL-RKHP>] (noting the

The tightening of the media landscape since 2016 also greatly affected the space for discourse on women's rights and LGBTQ rights activism. New regulations released by the Cyberspace Administration of China in May 2017 increased restrictions on acceptable content on mass communication and social media platforms, and subjected all services offered by online news portals and network providers to party-sanctioned editorial staff.<sup>113</sup> In June 2017, regulations released by the China Netcasting Services Association lumped homosexuality together with sexual abuse and violence under the category of "abnormal sexual relationships," and banned all references to homosexuality from online broadcasting.<sup>114</sup> These changes sparked outrage within the LGBTQ community with an outpouring of online criticisms; the government responded by deleting such criticisms with further penalties: in the case of Li Yinhe, China's leading sexologist, her critical commentary resulted in a three-month ban on Weibo.<sup>115</sup>

Though discussion of women's rights issues is generally allowed by media censors, influential feminist alternative media accounts have been subject to government censorship and attack. In February 2017, the social media account of a leading feminist organization, Feminist Voices, was suspended for 30 days.<sup>116</sup> On March 8, 2018, International Women's Day, the account was shut down indefinitely, with its Weibo and WeChat public accounts (and their archives) deleted.<sup>117</sup> Feminist Voices had more than 180,000 followers on Weibo and was very influential among young activist women.<sup>118</sup> The silencing of Feminist

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government's monitoring of Chinese LGBT NGO relationships with international NGOs and other embassies in China – including pressure to reject funding from US embassy).

113. See Cheng Li & Xinyue Zhang, *Online regulations and LGBT rights: A Test for China's Legal System*, CHINA-US FOCUS (Sept. 1, 2017), <https://www.chinausfocus.com/political-social-development/online-regulations-and-lgbt-rights-a-test-for-chinas-legal-system> [https://perma.cc/86KR-4JXY].

114. Jinghua Qian, *China's online multimedia sector bans portrayal of homosexuality*, CHINA FILM INSIDER, (June 30, 2017), <http://chinafilminsider.com/chinas-online-multimedia-sector-bans-portrayal-homosexuality/> [https://perma.cc/9SD8-9MFB].

115. *Id.*

116. See Didi Kirsten Tatlow, *Chinese Feminist's Social Media Account Suspended*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/world/asia/china-feminist-weibo.html>.

117. See Jiayun Feng, *Chinese Social Media Censors Feminist Voices*, SUPCHINA (Mar. 9, 2018), <https://supchina.com/2018/03/09/chinese-social-media-censors-feminist-voices/> [https://perma.cc/C7T4-XEDS].

118. See Wong Lok-to, *China Silences Its Feminists on International Women's Day*, RADIO FREE ASIA (Luisetta Mudie transl.) (Mar. 9, 2018), <https://www.rfa.org/english/news/china/women-silenced-03092018130214.html> [https://perma.cc/W2ZW-83C7].



Voices mark a new phase of ideological control, demonstrating a shift in government attitudes (which previously never marked women's rights and gender equality as taboo issues<sup>119</sup>) to one where feminist speech and organizing is deemed politically troublesome.

*V. CONCLUSION: INNOVATION IN THE MIDST OF  
MARGINALIZATION*

Xi Jinping's vision of a rejuvenated China is one that is characterized by increasing authority in the international sphere (driven by economic power and a muscular militarism), and a prosperous, well-regulated Chinese society under the CCP's authoritative leadership. Having presented its economic miracle as a model for developing countries, China is now poised to export its governing model, including the state-sponsored tools of social control, while the PRC government promotes alternative interpretations of international laws—including international human rights concepts and international norms of engagement. China's assertiveness in the international sphere is matched by the Chinese authorities' intolerance of those that disrupt the singular mythology of Chinese ascendancy.

The government's reaction to independent, vocal, and well-organized activists working to expand Chinese society's ideas of gender equality and LGBTQ rights likely signals a wariness of the mobilization power of these two groups; and perhaps a recognition that such activism at their very core do fundamentally challenge the status quo. Rights lawyers and advocates working on gender and sexuality are presented with a conundrum: how to harness social perceptions that women's rights and LGBTQ rights are politically non-threatening to their advantage. As the public space for discourse around the content of "human rights" and "universal values" constricts, the question for rights lawyers and activists is one of communications: how to deconstruct human rights concepts into their most basic ideas with broad public appeal—to learn how to communicate about ideas of justice, equality, and dignity in ways that the general public understands and supports.

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119. *Id.* See Xiao Meili, *China's Feminist Awakening*, N.Y. TIMES (May 13, 2015), <https://www.nytimes.com/2017/02/22/world/asia/china-feminist-weibo.html>.